

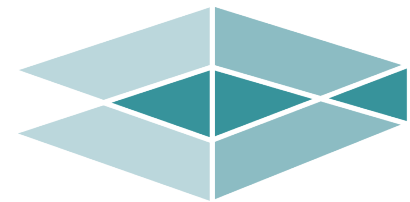
TITLE IX TRAINING FOR COORDINATORS, INVESTIGATORS, AND DECISION-MAKERS

AUGUST 14, 2020

ATTORNEY SHANA R. LEWIS
SLEWIS@STRANGPATTESON.COM

ATTORNEY GEOFFREY LACY
GLACY@STRANGPATTESON.COM

ATTORNEY TONY RENNING
TRENNING@STRANGPATTESON.COM



STRANG, PATTESON
RENNING, LEWIS & LACY

COPYRIGHT © STRANG, PATTESON, RENNING, LEWIS & LACY, S.C. 2020
ALL RIGHTS RESERVED.

Scope of this Program

This program is designed to provide the training to school district officials that is required by the new Title IX regulations, which are effective today. The structure is laid out as follows:

Part 1: Overview of Title IX purpose and coverage, Regulatory Training Requirements, and Definitions, including (a) sexual harassment; (b) education program or activity; (c) formal complaint; (d) informal process; (e) supportive measures (f) interim measures.

Part 2: Conducting the impartial investigation, avoiding prejudging facts, avoiding bias and conflicts in the investigative process, setting up required presumptions and evidentiary standards.

Part 3: The investigative report, evaluating relevance of evidence including relevance of prior sexual behavior, avoiding sex stereotypes, reaching decisions and resolution options, conducting hearings and the appeal process, evaluating bias and conflict of interest.

TITLE IX Training – Part 1

Overview of Title IX purpose and coverage, Regulatory Training Requirements, and Definitions, including (a) sexual harassment; (b) education program or activity; (c) formal complaint; (d) informal process; (e) supportive measures (f) interim measures.

Training Requirements

Section 106.45(b)(1): school districts must provide training for all individuals involved with the district's Title IX compliance, including:

- The Title IX Coordinator(s),
- Investigators,
- Decision-makers,
- Those involved in informal resolution, and
- Those that handle appeals.

TITLE IX Coordinators

The Title IX Coordinator(s)

- School districts must designate a Title IX Coordinator(s).
- May be one or more district employee.
- Contact info must be provided on district website, staff and student handbooks.
- Responsible for implementing Title IX requirements throughout the district, receiving complaints, designating investigators and decision-makers, and implementing supportive measures.

Investigators

Investigators

- Title IX Coordinator will designate one or more investigator to handle each Title IX complaint.
- May be the Title IX Coordinator or a designee (e.g., other district staff, or third parties).
- Must be free of bias or conflicts of interest.
- Must receive training on how to conduct investigations, including issues of relevance of evidence to create an investigative report that fairly summarizes relevant evidence.
- Helpful to have several trained investigators available to avoid bias or conflict of interest, depending upon the parties involved.

Decision-Makers

Decision-Makers

- Title IX Coordinator will designate a decision-maker to handle each Title IX complaint.
- Must not be the same individual who investigated the complaint.
- Must not be the Title IX Coordinator.
- Must be free of bias or conflicts of interest.
- Must receive training on how to conduct the formal grievance process, including issues of relevant evidence, and application of rape shield laws.
- Helpful to have several trained decision-makers available to avoid bias or conflict of interest, depending upon the parties involved.

Required Training Topics

Training must cover the following:

- The definition of sexual harassment;
- The scope of the district's education program or activity;
- How to conduct an investigation;
- The grievance process, including hearings, appeals, formal and informal resolution processes;
- How to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias.
- Issues of relevance of evidence.

Training Materials Retention

Materials used for training purposes must be made publicly available, including on the district's website (if one is maintained). 34 CFR § 106.45(b)(10)(D).

Statutory Authority – Title IX

Title IX states that:

No person in the United States shall, **on the basis of sex**, be **excluded from participation in**, be denied the benefit of, or be subjected to discrimination under any **education program or activity** receiving Federal financial assistance.

20 U.S.C. § 1681(a).

Scope of Regulations

Final Regulations, Published May 19, 2020 (Federal Register, Vol. 85, No. 97, pp. 30026–30579).

Summary States:

These regulations are intended to effectuate Title IX's prohibition against sex discrimination by requiring recipients to address sexual harassment as a form of sex discrimination in education programs or activities.

Coverage extends to sexual harassment that meets the definition provided, and that occurs in the programs or activities over which the district maintains substantial control and that occur within the United States. The regulations discussion make it clear that the forum is not limited (i.e., may encompass cyber-harassment).

Sexual Harassment - Defined

34 CFR § 106.30(a): Conduct on the basis of Sex that satisfies on or more of the following:

- 1) An employee conditioning the provision of aid, benefit, or service 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 equal access to the recipient's education program or activity;
- 3) Sexual assault, dating violence, domestic violence, or stalking.

Conditioning the Provision of Aid, Benefit, or Service on Participation in Sexual Conduct

- Premising grades, grade promotion, enrollment in a program, college admission letters, etc. on submission to sexual conduct.
- Can include conduct that is only “speech”, in other words, no actual sexual conduct need occur, if the speech is intended to compel conduct.
- *Quid pro quo* harassment need not be “severe, pervasive, and objectively offensive” to constitute sexual harassment.

Unwelcome Conduct that is Severe, Pervasive, and Objectively Offensive so as to Deny Equal Access to the Education Program or Activity

- Conduct must be “unwelcome”
- Conduct must be severe, pervasive, and objectively offensive
- Conduct must effectively deny the complainant of (a) equal access (b) to the district’s educational program or activity.

Unwelcome Conduct

- Conduct must be “unwelcome”.
 - In instances involving staff-student, conduct must still be unwelcome to be covered by Title IX.
 - “Grooming” behavior may not meet the standard if it is not unwelcome (but can be addressed in other contexts outside Title IX).
 - Unwelcome may be simply unreciprocated advances – not prohibited unless the conduct meets the other two prongs of this definition (i.e., severe, pervasive, and objectively offensive and serves to deny access).

Severe, Pervasive, and Objectively Offensive

- Conduct must be severe, pervasive, and objectively offensive.
 - Determined based on a “reasonable person” standard.
 - Differs from Title VII (which requires the conduct be severe or pervasive).
 - Requires a course of conduct.
 - **NOTE:** severe conduct that constitutes sexual assault, dating violence, domestic violence, or stalking covered by the third prong of the definition of sexual harassment.

Denies Equal Access to the Education Program or Activity

- Complainant need not have already suffered a loss of educational access to file a complaint, only that they have lost “equal” access then other not harassed.
- May involve student actually withdrawing from classes, quitting an extracurricular activity, experiencing falling grades.
- May involve development of mental or physical health complications effectively reducing the ability to fully participate.

Identifying the “Program or Activity”

The district’s program or activity includes [34 CFR § 106.44(a)]:

locations, events, or circumstances over which the recipient exercises substantial control over both the respondent and the context in which the sexual harassment occurs.

- Occurs in the United States.

NOTE: programs over which the district exercises substantial control over the respondent and the context may occur outside the U.S. Those instances are covered by Wisconsin law, Wis. Stat. § 118.13 and should be investigated according to pertinent policies.

Sexual Assault, Dating Violence, Domestic Violence, Stalking

- Conduct covered by this prong of the sexual harassment definition need not be established as unwanted or as severe, pervasive and objectively offensive.
- Conduct need not be demonstrated to have denied the complainant's equal access to the educational program.

Sexual Assault

Defined by reference to United States Code, Chapter 20, Section 1092 [20 USC §1092(f)(6)(A)(v)]:

The term “sexual assault” means an offense classified as a forcible or nonforcible sex offense under the uniform crime reporting system of the Federal Bureau of Investigation.

Forcible:

- sodomy, sexual assault with an object, fondling which occurs without consent or where the individual is incapable of consent due to age or mental or physical incapacity.
- Rape, defined as carnal knowledge of an individual without consent or where the person is incapable of consent due to physical or mental incapacity.

Nonforcible: statutory rape: nonforcible sexual intercourse with a person under the age of consent.

Dating Violence

34 USC § 12291(a)(10):

The term “dating violence” means violence committed by a person—

(A) who is or has been in a social relationship of a romantic or intimate nature with the victim; and

(B) where the existence of such a relationship shall be determined based on a consideration of the following factors:

(i) The length of the relationship.

(ii) The type of relationship.

(iii) The frequency of interaction between the persons involved in the relationship

Domestic Violence

34 USC § 12291(a)(8):

The term “domestic violence” includes felony or misdemeanor crimes of violence committed by a current or former spouse or intimate partner of the victim, by a person with whom the victim shares a child in common, by a person who is cohabitating with or has cohabitated with the victim as a spouse or intimate partner, by a person similarly situated to a spouse of the victim under the domestic or family violence laws of the jurisdiction receiving grant monies, or by any other person against an adult or youth victim who is protected from that person’s acts under the domestic or family violence laws of the jurisdiction.

Stalking

34 USC § 12291(a)(30):

The term “stalking” means engaging in a course of conduct directed at a specific person that would cause a reasonable person to—

- (A) fear for his or her safety or the safety of others; or
- (B) suffer substantial emotional distress.

Implementing Regulatory Process

WHO IS INVOLVED?

- Title IX Coordinator(s).
- Mediators for informal resolution.
- Investigators.
- Decision-makers
- Appeals persons.

WHAT IS THE PROCESS?

- Title IX Coordinator receives a report.
- A formal complaint is filed.
- The Title IX Coordinator informs the parties involved and proceeds to informal or formal resolution.
- Title IX Coordinator designates Investigators, who investigate the complaint (interviews and collection of evidence) and prepare a report.
- The decision-maker makes a determination.
- Appeal, if desired by the parties.

The Complaint Process

Receiving a Report

- When an incident of sexual harassment occurs, staff and students report such incidents to the Title IX Coordinator.
- The Title IX Coordinator must promptly contact the complainant to discuss:
 - The availability of supportive measures with or without filing a formal complaint;
 - Discuss the complainant's wishes with respect to supportive measures; and
 - Explain the process for filing a formal complaint.

The Complaint Process

Determining whether Title IX applies:

- Reported incidents may involve multiple parties and multiple allegations (e.g., gender, race, and bullying).
- Title IX applies if the incident:
 - Occurred in an education program or activity,
 - Involved a staff member or student, and
 - Involved sexual discrimination or sexual harassment.
- Ask the following questions:
 - Where and in what context did the incident occur?
 - Who are the parties involved?
 - Does the incident constitute one or more forms of sexual harassment found in the definition?

The Complaint Process

Filing a Formal Complaint:

- Formal complaints may be signed by the complainant or the Title IX Coordinator.
 - If the Title IX Coordinator signs the formal complaint, the complainant, not the Title IX Coordinator, is the party.
- The Title IX Coordinator should respect the complainant's wishes with respect to whether or not to file a formal complaint.
- However, if it is clearly unreasonable for the school district to not investigate the reported incident in light of the known circumstances, the Title IX Coordinator should prepare and sign a formal complaint so that the incident can be investigated.

The Complaint Process

Dismissing a Formal Complaint (as to Title IX only):

Mandatory Dismissal. The Title IX Coordinator must dismiss a formal complaint if the alleged conduct:

- Would not constitute sexual harassment even if proved;
- Did not occur in the school district's education program or activity; or
- Did not occur against a person in the United States.

Permissive Dismissal. The Title IX Coordinator may dismiss a formal complaint at any time during the investigation if:

- The complainant notifies the Title IX Coordinator that they would like to withdraw the complaint or any allegations therein;
- The respondent is no longer enrolled or employed by the school district; or
- Specific circumstances prevent the school district from gathering evidence to reach a determination.

After a dismissal, a school district may still take disciplinary action under other district policies.

The Complaint Process

Responding to a Formal Complaint:

The Title IX Coordinator should take the following steps:

- Provide written notice of the formal complaint to both parties.
- Consider and implement the **supportive measures**, if any, that may be appropriate for both parties.
- Consider and implement the **interim measures**, if any that may be needed.
- Discuss with both the complainant and respondent the availability of an **informal resolution process**.

Formal Complaint

Formal Complaint means:

- A document filed by a complainant or signed by the Title IX Coordinator alleging sexual harassment against a respondent and requesting that the district investigate the allegation of sexual harassment.
- At the time of filing a formal complaint, a complainant must be participating in or attempting to participate in the education program or activity of the district with which the formal complaint is filed.
- A formal complaint may be filed with the

Title IX Coordinator in person, by mail, or by electronic mail, by using the contact information required to be listed for the Title IX Coordinator under § 106.8(a), and by any additional method designated by the recipient.

- Where the Title IX Coordinator signs a formal complaint, the Title IX Coordinator is not a complainant.

34 CFR § 106.30(a).

Supportive Measures

Supportive Measures means:

- Non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, and without fee or charge to the complainant or the respondent before or after the filing of a formal complaint or where no formal complaint has been filed.
- Measures designed to restore or preserve equal access to the recipient's education program or activity without unreasonably burdening the other party, including measures designed to protect the safety of all parties or the recipient's educational environment, or deter sexual harassment.
- Supportive measures may include counseling, extensions of deadlines or other course-related adjustments, modifications of work or class schedules, campus escort services, mutual restrictions on contact between the parties, changes in work or housing locations, leaves of absence, increased security and monitoring of certain areas of the campus, and other similar measures.
- The district must maintain as confidential any supportive measures provided to the complainant or respondent, to the extent that it would not impair the ability of the district to provide the supportive measures.
- The Title IX Coordinator is responsible for coordinating the effective implementation of supportive measures.

34 CFR § 106.30(a).

Supportive Measures

The Title IX Coordinator should discuss with the parties the availability of supportive measures and whether they wish to utilize any such measures. Supportive measures can include:

- counseling,
- extensions of deadlines or other course-related adjustments,
- modifications of work or class schedules,
- campus escort services,
- mutual restrictions on contact between the parties,
- changes in work locations,
- leaves of absence,
- increased security and monitoring of certain areas of the campus, and
- other similar measures.

Interim Measures

The Title IX Coordinator should consider whether emergency interim measures may be needed, which could include emergency removal of the respondent from the education program or activity.

- Requires an individualized safety and risk analysis, and
- A determination that an immediate threat to the physical health or safety of any student or other individual arising from the allegations of sexual harassment justifies removal.
- Immediately following the removal, the district must provide notice and opportunity to be heard.
- If the respondent is a district staff member, the district may place the staff member on administrative leave during the pendency of a grievance process.

The Informal Resolution Process

Prior to engaging in the informal resolution process, the Title IX Coordinator must provide both parties with a written notice and obtain voluntary, informed, written consent from both parties. The written notice must include:

- A description of the allegations.
- The requirements of the informal resolution process.
- A statement that either party may withdraw from the informal resolution process and resume the formal grievance process with respect to the formal complaint.
- A statement of the consequences resulting from participating in the informal resolution process, including the records that will be maintained or could be shared.

The Informal Resolution Process

Conducting the Informal Resolution meeting(s):

- The Title IX Coordinator or designee acts as mediator.
- Familiarize yourself with:
 - The allegations.
 - The parties.
 - The undisputed and/or known evidence and facts.
 - The disputed and/or unknown evidence and facts.
 - The potential supportive measures and disciplinary actions that may be appropriate in light of the known circumstances.
- Prepare questions you may have for the parties regarding any unknown information.
- Establish the appropriate format.
 - Will discussions take place in-person, via telephone conference, or email?
 - Will the parties be face-to-face or in separate rooms or at separate times?
 - What are the complainant's needs given the relationship of the parties and the type and severity of the alleged incident?
- Execute the plan.
 - Remind the parties of their right to withdraw, and of the formal investigation and grievance procedures if they do.
 - Remind the parties of the goal of informal resolution: to resolve the current sexual harassment incident and prevent repeated incidents.

TITLE IX Training – PART 2

Conducting the impartial investigation, avoiding prejudging facts, avoiding bias and conflicts in the investigation process, setting up required presumptions and evidentiary standards.

Commencing The Investigation: Review Investigation Policies And Procedures

- What do the district's policies and procedures require for the investigation?
 - Timeline.
 - Notices.
 - Sharing of evidence.
 - Advisors for parties.
 - Freedom from bias.
 - Relevance of evidence issues.
- Who will serve as the investigator?
 - The Title IX Coordinator(s) or designee will be the investigator.
 - If the investigator is a third party, who will be selected?
 - Policy and/or procedure requirement.
 - Experience.
 - Objectivity/Impartiality (perceived or actual).
 - Good witness.
 - Role in future proceedings.
 - Availability.
 - Cost.
 - Internal v. External.
 - If the investigator is a third party, what kind of support may be needed?
 - Identifying individuals and providing contact information.
 - Providing space/time/access to interview witnesses.

Collecting Evidence

■ Examples of Evidence:

- Documents and other records, including electronic records.
- Photographs and videos.
- Roster and seating charts.
- Schedules.
- Attendance records.
- Student records.
- Personnel records.
- Desk contents.
- Written reports.
- Project files.
- Images.
- Court documents.
- Computer history logs.
- Emails, social media posts, text messages.
- Letters or written notes.
- Diary entries.
- Other.

■ Chain of Custody.

■ Search and Seizure.

- The Fourth Amendment to the U.S. Constitution provides as follows:
 - The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.
- Examples of areas that may be searched include:
 - Lockers.
 - Offices.
 - Automobiles.
 - Desks.
 - Computers and other technology.
 - Personal items.

■ Right of Privacy, Wis. Stat. § 995.50.

- An invasion of privacy is an intrusion upon the privacy of another of a nature highly offensive to a reasonable person, in a place that a reasonable person would consider private or in a manner which is actionable for trespass. Wisconsin provides for equitable relief, compensatory damages and attorney fees as relief for invasions of privacy.

The Investigation Plan

- Establish a timeline.
- Identify potential witnesses and records to review.
- Complainant, Witness, and Respondent.
 - Order of interviews.
 - Prepare interview questions.
 - Add to interview questions as more information becomes known.
- Honesty (Polygraph) Tests.
 - Employers may not require an employee to submit to a lie detector test, except when the test is administered in connection with an investigation involving economic loss or injury to the employer's business, such as theft, embezzlement, misappropriation or unlawful industrial espionage or sabotage. Even then, there are complex rules related to the administration and use of the test. Wis. Stat. § 111.37.

Responding to Common Distractions in Interviews

Before conducting any interview, the investigator should decide how he/she will respond to the following types of complications:

1. The complainant, witness, or respondent demands that the interview be taped;
2. The complainant, witness, or respondent requests that a parent, friend, co-worker, or attorney be present during the interview;
3. The representative for the complainant, witness, or respondent repeatedly interjects or tries to help the interview subject frame his or her answers;
4. The complainant, witness, or respondent refuses to answer questions;
5. The complainant, witness, or respondent asks who you have interviewed or plan to interview;
6. The respondent asks whether the employer is going to discipline him or her; and
7. The respondent or his/her representative asks for a written list of questions or asks to be allowed to submit written answers to questions in lieu of a face-to-face interview.

Employee Interviews

BY LAW ENFORCEMENT OFFICER

- Fifth Amendment Protections.
 - No person ... shall be compelled in any criminal case to be a witness against himself...
- Miranda Warning.
 - *You have the right to remain silent. Anything you say can and will be used against you in a court of law. You have the right to an attorney. If you cannot afford an attorney, one will be provided for you. Do you understand the rights I have just read to you? With these rights in mind, do you wish to speak to me?*

BY SCHOOL OFFICIALS

- Duty to Cooperate.
- Garrity Warning.
 - *You are required to cooperate with our investigation and answer our questions without waiving any Fifth Amendment privilege against self-incrimination that might apply. If there is any investigation conducted by law enforcement into this situation, the information obtained from this interview could not be used against you by such authorities.*
- Representation.
 - An employee is entitled to bring an employee with him or her to any meeting where the employer intends to interview the employee and where it is reasonably foreseeable that the employee's answers may lead to disciplinary action.

Student Interviews

BY LAW ENFORCEMENT OFFICER

- School districts have the authority to regulate the time in which law enforcement officers will be permitted to interview students on school property during the school day in order to minimize disruption in the school. However, the school district must avoid policies that ignore the legitimate needs of law enforcement officers. 81 Wis. Op. Att'y Gen. 126 (1994).
- Subject to Board Policy.
- Parental notification?
- Body camera?
- Miranda warning?

BY SCHOOL OFFICIALS

- Duty to cooperate.
- Subject to Board Policy; parental notification?
- Do not have to respect parents' demands to not interrogate student without parental consent.

Conducting Investigatory Interviews

- Determine order of interviewing.
- Prepare an outline of questions, but be prepared to deviate.
- Always interview complainant and respondent separately, and interview witnesses separately.
- Obtain current and accurate contact information (full name, age, address, and telephone numbers) for all complainants, witnesses, and respondents.
- Both the complainant and respondent are entitled to an advisor during interviews, advance notice of interviews, and access to any available evidence.
- Have someone present to take notes or consider recording the interview.
- Explain that you may not be able to maintain complete confidentiality, but assure the complainant, witness, and respondent that retaliation is prohibited.
- Remind the complainant, witness, or respondent of the duty to cooperate and maintain confidentiality.
- Remind the complainant, witness, or respondent that district policy prohibits providing knowingly false statements during an investigation (as applicable).
- Disclose to the complainant, witness, or respondent only what is necessary to question him/her and/or required by the policy.
- Ask open-ended questions; proceed broad to narrow.
- Do not interrupt the complainant, witness, or respondent during an interview, allow them to talk; use silence.
- Repeat questions in different ways and evaluate whether responses are consistent.
- If a complainant, witness, or respondent answers “I don’t know” or “I can’t recall,” break the question down and/or rephrase it to determine whether the witness does not have the information or is being evasive.
- Be an active listener and reiterate or restate responses to ensure accuracy if necessary.
- If you are confused by an answer, repeat what you think you’ve heard and ask the complainant, witness, or respondent to confirm your understanding.
- Ask for documents/records to the extent the complainant, witness, or respondent references them during the interview.
- Assess credibility.
- Avoid intimidation tactics and accusatory tones.
- Establish a positive rapport with the complainant, witness, or respondent, but remain professional and objective.
- Consider requesting written statements from the complainant, witness, or respondent.
- Provide the complainant, witness, or respondent with your contact information in the event that they have additional information to provide.

TITLE IX Training – PART 3

The investigative report, evaluating relevance of evidence including relevance of prior sexual behavior, avoiding sex stereotypes, reaching decisions and resolution options, conducting hearings and the appeal process, evaluating bias and conflict of interest.

Before Finalizing the Investigative Report

- Prior to drafting an investigative report:
 - The investigator must provide the parties with any evidence obtained that is directly related to the allegations in the formal complaint, including:
 - Evidence that the district does not intend to rely upon in making a final determination, and
 - Inculpatory or exculpatory evidence.
 - The investigator must provide each party with a copy of the investigative report at least ten (10) days prior to the hearing or other date of final determination.
 - Each party must have at least ten (10) days to review the evidence and submit a written response.
 - The investigator must consider the parties' responses prior to completing the investigative report.
- Before finalizing the investigative report, the investigator should read it carefully and critically.
 - Are there any typos?
 - Are there any loose ends?
 - Am I using the passive voice to avoid reaching conclusions?
 - How would an attorney or other advocate attack my report?

The Investigative Report: The Final Determination

- Drafting the investigative report:
 - Fairly summarize all relevant evidence.
 - Provide context for the evidence.
 - Analyze the evidence and, if necessary, weigh credibility of witnesses.
 - Address any need for confidentiality with regard to complainants, witnesses, etc., within the report. It may be advisable to use code names and a key to be maintained in a separate document.
 - Apply the appropriate evidence standard:
 - If using the “preponderance of evidence” standard, review the information to determine whether it is “more likely than not” that the alleged conduct occurred.
 - If using the “clear and convincing evidence standard, review the evidence to determine whether it is highly and substantially more probable to be true than not that the alleged conduct occurred.
- Contents of an Investigative Report.
 - Date.
 - Recipient(s).
 - Allegations.
 - Timeline and chronology of the investigation.
 - Relevant policies, procedures, ordinances, handbook provisions, etc.
 - Review of evidence.
 - Findings of Fact.
 - Conclusions.
 - Recommendations.
- The Investigative Report may also be subject to disclosure under the law, including the Public Records Law, the Personnel Records Law, and/or in the context of legal discovery.

The Decision Making Process

- The Title IX Coordinator shall appoint a decision-maker(s) to issue a determination of responsibility. The decision-maker(s) cannot be the same person(s) as the Title IX Coordinator(s) or the Investigator(s).
- Upon completing the Investigative Report and before the decision-maker(s) reach a determination, the Investigator shall share the Investigative Report with the decision-maker(s) and the parties. The decision-maker(s) shall:
 - Afford each party the opportunity to submit written, relevant questions that a party wants asked of any party or witness.
 - Provide each party with answers.
 - Allow for additional, limited follow-up questions from each party.
 - The decision-maker(s) must explain to the party proposing a question of any decision to exclude a question as not relevant.

Determination of Responsibility

- The decision-maker(s) will issue a written determination regarding responsibility (applying the appropriate standard).
- The written determination shall include the following content:
 - Identification of the allegations potentially constituting sexual harassment.
 - A description of the procedural steps taken from the receipt of the formal complaint through the determination.
 - Findings of fact supporting the determination.
 - Conclusions regarding the application of the applicable code of conduct to the facts.
 - A statement of, and rationale for, the result as to each allegation, including a determination of responsibility, any disciplinary measures the decision-maker(s) is recommending and whether remedies designed to restore or preserve equal access to educational programs/activities should be provided.
- The procedures and permissible bases for the Complainant(s) and Respondent(s) to appeal.

Issuance of Decision

- The decision-maker(s) will provide the written determination to the Title IX Coordinator who will provide the written determination to the parties simultaneously.
- In ultimately imposing a disciplinary sanction/consequence, the District Administrator will consider the severity of the incident, previous disciplinary violations (if any) and any mitigating circumstances.
- The Title IX Coordinator is responsible for the effective implementation of any remedies.

Evidentiary Issues

What evidence is relevant?

- Probative of a material fact concerning the allegations.

What evidence is not relevant?

- Any information protected by a legally recognized privilege (e.g., attorney-client, doctor-patient).
- A party's records of treatment from a physician, psychiatrist, or other professional, absent voluntary, written consent.

- Questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant.

- Unless:

- The prior sexual behavior is offered to prove that someone other than the respondent committed the conduct, or
- Relates to specific incidents of the complainant's prior sexual behavior with respect to the respondent and are offered to prove consent.

Conducting Hearings

Before the Hearing:

- Review the investigative report.
- Review the applicable standard of evidence.
- Review and understand what constitutes relevant evidence and what specific questions and evidence are deemed irrelevant by the Title IX regulations.
 - Be prepared to make real-time decisions about relevance during the hearing and to provide an explanation for excluding any questions or evidence deemed irrelevant.
- Prepare questions you may have for witnesses and/or parties.

At the Hearing:

- Provide each party an opportunity to present evidence and witnesses, beginning with the complainant.
- Allow for cross-examination by the opposing party's advisor of any witnesses that testify.
 - During cross-examination, vet any cross-examination questions for relevance.
 - Make a decision as to relevance before the witness/party answers the question.
 - Provide an explanation for the decision.

Appeals

Appeals:

- Available to both parties.
- May be made after a dismissal or final determination.
- Decision-maker for the appeal must not be the Title IX Coordinator, investigator or decision-maker of the initial determination.
- Provide notice of appeal to both parties, and provide an equal opportunity to submit a written response.
- Issue a written decision describing result and rationale.

- Provide decision to both parties simultaneously.

Grounds for appeal (must have affected the outcome of the matter):

- Procedural irregularity;
- New evidence that was not reasonably available at the time of determination or dismissal;
- The Title IX Coordinator, investigator(s), or decision-maker(s) had a conflict of interest or bias.

Impartiality

The school district's grievance process must:

- Require an objective evaluation of all relevant evidence—including both inculpatory and exculpatory evidence—and provide that credibility determinations may not be based on a person's status as a complainant, respondent, or witness.
- Require that the Title IX Coordinator, investigators, decision-makers, and any person involved in the informal resolution process not have a conflict of interest or bias for or against either party, generally or specifically.
- Treat complainants and respondents equitably.
- Include a presumption that the respondent is not responsible for the alleged conduct until a determination regarding responsibility is made at the conclusion of the grievance process.
- Apply the “preponderance of the evidence standard” or the “clear and convincing evidence standard” uniformly for all formal complaints of sexual harassment.

34 CFR § 106.45(b)(1).

Impartiality

Avoiding conflicts of interest:

- Consider the relationship between investigators/decision-makers and the parties, if any.
 - Coach/player, teacher/student, etc.
 - Prior involvement in Title IX complaints.
- If either party has a history of conflict with the district, consider a third-party investigator.

Avoiding bias.

- Adhere to investigation policies and procedures.
- Maintain documentation of the investigation

and relevance decisions.

- Avoid pre-determined conclusions. Let the evidence lead to the conclusion, not the other way around.
- Revise your hypothesis of events as evidence becomes known.
- Be aware of personal biases.
- “Show your work” in documenting the investigation and your analysis of evidence and credibility.
 - Evaluate source, content, and plausibility in light of other evidence.
- Be thorough. Don’t limit the investigation to either party’s witnesses or evidence.

Thank you
