

Interviews



Interviews

- "Provide, to a party whose participation is invited or expected, written notice of the date, time, location, participants, and purpose of all hearings, investigative interviews, or other meetings, with **sufficient time** for the party to prepare"
- 34 CFR 106.45(b)(5)(v)

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Witness Interviews

- Review any documents, videos, and other tangible evidence prior to interviews as appropriate
- Bring relevant documents to interview
- Outline and develop standard questions before the interview
 - Write out key questions and ask them the same way to every witness

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Witness Interviews

- Interviews should be somewhere private with limited interruptions
- Record? Take notes?
 - Taking notes during the interview—may slow down the interview but this is not necessarily a negative as it can help detect deception if party is nervous about your note taking
 - Should take place throughout interview, not just at incriminating or deceptive moments

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Witness Interviews

- Take your time!
- Introduce yourself and explain your role
- Explain purpose of interview and how information will be used
- Make clear they are not obligated to participate and the school can't retaliate against that decision
- Employ empathy while maintaining professionalism

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Witness Interviews

- Interview witnesses separately
- Tell the person he or she must tell the truth, even if it is difficult
- Don't promise confidentiality
 - But, limit the disclosure of information to people who really need to know
- Gather facts, not opinions or guesses
- Use "who, what, where, when, why, and how" questions

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Witness Interviews

- Investigate any bias the complainant or witnesses may have against the respondent
- Ask simple questions, not compound questions
- Let witnesses answer your questions in their own words
 - Do not suggest answers and do not help them with their answers
- Start with broad open-ended questions and get more specific as needed

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Witness Interviews

- Don't use leading questions
- Don't shy away from uncomfortable questions
- Question with empathy and understanding
 - It's not an interrogation

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Witness Interviews

- Have witnesses tell you what they know from personal knowledge and what they know from other sources
- Listen to "hearsay" but record it as hearsay
- Try to obtain information in chronological order to the extent possible
- Identify potential witnesses

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Witness Interviews

- Be comfortable with silence
- Consider obtaining legibly written (or typed) and signed statements
- Retaliation is prohibited
 - If they are threatened, harassed, etc., come to you
- Don't make promises about outcomes

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Witness Interviews

- Review your notes before the interview concludes; clarify anything you are unclear about
- Notes should be complete and detailed
 - Important for assessing credibility
 - Decision may turn on small details
- Where possible, include verbatim statements on critical issues – paraphrasing can later become problematic

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Witness Interviews

- Ask if there is anything the complainant wants to tell you that you didn't ask
- Contact you if they think of anything else
- Gather any additional documents, videos, or other tangible evidence
- Conduct as many follow-up interviews as are needed

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Dangerous Words

While interviewing complainant, be careful that these words don't come out of your mouth:

- It's just teasing- no big deal.
- The people in our school would never do...
- I know he/she didn't mean anything like that.
- You need to learn to handle these things.
- If you won't file a written complaint our hands are tied
- When it is he said she said I can't do anything
- Boys will be boys or Kids will be kids



Dangerous Words

While interviewing respondent, be careful that these words don't come out of your mouth:

- Why are you lying?
- You're in trouble
- You should not have done this
- How do you think this made her feel?



Investigation Hypo



- Maria Reynolds brings a complaint against Alexander Hamilton, alleging he sexually assaulted her in school
- She brings a formal complaint to Title IX Coordinator, Abigail Adams, who assigns Guidance Counselor Aaron Burr to investigate the complaint
- Ms. Adams reports the behavior as a crime and provides Maria and Alexander with the initial notice that the complaint has been filed



Investigation Hypo: Starting off



- What should Burr's first steps be?
 - Outline interview process/steps
 - Notice parties of interviews
 - Consider who else to interview
 - Consider other possible evidence
 - Prepare interview questions



Investigation Hypo: Approaching interviews



- Notice of Interviews
 - Must give sufficient time to prepare
- What to ask Reynolds?
 - Get as many specifics as possible
 - Consider facts and evidence needed to allow decision maker to make responsibility determination, such as
 - What exact words did Hamilton use?
 - Where and when did this happen?
 - How has this affected her education?
 - What's her history with Hamilton?



Investigation Hypo: Approaching interviews



- What to ask Hamilton?
 - Confront on the specific allegations made by Reynolds and keep asking until the response is clear
 - May ask about respondent's prior sexual behavior or predisposition, but not complainant's



Investigation Hypo: No stone unturned



- Other evidence?
 - Staff member witness interviews?
 - Student witness interviews?
 - Don't need to be direct witnesses to the incident to be relevant
 - Video evidence?
 - Evidence from law enforcement investigation?



Investigation Hypo: Parallel Investigations



- Police involvement
 - Police conduct an investigation over the next few days and school is notified the state's attorney does not plan on bringing charges against Hamilton
 - Any affect on school's obligations?



Parties' Rights During Investigation—Right to Present Witnesses

- Parties must have the opportunity to present witnesses during investigation
 - Can be both fact and expert witnesses if they wish
- The investigation must "[p]rovide an equal opportunity for the parties to present witnesses, including fact and expert witnesses, and other inculpatory and exculpatory evidence" 34 CFR 106.45(b)(5)(ii)

**Parties' Rights During Investigation—
Discussion of Allegations**

- "Not restrict the ability of either party to discuss the allegations under investigation or to gather and present relevant evidence"
 - 34 CFR 106.45(b)(5)(iii)
- Parties must be able to discuss allegations with anyone
 - Limited to the allegations themselves
 - Can place limits on discussion of the evidence outside of the Tix process
 - Regulations allow for school to require NDAs if no formal complaint is filed

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**Parties' Rights During Investigation—
Discussion of Allegations**

- Exceptions
 - No contact directives as part of supportive measures
- Possible First Amendment concerns?

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**Parties' Rights During Investigation—
Right to Advisor**

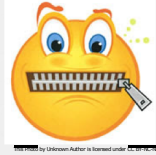
- "Provide the parties with the same opportunities to have others present during any grievance proceeding, including the opportunity to be accompanied to any related meeting or proceeding by the advisor of their choice, who may be, but is not required to be, an attorney, and not limit the choice or presence of advisor for either the complainant or respondent in any meeting or grievance proceeding; however, the recipient may establish restrictions regarding the extent to which the advisor may participate in the proceedings, as long as the restrictions apply equally to both parties"
 - 34 CFR 106.45(b)(5)(iv)

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Parties' Rights During Investigation— Protection from Retaliation

- Prohibition against retaliation
 - Cannot hold a party's (or a witness's) refusal to participate in the process against them
 - "Right to remain silent"
 - Applies both to investigation and employment



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Investigation Hypo: Dead to Rights?



- Burr issues a notice to Hamilton that his interview will take place in two days in the school conference room
- Hamilton responds that his attorney cannot attend that day, and he refuses to proceed without his attorney present
- Burr has already obtained video footage confirming Reynolds' allegations
- What next?



Parties' Rights During Investigation— Reviewing All Evidence

- Review of all compiled evidence
 - Once the investigator has compiled the evidence, ALL of the evidence, including that which he doesn't plan to use, must be disclosed to both parties
 - Parties must then have the chance to meaningfully respond to the evidence before the investigator drafts final report
- 34 CFR 106.45(b)(5)(vi)

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Parties' Rights During Investigation— Reviewing All Evidence

- Review of all compiled evidence
 - Can be submitted electronically
 - Parties must have **at least ten days** to submit a written response to evidence, which investigator must consider prior to drafting report

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Consider Dismissal?

- Once evidence is gathered, investigator should convene with Title IX coordinator to see if dismissal is either permitted or mandated
- Recall permissive vs. mandatory grounds for dismissal

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Burden of Proof

- School is the party responsible for figuring out what happened.
 - Not complainant's job to prove the claims
 - Not the respondent's job to exonerate themselves

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How much needs to be proved?

- Preponderance of the evidence
 - More likely than not
- Clear and convincing evidence
 - When the evidence "instantly tilts the scales in the affirmative when weighed against the evidence in opposition and if it causes the fact finder to have an abiding conviction that the evidence is true," it is considered clear and convincing. *Trickey v. Kaman Indus. Techs. Corp.*, 705 F.3d 788, 799 (8th Cir. 2013).
 - In other words, something highly and substantially more probable to be true than not
- 34 CFR 106.45(1)(vii)

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Report Writing

- 34 CFR 106.45(b)(5)(vii)
- Report must "fairly summarize the relevant evidence"



"Instead of writing my own book report, I've curated the results of previous reports, calculated the consensus opinion, and presented the average score with a cute graphic. I figured it'd save us both some time."

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Report Writing

- Report should include:
 - The names of the parties
 - The parties' representatives, if any
 - Allegations investigated
 - Individuals interviewed and dates of interviews
 - List of exhibits/evidence considered
 - Attach copies

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Report Writing

- Report should include:
 - Summary of facts
 - Include your reasoning for a controversial or contested fact determination
 - Discuss facts related to credibility of witnesses, witness reluctance, witness tampering or retaliation, etc.
 - Statement of Jurisdiction (control over respondent, control over context of allegations, reasons for no mandatory dismissal)
 - Burden of proof (preponderance of the evidence or clear and convincing)

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Report Writing

- Use their words as much as possible
- Should describe any prior relationships between the parties
- Must be sent to each party or the party's advisor
- Can be either in a hard copy or electronically

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Report Writing

- What evidence to put in report?
- Relevant Evidence
 - Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence
- Who, what, when, how of allegations in the complaint

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Report Writing

- Motive or bias of witnesses and parties
- Objective indications of truthfulness or deceit (e.g. witness looked down during entire interview, witness was sweating and would start and stop sentences frequently, sobbing, etc.)
- Relevant evidence can be both inculpatory (showing responsibility) and exculpatory (showing non-responsibility)

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Investigation Hypo: Evidence Concluded



- Burr has conducted interviews with both parties
- Hamilton alleges he wasn't at school that day but can't remember what he was doing
- Burr submits his evidence to both parties and believes he's ready to draft report
- On the eighth day after he submits evidence to both parties, Hamilton contends it is not him in the video and demands Burr interview a friend of his who can corroborate an alibi
- What are Burr's obligations?



Investigation Hypo: Evidence Concluded



- If Burr drafts report in spite of Hamilton's protests, could invite an appeal
- Desire to wrap investigation up quickly notwithstanding, should probably just do the interview
- Regulations are unclear on whether additional evidence after initial evidence review requires a restart




The Boundary between Investigations and Decision-Making



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Overview of Grievance Process



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Decision-Maker

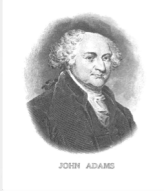
- Thomas Jefferson is principal and has training as a decision-maker
- Decision maker is a new role for Title IX complaints in sex harassment only
- Determines final responsibility or non-responsibility
- Issues written determination at culmination of grievance procedure



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KSB **Boundaries for Decision-Maker and Investigator**

- D-M not required to be an employee
- May not be Title IX Coordinator, Investigator, Appellate Decision-Maker, or informal mediator
- Recommended that you align decision-maker role with similar roles in general disciplinary processes
 - Usually the building principal



JOHN ADAMS


KSB **Investigator/Decision-Maker Boundary—Credibility**

- Credibility determinations
 - Cannot be made based on status of complainant, respondent, or witness
 - Generally left to the D-M, especially when they impact responsibility determinations
 - Investigator should report facts regarding physical behavior and indicators of reliability and truthfulness during interviews
- Decision-making left to decision maker
 - Investigator should include facts that would bear towards responsibility or non-responsibility, but notes and report should not state any determination by the investigator

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KSB **Credibility Determinations**

- Things Investigator can (and should) put into notes and subsequent investigative report:
 - "The complainant's eyes were moving constantly while he spoke."
 - "The respondent made several hand gestures when he was done speaking."
 - "Complainant's voice shook and faltered while she told the story."
 - "Respondent would respond with a raised voice when questioned."



www.kmflaw.com
"Say what you want about his politics, but nobody denies wrongdoing better."

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Credibility Determinations

- Things investigator **SHOULD NOT** put into notes and subsequent report
 - "The complainant did not appear truthful"
 - "The respondent was believable"
 - "Because of facts x,y, and z, the witness is likely lying"
 - The decision-maker should conclude

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The Investigative Report

- Decisions are the purview of the decision-maker
- Investigator should avoid credibility determinations
- Should include in notes facts that would bear towards responsibility or non-responsibility, but notes and report should not state any inferences to be drawn from those facts



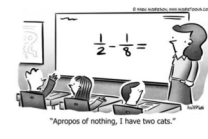
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Relevant Evidence

- Both Investigator and Decision Maker are asked to make determinations about the relevance of evidence
- Decision Maker can only consider relevant evidence for the determination




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 **Relevance**


- Evidence is legally relevant if:
 - (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and
 - (b) the fact is of consequence in determining the action.
 - FED. R. EVID. 401
- “A brick is not a wall”
 - The evidence doesn’t have to conclusively prove the case one way or another

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 **Relevance**

- Ultimate Question in a Title IX Grievance Process:
 - Did respondent sexually harass complainant?
- What are some “facts of consequence”?
 - Depends on nature of sexual harassment.

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 **Not Relevant**

- Complainant’s sexual predisposition
 - NEVER
- Complainant’s prior sexual behavior
 - UNLESS
 - Offered to prove that someone other than the respondent committed the alleged misconduct
 - Prior behavior with respect to respondent offered to prove consent

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Investigations/Decision Making Boundary Hypo 1

- Mr. Aaron Burr, the guidance counselor, has been asked by Title IX Coordinator Dolley Madison to investigate a formal complaint
- The complaint was filed by Alexander Hamilton against his former girlfriend, Maria Reynolds, for grabbing his crotch at school

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Investigations/Decision Making Boundary Hypo 1

- In Burr’s interview with Reynolds, she states the following:
 - She had recently broken up with Hamilton
 - She has no memory of the events in the complaint specifically, but admits that she had touched him that way during their relationship with his consent many times

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Investigations/Decision Making Boundary Hypo 1

- In Burr’s interview with Hamilton, Hamilton states:
 - Reynolds had never touched him that way before
 - He broke up with her
 - He threw her hand away as soon as she touched him
- Burr finds video of the incident showing Hamilton kiss Reynolds after she grabs him

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KSB **Investigations/Decision Making**
Boundary Hypo 1

- How should Burr approach his report?
- Once Jefferson gets the report, how should he approach his decision?
- Previous history of Reynolds touching Hamilton?
 - Relevant?
- Credibility?
- Responsibility?

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Title IX Team Training:
Informal Resolution Process


www.kob@topps.com



"You want informed consent, I want more pudding.
Let's make a deal."

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KSB **Overview of Grievance Process**



Sex Harassment → General Responses → Formal Complaint → Investigation → Decision → Appeal

Informal Resolution

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New Tool in the Belt

- 2001 and 2011 Guidance regarding previous Title IX regulations and procedures discouraged mediation or other informal resolution of complaints
- 2017 Guidance permitted informal resolution, but did not provide guidelines or limitations



Informal Resolution

“. . . At any time prior to reaching a determination regarding responsibility the recipient may facilitate an informal resolution process that does not involve a full investigation and adjudication. . .”

- 34 C.F.R. § 106.45(b)(9)



Provided That The Recipient. . .

- Provides to the parties a written notice of:
 - Allegations
 - Requirements of the informal resolution process
 - Extent it precludes resumption of grievance procedures/formal complaint regarding same allegations
 - Any party may withdraw from informal resolution and resume grievance procedures at any time prior to informal resolution
 - Consequences of informal resolution process
 - Including records that will be maintained or could be shared
 - Role of facilitator should grievance procedure resume
- Obtains parties’ voluntary, written consent



Discussion of Regulations

85 FR 30026

- Informal resolution options intended to promote autonomy and reporting for complainants
 - Ability to engage in informal resolution "may encourage some complainants to file a formal complaint where they may have been reluctant to do, so if a full investigation and adjudication was the only option"
 - Affords "greater choice and control for complainants"
- Intended to promote recipient discretion and problem solving



What is an Informal Resolution?

- May encompass a broad range of conflict resolution strategies
 - Arbitration
 - Mediation
 - Restorative justice
- Regs intentionally don't define the term, allowing parties the "freedom to choose the resolution option that is best for them, and recipient flexibility to craft resolution processes that serve the unique educational needs of their communities."
 - 85 FR 30026



Informal Resolution ≠ Supportive Measures

- Informal resolution may result in discipline or other burden on respondent
 - Supportive measures must be non-disciplinary and non-punitive
- Informal resolution can call for provision of service or measures that would otherwise constitute supportive measures
 - Counseling, no contact orders, etc.
- Informal resolution may finally resolve allegations
 - Supportive measures cannot preclude formal complaint initiating grievance procedures and final resolution



Never Mandatory

- Never mandatory for the recipient
 - Informal resolution *may* be facilitated
- Never mandatory for the parties
 - Participation voluntary, shown by written consent
 - May withdraw at any time prior to resolution
- Never incentivized
 - Cannot force parties to waive right to formal process and participate in informal resolution by conditioning any right or benefit upon that waiver



When Appropriate

- After a formal complaint has been filed
- Any time prior to the final determination (if the parties agree)
- As a part of the reasonably prompt resolution of allegations
- Never to resolve allegations that an employee sexually harassed a student



Process

- Must be facilitated by individual free from bias or conflict of interest, trained on how to serve impartially
- Not required to involve the parties confronting each other or even being present in the same room
 - Mediations or other processes may be accomplished by shuttle diplomacy



Outcomes

- Parties must agree to resolution, thus drive the result
- May result in respondent agreeing to accept disciplinary sanctions or other adverse consequences, without completing the grievance process
- May result in apology or acceptance of responsibility
- May result in other accommodations, supports, or services like counseling, no contact orders, etc.



Requirements for Facilitators

- Any person designated to facilitate informal resolution process must:
 - Not have a conflict of interest or bias
 - Receive training on the definition of sexual harassment, the scope of the recipient's education program or activity, how to conduct an informal resolution process, as applicable, and how to serve impartially



Informal Resolution Facilitator

- Work with both parties to reach a mutually agreed upon resolution to the formal complaint
 - Focus not on investigating/fact-finding, but that will likely factor in as parties work from common set of facts
- Utilize informal resolution process/method described in notice to parties



Informal Resolution in Practice

1. Determine whether to offer to facilitate informal resolution.
2. Provide written notice to the parties regarding the available informal resolution process.
3. Obtain the parties' voluntary, written consent to the informal resolution process.
4. Have a qualified facilitator facilitate the informal resolution.
5. Reach a resolution acceptable to each party and reduce to writing or resume grievance procedure.

***Notify TixC if party withdraws from process at any time**



Hypothetical

- John Laurens and Alexander Hamilton are members of the school wrestling team.
- One the first day of practice, Coach Abigail Adams began berating John Laurens for not exerting enough effort in a practice match with Hamilton, culminating with the Coach alleging that Laurens was "taking it easy on his little boyfriend."





Hypothetical

- In every practice after for two months, Coach Adams ridiculed the pair about their relationship and targeted them with homophobic slurs. The behavior continued to escalate through the season with encouragement of other team members.
- Laurens and Hamilton both quit the team a month before the end of the season and filed a formal complaint naming Coach Adams respondent.





Hypothetical

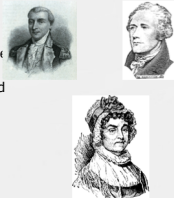
- After complaining, both Hamilton and Laurens express interest in rejoining the wrestling team if the harassment is resolved.
- When Coach Adams received notice of allegations, she was insistent it was an overblown misunderstanding of her intentions, which were never to offend but always in a crass attempt to motivate.





Hypothetical

- Coach Adams is adamant the issue could be resolved quickly and quietly by a team meeting led by the Athletic Director and Title IX Coordinator. She communicates this to both Complainants, assuring them this could even allow them to return to the team in time to compete in regionals. Both Hamilton's and Laurens' representatives would agree to an informal meeting to resolve the complaint.





Sorry, Coach!

- Complaint cannot be resolved through informal resolution where it is alleged an employee engaged in sexual harassment
- No right or benefit should be conditioned on engaging in informal resolution
 - Coach's communication suggests that informal resolution is incentivized by their more prompt return to the team



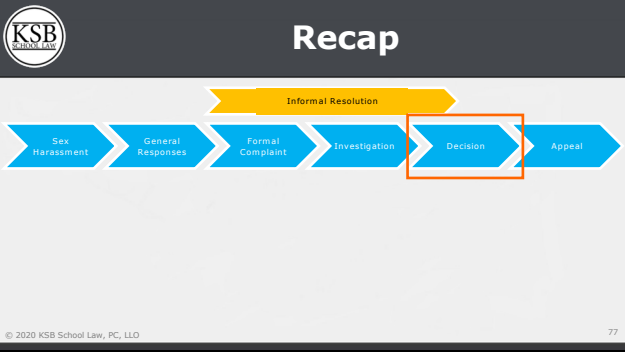
Title IX Team Training: Decision-Making Process



"I haven't yet decided if I'm staunchly in favor, or staunchly opposed. But rest assured, however I vote, it will be staunchly."

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Review of Investigation

- Parties have presented evidence and witness that Investigator has investigated
- Parties have reviewed Investigator's evidence and had opportunity to provide written feedback
- Investigator has considered parties' written responses

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Review of Investigation

- Investigator finalizes report that fairly summarizes all relevant evidence
- Parties receive Investigator’s Report
- Parties may provide a written response (to whom???)

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Decision-Making Process

- At the outset, Respondent still presumed to be not-responsible
- Decision-Maker cannot be the same person as the Title IX Coordinator or the Investigator
- No live hearing required for K-12 school districts

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Exchanging Written Questions

- The parties may pose written, relevant questions to any party or witness
- Decision-Maker must determine if questions seek relevant information

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Exchanging Written Questions

- Remember:
 - Complainant’s sexual predisposition
 - NEVER
 - Complainant’s prior sexual behavior
 - UNLESS
 - Offered to prove that someone other than the respondent committed the alleged misconduct
 - Prior behavior with respect to respondent offered to prove consent
- Decision-Maker must explain to party posing questions any decision to exclude a question as not relevant

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Exchanging Written Questions

- If questions are permissible, Decision-Maker facilitates the Q&A and provides the answers to the questioner
- Decision-maker(s) must:
 - provide each party with the answers
 - allow for additional, limited follow-up questions from each party
 - What does this mean?

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Timelines

- Regulations are silent about how long Q&A should last
 - Give the parties reasonable deadlines to submit and answer questions and follow up questions (2-3 days?)
 - Only waive Q&A deadlines for good cause shown
- Decision-Maker must wait **at least** 10 days before issuing decision



Required Contents of Written Determination

- **First:** make sure to identify what this document is and the relevant dates
- **Second:** Identify **each one of** the allegations potentially constituting sexual harassment
- **Third:** Describe the procedural steps taken by the district from the time that it received the formal complaint until the determination.

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Written Determination

- **Fourth:** make findings of facts
 - Credibility determinations
 - Who does Decision-Maker believe, disbelieve?
 - Decision-Maker can make credibility determinations
 - Conclude (for the district) what happened
- **Fifth:** go back to each allegation of sex harassment
 - For each allegation, say whether you find the respondent responsible and why.
- **Sixth:** determine whether the district’s code of conduct applies to the facts as you have found them

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Written Determination

- **Seventh:** identify responsive actions
 - Include:
 - whether remedies designed to restore or preserve equal access to the district’s education program or activity will be provided by the district to the complainant.
- **Eighth:** lay out the parties’ right to appeal

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Written Determination

- Provided to the parties simultaneously
- Becomes final either on the date that the district provides the parties with the written determination of the result of the appeal (if one is filed) or on the date that an appeal would no longer be timely

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Imposing Student Discipline

- District still must comply with state law
- When can student discipline be imposed?
 - At the end of the Title IX Grievance process
 - Role of determination of responsibility in student discipline
- Who can impose discipline / start the process?
- What discipline can be imposed?
- What process must be followed?

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Hypothetical

- Peggy Schuler and Maria Reynolds are 8th grade students in Minuteman Middle School.
- Both girls have romantic feelings for Alexander Hamilton, another middle school student.
- Peggy is outraged when Alexander invites Maria to make a TikTok dance video with him.



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Hypothetical

- Peggy Schuler begins to call Maria a "slut" and "whore" every time she sees her. Peggy spreads rumors about Maria engaging in promiscuous sexual relationships, that she has AIDS and is pregnant.
- Other students join in with Peggy



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Hypothetical

- Maria is so distressed by Peggy's taunts that she starts cutting herself and is hospitalized for a brief period of time.
- With the help and encouragement of her therapist, Maria files a Title IX complaint against Peggy



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Hypothetical

- Guidance Counselor Aaron Burr has investigated Maria's complaint, and has completed his written report.
- John Adams is the Minuteman principal and the designated decision-maker for this complaint.
- He is working through the process to make his decision.....



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Hypothetical

- Peggy Schuler submits the following questions for Maria:
 - Isn't it true that you and Alexander's TikTok video was banned by the app for being too explicit?
 - How many sexual partners have you had?
 - Why did Mark LaFayette break up with you earlier this year? Was it because you had sex with Alexander?



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Hypothetical

- Maria submits the following questions for Peggy:
 - Did Angelica Church (another student) obtain a restraining order against you after you threatened her for dating John Laurens, a boy for whom you had feelings?
 - How many disciplinary referrals have you received while a student at Minuteman Middle School?



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Hypothetical

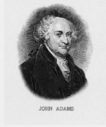
- Which questions should John Adams allow?
 - TikTok video ban?
 - Number of sexual partners?
 - Mark LaFayette breakup?
 - Restraining order?
 - Disciplinary referrals?
- How does John Adams communicate these limits?



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Hypothetical

- John Adams has reviewed Aaron Burr's report and the responses to that report from Peggy and Maria.
- He concludes that it is 51% likely that Peggy did the things Maria alleges.
 - Finding of responsibility or no responsibility?



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Hypothetical

- John Adams thinks it is extremely likely that Peggy engaged in sex harassment of Maria.
- What issues should he make findings of fact about in his report?
 - The TikTok video?
 - The girls' mutual romantic interest in Alexander?
 - Calling Maria "slut" and "whore"?
 - Promiscuity/pregnancy/AIDS rumors?
 - Other students?



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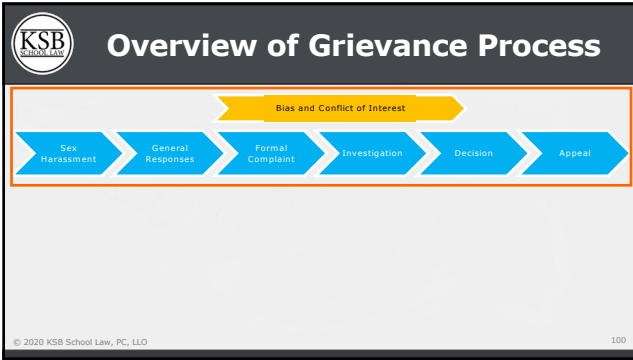
Title IX Team Training: Avoiding Bias and Conflicts of Interest



"Do I have confirmation bias? Yes.
You bet. Absolutely."

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Requirement of Impartiality

- Regulations require any member of Title IX team to be free from:
 - conflicts of interests
 - biases against complainants or respondents generally
 - biases against a individual complainant or respondent
- Members of Title IX team must "serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias"
- Training materials cannot rely on sex stereotypes and must promote impartial investigations and adjudications of formal complaints of sexual harassment

Requirement of Impartiality

- Grievance process must entail an objective evaluation of all relevant evidence
- Credibility determinations may not be based on a person's status as a complaint, respondent, or witness
- Both parties must have equal appeal rights, and parties may appeal on the grounds someone involved was biased or had a conflict of interest
- At each stage, each member of team must comply with these rules



Driving force behind the Regs

One of three main purposes of the regulations in its commentary is for schools to "avoid intentional or unintentional injection of sex-based biases and stereotypes into proceedings that too often have been biased for or against parties on the basis of sex, mostly because the underlying allegations at issue involve issues of sex-based conduct."

- 85 FR 30026



Determining Conflicts and Bias

- Department specifically chose not to further define conflicts of interest or bias despite requests from commenters
 - Indicated that training on serving impartially would ensure that Title IX Team was not impermissibly biased or conflicted
- Generally, in the Title IX context...
 - A **conflict of interest** occurs when an individual's interests raise a serious question as to whether they can act objectively and without bias should they need to act against those interests
 - **Bias** is the inability to maintain objectivity, due to some inclination or prejudice towards or against an individual, characteristic, or circumstance
 - **Prejudgment** refers to passing judgment prematurely or without sufficient objective consideration
- Serving multiple roles (if permitted by the regs) does not create a conflict

Determining Bias

- Regulations require:
 - an "objective (whether a reasonable person would believe bias exists), common sense approach to evaluating whether a particular person serving in a Title IX role is biased..."
 - Schools to exercise "not to apply generalizations that might unreasonably conclude that bias exists"
 - Training for the team must "provide Title IX personnel with the tools needed to serve impartially and without bias"



Bias or Conflict Issues?

- HS Principal, and HS Decision-Maker, Thomas Jefferson is the head football coach; respondent in formal complaint is the star quarterback (and yes, it's football season)
- Appellate Decision-Maker and Superintendent George Washington is direct supervisor, and evaluator of, all employees trained to serve as investigator and decision-maker





Bias or Conflict Issues?

- Teacher Abigail Adams is the respondent in a Title IX complaint from a middle school student; Middle School Principal John Adams is generally decision-maker for middle school complaints
- Investigator Burr, months after watching this Title IX training module, is often heard in the staff lounge bemoaning the #MeToo movement and suggesting that "most of the time, they're just making it up."





Other Characteristics

- Biases or assumptions about athletes were prevalent in suits alleging bias in Title IX proceedings
- Social statuses, ability to communicate effectively, appearance all shown to affect credibility determinations and general reactions to an individual
- Biases towards an individual, including those founded on prior history or issues, cannot affect decision-making



Are you biased?

- In the literal sense, yes, we all are... In the Title IX context...
 - Can you objectively serve in your role without predetermination, basing any decisions on the facts and investigating further when necessary?
 - Can you apply the concepts and meet the obligations described in this training while fulfilling your role?
 - Can you consistently apply the definitions and due process rights while fulfilling your role?
 - Will you allow the prescribed grievance process to drive the role you play, and the manner in which the issues are determined?
 - If **yes** to all... serve your role consistent with applicable requirements
 - If **no** to any... recuse yourself from the grievance process



Strategies to Serve Without Bias

- **Individuation:** give individuality to persons in a group
 - Intended to prevent making biased inferences on basis of sex, race, sexual orientation, etc.
 - Requires obtaining information about individual members of a group instead of relying on generalizations
- **Perspective Taking:** take a first-person perspective towards groups to promote empathy and understanding
- **Increased Opportunities for Contact:** seek out opportunities to engage with stigmatized groups in a positive manner



Hypothetical

- Mark Lafayette is a Senior best known for breaking Thomas Topham's school records in weight lifting, and for being the Class A wrestling champion three years straight
- He comes to Title IX Coordinator Madison to talk about an incident where he says his girlfriend, the petite and docile Angelica Church, pinned him down and sexually assaulted him
- Normally, Coordinator Madison would sign a complaint given these facts, but is hesitant because it seems far fetched that Angelica could have taken advantage of Lafayette



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Appeals

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Overview of Grievance Process

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Who can appeal?

- Decision must make clear each party has this right
 - Complainant has just as much right to appeal a determination of non-responsibility as vice-versa

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When can a decision be appealed?

- Three mandatory grounds*:
 - Procedural issue
 - New evidence
 - Bias/conflict of interest
- Recipient can add grounds, but must apply them equally to both parties

** Both parties can also appeal a recipient's determination that the allegations were subject to mandatory dismissal under § 106.45(b)(3)(i).*

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When can a decision be appealed?

- Regardless of grounds used, appellant must show the issue actually affected the outcome
- Will be a common reason to dismiss appeals

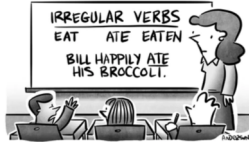
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When a decision can be appealed—procedural issues

- Procedural issues
 - Party appealing must show how the procedural irregularity affected the outcome



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When a decision can be appealed—new evidence

- New evidence
 - Must have been able to alter the outcome
 - Must have not been “reasonably available” at the time of the determination or dismissal
- Example
 - A witness comes forward with testimony after a determination was made that he saw respondent somewhere else at the time of the alleged assault
 - No one was aware of the witness’s testimony until he came forward

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When a decision can be appealed—bias/Conflict

- Bias/conflict of interest
- Must have affected outcome
- Example
 - Complainant becomes aware after decision that respondent is related to the TixC



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Appeal Decision-Maker

- Cannot be the TixC, investigator, or D-M
- Must be free of bias and conflicts of interest
- Must issue written decision and submit it to both parties simultaneously



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Appeal Procedure

- KSB Policy recommends ten days to bring appeal
- Must notify other party when appeal is brought
- Each party must have an opportunity to submit a written statement either in support of or against the decision

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Drafting the Appeal Decision

- Framed similarly to original decision
- More streamlined
 - Less emphasis on all the facts required



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Drafting the Appeal Decision

- **First:** Make sure to identify what this document is and the relevant dates
- **Second:** Identify and describe the arguments for appeal
- **Third:** Describe the procedural steps from time of complaint to time of drafting decision

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Drafting the Appeal Decision

- **Fourth:** Summarize decision and its rational
- **Fifth:** Analyze whether outcome was affected by claimed error:
 - If not, appeal can be dismissed
- **Sixth:** Grant or reject the appeal and state your rationale for doing so

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Appeals Hypothetical

- Angelica Church accused Alexander Hamilton of sexual assault and filed a formal complaint with the TixC
- After the investigation concluded, Lincoln High School Principal Thomas Jefferson submitted his decision to the parties three days ago. He made a finding of non-responsibility



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Appeals Hypothetical

- Angelica wishes to appeal on the following grounds:
 - The investigation yielded a video recording of the assault and the decision does not mention it
 - The school only gave her the notice of her interview only a few hours prior to the scheduled time



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Appeals Hypothetical

- Angelica wishes to appeal on the following grounds (more):
 - A witness came to the complainant after the decision was made. This person claimed may have possibly seen the Respondent somewhere other than where he said he was the night of the complaint



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Appeals Hypothetical

- Angelica wishes to appeal on the following grounds (still more):
 - The investigator submitted his report eight days after the complaint was filed
 - The TixC is in Rotary Club with the respondent's mother



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Appeals Hypothetical

- What should the General do?
- Step 1: Solicit a response from Hamilton
 - 34 C.F.R. 106.45(b)(8)(D) says you must "Give both parties a reasonable, equal opportunity to submit a written statement in support of, or challenging, the outcome"
- Step 2: Look at each grounds for appeal
 - Does it fall under one of the three grounds?
 - Did it affect the outcome of the decision?



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Appeals Hypothetical

- The investigation yielded a video recording of the assault and the decision does not mention it
 - Does this fall under one of the three? Did it affect outcome?
- The school only gave her the notice of her interview only a few hours prior to the scheduled time
 - Does this fall under one of the three? Did it affect outcome?



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Appeals Hypothetical

- A witness came to the complainant after the decision was made. This person claimed may have possibly seen the Respondent somewhere other than where he said he was the night of the complaint
 - Does this fall under one of the three? Did it affect outcome?



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Appeals Hypothetical

- The investigator submitted his report eight days after the complaint was filed
 - Does this fall under one of the three? Did it affect outcome?
- The TixC is in Rotary Club with the respondent's mother
 - Does this fall under one of the three? Did it affect outcome?



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Appeals Hypothetical

- Written report could reverse determination of non-responsibility based on:
 - Video?
 - Interview Notice?
- Regardless of his decision, Washington must:
 - Create a written report describing the result of the appeal and the rationale for the result
 - Provide it to both parties simultaneously
 - (and remember, he cannot tell a lie....)



Title IX Team Training: Confidentiality and Retaliation



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Confidentiality and Retaliation

- Medical, Psychological and Other Treatment Records
- Privileged Information
- Confidentiality and Access to Evidence and Records
- Non-Disclosure Agreements
- First Amendment and Retaliation
- Reporting Child Abuse



Confidentiality and Retaliation

- Schools cannot access or disclose a party's medical/psychological records without the party's written consent
- School cannot consider evidence or utilize questions or evidence which results in the disclosure of privileged information unless the party waives the privilege
- School must keep confidential the identity of complainants and respondents both informal and formal, except as allowed under FERPA or if required to carry out Title IX grievance process



Disclosure of Evidence

- Must provide both parties an equal opportunity to inspect and review any evidence obtained as part of the investigation that is directly related to the allegations raised in a formal complaint
 - Including the evidence upon which the recipient does not intend to rely in reaching a determination regarding responsibility
 - And inculpatory or exculpatory evidence
 - Sent to each party in electronic format or a hard copy



May Limit Downloads and Copies (Under Title IX)

- "The Department acknowledges that a recipient may use, but is not required to use, a file sharing platform that restricts the parties and advisors from downloading or copying evidence."
 - 85 FR 30026
- BUT check state law (which may require copies of education records or personnel records be provided)



Disclosure of Report and Determination

- Must send to each party and the party's advisor, if any, the investigative report in an electronic format or a hard copy, for their review and written response
- Must provide the written determination to each party simultaneously



Hypo

- Alexander Hamilton, an 8th grader, filed a formal complaint against Paul Revere, the janitor, alleging that Paul Revere forcibly fondled him on August 18 in the school stables
- Investigator Aaron Burr pulled Alexander's attendance records for the day in question, and they show that he was absent on the 18th
 - He also reviewed security footage, which does not show Alexander in the stable area on the day in question
- Alexander's parents have e-mailed investigator Burr, informing him that their son's attendance records and any video used in the investigation are protected by FERPA and they will not consent to disclosure





Why?

"The Department is precluded from administering, enforcing, and interpreting statutes, including Title IX and FERPA, in a manner that would require a recipient to deny the parties, including employee-respondents, their constitutional right to due process because the Department, as an agency of the Federal government, is subject to the U.S. Constitution."

• 85 FR 30026



Non-Disclosure Agreements (NDAs)

"The Department does not interpret Title IX as either requiring recipients to, or prohibiting recipients from, using a non-disclosure agreement, as long as such non-disclosure agreement does not restrict the ability of either party to discuss the allegations under investigation or to gather and present relevant evidence under § 106.45(b)(5)(iii). Any non-disclosure agreement, however, must comply with all applicable laws."

• 85 FR 30026



Hypo

- Same facts as before
- To ease the privacy concerns of Mr. and Mrs. Hamilton, Investigator Burr requests that the parties sign a non-disclosure agreement prior to sharing the evidence
- Revere signs the agreement, but subsequently discloses the evidence to each of his witnesses
- Revere also refers to the evidence in detail in a long Facebook post written to publicly "clear his name"



Free Speech Concerns?

• "*Constitutional protections.* Nothing in this part requires a recipient to . . . restrict any rights that would otherwise be protected from government action by the First Amendment of the U.S. Constitution."

• 34 C.F.R. § 106.6(d)

• "The Department may not deem a recipient to have satisfied the recipient's duty to not be deliberately indifferent under this part based on the recipient's restriction of rights protected under the U.S. Constitution, including the First Amendment, Fifth Amendment, and Fourteenth Amendment."

• 34 C.F.R. § 106.44(a)



Retaliation and False Statements

- Schools are allowed to punish for lying during a grievance procedure without violating the student's free speech
 - Provided the school does not use the finding of responsibility/non-responsibility as the basis for determining the person lied
- Schools cannot "intimidate, threaten, coerce, or discriminate against any individual" for the purposes of interfering with the person's Title IX rights because that person participated or refused to participate in the Title IX process



Avoiding Retaliation Claims


- You may be able to discipline for inappropriate speech even if it doesn't rise to severe, pervasive, and objectively offensive, but tread lightly
- You may discipline for false statements in grievance process, long as basis is not simply the result/determination
- You may require NDAs, but you cannot restrict protected First Amendment activity or the right to discuss the case and prepare a response



Reporting Child Abuse


- Reporting child abuse permitted under FERPA
 - Health and Safety (Emergency) exception to consent
- Reporting child abuse may be required by state law
 - Requirements vary by state
 - In some states it is "all persons" and others it may also or in the alternative have special or specific obligations for school officials
 - State law definitions of child abuse may or may not line up with definitions of "sexual harassment" under Title IX

**Title IX Team Training:
Special Education Considerations-Last One!**



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Overview of Grievance Process



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**Disproportionate Impact on
Students with Disabilities**

- Data cited in the comments to the proposed regulations:
 - 22 percent of students with disabilities reported some form of abuse over the last year
 - Nearly 62 percent had experienced some form of physical or sexual abuse before the age of 17
 - Only 27 percent reported the incident
 - Individuals with intellectual disabilities are sexually assaulted and raped at more than seven times the rate of individuals without disabilities



Two Sides of the Coin

- Students with disabilities may exhibit sexually aggressive or inappropriate behaviors
 - Number of Title IX and other cases related to sexual violence in which both aggressor and victim is student with a disability
- Consider school's obligation to address such behaviors
- Consider school's limitations in addressing such behaviors
- Regulations make clear schools' special education obligations are not affected by the new regulations
 - FAPE obligations entirely unaffected



Hypothetical

- The parents of Maria Reynolds, a student with ASD who is nonverbal, submit a formal complaint
 - Alleges that an AngelSense™ device kept in Maria's backpack captured audio of her being sexually harassed every day for over two months by John Laurens, a student with an IEP due to his diagnosis of Tourette's Syndrome, and Mark Lafayette, a student with an IEP due to his diagnosis of dyslexia
 - Alleges Mark Lafayette made daily, graphic threats of sexual assault before attempting to rape Maria last week
 - Alleges John Laurens called Maria a "whore" and "slut" several times an hour





Accommodate throughout Process

"The Department also fully encourages recipients to provide whatever reasonable accommodations are necessary for students with disabilities; recipients must comply with applicable disability laws while also complying with these final regulations."

- 85 FR 30026



Hypothetical

- John Lauren’s father is serving as John’s advisor, and dad is deaf
- Consider accommodations throughout process:
 - Providing transcriptions of audio evidence, such as the AngelSense™ recordings
 - Making available an ASL interpreter in interviews involving the advisor





Hypothetical

- Given Maria’s inability to communicate verbally or engage in any activity for an extended period of time, her advisor requested additional time to prepare responses to written questions, evaluate evidence, and prepare a response to the investigator’s report.





No Magic Words

- Investigate reports of misconduct even if it isn’t initially clear the report is a formal complaint of sexual harassment
 - “Similarly, recognizing whether a student has disclosed a Title IX sexual harassment incident includes taking into account any disability the reporting student may have that may affect how that student describes or communicates about the incident.”



Supportive Measures

- Department commentary emphasizes role of supportive measures in meeting the needs of students with disabilities
- Supportive measures, to the extent they change a student's placement, must be determined/approved by IEP team or written agreement with parents
 - I.e., if counseling services would remove complainant from general education setting, must amend IEP
- The process for offering supportive measures after considering the complainant's wishes is an interactive process that is not unlike the interactive process that the ADA requires.



Running Hypothetical




- Supportive measures for Maria
 - IEP team should be involved in determining appropriate supportive measures, as some may change her placement
 - Any additional counseling services that may remove her from current placement
 - If you determine separating her from respondents is appropriate, consider whether you're changing anyone's placement or whether you're changing location
 - Changes in placement for Maria, John, and Mark must be made through IEP process
 - Changes in location for Maria, John, and Mark may be made unilaterally
 - Consider whether supportive measures require accommodations or impact ability to access FAPE
- Consent issues? Consider how a student's disability affects his/her ability/capacity to consent to sexual activity
 - For instance, Maria likely lacks the capacity to consent to sexual activity





Respondents with Disabilities

- Consider compliance with IDEA at all stages, including emergency removals, supportive measures, discipline
- Respondent must be provided FAPE irrespective of supportive measures
- Manifestation required prior to disciplinary removals of ten days or more
- Contemplate respondent's need for new placement/services
- Consider early whether discipline or a change in placement is more appropriate to address misconduct


 **Hypothetical**

- Guidance Counselor Aaron Burr is investigating the formal complaint, and believes that Mark Lafayette presents an immediate threat to the safety of his peers
 - May Mark Lafayette be removed from school?
 - Must we conduct an MDR prior to removal?
 - Must his IEP Team meet?
 - Should his IEP Team meet?
- Burr believes that John Laurens is highly likely to continue verbally harass peers during process
 - May John Laurens be removed from school?



 **Emergency Removals**

- School is allowed to remove a student in an emergency, but only if:
 - It undertakes an individualized safety and risk analysis
 - Determines that an immediate threat to the physical health or safety of any student or individual arising from the allegations justifies removal
 - Provides respondent with notice and an opportunity to challenge decision immediately following removal
- Regulations make clear emergency removals cannot modify any individual's rights under the ADA, IDEA, or § 504
- Schools may convene the IEP team before an emergency removal
- If a situation satisfies the emergency removal parameters of Title IX but the behavior was a manifestation of the student's disability, the school does not have to remove the student

 **Running Hypothetical**

- Guidance Counselor Aaron Burr is investigating the formal complaint, and believes that Mark Lafayette presents an immediate threat to the safety of his peers
 - May Mark Lafayette be removed from school?
 - Yes, subject to the requirements of notice and due process
 - Must we conduct an MDR prior to removal?
 - Check state law...
 - Required for **disciplinary** removals; emergency removals may not be disciplinary
 - Must his IEP Team meet?
 - Guidance indicates the team **should** meet to consider a revision to his placement/services if he'll be removed for 10+ days
 - Not explicitly required by regulation, but you still owe FAPE



Sticks and Stones

- Burr believes that John Laurens is highly likely to continue to verbally harass peers during process
- May John Laurens be removed from school?
 - No! Verbal harassment does not present an immediate threat to the physical health and safety of others.



Running Hypothetical



- Both respondents verified under the IDEA, will be subject to procedural safeguards
- Title IX Coordinator Dolley Madison is familiar with both respondents
 - She believes that *if* the allegations are true, John's alleged misconduct would have been caused by, or directly related to, his disability
 - She believes that *if* the allegations are true, Mark's alleged misconduct would not be related to his disability
- Why is this important???



Discipline

- Students with disabilities may be disciplined subject to procedural safeguards of the IDEA
- Discipline may only be administered after a final determination of responsibility finds a respondent responsible after the formal grievance procedure



Discipline NOT Required

•OCR will not "second guess whether the recipient imposes a disciplinary sanction on a respondent who is found responsible for sexual harassment" giving schools flexibility to administer appropriate discipline to students with disabilities in light of the particular circumstances



Not more than 10 consecutive school days

- 10 consecutive days per offense
- Additional removals in same school year for separate incidents of misconduct allowable so long as not a "pattern of removals" constituting a "change in placement"



Major Discipline

- Removals for more than 10 days
- "Expulsion"
- Removal for 45 days for special issues
- Requires MDR
 - The MDR must be conducted by "the LEA, the parent, and relevant members of the child's IEP Team (as determined by the parent and the LEA)." 34 CFR 300.530(e)(1)
 - Team must "review all relevant information in the student's file, including the child's IEP, [and] teacher observations ... and any relevant information provided by the parents."



Manifestation Determination

- Questions for MDR:
 - Was this misbehavior caused by the student's disability?
 - Was conduct in question caused by or did it have a direct and substantial relationship to the child's disability?
 - Was the misconduct a direct result of the district's failure to implement IEP?
- If no:
 - Child can be treated like a regular education student consistent with state law...sort of ...
- If yes:
 - Cannot remove
 - Must conduct FBA, implement BIP, OR review existing BIP
 - Must return to prior placement (unless agreement otherwise)



Misconduct is a Manifestation 34 CFR 300.530(f)

- If student's conduct is a manifestation of the student's disability, the IEP team must:
 - Conduct a functional behavioral assessment (provided the district had not conducted such assessment prior to the conduct at issue) and implement a behavioral intervention plan for the child.
 - When a behavioral intervention plan already has been developed, review the plan and modify it as necessary to address the behavior.
 - **Return the child to the placement from which he was removed**, unless the parent and district agree to a change in placement as part of the modification of the behavioral intervention plan.



IAES May Be an Option

- May remove a student to IAES for 45 days (regardless of manifestation) if student . . . has inflicted **serious bodily injury** upon another person while at school.
- The term "serious bodily injury" means bodily injury that involves:
 - a substantial risk of death,
 - unconsciousness,
 - extreme physical pain,
 - protracted and obvious disfigurement, or
 - protracted loss or impairment of the function of a bodily member, organ, or mental faculty



Different Outcomes ≠ Bias

- “Any different treatment between students without disabilities and students with disabilities with respect to emergency removals, may occur due to a recipient’s need to comply with the IDEA, Section 504, the ADA, or other disability laws, but would not be permissible due to bias or stereotypes against individuals with disabilities.”
 - 85 FR 30026
- Same would be true of discipline



Changes in Placement

- If a student’s behavior is likely a manifestation, it may be more appropriate to address behavior via services and placement rather than discipline
- Once discipline is initiated, student’s placement cannot be changed without bilateral agreement if misconduct is a manifestation
 - Can hinder your ability to effectively meet student’s needs
 - Can hinder your ability to ensure safe atmosphere



Running Hypothetical

- Guidance Counselor Burr is in the process of investigating Maria’s claims.
- Principal Tom Jefferson* has emergency excluded John Laurens during the pendency of the investigation
 - Manifestation required?
- Mark LaFayette’s IEP team decided to remove him to an intensive day program which specializes in helping students with disabilities understand healthy sexuality.
 - Manifestation required?



Title IX Team Training: Wrapping Up



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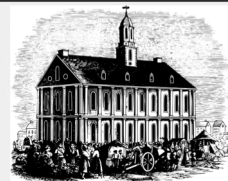
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We get that this was A LOT of material

- Remember, this is really just what the regulations require
- You can (and should) improve on your best practices and your systems as you gain more experience with specific cases
- Reach out to your school's legal counsel early and often as you get familiar with these procedures and how you will handle specific cases
- "Steal" the best ideas that you know/hear about



Parting Thoughts on Sex Equity in Education



- Like your district, District 1776 isn't perfect
- That doesn't mean it is automatically deliberately indifferent
- That doesn't mean it cannot improve its sex equity processes

Title IX Team Training



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