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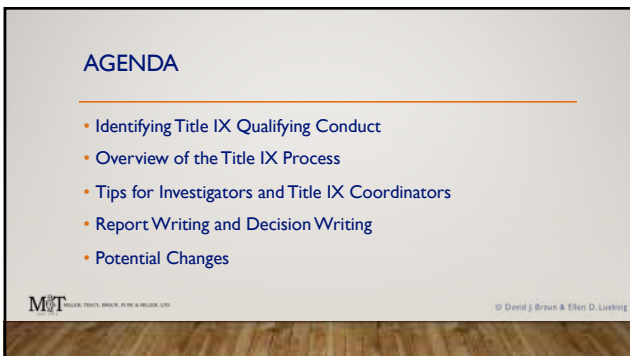
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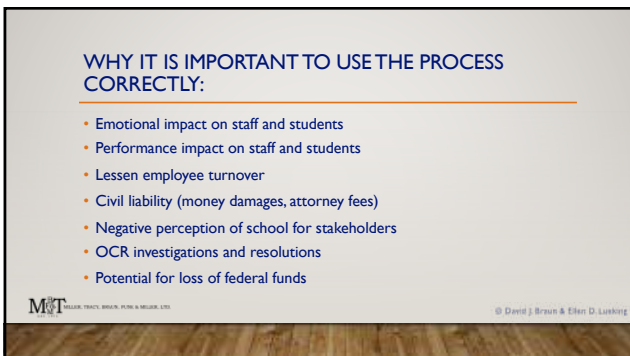
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**IDENTIFYING TITLE IX QUALIFYING CONDUCT**

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“No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance.”

20 U.S.C. § 1681 et seq.

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**TITLE IX REGULATION**

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- In August 2020, the current Title IX regulations we are operating under were enacted. The Department of Education at that time published a 2000+ page document with comments advising about interpretations and reasoning. It is clear that a primary focus of the regulations is due process for Respondents, which comes in a few forms:
  - Notice of allegations (including naming the Complainant)
  - Opportunity to present evidence
  - Opportunity to hear evidence against (and to cross-examine)
  - Opportunity for representation through the process




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**PRESS POLICY 2:265**

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- Most Districts have adopted PRESS 2:265, which is the District policy on Title IX Sexual Harassment.
- However, everything you need is not contained only in 2:265.
  - PRESS 2:265-AP1 explains intake of incidents.
  - PRESS 2:265-AP2 explains the full Title IX grievance process.
  - PRESS 2:265-E is a glossary of definitions.

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**EXPANDED DISTRICT OBLIGATIONS TO ENSURE KNOWLEDGE ABOUT REPORTING**

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- There must be an employee designated as "Title IX Coordinator."
- Districts must notify students, employees, **applicants for admission and employment**, parents or legal guardians of elementary and secondary school students, **and all unions** of the name or title, office address, email address, and telephone number of the Title IX Coordinator.
- Districts must prominently display on website the required contact information for the Title IX Coordinator, grievance procedures, and training materials used to train Title IX Personnel.

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**SEXUAL HARASSMENT**

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Sexual harassment is conduct on the basis of sex that satisfies one or more of the following:

1. An employee conditioning the provision of an aid, benefit, or service of the district on the complainant's participation in unwelcome sexual conduct;
2. Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the district's education program or activity; or
3. "Sexual assault" as defined in 20 U.S.C. 1092(f)(6)(A)(v), "dating violence" as defined in 34 U.S.C. 12291(a)(10), "domestic violence" as defined in 34 U.S.C. 12291(a)(8), or "stalking" as defined in 34 U.S.C. 12291(a)(30).

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**GENDER-BASED HARASSMENT**

- Slurs, taunts, stereotyping or name-calling based on an individual's actual or perceived sex may rise to the level hostile environment sexual harassment (severe, pervasive, and objectively offensive).
  - Keep an eye out for conduct based on an individual's LGBTQ+ status such as dead-naming and intentionally using incorrect pronouns.

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**“SEXUAL ASSAULT”**

- Actual or intentional physical sexual acts against a person **without consent** that may include:
  - Rape, sodomy, forcible fondling, incest, sexual assault with an object, and statutory rape

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**CONSENT**

- "Recipients must clearly define consent and must apply that definition consistently." 85 Fed. Reg. 30125.
- PRESS 2:265-E defines consent: "Knowing, voluntary, and clear permission by word or action, to engage in mutually agreed upon sexual activity. Consent may not be inferred from silence, passivity, or a lack of verbal or physical resistance. A person's manner of dress does not constitute consent. Past consent to sexual activities, or a current or previous dating relationship, does not imply ongoing or future consent. Consent to some sexual contact (such as kissing or fondling) cannot be presumed to be consent for other sexual activity (such as intercourse). Consent to engage in sexual activity with one person does not constitute consent to engage in sexual activity with another person. Consent may be withdrawn at any time. A person cannot consent to sexual activity if that person is unable to understand the nature of the activity or give knowing consent due to circumstances, including without limitation to the following:

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**CONSENT CONTINUED**

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1. The person is incapacitated due to the use of influence of alcohol or drugs;
2. The person is asleep or unconscious;
3. **The person is under age;** or
4. The person is incapacitated due to a mental disability.

The existence of consent is based on the totality of the circumstances, including the context in which the alleged incident occurred. Coercion, force, or the threat of either invalidates consent.

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**THE AGE OF CONSENT IN ILLINOIS**

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- “‘Child’ means a person under 17 years of age.”  
720 ILCS 5/11-9.1.

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**OVERVIEW OF TITLE IX PROCESS**

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**TITLE IX PERSONNEL**

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- Title IX Coordinator
- Investigator
- Informal Resolution Facilitator
- Initial Decision-Maker
- Appellate Decision-Maker

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**TITLE IX PERSONNEL**

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- Must be free from conflict of interest and bias and must be trained to serve impartially and without prejudging facts.
- Impartiality requires serving neutrally with no partiality to a specific complainant or respondent or towards complainants or respondents generally.
- Actual bias vs. perceived bias—does it matter?
  - Think about social media posts, likes, and presence.
  - Think about school and outside of school relationships and associations.
- Thoughtfully respond to allegations of conflict and bias.

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**TITLE IX PERSONNEL**

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- The Initial Decision-Maker needs to be siloed off from receiving information about the case so that they make a determination of responsibility without prejudgment or bias.
- Keep in mind that the Initial Decision-Maker is often the Superintendent, so this may mean excluding them from conversations they would be included on in any other student/employee conduct issue.

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**TITLE IX PERSONNEL**

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- If the Appellate Decision-Maker is the Board of Education, they all need to receive Title IX training.
- Districts may outsource this role or exchange services with a neighboring District administrator for this role.

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**TITLE IX PERSONNEL**

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- The Title IX Coordinator and Investigator may have a collaborative relationship. The same person may hold both roles.
- If a person serves as a facilitator for informal resolution, they cannot be a decision-maker and should likely not be an Investigator, either, if the issue did not resolve and proceeded to the formal grievance process.

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**PRESUMPTION OF NO RESPONSIBILITY**

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- Respondent must be presumed not responsible until there is a finding of responsibility at the end of the grievance process and the appeal period has passed.
- This means **no discipline until the grievance process is over and the appeal period has passed.**
  - There are three mandatory 10 school business day response periods built in to the process, therefore if this process takes less than a month and a half, the District has not followed policy.

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**THE TITLE IX PROCESS**

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- Notice of conduct that may qualify as sexual harassment.
  - "Actual knowledge means notice of sexual harassment or allegations of sexual harassment to...an official of the [District] who has the authority to institute corrective measures on behalf of the [District]."
  - Often this is a phone call from a parent or an in-person report from a student, but it can take other forms. Notice may be given in a conversation that a student has with a teacher, paraprofessional, or a coach (who is not otherwise employed by the school). It can also come from a third party.

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**INTAKE**

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- After receiving notice, the **Title IX Coordinator**, must promptly meet with the Complainant (alleged victim of the conduct) to:
  1. Discuss the availability of supportive measures;
  2. Consider Complainant wishes about supportive measures;
  3. Inform Complainant that supportive measures are available with or without a formal complaint; and
  4. Explain the process for filing a formal complaint.

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**SUPPORTIVE MEASURES**

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**Non-disciplinary, non-punitive** individualized services offered as appropriate, as reasonably available, and without fee or charge to a Complainant or Respondent before, after, or without the filing of a formal complaint. Such measures are designed to restore or preserve equal access to the District's education program or activity without unreasonably burdening the other party, including measures designed to protect the safety of all parties or the District's educational environment, or deter sexual harassment.

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**EXAMPLES OF SUPPORTIVE MEASURES**

- Counseling
- Extensions of deadlines
- Other course related adjustments
- Modifications of work or class schedules\*
- Escort services
- Mutual restrictions on contact
- Changes in work or class locations
- Leaves of absence
- Increased security and monitoring

Confidentiality of supportive measures should be maintained to the greatest extent possible. Information should be shared only as appropriate, on a need-to-know basis.

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**SUPPORTIVE MEASURES**

- Document supportive measures given to each party, and maintain documentation, as required.
- If certain measures are requested but not granted, a written memorandum with an explanation should be included in the case file.

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**EMERGENCY REMOVAL**

Emergency removal may be necessary in cases with particularly violent and threatening conduct.

- For student respondents, the emergency removal process is the *Threat Assessment Process*. See PRESS 4:190. Be mindful of potential manifestation determination issues.
- For employee respondents, use applicable bargaining agreements and administrative leave policies.

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**CAN I START THE INVESTIGATION UPON INTAKE?**

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- Some preliminary information can be solicited to better understand the complaint, but this is not when you start interviewing parties and witnesses.
- This might be the appropriate time to ensure that any video camera recording that may be relevant are preserved.

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**FORMAL COMPLAINT**

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- The Complainant may file a formal complaint. If Complainant chooses not to, their wishes should generally be honored.

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**FORMAL COMPLAINT**

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- If the Complainant does not wish to file a formal complaint, the Title IX Coordinator assesses whether the circumstances justify overriding the Complainant's wishes, where the Title IX Coordinator signs the formal complaint themselves. Some instances where we see this occur:
  1. Employee on student conduct
  2. Conduct that included violence
  3. Repeated conduct against other persons (especially when those have been unwilling to proceed on formal complaints)
- The decision to override should be thoughtful and intentional. We encourage a brief memorandum in the Title IX case file explaining the Coordinator's reasoning.

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### INFORMAL RESOLUTION

- The District does not have to offer informal resolution.
- Informal resolution cannot be used for employee on student complaints and cannot require the parties to participate from the same physical room.
- Informal resolution can only occur after a formal complaint and with written agreement by both parties.
- Either party, or the facilitator, may end it at any time and proceed to the formal grievance process.
- When resolution is agreed upon, it should be condensed to writing and signed by the parties.

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### MANDATORY DISMISSALS

- The Title IX Coordinator **must** dismissal allegations in formal complaints where:
  1. The conduct alleged would not constitute sexual harassment, as defined, even if proved.
  2. The conduct is not alleged to have occurred in the recipient's education program or activity.
  3. The conduct is not alleged to have occurred against a person in the United States.

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### PERMISSIVE/DISCRETIONARY DISMISSALS

- The Title IX Coordinator **may** dismiss the complaint or certain allegations in the complaint if:
  1. The Complainant notifies the Title IX Coordinator, in writing, that the Complainant wants to withdraw the entire complaint or any allegation within the complaint;
  2. The Respondent is no longer enrolled or employed by the District;
  3. Specific circumstances prevent the District from gathering enough evidence to reach a determination as to the complaint or certain allegations in the complaint.

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**DISMISSALS**

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- Be aware that the parties have appeal rights and a notification of those rights must be included in the notice of dismissal.
- The Title IX Coordinator should justify their determination, ideally in a written memorandum for the case file.

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**CONSOLIDATION**

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- Consolidation of formal complaints is permitted where the allegations in multiple complaints arise out of the same facts or circumstances.

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**FORMAL GRIEVANCE — INVESTIGATION**

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- The Title IX Coordinator issues a Notice of Allegations to all known parties, with sufficient time for Respondent to prepare a defense before any Investigatory interview. Notice should include:
  - Copy of grievance procedures (PRESS 2.265-AP2)
  - The allegations (including identities of parties, the conduct alleged, and the date and location, if known—this will generally be a copy of the formal complaint)
  - Statement of presumption of no responsibility
  - Statement that parties are entitled to an advisor of their choice, who may be an attorney
  - Statements that all parties may inspect and review any evidence obtained as part of the investigation that is directly related to the allegations, so that each party may meaningfully respond before conclusion
  - A statement that the policy prohibits making knowingly false statements or submitting knowingly false information
  - Possible outcomes

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**FORMAL GRIEVANCE — INVESTIGATION**

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- The Investigator schedules interviews with parties and witnesses.
  - Generally, we opt to interview Complainant, Respondent, and then witnesses.

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**FORMAL GRIEVANCE — INVESTIGATION**

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- As the investigation process proceeds, the Title IX Coordinator should periodically check in with the parties about supportive measures and to provide updates.
  - The Title IX Coordinator "must serve as the point of contact for the affected [person] to ensure that the supportive measures are effectively implemented so that the burden of navigating paperwork or other administrative requirements does not fall on the student receiving the supportive measures."

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**FORMAL GRIEVANCE—INVESTIGATION**

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- We would advise informing the parties of an end-date for the parties to submit evidence and to suggest witnesses to be interviewed prior to the issuance of the preliminary investigation report to the investigation.
- The burden of gathering evidence is on the Investigator, not the parties.
- The parties cannot be prohibited from discussing the allegations or from gathering/presenting evidence.

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**INVESTIGATION REPORT**

- The Investigator will draft a preliminary investigation report where all relevant and related evidence is included and will submit that report to the parties.
- The parties have a 10 school business day period to draft a written response to the evidence.
- We recommend including a section at the end of this preliminary report explaining next steps in the process. We also suggest including a cover letter to the report with next steps, identifying that the report is confidential to the parties and their advisor, anti-retaliation policies, and another outreach about supportive measures.

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**PARTS OF AN INVESTIGATION REPORT**

- Allegation—prefer to use direct quote(s)
- Relevant policy language
  - Definitions
- Standard of evidence used (preponderance of the evidence)
- Related and relevant evidence
- Attachments and exhibits as necessary

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**INVESTIGATION REPORT**

- Any written responses are considered by the Investigator as they complete the final investigation report.
- The Investigator drafts a final investigation report promptly, considering the written responses of the parties as they draft that final investigation report.
- The final investigation report is then submitted to the parties and simultaneously to the Initial Decision-maker.

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**QUESTION AND ANSWER PERIOD**

- Following receipt of the final investigation report, the parties now have two simultaneous timelines running.
- First, they have another 10 day period to submit a written response. This should be directed to the Investigator who then forwards it to the Initial Decision-Maker.
- Second, they have a question and answer period running. To begin, they 5 day period to draft written questions directed at the other party. They will submit those to the Initial Decision-Maker who will exchange them between the parties. The Initial Decision-Maker will evaluate the questions for relevance and requests for privileged or protected information.

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**QUESTION AND ANSWER PERIOD**

- If there are any questions excluded, the askers receives a written explanation as to the reason for the exclusion.
- The parties then have 5 days to respond in writing to the Initial Decision-Maker to the questions directed at them from the other party.
- If the parties chose to use the question and answer procedure, they are allowed a second question and answer period for limited follow-up questions. The method and timeframe is the same.

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**WRITTEN DETERMINATION**

- The Initial Decision-maker can finally draft the written determination. The Initial Decision-maker gets access to the final investigation report, all evidence gathered during the investigation that is directly related to the allegation, and the formal complaint.
- Discipline still cannot happen.

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**WRITTEN DETERMINATION**

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- The written determination must include:
  - The allegations potentially constituting Title IX sexual harassment
  - Description of procedural steps, including when any notification were sent, interviews were conducted, reports sent, and other descriptions of evidence gathering conduct
  - Findings of fact supporting determination
  - Conclusions regarding the application of the District's policies and procedures to the facts
  - A statement of, and rationale for, the result as to each allegation, including a determination of responsibility, and any recommended disciplinary sanctions, as well as any remedies designed to restore or preserve access to the District's programs
  - Notice of appeal rights

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**APPEAL**

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- A party may appeal, in writing, within 10 days, on one of three bases:
  1. Procedural irregularity that affected the outcome
  2. New evidence now available that could affect the outcome but was not reasonably available at the time of the determination
  3. Conflicts of interest or bias of the Title IX Coordinator, Investigator, or Initial Decision-maker for or against complainant or respondent or complainants or respondents generally.

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**APPEAL**

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- Upon receiving notice of an appeal, the Title IX Coordinator will notify the other party and allow both parties 5 days to submit a written statement in support of, or challenging, the outcome.
- All relevant materials are sent to the Appellate Decision-maker.

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**RISKS OF BOARD AS APPELLATE DECISION-MAKER**

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- Every member would be required to have Title IX training.
- Board's objectivity at a disciplinary hearing is likely to be questioned.

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**APPEAL**

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- Within 30 school business days, the Appellate Decision-maker affirms, reverses, or amends the written determination (or dismissal if the determination being appealed is a dismissal).
- Within 5 school business days, issues a written decision describing the result of the appeal and the rationale.

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**RECORD MAINTENANCE**

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- Title IX records must be retained for 7 years.
- State law may require additional time.

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**TIPS FOR INVESTIGATORS AND TITLE IX COORDINATORS**

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**RIGHT TO NOT PARTICIPATE**

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- No party or witness may be compelled to participate in a Title IX investigation.
- No discipline may occur as a result of a person's choice to not participate.

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**TWO TYPES OF ANONYMOUS COMPLAINTS**

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<p><b>TRULY ANONYMOUS</b></p> <ul style="list-style-type: none"> <li>• Mailed in with no return address and unsigned</li> <li>• Submitted via unrecognizable email address</li> <li>• Hard copy, but no signature, slid under a door</li> </ul>	<p><b>WANNABE ANONYMOUS</b></p> <ul style="list-style-type: none"> <li>• Individual requests anonymity</li> <li>• Individual is identified by someone else but refuses to participate in Title IX process</li> </ul>
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**TRULY ANONYMOUS COMPLAINTS**

- Unless it can be determined who submitted with preliminary investigation, these often end with dismissal, but remember that files **MUST** be maintained for 7 years.
- Where alleged conduct is so egregious, the Title IX Coordinator may have an obligation to file under their own signature and initiate an investigation—this may still result in dismissal.

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**WANNABE ANONYMOUS COMPLAINTS**

1. If Complainant requests anonymity, Title IX Coordinator must explain that isn't possible under the due process requirements and then allow Complainant to determine if they want to file, knowing their identity will be disclosed.
2. If Complainant does not want to file, Title IX Coordinator should evaluate if they need to proceed under their own signature.

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**LAW ENFORCEMENT AND CHILD ADVOCACY CENTER INVOLVEMENT**

- Illinois School Code states:
  - After an alleged incident of sexual abuse is accepted for investigation and while the criminal and child abuse investigations are being conducted by the CAC, the school relevant to the incident **CANNOT** interview the alleged victim regarding details of the alleged incident of sexual abuse until **AFTER** the completion of the forensic interview is conducted at a CAC.

105 ILCS 5/22-85

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**THE CAC AND THE SCHOOL**

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- Illinois School Code states:
  - Multiple interviews should be avoided
  - CAC should take the lead in conducting developmentally appropriate investigations

105 ILCS 5/22-85

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**THE CAC AND THE SCHOOL**

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- When the conduct alleged was employee on student, your Title IX Investigator gets to VIEW the CAC forensic interview.
- You DO NOT want possession (and the CAC should not attempt to give you possession), because of the evidence disclosure obligations to Respondent.
- We recommend the Title IX Investigator to take high-quality notes while reviewing the CAC forensic interview so that they can summarize the video in the report.

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**THE CAC AND THE SCHOOL**

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Unique situation:

- Respondent is a student, but the incident has been accepted for investigation and a forensic interview with the CAC will be conducted.
  - May inform Complainant of rights and provide supportive measures
  - May not interview Complainant until after forensic interview, but no right to view forensic interview, because that right only exists for employee on student conduct

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**LAW ENFORCEMENT INVOLVEMENT**

- The Title IX regulations allow for short-term, good cause delays throughout the process. Law enforcement involvement is often a cause for delay.
- In concurrent law enforcement and Title IX investigations, law enforcement may ask that Respondent not be interviewed in the Title IX process until they have had an opportunity to interview.
- Delaying until the entire criminal prosecution has proceeded would generally not be a short-term delay.

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**LAW ENFORCEMENT (SRO) ROLES IN TITLE IX INVESTIGATIONS**

- SROs likely should not be doing interviews as a part of the investigations.
  1. There may be limits to their ability under the intergovernmental agreement.
  2. Title IX training required for Title IX personnel.
  3. Their normal methods are unlikely to comply with Title IX. (Notice, disclosures, etc.)

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**RETALIATION**

- Retaliation for participating in or refusing to participate in a Title IX investigation, hearing, or interview is prohibited.
- Retaliation allegations must be investigated, but are not required to go through the Title IX process. They may be investigated and addressed through normal procedures.

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### RETALIATION

- A party speaking about the allegations or investigation is protected by the First Amendment—it is retaliation to discipline a party for doing so.
- Charging a party with conduct violations that do not involve sexual harassment, but arise out of the same facts or circumstances as a report or formal complaint of sexual harassment, for the purpose of interfering with any Title IX right constitutes retaliation.

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### INVESTIGATORY INTERVIEWS

- Start with a script notifying the individual you're interviewing of their rights.
- Re-read the definition of the policy violation alleged. Draft questions based on the information that would need to be present to prove the allegation.
- Build a rapport with easy background questions about the person, their interests, their support system at home and school, etc.
- Start broad with your questions when you're soliciting information about the allegations in the complaint and narrow in on what you specifically need.

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### INVESTIGATORY INTERVIEWS

- Your scripted questions are there to guide you, but a response to an open-ended question may lead you to a point that is three-fourths of the way through what you'd drafted. Don't be afraid to follow their flow and come back to the earlier questions you drafted.
- Ask follow up questions for specific examples or incidents they recall when they speak in generalities.
  - "He made comments about women's bodies and their clothing."
    - What was the first instance of him making a comment about a woman's body?

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**INVESTIGATORY INTERVIEWS**

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- Can you tell me more about that?
- What was the first time you recall X happening?
  - What was the next time?
- I heard you describe what she said as “inappropriate”—what do you mean by inappropriate?
  - Do you recall a specific example of this?
  - Any other examples of this?

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**INVESTIGATORY INTERVIEWS**

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- We like to close interviews with the following:
  - “Is there anything else you wish I had asked you about?”
  - “Is there anything else you think is important for me to know that we haven’t talked about?”
  - “Who else do you think I could talk to that might help me understand what happened?”
    - “What do you think they can talk to me about?”

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**INVESTIGATORY INTERVIEWS**

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- Do not ask about privileged information: doctor/patient; attorney/client; spousal; priest.
- Rape shield protections apply. This means that a person’s previous sexual behavior is presumed to be not relevant.
- It is important to clarify what certain slang terms mean with individuals to ensure you are not making assumptions and so that the record is clear.

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**INVESTIGATORY INTERVIEWS**

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- If a new allegation is made during an interview, the Title IX Coordinator needs to be alerted so that they can issue a revised Notice of Allegations.
- If another person is identified as a potential Complainant, the Title IX Coordinator also needs notified so that they can perform those early contact duties.

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**TIPS FOR WRITTEN DETERMINATIONS**

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**USE THE STANDARD**

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- “By a preponderance of the evidence, I find Respondent has/has not violated \_\_\_\_\_.”
- Don't be stingy with explaining which facts inform your determination and why.

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**OTHER POLICY VIOLATIONS**

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- In the written determination (or in the dismissal of a complaint) is a good place to now determine responsibility regarding other policy violations that do not involve sexual harassment, but arise out of the same facts or circumstances as a report or formal complaint of sexual harassment.

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**POTENTIAL CHANGES AND THE IMPACT**

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**SINGLE INVESTIGATOR MODEL**

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- Proposed amendments would allow for the investigator and decision-maker to be the same person.
- Where it can be avoided, we would not recommend using the single investigator model. The Sixth Circuit has previously held this model to deprive a student of their due process rights. While that isn't controlling for us in Illinois at this time, there is a litigation risk.

Doo v. Baum, et al. No. 17-2213 (6th Cir. Sept. 7, 2018). © David J. Brown & Ellen D. Luskling

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**CHANGING STANDARD**

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- Current hostile environment standard: "so severe, pervasive, and objectively offensive that it effectively denies equal access to the educational program or activity"
- Proposed: "sufficiently severe or pervasive, that, based on the totality of circumstances and evaluated subjectively and objectively, denies or limits a person's ability to participate in or benefit from the recipient's education program or activity"

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**FACTORS TO EVALUATE HOSTILE ENVIRONMENT**

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- These are proposed factors for evaluating severity, pervasiveness, and offensiveness:
  - The degree to which the conduct affected the complainant's ability to access the recipient's education program or activity
  - The type, frequency, and duration of the conduct
  - The parties' ages, roles within the recipient's education program or activity, previous interactions, and other factors about each party that may be relevant to evaluating the effects of the alleged unwelcome conduct

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**FACTORS TO EVALUATE HOSTILE ENVIRONMENT**

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- These are proposed factors for evaluating severity, pervasiveness, and offensiveness:
  - The location of the conduct, the context in which the conduct occurred, and the control the recipient has over the respondent
  - Other sex-based harassment in the recipient's education program or activity

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### CHANGING THE STANDARD FOR DISMISSAL

- Current: A District is required to dismiss if conduct did not occur in the District's education program or activity.
- Proposed: A District **"has an obligation to address** a sex-based hostile environment under its education program or activity, **even if** sex-based harassment contributing to the hostile environment occurred **outside the recipient's education program or activity or outside the United States."**

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