



Title IX Training

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What is Title IX?

- ▶ Title IX of the Education Amendments of 1972 protects people from discrimination based on sex in education programs or activities that receive Federal financial assistance.
- ▶ Title IX states:
- ▶ *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.*
- ▶ The U.S. Department of Education's Office for Civil Rights (OCR) enforces Title IX.

New Regulations

- ▶ New regulations- must be in compliance by **August 14, 2020**
- ▶ **34 CFR Part 106**
- ▶ **Betsy DeVos, Secretary of Education**, said the new regulation will:
 - ▶ Secure due process rights for students who report sexual misconduct and for those accused of it, by requiring colleges to provide live hearings (discretionary for secondary schools) and allowing students' advisors to cross-examine parties and witnesses involved.
 - ▶ Institutions must presume that those accused of sexual misconduct are innocent prior to the investigative and decision-making process.

OVERVIEW

- ▶ Training Required
- ▶ People: Title IX Coordinator, Investigator, Decision Maker, Appeal Decision Maker, and Individual who Facilitates Informal Resolution Process
- ▶ Definitions
- ▶ Policy
- ▶ Formal Complaint of Sexual Harassment
- ▶ District's Response
- ▶ Notices
- ▶ Grievance Process
- ▶ Investigations
- ▶ Investigative Report
- ▶ Hearing
- ▶ Determination of Responsibility
- ▶ Appeal
- ▶ Informal Resolution Process
- ▶ Record Keeping
- ▶ Retaliation Prohibited

TRAINING
REQUIRED



Training Required



- ▶ Title IX Coordinator, investigator, decision-maker or any person designated to facilitate an informal resolution process must have training on:
 - ▶ Definition of sexual harassment
 - ▶ The scope of the education program or activity
 - ▶ How to conduct an investigation and grievance process including hearings, appeals, and informal resolution processes
 - ▶ How to serve impartially- avoiding prejudgment of the facts at issue, conflicts of interest, and bias

Training Required

- ▶ **Decision-makers** must also have training in:
 - ▶ Technology to be used at a live hearing
 - ▶ Issues of relevance of questions and evidence
 - ▶ When questions and evidence about a complainant's sexual predisposition or prior sexual behavior are not relevant
- ▶ **Investigators** must also have training in:
 - ▶ Issues of relevance to create an investigative report
- ▶ Materials must not rely on sex stereotypes and must promote impartial investigations and adjudications of formal complaints of sexual harassment

Title IX Coordinator

- ▶ Designate at least one employee to coordinate efforts to comply with Title IX
- ▶ Must notify applicants for admission and employment, students, parents or legal guardians of elementary and secondary school students, employees, and all unions or professional associations:
 - ▶ Title OR Name
 - ▶ Office Address
 - ▶ Email address
 - ▶ Telephone number
- ▶ Display on website

Title IX Policy

- ▶ The District, in accordance with Title IX, does not discriminate on the basis of sex in education programs and activities (including admission)
- ▶ Inquiries regarding the application of Title IX should be referred to the Title IX Coordinator, Assistant Secretary, or both

Publication

- ▶ Display policy on website and in each handbook or catalog for employees, parents, students, and collective bargaining units
- ▶ Title IX Coordinator's contact information must be included on website
- ▶ Grievance procedures and grievance process for formal complaints must be adopted and published
- ▶ Must notify applicants for admission and employment, students, parents or legal guardians of elementary and secondary school students, employees, and all unions or professional associations of grievance procedures and grievance process, including how to report or file a complaint of sex discrimination and/or sexual harassment; and how the District will respond

DEFINITIONS

Actual Knowledge – Definition

- ▶ Notice of sexual harassment or allegations of sexual harassment to:
- ▶ Title IX Coordinator, or
- ▶ **any official of the District** who has authority to institute corrective measures on behalf of the District, or
- ▶ to **any employee** of an elementary or secondary school

Complainant – Definition

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

Respondent – Definition

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

Formal Complaint – Definition

- ▶ 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 the filing of the complaint, the complainant must be participating in or attempting to participate in an education program or activity of the District

Formal Complaint – Definition

- ▶ May be filed with the Title IX Coordinator in person, by mail, or by electronic mail, or any other method designated by the District
- ▶ Can be a document or electronic submission that contains the physical or electronic signature, or otherwise indicates the complainant is the person filing the complaint
- ▶ Where the Title IX Coordinator files the formal complaint, the Title IX Coordinator is NOT a complainant or party

Sexual Harassment – Definition

- ▶ **Conduct on the basis of sex that satisfies one or more of the following:**
- ▶ (1) An employee of the District conditioning the provision of aid, benefit, or service of the District on an individual's participation in unwelcome sexual conduct (*quid pro quo*);
- ▶ (2) Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the District's education program or activity; or
- ▶ (3) Sexual assault (20 U.S.C. 1092 (f)(6)(A)(v)), dating violence (34 U.S.C. 12291 (a) (10)), domestic violence (34 U.S.C. 12291 (a)(8)), or stalking (34 U.S.C. 12291 (a)(30))

Scope of Education Program or Activity

- ▶ Includes locations, events or circumstances, over which the recipient exercised substantial control over both the respondent and the context in which the sexual harassment occurs

Supportive Measures- Definition

- ▶ Non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, and without fee or charge to the complainant or respondent before or after the filing of a formal complaint or where no formal complaint has been filed
- ▶ Measures that are designed to restore or preserve equal access to the District's education program or activity without unreasonably burdening the other party, including measures designed to protect the safety of all parties or the District's educational environment, or deter sexual harassment.
- ▶ Title IX Coordinator is responsible for coordinating supportive measures

Supportive Measures- Examples

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
- ▶ Other similar measures

Supportive Measures-

Confidentiality

- ▶ The District must maintain as confidential any supportive measures provided to the complainant or respondent, to the extent that maintaining confidentiality would not impair the ability of the District to provide the supportive measure

When does a District have notice?

- ▶ Once a District has actual knowledge of sexual harassment or allegations of sexual harassment the school has to respond and take action
- ▶ A district has actual knowledge when the district (**any employee**) has notice that a person may have been victimized by sexual harassment
- ▶ Any person, whether the alleged victim or a parent, friend, or bystander, has the right to report sexual harassment to put the school on notice.
- ▶ School personnel may personally observe sexual harassment

AWARE OF ALLEGATION OF SEXUAL HARASSMENT

- ▶ When the Title IX Coordinator is aware of an allegation of sexual harassment, the **Title IX Coordinator will promptly and confidentially reach out to the student alleging sexual harassment to discuss available options**, including, but not limited to:
 - ▶ The availability of supportive measures to restore access to the school's education program or activity with or without the filing of a formal complaint;
 - ▶ The right to file a complaint to initiate an investigation into the sexual harassment allegations; and
 - ▶ The process for filing a formal complaint.
- ▶ The Title IX Coordinator will provide the complainant with information concerning the right to supportive measures even if no formal complaint is filed. *The District will consider the alleged victim's wishes with respect to requests for supportive measures.*



District Response to Sexual Harassment

District's Response to Sexual Harassment

- ▶ General Response (with or without a formal complaint)
- ▶ A District with **actual knowledge** in an education program or activity of District against a person in the U.S. must respond **promptly** in a manner that is **not deliberately indifferent**
- ▶ A District is deliberately indifferent only if its response to sexual harassment is **clearly unreasonable in light of known circumstances**
- ▶ “**Education program or activity**” includes locations, events, or circumstances over which the recipient exercised substantial control over both the respondent and the context in which the sexual harassment occurs

District's Response to Sexual Harassment

- ▶ The District must treat complainants and respondents equally by:
 - ▶ offering supportive measures to a complainant
 - ▶ Following the grievance process before imposition of any disciplinary sanctions or other actions that are not supportive measures against a respondent
- ▶ The Title IX Coordinator must contact the complainant to discuss the availability of supportive measures, inform the complainant of the availability of supportive measures with or without the filing of a formal complaint

District's Response to Formal Complaint of Sexual Harassment

- ▶ (1) Must follow the grievance process
- ▶ (2) the District's determination of responsibility will not be evidence of deliberate indifference or evidence of Title IX discrimination solely because the Asst. Secretary would have reached a different determination based on an independent weighing of the evidence

District's Response to Formal Complaint of Sexual Harassment

Emergency Removal

- ▶ A District has the ability to remove a respondent from the education program or activity on an emergency basis,
- ▶ provided that the District undertakes an individualized safety and risk analysis,
- ▶ determines 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, and
- ▶ provides the respondent with notice and an opportunity to challenge the decision immediately following the removal

District's Response to Formal Complaint of Sexual Harassment

Administrative leave

- ▶ A non-student employee respondent may be placed on leave during the pendency of the grievance process



RECEIPT OF FORMAL COMPLAINT

Grievance Process for Formal Complaints of Sexual Harassment



Grievance Process for Formal Complaints of Sexual Harassment

- ▶ **Discrimination on the basis of Sex**
- ▶ Treatment of a complainant or respondent in response to a formal complaint of sexual harassment may constitute discrimination on the basis of sex under Title IX

Grievance Process for Formal Complaints of Sexual Harassment

▶ REQUIREMENTS:

- ▶ Treat complainant and respondent equitably by:
 - ▶ Providing remedies to a complainant where a determination of responsibility for sexual harassment has been made against the respondent; and
 - ▶ Follow the grievance process before the imposition of any disciplinary sanctions or other actions that are not supportive measures against a respondent

Grievance Process for Formal Complaints of Sexual Harassment

▶ REQUIREMENTS:

- ▶ Remedies must be designed to restore or preserve equal access to the educational plan or activity
- ▶ Remedies may include supportive measures
- ▶ Remedies need not be non-disciplinary or non-punitive and need not avoid burdening the respondent

Grievance Process for Formal Complaints of Sexual Harassment

▶ REQUIREMENTS:

- ▶ Objective evaluation of all of the relevant evidence – inculpatory and exculpatory
- ▶ Credibility determinations cannot be based on a person's status as a complainant, respondent, or witness

Grievance Process for Formal Complaints of Sexual Harassment

▶ REQUIREMENTS:

- ▶ Title IX Coordinator, investigator, decision-maker or any person designated to facilitate an informal resolution process cannot have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent

Grievance Process: Training Required

- ▶ Title IX Coordinator, investigator, decision-maker or any person designated to facilitate an informal resolution process must have training on:
 - ▶ Definition of sexual harassment
 - ▶ The scope of the education program or activity
 - ▶ How to conduct an investigation and grievance process including hearings, appeals, and informal resolution processes
 - ▶ How to serve impartially- avoiding prejudgment of the facts at issue, conflicts of interest, and bias

Grievance Process: Training Required

- ▶ **Decision-makers** must also have training in:
 - ▶ Technology to be used at a live hearing
 - ▶ Issues of relevance of questions and evidence
 - ▶ When questions and evidence about a complainant's sexual predisposition or prior sexual behavior are not relevant
- ▶ **Investigators** must also have training in:
 - ▶ Issues of relevance to create an investigative report
- ▶ Materials must not rely on sex stereotypes and must promote impartial investigations and adjudications of formal complaints of sexual harassment

Grievance Process for Formal Complaints of Sexual Harassment

▶ **Must include:**

- ▶ 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
- ▶ “Reasonably prompt” timeframes for conclusion of the grievance process
- ▶ “Reasonably” prompt time frames for filing and resolving appeals and informal resolution processes

Grievance Process for Formal Complaints of Sexual Harassment

- ▶ Must include:
 - ▶ Temporary delay of grievance process and extensions of time frames for good cause and written notice to complainant and respondent
- ▶ **Good Cause**- considerations such as:
 - ▶ Absence of a party, a party's advisor, or a witness;
 - ▶ Concurrent law enforcement activity
 - ▶ The need for language assistance or accommodation of disabilities

Grievance Process for Formal Complaints of Sexual Harassment

- ▶ Must describe or list the range of possible disciplinary sanctions and remedies the District may implement following any determination of responsibility
- ▶ Must state standard of evidence to be used (preponderance of the evidence OR clear and convincing standard)
- ▶ The standard of evidence must be the same for complaints against students and staff

Grievance Process for Formal Complaints of Sexual Harassment

- ▶ Must include appeal procedures and bases for appeal
- ▶ Describe range of supportive measures available to complainants and respondents
- ▶ Not require, allow, rely upon, or otherwise use questions or evidence that constitute or seek disclosure of information protected under a legally recognized privilege, unless the person holding the privilege has waived the privilege

Grievance Process for Formal Complaints of Sexual Harassment

- ▶ Notice of Allegations:
- ▶ Receipt of a formal complaint of sexual harassment
- ▶ To both parties
- ▶ Provide notice of the District's grievance process, including informal resolution process

Grievance Process for Formal Complaints of Sexual Harassment

- ▶ Notice of allegations of sexual harassment including sufficient details known at the time
 - ▶ Identities of the parties involved in the incident
 - ▶ Conduct alleged
 - ▶ Date and location of the alleged incident

Grievance Process for Formal Complaints of Sexual Harassment

- ▶ Notice:
- ▶ Statement that the respondent is responsible and a determination is made at the conclusion of the grievance process
- ▶ Notify the parties they are entitled to advisors (can be an attorney)
- ▶ Notify parties they may inspect and review evidence

Grievance Process for Formal Complaints of Sexual Harassment

- ▶ Notice:
- ▶ Inform parties of code of conduct provision that prohibits knowingly making false statements or knowingly submitting false information during the grievance process
- ▶ Notify parties of any additional allegations (not included originally) that arise in the course of the investigation

Grievance Process for Formal Complaints of Sexual Harassment

- ▶ Dismissal of a Formal Complaint:
 - ▶ If the conduct alleged would not constitute sexual harassment under the definition even if proved;
 - ▶ If the conduct alleged did not occur in the District's education program or activity; or
 - ▶ If the conduct alleged did not occur against a person in the United States.
- ▶ Dismissal does not preclude action under the code of conduct.*
- ▶ District must promptly send written notice of the dismissal and reasons simultaneously to the parties.

Grievance Process for Formal Complaints of Sexual Harassment

▶ Dismissal of a Formal Complaint

- ▶ At any time during the investigation or hearing if:
- ▶ Complainant notifies the Title IX Coordinator in writing that he/she would like to withdraw the formal complaint or any allegations;
- ▶ 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.
- ▶ District must promptly send written notice of the dismissal and reasons simultaneously to the parties.

Grievance Process for Formal Complaints of Sexual Harassment

▶ CONSOLIDATION OF FORMAL COMPLAINTS

- ▶ If allegations of sexual harassment arise out of the same facts or circumstances
- ▶ May consolidate formal complaints of sexual harassment:
 - ▶ against more than one respondent; or
 - ▶ By more than one complainant against one or more respondents

INVESTIGATION

How to Conduct An Investigation

- ▶ Who, What, When, Where, Why?
- ▶ Start with Complainant, Witnesses, and Respondent
- ▶ Document investigation
- ▶ Gather evidence – see next slide
- ▶ Assessing credibility of witnesses and parties
- ▶ Prompt
- ▶ Thorough
- ▶ No conflicts of interest
- ▶ No bias or stereotypes

What is Evidence?

- ▶ Evidence is **any form of proof** presented to the Court to show the existence or nonexistence of a fact. It may include testimony (what a person says under oath during a trial), documents, photographs, recordings, or things
- ▶ https://courts.delaware.gov/help/jp_rulevi_qa.aspx

Grievance Process for Formal Complaints of Sexual Harassment: INVESTIGATION

- ▶ The burden of proof and burden of gathering evidence rests on the District (not on the parties)
- ▶ District cannot access, consider, disclose, or use a party's records that are made or maintained by a physician, psychiatrist, psychologist or other professional which are made and maintained in connection with treatment
- ▶ Unless the District obtains voluntary written consent by the party or the parent

Grievance Process for Formal Complaints of Sexual Harassment: INVESTIGATION

- ▶ The parties have an equal opportunity to present witnesses (fact and expert) and other inculpatory and exculpatory evidence
- ▶ Neither party can be restricted from the ability to discuss the allegations under investigation or to gather and present evidence

Grievance Process for Formal Complaints of Sexual Harassment: INVESTIGATION

- ▶ Both parties must have the same opportunity to have other present during the grievance proceeding
- ▶ Bring advisor of their choice to meetings or proceedings (attorney or not)
- ▶ District may establish restrictions regarding the extent to which the advisor may participate as long as the same for both parties

Grievance Process for Formal Complaints of Sexual Harassment: INVESTIGATION

- ▶ Must provide written notice to a party whose participation or expected:
 - ▶ Date
 - ▶ Time
 - ▶ Location
 - ▶ Participants
 - ▶ Purpose of all hearings, investigative interviews, or other meetings
 - ▶ Sufficient time for the party to participate

- Grievance Process for Formal Complaints of Sexual Harassment:
INVESTIGATION

- ▶ Both parties must have an equal opportunity to inspect and review any evidence obtained during the investigation directly related to the allegations raised in the formal complaint
- ▶ Including evidence upon which the District does not intend to rely in reaching a determination of responsibility
- ▶ Incuplatory or exculpatory evidence from a party or other source
- ▶ Each party can meaningfully respond to the evidence prior to the conclusion of the investigation

- Grievance Process for Formal Complaints of Sexual Harassment: INVESTIGATION

- ▶ Prior to the completion of the investigative report:
- ▶ Send to each party and the party's advisor the evidence subject to inspection and review in an electronic format or hard copy
- ▶ Parties must have at least 10 days to submit a written response for the investigator to consider

INVESTIGATOR

- ▶ Issues of relevance to create an investigative report:
- ▶ Delaware Rule of Evidence 401, Test for Relevant Evidence:
- ▶ **Evidence is relevant if:**
- ▶ (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and
- ▶ (b) the fact is of consequence in determining the action

Relevant Evidence

- ▶ Relevance:
- ▶ This means that it must be helpful in deciding the action before the court. (D.R.E. 401)
- ▶ For example, in a case in which a roofer is suing a homeowner for failing to pay his bill, the bill sent to the homeowner would be relevant, but testimony that the homeowner had been convicted of shoplifting would not be relevant.
- ▶ https://courts.delaware.gov/help/jp_rulevi_qa.aspx

INVESTIGATOR

- ▶ Materials must not rely on sex stereotypes (complainant and respondent)
- ▶ Materials must promote impartial investigations and adjudications of formal complaints of sexual harassment

- Grievance Process for Formal Complaints of Sexual Harassment: INVESTIGATIVE REPORT

- ▶ Create an Investigative Report:

- ▶ Fairly summarize relevant evidence (no particular length requirement)
- ▶ At least 10 days prior to the hearing (or other time of determination regarding responsibility), send to each party and the advisor the investigative report in electronic or hard copy for review and permit a written response

HEARING



How to Conduct a Hearing

- ▶ Opening Statements
- ▶ Witnesses called one at a time
- ▶ Direct Examination
- ▶ Cross Examination (by party's advisor only)
- ▶ Decision maker – Impartiality (discussed more later)
- ▶ Relevance
- ▶ Admission of Evidence/Exhibits
- ▶ Objections and Rulings
- ▶ Closing Arguments
- ▶ Written decision
- ▶ Recording of the Hearing
- ▶ Technology

What Makes Evidence Admissible

- ▶ A basic requirement of admissibility is that the evidence must be relevant. (D.R.E. 402) This means that it must be helpful in deciding the action before the court. (D.R.E. 401)
- ▶ However, even relevant evidence may not be admissible if it is repetitive (said more than once), confusing, or will unfairly influence the judge's decision as compared to what it adds to the case, or for certain other reasons.

HOW TO SERVE IMPARTIALLY

- ▶ Avoiding prejudgment of the facts at issue,
- ▶ Avoiding conflicts of interest (do you know anything beforehand?)
- ▶ Avoiding bias
- ▶ Not prejudiced towards or against any particular side or party; fair; unbiased. (Collins Dictionary)
- ▶ Not supporting any of the sides involved in an argument. (The Cambridge Advanced Learners's Dictionary & Thesaurus)
- ▶ Treating everyone or everything equally, not bias (The Oxford English Dictionary)
- ▶ “Not favouring one more than another” and “impartiality” as the quality or state of being impartial, i.e. freedom from bias or favouritism” (Webster's Third New International Dictionary)

HOW TO SERVE IMPARTIALLY

- ▶ Neutrality, which includes both his or her impartial relationship to parties as well as his or her objective attitude towards the case subject matter (Wolf 219).
- ▶ Judicial activity requires unconditional neutrality-- the parties to the proceedings and the subject matter of the proceedings
- ▶ <https://oxcon.ouplaw.com/view/10.1093/law-mpeccol/law-mpeccol-e338>

Impartiality

- ▶ A judge should be patient, dignified, respectful, and courteous to litigants, jurors, witnesses, lawyers, and others with whom the judge deals in an official capacity. A judge should require similar conduct by those subject to the judge's control, including lawyers to the extent consistent with their role in the adversary process.
- ▶ <https://www.uscourts.gov/judges-judgeships/code-conduct-united-states-judges#d>

No Sex Stereotyping

- ▶ What Is Sex Stereotyping?
- ▶ When an individual has a preconceived idea about how someone should be, act, or behave on the basis of that person's sex.
- ▶ Gender expectations---he or she does not act masculine or feminine enough based on predetermined ideas of what it means to be either masculine or feminine.
- ▶ It is problematic when a person is penalized for not acting in a way that is expected of them on the basis of their gender; when a person does not conform to a preconceived notion or stereotype, and they suffer a negative consequence as a result.
- ▶ Examples: expecting males to be tough, aggressive, or unattached or expecting females to be more sensitive, more emotional, and not aggressive.
- ▶ A male or female can be a complainant, and a male or female can be a respondent

- Grievance Process for Formal Complaints of Sexual Harassment: HEARING

- ▶ Elementary and Secondary Schools- Hearings are OPTIONAL (mandatory live hearings for post-secondary schools)
- ▶ Advisor for each party – if a party does not have an advisor present, the District must provide the party with an advisor (at no charge) to conduct cross-examination on behalf of that party

- Grievance Process for Formal Complaints of Sexual Harassment:
HEARING

Hearing Requirements:

- ▶ Decision-maker presides over the hearing
- ▶ Only relevant questions may be asked of a party or witness
- ▶ Before the party or witness answers, the decision-maker must determine whether the question is relevant and explain any decision to exclude a question as not relevant

- Grievance Process for Formal Complaints of Sexual Harassment: HEARING

Hearing Requirements:

- ▶ Decision-maker (not the Title IX Coordinator or the Investigator)
- ▶ Permit each party's advisor to ask the other party and all witnesses all relevant questions and follow up questions, including challenging credibility
- ▶ Cross-examination – directly, orally, and in real time by advisor (NOT party)
- ▶ If a party or witness does NOT submit to cross-examination at the live hearing, the decision-maker must not rely on any statement of that party or witness in reaching a determination regarding responsibility

- Grievance Process for Formal Complaints of Sexual Harassment: HEARING

Hearing Requirements:

- ▶ If a party or witness does NOT submit to cross-examination at the live hearing, the decision-maker must not rely on any statement of that party or witness in reaching a determination regarding responsibility
- ▶ But – the decision maker cannot draw an inference about the determination regarding responsibility based solely on a party's or witness's absence from the live hearing or refusal to answer cross-examination or other questions

- Grievance Process for Formal Complaints of Sexual Harassment: HEARING

- ▶ Questions and evidence regarding the complainant's sexual predisposition or prior sexual behavior are NOT relevant UNLESS:
 - ▶ Such questions and evidence about the prior sexual behavior are offered to prove that someone other than the respondent committed the conduct alleged by the complainant; or
 - ▶ If the questions and evidence concern specific incidents of the complainant's prior sexual behavior with respect to the respondent are offered to prove consent

- Grievance Process for Formal Complaints of Sexual Harassment: HEARING

Hearing Requirements:

- ▶ With all parties physically present in the same geographic location, or
- ▶ At the District's discretion, any or all parties may appear at the live hearing virtually with technology enabling participants to see and hear each other
- ▶ At the request of either party, live hearing must occur with parties located in separate rooms with technology enabling the decision-maker and the parties to simultaneously see and hear the party or the witness answering the question

- Grievance Process for Formal Complaints of Sexual Harassment: HEARING

Recording:

- ▶ The District must create an audio or audiovisual recording, or transcript, of any live hearing and make it available to the parties for inspection and review

EXCHANGE OF QUESTIONS



- Grievance Process for Formal Complaints of Sexual Harassment

EXCHANGE OF QUESTIONS

With or Without a Hearing:

- ▶ After the District sends the investigative report to the parties, and before reaching a determination of responsibility, the decision maker must afford each party:
 - ▶ the opportunity to submit written, relevant questions that a party wants asked of any party or witness,
 - ▶ provide each party with the answers, and
 - ▶ allow for additional, limited follow up questions from each party



DETERMINATION OF RESPONSIBILITY

- Grievance Process for Formal Complaints of Sexual Harassment
DETERMINATION OF RESPONSIBILITY

- ▶ Decision maker must issue a written determination regarding responsibility
- ▶ Simultaneously to the parties
- ▶ Must apply the standard of evidence

- Grievance Process for Formal Complaints of Sexual Harassment
DETERMINATION OF RESPONSIBILITY

- ▶ Must include all of these items:
 - ▶ (A) Identification of the allegations of sexual harassment;
 - ▶ (B) Description of the procedural steps taken from the receipt of the formal complaint through the determination, including any notifications to the parties, interviews with parties and witnesses, site visits, methods used to gather other evidence, and hearings held;
 - ▶ (C) Findings of fact supporting the determination;
 - ▶ (D) Conclusions regarding the application of the District's code of conduct to the facts;

- Grievance Process for Formal Complaints of Sexual Harassment
DETERMINATION OF RESPONSIBILITY

- ▶ Must include:

- ▶ (E) A statement of, and rationale for, the result as to each allegation, including a determination regarding responsibility, any disciplinary sanctions the District imposes on the respondent, and whether remedies designed to restore or preserve equal access to the District's education program or activity will be provided by the District to the complainant; and
- ▶ (F) The District's procedures and permissible bases for complainant and the respondent to appeal.

- Grievance Process for Formal Complaints of Sexual Harassment
DETERMINATION OF RESPONSIBILITY

- ▶ Determination of responsibility becomes final either on:
 - ▶ If an appeal is filed → the date the District provides the parties with written determination of the result of the appeal; or
 - ▶ If an appeal is not filed → the date on which an appeal would no longer be considered timely

APPEAL



HOW TO CONDUCT THE APPEAL PROCESS

- ▶ Decision maker- impartial
- ▶ Know the bases for appeal
- ▶ Notifications to parties
- ▶ Written statements
- ▶ Timelines
- ▶ Written decision

- Grievance Process for Formal Complaints of Sexual Harassment
APPEAL

- ▶ An appeal from a determination of responsibility and/or dismissal of a formal complaint (or allegations) MUST be available to the parties on the following bases:
- ▶ (A) Procedural irregularity that affected the outcome of the matter;
- ▶ (B) New evidence that was not reasonably available at the time of the determination regarding responsibility or dismissal of complaint; or
- ▶ (C) The Title IX Coordinator, investigator, or decision maker had a conflict of interest or bias for or against complainants or respondents generally or the individual complainant or respondent.

- Grievance Process for Formal Complaints of Sexual Harassment
APPEAL

- ▶ The District MAY offer an appeal equally to both parties on additional bases
- ▶ Requirements for all appeals:
 - ▶ Notify the other party in writing when an appeal is filed and implement appeal procedures equally for both parties;
 - ▶ Ensure the decision maker for the appeal is NOT the same person who reached the determination regarding responsibility or dismissal, investigator, or Title IX Coordinator;

Grievance Process for Formal Complaints of Sexual Harassment

APPEAL

- ▶ Requirements for all appeals:
 - ▶ Give both parties a reasonable, equal opportunity to submit a written statement in support of, or challenging the outcome; and
 - ▶ The decision maker for the appeal shall issue a written decision describing the result of the appeal and the rationale for the result

Grievance Process for Formal Complaints of Sexual Harassment

APPEAL

- ▶ Requirements for all appeals:
 - ▶ Ensure the decision maker for the appeal has no conflict of interest or bias; and
 - ▶ Receives training on the definition of sexual harassment, scope of the district's education program or activity, how to conduct the proceedings, how to serve impartially, avoiding prejudgment of the facts, conflicts of interest and bias



INFORMAL RESOLUTION

How to Conduct the Informal Resolution Process

- ▶ Impartial individual handling the informal resolution process
- ▶ Mediation is an option
- ▶ Notice
- ▶ Consent
- ▶ Resolution of the Complaint
- ▶ Remedial Measures

Grievance Process for Formal Complaints of Sexual Harassment

INFORMAL RESOLUTION

- ▶ The District may not require as a condition of employment or continued employment, enrollment or continued enrollment, or enjoyment of any other right, waiver of the right to an investigation and adjudication of formal complaints of sexual harassment
- ▶ The District may not require the parties to participate in an informal resolution process
- ▶ The District may not offer an informal resolution process unless a formal complaint is filed

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INFORMAL RESOLUTION

- ▶ At any time prior to reaching a determination regarding responsibility the District may facilitate an informal resolution process (e.g. mediation) that does not involve a full investigation and adjudication provided that the District:
 - ▶ Provides the parties a written notice with proper disclosures (see next slide);
 - ▶ Obtain the parties' voluntary written consent to the informal process; and
 - ▶ Does not offer or facilitate an informal resolution process to resolve allegations of sexual harassment of a student by an employee

Grievance Process for Formal Complaints of Sexual Harassment

INFORMAL RESOLUTION

- ▶ Written notice to the parties for an informal resolution process must include:
 - ▶ The allegations;
 - ▶ The requirements of the informal resolution process including circumstances under which it precludes the parties from resuming a formal complaint arising from the same allegations;
 - ▶ At any time prior to agreeing to a resolution, any party has the right to withdraw from the informal resolution process and resume the grievance process; and
 - ▶ Any consequences resulting from participating in the informal resolution process, including the records that will be maintained or could be shared.

RECORDKEEPING

RECORDKEEPING

- ▶ Must maintain records for 7 years:
 - ▶ Each sexual harassment investigation (determination of responsibility, any transcript or recording, disciplinary sanctions imposed on the respondent, and remedies offered to the complainant);
 - ▶ Any appeal and the result;
 - ▶ Any informal resolution and the outcome; and
 - ▶ All materials used to training Title IX Coordinators, investigators, decision makers, and any person who facilitates the informal resolution process (also posted on the website)

RECORDKEEPING

- ▶ Must maintain records for 7 years:
 - ▶ Records of the District's response when it has actual knowledge of sexual harassment in an education program or activity
 - ▶ *The District's response must be prompt and in a manner that is not deliberately indifferent
 - ▶ The District must create and maintain records of any actions including supportive measures taken in response to a formal complaint or report of sexual harassment

RECORDKEEPING

- ▶ The District must:
- ▶ Document the basis for the District's conclusion that its response was not deliberately indifferent
- ▶ Document the District has taken measures designed to restore or preserve equal access to the District's education program or activity
- ▶ If the District does not provide a complainant with supportive measures, the District must document the reasons why such a response was not clearly unreasonable under the circumstances
- ▶ *The District will not be limited in the future from providing additional explanations or detailing additional measures taken.

RETALIATION



RETALIATION

- ▶ Retaliation is prohibited
- ▶ No intimidation, threatening, coercing or discrimination against an individual for the purpose of interfering with any right or privilege secured by Title IX because the individual has:
 - ▶ Made a report or complaint
 - ▶ Testified
 - ▶ Assisted
 - ▶ Participated (or refused to participate)
 - ▶ In any manner in an investigation, proceeding or hearing

RETALIATION

▶ **Confidentiality**

- ▶ The District must keep confidential:
 - ▶ Identity of any individual who makes a complaint of sex discrimination (including sexual harassment);
 - ▶ Any complainant;
 - ▶ Any individual who has been reported to be the perpetrator of sex discrimination;
 - ▶ Any respondent; and
 - ▶ Any witness.
- ▶ *Exception for FERPA or as required by law, and to carry out an investigation, hearing or judicial proceeding*

RETALIATION

▶ **Specific Circumstances**

- ▶ Exercising rights under the First Amendment does not constitute retaliation
- ▶ Charging an individual for a code of conduct violation for making a materially false statement in bad faith in the course of a grievance proceeding is not retaliation
 - ▶ *The determination of responsibility alone is not sufficient to conclude that any party made a materially false statement in bad faith

Questions

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