

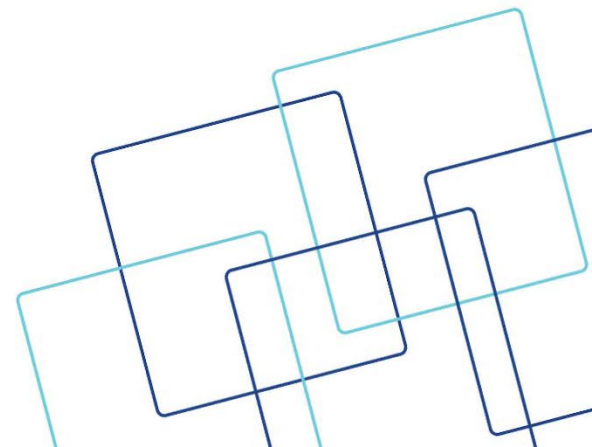


Overview of Effective Investigations

Presented by: Emma J. Sol

West Contra Costa Unified School District

March 13, 2023



Presenter

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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.



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Objectives

- Overview of Title IX
- Overview of the Uniform Complaint Procedures (UCP)
- Learn Steps to Conduct an Effective Investigation



Title IX



Title IX--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



Why Title IX is Important - Potential Impact of Sexual Misconduct on Students and Employees



- Shame, humiliation, stress, anxiety, depression, loss of sleep
- Impaired learning/poor work performance
- Absenteeism/turnover
- Culture of discrimination
- Civil liability (monetary damages, attorney fees)
- Negative media attention and public outcry
- OCR Resolution Agreement
- Loss of federal funds

Title IX Definitions

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

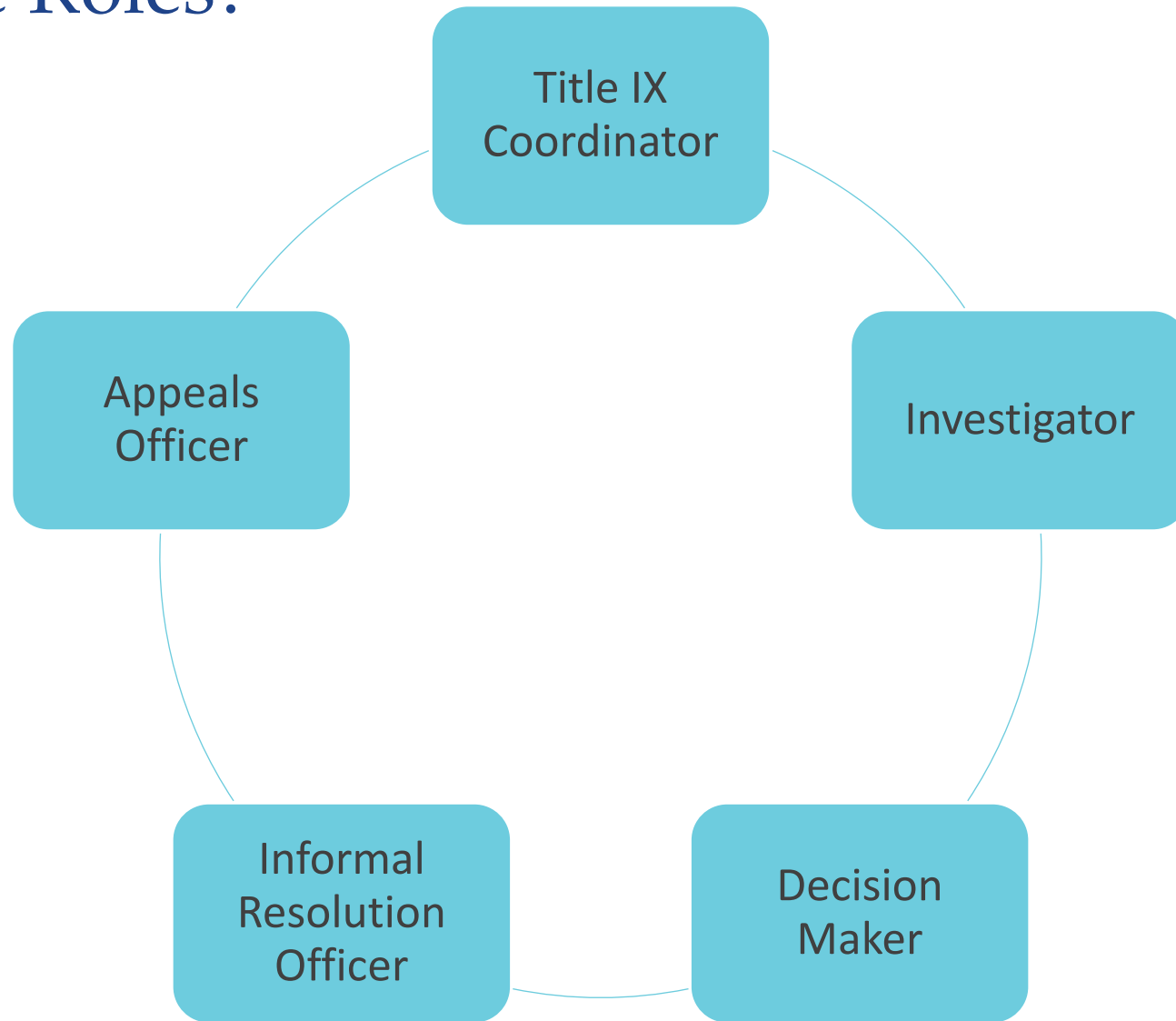
Complainant

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

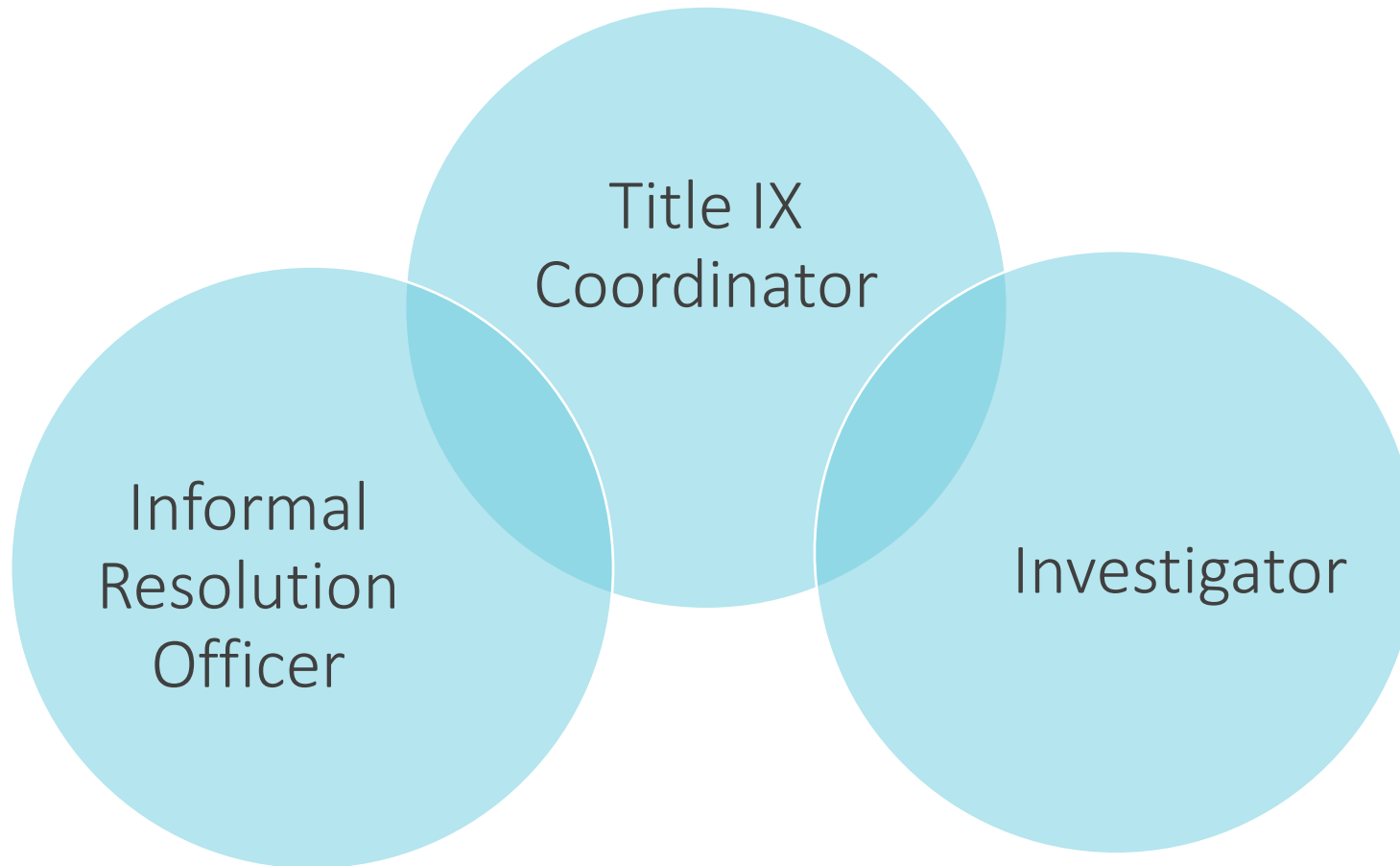
Respondent

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

What are the Roles?



What roles can overlap?



What can be outsourced?

Investigator



Decision-maker



Informal Resolution Officer



Appeals Officer



Responsibilities of All Employees: TITLE IX



- Report to the District's Title IX Coordinator, as well as any additional designated individuals (school site administrators), any known claims of potential sexual harassment.
- All employees should be trained on how to identify potential sexual harassment issues and reporting procedures.
- This does not relieve an employee of their mandated reporter duties!

Sexual Harassment Under Title IX

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 Jurisdiction

1. Education Program or Activity
 - a) If the school exercises substantial control over the respondent; and
 - b) The school exercises substantial control over the context in which the sexual harassment occurred.
2. Must be within the United States.
3. At the time of filing a formal complaint, complainant must be participating/attempting to participate in the educational program.

Think Through It!

During PE, a 3rd grade male, Lincoln, slaps a male classmate, Harrison on the buttocks after Harrison runs the bases while they are playing softball or while they are playing basketball. This has happened every day for the past few weeks.

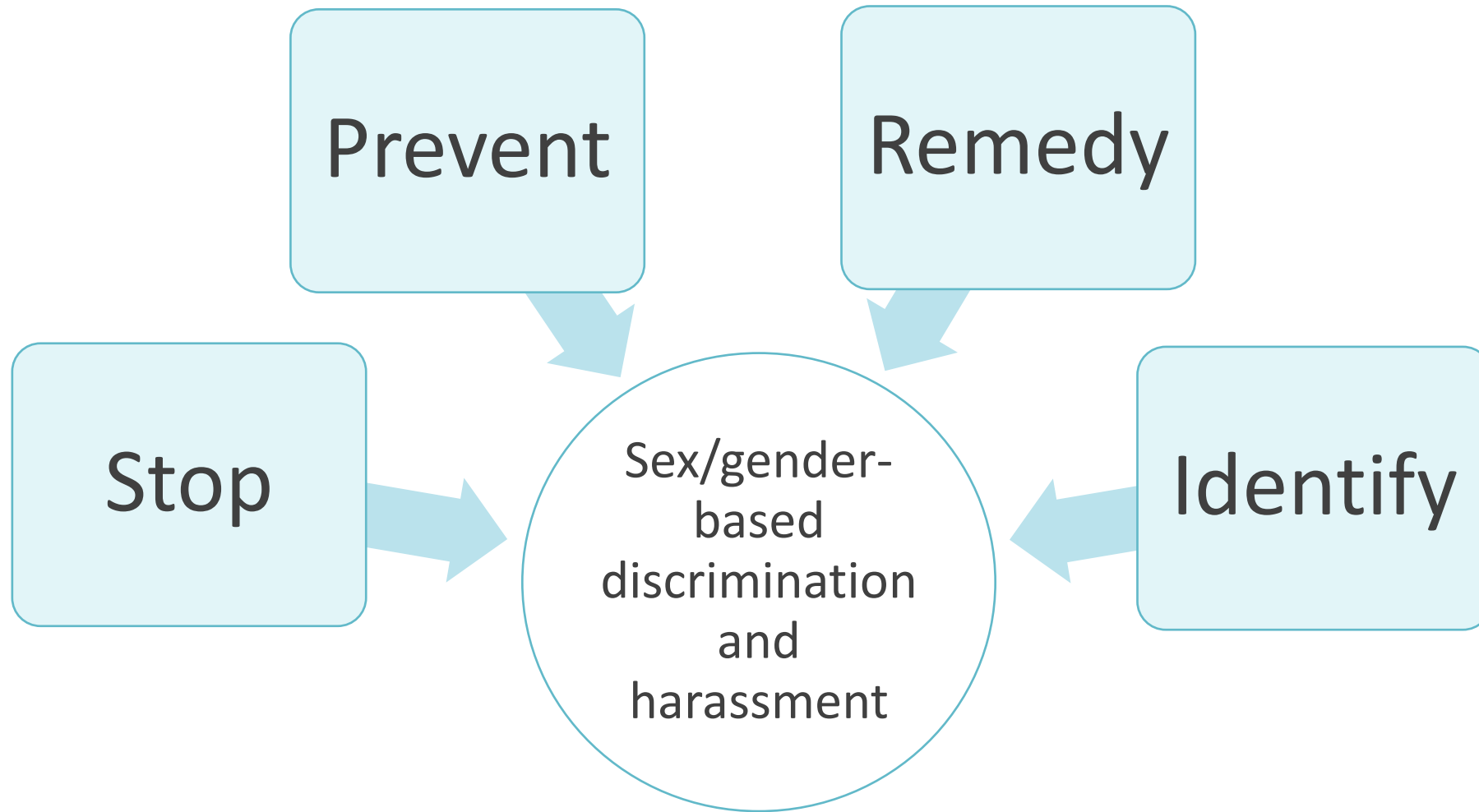
Is this Title IX?



Title IX Coordinator



Title IX Coordinator duties



Title IX Coordinator's Duties

- Receives complaints and oversees the complaint/grievance or informal resolution process
- Explains the complaint/grievance process to complainant
- Offers supportive measures to complainant and respondent
- Determines mandatory and discretionary dismissals
- Evaluates corrective actions and identifies systemic issues
- Ensures overall Title IX compliance

Title IX Grievance Procedure

Receive Complaint	Is it Title IX?	Formal Investigation & Report	Determination	Appeal & Corrective Action
<ul style="list-style-type: none"> Complaint or notice to the Title IX Coordinator Intake Offer supportive measures to both parties Discuss options to file a formal complaint 	<p><i>Following a formal complaint:</i></p> <ul style="list-style-type: none"> Definition of sexual harassment? Title IX jurisdiction? Mandatory/discretionary dismissal <ul style="list-style-type: none"> Consider UCP/4030 process Emergency removal? Administrative leave? Determine if informal resolution is an option 	<ul style="list-style-type: none"> Identify timeline Notice to parties List of witnesses Plan interviews Gather evidence Draft investigation report Exchange evidence Investigation report finalized and shared 	<ul style="list-style-type: none"> Exchange of written questions and answers Determine if relevant Written determination 	<ul style="list-style-type: none"> Appeal decision and rationale drafted and shared Determine if discipline is appropriate once appeal window is closed Corrective action Systemic change

Title IX Coordinator - Complaints

Receives Complaints

- Can come from anywhere
- Can be received by any employee
- Mandated reporter obligations
- Notify law enforcement
- Supportive Measures

Oversees Complaints

- Keep a log
- Oversee Grievance Procedure
 - Send notices and communicate with parties
 - Timeline
- Oversee Informal Resolution

Uniform Complaint Procedures (UCP)

UCP -- The Plain Language

A complaint under the UCP is a written and signed statement by an individual, public agency, or organization alleging a violation of federal or state laws governing educational programs, including allegations of unlawful discrimination, harassment, intimidation, bullying (of a protected group), and failure to comply with laws relating to pupil fees and the Local Control Accountability Plan (LCAP).

California Code of Regulations, Title 5, Sections 4600-4670

See also BP/AR 1312.3

UCP Complaints

- Formal v. informal? Comments/suggestions v. complaint?
- Complaining party need not specify that they are filing a “UCP” complaint
- CDE: *“It is the LEA’s responsibility to determine, through the analysis of applicable laws and regulations, whether the complaint is within the jurisdiction of local control or the UCP or possibly both.”*
- A complaint may contain multiple complaints – some UCP and some that are not
- Need not be filed directly with the “School Community Liaison” or “Compliance Officer” to be a proper UCP – can be given to any administrator

Responsibilities of Complainant

- File written complaint
- Cooperate in investigation
- May file written appeal to CDE within 30 days of receiving the District's UCP Decision
- Must specify the basis for the appeal to CDE
- May further appeal CDE's decision to State Superintendent of Public Instruction

Responsibilities of LEA

- Ensure compliance with Federal and State laws and regulations
- Adopt UCP policies and procedures consistent with law
- Designate staff member to receive, investigate, and resolve complaints (and train staff)
- Protect complainants and witnesses from retaliation
- Resolve the complaint and complete a written report (“decision”) within 60 days
- Advise the complainant of right to appeal the decision to CDE

Hypothetical

Maria, a 10th grade student, reports that she was sexually assaulted after a football game. Maria said she left the football game with her classmate, Max, and they went across the street to the local shopping center to get frozen yogurt. After leaving the frozen yogurt place and waiting for a ride, Max stuck his hands down Maria's pants and digitally penetrated her.

Would this fall under
Title IX or the UCP?



10 Steps for an Effective Investigation



10 Steps for an Effective Investigation

1. Receiving and Assessing Complaints
2. Consider Urgent Measures
3. Initiate an Investigation into the Complaint
4. Gather, Review, and Preserve Evidence
5. Draft a List of Witnesses
6. Draft Interview Questions and Apply a Trauma-Informed Approach
7. Conduct Interviews
8. Prepare the Investigation Report
9. Prepare Factual Findings and Written Decision
10. Take Appropriate Corrective Action

10 Steps for Effective Investigations

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

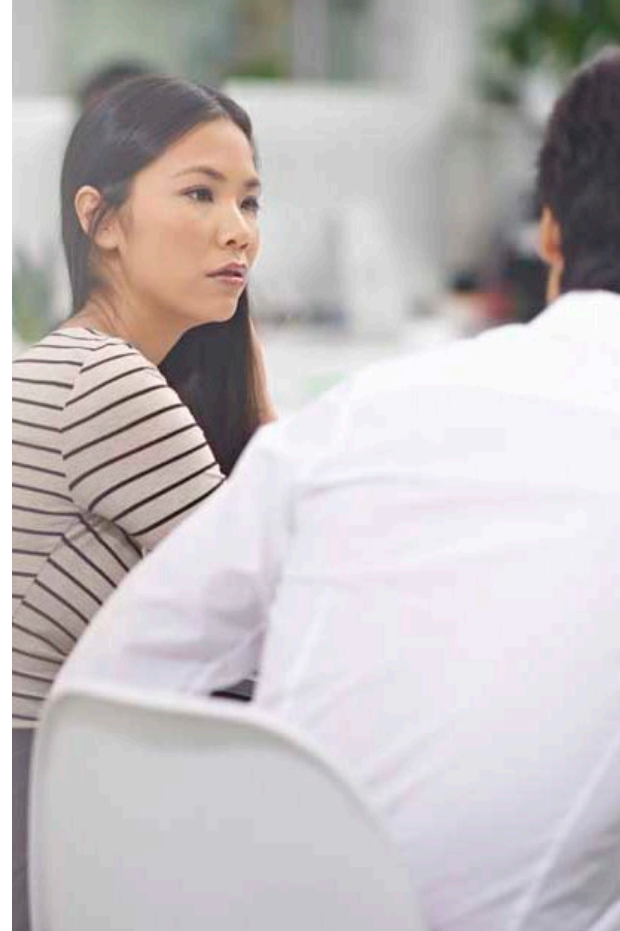
Verbal

Written

No Complaint (Rumor or Observation)

Examples of “Red Flag” Conduct

- Flirtations or propositions
- Derogatory comments
- Sexual jokes or gestures
- Spreading sexual rumors
- Massaging, grabbing, or touching
- Comments on an employee or student’s body
- Sexual acts without consent or based on coercion
- Non-consensual “sexting”
- Sexploitation



Do You Have a “Formal” Title IX Complaint?

Document filed
by Complainant

OR

Signed by Title
IX Coordinator

Discretionary Dismissals

Districts *MAY* dismiss a formal complaint, or any allegations therein if:

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

Dismissals (Mandatory and Discretionary)

The decision to dismiss a complaint should be made in consultation with the Title IX Coordinator.

Notice of dismissal must be issued to both parties in writing.

Parties must be informed of their right to appeal the dismissal on the basis of:

- Procedural irregularity;
- New evidence that was not reasonably available earlier; or
- Involved personnel had a conflict of interest or bias.

Contact the Complainant

- Conduct initial discussion with complainant to better understand the complaint
- Discuss options for supportive measures
- Explain options for filing a formal complaint with the district
- Discuss the district's policy that prohibits retaliation
- Confidentiality cannot be promised to complainant or anyone

Hypo

Megan is a senior and the team manager for the wrestling team at your high school. One day, late after practice, Megan is in the equipment shed, organizing and cleaning the mats. Drew, a sophomore wrestler, comes into the shed, startling Megan. When Megan tries to leave, Drew grabs her, pushes her down, and has sexual intercourse with her.

Megan comes to you a week later, upset and nervous.

Is this Title IX?
What do you say to Megan?

Possibility of Informal Resolution

Title IX Informal Resolution Officer

- Verifies a complaint meets the criteria for informal resolution, and that the parties have given voluntary, written consent
- Ensures the parties know their rights, including their right to withdraw at any time prior to a resolution being reached

UCP

BP 1312.3: “The Board encourages early resolution of complaints whenever possible.”

- Still requires notice and “findings”

What if the Complainant says “Do Nothing”?

The Title IX Coordinator must inform them of their options

- This includes supportive measures without filing a formal complaint

The Title IX Coordinator can sign a formal complaint on the complainant's behalf

- Assess the conduct!
- If NOT filing a formal complaint would be deliberately indifferent, the Title IX Coordinator has the discretion to sign a formal complaint on the complainant's behalf

Even if You Determine Title IX Is NOT Triggered or the Complaint Should Be Dismissed, Do NOT Stop There!

- *Consider whether the alleged conduct may otherwise violate District policy or employee/student conduct standards*



Policies and Procedures for Investigating Complaints

BP/AR 1312.3 – Uniform Complaint Procedures

BP/AR 4030 – Nondiscrimination in Employment

BP/AR 4119.11 – Sexual Harassment (Employee)

AR 4119.12 – Title IX Sexual Harassment Complaint Procedures (Employee)

BP/AR 5145.7 – Sexual Harassment (Students)

AR 5145.71 – Title IX Sexual Harassment Complaint Procedures (Student)

Do You Have a UCP Complaint?

Written and
signed
complaint*

and

Alleging
(or implying)
violation of law

Consider Reporting Obligations

Mandatory:

- If reasonable suspicion of child abuse or neglect, then follow mandated reporter obligations

Discretionary:

- If potential criminal activity, call law enforcement
- If the allegations involve a student, determine whether the parents of the student should be notified



Hypo

An 8th grade student, Riley, reported to her teacher that a classmate, Brandon, requested they connect on Snapchat so they could communicate about a group project. At first the messages were just that. However, as the semester went on, Brandon began texting pictures of himself to Riley and requested that she do the same. The texts happened at all hours of the day/night. Riley did not think much of the requests until Brandon sent a picture of himself shirtless and in bed. Riley became uncomfortable and reported the conduct.

Is this Title IX?
What do you do?

Investigation Timelines



- Title IX – “reasonably prompt time frame”
- 60 calendar days – Required by State Law
- UCP – begin investigation within 10 business days; prepare and send written report within 60 calendar days

10 Steps for Effective Investigations

Step 2

Consider Urgent Measures



Urgent Considerations



- Supportive Measures
- Student Discipline
- Mandated Reporter
- Criminal Acts
- Paid Administrative Leave

Supportive Measures

Examples:

- Counseling
- Medical services
- Academic support (e.g., extension of deadlines or other course adjustments)
- No-contact orders
- Increased security
- Changed schedules (e.g., modification of work or class schedule)
- Emergency removals in compliance with Title IX

Document the implemented supportive measures, but don't stop there!

Administrative Leave

Placing an
employee on
Administrative
Leave is not
disciplinary

No Discipline (Students)

The Title IX Regulations contemplate that the entire Title IX grievance procedure be completed prior to discipline being imposed.



Emergency Removals (Students)

Districts are prohibited from disciplining a student for alleged sexual harassment until a full Title IX investigation has been completed.

EXCEPTION: An 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;
- Respondent is provided with notice and an opportunity to challenge the decision immediately after removal.

***Note:** There are no restrictions for placing an employee on paid administrative leave.

Hypo

A 4th grade student, Alexis, alleges she and a 5th grade student, Julian, were watching a TikTok video on his phone in the cafeteria. He moved the phone to show her his erection. The next day, while passing each other in the hallway, Julian looked at Alexis' chest and said "Damn!!" A few days later, while in class together, Julian again pointed out his erection to Alexis and asked her if she wanted to touch it.

Is this Title IX?

What supportive measures would you offer?

Criminal Investigation – Use of SROs

1. A police investigation does *not* relieve a district of its obligations
2. What if law enforcement is involved?
 - 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

Group Activity: Police Investigation

Katie comes into your office and tells you she was sexually assaulted by Mason in the bathroom last week. She explains that she has been avoiding Mason, but that his friends are taunting her; asking her when she is “meeting him in the bathroom again.”

Katie tells you she went to the police, and they are doing an investigation. You contact the police to coordinate, and they tell you they have not yet spoken to Respondent, and they ask that you NOT contact Respondent until they do.

What do you do?
What do you ask for?

What supportive measures
do you offer Katie?

10 Steps for Effective Investigations

Step 3

Initiate an Investigation into the Complaint



Notice of Investigation

Title IX and UCP Notices provide information regarding the allegations, investigation process, and next steps.

- Title IX requires sufficient detail, including names, dates, and specific details to the conduct.
- UCP only requires general information regarding the complaint.
- USE THE TEMPLATES.

Scope of the Investigation

- Clearly define allegations
- Avoid “scope creep”
- This step helps to outline or organize the whole investigation



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 such as “discriminated,” “harassed,” or “retaliated”
- Avoid ambiguous and subjective words such as “threaten” and “bully”
- Make sure all relevant claims are included in the allegations (or, if you excluded something, be prepared to explain why)

Understand the Scope - Frame the Allegations

- Bad example: Did Suzie bully Joe?
- Good example: Did Suzie repeatedly call Joe a derogatory name and publicly tease him because of his height?
- Bad example: Did Suzie act mean and unfairly toward Joe?
- Good example: Did Suzie tell Joe “Go to Hell?”

Hypo

Natasha, a senior, has made a complaint alleging that one of her classmates, Vanessa, groped her chest under her shirt in a hotel room during an overnight school field trip.

Is this Title IX?

What else do you need to ask Natasha to frame the scope of your investigation?

10 Steps for Effective Investigations

Step 4

Gather, Review, and Preserve Evidence



Preponderance of the Evidence



Documentation & Evidence

TYPES OF EVIDENCE

- Emails
- Phone records/Voicemails
- Attendance records
- Travel logs
- Security records
- Computer records/files
- Internet usage and websites visited
- Text or Social Media messages
- Pictures or Screenshots
- Audio/Video
- Credit Card Receipts
- Observing Locations

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.

Warning: 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.

10 Steps for Effective Investigations

Step 5

Draft a List of Witnesses



Developing a Witness List

- Develop a witness list:
 - Start with the complaint and complainant – Who is listed as a witness?
 - Ask each witness who may have relevant information
 - Ask the respondent to provide their list of those with information
- Consider potential conflicts of interest
- Consider location, timing, and order
- If possible, have a second administrator or confidential secretary come to the interview
- Never interview more than one person at the same time!

10 Steps for Effective Investigations

Step 6

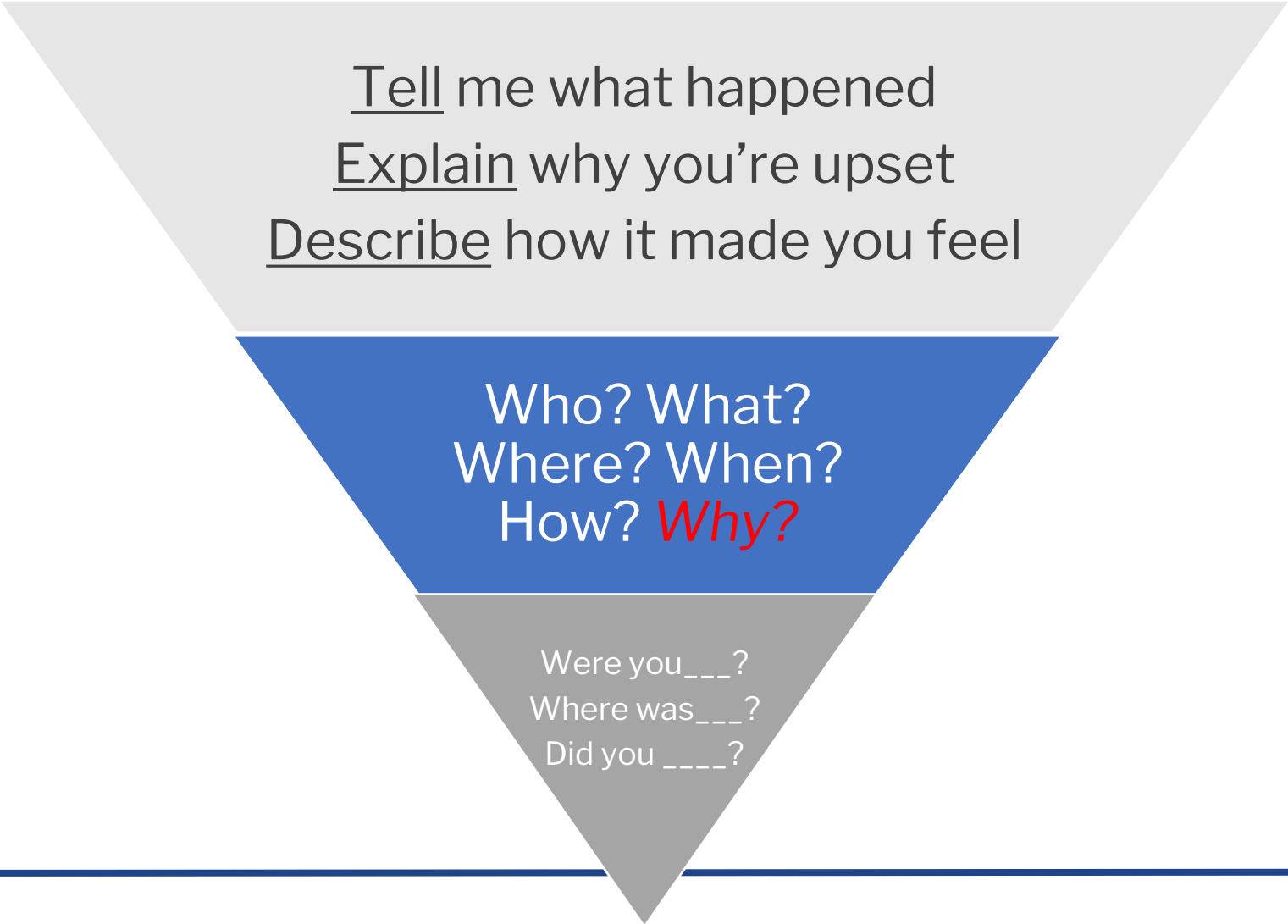
Draft Interview Questions and
Apply a Trauma Informed
Approach



Interviews

- Start with an outline of questions as a roadmap but be flexible!
- Beware of compound questions!
- If there are a series of incidents, consider a linear roadmap
- Keep in mind big picture goals
- Always ask for documentary evidence (social media, texts, emails, etc.)
- At the end, always ask:
 - Is there anything else you think I should know?
 - Is there anyone else you think I should speak with?

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 ____?

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

Hypo

Laura, a mother to 5th grade student, Paige, has filed a Title IX formal complaint on Paige's behalf, alleging that a teacher has touched Paige on the lower back and bottom on numerous occasions. When you go to talk to Paige about the incident, Paige is visibly upset and does not want to talk about the incident.

What can you do to make Paige feel more comfortable?

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?

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

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

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

Avoid leading questions

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

Framing the Questions

Funnel Approach – Start broad and then follow up with specific questions.

- Tell me what happened on May 5, 2021.
 - Who was present?
 - Any documentation of this incident (text messages, emails, videos, pictures)?
 - You said he “attacked” you. Can you explain that further? What does “attack” mean to you?

Avoid Leading Questions

- PROBLEMATIC: On May 5, 2021, you were alone in a room with Mr. Smith, correct?
- PROBLEMATIC: Did you engage in any inappropriate behavior?
- PROBLEMATIC: Do you consider yourself a racist?

Hypo: Good or Bad questions

- 1) “So, you were drunk, right?”
- 2) “Did you see Jeff on April 2”
[If answer is yes] “Tell me about that.”
- 3) “Tell me how that made you feel.”
- 4) “That must have made you feel angry, didn’t it?”
- 5) “What time did you arrive?”
and “How long did you stay there?”
- 6) “What was your thought process at that time?”
- 7) “Then you hit Andy, right?”
- 8) “Why didn’t you just say ‘No’?”

10 Steps for Effective Investigations

Step 7

Conduct Interviews



Common Issues

- The reluctant complainant – “I don’t want to get anyone in trouble”
- The hostile respondent
- The witness refuses to be interviewed
- The witness is a minor
- Parent demands to be present while child is being interviewed
- The difficult representative
- The witness is biased
- The witness lies
- Conflicts of interest

Recording the Interview



- Take detailed notes or have a second administrator or confidential employee involved to take notes
- Avoid audio recordings
- Consider signed witness statement summaries

Written Statements

A wisely-developed witness statement ultimately saves time, preserves stronger evidence, and can help provide leverage with the wrongdoer at an earlier stage in the proceedings

Bad Example

“I was in class last week when Mr. X threatened Sam. I think Sam was calling Mr. X out to throw down right there. When Mr. X pushed his chair back and stood up, it scared everyone.”

Good Example

“Last Monday at the end of 3rd period, Sam walked up to Mr. X’s desk and said loudly, “Why did you give me an F?” Mr. X stood up to talk to Sam, who is very tall. When Mr. X stood up, his chair rolled back into a metal filing cabinet and it made a loud “boom” sound that surprised me a lot.”

Serving Impartially

- Preserving the integrity of the investigation from its inception.
- Avoid prejudgment of the facts.
- Is there any actual or perceived conflict of interest with the parties and the person serving in any of the Title IX roles?
 - If so, how can it be addressed?

Understanding Bias

Implicit Bias

- Unconscious bias towards or against certain groups of people
- Often based on social stereotypes that have led to an association between a group and a trait
- Numerous studies have demonstrated that certain traditionally disadvantaged groups are treated differently, to their detriment
- Many (if not most) of the people treating others differently are unaware of doing so (e.g. microaggressions)

Confirmation Bias

- Confirmation bias, or the selective collection of evidence, is our subconscious tendency to seek and interpret information and other evidence in ways that affirm our existing beliefs, ideas, expectations, and/or hypotheses.
- Therefore, confirmation bias is both affected by and feeds our implicit biases.

Suggestions to Counteracting Bias

- Actively consider an alternative hypothesis or why a favored hypothesis could be wrong.
- The process of writing might challenge the investigator to assess a decision more carefully.
- Have findings peer-reviewed.
- Good investigative skills and practices.



How to Analyze the Evidence

- Review all the evidence
 - Witness statements
 - Documents
- Apply the facts to the law/policy/allegation
- Weigh the evidence
- Make credibility determinations
 - Note these in your findings letters



Credibility Factors

- **Inherent plausibility:** Is the testimony believable on its face? Does it make sense?
- **Demeanor:** Did the person seem to be telling the truth or lying?
- **Motive to falsify:** Did the person have a reason to lie?
- **Corroboration:** Is there witness testimony (such as testimony by eye-witnesses, people who saw the person soon after the alleged incidents, or people who discussed the incidents with him or her around the time that they occurred) or physical evidence (such as written documentation) that corroborates the party's testimony?

Credibility Factors (continued)

- **Past record:** Did the alleged harasser have a history of similar behavior in the past?
- **Opportunity and capacity to observe/actual knowledge:** Did the person see it themselves, or are they recounting what someone else told them?
- **Consistent or inconsistent statements:** Is the person changing their story? Did the person say the same thing to three other witnesses?
- **Reputation for veracity or deceit:** Does this person have a reputation of lying, cheating, etc.?
- **Bias:** Is this person the Complainant's best friend? Does the person have their own complaint against Respondent?

10 Steps for Effective Investigations

Step 8

Prepare the Title IX Investigation Report



Investigation Report

Prepare draft report
with all evidence
directly related to
the allegation



The parties have 10
days to review the
evidence and
respond



Finalize report with
only relevant
evidence

Relevant Evidence

Relevant evidence must be objectively evaluated by investigators and decision-makers

Relevant evidence includes evidence that is “inculpatory” or “exculpatory”

Inculpatory Evidence:
Evidence that shows or tends to show, a person’s involvement in an act

Exculpatory Evidence:
Evidence tending to excuse, justify, or absolve an alleged act or guilt

Limitations on Relevance

A complainant's prior sexual behavior is **irrelevant** unless used:

To prove that someone other than the respondent committed the conduct alleged by the complainant, or

To prove consent, if there is evidence about prior instances of consensual sexual acts between complainant and respondent

Prior Sexual History

Rape shield protection does not pertain to the sexual predisposition or sexual behavior of Respondents, so evidence of a pattern of inappropriate behavior by an alleged harasser must be judged for relevance as any other evidence

Scenarios where respondent might try to prove complainant had motive to fabricate or conceal a sexual interaction do not require admission or consideration of the complainant's sexual behavior

Prior or Subsequent Misconduct

- Regulations do not prohibit the use of prior or subsequent misconduct
 - Evidence of a pattern of inappropriate behavior by an alleged harasser is permitted if relevant
- Decision-maker will need to determine if such conduct is:
 - Relevant
 - May be used in determining responsibility
 - May be used in sanctioning
- Prior or subsequent misconduct may be relevant to demonstrate:
 - Intent/knowledge/state of mind
 - Motive
 - Opportunity
 - Lack of mistake
 - Pattern
 - Identity
 - Information that is inextricably interwoven with the facts

Hypo

The respondent, a teacher, provides the investigator with evidence that the complainant, a student, was failing all her classes and was using a baseless sexual harassment allegation against respondent to obtain supportive measures as an excuse for her poor academic performance.



Relevant

**Directly
Related**

**Not
relevant**

Hypo

Two juniors engaged in sexual activity in the back of an SUV after a high school soccer game. Complainant later reports Respondent forced him to perform oral sex on him. Respondent wants to introduce evidence that Complainant engaged in oral sex with a friend of his, the weekend prior.

Relevant

**Directly
Related**

**Not
relevant**

Hypo

A high school senior threatens to sabotage a sophomore's reputation unless she sends him nude photographs of herself.

The senior says he never threatened to sabotage her reputation and he wants to introduce evidence that the sophomore told him that she suffered from a mental disorder which caused her to be paranoid at times.

Relevant

**Directly
Related**

**Not
relevant**

Hypo

Complainant reports that Respondent raped her. She has corroborating injuries.

Respondent knows Complainant has a boyfriend and has heard that the relationship is volatile. Respondent wants to introduce evidence of social media posts showing Complainant was with her boyfriend at the time/date she alleged she was raped, as well as photos depicting her crying later that same day.

Relevant

**Directly
Related**

**Not
relevant**

Investigation Report (Recommended Content)

Identify the date the investigation commenced

Identify the investigator

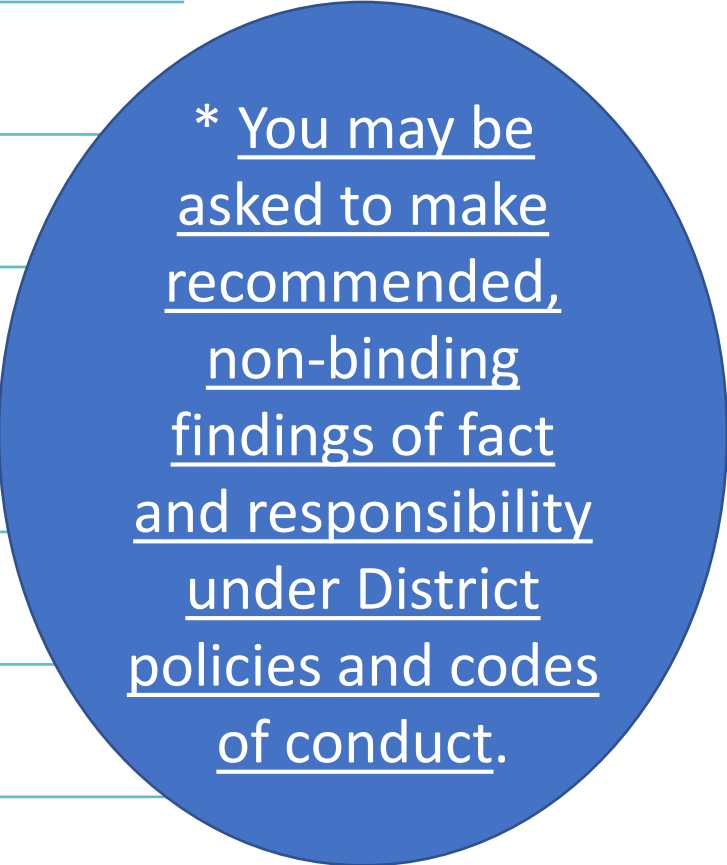
Identify supportive measures offered to and accepted by the parties

Summary of the investigation process

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

Identify number of/identity of witnesses

Summary of evidence – documents and witness statements



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


10 Steps for Effective Title IX Investigations

Step 9

Prepare Factual Findings and Written Decision



Exchange of Written Questions



The decision-maker must allow parties at least 10 days 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, and if a question is not allowed, they explain why questions were deemed irrelevant

Decision-Maker: Explaining Exclusion of Questions

Before complainant, respondent, or witness answers a question, the decision-maker must first determine whether the question is relevant and if a question is excluded the decision-maker must explain their decision to exclude the question as not relevant

This provision does not require the decision-maker to give lengthy or complicated explanation

Hypo

Molly alleges that Jeff raped her at a high school tailgate in November.

Jeff contends the sexual activity was consensual. He knows several classmates with whom Molly has had sex earlier in the semester. He believes this will help prove his sexual activity with Molly at the tailgate was consensual. Jeff submits the following written question for Molly:

“Isn’t it true that you performed oral sex on Sam, Henry and Andy earlier this year?”



Relevant

Not
relevant

Hypo

Molly alleges that Jeff raped her at a high school tailgate in November.

Jeff contends the sexual activity at the tailgate was consensual. He says he and Molly went out on several dates before this event, and she had consensual sex with him on three occasions, including the week before the tailgate. Jeff submits the following written question for Molly:

“Did you have consensual sex with Jeff on three occasions, including the week before the tailgate?”



Relevant

Not
relevant

Hypo

Molly alleges that Jeff raped her at a high school tailgate in November.

Jeff believes the sexual activity at the tailgate was consensual. He submits the following written question for Molly:

“Did you respond to texts from Jeff after the tailgate, agreeing to plans to hangout the following weekend?”



Relevant



Not
relevant

Recap: Limitations on Relevance

- Information protected by any legally recognized privilege cannot be used; no party's treatment records may be used without that party's voluntary, written consent
- When evidence is duplicative of other evidence, it may be deemed not relevant
- A complainant's predisposition is never relevant.
- A complainant's prior sexual behavior is irrelevant unless:
 - To prove that someone other than the respondent committed the conduct alleged by the complainant, or
 - To prove consent, if the questions and evidence concern specific incidents of the complainant's prior sexual behavior with respect to the respondent

Investigation Findings Letters

- Best practice is to document the outcome of the investigation in separate complaint findings letters to the Complainant and the Respondent.
- Use templates provided as a *starting point*.
- Content of the complaint findings letters will depend on which Board Policy you are processing the complaint under.
- Be sure to proofread and format.

Critical Thinking

Writing the Analysis

Topic sentence

Summarize Complainant's version of events (address credibility)

Summarize Respondent's version of events (address credibility)

Summarize independent evidence (witness statements, documents, etc.) and explain how it corroborates or contradicts the parties' version of events.

Factual Finding (i.e., sustained, not sustained, partially sustained.)

Factual Findings v. Legal Conclusions

- Focus on whether or not the alleged conduct occurred.
- Avoid legal conclusions.
- *Examples:*
 - PROBLEMATIC: “Ms. Ross sexually harassed Mr. Smith.”
 - BEST PRACTICE: “Ms. Ross massaged Mr. Smith’s shoulders on two occasions, and the conduct was unwelcomed.”
 - BEST PRACTICE: “On May 17, 2021, Ms. Ross touched Mr. Smith’s thigh.”

Title IX: Appeal Rights for Both Parties at the District

Parties may appeal the written determination on the following bases:

1. Procedural irregularity;
2. New evidence that was not reasonably available earlier;
3. Title IX personnel had a conflict of interest or bias.

*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).

UCP: Appeal Rights for Dissatisfied Complainant

- A party may file an appeal in writing with CDE within 30 days of receiving District's decision.
- Upon notification by the CDE that the decision has been appealed, District must provide CDE:
 - A copy of the original complaint;
 - A copy of the decision;
 - A summary of nature and extent of investigation;
 - A copy of the investigation file;
 - A report on any action taken to resolve the complaint;
 - A copy of the district's UCP;
 - Other relevant information requested by CDE.

10 Steps for Effective Investigations

Step 10

Take Appropriate Corrective Action



Corrective Actions

- Student discipline process
- Ensuring no retaliation
- Additional support for involved parties
- Generalized training for staff/students in class, school, or district-wide
- Generalized notification of policies/rules
- Increased monitoring and check-ins
- Changes to district practice



Loose Ends

- Is a Commission on Teacher Credentialing (CTC) report required?
- Have all mandated reporter duties been satisfied if child abuse or neglect is at issue?
- What can be learned? Any evidence of a systemic issue?
- Would staff benefit from further training?
- Be proactive.

Questions





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