

Title IX: A Deeper Dive for Title IX Coordinators



NORTH ORANGE COUNTY
COMMUNITY COLLEGE DISTRICT

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Agenda

- Before you dive in...
- Informal Resolution
- Investigations
- Hearings
- Appeals

Before you dive in...

- What policy are you using?
 - AP 3410 or 3434?

Be Prepared: Training

- Role
- Relevancy
- Provide training to all employees on the identification and reporting of sexual harassment (SB 493)
- Each employee engaged in the grievance procedures shall be trained on (SB 493):
 - trauma-informed investigatory and hearing practices that help ensure an impartial and equitable process;
 - best practices for assessment of a sexual harassment or sexual violence complaint;
 - best practices for questioning of the complainant, respondent, and witnesses; and
 - implicit bias and racial inequities, both broadly and in school disciplinary processes.
- Training materials must include statistics on the prevalence of sexual harassment and sexual violence in the educational setting, and the differing rates at which students experience sexual harassment and sexual assault in the educational setting based on their race, sexual orientation, disability, gender, and gender identity.

INFORMAL RESOLUTION

Informal Resolution

- Only possible after a formal Title IX Complaint is filed
- Must be mutual and voluntary. Requires written consent by the parties.
- Available any time prior to reaching a determination regarding responsibility (some exceptions)
- “Informal process” left undefined in the 2020 Title IX amendments to allow schools discretion to adopt what process serves the need of its community.
- May include: mediations, restorative justice

INVESTIGATIONS

Best Practices

- Who should investigate?
 - Availability
 - Training
 - Conflicts (Perceived Conflicts)

Starting an Investigation

- Review **Complaint** and **Notice of Allegations**
 1. Who are the **parties**?
 2. Who are potential **witnesses**?
 3. Identify other potential **evidence**?
 4. What general **claims** are asserted or described?
 5. What **policies** are potentially violated?
 6. What **allegations** should you ask questions about?
 7. What's the **chronology**?
- Create an **Investigation Plan**

Create an Investigation File & Timeline

- Paper file, binder with tabs, or electronic file
 - Section for Formal Complaint, Notice of Allegations, Policies/Regulations, Definitions, Supportive Measures provided to Complainant and Respondent
 - Section for Investigation Plan
 - Section for communication with Complainant/Advisor, Respondent/Advisor, Witnesses, Title IX Coordinator
 - Phone/email log
 - Notice of Interview for parties/advisors
 - Notice to extend timelines
 - Section for each party and witness with interview notes and list of evidence gathered from that party or witness
- Create a timeline for investigation, calendar important dates, and foresee holidays, office closures, and busy times

Prepare Interview Environment

- General Location or Platform (on campus, district office, Zoom?)
- Waiting Area
- Interview Room
 - Private
 - No distractions
 - Choices
 - Easy access to exit
 - Enough room for more than one advisor
 - Clear visual of interviewee
 - Water, tissues, paper, and pencil
- Exiting considerations

Prepare Notice of Interview

- Provide written notice of the investigative interview to each **party** with sufficient time for the party to prepare to participate.
 - Query: Will Title IX Coordinator or Investigator prepare and/or send notice?
- The Notice shall include:
 - Date
 - Time
 - Location
 - Participants
 - Purpose
 - A party may bring advisor of choice
- Consider reiterating what evidence to bring, if any

Prepare Interview Introduction & Advisements

- Sample Introductory **Comments by Investigator**
 - Introduce yourself and your role:
 - Review the complaint and relevant policies
 - Interview witnesses
 - Gather and review relevant and directly related evidence on all sides
 - Ask follow-up questions, as needed
 - Weigh the evidence and determine what is undisputed or in dispute
 - Maintain confidentiality **outside** of the complaint process
 - ***For Complainant and Respondent:*** Provide the parties and advisors with a Draft Report of Evidence and then a Final Investigative Report which fairly summarizes the relevant evidence, both for review and comment

Prepare Interview Introduction & Advisements

- Sample **Introductory Instructions** for Parties and Witnesses
 - Listen carefully to questions, answer truthfully, and be forthcoming with relevant information
 - We want evidence in its best, most original form, so do not tamper with any evidence (give examples of tampering)
 - Retaliation is against the law and policy. Please report retaliation to Title IX Coordinator or Supt and do not retaliate against anyone involved in this process
 - ***For witnesses only:*** Maintain confidentiality about the identities of the parties or witnesses and the information revealed during the interview
 - ***For advisors only:*** Discuss protocols established by educational institution, such as not answering for a party, not interrupting questions or answers, asking for a break after an answer and before next question, confidentiality, etc.

Prepare Scope of Questions

- For Complainant, prepare for the interview by outlining subjects to cover and/or questions to ask
- After interview with Complainant, prepare an outline or list of questions for each Witness based on their likely scope of knowledge
- After interviews with Complainant and Witnesses, prepare an outline of subjects to cover, general questions, **and** specific questions for the Respondent
- Provide Respondent with a full and fair opportunity to respond to all of the allegations
- Prepare specific follow-up questions as needed

Issue Specific Questions

- *Consent*
 - *See AP 3434, Section 4.3 Consent.*
- *Sexual Harassment Under Title IX, including Sexual Assault*
 - *See AP 3434, Section 4.8- 4.8.3.9.*

Definition of Relevance

- Having significant and demonstrable bearing on the matter at hand
- Affording evidence tending to prove or disprove the matter at issue or under discussion
- Synonyms: applicable, material, pertinent
(Merriam-Webster)
- Legalistic definition of relevance:
 - That quality of evidence which renders it properly applicable in determining the truth and falsity of the matters at issue between the parties.

(Black's Law Dictionary, Sixth Edition)

INTERVIEWING TIPS

Trauma-Informed Interviewing Tips

- Complainant, Respondent, and/or Witnesses may experience some type of discomfort or trauma related to the allegations or involvement in a Title IX complaint and investigation
- Consider the tone of your communications and questions
 - Are you showing respect to all people involved in the investigation?
 - Are you empathetic about the difficulty of this process?
 - Are you compassionate about what it's like to be in this situation?
 - Are you exhibiting patience?
- Investigator's ***goal is to objectively and thoroughly gather relevant evidence with a respectful and compassionate demeanor***

Initial Questions

- After the introduction and advisements, consider asking routine **questions to “warm-up”** and provide an opportunity to observe any baseline communication patterns. Sample questions:
 - What are you studying? What class are you missing right now? What are your plans after graduation?
 - What is your job title? How long have you worked in that position? Who is your supervisor? What are your general job responsibilities?

Narrative Questions

Explain you have reviewed the Complaint and the NOA

- Tell me what happened on August 21, 2022, with Respondent
 - Allow for a narrative and, generally, do not interrupt
 - Take copious notes and identify areas for follow-up questions
- Acknowledge their story (e.g., “Thank you for explaining this to me.”)
- Explain you will now go back and ask follow-up questions for additional information and/or a better understanding
- Ask all relevant follow-up questions

Open-ended Questions

- Ask **Who, What, Where, When, Why,** and **How** questions **for every allegation**, as well as any follow-up questions to understand the alleged incidents
- If there are multiple allegations, consider asking the Complainant to start from the first incident or start with the most recent incident and work in chronological order. *Caveat:* Some witnesses do not recall or think in a chronological fashion; follow witness's lead
- For each allegation, start broad but circle back for additional details

Listen Closely & Follow-up

- When you listen closely, you may notice gaps in the Party's or Witness's statements. Ask follow-up questions to fill in those gaps. Some examples:
 - “**Before I knew it**, Respondent was fondling my breast.”
 - “**Eventually**, Respondent told me what I was supposed to do.”
 - “**After a while**, I knew what Complainant wanted.”
 - “**One thing led to another**, and Respondent touched my private area.”
- Ask questions to elicit additional information

Listen Closely & Follow-up

- When you hear conclusory language, ask more questions:
 - ***“It happens all the time.”***
 - Ask, “How often?”
 - “Over what time period?”
 - ***“Sam never made that statement.”***
 - Ask, “How much time do you work together during the day and over the week?”
 - “How long have you been in the same classes?”
 - “Is it possible Sam said something like that?”
 - ***“Sam can’t stand me.”***
 - Reply, “Tell me more about that.”
 - “How did you come to know that?”
 - “Can you give me some examples?”

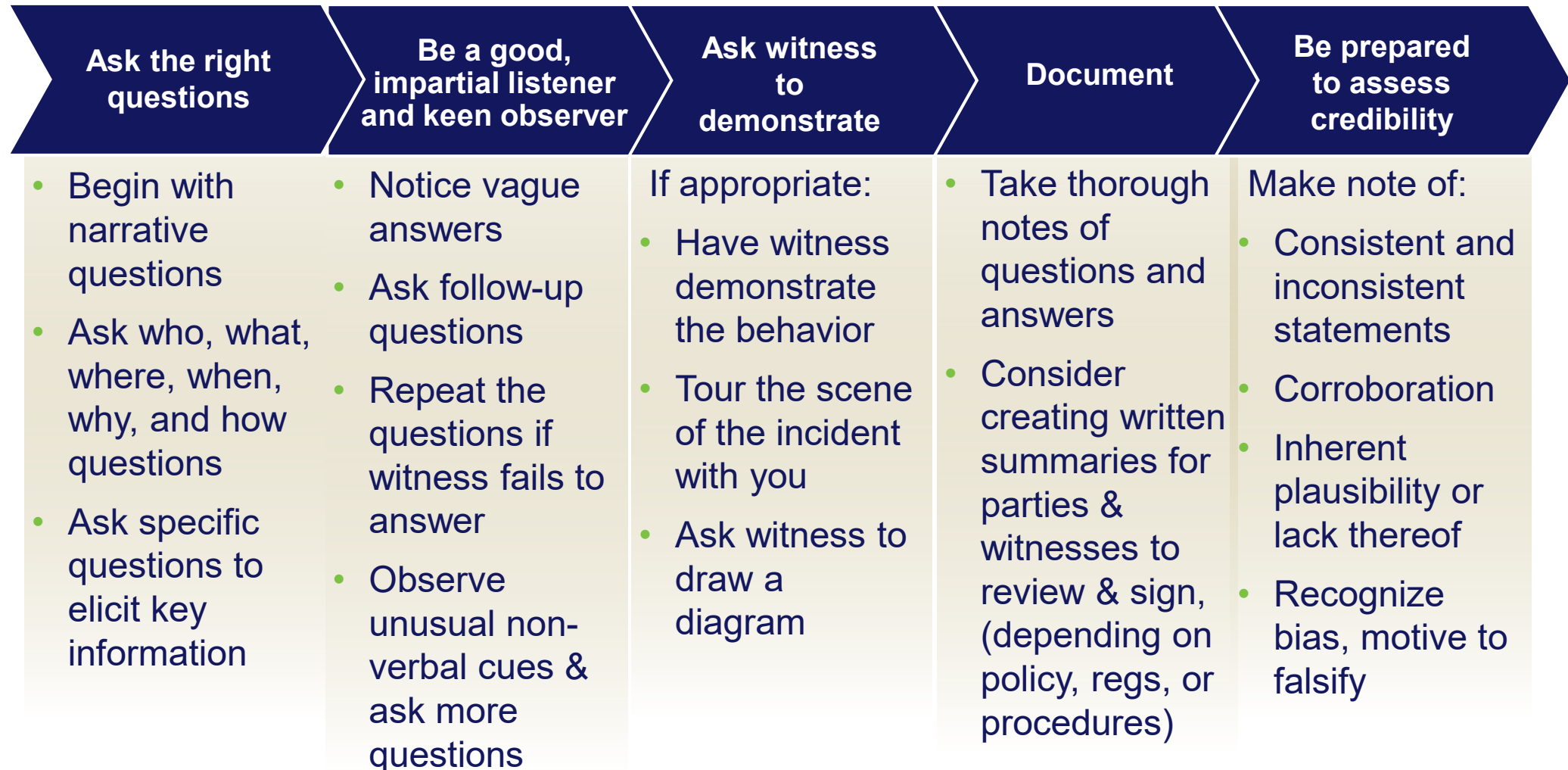
Do Not Avoid Difficult Questions

- Ask questions related to body parts and types of touching
- Learn to note and address the following:
 - Repetitive use of “I don’t remember” or “I don’t recall”
 - Evasive, rambling responses
 - Refusals to answer
 - Answers that are self-contradictory or obviously false
- Ask questions about authenticity of electronic evidence
 - Are texts, videos, photos, or screenshots altered?
 - Ask for properties information for photos, date taken, etc.

Types of Questions to Avoid

- Avoid **leading** questions
 - “You felt helpless, didn’t you?”
 - “You wanted to be there, didn’t you?”
 - “They are treating you this way because of your gender and skin color, right?”
- Avoid **compound** questions
 - “What time did you arrive, and how long were you there?”
- Avoid **vague** questions
 - “Why is that?”

Summary: How to Get the Most Out of an Interview



Problem Solving Common Issues

- Unavailable Witness
 - Document attempts to contact; use various methods (e.g., phone message, email, text, etc.)
- Reluctant Witness or Witness Refusal to Participate
 - Acknowledge, answer questions, explain role in process, explain not likely only witness
- Difficult Advisors
 - Remind of protocols
 - Answer or refer questions
 - Give warning
 - Stop interview and notify Title IX Coordinator
- Recover from any change in direction of interview

Close the Interview

- Ask closing questions:
 - “Is there anything else you think I **should know**?”
 - “Is there anything else I should have **asked** you?”
- Explain your **follow-up** process:
 - “I may need to ask you follow-up questions at some point during the investigation. How would you like me to contact you?”
 - “Are there any times of the day that are off-limits to call or text you?”
 - “Do you want your advisor present for any further communications?”
- Consider acknowledging the difficulties of this important process, especially if you observed stress during the interview
- **Thank** each and every person for their participation

Prepare Interview Notes and/or Summaries

- **Review interview notes** as soon as possible
 - Schedule time after each interview to review notes
 - Fill-in abbreviated words & sentences, correct spelling & grammar, clarify vague pronouns, add correct names, note your relevant observations
 - Do not add or embellish information that was not discussed
 - Make a list of any questions missed or areas needing clarification; seek follow-up information

**WEIGH THE EVIDENCE &
DETERMINE DISPUTED AND
UNDISPUTED ISSUES**

Review All of the Evidence Gathered

- Review the formal complaint, NOA, and policies again to refresh your memory of allegations and the policy definitions for the type of sexual harassment allegations
- Review all documents, photos, texts, videos, or other evidence gathered
 - Determine and set aside any evidence provided to you which is irrelevant and will not be considered

Identify Undisputed and Disputed Issues

- **Common Undisputed Issues**
 - Nature of relationship, age, how met, prior communications
 - Date, general time, location, who was present
 - Sexual or intimate relationship
- **Common Disputed Issues**
 - Sexual activity
 - Consent
 - Force, duress, or threats
 - Incapacitation
 - Intent
 - Words
 - Tone

Credibility Factors to Weigh Disputed Evidence

- Actual Knowledge/Opportunity to Observe or not Observe
- Inherently Plausible or Implausible
- Direct or Indirect Corroboration
- Consistent or Inconsistent Statements
- Material Omission or Material Admissions

BUILD A DRAFT REPORT OF EVIDENCE AND ATTACHMENTS

Draft Report of Evidence and Attachments

- Before completing the investigation, provide a ***Draft Report of Evidence and Attachments*** to both parties & advisors via electronic format or a hard copy.
 - Parties shall have an equal opportunity to inspect and review any evidence obtained during the investigation that is directly related to the allegations, including evidence which the investigator does *not* intend to rely upon, as well as inculpatory and exculpatory evidence regardless of where it was obtained, so the parties can meaningfully respond to the evidence *before* the conclusion of the investigation.
 - Prior to completion of the final investigative report, the parties must have at least 10 days to review the evidence and submit written responses for the investigator's consideration.
- During this review process, the investigator must share any new evidence with the parties and continue the investigation related to new information, if needed.
See 34 CFR §106.45(b)(5)(i-vii)

Contents of Draft Report of Evidence and Attachments

- Cover Page
- Body of Report with Headings
 - **Brief Introduction**
 - Date of formal complaint
 - Date investigator assigned
 - Name of Complainant and Respondent, with brief summary of allegation(s) against Respondent
 - Summary of scope of the investigation consistent with Notice of Allegations
 - *Type of writing:* Clear, concise, easy to read and understand; this section of the report sets the stage and provides first impression

Contents of Draft Report of Evidence and Attachments

- Body of Report with Headings, continued
 - **Investigative Background**
 - List witnesses interviewed
 - Note unavailable witnesses & efforts to reach, refusals to participate, or decisions not to interview
 - Note advisor names, if any
 - Note any advisements, protocols, releases, and/or agreements, if any
 - List documents reviewed, released, unavailable, withheld, or not sought
 - List evidence not considered, not released, unavailable, withheld, or not sought
 - Examples may include audio/visual information, previously deleted evidence, or privileged information (e.g., mental health files, etc.)

Contents of Draft Report of Evidence & Attachments

- Body of Report with Headings, continued
 - **Investigative Background**
 - Relevant Policies and Procedures/Regulations guiding the investigation
 - Summarize and/or quote relevant parts
 - Evidentiary Standard for the Complaint Process
 - Preponderance of the Evidence or Clear and Convincing Evidence
 - Independence of the Investigator
 - Timing or Duration Issues
 - Other, if needed
 - *Type of Writing*: Demonstrates impartiality, fairness, and thoroughness of your investigation methods & your consideration of issues raised; preemptively addresses various reader questions (parties, decision-maker, appeal officer, etc.)

Contents of Draft Report of Evidence & Attachments

- Body of Report with Headings, continued
 - **Evidence Regarding Allegations**
 - Complainant's Allegations & Perspective
 - Include interview summary and summary of documents provided by Complainant, if any
 - Respondent's Response & Perspective
 - Include interview summary and summary of documents provided by Respondent, if any
 - Witness Perspectives
 - Include interview summary and summary of documents provided, if any, by each witness

Contents of Draft Report of Evidence & Attachments

- Body of Report with Headings, continued
 - **Evidence Regarding Allegations**
 - Documents or Other Evidence Gathered
 - Screenshots, photographs, text messages, videos, audio recordings, etc.
 - School calendars, bell schedules, and/or campus maps
 - Student or employee handbooks
 - Closing Statement
 - “This concludes the confidential Draft Report of Evidence”
 - *Type of Writing*: Write in a simple, clear, and “readable” style **without** altering the content or the meaning of the parties’ or witnesses’ testimony; use legal thinking to help identify and summarize the relevant, directly related, and material information for the parties, Decision-Maker, and other readers

**SHARE DRAFT REPORT OF
EVIDENCE WITH PARTIES AND
ADVISORS**

Consider Redaction, Initials, or Pseudonyms

- Another tool to help protect confidentiality is to provide the Draft Report of Evidence and Attachments with:
 - Use redacted names
 - Use initials instead of full names
 - Use pseudonyms (i.e., Complainant, Respondent, Witness 1, Witness 2, etc.)
- Provide a “key” to the Parties and Advisors via a different delivery method to reduce risk of public disclosure

Consider Logistics of Electronically Sharing Evidence

- Sharing the Draft Report of Evidence and Attachments Electronically
 - The goal is to allow the review of evidence with tools to maximize the confidentiality of the information and minimize the ability to share the confidential information or documents with people other than advisors
 - Consult IT staff about electronic options available within your organization
 - Electronic options may include, but are not limited to:
 - Dropbox
 - Google Drive
 - Adobe
 - One Hub
 - Box
 - Lock Lizard
 - One Drive

Consider Logistics of Physically Sharing Evidence

- Sharing a Physical Copy of the Draft Report of Evidence and Attachments
 - The goal is to provide a physical review of evidence while maximizing confidentiality and minimizing the ability to share confidential information or documents with people other than advisors
 - Provide physical documents for review on-site during arranged times
 - Locations may include conference room, empty classroom, after hours in library, or other office space
- Allow multiple opportunities and lengths of time for review
- Retrieve the physical documents after each review, and provide the same physical documents for additional reviews

Impact of Sharing Draft Report of Evidence

- During review of the evidence, the Parties or Advisors may:
 - Notice missing information
 - Review evidence that elicits an additional response, triggers a memory, helps identify other relevant documents or additional witnesses, and/or identifies additional questions for witnesses
 - Identify and understand the evidence that will **not** be relied upon during the complaint process
 - Seek informal resolution process before the determination
 - Identify potential investigator bias, conflict of interest, or lack of impartiality
- Investigator should report any issues to the Title IX Coordinator, as appropriate

PREPARE & SHARE FINAL INVESTIGATIVE REPORT

Final Investigative Report - Overview

- Prepare a *Final Investigative Report* that **fairly summarizes the relevant evidence**
 - Relevant evidence includes the *who, what, where, when, why, and how* information for each *material* allegation within the scope of the investigation
 - Relevant evidence *may* also include pointing out the weight of the evidence related to consistency/inconsistency, corroboration/lack of corroboration, plausibility/improbability, opportunity/lack of opportunity to observe, and material omissions or admissions
- The Final Investigative Report helps the Decision-Maker understand the relevant evidence in order to help the Parties engage in written cross-examination and to ultimately make factual findings & a decision

Contents of Final Investigative Report

- Similar Organization of Draft Report and duplication
- Amend Title of Cover Page
- Mostly the Same Headings as the Draft Report
 - **Introduction**
 - **Investigative Background**
 - Update the Investigative Background to include the Party's feedback and any new evidence
 - **Evidence Regarding Allegations**
 - Update the Evidence Section with any new evidence obtained by the Parties or Witnesses
 - **Fairly Summarize the Relevant Evidence for the Parties and Decision-Maker**
 - **Identify Undisputed and Disputed Material Facts**
 - Mention Investigator's observations about the weight of the evidence

Share Final Investigative Report with Parties

- Provide the ***Final Investigative Report*** to each Party and the Party's Advisor(s) in an electronic format or hard copy for review and written response at least 10 days prior to the time of determination of responsibility by the Decision-Maker
- Investigator reviews written responses, attaches the written responses to the report, and delivers the Final Investigative Report to the Title IX Coordinator, Decision-Maker, and the Parties
- Unless the Decision-Maker has procedural questions or requests for additional information from the Investigator, the investigation phase of the Title IX complaint process is complete
- The Investigator could be called as a witness in a decision-making process, a hearing, an appeal, or for a student or employee discipline hearings

Conclusion: Seek Assistance When Needed

- The Title IX regulations and the Office for Civil Rights' commentary and Q&A Documents include extensive, complex, and legalistic principles
- When in doubt, consider seeking:
 - Additional training opportunities
 - Advice from legal counsel
 - Opportunities to shadow an experienced investigator
 - Legal counsel review of your Draft Report of Evidence or your Final Investigative Report
 - Outside, trained professionals to investigate for your educational entity

DECISION MAKING

Definitions for Training

- Complainant/Respondent
- Parties
- Witness
- Advisor
- Grievance Process
- Final Investigative Report
- Hearing
- Written Decision and Determination of Responsibility

Title IX Team: Decision-Maker

Decision-Maker Role:



- Reviews Final Investigative Report with “fresh eyes” to see if information is missing or incomplete
- Facilitates relevant written questions & “cross-examination” from parties for parties and witnesses; must be trained on issues of relevance
- Reviews all evidence, identifies the disputed issues, and weighs the evidence

Title IX Team: Decision-Maker

Decision-Maker Role:



- Makes conclusions about whether alleged conduct occurred and determines responsibility
- Prepares written determination with findings of fact, policy conclusions, and rationale for the result as to each allegation
- If applicable, recommends sanctions for Respondent and remedies for Complainant
- Provides written determination and appeal rights to the parties/advisors simultaneously

Preparing for the Hearing

Review Final Investigative Report

- **Review your Title IX Board Policies and/or Administrative Regulations**

- Look at the policies and regulations cited in the Final Investigative Report and the Notice of Allegations
- Review your role as Decision-Maker, and determine the scope of your decision
 - Are you deciding if there is a preponderance of evidence to find quid pro quo sexual harassment, hostile environment sexual harassment, sexual assault, fondling, stalking, and/or dating violence, etc. under the Title IX administrative regulations? (Federal Law)
 - Are you deciding if there is a preponderance of evidence to find quid pro quo sexual harassment, hostile environment sexual harassment, sexual assault, and/or sexual battery, etc. under the Board Policies prohibiting sexual harassment? (State Law)

Review Final Investigative Report

- **Read Final Investigative Report and Review Attachments**
 - Take notes, and create a list of questions (if any)
- **Calendar timelines to accommodate these phases:**
 - Process to ask questions of Parties and exchange written “cross examination” questions between Parties or from the Parties to witnesses
 - Decision-Maker analyzes the evidence, writes the decision, and Title IX Coordinator, administrator or legal advisor reviews for thoroughness and readability
 - Deliver written decision to the Complainant, Respondent, Advisors (if any), and Title IX Coordinator with notice of appeal rights
- **Plan and Schedule the Process with the Parties**
 - If needed, seek help from Title IX Coordinator to schedule and plan logistics

Preponderance of the Evidence Standard

Evidentiary Standard

- The evidence is reviewed, compared and analyzed under a “preponderance of the evidence” standard to determine whether the allegations were with or without merit.
 - “Preponderance of the evidence” means that evidence on one side outweighs, or is more than, the evidence on the other side.
 - More likely than not; over 50%; more than 50%
 - There is a greater than 50% chance that the allegations are accurate
 - This is a qualitative, not quantitative, standard
 - Qualitative evidence includes interviews with Complainant, Respondent, or witnesses; data or information that is expressed in terms of the meaning of acts or events

Live Hearing

Pre-Hearing and Hearing Procedures (Title IX)

The Post-Secondary Institution must provide a “live hearing” with cross-examination of the parties and witnesses by the parties’ advisors in compliance with **§106.45(b)(6)**. In general, the Institution must create Pre-Hearing, Live Hearing, and Post-Hearing Procedures that provide adequate notice, equitable participation, and a fair process. Procedures must address:

- 1. Dates, location, recording, and other logistics by Hearing Coordinator**
- 2. Appointing Decision-Maker (Hearing officer or panel) & Conflict process**
- 3. Notice of Hearing with rights, responsibilities, timeline, & process**
- 4. In-Person or Virtual Hearing Options**
 - At the request of either party, the entire live hearing may be conducted with parties located in separate rooms with technology enabling the decision maker(s) and parties to simultaneously see and hear the party or witness answering questions.

Advisor of Choice

- What is the Role of the Advisor?
 - Defining the role. AP 3434: Investigation and Hearing
 - Setting expectations for the Parties
 - Establishing Rules and Norms
 - Training?

Live Hearing with Cross-Examination (Title IX)

Cross-Examination and Other Questions

- Each party’s advisor may ask the other party and any witnesses all relevant, follow-up, and questions challenging credibility
- Cross-Examination must be conducted directly, orally, and in real time by the party’s advisor and “never” by a party personally. If a party does not have an advisor of choice, institution must provide advisor to conduct cross-examination
- Before a party or witness answers the cross-examination or other question, the decision-maker(s) must first determine whether the question is relevant.
 - *Rape Shield Protections:* Evidence about Complainant's sexual predisposition or prior sexual behavior are **not relevant** unless offered to prove someone else committed the alleged conduct or if prior sexual behavior with respondent offered to prove consent
- Decision-Maker must explain any decision to exclude a question as not relevant

Live Hearing with Cross-Examination (Title IX)

Cross-Examination and Other Questions, continued:

- Title IX Regulations state that if a party or witness does not submit to cross-examination at the live hearing, the Decision-maker(s) must not rely on any statement of that party or witness in reaching a determination regarding responsibility, however, OCR has stated that it will not enforce this, based on court ruling in *Victim Rights Law Center v. Cardona (2021)*.
- The Decision-maker(s) cannot draw an inference about the responsibility based **solely** on a party's or witness's absence from the live hearing or refusal to answer cross-examination or other questions.
- Decision-maker(s) must be trained to rule on relevance of questions and repetitive questions
- Institution must create an audio or audiovisual recording or transcript and make it available to parties for inspection and review

Guidelines for Questions

- Questions should not be repetitive
 - Ask the party to ask another question intended to elicit different information
- Questions should be clear
 - Ask the party to clarify the question
- Avoid compound questions
 - Ask the party to separate the questions
- Avoid questions with difficult words
 - Ask the party to rephrase the question
- Avoid argumentative questions
 - Ask the party to rephrase the question

Planning for the Hearing

- Planning for disabilities/accommodations
- What can be done before hearing?
 - Submittal of questions? Witness Lists?
- Format of Hearing
 - Opening Remarks
 - Questions posed by the Decision Maker(s) & cross-examination by advisors
 - Will participants be allowed to review notes?
 - Hearing recording. How?
 - How will exhibits/evidence be shared and referenced?
 - Witnesses only attend for their own testimony
 - Closing Remarks
- Rules of Decorum

THE WRITTEN DECISION

Determination of Responsibility

Decision-Maker Determines Responsibility per §106.45(b)(7)

- Decision-maker must issue a written determination regarding responsibility
- Decision-maker must understand the “preponderance of the evidence” or “clear and convincing evidence” standard
- *Reminder:* The Title IX Coordinator or investigator cannot determine responsibility

Determination of Responsibility

Written Determination must include:

- Identification of the allegations potentially constituting sexual harassment as defined under Title IX
- A 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, (if any)
- Findings of fact supporting the determination
- Conclusions regarding the application of the District's code of conduct (or policy) to the facts

Determination of Responsibility

Written Determination must include, continued:

- A statement of, and rationale for, the result as to each allegation, including a determination regarding responsibility, any disciplinary sanctions the recipient imposes on the Respondent, and whether remedies designed to restore or preserve equal access to the recipient's education program or activity will be provided by the recipient to the Complainant
- The recipient's procedures and permissible bases for the Complainant and Respondent to appeal

Determination of Responsibility

Written Determination must include, continued:

- The written determination must be provided to the parties simultaneously
- The determination regarding responsibility becomes final either on the date the recipient provides the parties with the written determination of the result of an appeal, if an appeal is filed, or if an appeal is not filed, the date on which an appeal would no longer be considered timely.

Table of Contents for Written Determination

- Brief Introduction
- Investigative and Decision-Making Background
- Factual Findings
 - **Nature of Parties’ Relationship Prior to August 21, 2022**
 - Factual Finding: I find by a preponderance of the evidence that, between August 5-19, 2022, Complainant and Respondent interacted with each other in a [friendly/flirty] way when [describe actions]. These actions were [welcome/unwelcome] to Complainant.
 - Rationale for factual findings: I made these findings because I found [Complainant/Respondent] version of events to be more credible based on [explain your objective reasons why you believed one person over the other]

Table of Contents for Written Determination

- Factual Findings, Continued

- **Tutoring Session on August 21, 2020**

- Factual Findings. I find by a preponderance of the evidence that, on August 21, 2020, in the library after school, Respondent [did/did not] touch Complainant's private genital area with Respondent's left hand. Respondent touched Complainant's private genital area [accidentally/purposefully] and [with/without] Complainant's permission. While touching Complainant, Respondent [made/did not make] comments something like, "We should smash," which the Complainant [reasonably/unreasonably] interpreted as sexual comments. Respondent touched Complainant's private area based on [non-sexual reasons/sexual gratification]
 - Rationale for factual findings: I made these findings because....

Table of Contents for Written Determination

- Conclusions about Sexual Fondling
 - Conclusion: I find by a preponderance of the evidence that Respondent's actions [do/do not] rise to the level of sexual fondling as defined by [code of conduct/policy].
 - Rationale: I reach this conclusion because Respondent [did/did not] touch a private area of Complainant when placing a hand on Complainant's genital area [with/without] permission. The facts further demonstrated that Respondent touched Complainant [accidentally/for the purposes of sexual gratification].

Table of Contents for Written Determination

- Conclusions about Sexual Harassment
 - Conclusion: I find by a preponderance of the evidence that Respondent's actions [do/do not] rise to the level of sexual harassment as defined by [code of conduct/policy].
 - Rationale: I reach this conclusion because Respondent [did/did not] engage in unwelcome physical and verbal conduct based on sex towards Complainant, which determined by a reasonable person would be regarded as severe, pervasive, and objectively offensive.
- Responsibility
 - Based on a thorough review of the evidence, I find by a preponderance of the evidence that Respondent [is/is not] responsible for [sexual fondling and/or sexual harassment].

Table of Contents for Written Determination

- Sanctions (if responsibility)
 - I recommend the following sanctions for Respondent [List all that apply to the specific findings and conclusions]
- Remedies (if responsibility)
 - I recommend the following remedies for Complainant [List all that apply to the specific findings and conclusions]
- Appeal Rights Available for Both Parties
- Closing Statement

APPEALS

Appeals (Title IX)

1. Equal Opportunity for Appeal under §106.45(b)(8)

- Both parties must have opportunity to appeal
 - the determination of responsibility, or
 - the dismissal of a formal complaint or allegations

2. Bases for Appeal

- Procedural irregularity that affected the outcome;
- New evidence that was not reasonably available & could have affected outcome; or
- Conflict of interest or bias generally or specifically by Title IX Coordinator, investigator, and/or decision-maker

Institution may include other bases for appeal if both parties have equal right to use

Title IX Team: Appeals Officer

Appeal Officer Role:



- Provides written notice to both parties about the right to appeal based on three grounds for appeal
- If an appeal is filed, the Appeal Officer evaluates the appeal request(s) to determine if within the scope of appeal
- Provides a written Notice of Appeal to both parties
- Reviews both written statements and arguments from the parties
- Renders written decision on appeal and explains rationale for the result
- Provides the written decision to parties at same time

Overview of SB 493

Overview of SB 493

- Went into effect January 1, 2022 and enforceable thereafter.
- Amended California Education code section 66262.5.
 - Clarifies the definitions in Education Code section 66262.5 regarding sexual harassment.
- Provides a new grievance procedure set forth in Education Code section 66281.8
 - Seeks to clarify the process and provide grievance procedures for adjudicating student complaints of sexual harassment at postsecondary educational institutions, including sexual or gender-based violence, and dating or domestic violence.
- Establishes specific employee training requirements.

Overview SB 493 — Notices, Policies, and Website

- Disseminate notices of nondiscrimination to employees, volunteers, and those who contract with the institution;
- Designate an SB 493 coordinator;
- Adopt rules and procedures for the prevention of sexual harassment, including those required by Title IX of the Education Amendments of 1972 (20 U.S.C. Sec. 1681 et seq.);
- Adopt and publish on your website the grievance procedures which provide for the prompt and equitable resolution of sexual harassment complaints;
- Publish on your website the name, title, and contact information for the Title IX Coordinator or other employee designated to coordinate the compliance with SB 493, and any individual official with authority to investigate complaints or to institute corrective measures as specified;

Overview of SB 493— Training Requirements

- Include specific training to each employee engaged in the grievance procedure;
- Include annual training for residential life student and nonstudent staff for the trauma-informed handling of reports regarding incident of sexual harassment or violence at an institution with on-campus housing;
- Notify “responsible employees” of the obligation to report sexual harassment to appropriate school officials; and
- Provide training to all employees on the identification of sexual harassment.

Overview of SB 493— Interactions with Title IX

- SB 493 is implicitly premised on the anticipation that federal regulations may change under the current administration.
- The U.S. Department of Education announced plans to revisit the 2020 Title IX regulations, and in June 2022 announced that it expects to issue new proposed regulations sometime around April 2023.
- How does SB 493 currently interact with Title IX?
 - Mirrors some of the Title IX regulations
 - Provides additional rights to the parties that are not inconsistent with the Title IX regulations
 - Some provisions of SB 493 are inconsistent with specific provisions of the Title IX regulations
- Apply both Title IX and SB 493 to the extent that SB 493 does not conflict with the current Title IX Regulations.

New Proposed Regulations – Title IX (June 23, 2022)

If adopted as proposed, would make many changes including but not limited to:

- Eliminate Title IX requirement for live hearing
- Instead of live hearing requirement, would permit decisionmaker to ask questions of parties and witnesses in individual meetings
- If no live hearing, parties must be allowed to propose to decisionmaker questions to be asked
- If a party does not respond to questions related to their credibility, decisionmaker must not rely on any statement of that party that supports that party's position
- Institution has discretion to conduct live hearing "virtually"; must do so upon request of either party

CURRENTLY, THESE ARE ONLY PROPOSED REGULATIONS, THEY ARE NOT LAW, AND THE FINAL REGULATIONS MAY BE DIFFERENT

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