

**Title IX**  
Investigator & Decision-maker  
Training

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**Outline**

- Background
- The Grievance Process & Common Elements
- Impartiality, Bias & Conflicts of Interest
- Investigations / Investigators
- Determinations / Decision-makers
- The Determination Report

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**Disclaimer**

- This presentation is not legal advice and is for general information only
- Always consult with your legal counsel regarding how best to address a specific situation

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### Nondiscrimination/Harassment

- Board Policy AC, Nondiscrimination/Equal Opportunity
  - AC-R-1 Complaint and Compliance Process
  - **AC-R-2 Sexual Harassment Investigation Procedures**
  - AC-E-1 Sample Notice
  - AC-E-2 Complaint Form
- Board Policy GBAA Sexual Harassment (Staff)
- JBB, Sexual Harassment (Student)
- JICDE Bullying Prevention and Education

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### TITLE IX BACKGROUND

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### What is Title IX?

- Title IX is a federal civil rights law passed as part of the Education Amendments of 1972
- It prohibits discrimination **on the basis of sex** (including sexual harassment) in education programs or activities (schools) that receive federal financial assistance
- Entities that receive federal financial assistance are called **Recipients** (school districts, BOCES, charter schools)

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### Title IX – 20 U.S.C. § 1681

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.

- Implementing regulations at 34 C.F.R. Part 106

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### OCR and the Courts

- Enforced by the U.S. Department of Education's Office for Civil Rights (OCR)
- Individuals can bring Title IX claims directly in court – *Cannon v. Univ. of Chicago*, 441 U.S. 677 (1979)
- And get monetary damages – *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992)
- Schools can be held liable for employee on student sexual harassment – *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274 (1998)
- And student on student sexual harassment – *Davis v. Monroe Cty. Bd. of Ed.*, 526 U.S. 629 (1999)

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### Educational Program or Activities

- Applies to all aspects of a Recipient's programs and activities operated within the United States. Includes locations, events, or circumstances where the Recipient exercises substantial control over both the respondent and the context in which the sexual harassment occurs, such as:
  - recruitment, admissions, and counseling
  - financial assistance
  - athletics
  - alternative educational programs
  - discipline
  - employment

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### What does "Sex" Mean?

- Biological Sex
- Gender
- Sex Stereotyping
- Sexual Orientation and Gender Identity
- "Sex" as a verb

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### What has Changed?

- On May 6, 2020, the U.S. Department of Education released revised Title IX Regulations which became effective August 14, 2020
- The new regulations make important changes to Title IX
  - Narrows the definition of sexual harassment
  - Expands the "actual knowledge" standard to include notice to **any** district employee of alleged sexual harassment
  - Creates new formal roles for Investigators & Decision-makers
  - Requires formal training for Title IX Coordinator, Investigator, Decision-maker and anyone facilitating informal resolutions
  - Creates extensive formal resolution process
  - Only applies to programs and activities in the United States
  - Codifies the "deliberate indifference" standard applicable to a district's duty to respond

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### Terminology – Response Team Roles

- **Title IX Coordinator** – the employee designated by the district to coordinate its efforts to comply with Title IX responsibilities. Provide notice, offer supportive measures, consider emergency removals/administrative leave, offer informal resolution.
- **Investigator** – individual trained to objectively evaluate the credibility of the parties and witnesses, synthesize all available evidence- including both inculpatory and exculpatory evidence- and takes into account the unique and complex circumstances of each situation
- **Decision-maker** – is responsible for reviewing the relevant evidence, including party and witness credibility, to decide if the district met its burden of proof showing the respondent to be responsible for the alleged sexual harassment.

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### Terminology - Parties

- **Complainant** – Individual who is alleged to be the victim of conduct that could constitute sexual harassment.
- **Respondent** – Individual who is alleged to be the perpetrator of conduct that could constitute sexual harassment.
- **Advisor** – Individual selected by the Complainant and Respondent to advise them during the process. Can be a parent, a lawyer or other person.

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### The new Title IX Regulation

*A recipient with **actual knowledge** of **sexual harassment** in an education program or activity of the recipient against a person in the United States, must respond promptly in a manner that is not **deliberately indifferent**.*

- 34 C.F.R. § 106.44(a)

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### Actual Knowledge Defined

***actual knowledge** means notice of sexual harassment or allegations of sexual harassment to a recipient's Title IX Coordinator or . . . to **any employee** of an elementary and secondary school*

- 34 C.F.R. § 106.30(a)

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### Actual Knowledge

- Staff should be trained and required to report all instances of sexual harassment to Title IX Coordinator immediately.
- Students, parents and volunteers should be trained and encouraged to report as well

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### Sexual Harassment Defined

**sexual harassment** means conduct on the basis of sex that satisfies one or more of the following:

- (1) An employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct; (*quid pro quo*)
  - (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 recipient's education program or activity; (*hostile environment*) or
  - (3) "Sexual assault", "dating violence", "domestic violence", or "stalking"
- 34 C.F.R. § 106.30(a)

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### Deliberate Indifference Defined

**deliberately indifferent** - a recipient is deliberately indifferent only if its response to sexual harassment is clearly unreasonable in light of the known circumstances.

- 34 C.F.R. § 106.44(a)

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### Deliberate Indifference

- Liability has been imposed where districts (i) fail to investigate and/or inform law enforcement or student' s parents; (ii) fail to discipline offender; and/or (iii) fail to take additional steps if harassment continues.
- Recipients are not required to take any particular disciplinary action
- Victims do not have a right to particular remedial outcomes

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### Retaliation

- Retaliation section added to new Title IX regs
- *No recipient or other person may intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by title IX . . . or because the individual has made a report or complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing . . .*
- More than just someone expressing their opinion
- Report immediately to Title IX Coordinator

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### Sexual Harassment and Bullying

- Sexual harassment comes in many forms, and can include sexual advances, requests for sexual favors, or other conduct—both verbal and non-verbal—of a sexual nature. Sexual touching, sexual comments, jokes, gestures, graffiti, drawings, pictures, and writing can all be examples of sexual harassment.
- Bullying becomes sexual harassment under Title IX when it is based on sex and becomes so severe, pervasive, and objectively offensive that it effectively denies a student the opportunity to participate in or benefit from the services, activities, or opportunities offered by a school.

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### Bullying or Sexual Harassment?

- A female student “hooked up” with a boy at her school, and now a group of girls are repeatedly texting her and tweeting about her at school, calling her a “slut” and a “whore.”
- Another female student sent her boyfriend “sexts” and pictures of herself naked. Then they break up. The boyfriend shares these sexts and photos with his friends at school to get back at her. He also spreads rumors about her sexual behavior.
- A male student has mostly female friends, he sings Lady Gaga songs in the hallway and is on the dance team. Fellow students call him a “fairy,” “gay boy,” or “queer,” and tell him he should run for homecoming queen.

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### Jurisdiction under Title IX

- Under the new regulations, you must dismiss the Title IX complaint if the alleged conduct:
  - Would not constitute sexual harassment if proved;
  - Occurred outside of the US; or
  - Occurred outside of the District’s “education program or activity
- **Conduct that does not fall under Title IX can and should still be investigated to for violations of Code of Conduct and/or other policies, and discipline may be imposed as appropriate**

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### Permissive Dismissal

- Permissive dismissal if at any time during the investigation or hearing:
  - a complainant notifies the Title IX Coordinator in writing that the complainant would like to withdraw the formal complaint or any allegations therein;
  - the respondent is no longer enrolled or employed by the recipient; or
  - specific circumstances prevent the recipient from gathering evidence sufficient to reach a determination as to the formal complaint or allegations therein.
- Consider reasons not to dismiss

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### Informal Resolution

- Cannot be mandatory
- Cannot be offered until after a Formal Complaint is filed
- Cannot be offered in allegation by student against employee
- Must have voluntary, written consent from both parties

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### Record Keeping Requirements

- Maintain for 7 Years
- Investigation Records (including determination, recordings, transcripts, sanctions, remedies)
- Appeal Records
- Records of any Informal Resolution
- Training materials – also must be posted on website/available upon request
- Documentation of Recipient's response to all reports and formal complaints

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### Title IX Response Team Restrictions/Considerations

- Title IX Coordinator cannot be the Decision-maker
- Investigator cannot be the Decision-maker
- Conflict concerns arise if the Title IX Coordinator also acts as the Investigator
- Conflict and legal/practical concerns arise if the Board acts as the Decision-maker

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### Response Team Training requirements

*A recipient must ensure that Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process, receive training on the **definition of sexual harassment . . . , the scope of the recipient's education program or activity, how to conduct an investigation and grievance process** including hearings, appeals, and informal resolution processes, as applicable, and **how to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias.***

34 C.F.R. § 106.45(b)(1)(iii)

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### GRIEVANCE PROCESS

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### General Requirements: Due Process and Fundamental Fairness

- A recipient must **adopt and publish grievance procedures** that provide for the prompt and equitable resolution of student and employee complaints alleging sexual harassment
- A recipient **must provide notice of the grievance procedures and grievance process**, including how to report or file a complaint of sex discrimination, how to report or file a formal complaint of sexual harassment, and how the recipient will respond.

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### General Requirements: Due Process and Fundamental Fairness

- The grievance process must **treat complainants and respondents equitably** by:
  - providing **remedies to a complainant where a determination of responsibility for sexual harassment has been made** against the respondent, and
  - **following a grievance process before the imposition of any disciplinary sanctions** or other actions that are not supportive measures

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### General Requirements: Due Process and Fundamental Fairness

- Remedies must be designed to **restore or preserve equal access to the recipient's education program or activity**. Such remedies may include the same individualized services as **"supportive measures"**;
- Remedies need not be non-disciplinary or non-punitive and need not avoid burdening the respondent

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### Supportive measures

- Supportive measures are non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, and without fee or charge to the complainant or the respondent *before or after the filing of a formal complaint or where no formal complaint has been filed*.
- Supportive measures are designed to restore or preserve equal access to the program or activity without unreasonably burdening the other party, including measures designed to protect the safety of all parties or the educational environment, or deter sexual harassment.
- Supportive measures include: counseling, extensions of deadlines or other course related adjustments, modifications of work or class schedules, mutual restrictions on contact.

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### General Requirements: Due Process and Fundamental Fairness

- The grievance process must require an **objective evaluation of all relevant evidence**—including both inculpatory and exculpatory evidence—and provide that credibility determinations may not be based on a person’s status as a complainant, respondent, or witness;

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### General Requirements: Due Process and Fundamental Fairness

- The grievance process must require that any individual designated by a recipient as a Title IX Coordinator, investigator, decision-maker, or any person designated by a recipient to facilitate an informal resolution process, **not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent.**

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### General Requirements: Due Process and Fundamental Fairness

- A recipient must ensure that **decision-makers receive training . . . on issues of relevance of questions and evidence**, including when questions and evidence about the complainant’s sexual predisposition or prior sexual behavior are not relevant
- A recipient also must ensure that **investigators receive training on issues of relevance** to create an investigative report that fairly summarizes relevant evidence . . .

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### General Requirements: Due Process and Fundamental Fairness

- Any materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process, must **not rely on sex stereotypes and must promote impartial investigations** and adjudications of formal complaints of sexual harassment;

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### General Requirements: Due Process and Fundamental Fairness

- The grievance process must include a **presumption that the respondent is not responsible for the alleged conduct** until a determination regarding responsibility is made at the conclusion of the grievance process;

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### General Requirements: Due Process and Fundamental Fairness

- The grievance process must include **reasonably prompt time frames** for conclusion of the grievance process, including **reasonably prompt time frames for filing and resolving appeals and informal resolution processes** if the recipient offers informal resolution processes, and a process that allows for the temporary delay of the grievance process or the limited extension of time frames for good cause with written notice to the complainant and the respondent of the delay or extension and the reasons for the action.
- Good cause may include considerations such as the absence of a party, a party's advisor, or a witness; concurrent law enforcement activity; or the need for language assistance or accommodation of disabilities
- 60 days is deemed to be "reasonably prompt"

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### General Requirements: Due Process and Fundamental Fairness

- The grievance process must describe the range of possible disciplinary sanctions and remedies or list the possible disciplinary sanctions and remedies that the recipient may implement following any determination of responsibility

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### General Requirements: Due Process and Fundamental Fairness

- The grievance process must state whether the standard of evidence to be used to determine responsibility is the **preponderance of the evidence** standard or the clear and convincing evidence standard, apply the same standard of evidence for formal complaints against students as for formal complaints against employees, including faculty, and apply the same standard of evidence to all formal complaints of sexual harassment
- CASB policy uses preponderance of the evidence standard: "more likely than not"

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### General Requirements: Due Process and Fundamental Fairness

- The grievance process must include the procedures and permissible bases for the complainant and respondent to appeal
- Required bases for appeals:
  - Procedural irregularity that affected the outcome
  - New evidence that was not available and could affect the outcome
  - Conflict of interest/bias

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### General Requirements: Due Process and Fundamental Fairness

- The grievance process must describe the range of supportive measures available to complainants and respondents

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### General Requirements: Due Process and Fundamental Fairness

- The grievance process must not require, allow, rely upon, or otherwise **use questions or evidence that constitute, or seek disclosure of, information protected under a legally recognized privilege**, unless the person holding such privilege has waived the privilege

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### Notice and the Formal Complaint

- The Recipient has an obligation to respond (in a manner that is not deliberately indifferent) when it has **actual knowledge** of an allegation of sexual harassment
- **Notice** to any employee constitutes "actual knowledge" and the information must be reported immediately to the Title IX Coordinator to notify the parties, determine jurisdiction and initiate the grievance process through a Formal Complaint or dismiss for lack of jurisdiction
- **Formal Complaint** – the document filed by a **complainant** or signed by the Title IX Coordinator alleging sexual harassment against a respondent and requesting that the Recipient investigate the allegation of sexual harassment

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### Title IX Coordinator Initiates the Grievance Process

- Collects Information
- Notifies Police if child abuse or other criminal behavior
- Notifies parties
- Offers supportive measures
- Determines jurisdiction
- Offers informal resolution (if available)
- Assigns Investigator and Decision Maker
- Emergency Removal/Admin leave?

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### IMPARTIALITY, BIAS & CONFLICTS OF INTEREST

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### Conflict of Interest/Bias Regulation

*any individual designated . . . as a Title IX Coordinator, investigator, decision-maker, . . . [must] not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent*

34 C.F.R. § 106.45(b)(1)(iii)

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### Insight from the preamble

- Final regulations “**leave recipients flexibility to use their own employees, or to outsource Title IX investigation and adjudication functions**, and the Department encourages recipients to *pursue alternatives to the inherent difficulties that arise when a recipient’s own employees are expected to perform functions free from conflicts of interest and bias.*”

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### Bias from preamble

- Are all paid staff members biased in favor of the institution that employs them?
- Was an institutional history of covering up issues enough for bias?
- Were past tweets or public comments that appear to support complainants or respondents sufficient to show bias?
- Is identifying as a feminist enough to show bias?
- Should bias extend to “perceived bias” or did it require actual bias?
- Department declined to determine whether bias has to be actual or if perceived is sufficient to create an issue
- Each specific bias issue requires a fact-specific analysis

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### More on preamble...

- “Whether bias exists requires **examination of the particular facts** of a situation and the Department encourages recipients to apply 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**, exercising caution **not to apply generalizations** that might unreasonably conclude that bias exists...bearing in mind that **the very training required by [the regulations] is intended to provide Title IX personnel with the tools needed to serve impartially and without bias** such that the **prior professional experience of a person** whom a recipient would like to have in a Title IX role **need not disqualify the person from obtaining the requisite training** to serve impartially in a Title IX role.”

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### What is Bias?

- Definition: prejudice in favor of or against one thing, person, or group compared with another, usually in a way considered to be unfair.
- Bias results from a tendency or need to classify individuals into categories so that we can more quickly process information and make sense of the world. In other words, bias is an unconscious shortcut that results in assumptions and stereotypes about others.

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### Bias

- Explicit bias – you are aware of your attitudes and prejudices against certain groups
- Implicit bias - the subconscious feelings, perceptions, attitudes, and stereotypes that have developed as a result of prior influences and life experiences
- Bias is different from evidence-based information or peer reviewed scientific research, including impact of trauma and consent.

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### Examples of Bias

- *Examples:*
  - The Respondent must be innocent because she attends church regularly.
  - The Complainant wasn't noticeably upset so he must be exaggerating.
  - The Complainant is larger and stronger than the Respondent, so she couldn't have been assaulted.

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### Avoiding Bias

- Avoiding bias:
  - Keep an open mind about the facts and the parties
  - Consider **everything**
  - Make no judgments
  - Do not attempt to reach any conclusions until the end of the process

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### What is a Conflict of Interest?

- *actual* conflict of interest is a direct conflict between one's official duties and responsibilities, and a competing personal interest or obligation.
  - *Example: The Decision-maker's son is the Respondent in a sexual harassment case.*

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### Conflict of Interest

- *perceived* conflict of interest is a situation where it could reasonably be perceived that a competing interest could improperly influence the performance of one's official duties and responsibilities
  - *Example: The Investigator's spouse is a business partner of the Complainant's parent.*

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### Conflict of Interest

- *potential* conflict of interest arises where a personal interest or obligation could conflict with one's official duties and responsibilities in the future
  - Example: The Title IX Coordinator and the Complainant attend the same church.

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### Conflict concerns raised in preamble

- Decision-maker and financial and reputational interest aligned with institution (or to protect institution)
- No per se conflict of interest or bias for professional experiences or affiliations of decision-makers and other roles in the grievance process
- No per se prohibited conflicts of interest from using employees and administrative staff, including supervisory hierarchies
  - but concerns about decision-makers and Title IX Coordinator as supervisor

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### Do you have a conflict?

- To test for conflict of interest, ask yourself how someone on the outside would evaluate the potential conflict?
- How would you feel if the community or media learned of the potential conflict?
- Would you want a judge with a similar conflict to rule on a case you were involved in?

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### Relevance

- “The final regulations do not define relevance, and the ordinary meaning of the word should be understood and applied.”
- Rules of Evidence do not and can not apply. All relevant evidence should be considered.
- Can only consider and solicit questions/evidence that are relevant to the grievance process.

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### Relevance Defined

- Relevant –  
Bearing upon, or properly applying to, the case in hand; pertinent; applicable.  
Closely connected or appropriate to what is being done or considered.

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### Legal Relevance

- Evidence is 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.

- Federal Rule of Evidence 401. Test for Relevant Evidence

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### Relevancy

The following can not be deemed relevant:

- Information protected by a legally recognized privilege unless voluntary written consent.
- Evidence about complainant's prior sexual history –
  - unless such questions/evidence are **offered to prove that someone other than the respondent committed the conduct**; or
  - if the questions/evidence concern **specific incidents of the complainant's prior sexual behavior with respect to the respondent and are offered to prove consent**.
- Party or witness statements that have not been subjected to cross-examination at a live hearing\*

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### Relevancy: Legally Privileged Information

- Section 106.45(b)(5)(i): when investigating a formal complaint, recipient: • "[C]annot access, consider, disclose, or otherwise use a party's records that are **made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in the professional's or paraprofessional's capacity, or assisting in that capacity, and which are made and maintained in connection with the provision of treatment to the party**, unless the recipient obtains that party's **voluntary, written consent** to do so for a grievance process under this section."
- Section 106.45(b)(1)(x): A recipient's **grievance process must...not** require, allow, rely upon, or otherwise **use questions** or evidence **that constitute, or seek disclosure of, information protected under a legally recognized privilege**, unless the **person holding such privilege has waived the privilege**.

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### Confidentiality

- Must keep confidential the identity of any individual who has made a report or complaint of sex discrimination, including any individual who has made a report or filed a formal complaint of sexual harassment, any complainant, any individual who has been reported to be the perpetrator of sex discrimination, any respondent, and any witness, **except . . .**
- as permitted by FERPA
- as required by law
- or to carry out the purposes of [Title IX] – **supersedes FERPA**

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### Confidentiality

- To the extent of a conflict between State or local law and Title IX as implemented by §§106.30, 106.44, and 106.45, the obligation to comply with §§106.30, 106.44, and 106.45 is not obviated or alleviated by any State or local law.
- This means Title IX potentially preempts state confidentiality laws . . . like Safe2Tell?!

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### INVESTIGATIONS

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### Investigation Process Generally

- Presumption of non-responsibility for respondent until the decision is made!
- Burden of proof and burden of gathering evidence is on Recipient
- Equal opportunity to present witnesses
- May not prohibit parties from discussing allegations or gathering/presenting evidence

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### Investigation

- Must provide the parties with the same opportunities to have others present, including the opportunity to be accompanied by the advisor of their choice
- Cannot limit the choice or presence of advisor
- May establish restrictions regarding the extent to which the advisor may participate in the proceedings, i.e., participate in interviews, as long as the restrictions apply equally to both parties

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### Notice Requirements

- Must provide 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 to participate**

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### Evidence Production

- 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,
- Includes evidence upon which the Recipient does not intend to rely in reaching a determination regarding responsibility and inculpatory or exculpatory evidence whether obtained from a party or other source
- Purpose is so each party can meaningfully respond to the evidence prior to conclusion of the investigation
- The parties must have at least 10 days to submit a written response, which the investigator will consider prior to completion of the investigative report

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### Selecting an Investigator

- The appropriate investigator should possess all the following:
- An ability to investigate objectively without bias.
- No stake in the outcome. The investigator should not have a personal relationship with the involved parties. The outcome should not directly affect the investigator's position within the organization.
- Skills that include prior investigative knowledge and working knowledge of employment laws.
- Strong interpersonal skills to build a rapport with the parties involved and to be perceived as neutral and fair.
- Attention to detail.
- The right temperament to conduct interviews.

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### Impartial Investigations

- The investigator should focus on being impartial and objective to gather and consider relevant facts.
- Don't push the investigation in any particular direction.
- The investigator should never offer any opinion or say anything to interviewees that will discredit his or her impartiality.
- Objectivity must be maintained with every interview.
- Taking notes, looking for inconsistencies, and seeking opportunities for more evidence and names of other potential witnesses should be a consideration as well.
- Don't hesitate to bring person back in for questions to confirm or consider additional evidence.

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### Ideal Mindset for Investigation

- Approach all parties with compassion
- Open-minded/Impartial
- No explicit bias or preconceived notions about the incident or either of the parties
- Does not rely on sex (or other) stereotypes. Examples of sex-stereotypes: women have regret about sex and lie about sexual assaults, men are sexually aggressive or likely to perpetrate sexual assault.
- Understanding/awareness of potential impact of trauma, issues surrounding consent and applicable cultural perspectives.
- Have tools to recognize potential bias as/if they arise in investigation and understand how to ensure that bias won't impact process.
- No close personal relationships, or other real or perceived conflict, with any of the individuals involved

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### Importance of Understanding Trauma/Cultural Perspectives

- How you handle a person in your first meeting can make the difference between:
  - Cooperation in the investigation vs. refusal to cooperate
  - Retraumatization vs. supportive environment
- Putting off other potential complainants or witnesses from coming forward vs. encouraging future reports
- Combative vs. supportive and cooperative relationship

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### Potential Impact of Trauma on Behavior/Responses

- Delayed reporting
- Difficulty remembering specifics (could also be due to drugs/alcohol)
- Reluctant reporting
- Remaining in a relationship or living arrangement with the respondent
- Being calm and composed after an assault
- Failing to identify the accused
- **Do not assume that because there are signs of trauma that the respondent caused the trauma and violated the policy**
- **Do not assume that because there are no signs of trauma nothing bad happened**

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### Potential Impact of Culture on Behavior/Responses

- Age of consent
- Attitudes towards homosexuality
- Attitudes towards intimate partner violence
- Cooperating with investigations
- Sharing personal information
- Reactions toward authority figures
- Reactions toward male vs. female

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### Create a Plan for the Investigation

- An investigation must be planned to be effective and properly executed.
- Formal Investigation Checklist: Western Equity Educational Assistance Center:  
<https://www.msudenver.edu/media/content/equityassistancecenter/documents/ChecklistforConductingFormalInvestigationsmidraik3TRACKOFF.pdf>
- A complete plan should include:
  - an outline of the issue,
  - the development of a witness list,
  - sources for information and evidence,
  - interview questions targeted to elicit crucial information and details, and
  - a process for retention of documentation (e.g., interview notes and e-mails that could be treated as evidence).

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### Information from Complainant

- The name, department and position of the person or persons allegedly committing harassment.
- A description of the incident(s), including the date(s), location(s) and the presence of any witnesses.
- The effect of the incident(s) on the complainant's ability to perform his or her job, or on other terms or conditions of his or her employment.
- The names of other individuals who might have been subject to the same or similar harassment.
- What, if any, steps the complainant has taken to try to stop the harassment.
- Any other information the complainant believes to be relevant to the harassment complaint.

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### Review Evidence

- Review evidence
  - Video
  - Email
  - Text messages
  - Social media posts
  - Direct messages from other platforms
- Ensure physical evidence is in a secure location and documented in the investigation log

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### Interview Parties and Witnesses

- Conduct interviews with:
  - Complainant
  - Respondent
  - Witnesses
  - Employees
- “Interviews are an integral part of investigations. The objective of interviews is to **gain an understanding of the records and data relevant to the issues in the case**; to obtain information from and assess the credibility of witnesses”

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### Notice Prior to Interviews

- Must provide notice prior to all interviews/meeting. Notice must provide party sufficient time to prepare.
- Should provide notice to everyone submitting evidence or participating in interviews that everything provided must/will be shared with the Complainant and the Respondent

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### Organizing for the Interview

- What should you have with you?
  - Allegations
  - Investigation log
  - Investigation notes cover sheet
  - Pre-prepared questions
  - Evidence you may need to reference or show witness
  - Policy or Handbook

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### Interview Tips

- Outline questions
- Good questions are relevant and designed to draw out facts without leading the interviewee;
- Questions should open-ended to elicit as much information as possible
  - Go beyond your initial questions if responses warrant
- State questions broadly and get specific
- Maintaining rapport while focusing on facts are keys in successful interviewing
- Repeat questions if requested
- Reiterate your understanding
- Explore "opinions" - look for facts and dig deep
- Direct the interview (maintain focus, do not allow interviewee to wander)
- Ask about supporting witnesses
- Always conclude by asking if there is anything else the investigator needs to know regarding the investigation or those involved
- Determine if any individuals need to be interviewed a second time based upon additional information obtained by others interviewed

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### Conducting Interviews

- Purpose, Confidentiality, Retaliation, Truthfulness
- Describe your documentation process, be consistent with all interviewed
- Allow questions (to an extent)
- Witness: "I am conducting an investigation of allegations of sexual harassment. We will make every effort to keep the investigation and findings confidential.... Retaliation is prohibited... We expect you to be truthful in your responses."
- Employee accused of allegation: "We have asked you to be present today to provide you an opportunity to respond to the allegations sexual harassment. We will ask questions and you are expected to be honest in your responses. At the conclusion of the interview, we will provide you an opportunity to provide any additional information that you believe is relevant to the investigation."

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### Crafting Questions

- Refer to the policy
- Consider what information they are likely to have related to each element
- Consider what information they are likely to have that may assist the decision-maker in determining credibility
- Be flexible

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### Note taking Tips

- Use predictable symbols in the margin to easily skim during the interview:
  - ? Follow-up questions
  - \* Potential evidence
  - W Potential witness
- Try to record exact quotes when possible

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### Start Broadly then get specific

- Elicit a monologue about the incident
  - What happened earlier that day before the incident?
  - What happened with regard to the incident?
  - What happened next?
- Ask the witness to "freeze" on the moment and describe details
  - What could they see? Feel? Smell? Taste? Hear?
  - Where was the other person? How were they positioned?
  - Where were you? How positioned?
  - What did you say to the other person? Them to you?
  - Describe other person's tone, demeanor, body language

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### Ask Follow Up Questions

- Re-review your notes
- Re-review the elements of each charge
- Have you elicited all of the information this witness might have about each element?
- Do you have an understanding of how the witness obtained the information they shared?

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### Credibility

- Gather evidence of credibility to assist decision-maker
- Ask questions to test memory
- Identify where the witness may corroborate or contradict their testimony, or other witnesses, and physical evidence
- Be sensitive to potential trauma experienced by witnesses that could impact memory

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### Closing the Interview

- Closing questions
- Request copies of all evidence potentially available to the witness
- Discuss confidentiality - but do not prohibit a party from discussing allegations
- Inform the witness of next steps and how to reach you

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### After the Interview

- Update investigation log
- Review notes, make corrections/clarifications
- Update witness list
- Update list of evidence to be obtained
- Write down questions to ask other witnesses
- Prepare interview summary

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### Structure of Interview Summary

- Who, when, where, via what medium?
- Did they have an advisor?
- Did you discuss your role? Their role?
- Did you discuss the prohibition on retaliation?
- Background - How does this person connect with the parties and witnesses? Age, year in school - Length of employment, position
- Evidence requested, evidence provided - Witnesses suggested

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### Interview Summary

- Write your interview summaries in narrative form
- Be consistent in terminology
- Interview summary is often more complete than what is relied on in the report
- May include information irrelevant to investigative decision, such as discussions about supportive measures
- Include screenshots and other reference material directly in summary when possible
- Don't paraphrase when you can use direct quotes

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### Questions to Ask the Complainant:

- Who, what, when, where, and how:
- Who committed the alleged harassment?
- What exactly occurred or was said?
- When did it occur and is it still ongoing?
- Where did it occur?
- How often did it occur?
- How did it affect you?

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### More for Complainant

- How did you react?
- What response did you make when the incident(s) occurred or afterwards?
- How did the harassment affect you?
- Are there any persons who have relevant information?
- Was anyone present when the alleged harassment occurred?
- Did you tell anyone about it?
- Did anyone see you immediately after episodes of alleged harassment?
- Are there any notes, physical evidence, or other documentation regarding the incident(s)?
- How would you like to see the situation resolved?
- Do you know of any other relevant information?

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### Questions to ask Respondent

- What is your response to the allegations?
- If the Respondent claims that the allegations are false, ask why the complainant might lie.
- Are there any persons who have relevant information?
- Are there any notes, physical evidence, or other documentation regarding the incident(s)?
- Do you know of any other relevant information?

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### Questions to ask 3<sup>rd</sup> party

- **Questions to Ask Third Parties:**
- What did you see or hear?
- When did this occur?
- Describe the alleged harasser's behavior toward the complainant and toward others at school.
- What did the complainant tell you?
- When did s/he tell you this?
- Do you know of any other relevant information?
- Are there other persons who have relevant information?

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### Is Consent at Issue?

- No required definition in law, regs, or guidance
- CASB policy does not define. Colorado law applies.
- Consent for sexual activity means cooperation in act or attitude pursuant to an exercise of free will and with knowledge of the nature of the act. A current or previous relationship is not sufficient to constitute consent.
- Colorado age of consent is 17
- Age of consent is 14 for sex with person up to 4 years older
- A person is unable to give consent if the person is incapacitated because of drugs, alcohol, physical or intellectual disability, or unconsciousness
- Submission under the influence of fear shall not be sufficient to constitute consent.
- **Any conduct of a sexual nature directed toward a student by a District employee shall be presumed to nonconsensual and is strictly prohibited.**

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### Evidence of Consent

- [Ask the respondent] What did complainant say to you and/or what actions did they take to show consent? - "How did you know they wanted to have sex?"
- If applicable, what role, if any, did respondent play in complainant's intoxication/incapacitation?
- Who took off what clothes?
- Who provided the condom?
- Who initiated physical contact?
- Who touched who where?
- "They gave consent" = What did you say to them, and what did they say to you?

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### Production of Evidence

- Provide ALL Evidence to both parties and advisors. Yes, this overrides FERPA!
- Include everything directly related to allegations, even if you don't expect decision-maker to rely on it
- Number pages for ease of reference going forward
- Allow 10 days to review
- Allow written response
- Follow up where necessary
- Consider responses when preparing report

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### Investigative Report

- Summarize facts and relevant evidence
- Include the evidence you don't intend to rely on
- Include inculpatory or exculpatory evidence whether obtained from a party or other source
- No determination-you are not the Decision Maker

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### Investigative Report

- Provide **draft** to parties 10 days prior to finalization
- Allow parties to submit written responses before finalizing report
- Provide **final** report to parties and Decision-maker at least 10 days prior to the start of the determination process/hearing

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### Writing the Investigative Report

- Basic Procedural Information/History
  - Complainant
  - Respondent
  - Investigator
  - When was the complaint made?
  - Basic description of charges
  - How did the complaint make its way to an investigation?
- Establish compliance with notice and other requirements.
- Any procedural anomalies to be explained?

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### Investigative Report

- Overview of the Investigation:
  - Who did you interview, who was present at interviews?
  - Attach witness interview summaries and notes.
  - List and attach evidence reviewed.
- Summary of the Complaint: Outline facts alleged in the Complaint
- Summary of Relevant Evidence
  - Uncontested Facts and inculpatory/exculpatory evidence
  - Contested Facts and inculpatory/exculpatory evidence

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### Investigative Report

- Credibility Issues
  - Point to discrepancies without deciding who is telling the truth.  
Example: John testified that he did not share details of his relationship with Complainant with anyone. However, witness X and Y both produced emails from John describing his sexual relationship with Complainant.
- Written Response from Parties
  - Explain issues raised by parties in response to draft investigation report. Did you make any changes based on concerns? Why? Why not?
- Conclusion

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### Maintain a non-judgmental tone

- Stay away from charged words of advocacy:
    - Clearly/obviously
    - Innocent/guilty
    - Victim/perpetrator
- Watch your adjectives and adverbs – unless they are in a quote
- Recognize the impact of your words
- Will the parties feel heard?
  - Will the parties feel blamed?
  - Will the parties feel vilified?
  - Will the tone otherwise inflame the parties unnecessarily?

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### Unambiguous

- Could my mother pick up the report and understand what happened?
- Make no assumptions that the reader will understand certain aspects of the community
- Write for a judge and jury to understand with no prior background

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### DETERMINATIONS

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### Decision-maker

- The Decision-maker cannot be the same person as the Title IX Coordinator or the investigator
- Must issue a written determination regarding responsibility.
- To reach this determination, the Recipient must apply the standard of evidence stated in policy (*preponderance of the evidence* or *clear and convincing*)
  - **Preponderance of the evidence** is the CASB default

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### Decision-maker

- Must avoid prejudgment of the facts at issue, conflicts of interest, and bias
- Cannot have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent
- Must receive training on issues of relevance of questions and evidence

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### Decision-maker

- Must objectively evaluate all relevant evidence, including both inculpatory and exculpatory evidence
- Credibility determinations may not be based on a person's status as a complainant, respondent, or witness
- Must not rely on sex stereotypes

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### Process Requirements

- Elementary and secondary schools may provide for a hearing
  - Most are not
- Be default, CASB policy does not provide for a live hearing
- Regardless of whether a live hearing is provided, the same procedural requirements apply.

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### Process Requirements

- After the Recipient has sent the investigative report to the parties and before reaching a determination regarding responsibility, the Decision-maker must:
  - afford each party the opportunity to submit written, relevant questions that a party wants asked of any party or witness,
  - provide each party with the answers, and
  - allow for additional, limited follow-up questions from each party.

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### Process Requirements

- Questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant, unless:
  - such questions and evidence about the complainant's prior sexual behavior are offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or
  - if the questions and evidence concern specific incidents of the complainant's prior sexual behavior with respect to the respondent and are offered to prove consent
- The decision-maker(s) must explain to the party proposing the questions any decision to exclude a question as not relevant.\

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### Process Requirements

- Conclude within a reasonably prompt time frame (< 60 days)

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### The Written Determination

- The written determination must include:
  - Identification of the allegations potentially constituting sexual harassment (as defined in the Title IX regs)
  - A description of the procedural steps taken from the receipt of the formal complaint through the determination, including any notifications to the parties, interviews with parties and witnesses, site visits, methods used to gather other evidence, and hearings held

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### The Written Determination

- The written determination must include:
  - Findings of fact supporting the determination
  - Conclusions regarding the application of the Recipient's code of conduct

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### The Written Determination

- The written determination must include:
  - a statement of, and rationale for, the result as to each allegation, including a determination regarding responsibility,
  - any disciplinary sanctions the recipient imposes on the respondent, and
  - whether remedies designed to restore or preserve equal access to the recipient's education program or activity will be provided by the recipient to the complainant
  - The procedures and permissible bases for the complainant and respondent to appeal

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### The Written Determination

- The Recipient must provide the written determination to the parties simultaneously.
- The determination regarding responsibility becomes final:
  - if an appeal is not filed, on the date on which an appeal would no longer be considered timely
  - if an appeal is filed, on the date that the recipient provides the parties with the written determination of the result of the appeal

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### Appeals

- A recipient must offer both parties an appeal from a determination regarding responsibility, and from a recipient's dismissal of a formal complaint or any allegations therein, on the following bases:
  - Procedural irregularity that affected the outcome of the matter;
  - New evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter; and
  - The Title IX Coordinator, investigator(s), or decision-maker(s) had a conflict of interest or bias for or against complainants or respondents generally or the individual complainant or respondent that affected the outcome of the matter.

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### Appeals

- A recipient may offer an appeal equally to both parties on additional bases

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## Appeals

- As to all appeals, the recipient must:
  - Notify the other party in writing when an appeal is filed and implement appeal procedures equally for both parties
  - Ensure that the decision-maker for the appeal is not the same person as the decision-maker that reached the determination regarding responsibility or dismissal, the investigator, or the Title IX Coordinator
  - Ensure that the decision-maker(s) for the appeal complies with the evidentiary standard established in your policy

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## Appeals

- As to all appeals, the recipient must:
  - Give both parties a reasonable, equal opportunity to submit a written statement in support of, or challenging, the outcome
  - Issue a written decision describing the result of the appeal and the rationale for the result
  - Provide the written decision simultaneously to both parties

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## THE DETERMINATION REPORT

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## Definition of Sexual Harassment

**sexual harassment** means conduct on the basis of sex that satisfies one or more of the following:

- (1) An employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct; (*quid pro quo*)
- (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 recipient's education program or activity; (*hostile environment*) or
- (3) "Sexual assault", "dating violence", "domestic violence", or "stalking"

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## Goals

- Be consistent in terminology
- Be clear as to the source of information.
- Compare:
  - "Bob stated that this happened."
  - This happened."

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## Unambiguous

- Could someone unfamiliar with the incident pick up the decision and understand what happened?
- Make no assumptions that the reader will understand certain aspects of the community
- Write for a judge and jury to understand with no prior background

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### Sensitive

- Will the parties feel heard?
- Will the parties feel blamed?
- Will the parties feel vilified?
- Will the tone otherwise inflame the parties unnecessarily?
- **Maintain neutral, evidence-driven tone**

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### Empathetic

- Maintain a non-judgmental tone
- Stay away from charged words of advocacy:
  - Clearly/obviously
  - Innocent/guilty
  - Victim/perpetrator
- Watch your adjectives and adverbs – unless they are in a quote
- Recognize the impact of your words

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### Relevancy

- Include any decisions made that exclude information/evidence as not relevant
- Check to ensure that your report does not contain any information you are prohibited from including:
  - Legally privileged
  - Prior sexual acts

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### Objectively Evaluate Relevant Evidence

- Preamble indicates that the decision-maker should be looking at consistency, accuracy, memory, credibility, implausibility, inconsistency, unreliability, ulterior motives, lack of credibility
- Not making relevancy determinations beyond those expressly included in regulations
- Use the standard of proof to guide decision

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### Resolve Disputes of Fact

Fact Finding Process:

- List undisputed facts – what do parties agree on? = **findings of fact**
- List disputed facts – what do parties disagree on?
  - What undisputed facts address each element?
  - What disputed facts must be resolved for each element?
- Weigh the evidence for each relevant disputed fact •
- Resolve disputed facts = **findings of fact**

134

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### Considerations for Resolving Conflicts

- Statements by witnesses to the alleged incident
- Evidence about the relative credibility of the complainant/respondent
  - The level of detail and consistency of each person's account should be compared in an attempt to determine who is telling the truth
  - Is corroborative evidence lacking where it should logically exist?
- Evidence of the complainant's reaction or behavior after the alleged harassment.
  - Were there witnesses who saw that the complainant was upset? - Changes in behaviors? Work-related? School? Concerns from friends and family? Avoiding certain places?
- May not manifest until later

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### Considerations (cont'd)

- Evidence about whether the complainant filed the complaint or took other action to protest the conduct soon after the alleged incident occurred
  - But: failure to immediately complain may merely reflect a fear of retaliation, a fear that the complainant may not be believed, etc. rather than that the alleged harassment did not occur
- Other contemporaneous evidence: -
  - Did the complainant write about the conduct and reaction to it soon after it occurred (e.g. in a diary, email, blog, social media post)?
  - Did the student tell others (friends, parents) about the conduct and their reaction soon after it occurred?

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136

### Keep an Open Mind

- Keep an open mind until all evidence has been heard
- Don't come to any judgment, opinion, conclusion or belief about any aspect of this matter until you've reviewed or heard all of the evidence AND consider only the evidence that can remain

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### Sound, Reasoned Decision

- You must render a sound, reasoned decision on every charge
- You must determine the facts in this case based on the information presented
- You must determine what evidence to believe, the importance of the evidence, and the conclusions to draw from that evidence

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138

### Consider only the Evidence

- You must make a decision based solely on the relevant evidence obtained in this matter
- You may consider nothing but this evidence

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139

### Impartial

- You must be impartial when considering evidence and weighing the credibility of parties and witnesses
- You should not be swayed by prejudice, sympathy, or a personal view that you may have of the claim or any party

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### Weight of the Evidence

- The quality of evidence is not determined by the volume of evidence or the number of witnesses or exhibits.
- It is the weight of the evidence, or its strength in tending to prove the issue at stake that is important.
- You must evaluate the evidence as a whole based on your own judgment.

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141

### Witness Credibility

- You must give the testimony and information of each party or witness the degree of importance you reasonably believe it is entitled to receive.
- Identify all conflicts and attempt to resolve those conflicts and determine where the truth lies.
- Consider the reasonableness or unreasonableness, or probability or improbability, of the testimony.
- Does the witness have any motive?
- Is there any bias?
- As indicated earlier, the Regulations provide consideration of consistency, accuracy, memory, credibility, implausibility, inconsistency, unreliability, ulterior motives, lack of credibility

142

142

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### Credibility

- Credibility is determined fact by fact, not witness by witness - The most earnest and honest witness may share information that turns out not to be true

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### Reasonable Inferences

- Inferences are sometimes called "circumstantial evidence."
- It is the evidence that you infer from direct evidence that you reviewed during the course of reviewing the evidence.
- Inferences only as warranted and reasonable.

144

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### Standard of Evidence

- Use the standard of evidence as defined by your policy when evaluating whether someone is responsible for each policy violation and ALWAYS start with presumption of no violation.
- Preponderance of the evidence (most common standard of evidence): you must **determine whether it is more likely than not true that the respondent engaged in the alleged misconduct**. May be clearly convincing standard
- Look to all the evidence in total, make judgments about weight and credibility, and then determine whether or not the burden has been met.
- Any time you make a decision, use your standard of evidence

145

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### Don't Consider Impact

- Don't consider the potential impact of your decision on either party when determining if the charges have been proven
- Focus only on the charge or charges brought in the case and whether the evidence presented to you is sufficient to persuade you that the respondent is responsible for the charges

146

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### Checklist for Decision Maker

- Are there any procedural anomalies to be explained?
- Is every element of every charge accounted for?
- Is every relevant disputed fact resolved in the analysis?
- Is there a clear connection between the charges, the investigation, the evidence, and the conclusions?
- Would an unfamiliar reader be able to connect the dots?

147

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### Specific

- Set the scene visually (will help identify inconsistencies in stories)
- Use quotation marks carefully
- Include details to the level that you can thoroughly understand what it looked like
- Be careful of pronoun usage so that we always know who is saying or doing what

148

148

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### POST-DETERMINATION

149

149

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### Once the Determination is Final

- Continue offering supportive measures as appropriate
- Implement appropriate remedies, including disciplinary sanctions as allowed for in policy
- Follow up with the parties to ensure the matter is resolved and no retaliation is taking place
- Compile all documentation and reports for recordkeeping

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