

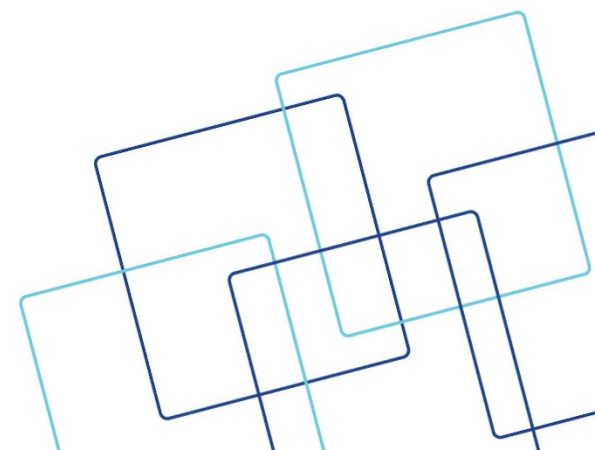


# Best Practices for Identifying, Responding to, and Investigating Complaints - Title IX

Presented by: Emma J. Sol

West Contra Costa Unified School District

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# Presenter

## Emma J. Sol

### AT LOZANO SMITH

Emma J. Sol is an Associate in Lozano Smith's Walnut Creek office. Ms. Sol focuses her practice primarily on Title IX, student and investigations issues. Ms. Sol frequently assists clients in all aspects of Title IX compliance, including completing investigations and drafting policy. She also utilizes her knowledge and expertise in the area to present trainings on Title IX topics to assist clients in understanding this complex law.



### CONNECT

esol@lozanosmith.com  
925.953.1620



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Poll Time:  
Who has experience  
with Title IX?

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Poll Time:  
Who has participated in  
a Title IX investigation?

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# Title IX and the New Regulations



# The Plain Language

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

20 U.S.C. § 1681 *et seq.*

# What Does Title IX Cover?

1. Education Programs or Activities
2. Sports
3. Employment
4. Equal Access to Facilities
5. Admissions and Recruitment
6. Sexual Harassment\*

(34 C.F.R. Part 106)

\*New regulations that have the full force and effect of law



# Title IX Definitions (2020 Regulations)

## Actual Knowledge (K-12)

- When ***any employee*** has notice of sexual harassment or allegations of sexual harassment

## Formal Complaint

- A document filed by a ***complainant*** or signed by the ***Title IX Coordinator*** alleging sexual harassment against a respondent, and requesting that the recipient (District) investigate the allegation

## Complainant

- An individual who is alleged to be the ***victim of the conduct*** that could constitute sexual harassment

## Respondent

- An individual who has been reported to be the ***perpetrator of the conduct*** that could constitute sexual harassment



# Title IX Definitions – Sexual Harassment

Sexual Harassment is conduct on the basis of sex that satisfies one or more of the following:

An **employee** conditioning the provision of an aid, benefit, or service of the district on the complainant's participation in unwelcome sexual conduct;

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

***"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).

# Title IX Definitions – Sexual Assault



Forcible Fondling—The touching of the private body parts of another person for the purpose of sexual gratification, forcibly and/or against that person’s will or not forcibly or against the person’s will in instances where the victim is incapable of giving consent because of his/her youth or because of his/her temporary or permanent mental or physical incapacity.

# Title IX Jurisdiction

The conduct occurs against a person *in the United States*;

The conduct occurs in an education program or activity over which the District exercised *substantial control* over both:

The complainant was *participating/attempting to participate in* the educational program or activity at the time the complaint was filed.

1) the *respondent* and

2) the *context* in which the sexual harassment occurs; and

# GROUP ACTIVITY

Which of the following is considered “Sexual Harassment” under Title IX?

1

A student conditioning the provision of an aid or benefit on the complainant’s participation in unwelcome sexual conduct.

2

An employee conditioning the provision of an aid, benefit, or service of the district on the complainant’s participation in unwelcome sexual conduct.

3

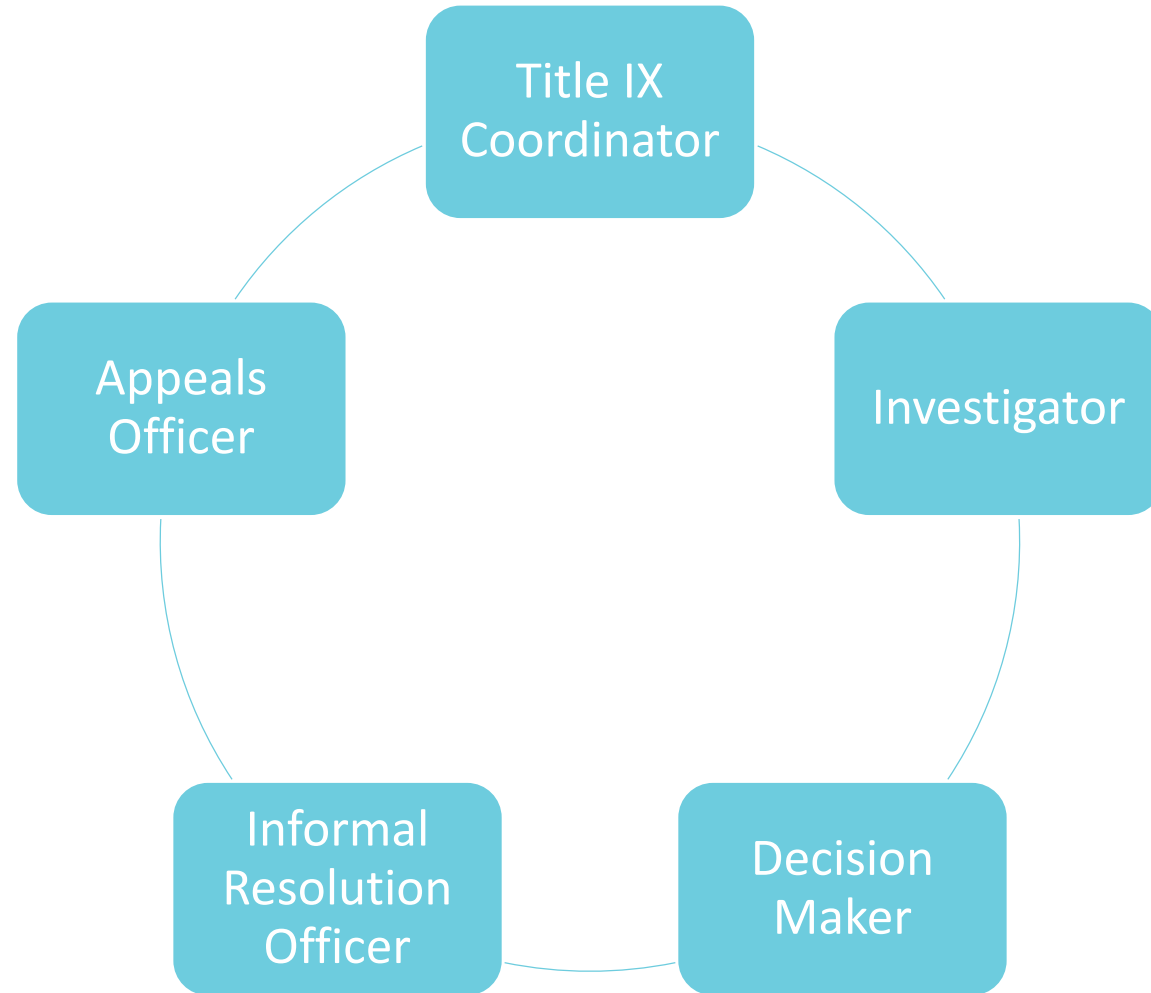
Unwelcome conduct determined by a reasonable person to be severe and pervasive.



# The Roles and Responsibilities of District Administrators and Employees



# What are the Roles?



The Title IX Coordinator CANNOT be the Decision Maker or the Appeals Officer

# Who is your Title IX Coordinator?

Jose Espinoza,  
Director,  
Office of Educational Equity

# Responsibilities of Administrators

- Have the initial conversation with parents/Complainants about filing a Title IX complaint.
- Assist in investigations as needed
  - You may be asked to serve in one of the following positions:
    - Investigator
    - Decision Maker
    - Appeals Officer
- Be the link between the OEE office and your school site
- Help organize interviews with students
- Help coordinate and implement supportive measures

Thorough and detailed investigations promote a safe school and work environment.



# Responsibilities of All Employees:



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Identify

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Report

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**This does not relieve an employee of their mandated reporter duties!**

# Criminal Investigation

A police investigation does ***not*** relieve a district of its obligations under Title IX or state laws

## Gathering evidence

- A brief delay is permissible, but it is not good cause to delay sending the written notice of the investigation
- Criminal reports may be useful for fact gathering
- Coordinate with local law enforcement

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# 12-Step Investigations for Title IX Complaints

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# 12 Steps for Effective Investigations

1. Receiving the Complaint
2. Urgent/Supportive Measures
3. Assessing the Nature of the Complaint
4. Send Notice of Investigation
5. Frame the Scope
6. Make a List of Witnesses
7. Draft Questions for and Interview the Complainant
8. Gather and Preserve Evidence
9. Conduct Witness and Respondent Interviews
10. Conduct Additional Interviews If Needed
11. Exchange Evidence, Prepare the Investigation Report and Written Determination
12. Corrective Action and Tying up Loose Ends

# 12 Steps for Effective Title IX Investigations

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## *Step 1* Receiving and Assessing Complaints



# Receiving Complaints (In General)

## WHERE COMPLAINTS COME FROM

Student

Parent

Employee

Member of Public

Anonymous Person

## FORM OF COMPLAINTS

Verbal

Written

No Complaint (Rumor or Observation)

## Group Activity

You are outside in the morning to greet students as they arrive to school. You see two 8<sup>th</sup> grade students, Casey and Julie, walking towards the school. Casey appears to be trying to hold Julie's hand, and Julie keeps pulling it away. Julie is looking down and appears upset.

Is this a complaint?

What do you do?

# Receiving a Complaint



- Notify the Title IX Coordinator
- Assess whether a CPS report should be filed (continue to reassess)
- Title IX Coordinator should promptly schedule a meeting with the victim



# 12 Steps for Effective Investigations

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## *Step 2* Supportive/Urgent Measures



# Urgent Considerations



- Is there a threat of imminent harm to others?
- Was a crime potentially committed?
- Have mandated reporting obligations been triggered?
- Should an employee be placed on paid administrative leave?

# Contact the Victim/Complainant

Conduct initial discussion with complainant/victim to better understand the complaint and if it rises to the level of sexual harassment under Title IX

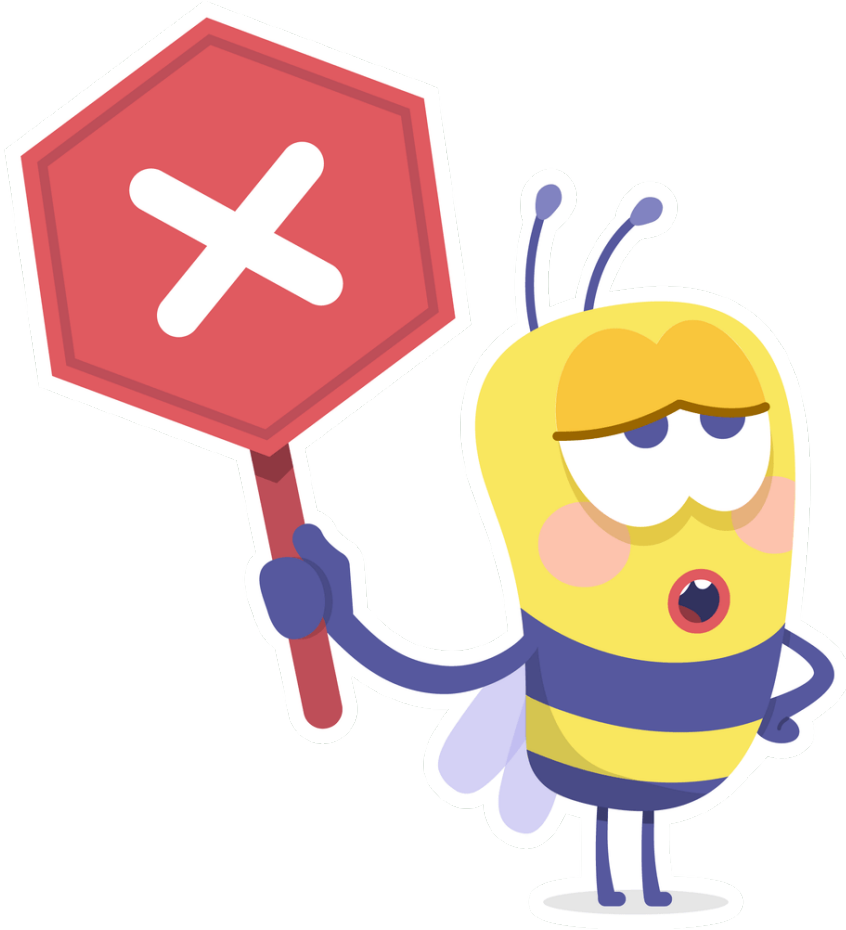
- Discuss options for supportive measures
- Explain options for filing a formal complaint with the District
- Discuss the District's policy that prohibits retaliation

# Initial Discussion With Victim/Complainant

- Ask open-ended questions
- Get complaint in writing or confirm allegations in writing if not already received
- Review policy against retaliation
- Do not promise confidentiality
- Determine whether matter can be resolved informally
- Listen and “hear” the concern



# STOP before you discipline



A . . . response must treat complainants and respondents equitably ... by following a grievance process that complies with § 106.45 before the imposition of any disciplinary sanctions or other actions that are not supportive measures as defined in § 106.30, against a respondent.

# Title IX and Student Discipline

## Emergency Removal

- Respondent must be an immediate threat to the physical health or safety of any student or individual;
- The immediate threat must arise from the allegations of sexual harassment; and
- Respondent must be provided with notice and an opportunity to challenge the decision immediately after removal.

## Supportive Measures

- No-contact orders
- Change of class or work schedules
- Modified lunch schedules
- Campus escort services
- Change in work locations
- Increased security/monitoring
- Extensions of deadlines or other course-related adjustments
- Counseling
- Offer independent study (must be voluntary)

If you have a student complaint involving sexual harassment or assault, DO NOT DISCIPLINE.

Call or  
Email Jose  
Espinoza for  
next steps.



# 12 Steps for Effective Investigations

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## *Step 3* Assessing the Nature of the Complaint





# Do You Have a “Formal” Title IX Complaint?

Document filed by a complainant (who is also the victim or the victim’s parent/guardian) alleging sexual harassment against a respondent and requesting that the recipient investigate the allegation.

Document signed by the Title IX Coordinator alleging sexual harassment against a respondent and requesting that the recipient investigate the allegation.

## Group Activity

An 8<sup>th</sup> grade student, Erica, comes and tells you that a 7<sup>th</sup> grade student, Natalie, has been making her feel uncomfortable at school. Erica tells you that Natalie has been staring at her in the locker room, and that one of her friends overheard Natalie call her “sexy” when she was changing in the locker room.

- Is this Title IX?
- What supportive measures do you offer?
- What do you do next?

# Dismissals

## Mandatory

1. Sexual harassment under Title IX
2. Title IX Jurisdiction
3. Occur against a person in the United States

## Discretionary

1. Written withdrawal
2. No longer enrolled or employed
3. Cannot gather evidence

**Work with Title IX Coordinator!!**

# If Not Title IX, Do NOT Stop There!

Consider whether the alleged conduct must be addressed by other District policies or employee/student conduct standards



# 12 Steps for Effective Investigations

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*Step 4*

Send Notice of the Investigation



# Notice of Investigation

Sent by Title IX Coordinator

Cannot restrict either party's ability to discuss the allegations under investigation.

# Informal Resolution

Either party can withdraw from the informal resolution process at any time, and should be notified of this right.

Cannot be used for allegations where an employee is alleged to have sexually harassed a student.

## It can only be offered when:

- A formal complaint is filed;
- The school district has sent a written notice about the allegations and the informal resolution process;
- A written determination has not yet been made; and
- Both parties have provided voluntary, written consent to the process.

# 12 Steps for Effective Investigations

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## *Step 5* Frame the Scope





# Understand the Scope - Frame the Allegations

- Prepare clear and concise “yes or no” questions or statements that the investigation will answer or address.
  - Do not include legal terms or ambiguous or subjective words. Be specific and descriptive in your allegations. (e.g., Instead of “Did Suzie act mean towards Joe?” use “Did Suzie tell Joe to “Go to Hell?””)
- Make sure all relevant claims are included in the allegations.
  - If you excluded something, be prepared to explain why.
- Focus on whether or not the alleged conduct occurred and AVOID legal conclusions.

# Understand the Scope - Frame the Allegations

- Bad example: Did Suzie discriminate against Joe?
- Good example: Did Suzie issue Joe a letter of reprimand because of Joe's race?
- Bad example: Did Suzie act mean and unfairly toward Joe?
- Good example: Did Suzie tell Joe "Go to Hell?"

## Group Activity

Natasha, an 8<sup>th</sup> grader, has made a complaint alleging that one of her classmates, Vanessa, sexually assaulted her. Specifically, she said Vanessa groped her chest under her shirt in a hotel room during an overnight school field trip. She also said, Vanessa came up behind her at a school dance and put her arms around her waist, kissing her neck and trying to reach down her pants.

Write out the allegation(s) for this investigation?

## Group Activity – Answer

1. During an overnight school field trip Respondent reached under Complainant's shirt and touched her breast without Complainant's consent
  - (would want more details to confirm the specific actions on this one)
2. At a school dance Respondent came up behind Complainant, putting her arms around Complainant's waist and tried to reach down Complainant's pants.
3. At a school dance Respondent came up behind Complainant, and tried to kiss Complainant on the neck.

## Preponderance of the Evidence



# Investigation Timelines



- Title IX - “reasonably prompt time frame”
- District policies

# 12 Steps for Effective Investigations

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## *Step 6* Gather, Review, and Preserve Evidence



# Title IX Evidence Requirements

- District has the burden of gathering evidence.
- District cannot access or use a party's medical, psychological or other similar records unless they obtain the party's voluntary, written consent.
- District cannot restrict parties from discussing allegations or gathering and presenting relevant evidence.
- District must provide an opportunity for parties to present fact and expert witnesses and other exculpatory or inculpatory evidence.



# Types of Evidence



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Emails

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Text Messages

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Phone Records

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Pictures

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Videos

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Attendance Sheets

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Social Media Posts

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# Child Pornography

Call School Resource Officer, Police Department, or Safety & Security Department right away before touching anything

Third party witness

Track chain of custody

**Warning:** It is a state and federal crime to possess and/or distribute child pornography. There's no exception for school administrators or investigators.

# 12 Steps for Effective Investigations

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## *Step 7* Make a List of Witnesses



# Preparing to Conduct Interviews

Consider potential conflicts of interest.

Consider location, timing, and order.

How to make initial contact

Age of the party being interviewed

As you conduct interviews, be sure to ask each witness if there are other witnesses you should speak with.

# 12 Steps for Effective Investigations

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## *Step 8*

Draft Interview Questions and Apply a Trauma-Informed Approach



# Trauma-Informed Approach

Schedule interview at convenient time and place

Listen attentively and actively without interrupting

Save technical questions for the end of the interview once open-ended ones exhausted

Display compassion and sincerity

Interview without judgment or skepticism

*Use of trauma-informed techniques during the complainant's interview can facilitate rapport building, cooperation and complainant's emotional recovery.*

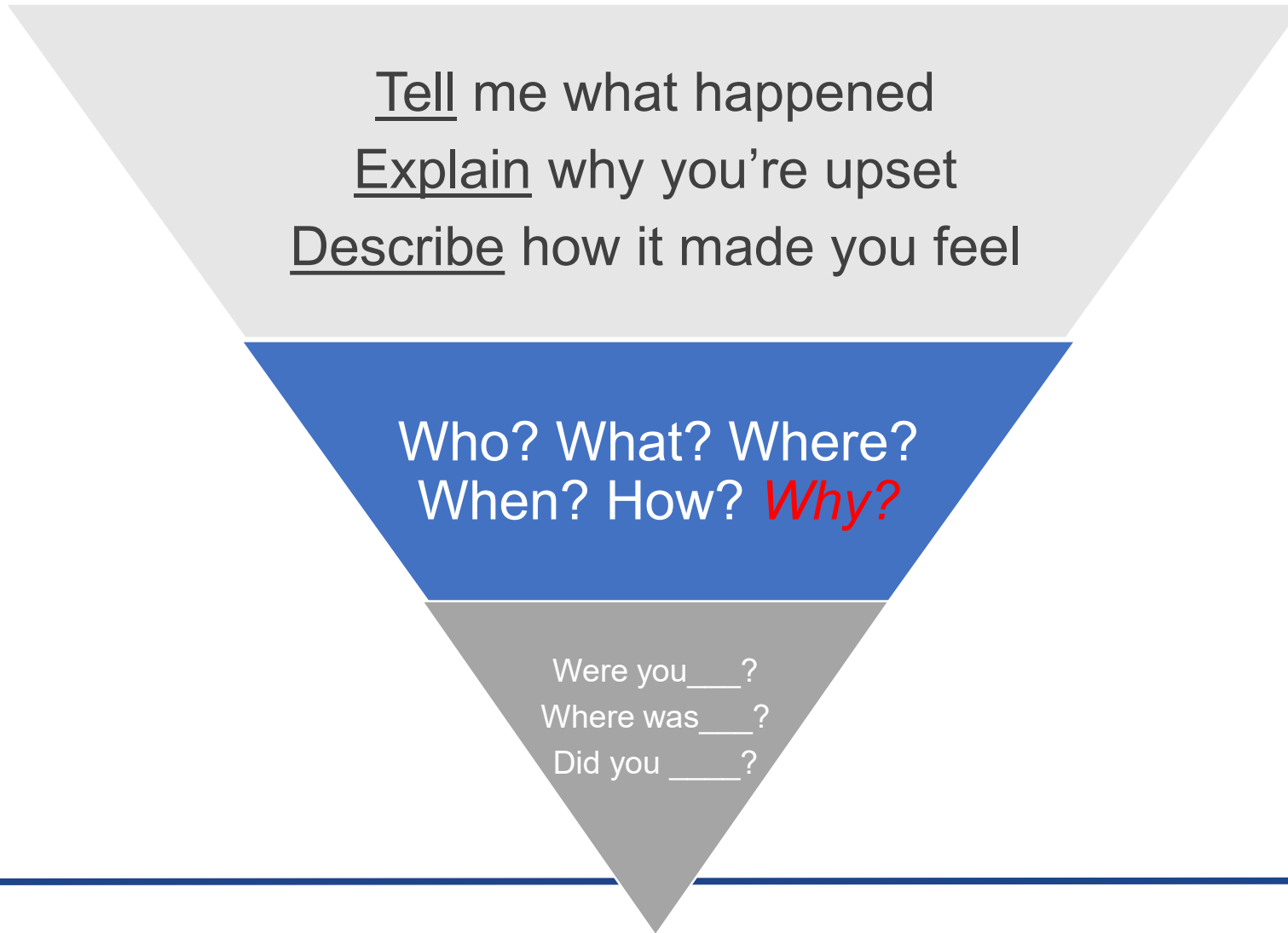
Do NOT Victim-Blame

Permit student/employee to control information flow

Suggest breaks as needed

Explain the need/context when asking sensitive questions

# Questioning Techniques



Tell me what happened  
Explain why you're upset  
Describe how it made you feel

Who? What? Where?  
When? How? *Why?*

Were you \_\_\_?  
Where was \_\_\_?  
Did you \_\_\_?

# Statements/Questions to Avoid

## Questions to avoid:

- Why did you...?
- Why didn't you...?
- Didn't you consider...?

## Questions that may be helpful:

- How did that make you feel?
- What was your thought process at that time?
- Do you remember smelling/hearing anything?

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**Don't** insert your opinion into the victim's experience

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**Don't** make assumptions about what the victim needs or wants

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**Avoid** questions that can be answered with one-word or short responses

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**Avoid** leading questions

"And then you did this..." v. "What happened next?"



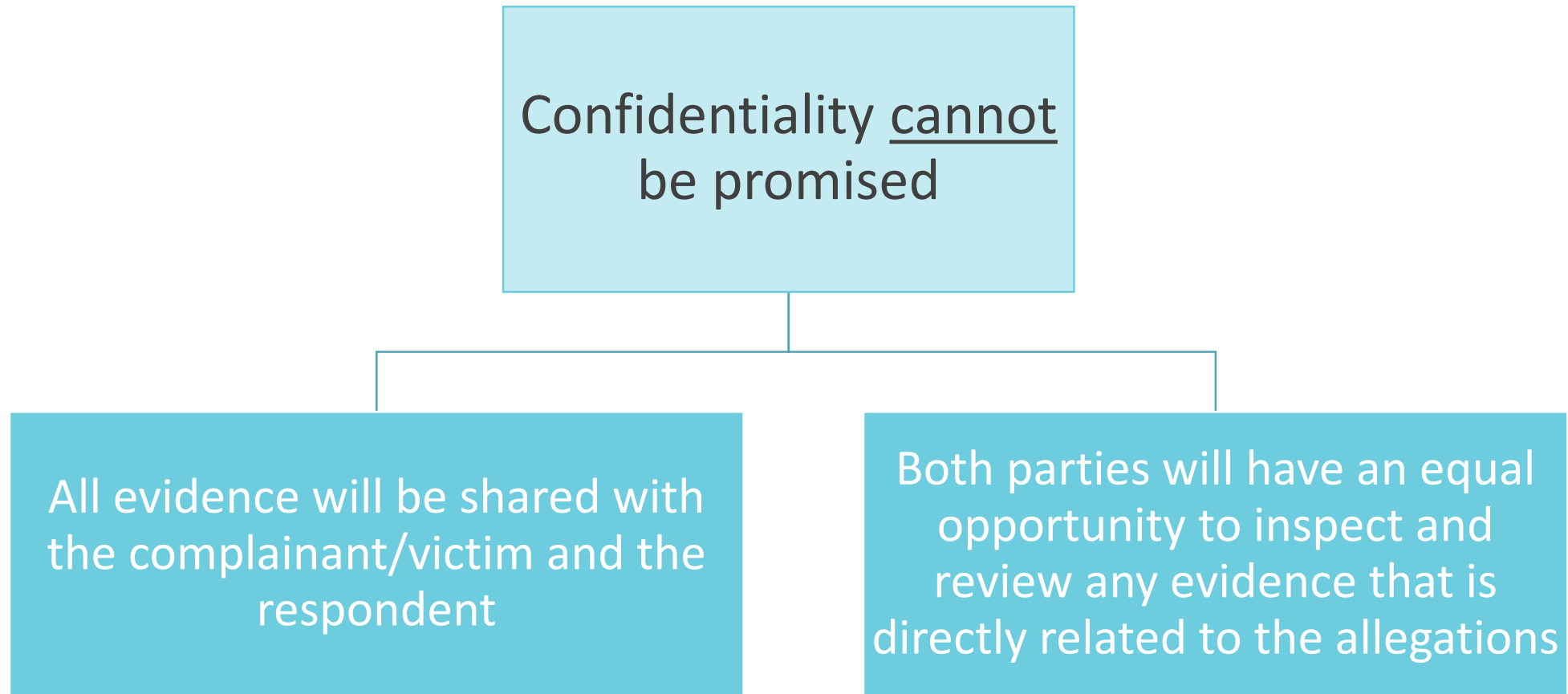
# 12 Steps for Effective Investigations

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## *Step 9* Conduct Witness



# Confidentiality & Preserving the Integrity of the Investigation





# Take Notes

Take detailed notes and/or have a second administrator or confidential employee involved to take notes.

Consider signed witness statement summaries.



# 12 Steps for Effective Investigations

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*Step 10*

Conduct Additional Interviews If Needed



# Conduct Additional Interviews



Review your witness summaries and evidence and ask yourself if there are any holes.



Do you have all the information you need to thoroughly address each allegation?



It is OK to conduct follow-up interviews of witnesses if needed.

# 12 Steps for Effective Investigations

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## *Step 11*

Exchange Evidence, Prepare the Investigation Report and Written Determination



# Review of Evidence By the Parties

Send the parties all evidence directly related to the allegations raised in the formal complaint.

- Includes evidence the District does not intend to rely on in reaching its decision regarding responsibility.
- Use of a draft investigation report or report of evidence.

Must be done prior to the completion of the investigation report.



Parties must be given at least 10 days to respond to the evidence, which must be considered by the investigator.

**\*\***The investigator should work with the Title IX Coordinator to securely transmit the evidence to the parties, and to assess whether redactions may be appropriate.

# Investigation Report

- The final investigation report should be prepared by the investigator and must summarize all relevant evidence.
- Must be sent to the parties at least 10 days before a written determination regarding responsibility is issued by the decision-maker.





# Investigation Report (Recommended Content)

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Identify the date the investigation commenced

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Identify the investigator

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Identify supportive measures offered to and accepted by the parties

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Summary of the investigation process

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Identify the legal standard of review applied to the review of evidence/applicable policies

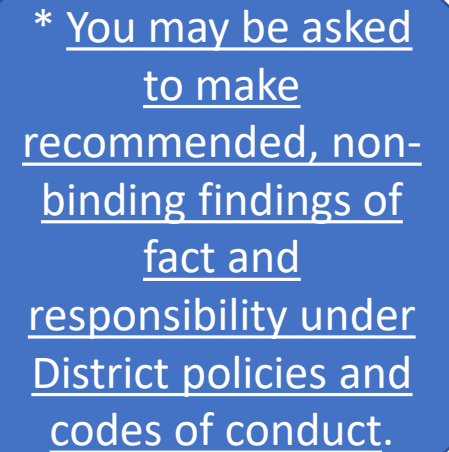
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Identify number of/identity of witnesses

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Summary of evidence – documents and witness statements

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\* You may be asked to make recommended, non-binding findings of fact and responsibility under District policies and codes of conduct.

# Submission of Written Questions

The decision-maker must allow parties the opportunity to submit written, relevant questions that they want to ask any other party or witness.

Once the parties are provided with the answers, they are permitted to submit additional, limited follow-up questions from each part.

Decision-maker determines relevancy

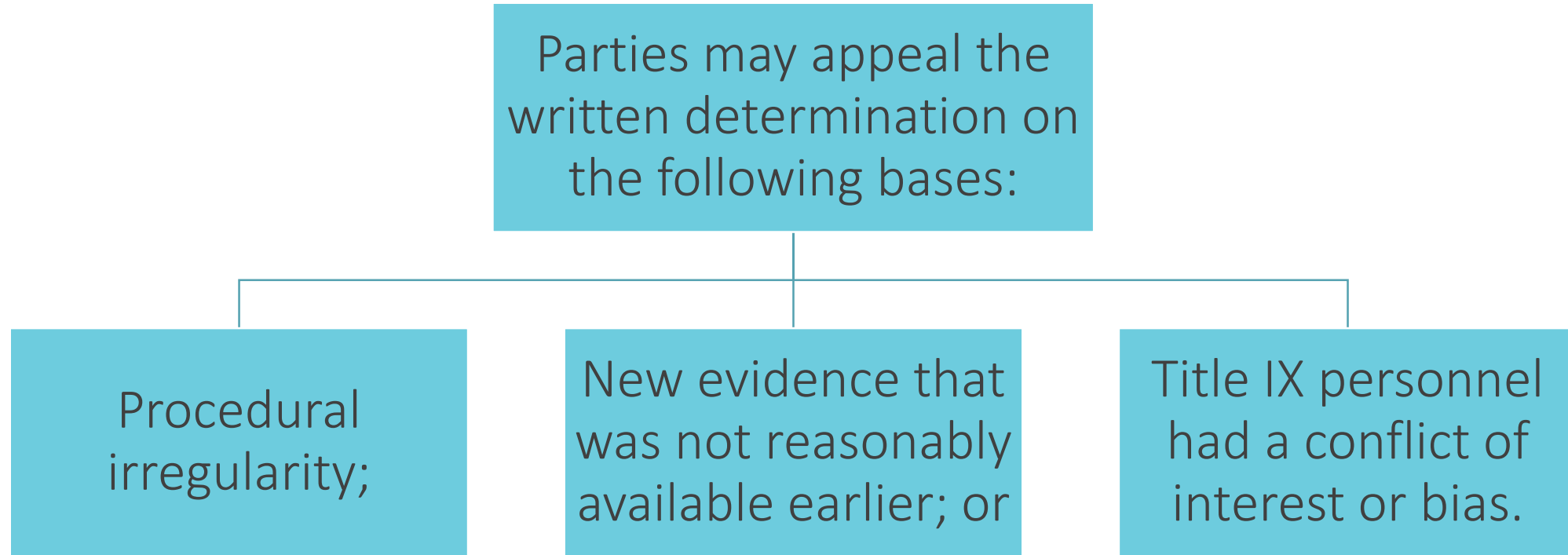
- Explains why questions were deemed irrelevant

Complainant's sexual history is irrelevant unless offered to prove someone else committed the conduct or for proof of consent.

# Written Determination Regarding Responsibility – Issued by the Decision-Maker

- **Identification of the allegations** potentially constituting sexual harassment.
- **A description of the procedural steps** taken from formal complaint through the determination of responsibility.
- **Findings of Fact** supporting the determination.
- **Conclusions** regarding the application of the recipient's code of conduct to the facts.
- **Rationale** for each finding and conclusion, including a **determination of responsibility** for each allegation.
- Statement of **potential disciplinary sanctions**.
- **Appeal rights**.

# Appeal Rights for Both Parties at the District



Students/employees may also be afforded the right to file a complaint or an appeal with federal and/or state agencies (e.g. OCR, CDE, CRD, EEOC).

# 12 Steps for Effective Investigations

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## *Step 12* Corrective Action and Tying Up Loose Ends



# Corrective Actions

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Staff/student discipline

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Ensuring no retaliation

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Additional support for involved parties

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Generalized training for staff/students in class, school, or district-wide

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Generalized notification of policies/ rules

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Increased monitoring and check-ins

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Changes to District practice

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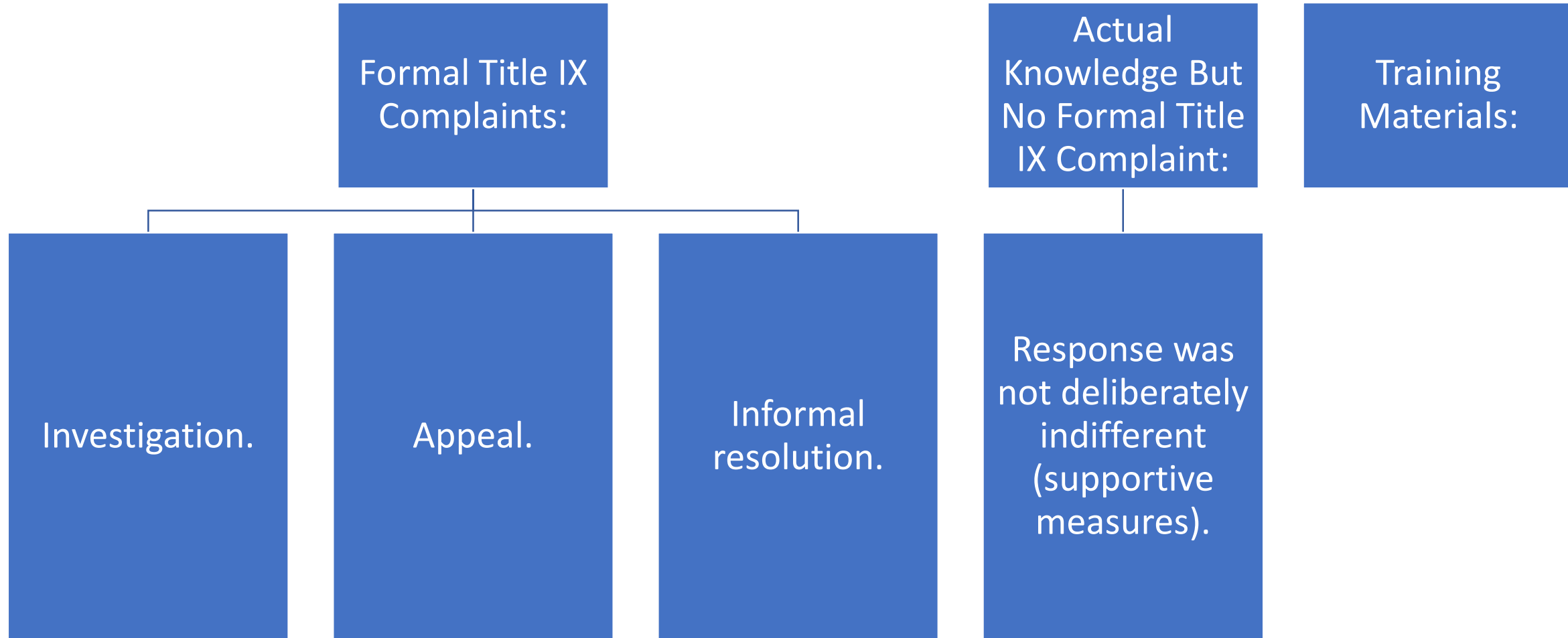


# Discipline after Final Written Determination



If the final written determination concludes that Respondent committed sexual harassment, sexual assault, or sexual battery, the date the school site can suspend the Respondent depends on if an appeal is filed.

# Recordkeeping – Records Must Be Maintained for 7 Years





# The 2020 Title IX Regulations remain in effect!

- *New Title IX regulations are undergoing the rulemaking process; however, these new regulations are NOT finalized and are NOT in effect at this time.*



# Questions





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*For more information, questions and  
comments about the presentation,  
please feel free to contact:*

**Emma J. Sol**

*Associate*

**Tel: 925.953.1620**

**[esol@lozanosmith.com](mailto:esol@lozanosmith.com)**

*Or any of the attorneys  
in one of our 8 offices.*

**LS**



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