



SEATTLE
PUBLIC
SCHOOLS

K-12 Title IX & Sexual Harassment Response

Seattle Public Schools is committed to making its online information accessible and usable to all people, regardless of ability or technology. Meeting web accessibility guidelines and standards is an ongoing process that we are consistently working to improve.

While Seattle Public Schools endeavors to only post documents optimized for accessibility, due to the nature and complexity of some documents, an accessible version of the document may not be available. In these limited circumstances, the District will provide equally effective alternate access.

For questions and more information about this document, please contact the following:

Title IX Coordinator
Office of Civil Rights
title.ix@seattleschools.org

The document is a PDF of training materials from Husch Blackwell. This is one of the training modules Title IX staff members have attended. The training covers definitions under Title IX, when Title IX applies, the grievance process at the K-12 level, best practices in response, and school district requirements when responding to concerns of sexual harassment under Title IX.

The logo for Husch Blackwell, consisting of a large, stylized white letter 'B' on a blue background. The 'B' is composed of a top section with two rounded lobes, a vertical stem, and a bottom section with a horizontal base and a vertical tail.

HUSCH BLACKWELL

K-12 Title IX & Sexual Harassment Response

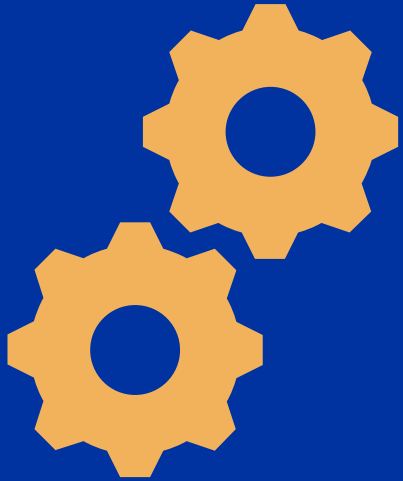
January 11, 2022



Housekeeping

- **Recording is not permitted**
- Change Zoom name to match registration
- Please list your school district or other affiliation with your name
- Raise hand or use chat function to ask questions
- Anticipated lunch break of 12:00 - 1:00 pm CST
- Other breaks throughout, but feel free to take individually as needed

Group Scenario



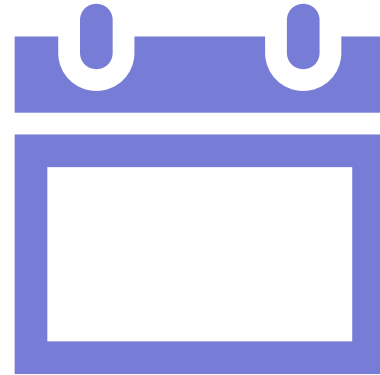
Breakout Groups

- Scenarios discussed in Breakout Groups
- First group – time to introduce yourselves and select a spokesperson; this will be your group for today's training
- Scenario and questions for each Group Scenario will be posted in the Chat Box
- Presenters will randomly call on Breakout Groups to provide your responses – be ready!
- Presenters will visit each Breakout Group at some point during the training
- Add your school to your display name



Agenda

- Title IX Scope & Jurisdiction
- Support and Interim Measures
- The Investigation Process
- The Hearing Process (brief)
- Alternative and Parallel Processes
- Regulatory and Caselaw Update





HUSCH BLACKWELL

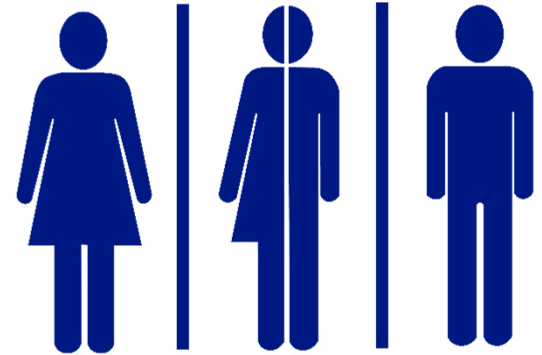
Title IX Scope & Jurisdiction



What is Title IX?

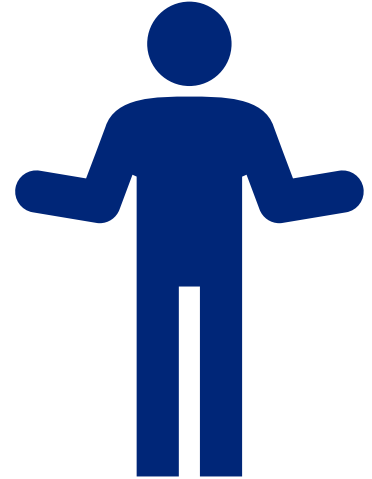
“[N]o person in the United States shall on the basis of sex be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance.”

32 C.F.R. § 106.31



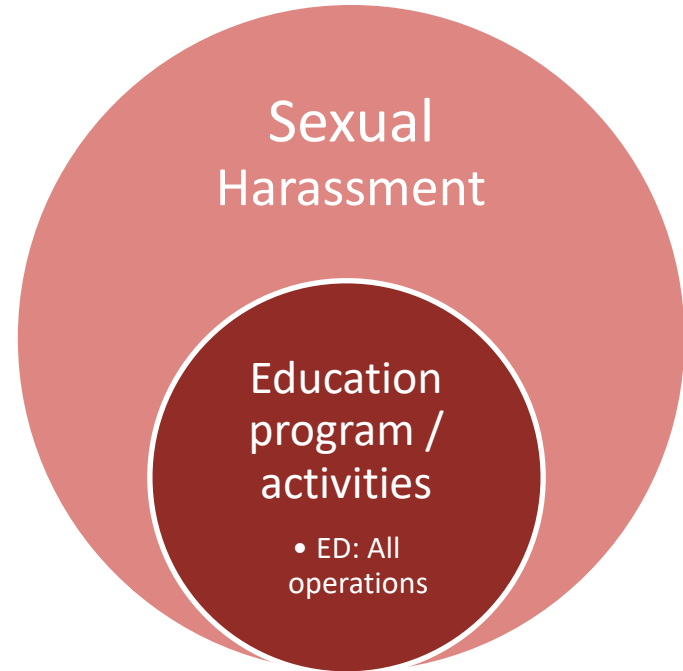
Does Title IX apply to persons?

- No
- But Title IX requires covered educational institutions to have certain policies that prohibit sexual harassment
- And those *policies* apply to persons



What sexual harassment does Title IX apply to?

- Title IX applies to sexual harassment in the “education program or activity” of a federal funding recipient
 - Title IX defines “education program or activity” to include the “operations” of educational institutions
- Title IX does not apply to private conduct occurring in private location that is not part of education program/activity



What are examples of education programs and activities?

Student Assignment

Hiring

Workplace

In-person classes

Online classes

Recreational activities

Sports teams

Student clubs

Performances on campus

Off-school grounds trips or experiences organized by the school district

Sponsored organization activities

Anything else that happens on school grounds



Does Title IX apply to sexual harassment in other countries?

- No – the US Department of Education interprets Title IX to apply only within the geographic boundaries of the United States
- Other countries may have laws that govern sexual harassment



When must we dismiss a Title IX complaint?

- Alleged sexual harassment occurred outside education programs or activities
- Alleged misconduct could not be sexual harassment even if true
- Complainant is not a current participant in education programs and activities at time of complaint



When may a case be dismissed?

- Complainant withdraws allegations in writing
- Respondent is no longer employed or is no longer a student
- Specific circumstances prevent the school from gathering evidence sufficient to reach a determination



What other policies might apply?

- Schools are free to use
 - Student code of conduct
 - Faculty/employee handbooks
 - Other policies

to address sexual harassment that does not occur in an education program or activity

What is sexual harassment?

Conduct on the basis of sex that is:

Quid pro quo harassment

Hostile environment harassment

Sexual assault

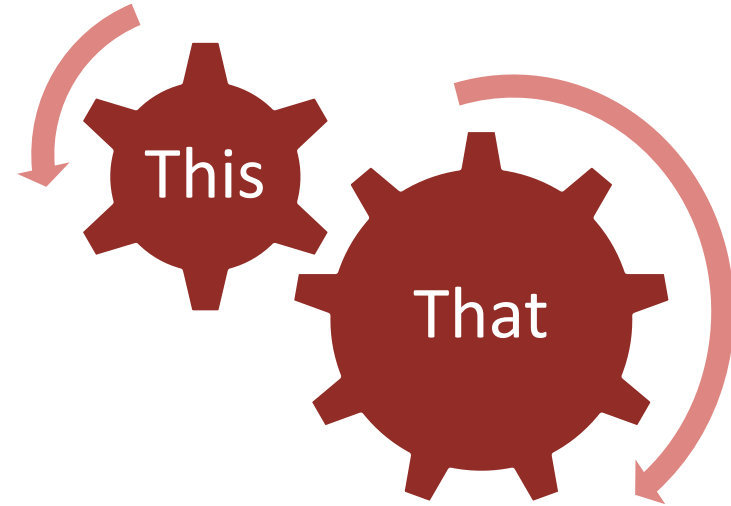
Dating violence

Domestic violence

Stalking

What is quid pro quo?

- A school conditions the provision of some aid, benefit, or service on another person's participation in unwelcome sexual conduct
 - Often arises in the employment context or where an employee holds a position of authority over a student



What is hostile environment?

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 recipient's education program or activity.





How do we determine if a hostile environment exists?

- Consider all the facts and circumstances, such as:
 - The type of misconduct
 - The frequency of the misconduct
 - Where the misconduct occurs
 - Whether a power differential exists, etc.
- From the perspective of a reasonable person

What is sexual assault?

Title IX regulations define “sexual assault” as incorporating the following classes of conduct:

Rape

Sodomy

Sexual assault
with an object

Fondling

Incest



What is rape?

Having carnal knowledge of a person, without the consent of the victim, including instances where the victim is incapable of giving consent because of age or because of temporary or permanent mental or physical incapacity. There is “carnal knowledge” if there is the slightest penetration of the vagina or penis by the sex organ of the other person. Attempted rape is included.



What is consent?

- Words or actions that a reasonable person in the respondent's perspective would understand as agreement to engage in the sexual conduct at issue
- A person who is incapacitated is not capable of giving consent
- Consent cannot be procured by coercion
- Be aware of minimum age of consent

What is incapacity?

Incapacity refers to a state where a person does not appreciate the nature or fact of sexual activity due to the effect of drugs or alcohol consumption, medical condition or disability, or due to a state of unconsciousness or sleep.





What is fondling?

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 age or because of temporary or permanent mental or physical incapacity.



What is incest?

Sexual intercourse between persons who are related to each other within the degrees wherein marriage is prohibited by law.



What is domestic violence?

Felony or misdemeanor crimes 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 state, or 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 state.



What is dating violence?

“Dating Violence” is violence committed by a person:

- Who is or has been in a social relationship of a romantic or intimate nature with the victim; and
- Where the existence of such a relationship will be determined based on consideration of the following factors:
 - The length of the relationship;
 - The type of relationship; and
 - The frequency of interaction between the persons involved in the relationship.



Example of dating violence

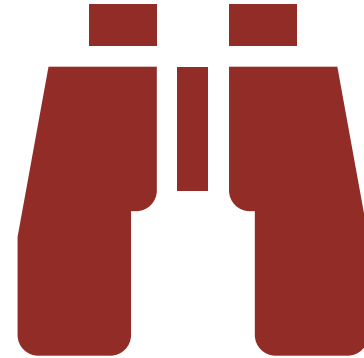
Two students have been dating for several months. One walks in on the other making out with another student on the sofa in the locker room. The student who walked in loudly shouts derogatory expletives at the other, threatens to “kill you both,” and forces/yanks the other graduate student by the arm and off the sofa.



What is stalking?

Engaging in a course of conduct directed at a specific person that would cause a reasonable person to:

- Fear for their safety or the safety of others; or
- Suffer substantial emotional distress.



Example of stalking



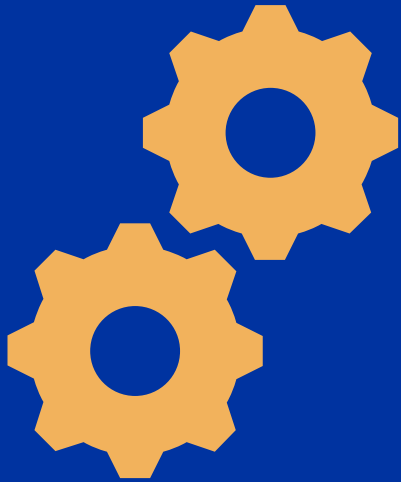
Cafeteria employee breaks up with Facilities employee. Facilities employee repeatedly shows up at the Cafeteria crying and asking for Cafeteria employee. Facilities employee repeatedly instant messages Cafeteria employee during work to talk about their relationship. Cafeteria employee rebuffs Facilities employee. One night, Facilities employee follows Cafeteria employee home by car from the school parking lot, prompting Cafeteria employee to call police.



Does Title IX also prohibit retaliation?

Yes – Title IX prohibits intimidation, threats, coercion, or discrimination against any individual for the purpose of interfering with any right or privilege secured by Title IX and its implementing regulations or because an individual has made a report or complaint, testified, assisted, participated in or refused to participate in any manner in an investigation, proceeding, or hearing under the school district’s policy.

Group Scenario



Senior and Junior connect on Tinder. They meet in a school parking lot where they take several shots of hard alcohol and anti-depressants that Senior brought. The two students kiss in the car for 30 minutes before driving to a local hotel where they have oral sex and intercourse without incident. The two students connect again a week later and meet in the school bathroom. Senior supplies alcohol and anti-depressants. The two engage in mutual oral sex and mutual digital penetration. Junior then gets on top of Senior and initiates intercourse. However, before the act is complete, Junior passes out and slumps over. After some time, Senior carries Junior to Senior's car in order to drive Junior back home. Junior comes-to in the car and becomes violent, striking Senior, throwing items at Senior, and demanding to know what Senior did "while I was out." The next day, Junior files a formal complaint, accusing Senior of sexual assault by incapacitation with respect to both encounters. Senior files a counter-complaint alleging sexual assault and dating violence with respect to the second encounter. Junior then files a counter-counter complaint accusing Senior of retaliation by having brought a frivolous counter-complaint.

Questions





HUSCH BLACKWELL

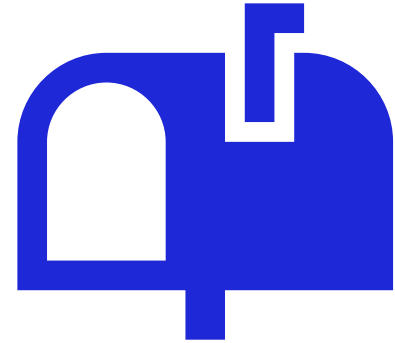
**Support Measures
and Interim
Restrictions**





How does a school district get notice of sexual harassment?

Sexual harassment response is triggered when district has “actual knowledge” of potential sexual harassment.





What is “actual knowledge”?

- “Actual knowledge” occurs when
 - Any employee or official has notice of sexual harassment in the school’s education programs or activities—in that the employee knew or should have known (e.g., through observation, overhearing conversations of uninvolved individuals, or receiving a complaint).
 - Note: the preamble to new regulations specifies that K-12 school officials include “peripheral” officials, such as coaches and school bus drivers.



When do we reach out to the alleged victim?

- After district has actual knowledge of alleged sexual harassment, Title IX Coordinator must contact alleged victim
- Provide information about supportive measures, explain the grievance process and how to file a formal complaint, and discuss the alleged victim's wishes



What if we can't identify the alleged victim from a report?

- Title IX Coordinator should oversee preliminary investigation to determine identity of alleged victim
- If identity of alleged victim cannot be discerned after reasonable inquiry, matter should be documented and consideration given as to whether other policies (such as student code of conduct) are utilized

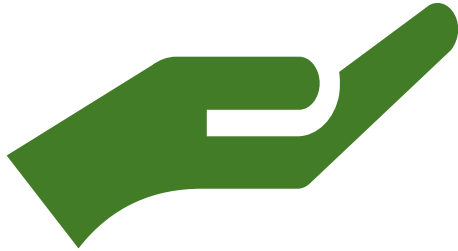


Do we need a formal complaint?

- No. Not in order to contact the alleged victim and begin support services
- The formal complaint is a specific written document that is required to commence the investigation and hearing process





What are supportive measures?




- Non-disciplinary, non-punitive supports and accommodations designed to preserve access to education programs and activities
- Reasonably available without fee or charge
- Without unreasonably burdening the other party


Examples of supportive measures

 Counseling

 Academic accommodations

 Counseling accommodations

 Security escorts

 Leave of absence

 Increased security or monitoring

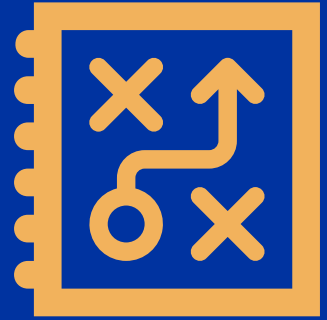
 Modified work schedules

 Mutual no-contact order where implicated by facts



Example of reasonable supportive measure

Student reports that Fellow Student sexually harassed Student by repeatedly propositioning Fellow Student until Student's brother intervened. Student would like to receive counseling but does not wish to file a formal complaint. Student does not believe Fellow Student poses a physical threat.



Example of reasonable supportive measure

History student reports that another student, also in AP US History, sexually assaulted History student two weeks ago. History student is uncertain whether to file a formal complaint but wants assistance transferring to a different teacher for AP US History.





Example of unreasonable supportive measure

One student reports another student committed sexual assault three years ago when they were freshman. The reporter has received strong academic marks since then. The reporter requests a refund of all private counseling charges for the last three years.

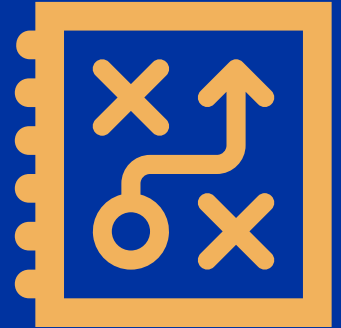




Example of unreasonable supportive measure

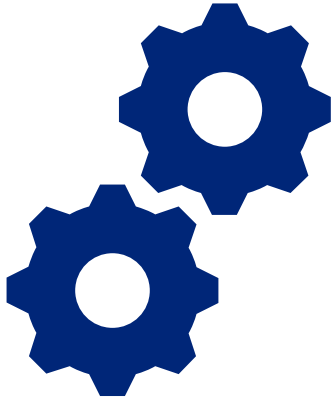
Employee in maintenance department accuses supervisor of sexual harassment by way of making sexualized jokes and remarks. Employee requests to be on indefinite paid leave for the remaining six months of the academic year.

Employee could easily be reassigned to work under a different supervisor in a different part of campus.





Do students and employees have other rights?



- Yes—other laws may trigger accommodations when a medical condition or disability is present
 - Americans with Disabilities Act
 - Family and Medical Leave Act
 - Section 504 of the Rehabilitation Act
 - IDEA



Can supportive measures affect the respondent?

- Yes, but cannot create an unreasonable burden
- Cannot be a form of *de facto* discipline
- Supportive measures are not a substitute for the investigation and hearing process



Are supportive measures confidential?

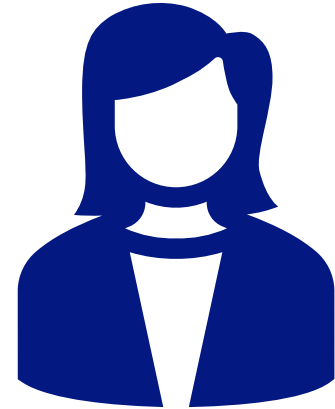


- Generally, yes
- Only shared to the extent necessary to effectuate the purpose of the supportive measure
- Only shared with school district employees who have a legitimate need to know



Who is responsible for supportive measures?

- Title IX Coordinator is responsible for “coordinating the effective implementation”
- May be delegated with appropriate oversight
- Typically, a collaborative effort involving more than one person



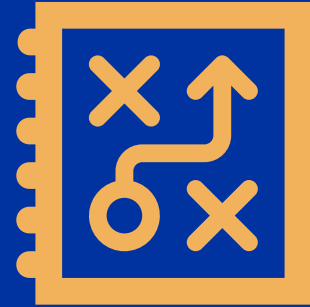


Can we utilize interim removals or suspensions for students?

- Students may be removed on emergency basis if:
 - Individualized safety and risk analysis
 - Determines an immediate threat to physical health or safety of any student or other individual arising from the alleged sexual harassment justifies removal
 - Student is given immediate notice and opportunity to contest the removal

Example of immediate threat to physical health or safety

French Club Student is reported to have raped Technology Club Student after providing Technology Club Student with a large quantity of heroin. Technology Club Student explains that French Club Student keeps heroin in French Club Student's campus locker and is known to sell it to others. Technology Club Student explains that at least one other student has been sexually assaulted by French Club Student using this method.





Can we utilize an already existing process for interim removals?

- Yes, if that process complies with the Title IX standard.
- Common examples include:
 - Threat assessment policy
 - Critical Incident Response Team (“CIRT”)
 - Interim suspension provisions of a Code of Conduct



Can we place employees on administrative leave?

- Yes – employee respondents may be placed on administrative leave without requisite showing of threat to physical health or safety
- Whether an opportunity to challenge administrative leave must be given depends on employee status and other policies (e.g., Employee Handbook)

Example of administrative leave



Teacher is accused of having sex in on-school grounds office with Student (age 18) currently in the teacher's class. Student alleges the encounter was non-consensual. Teacher admits to sex but denies it was coerced or otherwise non-consensual. School temporarily suspends teacher from teaching but continues pay and administrative duties.

Questions





HUSCH BLACKWELL

The Investigation Process





What is the purpose of Title IX investigation?

- For the district
- To collect relevant inculpatory and exculpatory evidence
- Sufficient to permit an impartial decision-maker to determine
- Whether or not the reported sexual harassment occurred



What are the general principles of an investigation?

- Parties must have sufficient notice to prepare and meaningfully participate
- Investigator has an independent duty to collect relevant inculpatory and exculpatory evidence
- Parties have an equal opportunity to present their statements, evidence, and to identify witnesses
- Parties have equal opportunity to review and comment on evidence developed
- Investigation is evidence-gathering; not fact-finding



What is a formal complaint?

- Signed writing
- From the alleged victim or the Title IX Coordinator;
- Alleging sexual harassment;
- Indicating desire to initiate the grievance process (i.e., investigation).



How do we tell the parties about an investigation?

- The school district must provide the parties written notice of a formal complaint that includes sufficient details about the “who, what, when, where, and how” before investigating





What else does the notice need to say?

- Written notice must also include:
 - Statement of presumption respondent is not responsible unless and until a determination is made at the end of the process
 - That parties have the right to an advisor of their choice
 - That parties have the right to inspect and review evidence
 - Any prohibition on providing knowingly false statements or information

Example (incorrect)



Student accuses Employee of quid pro quo harassment. Prior to sending written notice, Title IX Coordinator appoints investigator who schedules interviews with Employee's co-workers. Only after these interviews are complete, does the investigator send a written notice to Employee.



Can we gather any information prior to the written notice?

- Yes, but only to the extent necessary to determine how the case will proceed
- Typically, this “preliminary inquiry” would involve identifying the putative victim and understanding the scope of the allegations
- Information gathering that seeks to determine whether the allegations are *true* is investigatory and should await the written notice

Example (preliminary inquiry)



Student submits formal complaint via email with a single sentence reading, “Named Student sexually assaulted me.” Prior to sending a written notice, investigator meets with the complainant and asks for more specific information about what happened—the “who, what, when, where, and how.”

Example (preliminary inquiry)



School visitor reports that Student was sexually assaulted by another student. Investigator sends email to Student seeking to meet with Student to understand what happened and how Student wishes to proceed.

How do we collect evidence in an investigation?



Interviews of parties and witnesses



Collection of non-testimonial evidence

How do you structure an interview?



Rapport building/information providing phase



Substantive testimony collection

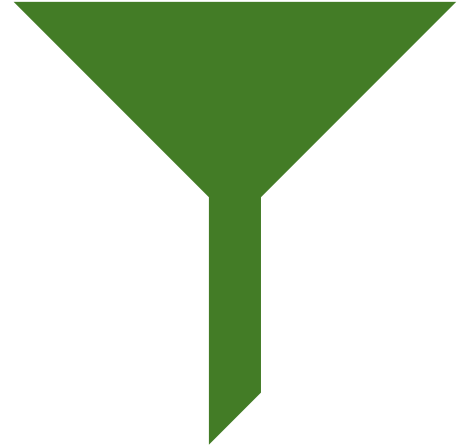


Closure/information providing phase



How do I ask questions in the substantive phase?

- Open-ended and non-suggestive invitations
- Use facilitator words to keep the narrative flowing
- Use cued-invitations to expand particular topics
- Delay use of specific questions (“recognition prompts”) as long as possible
- Avoid suggestive or leading questions



Examples of open invitations



“Please tell me what happened that night.”



“Walk me through what happened.”



“In your own words, tell me what occurred.”



“Please tell me everything that happened after you got to the party.”

Examples of facilitators



Examples of cued invitations

“You mentioned that . .
. . Can you tell me
more?”

“You said that Can
you elaborate?”

“You said they
'coerced' you. Can you
tell me what they did?”

“If I understood you
right, you said that
after Can you tell
me what happened in
between?”

Examples of recognition prompts



“What did she say?” (directive)



“What day did that happen?” (directive)



“Did it hurt?” (option choosing)



“Was he slurring words?” (option choosing)

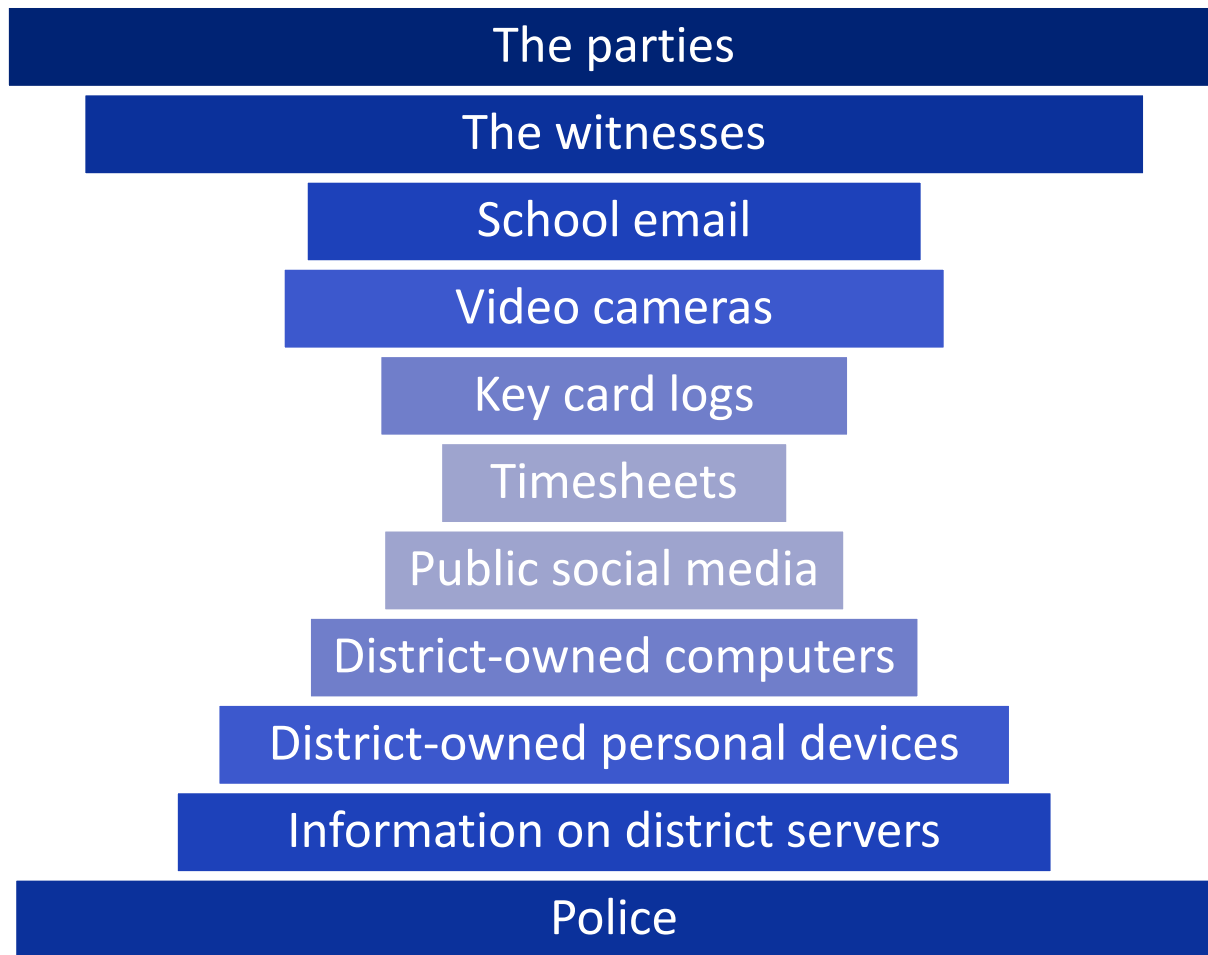


How do we make a record of the interview?

- Note-taking and audio recording are both appropriate methods of making a record of the interview
- If the investigator takes notes, they should be used to create a coherent interview memorandum shortly after the interview while the interview is fresh in the investigator's mind
- If the investigator records the interview, the investigator must be sure to clearly state on the record the time, place, date, and persons involved in the interview



**Example
sources of
non-testimonial
evidence**





May an investigation collect evidence on sexual history?

- Generally, no – Evidence of a complainant’s prior sexual behavior is relevant only if offered to prove that someone other than the respondent committed the conduct, or if evidence of specific incidents of the complainant’s prior sexual behavior with the respondent are offered to prove consent



May an investigation collect and rely on privileged records?

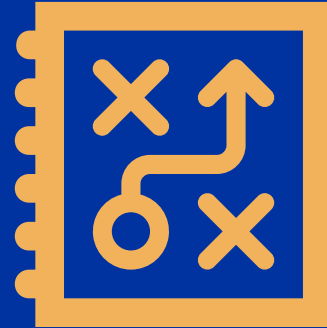


- Only if a party waives the privilege
- A school may not access information under a legally recognized privilege unless the holder of the privilege waives it
- School cannot unilaterally access its own counseling and health files for investigation purposes



Example of permissible use

—
Student who makes report of sexual assault executes release allowing disclosure of counseling records demonstrating student sought an emergency counseling session the morning after the alleged sexual assault



Example of impermissible use

—



Employee accuses Student of sexual assault and reports that Student transmitted an STD. Student denies sexual encounter occurred.

Investigator unilaterally contacts school nurse seeking records to determine whether Student has been treated for STD.



Do the parties have access to the evidence?

- Parties must be given access to all inculpatory and exculpatory evidence directly related to the allegations (regardless of whether the school intends to rely on it) at least 10 days before the investigation report is finalized
- Evidence must be provided to a party and their advisor in physical copy or electronically
- Any earlier access to the evidence must be provided equally



What exactly has to be shared?

- Anything that has “evidentiary” value
- That is, the information is potentially inculpatory or exculpatory in light of the allegations at issue; or is otherwise potentially relevant
- E.g., witness statements; interview transcripts; text messages; social media posts; photographs; etc.
- Logistical communications; calendar invites; support measure communications generally are not shared



Example



Transcript of interview with complainant contains 10 minutes of initial discussion about complainant's supportive measures and access to counseling. Investigator redacts this portion of the transcript before sharing with the parties.



Example



Investigator had 12 emails with respondent and advisor attempting to negotiate a time and place for interview. Investigator excludes the 12 emails from the evidence made available to the parties.



Do the parties get to respond to the evidence?

- Yes – after they review the evidence provided at least 10 days prior to issuance of the investigation report, parties can provide written responses
- Depending on written responses, additional investigation may be needed
- Investigator should consider the written responses in drafting final language of investigation report

Example (permissible)



After completing all interviews, investigator uploads interview transcripts and other evidence to a secure file sharing program and sends individual links and passwords to each party and their advisor.

Example (impermissible)

—



After completing all interviews, investigator prints the evidence and tells parties they can schedule a time to review it in a conference room without cell phones. They are not allowed to take the evidence outside the room.



How is the investigation concluded?

- Issuance of a written investigation report
- Must fairly summarize the evidence collected, including both inculpatory and exculpatory evidence
- Must be provided to each party and their advisor at least 10 days prior to any hearing (if applicable)



Does the investigation report make findings?

- No – the investigation report fairly summarizes the relevant inculpatory and exculpatory evidence collected during the investigation
- Under the new Title IX regulations, factual findings and determinations of policy violations are made by a decision-maker



Do the parties get to comment on the investigation report?

- Yes
- Parties are permitted to “review” and provide “written response” to investigation report





May parties have an advisor during the investigation?

- Yes – parties may be accompanied to any investigative interviews and meetings by an advisor of their choice
- Advisor may be an attorney, but does not have to be
- School may confine advisor to a passive role during the investigation phase
- School is not required to provide an advisor during the investigation phase

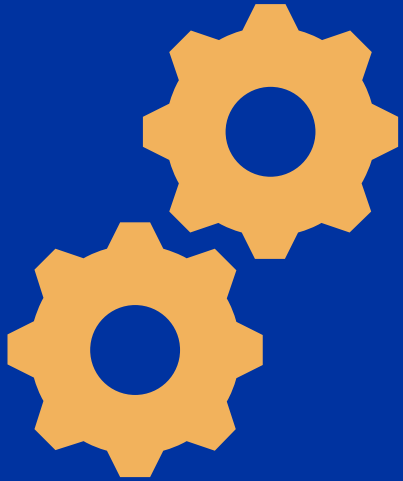




Parents' Involvement

- In K-12 education, parents/guardians have a legal right to act on behalf of a student in exercising Title IX rights, which includes the right to act for a student as a party or witness.
- The right of a parent/guardian applies throughout all aspects of a Title IX matter, from reporting sexual harassment to considering appropriate and beneficial supportive measures, and from choosing to file a formal complaint to participating in the grievance process.

Group Scenario



Student athlete accuses teammate of sexual harassment after teammate kisses student athlete in a hotel room at an out-of-season summer tournament in which some team members are playing with coach's encouragement. Teammate does not respond to investigator's written request for interview. Eventually, attorney for teammate sends letter to investigator indicating teammate will not submit to interview and demanding complaint be dismissed because the incident occurred outside Title IX jurisdiction. After investigator completes other interviews and makes the evidence available, teammate's attorney sends a signed declaration from teammate disputing the allegations and accusing student athlete of falsifying the complaint. The teammate's attorney also identifies six student athletes who teammate wants interviewed, three of whom will purportedly testify to the complainant's general predisposition to be untruthful.

Questions





HUSCH BLACKWELL

The Hearing Process



What is the purpose of the hearing?

- To hear testimony and receive non-testimonial evidence so that
- The decision-maker can determine facts under a standard of evidence
- Apply those facts to the policy, and
- Issue a written determination resolving the formal complaint and imposing discipline/remedial measures as necessary

Who is the “decision-maker”?



- A single hearing officer; or
- A hearing panel led by a chair



What standard of evidence can be used?

- Either
 - Preponderance of the evidence or
 - Clear and convincing evidence
- District must select a standard and apply it uniformly in all cases, regardless of the identity of the respondent



What happens before the hearing?

- Parties are provided the final investigation report at least 10 days prior to the hearing
- “Decision-maker” must be identified and clear conflicts of interest assessment
- Hearing must be scheduled, and logistics arranged
- Witnesses must be notified
- Pre-hearing conference should be held



What is a conflict of interest?

- A material connection to a dispute, the parties involved, or a witness, such that a reasonable person would question the individual's ability to be impartial
- May be based on prior relationship; professional interest; financial interest; prior involvement in a matter; or nature of position



How do we schedule a hearing?

- Set aside sufficient time considering the nature and complexity of the case
- Consider class and work schedules of parties and key witnesses to avoid conflicts
- Consider pre-scheduling a backup or “spill over” date in the event the hearing runs long or must be continued
- Provide letters excusing parties and witnesses from other obligations, as necessary



How do we notify parties and witnesses?

- Must provide written notice to the parties of time and place of hearing
- Should provide written notice to witnesses requesting their presence
- Notice may be issued by the decision-maker or another person in coordination with decision-maker

How does the hearing actually work?

- Title IX regulation is largely silent on specific elements
- Required elements include:

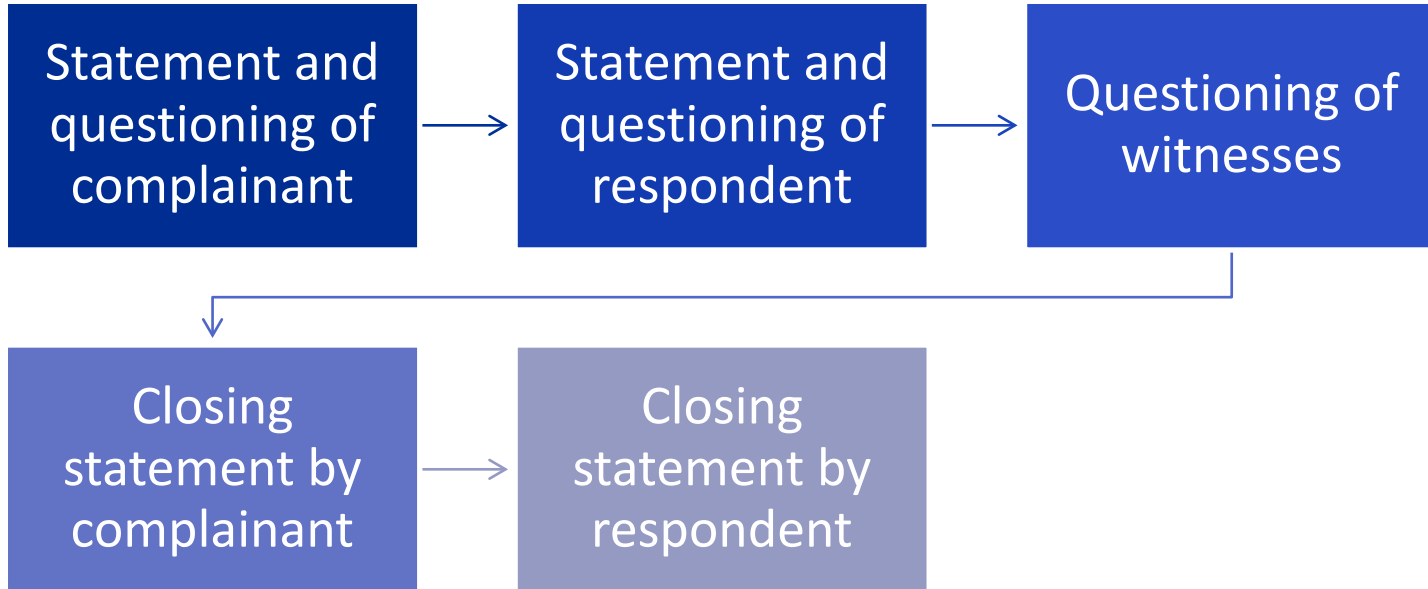
Decision-maker(s) must independently evaluate questions for relevance and resolve relevancy objections

Party's advisors must be allowed to conduct live questioning of other party and witnesses

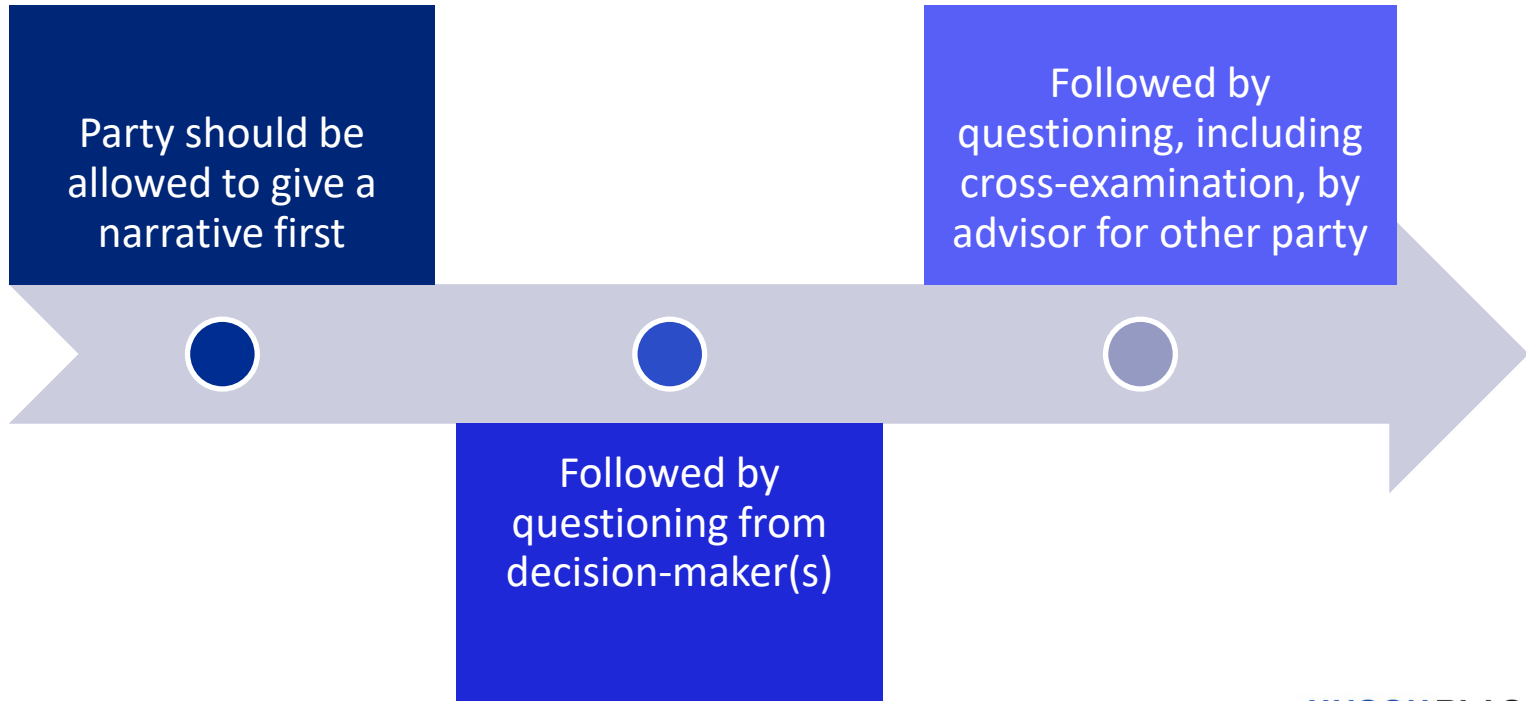
Party or witness who refuses to submit to live questioning from other party's advisor may have their testimony excluded (depends on policy)

Questioning of sexual history generally not permitted

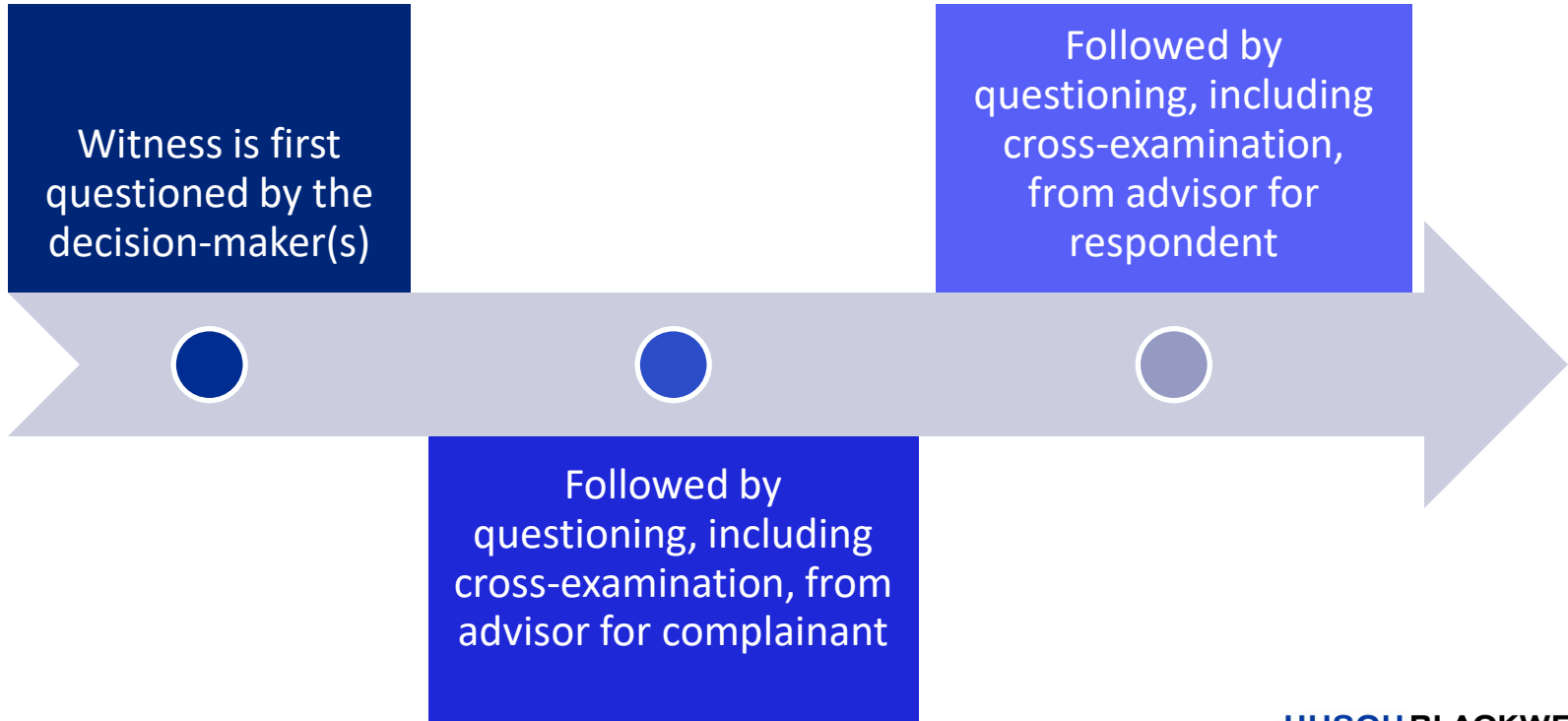
What is a potential sequence?



How might questioning of parties take place?



How might questioning of witnesses take place?





Can we have standards of decorum for hearings?

Yes, provided they are applied equally and do not violate explicit guarantees from the Title IX regulation.

Example (permissible)



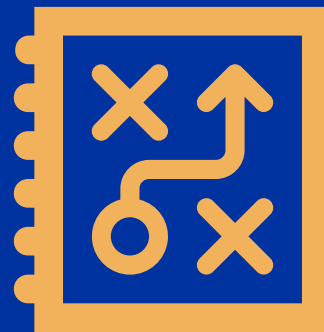
A school district's hearing procedures require all participants to remain seated during the hearing and to remain silent when another party is testifying or engaging in cross-examination except to succinctly raise an objection.



Example (impermissible; too broad)

—

A school district’s policy prohibits a party or advisor from “doing anything that would make another party feel intimidated, re-traumatized, or attacked in any way.”



How do(es) the decision-maker(s) decide a case?



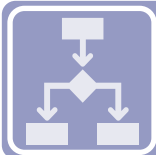
After hearing, decision-maker(s) must deliberate and consider all the admissible testimony and admissible non-testimonial evidence



Evaluate evidence for weight and credibility



Resolve disputed issues of fact under the standard of evidence adopted by the school district



Using the facts as found, apply the policy's definitions to those facts to determine whether sexual harassment occurred



How do(es) the decision-maker(s) issue a decision?

- In a written document, provided contemporaneously to the parties that:
 - Identifies the allegations of sexual harassment
 - Describes the various procedural steps taken from the time the formal complaint was made
 - States findings of facts supporting the determination
 - Reaches conclusions regarding application of relevant policy definitions to the facts
 - Includes a rationale for each finding for each allegation
 - States the disciplinary sanctions and remedies, if implicated by the determination made, and
 - Explains the procedures and grounds for appeal

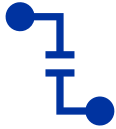


Who determines discipline and remediation?

- Some schools will have the decision-maker(s) also impose discipline
- Others may refer a disciplinary authority with jurisdiction over the respondent (i.e., Director of Human Resources)
- If referred to someone else, that must occur before the written determination is issued

What are the grounds for appeal?

Title IX regulation requires the following permitted grounds:



Procedural irregularity that affected the outcome of the matter

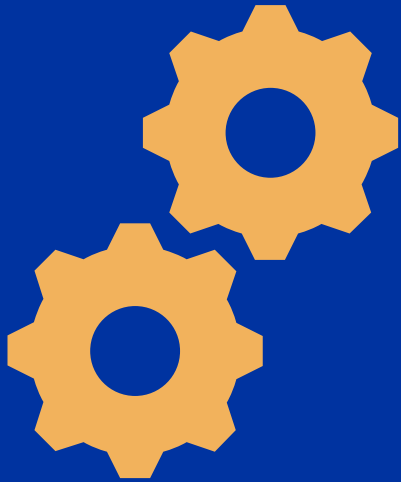


New evidence that was not reasonably available at the time of the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter; or



Title IX Coordinator, investigator, or decision-maker had a conflict of interest or bias against complainants or respondents generally or the individual complainant or respondent that affected the outcome of the matter

Group Scenario



Respondent is accused of sexually harassing another student at a school sports camp. School utilizes a single hearing officer. In advance of the hearing, school provides the hearing officer a copy of the investigation report and all evidence disclosed to the parties, including witness statements. At the hearing, the investigator testifies briefly about the nature of the formal complaint and the timing of various stages of the investigation. Advisor for the respondent then seeks to cross-examine the investigator about specific questions investigator asked or did not ask in interviews. The hearing officer rules the questioning irrelevant. When complainant is cross-examined by respondent's advisor, complainant takes long pauses and asks for several breaks before answering questions. The hearing officer permits this. Later, advisor for the complainant seeks to cross-examine respondent about whether respondent has been diagnosed with sexual addiction. The respondent refuses to answer. Three witnesses who gave statements in the investigation do not appear at the hearing.

Questions





HUSCH BLACKWELL

Alternative and Parallel Processes





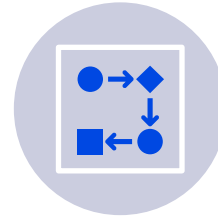
What is informal resolution?

A voluntary process to resolve formal complaints of sexual harassment through a mechanism other than the default investigation and hearing.

What are the key concepts of informal resolution?



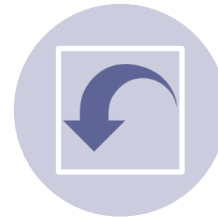
A formal complaint must first have been filed and written notice given to the parties



The parties must be apprised in writing of how the informal resolution process will work and the consequences of participating in it



The parties must voluntarily agree to participate in writing



The parties must be allowed to withdraw from informal resolution up until the point it is final

What are the limitations?

- Informal resolution cannot be used where an employee is accused of sexually harassing a student
- Informal resolution cannot be used in the absence of a formal complaint
- Cannot require persons to consent to informal resolution as a condition of employment or enrollment





Who facilitates an informal resolution?

- Any suitably qualified and trained person may facilitate informal resolution, including the Title IX Coordinator
- Facilitator can be a third-party mediator or alternative dispute resolution specialist
- Default rules on conflicts of interest and bias apply



How long can an informal resolution take?

- Informal resolution should be reasonably prompt
- Typically has the effect of suspending any default investigation and hearing process
- If informal resolution fails or appears futile, school should promptly resume default investigation and hearing process

Can a case that is resolved informally be “reopened”?

- It depends upon the terms of the informal resolution
- Title IX Coordinator should ensure that any informal resolution clearly resolves this question



Example

Informal resolution indicates that, in lieu of investigation, respondent will apologize for respondent's conduct and avoid future communication with complainant. Agreement states that, if respondent violates informal resolution, respondent will be subject to discipline under Student Code of Conduct, but formal Title IX complaint is resolved and closed.





How is an informal resolution documented?

- Agreements should be well-documented by the informal resolution facilitator
- Ideally, parties will sign the agreement or provide some other form of written confirmation
- Formal settlement agreements are typically not required unless they are resolving legal claims that have been asserted



May we use another process after Title IX?

- Yes
- Some conduct may not violate Title IX standards but will violate other standards
- Some conduct may merit additional punishment beyond what is merited by Title IX policy





May we use two processes at the same time?



- Yes
- Title IX permits other process to run concurrently
- Important to be clear to parties involved what is happening and how processes differ



May we conduct a “joint” investigation?

- Yes
- But any “joint” investigation must satisfy the Title IX standards
- Important to be clear to the parties what is going on
- Important to maintain integrity of Title IX evidence





Why would a school district continue with a Title IX process after respondent departure?

- Complainant's wishes
- Desire to avoid "passing the harasser" scenario
- Community expectation
- Large investment of time and resources to date
- Potential for respondent's return in the future
- Other factors possible

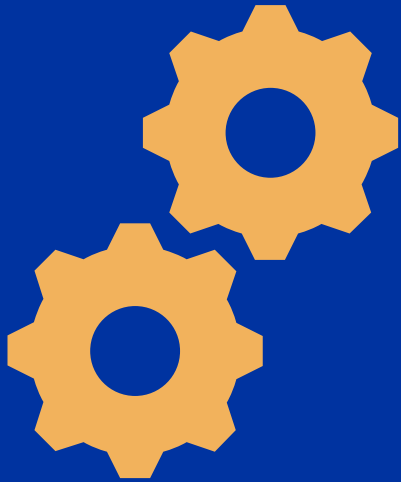


Can we use another process to make the same finding we would otherwise make under Title IX policy?



- No
- Title IX regulation requires the use of specific Title IX process for any “sexual harassment” as defined by Title IX that occurs in school district’s educational programs or activities

Group Scenario



Junior Student files sexual harassment complaint alleging that Senior Student broke down the door to Junior’s bathroom stall door while high on drugs, took off Senior’s own clothes, and attempted to get near Junior while Junior had pants down in the stall. As Title IX investigation proceeds, Junior indicates a desire for informal resolution of the sexual harassment complaint if Senior will apologize and agree to treatment. Senior agrees, and the Title IX complaint is closed. Unbeknownst to Junior, Senior has one prior conduct charge for illegal drug use and was previously reported to have sexually harassed another student while drunk. Concerned about the continuing risk Senior may pose, and after the Title IX complaint is closed, school district charges Senior under its conduct code for illegal drug use; damaging school property; lewd conduct; and invasion of privacy. The district’s conduct code does not use a hearing model. The school district finds Senior in violation of its code based on Junior’s statement and the statements of other witnesses that were made in the Title IX case before it was resolved. Senior accuses the district of a “bait and switch.”

Questions





HUSCH BLACKWELL

Regulatory and Caselaw Update





Have the Title IX regulations been rescinded?

- No
- The 2020 Title IX regulations remain in effect and school districts must continue to abide by them
- Court challenges to the regulations have been largely unsuccessful (to date; but see D. Mass.)
- Current administration cannot rescind or alter regulations without rulemaking process



Will the Title IX regulations be rescinded?

- Changes are likely but wholesale rescission is not
- ED is currently engaged in a “comprehensive review” of Title IX regulations
 - Internal review of regulations and guidance
 - Public hearings with comments and feedback from stakeholders
- Any changes likely will not take effect until 2022-2023 academic year at the earliest



Is there guidance in the interim?

- Yes
- July 2021 ED Q&A document on Title IX sexual harassment guidance
- Q&A articulates ED's interpretation of existing regulations and does not have the force and effect of law
- Includes sample language for key policy provisions



Are there key points from the Q&A? (1 of 5)

- Regulatory application
 - Regulations apply to sexual harassment occurring on or after August 14, 2020
 - Sexual harassment in online/virtual operations of a school district is covered by Title IX
 - A school's Title IX obligations continue despite COVID-19



Are there key points from the Q&A? (2 of 5)

- Combatting sexual harassment
 - Schools should take steps to affirmatively prevent sexual harassment in addition to the grievance process
 - Schools can take additional steps to combat sexual harassment as long as those steps don't conflict with regulations



Are there key points from the Q&A? (3 of 5)

- Other policies
 - Schools may address conduct that falls outside the scope of the regulations through other policies
 - A school may use its code of conduct to address sexual harassment where the complainant is not a participant at the time the complaint is filed
 - Forms of sex discrimination other than sexual harassment are not covered by the sexual harassment regulations and may be resolved through a different process that is prompt and equitable



Are there key points from the Q&A? (4 of 5)

- Process
 - A school may use a “trauma-informed” approach as long as it does not adopt improper presumptions or stereotypes
 - Presumption of no responsibility does not mean a presumption that the complainant is lying or that alleged harassment did not occur



Are there key points from the Q&A? (5 of 5)

- Hearings
 - An advisor may fulfill their cross-examination duty simply by restating questions their party wants asked
 - The cross-examination exclusionary rule does not apply to statements that are themselves alleged to be harassment; otherwise, no exceptions



Is there an update on Title IX and gender identity?

- Supreme Court decision in Title VII context
- ***Bostock v. Clayton County Georgia***, 140 S. Ct. 1731 (2020)
- “Sex” for purposes of Title VII’s definition of sex discrimination includes discrimination based on gender identity and sexual orientation
- Title VII caselaw often borrowed by courts to inform construction of Title IX



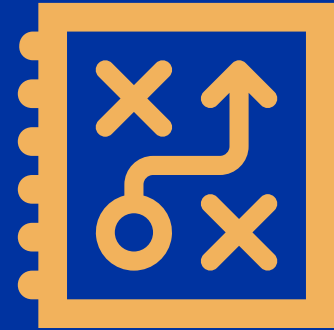
What is ED's current position on gender identity and Title IX?

- June 2021 Notice of Interpretation
 - Title IX prohibits discrimination based on gender identity and sexual orientation
 - Makes clear that harassment based on gender identity and/or sexual orientation is sexual harassment covered by August 2020 regulation



Example

Student experiences repeated jokes and taunts from peers in gym class regarding Student's transgender status and manner of gender expression. Student files formal complaint of sexual harassment. Complaint is covered by 2020 sexual harassment regulations.





Are there other administration initiatives concerning LGBTQ+?

- Biden-administration wide-directive to apply civil rights laws and regulations to ensure equal access for LGBTQ+ in USA and abroad
- Dear Colleague Letter on Transgender Students
- Executive Order on Preventing and Combatting Discrimination Based on Gender Identity or Sexual Orientation
- Anticipate more robust OCR enforcement of LGBTQ+ implicated complaints of discrimination/harassment



What are trends in caselaw?

- Continued growth in number of respondent-initiated lawsuits alleging:
 - Title IX sex discrimination based on status as male
 - Due process violations for failure to provide fundamental fairness (public schools)
 - Breach of contract for failure to follow policies and procedures in handbooks
 - Negligent administration of Title IX policies

Example: Doe v. University of Denver

- Respondent can prevail if demonstrates sex (male) was a motivating factor in disciplinary decision
- Can be shown by:
 - Significant (and largely unexplainable) procedural irregularities that all work to the benefit of a party of the opposite sex
 - Statistical evidence demonstrating harshness to males or leniency to women



Example: Does 1-2 v. University of Minnesota

- Public attention, media pressure, and threat of loss of public funding can support circumstantial case of intentional bias against male student athletes accused of sexually assaulting women
- Institution's history of legal claims brought by female victims, and desire to avoid future claims of a similar nature, can be circumstantial evidence of anti-male bias





Are there other trends?

- Rising number of cases presenting a conflict between First Amendment rights and anti-harassment policies
- Preferred name policies; social media policies; application of conduct expectations to off-campus social media



Example: Meriwether v. Hartop

- Institution's policy required all faculty members to refer to students by their preferred pronouns
- Religious faculty member refuses and Title IX complaint is made; hostile environment harassment is found before being revised to finding a disparate treatment
- Faculty member sues and wins; First Amendment's academic freedom principles protect faculty when teaching, including protection from certain compelled speech

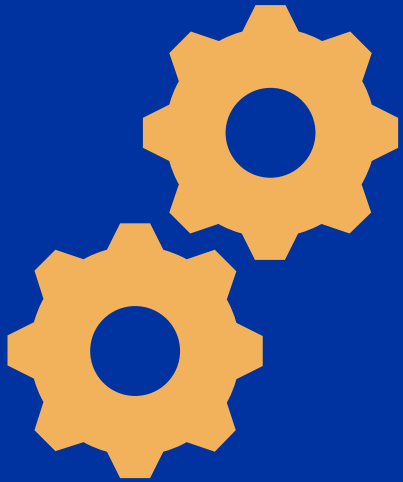


Example: Mahanoy Area Sch. Dist. v. B.L.

- Cheerleader disciplined for vulgar social media posts about team
- School's ability to discipline for off-campus speech is significantly less than on-campus speech
- School has a duty to protect the expression of unpopular views
- Vulgar speech on private time with no evidence of disruption is insufficient to overcome First Amendment's protections



Group Scenario



Two years ago, district settled lawsuit brought by student raped at hockey game. As part of settlement, district issued public statement promising “robust” measures to prevent sexual assault in the athletic community. Recently, district received Title IX sexual harassment complaint alleging members of the same athletic team are creating a hostile environment through public Facebook posts that refer to members of the opposite sex using vulgar terms and that discuss the members’ sexual conquests with members of other student organizations (without using names). The complaint specifically states: “It’s clear the school isn’t keeping its promise to prevent sexual assault when it’s allowing students to post garbage like this where everyone can see it.”

Questions



HUSCH
BLACKWELL