

SJSD

Compliance and

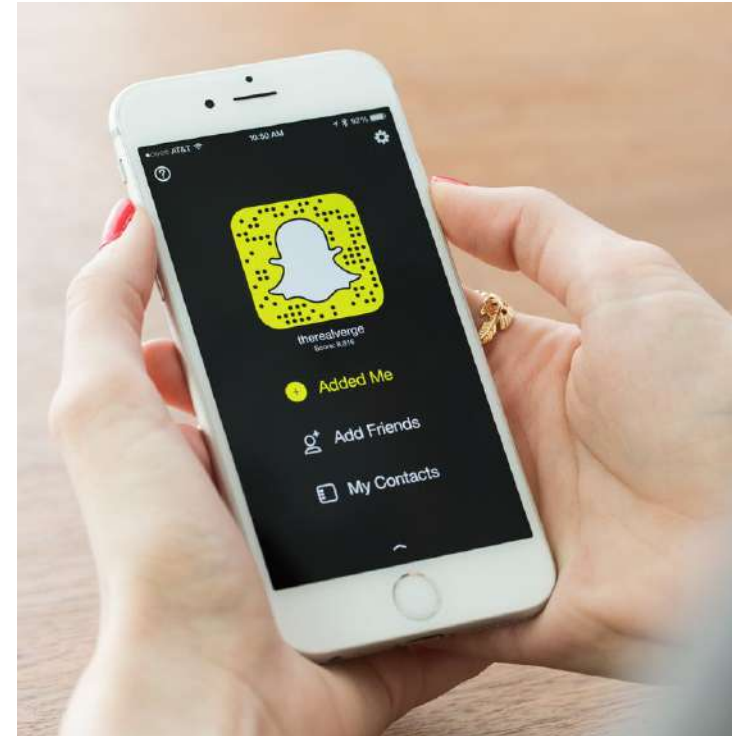
New Title IX Requirements



EdCounsel^{LLC}
SCHOOL ATTORNEYS

Scenario

- Jordan, a freshman, complains that Lyllian, also a freshman, posted a snapchat video that used the word “n@##*r” when saying something about Jordan.
- This video was made public.
- Many students have viewed the video, a number have done so in the hallways at school.



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- Is it an allegation of harassment or discrimination?
- To whom must this be reported?
- Is it appropriate to attempt an informal resolution?
- If so, at what point?
- Should we take any interim measures?
- What is our investigatory process?
- If the allegations are proven to be more likely than not, do we find a violation of discrimination/harassment policy?
- If so, what is our response to the violation/complaint?

Key Steps for Compliance

- Identifying conduct as potentially harassing, discriminatory or retaliatory conduct.
- Reporting to appropriate persons.
 - Informal resolution
 - Formal resolution
- Offering interim measures as appropriate.
- Investigating and determining whether board policy has been violated.
- Response to Complaint.



General Rule

- The district strictly prohibits discrimination and harassment against employees, students or others on the basis of *race, color, religion, sex, national origin, ancestry, disability, age, genetic information or any other characteristic protected by law*. The St. Joseph School District is an equal opportunity employer.
- The Board also prohibits retaliatory actions against those who:
 - Make complaints of prohibited discrimination or harassment.
 - Report prohibited discrimination or harassment.
 - Participate in an investigation, formal proceeding or informal resolution, whether conducted internally or outside the district, concerning prohibited discrimination or harassment.



Scenario



- On three separate occasions, during 2nd hour and 6th hour, Nate put his hands in Elli's pants while the teacher was not looking.
- Nate told Elli if she did not stay there, he would hit her and continuously do this.
- Elli is a student with a disability.
- Nate put his foot on Elli's leg, and then his hand.
- During one class, while in the library, Zach forced Elli to sit on his lap.
- Zach said, "Let's do this every day."
- Elli told Zach to "get the f@*k off me," and Elli left.

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Reporting Requirements

- All employees, students and visitors must *immediately* report to the district for investigation any incident or behavior that could constitute discrimination, harassment or retaliation in accordance with this policy.



Reporting Requirements



- Students, employees and others may attempt to resolve minor issues by addressing concerns directly to the person alleged to have violated this policy, but they are not expected or required to do so.
 - Any attempts to voluntarily resolve a grievance will not delay the investigation once a report has been made to the district.
- Unless the concern is otherwise voluntarily resolved, all persons must report incidents that might constitute discrimination, harassment or retaliation directly to the compliance officer or acting compliance officer.

Reporting Requirements

- All district employees will instruct all persons seeking to make a grievance to communicate directly with the compliance officer.
 - Even if the suspected victim of discrimination, harassment or retaliation does not file a grievance, district employees are required to report to the compliance officer any observations, rumors or other information regarding actions prohibited by this policy.
 - If a verbal grievance is made, the person will be asked to submit a written complaint to the compliance officer or acting compliance officer.
 - If a person refuses or is unable to submit a written complaint, the compliance officer will summarize the verbal complaint in writing.
 - A grievance is not needed for the district to take action upon finding a violation of law, district policy or district expectations.

Reporting Requirements

- Even if a grievance is not directly filed, if the compliance officer otherwise learns about possible discrimination, harassment or retaliation, including violence, the district will conduct a prompt, impartial, adequate, reliable and thorough investigation to determine whether unlawful conduct occurred and will implement the appropriate interim measures if necessary.



Scenario

- Susan, a sophomore, complains about the fact that Joey, a junior, is in two of her classes.
- She explains that they were at a party together last New Year's Eve and he forced her to have oral sex with him.
- During last semester, she made all attempts to avoid him but there were a few instances that she felt that she was in a "hostile environment" because she had to be in close proximity to him at school.
- She doesn't want to start this school year with Joey in her classes.

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Interim Measures

- When a report is made or the district otherwise learns of potential discrimination, harassment or retaliation, the district will take immediate action to protect the alleged victim, including implementing interim measures.
- For example, the district may alter a class seating arrangement, provide additional supervision for a student or suspend an employee pending an investigation.
- The district will take immediate steps to prevent retaliation against the alleged victim, any person associated with the alleged victim, or any witnesses or participants in the investigation.
- These steps may include, but are not limited to, notifying students, employees and others that they are protected from retaliation, ensuring that they know how to report future complaints, and initiating follow-up contact with the complainant to determine if any additional acts of discrimination, harassment or retaliation have occurred.

Scenario

- Mr. Harris is a H.S. girls basketball coach and math teacher.
- Alexa is a sophomore girls basketball player coached by Mr. Harris.
- Alexa babysits Mr. Harris's 3 year old son.
- She sometimes meets with Mr. Harris before and after class in his classroom.
- It was recently reported that on a Sunday afternoon, Mr. Harris was in his classroom and Alexa was seen going into the building at about the same time.



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Investigation of Complaint

- The district will immediately investigate all grievances.
- All persons are required to cooperate fully in the investigation.
- The district compliance officer or other designated investigator may utilize an attorney or other professionals to conduct the investigation.
- In determining whether alleged conduct constitutes discrimination, harassment or retaliation, the district will consider the surrounding circumstances, the nature of the behavior, the relationships between the parties involved, past incidents, the context in which the alleged incidents occurred and all other relevant information.
- Whether a particular action or incident constitutes a violation of this policy requires a determination based on all of the facts and surrounding circumstances.
- If, after investigation, school officials determine that it is more likely than not (the preponderance of the evidence standard) that discrimination, harassment or other prohibited behavior has occurred, the district will take immediate corrective action.

Scenario



- A complaint is made that a particular bus driver, when assigning seats on the bus, divides the kids by race.
- Black students are assigned to the front of bus, and white students are assigned to the back.
- Transportation pulled the videos of the bus and it appears that the front of the bus includes mostly black students, while the back of the bus includes mostly white students.

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New Title IX Regulations

- Effective August 14, 2020
- Numerous procedural changes
- District will need to adopt policy ACA or "Sexual Harassment under Title IX".



Basic Steps Outlined in the New Regulations



- District or school receives actual knowledge of conduct that may constitute sexual harassment.
- District-level or school-based Title IX Coordinator meets with alleged victim to discuss supportive measures and the process for filing a formal complaint.
- Investigator leads the investigation after the formal complaint is in place and written notice is given to the involved individuals and their parents/guardians.

Select Definitions

- *Actual Knowledge* – Notice of sexual harassment under Title IX or notice of allegations of sexual harassment under Title IX to the district's Title IX coordinator or to any district official who has the authority to institute corrective measures on behalf of the district or to any employee of the district, except where the only district official or employee with actual knowledge is also the respondent.

Select Definitions

- *Formal Complaint* – A document or electronic submission filed by the complainant or signed by the Title IX coordinator alleging sexual harassment under Title IX against a respondent and requesting that the district investigate the allegations. When a complainant files a formal complaint, the document or electronic submission must have the complainant's physical or digital signature or otherwise indicate the complainant's identity. A formal complaint may be filed only by a complainant participating in or attempting to participate in the district's education programs or activities.

Select Definitions

- *Informal Resolution Process* – Alternative dispute resolution methods designed to resolve allegations of sexual harassment without completing the formal complaint process. The purpose of the process is to restore or preserve equal access to the district's education programs or activities for all parties. Such a process may be offered by the Title IX coordinator after a formal complaint has been filed and after consultation with the district's attorney as to whether an informal resolution process will be sufficient to meet the district's Title IX obligations.

Basic Steps Outlined in the New Regulations



- Investigator gathers and reviews evidence, and prepares an investigative report; the involved individuals and their parents/guardians review and respond to the report.
- Decision-maker provides opportunity for involved individuals and their parents/guardians to prepare written questions to be answered by the other side.
- Decision-maker reviews all materials and makes a written responsibility determination – an impartial determination as to whether the alleged conduct occurred – including sanctions.

Basic Steps

- If a school has actual knowledge of sexual harassment allegations, the school must respond promptly and in a manner that is not deliberately indifferent (i.e., not “clearly unreasonable in light of the known circumstances”).
- A school must offer “supportive measures” to the alleged victim (complainant) and follow a grievance process that meets certain minimum requirements before imposing discipline or other actions that are not supportive measures against an alleged perpetrator (respondent).
- A school may not continue with the grievance process in the absence of a formal complaint.



Schools Must . . .

- Provide for the “prompt and equitable” resolution of student and employee complaints.
- Treat complainants and respondents equitably.
- Require an objective evaluation of all relevant evidence.
- Require that Title IX Coordinator, Investigator, Decision-maker, or any other key player have no conflicts of interest or bias for or against complainants or respondents, and that all such individuals receive specified professional development.
- Include a presumption of innocence for respondents.



Schools Must . . .

- Include a presumption of innocence for respondents.
- Designate reasonably prompt time-frames for resolution and the range of possible disciplinary actions.
- Use either the “preponderance of the evidence” or “clear and convincing” standard and apply it equally to employee and student complaints.
- Provide complainant and respondent (and their parents/guardians) an equal opportunity to review any evidence obtained that is directly related to the allegations raised in a formal complaint.
- Address certain other procedural steps enumerated at 34 C.F.R. § 106.45 of the new regulations.

Some Comparisons of Old to New

2001/2017 Prior Department Guidance	New Regulations
Conduct = "so severe, persistent, <u>or</u> pervasive"	Conduct = "so severe, pervasive, <u>and</u> objectively offensive"
Knowledge = The school district "knows or reasonably should know" of the conduct	Knowledge = The school district has "actual knowledge" of the conduct

Some Comparisons of Old to New

2001/2017 Prior Department Guidance	New Regulations
It may be appropriate for a school to take interim measures during the investigation of a complaint	Supportive measures must be offered once a school has actual knowledge of sexual harassment allegations
Decision-maker can be same person as Title IX Coordinator or Investigator	Decision-maker cannot be same person as Title IX Coordinator or Investigator
A school may offer the right to appeal a responsibility determination	A school must offer the right to appeal a responsibility determination

Board Policy ACA

"Sexual harassment under Title IX" is conduct on the basis of sex within the scope of the district's education programs or activities (as defined in this policy) that satisfies one or more of the following:

1. An employee of the district conditioning the provision of an aid, benefit or service of the district on an individual's participation in unwelcome sexual conduct;
2. Unwelcome conduct determined by a reasonable person to be so severe, pervasive and objectively offensive that it effectively denies a person equal access to the district's education program or activity; or
3. "Sexual assault" as defined in 20 U.S.C. 1092(f)(6)(A)(v), "dating violence" as defined in 34 U.S.C. 12291(a)(10), "domestic violence" as defined in 34 U.S.C. 12291(a)(8) or "stalking" as defined in 34 U.S.C. 12291(a)(30).

See the "Definitions Applicable to this Policy" section at the end of this document for definitions of other terms applicable to this policy.

Reporting Requirements

- Any person may report sexual harassment regardless of whether the person is the alleged victim (complainant).
- However, Board members and employees must immediately report to the Title IX coordinator any incident or behavior that could constitute sexual harassment or retaliation in accordance with this policy.
- Reports may be made at any time, including during nonbusiness hours, by using the telephone number, email address or office address listed below.



Intake and Classification of Reports



- The Title IX coordinator will receive and review all reports of sexual harassment even if a formal complaint has not been filed.
- If the Title IX coordinator determines that the report concerns conduct that does NOT involve sexual harassment under Title IX as that term is defined in this policy or did not occur in the district's education program or activity, the Title IX coordinator will use the grievance process in policy AC or forward the complaint to the individual responsible for implementing policy AC.

Procedures Prior to or without a Formal Complaint



- When the Title IX coordinator has actual knowledge of an allegation of sexual harassment under Title IX in an education program or activity of the district, the Title IX coordinator will promptly contact the complainant and:
 - Provide information about the supportive measures available to the complainant and inform the complainant that he or she may receive supportive measures without filing a formal complaint.
 - Consider the complainant's wishes with respect to supportive measures and implement appropriate supportive measures.
 - Explain to the complainant the process for filing a formal complaint.

The Formal Complaint Process

- The complainant may file a formal complaint or choose not to file a formal complaint and simply receive the supportive measures.
- If the complainant does not file a formal complaint, the Title IX coordinator may sign a formal complaint initiating the grievance process.
- The Title IX coordinator will do so only if initiating the grievance process against the respondent is not clearly unreasonable in light of the known circumstances.



In Absence of Formal Complaint

- If no formal complaint is filed by the complainant or signed by the Title IX coordinator, no disciplinary action will be taken against the respondent on the grounds of sexual harassment under Title IX.



Title IX Grievance Process upon Filing of a Formal Complaint

The district's grievance process will provide a prompt and equitable resolution of complaints and will:

- Treat complainants and respondents equitably by providing remedies to a complainant where a determination of responsibility for sexual harassment has been made against the respondent;
- Comply with Title IX regulations before imposing any disciplinary sanctions or other actions that are not supportive measures against a respondent;
- Require a decision-maker to objectively evaluate all relevant evidence, including both inculpatory and exculpatory evidence, and not make credibility determinations based on a person's status as a complainant, respondent or witness;
- Require that all Title IX coordinators, investigators, those responsible for facilitating informal resolution processes and decision-makers not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent;

Title IX Grievance Process upon Filing of a Formal Complaint (cont.)

- Presume that the respondent is not responsible for the conduct until a determination of responsibility is made at the conclusion of the grievance process;
- Follow stated timelines unless the district temporarily delays the grievance process for good cause (including, but not limited to, the absence of a party, a party's advisor, or a witness; concurrent law enforcement activity; or the need for language assistance or accommodation of a disability) and notify the parties in writing of the reason for a delay, if any; and
- Not require, allow, rely upon or otherwise use questions or evidence that constitutes, or seeks disclosure of, information protected under a legally recognized privilege unless the person holding such privilege has waived the privilege.



Notice to the Parties

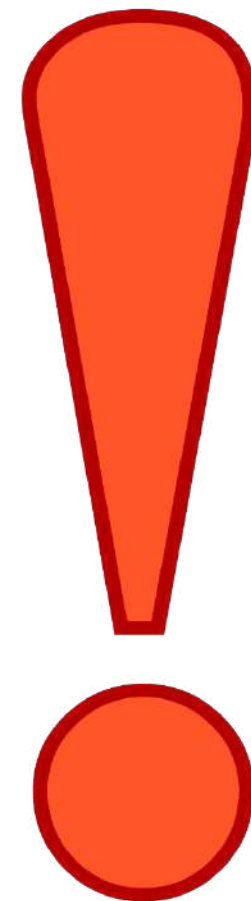
When the complainant files a formal complaint, written notice will be provided to all known parties and will include:

- Notice of the grievance process, including any informal resolution process that is available and the timeline for such process.
- Notice of the allegations of sexual harassment under Title IX made by the complainant with sufficient details known at the time and with sufficient time to allow the respondent to prepare before the initial interview. At a minimum, the details will include the identities of the parties involved in the incident, if known, the conduct and the date and location of the alleged incident if known.
- A statement that the respondent is presumed not responsible for the conduct and that a determination of responsibility will be made at the conclusion of the grievance process.



Notice to the Parties (cont.)

- A statement that parties may have an advisor of their choice, who may be an attorney.
- A statement that the parties and their advisors will have an equal opportunity to inspect and review any evidence that is directly related to the allegations raised in the formal complaint, including evidence upon which the district does not intend to rely, so that each party can meaningfully respond to the evidence prior to conclusion of the investigation.
- Notice of any provision in the district's discipline code that prohibits knowingly making a false statement or providing false information during the grievance process.
- If in the course of the investigation of sexual harassment under Title IX the district decides to investigate allegations about the complainant or respondent that were not in the initial notice, notice of the additional allegations will be provided to all known parties.



Investigation Process and Scope



- After the formal complaint is filed, the investigator will provide an investigative report to the decision-maker.
- The investigation may be conducted by someone other than the Title IX coordinator.
- The investigator will gather evidence sufficient to reach a determination of responsibility or nonresponsibility and may not require the parties to do so.

Investigation Process and Scope (cont.)

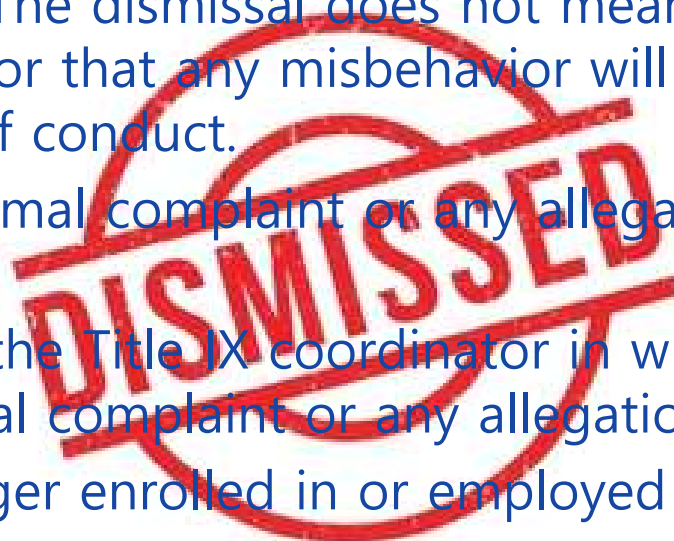
- During the investigation and the grievance process, the district will:
 - Provide equal opportunity to present witnesses, including fact and expert witnesses, and all evidence, including inculpatory and exculpatory evidence.
 - Not restrict the parties from discussing the allegations under investigation or gathering and presenting relevant evidence.
 - Provide the same opportunity for parties to have others, including an advisor of their choice, present during any grievance proceedings and related meetings, though the district may restrict the extent to which advisors may participate as long as the rules apply to both parties.
 - Provide written notice to parties who are invited or expected to participate of the date, time, location, participants and purpose of all hearings, investigative interviews or other meetings with sufficient time for the parties to prepare to participate.
 - Obtain written, voluntary consent before accessing records, such as medical records or counseling notes, that a physician, psychiatrist, psychologist or other recognized professional or paraprofessional made or maintained in connection with the provision of treatment to the party. If the party is at least 18 years old or is enrolled in postsecondary education, the party can sign on his or her own behalf. Otherwise, a parent/guardian must sign on the party's behalf.

Investigation Process and Scope (cont.)

- Provide both parties an equal opportunity to inspect and review any evidence obtained as part of the investigation that is directly related to the allegations raised in a formal complaint, so that each party can meaningfully respond to the evidence prior to the conclusion of the investigation.
 - This includes evidence upon which the district does not intend to rely in reaching a determination of responsibility and inculpatory or exculpatory evidence, whether obtained from a party or other source.
- Send to each party and the party's advisor, if any, the evidence subject to inspection and review prior to completion of the investigative report and within _____ [recommended: 20] business days of the parties receiving notice of the formal complaint.
 - The evidence may be sent in an electronic format or hard copy. The parties will be given at least ten business days, as required by law, to submit a written response, which the investigator will consider prior to the completion of the report.
- Create an investigative report that fairly summarizes relevant evidence and send it in an electronic or hard copy format to each party and their advisors, if any, for their review and written response.
 - The investigative report must be sent no later than ten business days prior to the time of determination of responsibility by the decision-maker, as required by law.

Dismissal of the Formal Complaint

- If the district determines that the allegations, even if proved, would not constitute sexual harassment under Title IX as defined in this policy, did not occur in the district's education program or activity, or were not committed against a person in the United States, the formal complaint will be dismissed. The dismissal does not mean that a complaint cannot be made under another district policy or that any misbehavior will not be addressed under another policy or the district's code of conduct.
- The district may dismiss a formal complaint or any allegations in a formal complaint at any time if:
 - The complainant notifies the Title IX coordinator in writing that the complainant would like to withdraw the formal complaint or any allegations in the formal complaint;
 - The respondent is no longer enrolled in or employed by the district; or
 - Specific circumstances prevent the district from gathering evidence sufficient to reach a determination of responsibility based on the merits of the formal complaint or allegations therein.

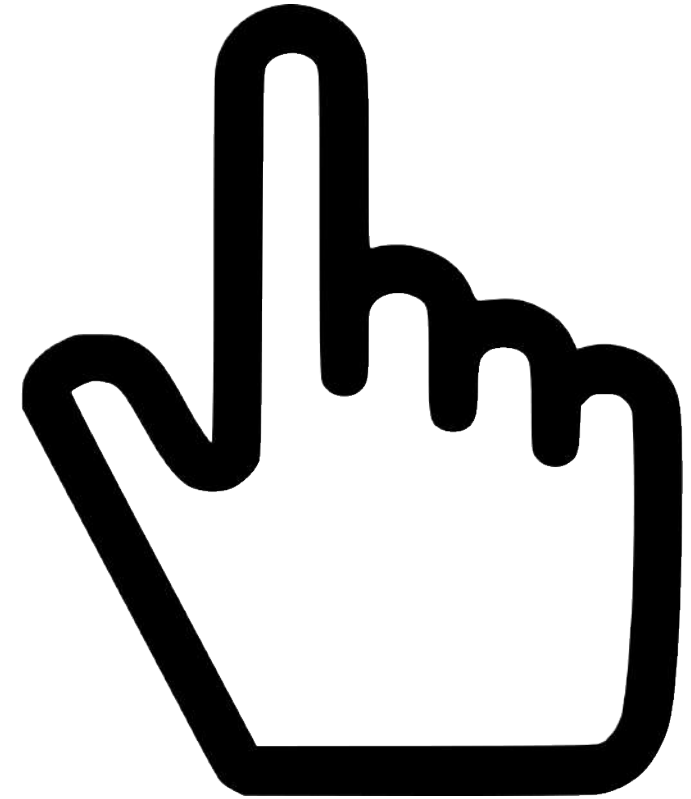


Dismissal of the Formal Complaint (cont.)

- If the formal complaint is dismissed, the district will notify the parties simultaneously. A party may appeal the dismissal of a formal complaint by submitting a written notification of appeal to the Title IX coordinator within _____ [recommended: five] business days of receiving the notice that the complaint was dismissed. If the Title IX coordinator or the investigator dismissed the complaint, the dismissal will be heard by the decision-maker. If the decision-maker dismissed the complaint, the dismissal will be heard by the appellate decision-maker. The appeal is limited to the following bases:
 - There was a procedural irregularity that affected the outcome.
 - There is new evidence that was not reasonably available at the time the dismissal was made that could affect the outcome of the matter.
 - The Title IX coordinator, investigator or decision-maker had a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent that affected the outcome of the matter.

Submission for a Determination of Responsibility and the Related Findings and Conclusions

- The Title IX coordinator will designate someone to serve as the decision-maker to determine whether the respondent is responsible for sexual harassment under Title IX.
- The designated person may be a district administrator, an attorney or another appropriate adult. The person designated cannot have been part of the investigation.



Procedures of the Decision-Maker and Party

Questions and Answers

- After the parties receive the final investigative report, each party may submit to the decision-maker any written, relevant questions that the party wants asked of any party or witness.
- Each party will receive the answers to the questions and will be allowed time to submit limited follow-up questions.
- The decision-maker:
 - Will permit questions and evidence about the complainant's sexual predisposition or prior sexual behavior only if such questions and evidence are offered to prove that someone other than the respondent committed the conduct alleged by the complainant or if the questions and evidence concern specific incidents of the complainant's prior sexual behavior with respect to the respondent and are offered to prove consent.
 - May exclude a question that is not relevant. The party who submitted the question will receive an explanation as to why the question was judged not relevant.

Initiating an Appeal of a Title IX Decision— Time, Contents and Assignment

- Either party may appeal the determination(s) of responsibility, the dismissal of a formal complaint or any allegation in a formal complaint by notifying the Title IX coordinator in writing within _____ [recommended: five] business days of the parties receiving the written Title IX decision from the decision-maker.
- Appeals must be based on one or more of the following:
 - A procedural irregularity that affected the outcome of the matter.
 - New evidence that was not reasonably available at the time of the determination and that could affect the outcome of the matter.
 - The Title IX coordinator, investigator(s) or decision-maker(s) had a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent that affected the outcome of the matter.



Appeals



Appeals

- If an appeal is filed, the Title IX coordinator will:
 - Assign the appeal to an appellate decision-maker who is not the same person as the initial decision-maker, the investigator or the Title IX coordinator.
 - Notify other parties in writing.
 - Implement the appeals process equally to all parties.
 - Give all parties the opportunity to submit a written statement in support of or challenging the outcome within _____ [recommended: five] business days of receiving the notice of appeal.
- Written statements and other written documents pertaining to the appeal will be shared with all parties.

Appeals

- The appellate decision-maker will review the findings of the initial decision-maker and review the written statements filed by the parties supporting or opposing the appeal.
- Within ____ [recommended: ten] business days of the close of the period for parties to file their written statements supporting or opposing the appeal, the appellate decision-maker will issue a written decision describing the result of the appeal and the rationale for the result to all parties simultaneously.
- The appellate decision-maker may refer an appealed issue back to a prior point in the grievance process for correction.



Process for Informal Resolution of Formal Complaints

- After a formal complaint has been filed and at any time prior to reaching a determination of responsibility, the district may facilitate an informal resolution process, such as mediation, that does not involve a full investigation and adjudication. If a party requests the use of an informal resolution process, the district will provide the parties a written notice that:
 - Discloses the allegations and the requirements of the informal resolution process, including the circumstances under which it precludes the parties from resuming a formal complaint arising from the same allegations;
 - Discloses that at any time prior to agreeing to a resolution, any party has the right to withdraw from the informal resolution process and resume the grievance process with respect to the formal complaint;
 - Discloses any consequences resulting from participating in the informal resolution process, including the records that, with voluntary written consent from the parties, will be maintained or could be shared; and
 - Obtains the parties' voluntary, written consent to the informal resolution process.

Process for Informal Resolution of Formal Complaints



- The informal resolution process may not be used to resolve allegations that an employee sexually harassed a student.
- If the informal resolution process does not resolve the formal complaint within _____ [recommended: 30] business days after both parties consented to use the process, the Title IX coordinator will resume the grievance process unless both parties again consent to continue using the informal resolution process.

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