

# Refresher: Title IX Sexual Harassment Procedures

Harry Wright, Jr. , Assistant General Counsel  
Legal Conference 2021

# Title IX Overview

- ▶ “No person in the United States shall, *on the basis of sex*, be excluded from participation in, be denied the benefits of, or be subject to discrimination under any education program or activity receiving federal financial assistance.”
  - ▶ Title IX protects students and employees from sex discrimination in their education environments, this includes protection from sexual harassment.
- ▶ In 2020, the U.S. Department of Education released new regulations under Title IX that dictated specific procedures on how schools must respond to sexual harassment complaints.
- ▶ New procedures went into effect for the 2020-2021 school year, and extensive training of all staff was completed last fall.

# Overview of New Regulations

- ▶ Define what falls within Title IX's protections
- ▶ Adopt deliberate indifference standard to “actual knowledge” of sexual harassment
- ▶ Add that knowledge of **any school district employee** can trigger a duty to respond (no longer limited to professional staff)
- ▶ Discuss how a school must respond to formal/informal complaints and the procedures that the school must have in place

# Overview of New Regulations

- ▶ Create new, required terms for the parties (complainant and respondent) and requires defined roles for staff:
  - ▶ Title IX coordinator, investigator, decision maker, informal resolution facilitator, hearing advisor, and person reviewing any appeal
- ▶ Outline training schools must provide to personnel involved in the Title IX complaint process
- ▶ Discuss written notices schools must provide as part of the complaint process
- ▶ Require specific anti-retaliation provisions with a complaint process for any retaliation

# Sexual Harassment Defined

- ▶ **Quid Pro Quo:** a school employee conditioning education benefits on participation in unwelcome sexual conduct
- ▶ **Hostile Environment:** Unwelcome conduct that a reasonable person would determine is so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the school's education program or activity
- ▶ Sexual assault, dating violence, domestic violence, or stalking

# Terms/ Definitions

- ▶ Complainant: an individual who is alleged to be the victim of conduct that could constitute sexual harassment.
- ▶ Respondent: an individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment.
- ▶ Recipient: the district/ schools

# School's Response Obligations: When to Respond

- ▶ A school must respond when it has:
  - ▶ Actual knowledge
  - ▶ Of sexual harassment
  - ▶ That occurred within the school's education program or activity
  - ▶ Against a person in the US

# School's Response Obligations: Actual Knowledge

- ▶ A school has actual knowledge when:
  - ▶ ANY employee of an elementary or secondary school has notice of sexual harassment or allegations of sexual harassment
    - ▶ Includes teachers, teacher's aide, bus drivers, cafeteria workers, counselors, school resource officers, maintenance staff worker, etc.

# School's Response Obligations: Education Program or Activity

- ▶ The sexual harassment must occur within the school's education program or activity
  - ▶ This includes events, or circumstances over which the school exercised **substantial control** over both
    - ▶ the **respondent**; and
    - ▶ the **context** in which the sexual harassment occurs
- ▶ The harassment must have been perpetrated against a person in the United States (this applies mainly to post-secondary programs that may occur abroad).

# School's Response Obligations: How to Respond

- ▶ Deliberate Indifference Standard
  - ▶ When a recipient has **actual knowledge** of sexual harassment or allegations of sexual harassment, the recipient must respond **promptly**, in a way that is not **deliberately indifferent**
    - ▶ Meaning in a way not clearly unreasonable in light of the known circumstances

# School's Response Obligations: How to Respond When I Get a Complaint?

If a parent or student makes allegations that could amount to sexual harassment, the campus Title IX Coordinator must promptly contact the “complainant” to:

- ▶ Explain
  - ▶ The right to file a formal complaint
  - ▶ Process for filing a formal complaint
  - ▶ Grievance process
- ▶ Discuss the availability of supportive measures
  - ▶ **With or without** the filing of formal complaint
- ▶ Consider the complainant's wishes with respect to supportive measures
- ▶ Document the District's response
  - ▶ Don't worry, we have created a checklist and forms for you!

# What are Supportive Measures?

- ▶ Free, individualized services designed to restore or preserve an individual's equal access to education, to protect the individual's safety, or deter further sexual harassment
- ▶ Required even if the complainant does not move forward with a formal complaint
- ▶ Cannot be punitive or disciplinary
- ▶ Consider the complainant's wishes regarding supportive measures
- ▶ The measures should not unreasonably burden another person
- ▶ The measures should be kept confidential
- ▶ Importantly, they should be made available to both the complainant and the respondent
- ▶ Title IX Coordinator is responsible for implementing the supportive measures

# Supportive Measures

- ▶ Examples:
  - ▶ Counseling
  - ▶ Course related adjustments
  - ▶ Modifications of work or class schedules
  - ▶ Campus escort services
  - ▶ Leaves of absence
  - ▶ Increased security and monitoring of certain areas of campus, and
  - ▶ Mutual restrictions on contact between the parties

# Emergency Removal/ Administrative Leave

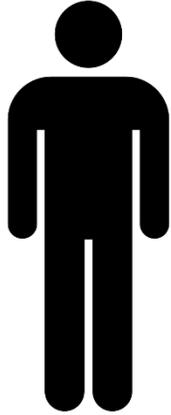
- ▶ Emergency removal of a student
  - ▶ Must conduct an individualized safety and risk assessment to determine if a student is an imminent threat to the physical health or safety of another student or individual arising from the allegations of sexual harassment
  - ▶ Must provide notice and opportunity to challenge the removal immediately following the removal
- ▶ Administrative leave for employees during an investigation is permitted
  - ▶ Follow state law, Board policy, and normal district procedures

But keep in mind...

## IDEA & Section 504 Implications

- ▶ Removal of a student could be a change of placement
- ▶ MDR requirements and procedural safeguards will be triggered if a removal would result in a change of placement
- ▶ Some supportive measures, such as provision of counseling or changes to class schedules, could also implicate placements and services under IDEA and Section 504
- ▶ Bottom line: ARD/Section 504 Committees will need to be involved from the beginning and the Title IX staff will need to be trained on identifying and address SPED/504 implications

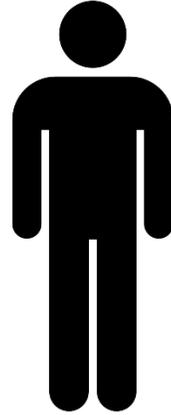
# Title IX Personnel



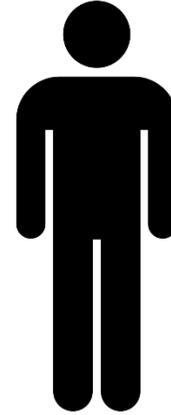
Title IX  
Coordinator(s)



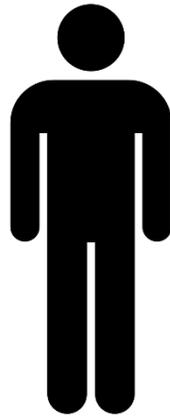
Investigator



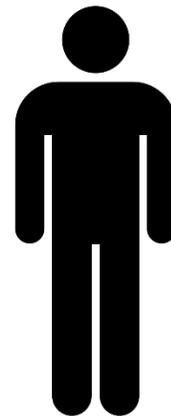
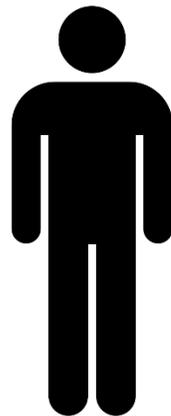
Decision maker



Appeal Officer

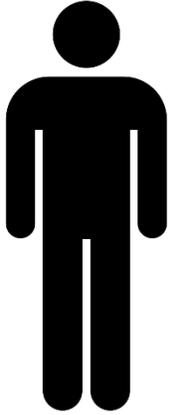


Informal Resolution Facilitator

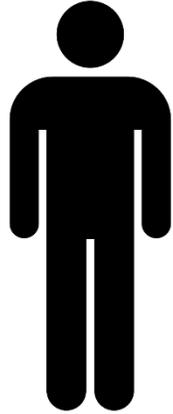


Hearing Advisors

# Title IX Assignments in CFISD



Title IX  
Coordinator(s)  
Assistant Principal  
(Elem)  
Director of  
Instruction (MS)  
Associate Principal  
(HS)



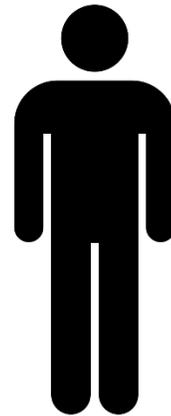
Investigator  
Assistant Principal



Decision maker  
Campus Principal

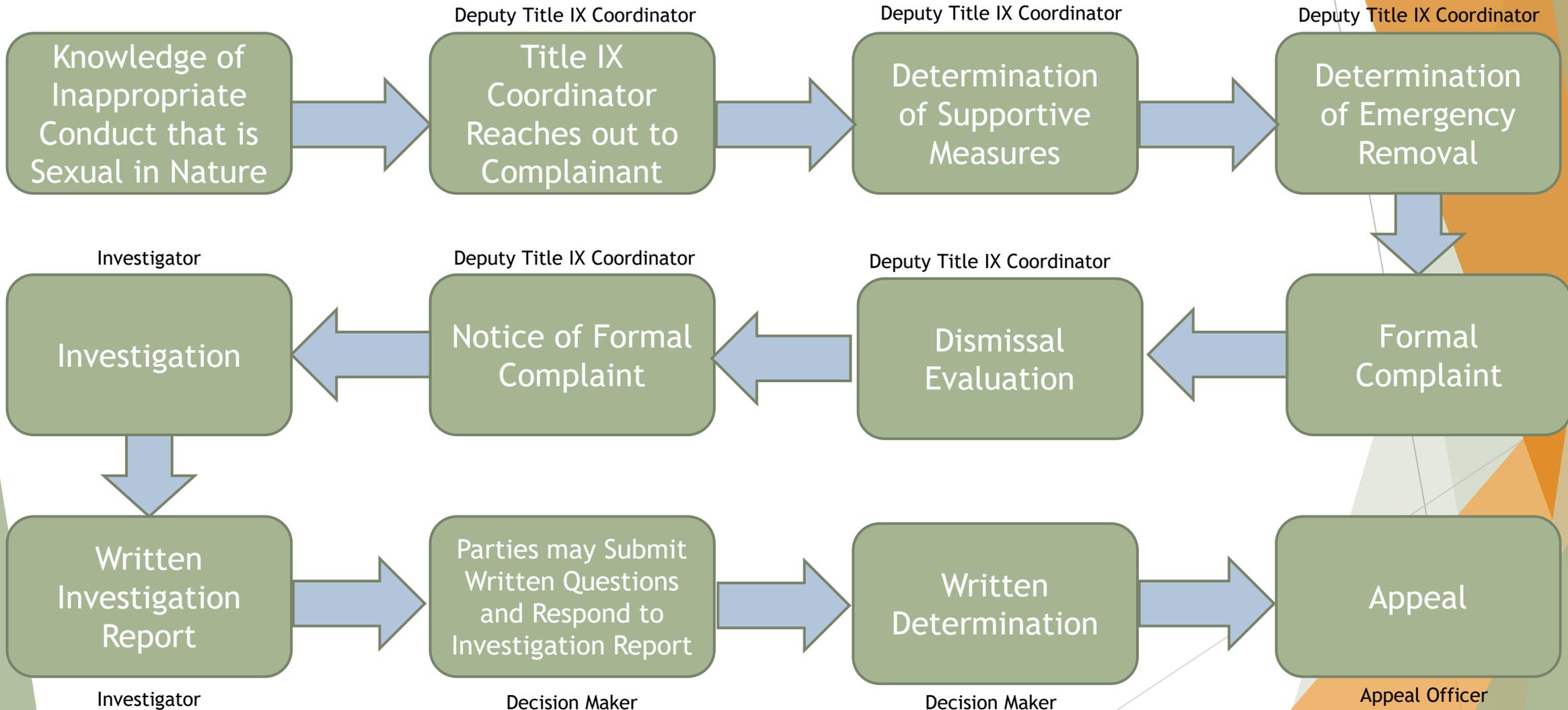


Appeal Officer  
Assistant  
Superintendent



Informal Resolution Facilitator  
Campus Counselor

# Basic Title IX Process



# Title IX Coordinators

- ▶ District must designate and authorize at least one District Title IX Coordinator (Dr. Deborah Stewart)
  - ▶ May also designate additional employees to serve as “Deputy Title IX Coordinators” which we call the Campus Title IX coordinators at every campus
- ▶ Campus Title IX Coordinators roles
  - ▶ Receive complaints of alleged sexual harassment
  - ▶ Advise complainants of availability of supportive measures
  - ▶ Explain to the complainant the process for filing a formal complaint
  - ▶ Potentially sign a formal complaint of harassment, if needed
  - ▶ Implement supportive measures, monitor and adjust as needed
  - ▶ Overseeing the grievance process

# Formal Complaint

- ▶ Made by a complainant (or parent, or legal guardian) or signed by the Title IX Coordinator
  - ▶ Alleging sexual harassment against a respondent; and
  - ▶ Requesting that the school investigate the allegation of sexual harassment
- ▶ Complainant's wishes as to whether to file a formal complaint should be respected unless the Title IX Coordinator determines that initiating an investigation against the complainant's wishes is not clearly unreasonable.
- ▶ Requires a complainant to be participating in or attempting to participate in the education program or activity of the school.
- ▶ School must have policy regarding how to file a formal complaint and must publish how to file the formal complaint on the district's website.

# Formal Complaint: Response

- ▶ Upon receipt of a formal complaint and prior to any interviews, schools must provide parties with written notice of:
  - ▶ School's grievance process
  - ▶ Allegations of sexual harassment
  - ▶ Presumption of innocence
  - ▶ Standard of Evidence
  - ▶ Right to inspect and review evidence
  - ▶ Right to have an advisor during the process
  - ▶ Any provisions in the school's code of conduct that prohibits knowingly making false statements or submitting false information during the grievance process
  - ▶ Informal resolution options

# Formal Complaint: Dismissal

- ▶ Mandatory dismissal required when allegations:
  - ▶ Do not meet the definition of sexual harassment
  - ▶ Do not occur in a school's education program or activity
  - ▶ Are not against a person in the U.S.
- ▶ Permissive/Discretionary dismissal allowed when:
  - ▶ Complainant informs the Title IX Coordinator in writing that the complainant desires to withdraw the formal complaint or allegations in the complaint
  - ▶ Respondent is no longer enrolled or employed by the school, or
  - ▶ Specific circumstances prevent the school from gathering sufficient evidence to reach a determination about the allegations
  - ▶ The Complainant no longer has any involvement with the District.

# Formal Complaint: Dismissal

- ▶ Upon dismissal, a school must promptly send written notice of the dismissal including:
  - ▶ Notice of dismissal
  - ▶ Reasons for dismissal
  - ▶ Appeal options for a dismissal
- ▶ Any party may appeal dismissal

# Formal Complaint Process: Requirements

- ▶ Treat parties equitably
- ▶ Objective evaluation of evidence
- ▶ Ensure all individuals involved are properly trained with no conflicts of interest
- ▶ Presumption of innocence
- ▶ Reasonably prompt timeframes with delays only for good cause
- ▶ Description of range of outcomes
- ▶ Standard of evidence
- ▶ Right to appeal
- ▶ Description of range of supportive measures
- ▶ No information protected by a legal privilege can be used unless the person holding privileges has waived it in writing

# Formal Complaint Process: Investigation Requirements

- ▶ Investigations cannot be conducted by decision makers or appeal officers
- ▶ Schools must provide written notice including:
  - ▶ Date, time, location, participants
  - ▶ Purpose of hearings (if applicable)
  - ▶ Investigative interviews
  - ▶ Other meetings
  - ▶ Sufficient time to prepare
- ▶ Hearing Advisors
  - ▶ Parties must have the same opportunity to select an advisor

# Formal Complaint Process: Investigation

## - Evidence Requirements

- ▶ Burden of gathering evidence and burden of proof must remain on schools
- ▶ All evidence must be objectively evaluated
- ▶ Confidentiality should be maintained to the greatest extent possible
- ▶ Privacy of a party's medical, psychological, and similar treatment records are protected by stating that schools cannot access or use such records unless the school obtains the party's voluntary, written consent to do so
- ▶ Schools must provide equal opportunity for the parties to present fact and expert witnesses and other inculpatory and exculpatory evidence
- ▶ Schools must not restrict the ability of the parties to discuss the allegations or gather evidence (e.g., no "gag orders")

# Standard of Evidence

The law gives school districts the choice between the preponderance of the evidence standard and clear and convincing evidence standard.

- ▶ The preponderance of the evidence standard is understood to mean concluding that a fact is more likely than not to be true. At least 51% of the evidence favors the complainant.
- ▶ A clear and convincing evidence standard is more rigorous, understood to mean that a fact is highly probable to be true.
- ▶ This standard must be used for all complaints against students and employees.
- ▶ In CFISD, we have adopted the preponderance of the evidence standard.

# Formal Complaint Process: Investigator Role

- ▶ Determine scope of investigation
- ▶ Immediately identify and gather sources of evidence
- ▶ Preserve evidence
- ▶ Conduct interviews
- ▶ Interview fact and expert witnesses
- ▶ Evaluate all the evidence
  - ▶ Opportunity to respond
- ▶ Draft investigative report
- ▶ Finalize investigative report
  - ▶ Opportunity to respond

# Formal Complaint Process: Investigative Report

- ▶ Contents of the investigative report
  - ▶ Description of allegations
  - ▶ Description of procedural steps
  - ▶ Responses of each party to the allegations
  - ▶ Summary of relevant evidence
  - ▶ The parties' written responses regarding the evidence
- ▶ No length requirement
- ▶ Must be directly related to the allegations raised in the formal complaint

# Formal Complaint Process: Investigation Process

- ▶ Opportunities to respond:
  - ▶ Both parties must be given the opportunity to review all evidence prior to the conclusion of the investigation and be given at least 10 days to submit a written response.
  - ▶ Prior to reaching a final determination, school must send to each party the investigative report for review and written response.

Recommended that the 10 days are school days.

# Formal Complaint Process: Hearings; Written Questions

No live hearing requirement for K-12. Recommended to not include a hearing in the grievance process.

But, the Decision Maker must afford each party the opportunity to submit written, relevant questions that a party wants asked of any party or witness prior to reaching a determination.

- ▶ Rape Shield - Questions and evidence about a complainants prior sexual behavior are irrelevant during the entire grievance process unless:
  - ▶ Offered to prove that someone other than the respondent committed the alleged misconduct
  - ▶ Offered to prove consent

# Formal Complaint Process: Hearings; Written Questions

## Written Questions Hearing Process

- ▶ Each party may submit written, relevant questions that a party wants asked of any party or witness.
  - ▶ Questions are to be submitted after the investigative report has been sent, but before determining responsibility.
- ▶ Each party must provide answers to the questions within the required timeline.
- ▶ Each party is allowed additional, relevant, follow-up questions.

The written submission of questions procedure may overlap with the time period for the submission of responses to the investigative report.

# Hearing Advisor Role

- ▶ Advisors may be present during interviews and meetings.
- ▶ Advisors may review evidence and reports from investigation process.
- ▶ Advisors may be present for the written hearing process.
- ▶ Advisors may be friends, family members, attorneys, or other individuals with whom the party has a trusted relationship.

The district is not responsible for providing or training hearing advisors.

# Written Determination Requirements

- ▶ Decision maker may not be the Title IX Coordinator or investigator.
- ▶ Written determination must be sent to both parties simultaneously.
- ▶ Title IX Coordinator is responsible for effective implementation of any remedies.
  - ▶ Remedies must be designed to restore or preserve equal access to the school's educational program or activity.
  - ▶ Remedies may be disciplinary and serve as punishment, they need not avoid burdening the respondent.

# Written Determination Requirements

- ▶ Written determination must include:
  - ▶ Identification of the allegations potentially constituting sexual harassment
  - ▶ Portion of the school's policies that was violated
  - ▶ Description of the procedural steps
  - ▶ Findings of fact
  - ▶ Conclusions regarding application of code of conduct to facts
  - ▶ Statement of/ rationale for the result as to each allegation
  - ▶ Determination regarding responsibility
  - ▶ Any disciplinary sanctions imposed on the respondent
  - ▶ Whether remedies will be provided to the complainant
  - ▶ Permissible bases for the complainant and respondent to appeal

# Decision Maker Role

- ▶ Determine responsibility using investigative report and written statements from parties
- ▶ Create a written determination
- ▶ Distribute determination to both parties simultaneously
- ▶ Facilitates the written questions process

# Appeal Requirements

- ▶ Must offer appeal to a written determination of responsibility or dismissal of a formal complaint on the following basis:
  - ▶ Procedural irregularity that affected the outcome of the matter,
  - ▶ Newly discovered evidence that could affect the outcome of the matter, and/or
  - ▶ Title IX personnel had a conflict of interest or bias that affected the outcome of the matter
- ▶ School may choose to offer appeals on an additional bases.
- ▶ Decision maker on appeal (the appeal officer) cannot be the same decision maker from the initial determination, the investigator, or Title IX Coordinator.

# Appeal Officer Role/ Appeal Process

- ▶ Notify the other party in writing when an appeal is filed
- ▶ Implement appeal procedures equally for both parties
- ▶ Review appeal form and appeal statements
- ▶ Give both parties a reasonable, equal opportunity to submit a written statement in support of, or challenging, the outcome
- ▶ Evaluate the evidence and outcome
- ▶ Issue a written decision including:
  - ▶ Result of the appeal
  - ▶ Rationale for the result
- ▶ Provide the written decision simultaneously to both parties
- ▶ This determination is final

# Informal Resolution Requirements

- ▶ Requires a formal complaint
- ▶ Voluntary, informed, written consent from both parties to proceed in an informal resolution
- ▶ May not require as a condition on enrollment or employment or enjoyment of any other right, waiver of the right to an informal resolution and adjudication of formal complaints
- ▶ Not available for allegations involving allegation that an employee sexually harassed a student

# Informal Resolution Requirements

- ▶ Written notice required upon initiation of informal resolution process detailing:
  - ▶ Allegations
  - ▶ Circumstances under which the parties would be precluded from resuming a formal complaint
    - ▶ I.e. after agreeing to a resolution determination
  - ▶ The right to withdraw
  - ▶ Consequences of the process
- ▶ Conducted by an informal resolution facilitator who assists the parties in reaching an agreement.

# Retaliation

- ▶ New regulations contain an anti-retaliation provision.
- ▶ Charges of code of conduct violations that arise out of the same facts or circumstances as a report of sex discrimination or sexual harassment for the purpose of interfering with any right under Title IX constitutes retaliation.
- ▶ Charges for making a materially false statement is not retaliation if charge is not based solely on outcome of the grievance process.
- ▶ Must have a complaint process for retaliation.

# Accessible Information

- ▶ Notice of the school’s policy of non-discrimination
- ▶ Title IX Coordinator Information
  - ▶ Name or title, office address, email address, and telephone number
- ▶ Training Materials
- ▶ Grievance Process
  - ▶ Must “adopt and publish grievance procedures that provide for the prompt and equitable resolution of student and employee complaints” alleging any action prohibited by Title IX

Information must be made available to applicants for admission and employment, students, parents or legal guardians, employees, all unions or professional organizations holding collective bargaining or professional agreements with the school.

# Recordkeeping

- ▶ Must maintain for a period of **seven years** records of—
  - ▶ Final determination
  - ▶ Any audio or audiovisual recording or transcript
  - ▶ Any disciplinary sanctions imposed on the respondent
  - ▶ Any remedies provided to the complainant designed to restore or preserve equal access to the recipient's education program or activity
  - ▶ Any supportive measures taken or the reason for no supportive measures
  - ▶ Any appeal and the result
  - ▶ Any informal resolution and the result; and
  - ▶ All materials used to train Title IX Personnel, also made available on the district's website
- ▶ Must document basis for conclusions reflecting that the district's response was not deliberately indifferent.
- ▶ Must document measures designed and taken to restore or preserve equal access to the recipient's education program or activity.

# Questions?

