

Responding to and Investigating Complaints of Sexual Harassment under the Title IX Grievance Procedures

Shawsheen Valley Regional Vocational Technical School District

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Training Objectives

01

Provide the nuts and bolts of information you need to complete your role in the Title IX process.

02

Answer Frequently Asked Questions regarding the new Title IX regulations.

03

Gain understanding of the Title IX Manual and how to use it.

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Overview of the Title IX Sexual Harassment Regulations

- The Title IX Sexual Harassment regulations went into effect on August 14, 2020.
- The regulations impose an extremely prescriptive grievance process and have created a much more detailed and resource-intensive investigative process.
 - The single-investigator model was eliminated. Multiple personnel (“Title IX Team”) are required in the investigative and decision-making process.
- Districts were required to adopt Title IX Grievance Procedures to meet the requirements.

*On June 23, 2022, the Biden administration issued new proposed regulations with a 60-day comment period. The timeline for finalization is unclear; however, the prior administration finalized the regulations approximately 18 months after publishing the proposed regulations.

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Students and Employees Protected

The Title IX Sexual Harassment regulations apply to both student victims/perpetrators as well as staff victims/perpetrators.

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District's Duty to Respond to Sexual Harassment under Title IX

- When must the District respond in accordance with Title IX?
 - Whenever the *District has actual knowledge*, which means **whenever any employee receives notice of sexual harassment or notice of allegations of sexual harassment occurring within an education program or activity of the district in the U.S.**
- The District's response **must be prompt and not deliberately indifferent**,
 - "not clearly unreasonable in light of the known circumstances."



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Title IX Definition of Sexual Harassment

- (1) Any instance of *quid pro quo* harassment by a employee; or
- (2) Unwelcome conduct on the basis of sex that is sufficiently severe and pervasive and objectively offensive conduct, effectively denying a person equal educational access; or
- (3) Any instance of sexual assault, dating violence, domestic violence, or stalking as defined by the Clery Act and the Violence Against Women Act.

TITLE IX

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Quid pro quo Sexual Harassment

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

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Severe, and pervasive, and objectively offensive conduct of a sexual nature

Unwelcome conduct, on the basis of sex, determined by a reasonable person to be so severe, and pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity

This is a significant narrowing from prior definition of "sufficiently severe or persistent or pervasive..."

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Clery Act
&
Violence Against
Women Act (VAWA)
Offenses

- Sexual Assault
- Dating Violence
- Domestic Violence
- Stalking

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Sexual Assault, Dating Violence, Domestic Violence, or Stalking

Sexual Assault:

Under Title IX, the term “sexual assault” means an offense classified as a sex offense under the Uniform Crime Reporting System’s National Incident-Based Reporting System. This includes Rape, Sodomy, Sexual Assault With An Object, or Fondling directed against another person, without the consent of the victim, including instances where the victim is incapable of giving consent; also, unlawful sexual intercourse.

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Sexual Assault, Dating Violence, Domestic Violence, or Stalking

- ❑ Rape - the carnal knowledge of a person, without the consent of the victim, including instances where the victim is incapable of giving consent because of his/her age or because of his/her temporary or permanent mental or physical incapacity.
- ❑ Sexual Assault With An Object - To use an object or instrument to unlawfully penetrate, however slightly, the genital or anal opening of the body of another person, without the consent of the victim, including instances where the victim is incapable of giving consent because of his/her age or because of his/her temporary or permanent mental or physical incapacity.
- ❑ Fondling - the touching of the private body parts of another person for the purpose of sexual gratification without the consent of the victim, including instances where the victim is incapable of giving consent because of his/her age or because of his/her temporary or permanent mental or physical incapacity. In Massachusetts, pursuant to M.G.L. c. 265, § 13B, a child under the age of 14 is incapable of giving consent to indecent touching.

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- ❑ Sodomy - oral or anal sexual intercourse with another person, without the consent of the victim, including instances where the victim is incapable of giving consent because of his/her age or because of his/her temporary or permanent mental or physical incapacity.
- ❑ Incest - Nonforcible sexual intercourse between persons who are related to each other within the degrees wherein marriage is prohibited by law.
- ❑ Statutory Rape - Nonforcible sexual intercourse with a person who is under the statutory age of consent. In Massachusetts, a child under the age of 16 is incapable of consenting to sexual intercourse.

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Sexual Assault, **Dating Violence**, Domestic Violence, or Stalking

Dating Violence:

Violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the victim. The existence of such a relationship shall be determined based on the reporting party's statement and with consideration of the length of the relationship, the type of relationship, and the frequency of interaction between the persons involved in the relationship. For the purposes of this definition, dating violence includes, but is not limited to, sexual or physical abuse or the threat of such abuse. Dating violence does not include acts covered under the definition of domestic violence.

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Sexual Assault, Dating Violence, **Domestic Violence**, or Stalking

Domestic Violence:

A felony or misdemeanor crime of violence committed by a current or former spouse or intimate partner of the victim; by a person with whom the victim shares a child in common; by a person who is cohabitating with, or has cohabitated with, the victim as a spouse or intimate partner; by a person similarly situated to a spouse of the victim under the domestic or family violence laws of the jurisdiction in which the crime of violence occurred; by any other person against an adult or youth victim who is protected from that person's acts under the domestic or family violence laws of the jurisdiction in which the crime of violence occurred.

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Sexual Assault, Dating Violence, Domestic Violence, or **Stalking**

Stalking:

Engaging in a *course of conduct* directed at a specific person that would cause a *reasonable person* to fear for the person's safety or the safety of others or suffer *substantial emotional distress*.

Course of conduct: two or more acts, including, but not limited to, acts in which the stalker directly, indirectly, or through third parties, by any action, method, device, or means, follows, monitors, observes, surveils, threatens, or communicates to or about a person, or interferes with a person's property.

Reasonable person: a reasonable person under similar circumstances and with similar identities to the victim.

Substantial emotional distress: significant mental suffering or anguish that may, but does not necessarily, require medical or other professional treatment or counseling.

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Responding to Reports and Complaints of Sexual Harassment under the Title IX Grievance Procedures

The Title IX Team

- Title IX Coordinator
- Investigator(s)
- Decision-Maker
- Appeals Officer
- Informal Resolution Facilitator(s)



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Title IX Team Members Impartiality Required

A conflict of interest can create a bias for or against a party.

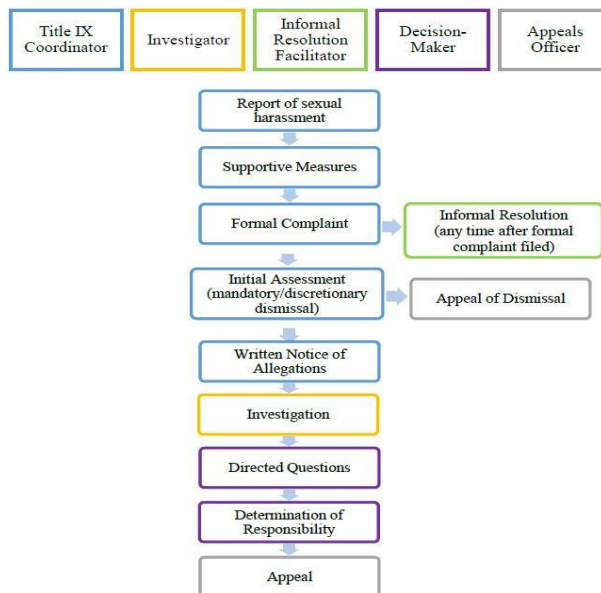
- Types of conflict and impartiality to consider:
 - Playing too many roles in the process.
 - Decision-Makers who are not impartial.
 - Training materials are biased.
- All Title IX Team members must avoid prejudgment of the facts at issue and must afford the accused the presumption of innocence.

Title IX Team has no side other than the integrity of the process!

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Title IX Process Overview Flowchart



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Title IX Coordinator

Every school district must appoint a District-level Title IX Coordinator:

- Can have more than one Title IX Coordinator.
- District can also appoint Deputy Title IX Coordinators (i.e., Athletics, Human Resources)
- Title IX Coordinator's Responsibilities:
 - Leads and coordinates compliance efforts for Title IX of the entire district.
 - **Must** have an understanding of Title IX, the Title IX Sexual Harassment regulations, and the District's Title IX Grievance Procedures.
 - **Must** have autonomy and independence
 - Should report directly to the Superintendent.
 - **Cannot** be the Decision-Maker or Appeals Officer.
 - **Can** serve as the Investigator or
 - **Can** serve as the Informal Resolution Facilitator.
 - **Can** serve as either the Investigator and Informal Resolution Facilitator, **but not both**.

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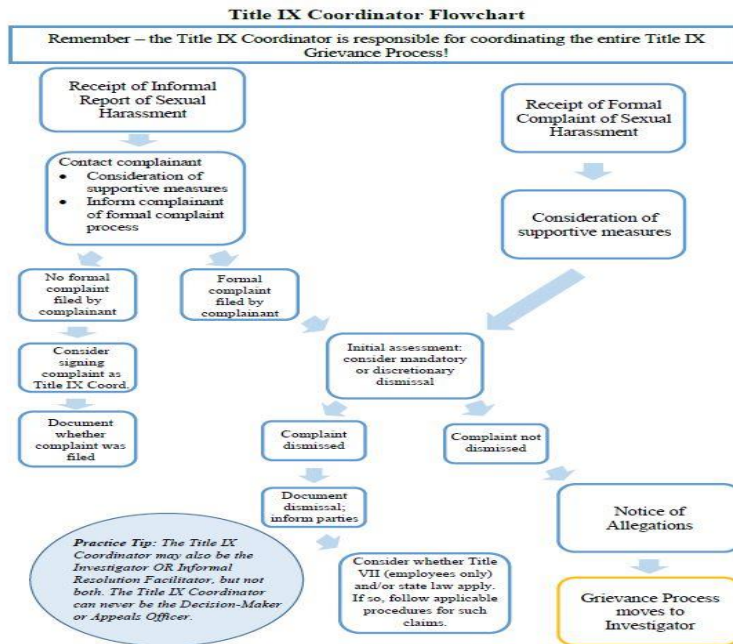
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Shawsheen Title IX Coordinator

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Receipt of Report of Sexual Harassment Initial Contact with Alleged Victim/Parents/Guardians

Upon receipt of a report of conduct that would, if true, constitute sexual harassment under Title IX, the Title IX Coordinator must:

- Promptly contact the alleged victim to discuss availability of supportive measures and consider alleged victim's wishes with respect to those measures.
- Explain that supportive measures will be considered with or without the filing of a Formal Complaint.
- Explain the process for filing a Formal Title IX Sexual Harassment complaint.
- Provide alleged victim and parents/guardians with a copy of the Title IX Sexual Harassment Grievance Procedures.
- Encourage alleged victim/parents/guardians to follow up with you to inform you whether or not they intend to file a formal complaint.

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Consideration of Supportive Measures

* Utilize the “Consideration of Supportive Measures” forms in your Title IX Manual to document your discussion and decisions. (pp. 12-13)

- Document the supportive measures requested by the complainant/parents.
- Determine which supportive measures will be implemented.
 - Examples: counseling; extension of deadline(s); other course-related adjustment(s); modifications of schedule (class or employment); mutual restrictions on contact between the parties; campus escort service; leave of absence from employment; increased security and monitoring of certain areas of the building/campus; other similar measures.
 - No Contact Orders: most often, no contact orders will be mutual.
 - Supportive measures may not unreasonably burden the accused.
 - Need to ensure the supportive measures are individualized and non-disciplinary.

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Consideration of Supportive Measures

- If any requested supportive measures are denied, document why the denial was reasonable.
- Following the initial meeting and your decisions on supportive measures, document with a letter to the complainant/parents.
 - Use the “Follow-up to Report of Sexual Harassment” letter in your Title IX Manual. (p.14)
- Remember, supportive measures must be kept confidential!
- Only exceptions are measures like mutual no contact orders – both parties need to be aware there is a no contact order in place so the District can enforce it.
- In some limited circumstances, District may want to contact respondent to provide supportive measures prior to filing of formal complaint. Not a requirement until after a Formal Title IX Compliant has been filed. however.

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Discipline Outside of Title IX Process Prohibited

“No [school district] or other person may intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by title IX or this part, or because the individual has made a report or complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing under [these regulations].”

“Intimidation, threats, coercion, or discrimination, including charges against an individual for code of conduct violations that do not involve sex discrimination or sexual harassment, but arise out of the same facts or circumstances as a report or complaint of sex discrimination, or a report or formal complaint of sexual harassment, for the purpose of interfering with any right or privilege secured by title IX or [these regulations] constitutes retaliation.”

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Frequently Asked Question

How can a no contact order developed as a supportive measure under Title IX be enforced if the District cannot impose school discipline prior to the completion of the Title IX Grievance Process?

- The violation of the no contact order stems from different circumstances that the original sexual harassment allegations, so the District could in fact impose discipline for a failure to follow the no contact order.

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Complainant Chooses Not to File Formal Complaint

- Title IX Coordinator cannot force the complainant to inform the District whether they are going to file a formal complaint.
- There is no statute of limitations on a Title IX complaint.
- If they are not going to file within a reasonable period of time, consider filing complaint as the Title IX Coordinator.
 - Consider best interests of community, information shared by complainant/parents, individual circumstances of the situation.
 - If filing as Title IX Coordinator, use form “Notice to Complainant of Title IX Coordinator’s Decision to File a Title IX Formal Complaint” in Title IX Manual.
- **Title IX Coordinator must file formal complaint on victim’s behalf if report involves a pattern of alleged sexual harassment by an individual in a position of authority.**

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Frequently Asked Question

If the Complainant does not want to file a formal complaint under Title IX and the Title IX Coordinator does not find a basis to sign a complaint, can the District then proceed with school discipline under school rules violations?

- No. The grievance process must be followed before the imposition of any disciplinary sanctions or other actions against a respondent.
- Supportive measures should be offered to the complainant, and documentation of the offer and/or implementation of supportive measures and the complainant’s decision not to file a formal complaint should also be made.
- Supportive measures must be non-punitive, non-disciplinary, and not place an unreasonable burden on either party.

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Frequently Asked Question

What if a complainant does not want to file a formal complaint under Title IX, but does want to file one under Massachusetts law only?

- Complainants do not determine which law to file the complaint under; that decision is restricted by the Title IX regulations.
- Districts should first review the complaint under the Title IX lens, and only after going through the process and determining that it does not meet the criteria for Title IX would you then move forward with investigating under the district's civil rights harassment grievance procedures.
 - **If the conduct complained of would, if proven, constitute sexual harassment under Title IX, it can only be investigated in accordance with the Title IX Grievance Procedure**

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Formal Complaint Filed Initial Assessment by Title IX Coordinator



Conduct initial assessment of Formal Complaint signed by the alleged victim or the victim's parent/guardian?

- Is the Formal Complaint subject to Mandatory dismissal?
- Is the Formal Complaint subject to Discretionary Dismissal?

*Use "Initial Assessment of Formal Complaint" checklist in Title IX Manual to document your decision, and the "Mandatory or Discretionary Dismissal of Formal Complaint - Notice to the Parties" letters if the complaint will be dismissed (See Title IX Handbook pp. 19-24)

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Mandatory Dismissal

Mandatory dismissal – Title IX Coordinator MUST dismiss the formal complaint if:

- I. Even if true, the alleged conduct would not constitute sexual harassment as defined by Title IX; or
- II. The alleged conduct did not occur in a District education program or activity; or
 - *District Education program or activity*: locations, events, or circumstances over which the district exercised substantial control over both the respondent and the context in which the sexual harassment occurred.
- III. The alleged conduct did not occur within the United States.
- IV. The Complainant (victim) was not, at the time of filing, enrolled in the District and was not seeking to return.

If a complaint is dismissed under Title IX, but could still violate state sexual harassment standards, then we must proceed in accordance with our Civil Rights Grievance Procedure (non-Title IX Sexual Harassment).

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Discretionary Dismissal

Discretionary dismissal – Title IX Coordinator MAY dismiss the Formal Complaint if at any time during the investigation or hearing:

- I. Complainant notifies the Title IX Coordinator in writing that he/she would like to withdraw the formal complaint or any allegations in it; or
- II. Respondent (accused) is no longer enrolled in or employed by the District; or
- III. Specific circumstances prevent the District from gathering evidence sufficient to reach a determination as to the formal complaint or the allegations.

***Upon any dismissal (mandatory or discretionary), Title IX Coordinator must send written notice of the dismissal, the basis for the dismissal, and appeal procedures to both parties simultaneously.**

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Additional Initial Considerations: Title IX Emergency Removal

District may remove a Respondent on an emergency basis pursuant to Title IX at any time following the filing of a Formal Complaint provided that the District undertakes an “individualized safety and risk analysis” and:

- 1) 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 that there is no alternative to the respondent’s emergency removal to mitigate the threat presented; and
- 2) Provides the Respondent with notice (oral or written) and the opportunity to challenge the decision immediately following the removal.

*The District will be required to provide alternative educational services to student removed on an emergency basis. If the Respondent is student with a disability, manifestation determination requirements will be applicable to any Emergency Removal exceeding ten (10) school days.

Due to impact on the Respondent and potential claims of retaliation in violation of Section 504, Emergency Removals pending completion of the Grievance Process should be implemented with caution and only in the minority of cases.

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Title IX Emergency Removal

Districts may need to undertake an emergency removal:

- Where a respondent poses an immediate threat to the physical health or safety of an individual before an investigation into sexual harassment allegations concludes.
- In order to fulfill the district’s Title IX duty not to be “deliberately indifferent” and protect the safety of the district’s community.

The emergency removal may be undertaken in addition to implementing supportive measures designed to restore or preserve a Complainant’s equal access to education.

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Emergency Removal Limitations

Districts may not impose a Title IX emergency removal:

- ❑ Based upon the likelihood the complainant will prevail on the allegations (i.e., the “strength” of the case).
- ❑ Based upon a generalized, hypothetical, or speculative belief.
- ❑ Based upon general assumptions about sex, or research that purports to profile characteristics of sex offense perpetrators, or statistical data about the frequency or infrequency of false or unfounded sexual misconduct allegations.

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Administrative Leave for Employees

EMPLOYEE
RELATIONS



The Title IX Emergency Removal regulations do not preclude a district from placing an employee on administrative leave for the duration of the investigation – specifically, the emergency removal standard does not need to be satisfied to implement an administrative leave.

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Written Notice of Formal Complaint

Following initial assessment of the Formal Complaint, Title IX Coordinator is required to send written notice to both the Complainant and Respondent of the filing of the Formal Complaint and initiation of the Title IX Grievance Procedures. (See Title IX Manual at p.25)

- Notice letter should be same for both parties.
- Leave names but remove contact information (residential address, email) for the opposing party
- Include ALL allegations set forth in the Formal Complaint.

*Remember supportive measures are confidential, unless a party needs to know (e.g. no contact order).

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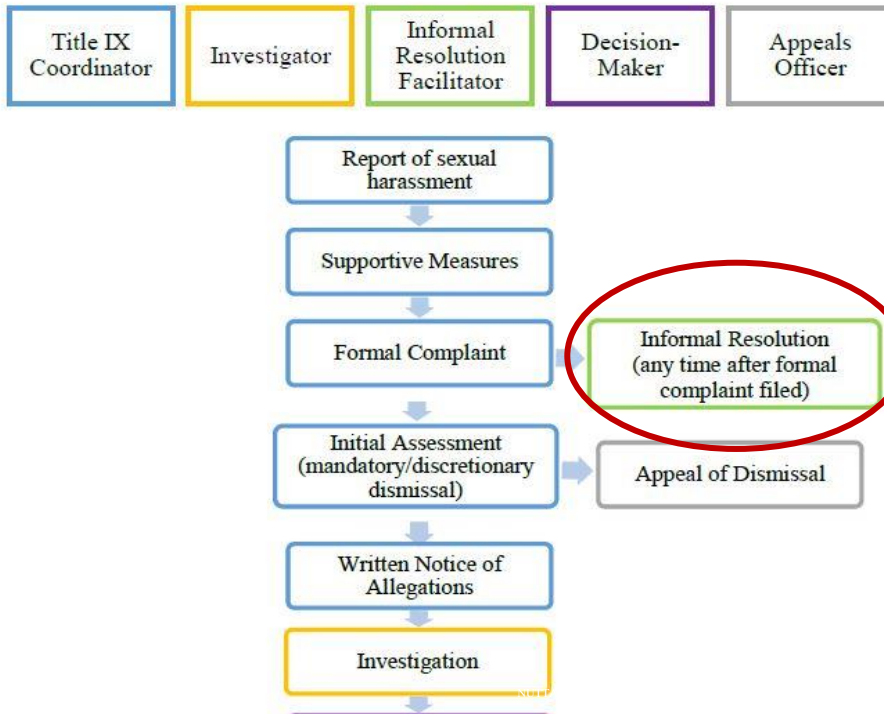


The Title IX Grievance Procedure Informal Resolution

- Upon the filing of a Formal Complaint, The Title IX Coordinator may offer informal resolution of any Title IX complaint that does not involve an employee's alleged sexual harassment of a Student.
 - Use "Notice to Parties of Informal Resolution Letter." (See Title IX Handbook p. 71)
- Title IX Coordinator may serve as the Informal Resolution Facilitator

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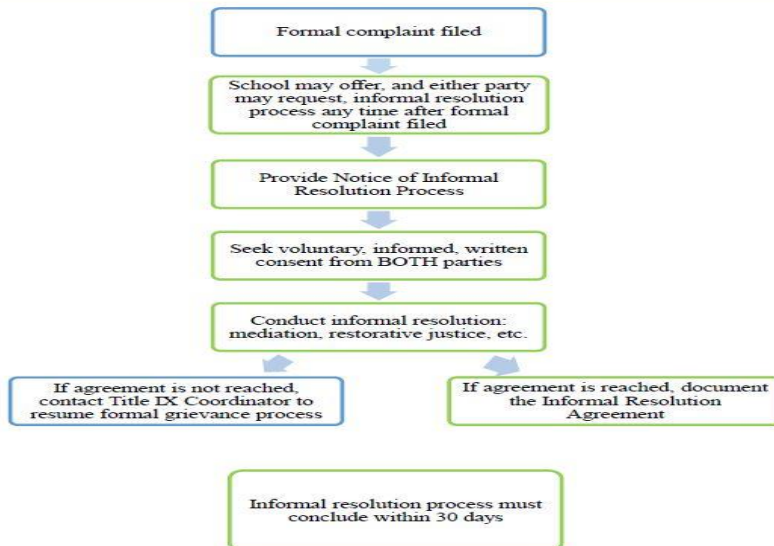
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Informal Resolution Facilitator Flowchart

Remember, informal resolution can NOT be used if the Respondent is an employee and the Complainant is a student. Either party may terminate or decline informal process at any time and resume the formal grievance process.



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Informal Resolution Facilitator

- ❑ Facilitates the **voluntary** process for informal resolution only after a formal complaint has been filed. Districts do not have to offer it.
- ❑ **Cannot** be Investigator or Decision-Maker, could be Title IX Coordinator not also acting as the Investigator.
- ❑ Informal resolution cannot be used if Respondent is an employee of the District.
- ❑ Either party can withdraw from the informal resolution process at any time.
- ❑ Timelines for grievance procedure paused if parties agree to informal resolution process.

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Informal Resolution Process

- Information shared during the Informal Resolution process is not confidential. It may be provided to the Title IX Coordinator, Investigator, administrator, or other outside agency (i.e. Department of Children and Families) as appropriate and required by law.
- Document agreement to participate in informal resolution process with the “Informal Resolution Process Agreement to Participate Consent Form.” (See Title IX Handbook p. 73)
- Once you have voluntary, informed, written consent from both parties, consider how you want to conduct the informal resolution.
 - Face-to-face meeting with both parties (in person or virtually) not recommended unless both parties provide written consent.
 - Shuttle Diplomacy

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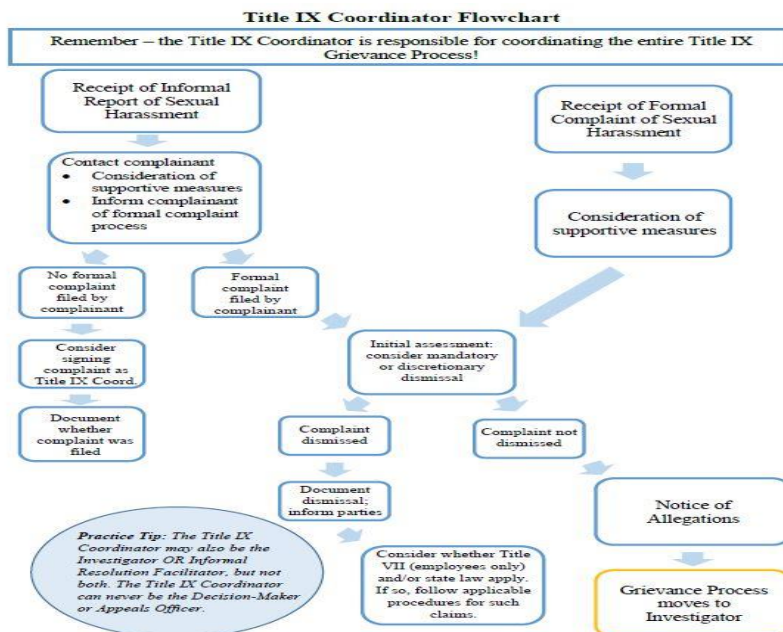
Informal Resolution Process



- Timelines for grievance procedure paused if parties agree to informal resolution process.
- Either party can withdraw from the informal resolution process at any time.
 - If either party withdraws from the Informal Resolution Process, District must immediately commence or continue investigation of the Formal Complaint.
- Document any agreement reached by the parties.
 - Use “Informal Resolution Agreement Template” in Title IX Manual.
- Notify Title IX Coordinator of outcome of the Informal Resolution Process.
 - If not successful, continue with formal Grievance Procedures.
 - If successful, Title IX Coordinator gets copy of the Informal Resolution Agreement and Title IX formal complaint is closed.
- If agreement impacts roles and responsibilities of school staff, ensure relevant staff and Title IX Coordinator receive copy of the Agreement.

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The Title IX Grievance Procedure Investigation of the Formal Complaint

Formal complaint to be investigated by a designated Investigator.

- Can be the Title IX Coordinator but in practice would most likely be an Assistant Principal.
- Any formal complaint about an employee who holds a supervisory position shall be investigated by a person who is not subject to that supervisor's authority.

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Formal Complaint Investigations Parties' Right to Advisor

Throughout the formal complaint investigation process:

- Each party may have one (1) advisor of their own selection and *at their own expense* participate in the grievance process (districts do not need to provide). May not be a District staff member.
- In the case of a minor child, the advisor may be in addition to the parents.
- Advisor may be an attorney.

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Title IX Investigator General Responsibilities

Responsible for completing an impartial investigation by seeking and gathering evidence relative to the investigation.

Responsibilities:

- Interview parties and witnesses
- Gather evidence (emails, photos, social media postings, video recordings, etc.)
- Maintain a presumption that the Respondent is not responsible
- Provide an equal opportunity for the parties to present fact and expert witnesses and other inculpatory and exculpatory evidence, and to inspect and review any evidence obtained that is directly related to the allegations
- Ensure the ability of the parties to discuss the allegations or gather and present relevant evidence (i.e., no “gag” orders)
- Identify, organize and compile relevant information.
- Maintain investigation records and notes.
- Complete Investigation and issue a final Investigative Report that fairly summarizes the relevant evidence within twenty-five (25) school days (includes mandatory 10 calendar day period for parties to respond to initial evidence package.)

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Investigative Considerations Definition of Consent

Question: During the formal complaint investigation process, what constitutes consent?

- Definition of Consent to be Applied: “The Department believes the definition of what constitutes consent ... within a recipient’s education community is a matter best left to the discretion of recipients, many of whom are under State law requirements to apply particular definitions of consent.”
- Massachusetts definition of lack of consent: compelling a person to do an act by force or by threat of bodily injury and against the complainant’s will.
- Note: In Massachusetts, a child under the age of 14 is incapable of giving consent to “indecent touching” and a child under the age of 16 is incapable of giving consent to sexual intercourse. M.G.L. c. 265, §13B and §23.

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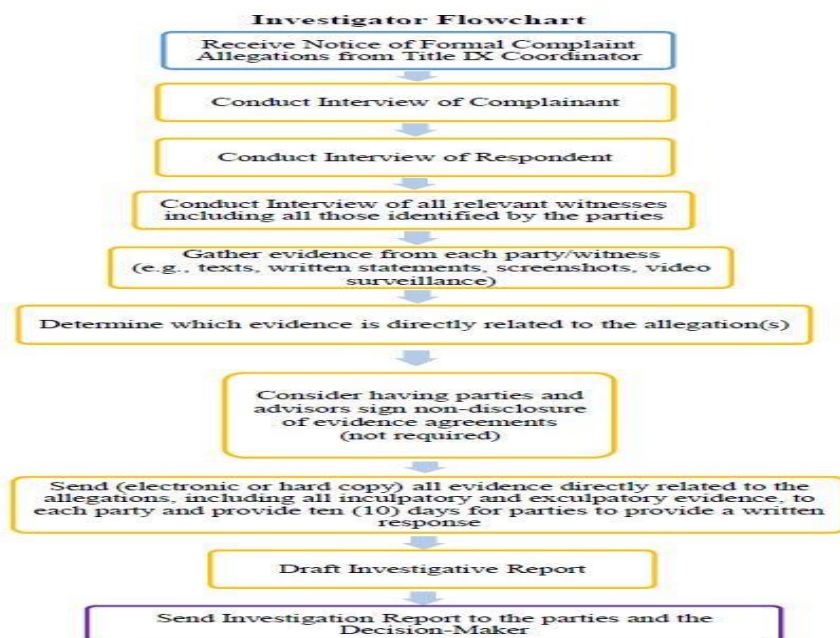
Investigative Considerations Standard of Proof

The Standard of proof to be applied in examining and determining with Sexual Harassment occurred is the “Preponderance of Evidence” standard:

- Preponderance of Evidence: The evidence establishes that the conduct complained of was more likely than not to have occurred.
 - “50% plus a feather.”

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Conducting the Investigation

- Provide written notice to Complainant and Respondent of any interview to be conducted of them.
 - Use “Notice to Party Whose Participation is Expected at an Investigative Interview” form in Title IX Handbook at p. 27.
- Written notice not required prior to interviews of witnesses other than Respondent or Complainant.
 - Utilize “Investigator’s Checklist for Interviews of Parties and Witnesses” in Title IX Handbook (p. 28) to document every interview. Use a separate checklist for each witness, and for each interview if there are subsequent or follow-up interviews for a party or witness.
- Take notes during all interviews conducted. If possible, ask for another person (not Decision Maker, Appeals Officer, or Informal Resolution Facilitator) to be present to take notes.
- Investigator may request confidentiality, but parties can still discuss the allegations and gather and present relevant evidence. Cannot give a “gag order.”

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Interviewing the Parties



Prior to interviewing the Complainant and Respondent

1. **Send written notice of the interview date, time, subject matter to be discussed and identifying who will be present.**
 - Both parties should be allowed to have parents/guardians and advisor (if any) present
 - Parents/guardians and/or advisors may not, however, interfere in the interview process.
2. Carefully review the Formal Title IX Complaint prior to conducting interviews
3. Interview Complainant first.:
 - If Complainant makes new allegations not contained within the original complaint, must investigate but must also provided written notice to both the Complainant and Respondent of the additional allegations.
4. Inform each party of right to be free from retaliation for the filing of the Formal Complaint and/or for participating in the Title IX Grievance Process.
 - Begin by reviewing and confirming the allegations set forth in the Formal Complaint.
 - Where did this happen?
 - When?
 - Where any witnesses present/
 - Is there any evidence that the Complainant could provide relative to the allegations set forth in the Formal Complaint?
 - At conclusion of interview, inform Complainant that you may need to conduct a follow up interview and, if so, will provide written notice of that follow up interview.

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Witness Interviews



- Be specific!
- The burden is on the District and Investigator to gather enough evidence for the Decision-Maker to make a determination.
 - The burden of proof is not on the Complainant or Respondent.
- Look for evidence or information that tends to corroborate or dispel the allegations.
- The questions need to be exhaustive and cover all relevant questions for each allegation.
- For non-party witnesses, start with general questions.
 - E.g., Can you tell me about your relationship with Complainant/ Respondent?
- Then move on to more specific questions as the interview progresses.

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Witness Interviews



- Remember: Who? What? When? Where? Why?
- For each and every allegation, you need to be asking:
 - The date, time, and location of the incident;
 - The exact phrase or words used;
 - Number of times conduct occurred;
 - Frequency that the incident(s) occurred (daily, weekly, etc.);
 - Names of any other witnesses who may have been present;
 - Names of any other witnesses who may have information regarding the allegations;
 - If relevant, the exact location on the alleged victim's person that the touching occurred, how long the physical contact lasted, and whether there were changes to the physical contact.
- Ask who else they may have talked to about the incident.
- Any other evidence (notes, emails about the incident, written statement, etc.).

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Gathering Evidence

- Ask for any additional evidence from each party/witness:
 - Emails, text messages, social media messages, screen shots, etc.;
 - Notes or statements provided by party/witness;
 - Written statement not required from each party/witness, burden is on the school district.
- Gather additional relevant evidence:
 - Request IT Department pull relevant emails or files on school servers
 - Obtain surveillance video
 - Social media posts
 - Attendance records of parties
 - Visit location of alleged incident if on school grounds. Document with notes and photos.
 - Medical and Psychological records
 - Can request them if they are relevant, but cannot obtain them or share unless written consent obtained from parent/guardian or student if 18+.

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Potential Investigation Pitfalls

- Failure to investigate each allegation.
- Investigating the singular allegation without inquiry as to whether other incidents occurred.
- Failure to follow up on other allegations learned during the course of the investigation.
- Failure to interview all of the witnesses.
- Failure to establish what actually occurred (e.g., what statements were made or what actions were taken).



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Concluding the Investigation: Sharing Evidence with Parties

- Investigator must provide all parties with the opportunity to review all evidence “directly related” to the allegation(s) and provide a written response.
 - May require redaction – if part of an email/other evidence is totally unrelated to investigation, that part must be redacted.
 - Use the form “Notice of Opportunity to Review Evidence and Notice of Opportunity to Submit a Written Response Within Ten (10) Days” in the Title IX Handbook (p. 33).
- Provide copies interview notes, witness/party statements, emails, text messages, photographs, screen shots, etc.
 - Do not redact names of witnesses interviewed unless the witness specifically requested to remain anonymous.
- Consider having parties sign a non-disclosure agreement prior to emailing or mailing a hard copy of the evidence. May take the further precaution of not emailing or sending a copy of the evidence, or a portion of the evidence, but rather making it available at the school for the party to schedule time to review with District staff/Investigator present.

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Evidence “Directly Related” to the Complaint

- “Directly related” is broader than “relevant”: The Department of Education believes that it is most beneficial for the parties to have access to all “directly related” evidence.
 - “Directly related” evidence can be any information that potentially corroborates or contradicts the allegations.
 - Err on the side of caution. If it was provided by a witness or party, most likely include the evidence in the initial evidence package.
- After parties have reviewed the evidence, the Investigator will then determine what evidence is “relevant.”

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Drafting the Investigation Report

- Allow 10 calendar days from sending out evidence to the parties before issuing the completed Investigation Report.
 - Consider any written responses from the parties when drafting the Report.
 - Include all procedural steps that were taken:
 - Dates of notices sent to parties;
 - Dates, times, participants in interviews;
 - Date on which evidence was sent to parties to review, date they provide written response (if any).
 - Include summaries of all interviews and relevant evidence.
 - Include “relevant evidence” as attachments to the report.
 - Avoid any determinations of credibility of parties or witnesses.
- *Use Title IX Handbook forms at pp. 34-37



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Relevant?

“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.
- What is never “relevant”?:
 - Questions and evidence offered by the respondent regarding the complainant’s general sexual predisposition are not relevant and should not be considered.
 - A complainant’s prior sexual behavior is also not relevant and should not be considered except for the two limited exceptions that are specific to the actual offensive conduct alleged:
 - If it is offered to prove someone else committed the conduct;
 - If it is offered to prove the complainant consented to the conduct under investigation.

Note: questions and evidence about a *respondent’s* sexual predisposition or prior sexual behavior are not subject to any special consideration but rather must be judged like any other question or evidence as relevant or irrelevant to the allegations at issue.

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Forwarding the Final Investigation Report to the Decision Maker and Parties

- Upon completion of the Final Investigation Report, the Investigator must send a copy to the designated Decision-Maker (Principal) and to the Parties. (Use form letter at p. 37 in the Title IX Handbook.)
 - The Investigator must notify the parties that they will be provided with ten (10) calendar days to submit a written response to the Investigation Report.
 - Parties are not, however, required to respond.
- **The Grievance Process then shifts to the designated Decision-Maker (Principal).**

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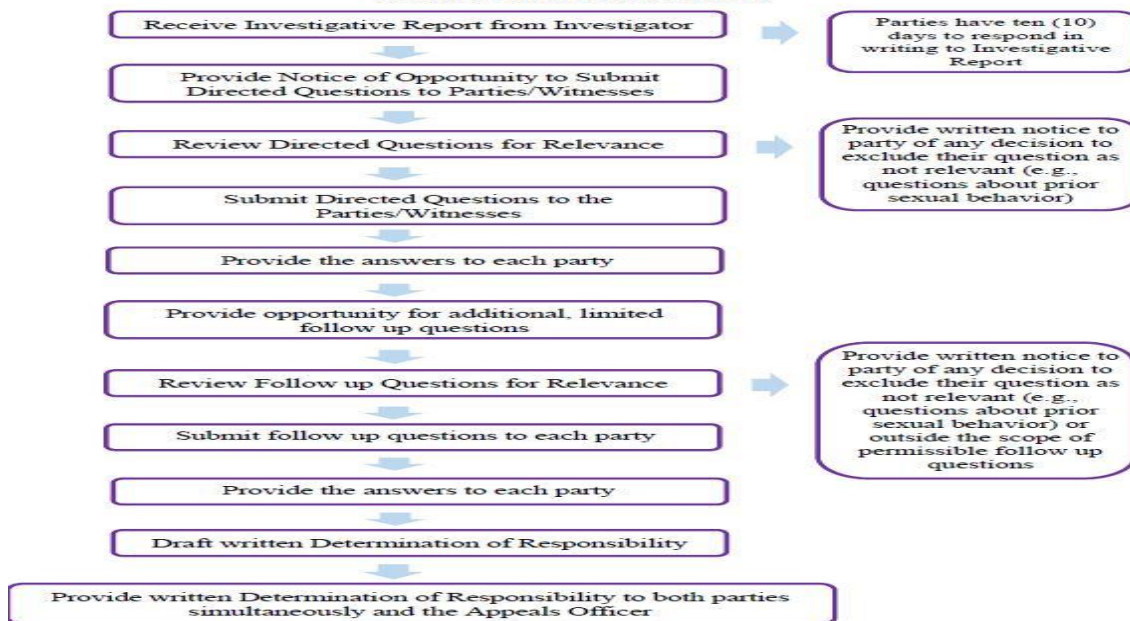
The Title IX Grievance Procedure The Decision-Maker

- The Decision-Maker cannot be the Investigator or the Title IX Coordinator and must not report directly to the Title IX Coordinator or Investigator.
 - Usually, will be the building Principal
- Decision-Maker must be objective and unbiased.

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Decision-Maker Flowchart



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NEXT STEPS

Title IX Decision-Maker Next Steps

- Upon receipt of the final Investigation Report, the designated Decision-Maker must send written notice to the parties of the parties' right to submit, within ten (10) calendar days, Directed Questions to the opposing party or any witnesses.
 - Parties do not have right to submit written questions to Title IX Coordinator of Investigator.
- Use Title IX Handbook form at p. 37.

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The Title IX Grievance Procedure Directed Questions From Parties

Restrictions on Directed Questions:

- All questions must be posed in a respectful manner.
- Only relevant questions will be permitted (Decision-Maker must provide reason(s) for excluding any questions as not relevant).
- Questions regarding the complainant's sexual predisposition are not relevant.
- Questions about the complainant's prior sexual behavior are also not relevant unless such questions are posed to prove someone other than the respondent committed the conduct alleged, or if the questions concern specific incidents of the complainant's prior sexual behavior with respect to the respondent and are offered to prove consent.

After receipt of answers by the parties, the Decision-Maker must allow additional, but limited, follow-up questions from each party to be answered by the opposing party or witness to whom they are directed within 5 calendar days.

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Directed Questions From Parties

Question: What if a party or witness does not answer directed questions from the other party?

- Regulations are silent on this possibility.
- The Department's comments to the regulations state the grievance process should not infringe upon a party's Fifth Amendment right to remain silent and provide that everyone has a right to participate or not participate in the grievance process, and the regulations themselves prohibit retaliation against any person exercising rights under Title IX, which includes the refusal to participate in the grievance process.
- Nonetheless, a recent Massachusetts federal court decision (*Victim Rights Law Center et al. v. Cardona*) determined, that schools are not prohibited from relying on statements that are not subject to cross-examination in Title IX decision-making process (emails or statements made outside of the grievance process).

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The Title IX Grievance Procedure Determination of Responsibility

- Upon conclusion of the Directed Questions time period, the Decision-Maker must issue a Determination of Responsibility
 - Written notice of determination with very specific requirements under the regulations.
 - See Title IX Handbook Forms pp. 49-59.
- Applies the standard of proof (preponderance of the evidence) to the facts to determine whether sexual harassment occurred as alleged.
- Three possible outcomes:
 - Sufficient evidence to find Respondent responsible for the allegations of sexual harassment
 - Insufficient evidence to find Respondent responsible for the allegations of sexual harassment
 - Mixed determination of Responsibility (sufficient evidence for some but not all of the allegations)

*Use the corresponding letter templates in the Title IX Manual to customize the determination based on the situation.
- **Written Determination should be sent to both parties and to the District's designated Appeals Officer.**

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Determination of Responsibility

For each allegation, describe the facts that the Decision-Maker has determined, by a preponderance of the evidence, actually occurred.

- Preponderance of the evidence = more probable than not.
- Address the circumstances in which the facts were established.
 - How many witnesses were there?
 - Did the witness's statements support the complainant's allegations? Were the accounts consistent?
 - Was there any other physical evidence that supported the allegations?
- Address circumstances in which the facts were not able to be established.
 - After interviews of all identified witnesses, were the allegations corroborated? Did any other evidence corroborate the allegations?
 - Were there conflicting accounts of what happened that can't be reconciled?

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Determination of Responsibility

After establishing what occurred based on preponderance of the evidence, apply the facts to the Title IX legal standards (definitions of sexual harassment).

- I. Quid Pro Quo
- II. Sexual Assault as defined by the Clery Act or the Violence Against Women Act
 - Rape, fondling, incest, statutory rape, dating violence, domestic violence, stalking
 - Fondling: The touching of the private body parts of another person **for the purpose of sexual gratification**, without the consent of the victim, including instances where the victim is incapable of giving consent because of his/her age or because of his/her temporary or permanent mental incapacity. In Massachusetts, pursuant to M.G.L. c. 265, § 13B, a child under the age of 14 is incapable of giving consent to indecent touching.
- III. Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denied the complainant equal access to the School's education program or activity.

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Determining Responsibility

Unwelcome conduct determined by a reasonable person to be so severe, and pervasive, and objectively offensive that it effectively denied the complainant equal access to the School's education program or activity.

- Fact-specific determination
- Cite to severity of the conduct, frequency of the conduct, duration of the conduct, and offensiveness to a reasonable person of the same age, grade, and gender.
- Include how the conduct would effectively deny a reasonable person of the same age, grade, and gender equal access to the School's education program or activity.

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Notice of Responsibility

- Provide notice of any remedies to be implemented based upon the finding of Sexual Harassment.
- Provide notification of possible disciplinary sanctions in line with the District's Code of Conduct or Employee Handbook.
- Note that any remedies provided to the complainant designed to restore or preserve equal access to the recipient's education program or activity are confidential. Just state whether or not they will be provided.
- **Provide notice of right to appeal and contact information for the Appeals Officer.**

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SANCTIONS

Discipline Following a Determination of Responsibility

- Title IX regulations take precedence; complete the Title IX procedures before imposing discipline as you usually would, with all state law due process measures in place.
- If the Respondent is subject to potential suspension or expulsion, that cannot be imposed prior to the determination of responsibility.
- Once the determination of responsibility has been made, the Respondent would receive notice of his/her rights based on the potential discipline under separate cover.

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SANCTIONS

Discipline Following a Determination of Responsibility

Title IX Determination:

- The respondent will be referred for consideration of a short term/long term suspension in accordance with M.G.L. c. 71, § 37H3/4. The respondent will be notified under separate cover of the date and time of a hearing to consider the respondent's long-term suspension (longer than ten (10) school days).

M.G.L. c. 71, § 37H3/4:

- Separate letter sent out providing notice of rights in the suspension process (short term or long-term suspension).
- Remember to hold Manifestation Determination if student is subject to removal longer than 10 days and school knows or has reason to know the Student has a disability.

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APPEAL

The Title IX Grievance Procedure Appeals

Within 5 calendar days of receipt of the Decision-Maker's determination, either the Complainant or Respondent may appeal from a determination regarding responsibility only on the following bases:

- I. Procedural irregularity that affected the outcome of the matter;
- II. Newly discovered evidence that could affect the outcome of the matter; and/or
- III. Title IX personnel had a conflict of interest or bias that affected the outcome of the matter.

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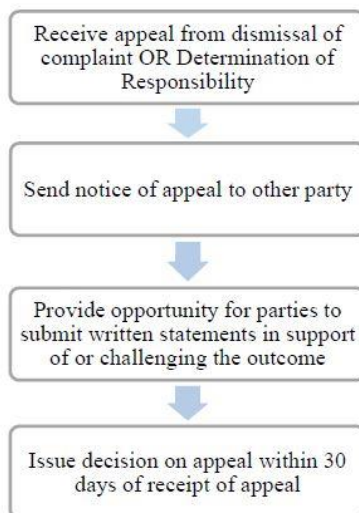
Appeals Officer

- Appeals Officer cannot be the Title IX Coordinator, the Decision-Maker or Investigator.
- Appeals Officer must be an individual not previously involved (someone other than the Title IX Coordinator, Investigator, and Decision-Maker).
- Should be the Superintendent
- Must determine if the appeal can move forward based on specific criteria.
- Within 30 calendar days of receipt of the appeal, the Appeals Officer issues a written determination describing the outcome of the appeal and the rationale. (use Title IX Handbook forms at pp. 65-69.)

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Appeals Officer Flowchart



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Questions?

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