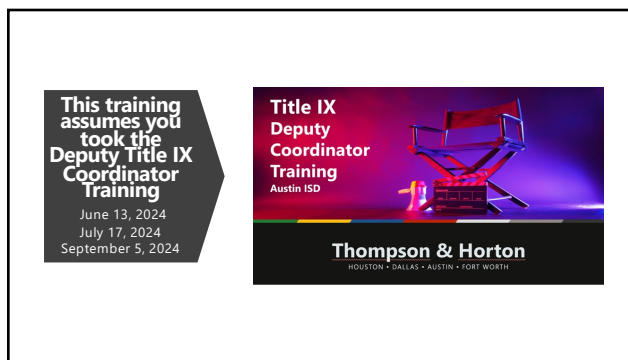
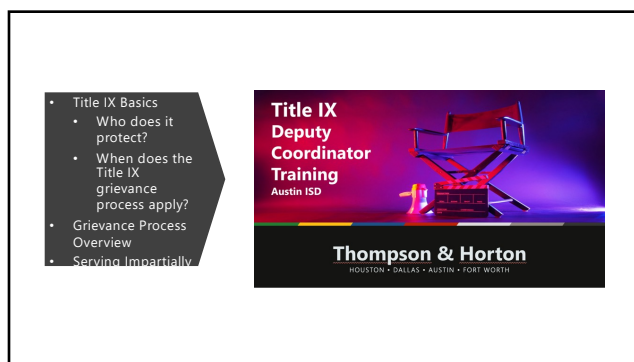




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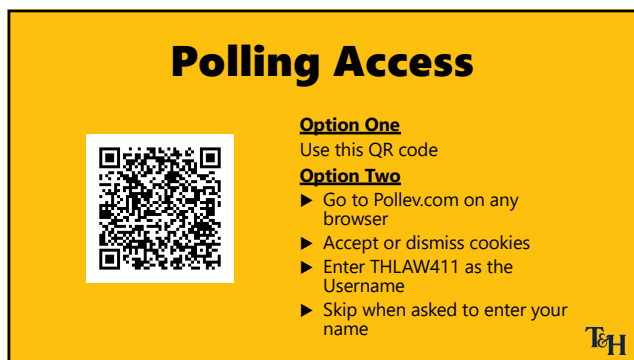
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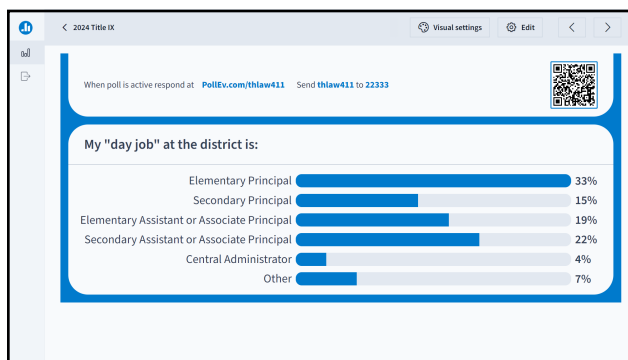
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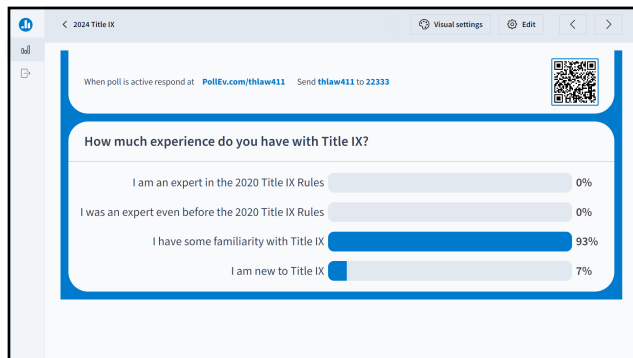
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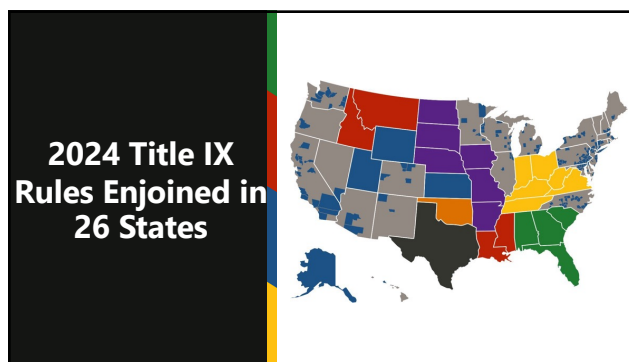
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10

**Aug. 16, 2024: Supreme Court Refuses to Narrow Injunctions**

- ▶ In 2 other appeals, the Department of Education asked SCOTUS, through an emergency application, to narrow preliminary injunctions secured by states against enforcement of the 2024 Regulations.
- ▶ In a 5-4 decision, SCOTUS denied the request to sever the challenged parts of the Rule and allow the remaining provisions take effect.
- ▶ Applies directly to the injunctions issued by the Kentucky and Louisiana district courts, but other decisions are also unlikely to be narrowed.

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**2020 vs. 2024 Rules**

Anytime you see this image today or a "Key Change", you will know where the 2024 Title IX Rules diverge or are different from the 2020 Title IX Rules

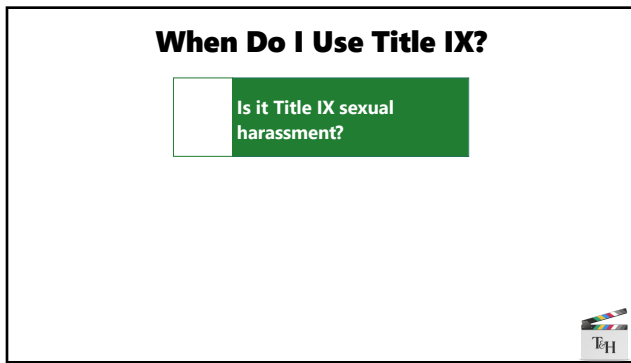
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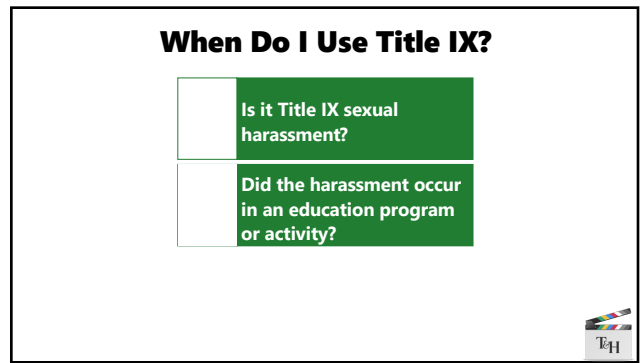
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17



18

### When Do I Use Title IX?

<input checked="" type="checkbox"/>	Is it Title IX sexual harassment?
<b>No</b>	Did the harassment occur in an education program or activity?
<input checked="" type="checkbox"/>	Was it in the United States?




19

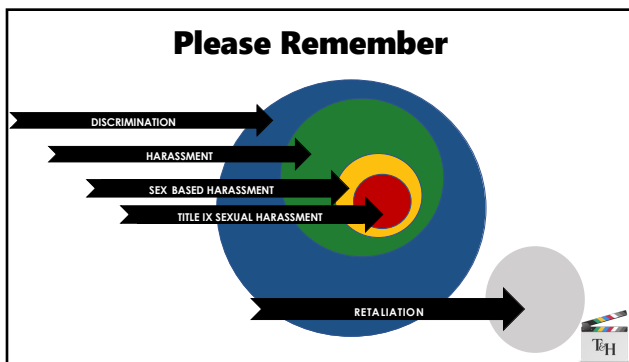
### When Do I Use Title IX?

<input checked="" type="checkbox"/>	Is it Title IX sexual harassment?
<b>No</b>	Did the harassment occur in an education program or activity?
<input checked="" type="checkbox"/>	Was it in the United States?

**⊘**  
If answer to any question is **NO**, it is a mandatory dismissal  
Use process for other misconduct




20



21

### Today Is Title IX but...

Complaints of discrimination, harassment, or retaliation based on protected statuses other than sex **should be reported** to the appropriate central administration official, and **must be addressed using the requirements of FFH (Local)**; they will **not** be addressed under the Title IX sexual harassment process we are talking about today, but are still important




22

**Remember from your Deputy Coordinator Training**

**Title IX Sexual Harassment Is....**

- Unwelcome conduct
- Based on sex
- That:
  - Is one of the Title IX "Big Five" or
  - Creates a Title IX "Hostile Environment"



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### Sexual Harassment

**The Title IX "Big 5"**

- Employee Quid Pro Quo
- Sexual Assault
- Domestic Violence
- Dating Violence
- Stalking

**&**


**Hostile Environment**  
Unwelcome conduct based on sex that is so severe, pervasive, and objectively offensive that it effectively denies equal access to the educational program or activity



24

**#1 of the "Big 5" Employee Quid Pro Quo**


- An employee of the school conditioning an aid, service, or benefit of the school on an individual's participation in unwelcome sexual conduct
- Examples include an employee:
  - Requesting sexual favors for a benefit or service
  - Threatening to remove a benefit or service unless a person engages in sexual favors
  - Expecting sexual favors for a benefit or service



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**#2 of the "Big 5" Sexual Assault (Clery Definition)**


- Rape, fondling without consent, incest or statutory rape
- Any act of vaginal or anal penetration, however slight, with any body part or object, or oral genital contact of another person, without consent
- Touching of the private body parts of another person for the purpose of sexual gratification, without consent (above or under clothing)



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**#3 of the "Big 5" Domestic Violence (VAWA Definition)**


- Felony or misdemeanor crimes of violence
- By
  - A current or former romantic partner
  - Spouse
  - Former spouse
  - Intimate partner
  - Person who shares a child
  - A person similarly situated to a spouse
  - An adult against a person protected under domestic or family violence laws of the jurisdiction



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**#4 of the "Big 5" Dating Violence (VAWA Definition)**


- Violence committed by a person who has been in a romantic or intimate social relationship with the victim
- Can include sexual, physical, emotional, or psychological violence
- Consider the complainant's description of the length of the relationship, the type of relationship, and the frequency of the interaction



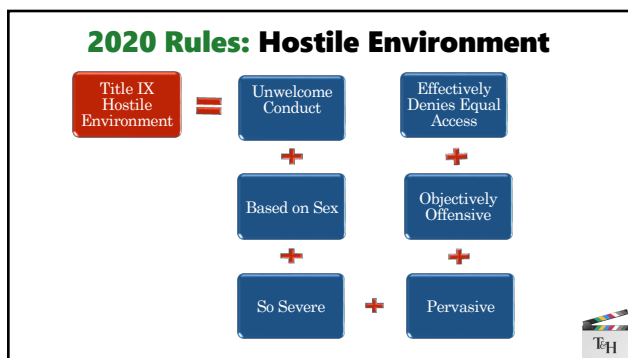
28

**#5 of the "Big 5" Stalking (VAWA Definition)**

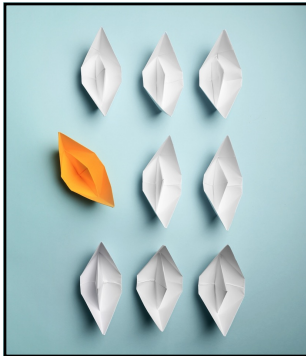
- A course of conduct based on sex (2+ times)
- Directed at a specific person
- That would cause a reasonable person to:
  - Fear for the person's safety or
  - Fear for the safety of others or
  - Suffer substantial emotional distress
- Can be direct or indirect



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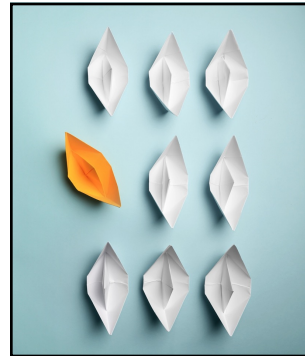


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### 2020 vs. 2024 Rules

- ▶ Title IX always prohibited *all forms* of sex discrimination
  - 2020 Rules: Title IX sexual harassment proceeds through grievance process
  - 2024 Rules: all Title IX sex discrimination proceeds through grievance process
- ▶ Title IX has long prohibited discrimination based on pregnancy, sex stereotypes, and sex characteristics; now in the 2024 Rules
- ▶ The inclusion of sexual orientation and gender identity is **new** in the 2024 Rules
- ▶ Even in the preamble to the 2020 Rules, ED said sexual harassment is prohibited regardless of sexual orientation or gender identity



### 2020 vs. 2024 Rules

#### Significant Changes

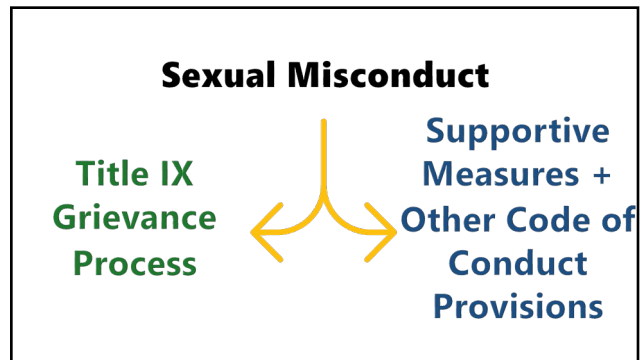
- ▶ 2020 Rules prohibit "sexual harassment", 2024 Rules prohibit "sex-based harassment"
- ▶ Definition of "hostile environment" harassment has changed
  - 2020 Rules: "severe, pervasive, and objectively offensive"
  - 2024 Rules: "subjectively and objectively offensive, and severe or pervasive"

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### What should I do if I receive a report of harassment that does not fit within the Title IX Process?

- ✔ Support
- ✔ Support
- ✔ Support
- ✔ Consider other policies and codes of conduct that may have been violated
- ✔ Remember: conduct that begins outside of the US or outside of your program or activity may continue into the education program or activity ("downstream effects")

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### Complainant

The person who allegedly experienced conduct that could constitute Title IX sex discrimination.


- Must have been participating or attempting to participate in the school's education program or activity at the time they file the formal complaint
- Person may be described as a complainant regardless of whether a complaint has been filed



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### Complaint

A written complaint that is either signed by the complainant or their parent/legal guardian, or is sufficient to indicate the complainant or parent/legal guardian was submitting the complaint and requesting a formal investigation.




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## Respondent

The person who is alleged to have violated the school's prohibition on sex discrimination

- Does not have to be a student or employee of the school district
- A person may be described as a respondent regardless of whether a complaint has been filed



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## BASICS

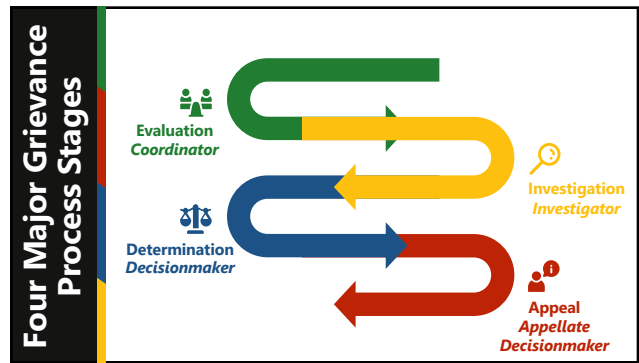
### Eight Basic Requirements for Grievance Process

1. Treat complainants and respondents equitably
2. Title IX personnel cannot have a conflict of interest or bias
3. Presumption that respondent is not responsible
4. Reasonably prompt timeframes for "major stages of grievance procedures"
5. Reasonable steps to protect privacy of witnesses and parties but must not restrict the ability of parties to obtain and present evidence
6. Objective evaluation of all relevant evidence
7. Exclusion of certain impermissible evidence
8. If the District adopts grievance procedures that apply to the resolution of some, but not all, complaints, articulate consistent principles for how to determine which procedures apply (2024)

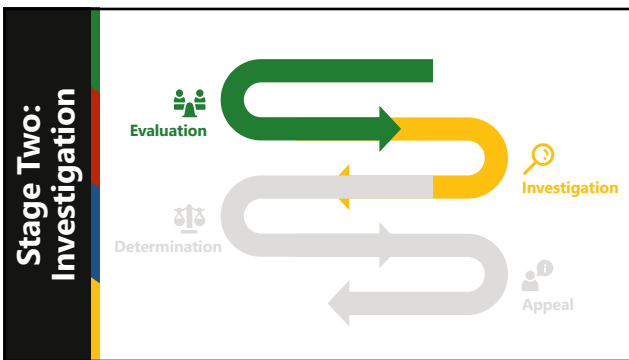
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### Investigator Decisionmaker Casting Options: 2020 Rules

**Coordinator & Investigator, Decisionmaker** OR **Coordinator, Investigator, Decisionmaker**

The **decision-maker(s)**, who cannot be the same person(s) as the **Title IX Coordinator** or the **investigator(s)**, must issue a written determination regarding responsibility.

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### Investigator Decisionmaker Casting Options: 2024 Rules

The **decisionmaker** may be the same person as the Title IX Coordinator or investigator.

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### Key Investigation Principles

- ▶ Thorough
- ▶ Prompt
- ▶ Impartial
- ▶ Fair

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### Investigator's Duties

- ▶ Serve Impartially
- ▶ Gather evidence
- ▶ Equal opportunity for parties to present witnesses and evidence
- ▶ Review all evidence and determine what evidence is relevant and permissible
- ▶ Provide parties with directly related evidence & 10 days to respond
- ▶ Provide parties with investigation report

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### Notice of Allegations – Impact on Investigation

- Notice of Allegations to the Respondent is required before the school meets with the respondent for an interview
- If there is not a Notice of Allegations, make sure one is sent before you do anything else in the investigation
- If you learn of new allegations, make sure a supplemental NOA goes out
- Supportive measures should have been offered to the parties by this time, as well—verify with the Title IX Coordinator so you can help keep an eye on supportive measures during the investigations

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### Investigator Tip

- ▶ Notice of Allegations to the Respondent is required before the school meets with the respondent for an interview
- ▶ The Notice of Allegations is your "roadmap" to your investigation
- ▶ Make sure you understand the allegations and the elements necessary to prove them
- ▶ If you learn of new allegations, make sure a supplemental Notice of Allegations goes out


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### Investigation Plan

- ▶ What questions need to be answered for a thorough and impartial investigation?
- ▶ What evidence do you need to collect?
- ▶ Who should you interview?
- ▶ In what order will you conduct witness interviews?
- ▶ Prepare interview outlines
- ▶ Think: What information do you need to obtain to allow the decisionmaker to answer the key questions and make a reliable determination


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### What will you ask?


- ▶ Think back to the Title IX definitions of "Title IX sexual harassment" "in an educational program or activity" and "against a person in the U.S."
- ▶ Look at the allegations and consider what the elements for each claim are
- ▶ Consider information needed to craft a remedy if a violation is found




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### Which is not a required element for rape (a type of sexual assault)?

Penetration of the anus or vagina, no matter how slight	
The conduct was non-consensual	
The conduct was done for purposes of sexual gratification	67%
None - they are all required elements	33%




50




### Fondling

- ▶ Was there touching of the private body parts of another?
- ▶ Was it without consent?
- ▶ Was it for purposes of sexual gratification?
- ▶ Was it in an "educational program or activity" of your school district?




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### Hostile Environment

- ▶ Was the conduct unwelcome?
- ▶ Was it based on sex?
- ▶ Was it objectively offensive?
- ▶ Was it severe?
- ▶ Was it pervasive?
- ▶ Was it in an "educational program or activity" of your school district?




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### Impact


- ▶ **Limits or Denies:** What were the effects on the Complainant, if any?
  - ▶ Grades?
  - ▶ Socially?
- ▶ What were the effects on the larger school community, if any?
- ▶ What issues may need to be addressed with the Respondent, if any?



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### Evidence Gathering

- ▶ Burden on the District to conduct an investigation that gathers sufficient evidence
- ▶ Provide equal opportunity for parties to present relevant fact witnesses and other inculpatory and exculpatory evidence
- ▶ Review all evidence gathered and determine what evidence is directly related and what evidence is relevant




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## "Relevant"

Related to the allegations of sex discrimination under investigation as part of the grievance procedures.

**Questions** are relevant when they seek evidence that may aid in showing whether the alleged sex discrimination occurred, and **evidence** is relevant when it may aid a decisionmaker in determining whether the alleged sex discrimination occurred.



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## Impermissible Evidence

- ▶ Evidence protected by a legal privilege
- ▶ Health care treatment records

**MUST OBTAIN WAIVER!**

- ▶ Complainant's sexual predisposition, or prior sexual behavior (unless exception)

Impermissible evidence must not be considered (except to determine exception) and must not be disclosed or used



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## Privileged or Confidential

- ▶ Information protected by a recognized federal or state law, such as attorney-client privilege, doctor-patient privilege, or spousal privilege may not be sought, used, or relied on
- ▶ Unless the person holding the privilege has waived it



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## Healthcare Treatment Records


- ▶ Healthcare treatment records made or maintained by a physician, psychologist, or other recognized professional or paraprofessional in connection with the provision of treatment may not be accessed, considered, or used
- ▶ Unless the student (parent) provides voluntary written consent
- ▶ Medical records previously provided to the school related to a special education or 504 evaluation become student records and are not impermissible



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## Complainant's Sexual Predisposition and Prior Sexual Behavior


- ▶ Questions and evidence related to a complainant's sexual predisposition or prior sexual behavior are **impermissible** and may not be asked or sought
- ▶ Exceptions: Evidence related to the complainant's prior sexual behavior
  - Offered to show someone other than the respondent committed the alleged conduct
  - Related to the sexual behavior between the complainant and respondent and offered to prove consent
- ▶ **However**, the fact of prior sexual conduct between the parties does not, by itself, demonstrate or imply the complainant's consent to the alleged sex-based harassment



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- ▶ Direct Evidence
- ▶ Circumstantial Evidence
- ▶ Hearsay

Rumor / innuendo (NOT evidence)





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## Direct Evidence


"Evidence that is based on personal knowledge or observation and that, if true, proves a fact without inference or presumption."  
 Black's Law Dictionary 675 (10th ed. 2014)

- ▶ What a witness directly experienced
- ▶ Eyewitness testimony
- ▶ Admissions—written or oral
- ▶ Surveillance tape or cell phone video captures the incident



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"Evidence based on inference and not on personal knowledge or observation ... all evidence that is not given by eyewitness testimony."



Black's Law Dictionary 674 (10th ed. 2014)

62


"A statement (oral or written) made by someone NOT WHILE TESTIFYING and that is offered to prove the truth of the matter asserted in the statement."  
 Fed. R. Evid. 801(c)

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## Sources of Evidence

- ▶ Interviews
- ▶ Testimony
- ▶ Documents
- ▶ School records
- ▶ Campus files
- ▶ Personnel files
- ▶ Investigation records
- ▶ Student files
- ▶ Police Reports
- ▶ Emails
- ▶ Handwritten notes
- ▶ Calendars
- ▶ Photographs
- ▶ Videos
- ▶ Text & instant Messages
- ▶ Other electronic files/ cloud storage
- ▶ Journal entries
- ▶ Medical records (ONLY with written consent)



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## Introduction to Parties

- Not required, but best practice
- Benefits:
  - Notice to the parties of the "rules" for the investigation
  - Notice to the parties that there may be periods where they do not hear from you, and how they can contact you
- Send to parties, parents/guardians of minor parties, and advisors, if any



*Use T&H Guidebook Document 28 – Investigator Introduction to Party*



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## Before Interviews



District must provide the parties written notice of the date, time, location, participants, and purpose of **all investigative interviews or other meetings** with sufficient time to prepare


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## Sharing the Evidence

- Provide the parties an opportunity to review the directly related evidence – includes evidence the school doesn't think it will use
- The parties must be given at least 10 days to review all the evidence and submit written responses about the evidence to the investigator
- The investigator must consider the responses when writing the investigative report

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### 2024 Rules

- ▶ Provide parties with an equal opportunity to access either the relevant and not impermissible evidence or an accurate description of this evidence

*If you provide a description of the evidence, you must provide access to the evidence upon request of any party*

- ▶ Provide a reasonable opportunity to respond

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## Response to the Evidence



- ▶ Did either party identify evidence that was absent or not gathered?
- ▶ Did either party identify new witnesses or new evidence?
- ▶ Did either party point out inconsistencies in the evidence?
- ▶ Did either party raise concerns regarding the relevance of the evidence?



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### What must be included in the report

- A summary of all evidence obtained in the investigation
- A summary of all directly related evidence obtained in the investigation
- A summary of all relevant evidence obtained in the investigation

Start the presentation to see live content. For screen share software, share the entire screen. Get help at [pollen.com/app](https://pollen.com/app)


71

## Investigation Report

- ▶ The report must summarize all "relevant evidence"
- ▶ You can (and should) begin drafting the report during the 10-day DRE period
- ▶ The report must be shared with the parties who have 10 days to respond before a decision




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### 2024 Rules: Investigation

- No requirement to allow 10 days to review evidence
- No requirement for a separate investigation report
- No requirement to allow 10 days to review separate investigation report
- No requirement to send to a separate decisionmaker

73

### Prevent Disclosure


- ▶ Take reasonable steps to protect the privacy of parties and witnesses during the grievance process
- ▶ Take reasonable steps to prevent and address the parties' unauthorized disclosure of information and evidence obtained solely through the grievance process



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### Except...


- ▶ Do not restrict the ability of parties to obtain evidence, speak to witnesses, or consult family members, advisors, or confidential resources
- ▶ Disclosures for purposes of administrative proceedings or litigation related to the allegations are authorized



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### Police Involvement


- ▶ The district must conduct its Title IX investigation in a "reasonably prompt" manner but may temporarily delay the investigation for good cause, which may include concurrent law enforcement activity
- ▶ No long or indefinite delay or extension of timeframes, regardless of whether a concurrent law enforcement investigation is still pending



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### What can justify a delay for concurrent law enforcement purposes?


- An oral request from law enforcement to delay
- Notice that law enforcement plans to release evidence that would be material to your determination at a particular future time
- The arrest and incarceration of the Respondent
- All of the above
- None of the above



77

### The police decided not to prosecute the Respondent because it's a "they said, they said" case. How does it impact your case?


- You can rely on the police's finding to dismiss the complaint
- You can rely on the factual information gathered by the police, but not their finding
- You cannot rely at all on any information from the police



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### When the Police Call



- Document everything!
- Ask police to put request for delay in writing
- Reduce verbal (e.g., telephone) conversations in writing
- Best practice is to respond with summary/ If my summary is incorrect, please let me know by [date] or I will assume it is correct.
- Explain in writing the school's obligation to conduct its own Title IX investigation and ask for notification when you can begin your investigation
- Follow up, then follow up again, then again



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## Notice of Delay

- ▶ The District must send written notice to both parties regarding the delay or extension and the reason(s) for the delay or extension
- ▶ Concurrent law enforcement activity is **not** good cause to delay sending the written notice of allegations to the complainant or respondent
- ▶ **T&H Guidebook Document 23 – Notice of Extension of Timeframes**

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- ▶ Police evidence may be useful for *initial* fact-gathering
- ▶ They **are not** a substitute for your own required investigation
- ▶ The standards for and purposes of criminal investigations are different from school investigations
- ▶ Police investigations or reports are not determinative and you need your own evidence-gathering to determine whether there was Title IX sex discrimination or whether the respondent is responsible




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## Investigator Dos and Don'ts


DOs	DON'Ts
<ul style="list-style-type: none"> <li>✓ Ensure you have no conflict of interest or bias and remain impartial</li> <li>✓ Treat all parties equitably</li> <li>✓ Provide an equal opportunity to the parties to present evidence and witnesses</li> <li>✓ Objectively evaluate all evidence for relevance</li> <li>✓ Know the elements and definitions of the type of alleged sex-based discrimination and identify the key factual issues</li> <li>✓ Conduct a complete and thorough investigation, identify and address any gaps</li> <li>✓ Ensure your description of the relevant and not otherwise impermissible evidence is thorough and accurate</li> </ul>	<ul style="list-style-type: none"> <li>✗ Conduct surprise interviews</li> <li>✗ Discriminate in the investigation or rely on stereotypes or preconceived notions</li> <li>✗ Delay or extend the investigation timeline absent good cause</li> <li>✗ Restrict the parties' ability to discuss allegations or gather evidence</li> <li>✗ Shy away from asking tough questions</li> <li>✗ Be accusatory or argumentative</li> <li>✗ Seek or use impermissible evidence, unless there is a waiver or applicable exception</li> <li>✗ Violate the parties' confidentiality</li> </ul>

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## Close the File



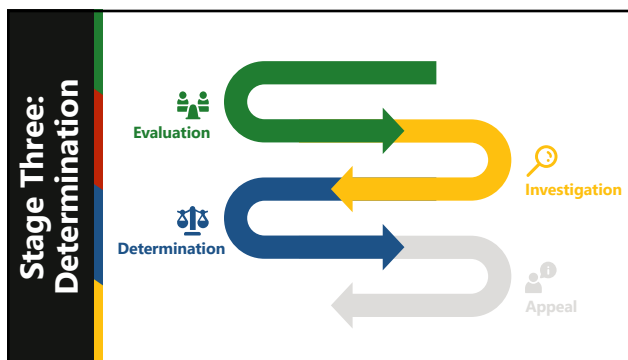
- ▶ Files related to a Title IX complaint must be maintained for seven years
- ▶ Finalize the file and transmit it to the Title IX Coordinator or their designee for the case
- ▶ If you'd like to avoid being called on in six years to find your files, compile and send them to the Title IX Coordinator now
- ▶ Think broadly!



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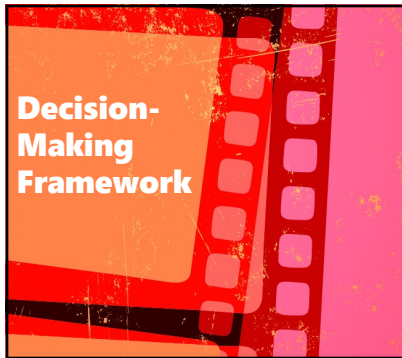

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## Decision-Making Framework



- Serve Impartially
- Review Case File
- Conduct Written Q&A
- Prepare Written Determination

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## Review Case File

- Formal Complaint
- Written Notice of Allegations
- Directly Related Evidence
- Party Responses to Directly Related Evidence
- Investigation Report






88

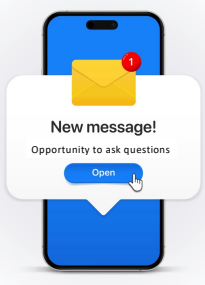
## Written Q&A

### Individuals Involved


- Parties
- Parents/guardians of minor parties
- Each party's advisor (can be but is not required to be an attorney)

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- Send notice of right to submit written, relevant questions and follow up questions (email and U.S. mail)
- Provide timeframe for when responses are due (e.g., within 3 or 5 days of electronic delivery of notice)
- Notice can state that questions and follow-up questions:
  - Should be numbered
  - Should identify the name of the party or witness to whom it should be posed




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## Questions Received

Review each question to determine whether it is:



**Relevant & Respectful**

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## Relevant?

- **Inculpatory:** Evidence tending to make a disputed fact or issue *more likely to be true*
- **Exculpatory:** Evidence tending to make a disputed fact or issue *less likely to be true*

92

### Respectful?

---


Cannot use profanity or irrelevant, ad hominem attacks

---

Harassing questions will not be tolerated

---


No written notice required, but recommend providing



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### Non-Relevant or Respectful Questions

- Must explain the reason for finding a question not relevant
- Examples:
  - "Complainant's Question #3 will not be forwarded to the party or witness because it seeks information protected by a legally recognized privilege"
  - "Respondent's Question #2 will not be forwarded to the party or witness because it includes irrelevant personal attacks"




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### Non-Relevant or Respectful Questions



- Not required to give parties an opportunity to restate their question
- If you do so, we recommend providing only one opportunity and a time-frame for submission (e.g., 2 days)


**Try & Try Again**



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### Forwarding Questions

- Forward all relevant and respectful questions to the appropriate party or witness
- Include notification of when a response is required (e.g., within 3 days of electronic delivery of the question)




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### Forwarding Answers




- Forward all answers to all parties
- Answers must be respectful
- Provide Notice of right to submit limited, relevant follow-up questions within a certain time period (e.g., 2 days of electronic transmission of responses)




97

### Follow-Up Questions



- Must be Relevant & Respectful
- Forward all answers to both parties
- Answers must be respectful
- Provide notice of right to submit limited, relevant follow-up questions
- Repeat as needed

**Limited to "Follow-Up"**  
**Follow up:** to follow with something similar, related, or supplementary (Merriam-Webster)







## Follow-Up Question?

**Initial Question:**  
When did it happen?

**Answer:**  
Yesterday

99

When poll is active, respond at [pollev.com/thlaw411](https://pollev.com/thlaw411)  
Text **THLAW411** to **22333** once to join

### What time of the day did it happen?

Follow-Up

Not Follow-Up

100

When poll is active, respond at [pollev.com/thlaw411](https://pollev.com/thlaw411)  
Text **THLAW411** to **22333** once to join

### Who was present?


Follow-Up

Not Follow-Up

101

## Determination

- ▶ Decisionmaker evaluates relevant, not impermissible evidence for its persuasiveness
- ▶ If not persuaded by the evidence (under the applicable standard and whatever the quantity of evidence may be) that sex discrimination occurred, the decisionmaker must not determine that sex discrimination occurred



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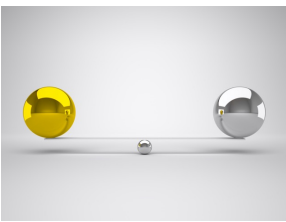


## Standard of Proof

- ▶ Preponderance of evidence (>50%)
- ▶ **Unless** your school uses the clear and convincing evidence standard in all other proceedings, including those related to other discrimination complaints

## They Said-They Said


- ▶ Very few cases end in 50/50
- ▶ More common for a particular disputed fact to end in 50/50, but even that happens less than one might think
- ▶ What tips the scale one way or another?



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### Credibility Factors

- ▶ **Corroborative evidence**
- ▶ **Contradictory evidence**
- ▶ Motive or interest in outcome
- ▶ Body language and demeanor
- ▶ Specific details
- ▶ Reasonableness of testimony / plausibility
- ▶ Memory (impact of time, outside influence, trauma, intoxicant)
- ▶ Bias or prejudice
- ▶ Internal consistency
- ▶ Other factors of believability




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### Written Determination



- ▶ The decision-maker(s), who cannot be the same person(s) as the Title IX Coordinator or the investigator(s), must issue a written determination regarding responsibility containing specific requirements.
- ▶ If you are part of a panel, consider how the group will deliberate, decide, and draft the decision.




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- ✔ Identify the allegations potentially constituting sexual harassment

**Written Determination Requirement Number One**


- ✔ Describe procedural steps taken from the receipt of the formal complaint through the determination

**Written Determination Requirement Number Two**



### Procedural Steps

- ▶ Notifications to the parties
- ▶ Interviews with parties and witnesses
- ▶ Site visits
- ▶ Methods used to gather evidence
- ▶ Hearings held



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- ✔ Findings of fact supporting the determination

**Written Determination Requirement Number Three**

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### Findings of Fact

- ▶ Identify the undisputed facts related to an issue
- ▶ Identify the first disputed fact related to an issue
  - ▶ Explain your conclusion as to what happened with the first disputed fact
  - ▶ Explain your reasoning for reaching that conclusion including credibility determinations
- ▶ Move to the next disputed fact
- ▶ Decide the overall issue
- ▶ Repeat for any other disputed issues


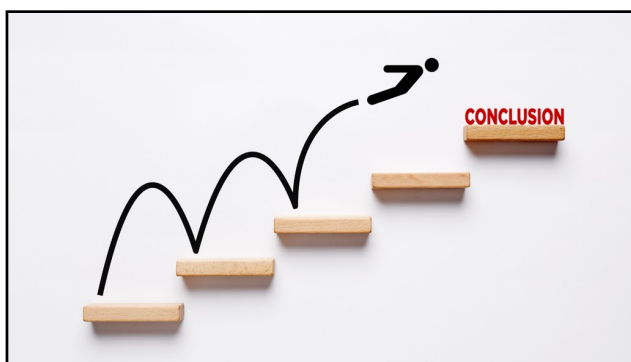


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### Preponderance of the Evidence




- ▶ It is more likely than not (greater than a 50% chance) that something is true
- ▶ Applies to both findings of fact and the overall question of responsibility
- ▶ For findings of fact, ask if there is sufficient evidence to find that it is more likely than not that a disputed fact is true
- ▶ Once you have "found" all your facts, look at them as a whole to decide if it is more likely than not that a policy violation occurred


- ✔ Conclusions regarding the application of the educational institution's code of conduct to the facts

Written Determination Requirement  
**Number Four**

### Applying the Code



- ▶ The Title IX Coordinator should have previously determined that the conduct alleged, if true, is covered by Title IX
- ▶ However, the written determination must include the analysis of the conduct established
- ▶ Remember to make findings with respect to each element of the alleged misconduct
- ▶ Refer to definitions in the policy



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- ✔ A statement of, and rationale for, the result as to each allegation

Written Determination Requirement  
**Number Five**

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### Results


- ▶ A determination regarding responsibility
  - ▶ The reasons for the determination
- ▶ A list of sanctions imposed on the respondent
  - ▶ The reasons for the sanctions
- ▶ Whether remedies provided to the complainant (do not list; communicate privately to the complainant)
  - ▶ The reasons for the remedies

- ✔ Process for Appeal

**Written Determination Requirement Number Six**

### Process for Appeal

- ▶ Provide the bases for appeal, timeline to file an appeal, and method to do so



- ✔ Provide the written determination to the parties simultaneously

**Written Determination Requirement Number Seven**



### What about FERPA?

- ▶ OCR states that sharing the result as to each allegation including a list of sanctions is permitted by FERPA because sanctions “always directly impact the victim”
- ▶ Remedies do not directly affect the respondent so should be communicated separately to the Complainant




### Decisionmaker Dos and Don'ts

DOs	DON'Ts
<ul style="list-style-type: none"> <li>✔ Explain the process to parties and advisors</li> <li>✔ Assume respondent is not responsible</li> <li>✔ Exercise independent judgment and objectively evaluate all relevant evidence</li> <li>✔ Follow your grievance procedure</li> <li>✔ Make credibility determinations and evaluate the weight of the evidence using preponderance standard</li> <li>✔ Make a clear determination regarding whether the respondent violated the school's policies</li> </ul>	<ul style="list-style-type: none"> <li>✘ Prejudge the facts or rush to judgment</li> <li>✘ Consider impermissible evidence unless a waiver or exception applies</li> <li>✘ Rely on stereotypes or preconceived notions when making credibility determinations or weighing the evidence</li> <li>✘ Delay or extend the decision timeline absent good cause</li> <li>✘ Neglect to provide the rationale for the determination</li> </ul>


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### Close the File




- ▶ Files related to a Title IX complaint must be maintained for seven years
- ▶ Finalize the file and transmit it to the Title IX Coordinator or their designee for the case
- ▶ If you'd like to avoid being called on in six years to find your files, compile and send them to the Title IX Coordinator now
- ▶ Think broadly!



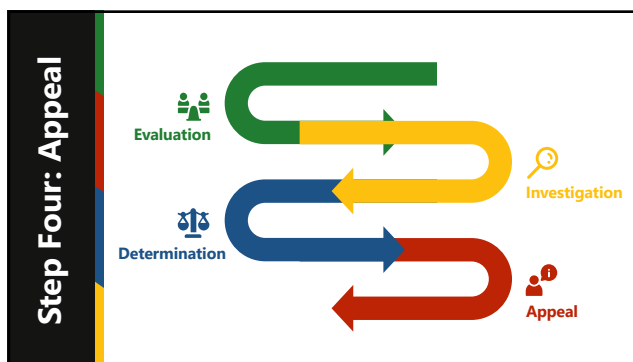
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### 2024 Rules: Decisionmaking




- ▶ The 2024 Rules require the decisionmaker to question the parties and witnesses to assess credibility, to the extent it is relevant and in dispute. No written Q&A required.
- ▶ The 2024 Rules do not prescribe a detailed list of elements that must be included in the written determination. Must simply include whether sex discrimination occurred and the rationale, procedures for appeal.

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### Appeal Process




- ▶ The 2020 Rules provide three bases for appeal (procedural irregularity, new evidence, bias/conflict – that affected the outcome).
- ▶ The 2024 Rules provide for the district to use its existing appeals processes. Note that if your appeals process concludes with the Board of Education, the board must receive Title IX training to carry out their appellate role.

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### Record Keeping

1. Must maintain records documenting the actions the school took to meet its obligations for a period of 7 years.
2. Includes, but is not limited to, documentation demonstrating the implementation of reasonable modifications and provision of lactation space for students because of pregnancy or related conditions under proposed, and the provision of lactation time and space for employees.




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### Record Keeping

Must Maintain for 7 Years

- ▶ For each complaint of sex discrimination
  - Documentation of informal resolution process or grievance procedures and resulting outcome
- ▶ For each incident of conduct that may constitute sex discrimination of which Title IX coordinator was notified, records documenting actions recipient took to meet is obligations
- ▶ All training materials



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### Records

- ▶ Reports Complaints
- ▶ Informal Resolution documentation
- ▶ Emergency Removal documentation
- ▶ Dismissal
- ▶ Determination
- ▶ Appeal and result
- ▶ Supportive Measures
- ▶ Disciplinary Sanctions
- ▶ Remedies provided
- ▶ Decision whether to initiate a complaint
- ▶ Actions to respond (including supportive measures, disciplinary sanctions, remedies)
- ▶ Decisionmaking (whether to initiate a complaint, impose a disciplinary removal, offer informal resolution, etc.)
- ▶ Training records



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### Investigation / Determination Best Practices & Tips



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## An Effective Investigation → A Reliable Determination

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### What You Do NOT Want

A  
"Swiss Cheese"  
Investigation or  
Determination



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### Steps to an Effective Investigation


1. Read and Compare
2. Evaluate
3. Define Scope
4. Identify Questions
5. Plan for the Investigation
6. Be Diligent in Gathering Evidence
7. Conduct Productive Interviews
8. Objectively Review the Evidence



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### Read & Compare

- ▶ Read the complaint, the Notice of Allegations, and preliminary information provided by the Title IX Coordinator regarding the allegations of sex discrimination
- ▶ Compare the allegations to your district's Title IX policies and procedures and prohibited conduct under Title IX




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## 2 Evaluate

**Consider the type of complaint and allegations at issue**  
 (The type and nature of the complaint dictate the type and extent of investigation necessary)


- ▶ Is it sex-based harassment? What type of harassment?
- ▶ What is the severity? What about potential action?
- ▶ Is it a single incident? Multiple incidents? Is there a pattern/practice?
- ▶ How many people are involved?



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## 3 Define the Scope

- ▶ The scope should be limited to the allegations in the complaint and notice of allegations
- ▶ Define what the allegations are and evaluate the needs of the investigation based on the defined scope
- ▶ The type of complaint and scope of investigation will influence the types of evidence to gather, the interviews to conduct, the number of interviews needed, and what will need to be addressed in the determination



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## 3 Define the Scope



*If there are additional allegations → Title IX Coordinator will need to amend the notice of allegations*


*If there are additional complainants or respondents → Title IX Coordinator will need to reach out to determine if there will be a Title IX complaint, provide all necessary notices and supports, and decide if consolidation is proper or if there will be separate investigations*

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**T&H Title IX Tip**


Considering the type of complaint and investigation needed and defining the scope help ensure efficient and timely investigations and may reduce the time needed for investigation, the amount of work required, and the nature and length of any written determination



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## 4 Identify the Question(s) to Answer

- ▶ The question(s) will be based on:
  - The allegations / reported misconduct
  - The policies or rules implicated
- ▶ This is one of the most critical steps for conducting and effective investigation that results in a reliable determination
- ▶ The questions identified guide what evidence you gather, the interviews you conduct, the questions you ask witnesses, and determining what evidence is relevant to share



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- ▶ Was the conduct unwelcome?
- ▶ Was the conduct sex-based?
- ▶ Was the conduct objectively offensive?
- ▶ Was the conduct severe
- ▶ Was the conduct pervasive?
- ▶ Did the conduct effectively deny the complainant's equal access to the education program or activity?



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### Questions to Answer in a Big 5 Investigation

- ▶ **Quid Pro Quo**
  - ▶ An employee
  - ▶ Explicitly or implicitly conditions an aide, benefit, or service
  - ▶ On the complainant's participation in unwelcome conduct
- ▶ **Sexual Assault**
  - ▶ Rape – penetration without consent
  - ▶ Fondling – touching a private body party for the purposes of sexual gratification without consent
- ▶ **Domestic Violence**
  - ▶ Crimes committed by a current or former spouse or partner
- ▶ **Dating Violence**
  - ▶ Violence committed by a person in a current or former social relationship or a romantic or intimate nature
- ▶ **Stalking**
  - ▶ A course of conduct (2+ acts)
  - ▶ Directed at a specific person and based on sex
  - ▶ That would cause a reasonable person to fear for their safety or suffer substantial emotional distress

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### 5 Plan for the Investigation

- ▶ You have determined the type of investigation, the scope of the investigation, and the questions you need to answer
- ▶ Now, you need to determine what actions steps you need to take to investigate to obtain sufficient, relevant evidence to allow the decisionmaker to reach a reliable determination
- ▶ To make sure this happens, you must **PLAN!**




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### What's Your Plan?

- ▶ What evidence do you need to collect?
  - Types, locations, people
- ▶ Who should you interview? In what order?


**Think:** What information do you need to obtain to allow the decisionmaker to answer the key questions you previously identified



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### 6 Be Diligent in Gathering Evidence

- ▶ The burden to gather evidence is on the school, not the complainant or respondent
- ▶ Identify and preserve likely sources of evidence
  - If there is evidence that could be at risk of loss, act swiftly and take steps to preserve evidence
  - Contact law enforcement immediately if there is knowledge of illegal or illicit evidence
- ▶ Locate and take control of the evidence




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### Evidence Must Be "Relevant"

**Relevant** – related to the allegations of sex discrimination under investigation as part of the grievance procedures.

**Questions** are relevant when they seek evidence that may aid in showing whether the alleged sex discrimination occurred, and **evidence** is relevant when it may aid a decisionmaker in determining whether the alleged sex discrimination occurred.



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### Relevant Evidence

**Inculpatory Evidence**

- ▶ Favorable to complainant
- ▶ Evidence that shows or tends to support the allegations of sexual harassment and/or the respondent's involvement in the allegations to establish responsibility

**Exculpatory Evidence**

- ▶ Favorable to the respondent
- ▶ Evidence that exonerates or tends to show the respondent is not responsible for the allegations of sexual harassment

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### Sources of Evidence

▶ Testimony	▶ Handwritten notes / Calendars
▶ Documents	▶ Photographs
▪ School records	▶ Videos
▪ Campus files	▶ Text & Instant Messages
▪ Personnel files	▶ Other electronic files/ cloud storage
▪ Grievances / investigations	▶ Journal entries
▪ Student files	▶ Medical records (limited use; watch out for privilege issues)
▪ Police Reports	
▶ Emails	

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### Impermissible Evidence



Impermissible evidence **must not be considered** (except to determine exception) and **must not be disclosed or used.**

Impermissible evidence includes:


- ▶ Evidence protected by a legal privilege\*
- ▶ Health care treatment records\*
- ▶ Complainant's sexual predisposition or prior sexual behavior (unless exception)

\*Use only with written waiver

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### When Consent Is at Issue and Relevant


- ▶ How is "consent" defined?
- ▶ Whether and how to define consent is up to the district
- ▶ But the burden of proving consent (or lack thereof) rests on the district
- ▶ Definition can take into account age and developmental level so long as consistent with applicable disability laws
- ▶ If the records maintained by a physician, psychologist or other recognized professional in connection with the provision of treatment (e.g., medical records) are relevant to consent, may only be used with the party's **voluntary, written consent**



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### They Said/They Said

- ▶ Sexual harassment often occurs behind closed doors
- ▶ There are often no witnesses to the alleged harassment
- ▶ Many cases are going to involve the complainant making certain allegations, the responding denying them, with no other witness
- ▶ **The fact that there are no witnesses to the alleged harassment does not mean it is automatically a "50/50"**
- ▶ A thorough investigation and a complete summary of all relevant evidence can help you/the decisionmaker assess credibility and reach a reliable determination



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### 7 Conduct Productive Interviews


**Preparation is key!!!!**

- ▶ Prepare a focused and targeted interview outline
- ▶ Focus on the allegations of sex discrimination and the questions you need to answer to reach a conclusion
- ▶ Identify "must ask" questions to elicit information related to the allegations and questions you have identified
- ▶ Identify evidence to discuss with witness
- ▶ Prepare questions to obtain a reliable chronology of events and all relevant information that witness has
- ▶ Avoid extraneous questions that seek information that is not relevant

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### Game Plan for Interviews

- ▶ Determine how you are going to establish rapport
- ▶ Where are you going to conduct the interview? Will it make the witness feel comfortable?
- ▶ Are you going to have others present? Who?
- ▶ How are you going to open the interview?
- ▶ Set notice of rights/expectations?
- ▶ To record or not to record?



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## Interviews

- Who do we interview?
- In what order should we conduct the interviews?

Complainant
Witnesses you identified (campus personnel, other students)
Witnesses identified by complainant
Respondent
Witnesses identified by respondent

- Background Questions
- Narrative (What Happened? The Allegations)
- Targeted Questions (Clarification; Fill In the Gaps)
- Any Must Ask Questions (How Allegations Relate to Key Title IX Issues)
- Identify Any Needed Follow Up (Other Witnesses? Other Evidence? Anything Else to Share?)

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- The "Narrative" – let the witness tell their story
- Utilize more open-ended questions to start
- Nail down the particulars of the "5Ws & H" – who, what, where, when, why, & how
- Follow up with more targeted/directed questions

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### Interview Dos & Don'ts

<p><b>DOs</b></p> <ul style="list-style-type: none"> <li>Make student feel at ease</li> <li>Be neutral, objective, and open-minded</li> <li>Listen <u>actively</u></li> <li>Let the interviewee tell their story</li> <li>Take all allegations and statements seriously</li> <li>Be thorough – make sure to elicit all relevant facts</li> </ul>	<p><b>DON'Ts</b></p> <ul style="list-style-type: none"> <li>Create a hostile or unwelcoming environment</li> <li>Have an agenda</li> <li>Be a passive interviewer</li> <li>Do all the talking</li> <li>Rush to judgment or dismiss allegations or statements</li> <li>Make determinations based on sex-stereotyping or status</li> </ul>
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### Interview Dos & Don'ts (cont'd)

<p><b>DOs</b></p> <ul style="list-style-type: none"> <li>Ask all necessary follow-up questions</li> <li>Ask probing questions</li> <li>Seek information regarding potential justifications/excuses</li> <li>Test the credibility of the statements in the interview</li> <li>Ask for supporting documents and/or corroborating witnesses</li> </ul>	<p><b>DON'Ts</b></p> <ul style="list-style-type: none"> <li>Shy away from asking tough questions</li> <li>Conduct an interrogation</li> <li>Be argumentative or accusatory</li> <li>Be unprepared</li> <li>Conduct the interview without reference to any documentation or other evidence</li> </ul>
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### You've Gathered the Evidence and Conducted the Interviews, Now What?

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### Fill In the Gaps


- ▶ Are there any gaps in your chronology of events?
- ▶ Is there any evidence missing?
- ▶ Did you obtain all the documents and information the parties and witnesses referenced?
- ▶ Are there any follow-up questions you need to ask the parties or witnesses?
- ▶ Is there anything else you need to track down to prepare that will allow you (or the decisionmaker) to reach a reliable determination?



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### 8 Objectively Review the Evidence

- ▶ Proceed with the presumption that the respondent is not responsible
- ▶ Review *all* relevant evidence, both inculpatory and exculpatory
- ▶ Exclude and do not consider any impermissible evidence
- ▶ Rely on the evidence—both documentary and testimonial—don't speculate and don't fill in gaps based on any preconceived notions, prejudice or bias
- ▶ Draft an investigation report that fairly summarizes the relevant evidence



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### Planning for the Written Determination



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### Start with the Basics

- ▶ Review the allegations (complaint and NOA)
- ▶ Review policies at issue
- ▶ Review documentary evidence and witness interviews and highlight or note the *key* evidence regarding the allegations, the key questions, or the policies at issue



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### Outline Your Determination

- ▶ If you have a single incident that requires one determination, this step may not apply
- ▶ If you have multiple incidents, you will have to reach multiple findings
- ▶ Outline the findings and review your highlights/notes of critical evidence that supports the finding
- ▶ Bulletpoint the rationale for each finding in outline form
- ▶ You want your rationale for the finding to be grounded in evidence (documents or testimonial evidence)
- ▶ Go back over outline before preparing the determination

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### Focus on the Elements

- ▶ Stay laser-focused on the elements of the alleged misconduct (review your policies) and the questions you have to answer to reach a finding
- ▶ Focus on the evidence that relates to the answers to the questions
- ▶ Ask yourself if each fact is truly relevant to the question you need to answer and the finding you will make
- ▶ Consider and weigh conflicting evidence, look for corroboration and contradictory evidence



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## Tips for Writing the Determination

- ▶ It must be objective
- ▶ It should be specific and direct
- ▶ Focus on facts, do not editorialize (we're writing in the news section of the paper, not the "Op Eds")
- ▶ If you have to make reasonable inferences for your rationale, provide the factual/evidentiary basis for those inferences
- ▶ If you have to make credibility determinations, provide the evidentiary basis for those determinations
- ▶ Ensure every factual statement you make is accurate
- ▶ Avoid conclusions not supported by facts
- ▶ There is no need to include extraneous facts

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