

TITLE IX TRAINING

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Title IX

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

- Title IX of the Education Amendments of 1972

- Definition of sexual harassment
- Scope of the school's education program and activities
- How to conduct an investigation and grievance process
- How to serve impartially, including how to avoid prejudgment of the facts at issue, conflicts of interest, and bias.
- How to create an investigative report that fairly summarizes relevant evidence
- Technology to be used at a live hearing (If applicable)
- Relevant questions and evidence, including when questions and evidence about a complainant's sexual predisposition or prior sexual behavior are not relevant.
- Decisions & Appeals

Training Subjects

New Definitions of Sexual Harassment

- **Quid Pro Quo-** A school employee conditioning an educational benefit or service upon a person's participation in unwelcome sexual conduct
- **Sexual Assault, dating violence, domestic violence or stalking**
 - NOTE: These types of misconduct are not evaluated for severity, pervasiveness, offensiveness, or denial of equal educational access
- **Unwelcome conduct** on the basis of sex that is
 - **so severe, pervasive, and objectively offensive**
 - that it effectively denies a person equal access to the school's education program or activity
 - "reasonable person" standard

“Denied equal access”

Reasonable person standard

- Doesn't require dropping out of school, panic attack or “breaking point”
- Doesn't require manifestations of trauma or “constructive expulsion”
- May not refuse to respond because complainant is “high functioning”

Signs of unequal access

- Skipping class to avoid harasser
- Decline in grades
- Difficulty concentrating in class

Title IX vs. Code of Conduct Violations

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Behavior
that doesn't
meet the
requirements

Not **so severe, pervasive, and objectively offensive** that it effectively denies a person equal access to an education

Not done within the scope of the educational program or activity

Disciplined
under the
Code of
Conduct

School is entitled to take action under another provision of the Code of Conduct

Preponderance of the evidence standard

Sexual Misconduct vs. Sexual Harassment:

Severe?
Pervasive?
Objectively offensive?

Examples of Sexual Misconduct

- Unwelcome sexual advances
- Sexual jokes, comments, gestures regarding another's sex life, sexual orientation, or gender identity
- Sexting
- Spreading sexual rumors
- Sexual assault, violence, threats, stalking
- Insults or threats based on sex or gender
- Change of academic or employment responsibilities based on sex, gender identity or expression, or sexual orientation

Nondiscrimination Policy & Grievance Procedures

- Notice of School's Nondiscrimination policy and grievance procedures, including
 - how to file or report sexual harassment and
 - how the School will respond
- Must be provided to
 - students
 - parents/legal guardians
 - applicants for admission
 - applicants for employment
- Must be posted to the website

Parties

- **Complainant:** The person who experienced the alleged sexual harassment (“victim”)
 - Usually, the complainant files the formal complaint
- **Respondent:** The person accused of engaging in sexual harassment (“perpetrator”)
 - Presumed innocent and credible

Who is covered:

- The complainant must be a current student or employee or “attempting to participate”
- If the respondent is no longer enrolled the school *may* end its investigation
- The complainant may withdrawal the complaint at any time and the school *may* end its investigation
 - Caveat: must avoid “deliberate indifference”

What is covered: Scope of the Education Program and Activities

- Any school event
 - Employment
 - Extracurricular activities
 - Athletics, performances
 - Community engagement and outreach programs
- Any location where a school event was taking place, including
 - on a school bus or other school-related vehicle
 - en route to or from school
 - off campus on a telecommunications access device or telecommunications service provider owned or under the control of the Academy
- Does not cover actions off campus unless the school exercised **substantial control** over both the **respondent** and the **context** in which the sexual harassment occurred
- Includes remote/ virtual learning

- Not addressed as a separate form of harassment
- Must meet the same standards, regardless of the method of harassment (fact-specific inquiry)
 - E.g., use of computer/internet networks owned or operated by school
 - Use of a personal device during class time to perpetrate online harassment
- Expressed concerns about First Amendment rights
 - Severity and pervasiveness required so as not to punish verbal conduct in a manner that chills and restricts speech
- The school can investigate the matter under Board policy or the Code of Conduct even if not required by Title IX

Online Sexual Harassment

Mandatory Reporting

- **All** employees/staff members have an obligation to report instances of sexual harassment.
 - Witnessed
 - Heard about
- A school has “actual knowledge” of a Title IX allegation if notice is given to any employee/staff of the school.

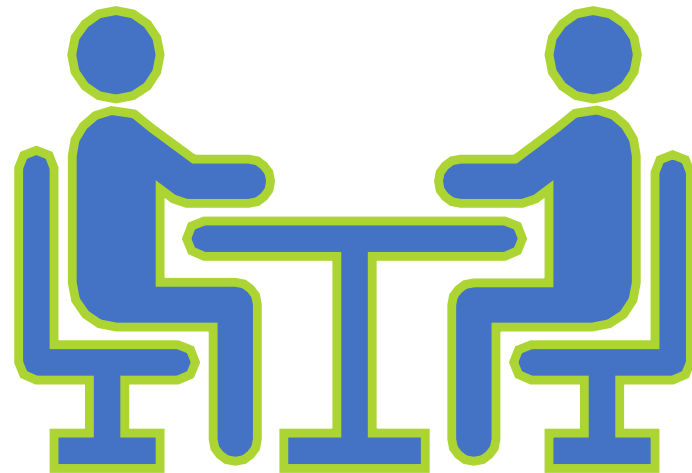
Mandatory Initial Response

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- Legal obligation to “respond promptly”
- in a manner that *is not deliberately indifferent*
 - response that is not clearly unreasonable in light of the known circumstances.
- Offer appropriate supportive measures to restore or preserve equal access to the educational program or activity
- Confirm whether the complainant wants to initiate or participate in a grievance process
- Title IX Coordinator to file a formal complaint when necessary to avoid deliberate indifference if the complainant chooses not to do so.

What Does a Response Look Like?

- Promptly contact the complainant to:
 - Discuss supportive measures
 - Offer restorative practices
 - Explain the process for filing a formal complaint
- Offer supportive measures to the complainant and respondent



“Supportive Measures”

- Reasonably available individualized services
- non-punitive, non-disciplinary prior to decision
- not unreasonably burdensome to the other party
- designed to:
 - ensure equal educational access,
 - protect safety or
 - deter sexual harassment.

Mandatory Response:

Investigate

Investigate sexual harassment allegations in any formal complaint

Process

Follow a grievance process that complies with the regulations

No Discipline

School may not use disciplinary measures against Respondent during the grievance process

- School may impose discipline sanctions against the Respondent prior to completion of the grievance process only if
- Individualized safety and risk analysis completed
 - determined that emergency removal is necessary
 - to protect a student or other individual from
 - an **immediate** threat to **physical** health or safety
- If there is an emergency removal, the School must provide the respondent with
 - notice and
 - an opportunity to challenge the decision immediately after the removal

Exception: Emergency Removals

Examples of Supportive Measures

- Move student(s) from classes
- Mental health support
- Altered schedules
- Extended deadlines
- Student conference(s) with administrator
- Counseling/therapeutic interventions
- Classroom reassignment
- Teacher notification plan
- Parent meeting(s)
- Safe person plan
- Increased monitoring/supervision
- Mutual restrictions on contact between parties
- Check in – Check out
- Unstructured areas safety plan
- Bus planning/notification

Confidentiality – Pre-Formal Complaint

Someone can report anonymously (though a school will be unable to provide supportive measures without knowing the complainant's identity)

A complainant may report and receive supportive measures while keeping the complainant's identity confidential from the respondent (unless the respondent must know the complainant's identity in order for the school to implement a supportive measure)

Informal Resolution

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- May use informal resolution processes but only if:
 - There has been a formal complaint filed and
 - both parties voluntarily agree in writing
- Either party has right to withdraw from informal resolution and resume grievance process
- Not an option in cases involving allegations that an employee sexually harassed a student.
- Mediation or restorative justice

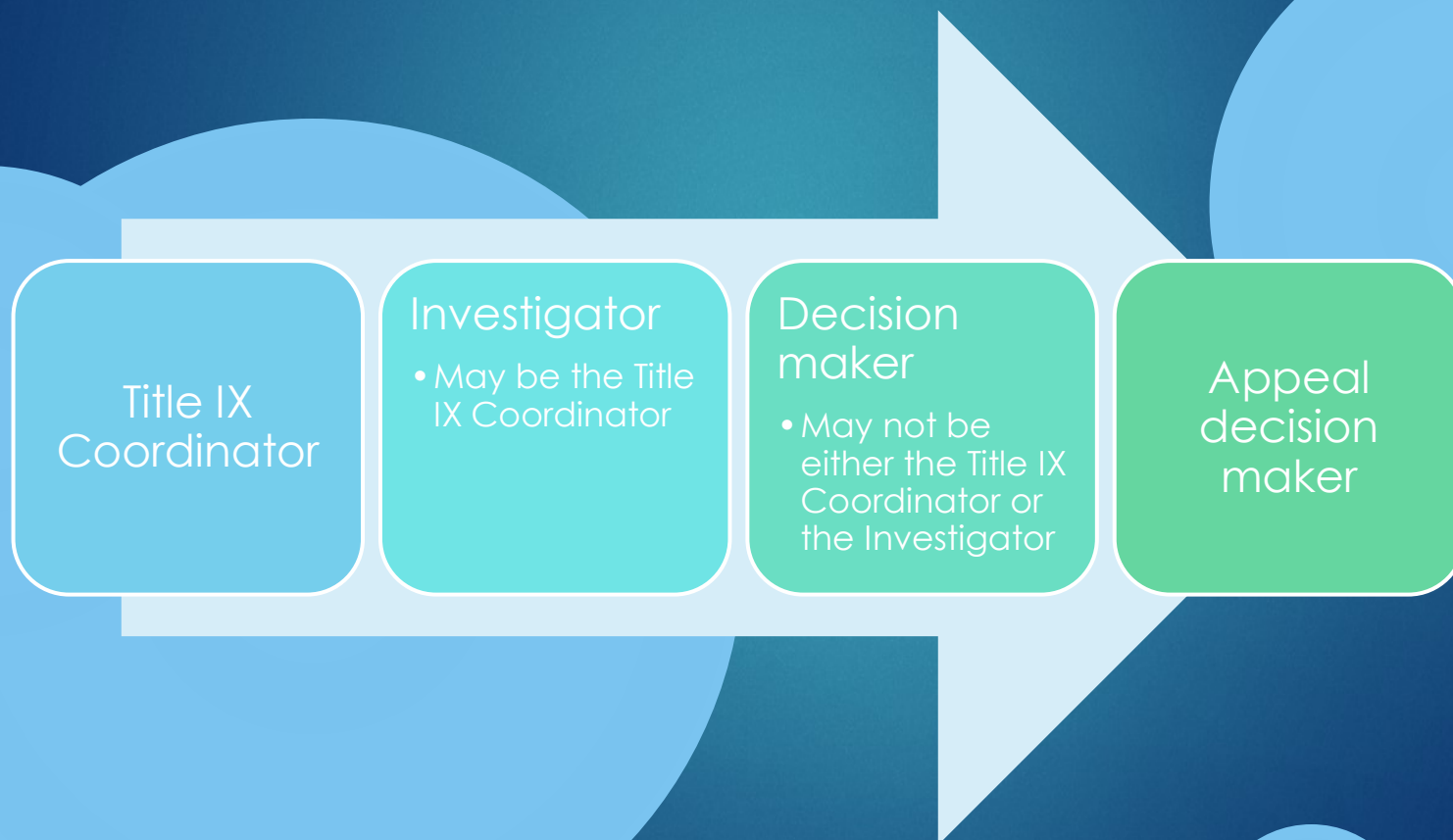
Formal Complaint

- Written document signed by a complainant or Title IX Coordinator requesting that the school investigate allegations of sexual harassment
- Triggers investigation/grievance process
- Must provide both parties with written notice of the allegations upon receipt of a formal complaint
- Withdrawn complaint: usually respected and the Title IX investigation would end
- School may continue to investigate if the complaint is severe to avoid deliberate indifference

Confidentiality – Post-Formal Complaint

- Once a formal complaint is filed against the respondent, the respondent will know the complainant's identity
- The complainant's identity is to be kept confidential to the extent possible for people outside the grievance process
 - except as permitted by FERPA,
 - required by law, or
 - as necessary to conduct the grievance process.

The Title IX Team



The Title IX Team:

Impartiality is Key

- Goal: protect students from victimization while at the same time providing appropriate due process to both complainants and respondents.
- It is essential to avoid prejudging the facts
- Recognize conflicts of interest
 - cannot have other job responsibilities that may create a conflict of interest.
 - Prior involvement with a student or employee that creates a conflict or bias
- Recognize Bias

- The regulations require school to appoint a “Title IX Coordinator”
 - Name, Office address, email address and phone number at posted on website
- Need to maintain records of annual training for the Title IX Coordinator
- NOTE: Rule says the Title IX Coordinator must be “an employee of the recipient”

Title IX Coordinator

Title IX Coordinator Responsibilities

- Provide **access to information** about how to file a complaint and how the School will respond to reports and complaints.
- Promptly and confidentially **contact complainants** to discuss the availability of supportive measures with or without the filing of a formal complaint.
- **Sign a formal complaint** when the complainant is unwilling to do so but failure to investigate could result in deliberate indifference by the School.
- **Assign an unbiased investigator** to each complaint of alleged sexual harassment.

Title IX Coordinator Responsibilities

- Pursue **informal resolution** options such as mediation or restorative justice.
- Ensure **transparency and consistency** in grievance process
- Meet all **notice** requirements.
- Ensure that all Title IX personnel are **free of conflicts** of interest and bias.
- Ensure that there is an **objective evaluation of all relevant evidence**.

Title IX Coordinator Responsibilities

- Oversee Title IX personnel **training**.
- **Post** Title IX training materials on the website
- Enforce **rape shield protections**
- **Maintain confidentiality** to extent permitted by law

Grievance Process

- This is the investigative process and subsequent decision
- Emphasis on “fair, equitable and without bias” process
- The school has the burden of gathering the evidence
- The investigator(s) cannot be the decision-makers

Notice Requirements

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1. Initial notice to parties

- Allegations (in sufficient detail to allow respondent to prepare a response)
 - names of known parties
 - conduct alleged
 - date and location of conduct, if known
- Opportunity to present fact and expert witnesses and other evidence
- Opportunity to select an advisor, including an attorney, of their choice

2. Investigation Notice

- Notice of any investigative interview, meetings, or hearings and
- Opportunity to submit questions
 - submitted questions must be sent to other party

- **Investigation began** within 2 days of incident being reported
- Free from **conflicts of interest or bias** for or against complainant(s) or respondent(s)
- Received required Title IX **training**
- Understands that there is 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

Investigator Assurances

- Agrees to **treat complainants equitably** by providing remedies any time a respondent is found responsible, and **to treat respondents equitably** by not imposing disciplinary sanctions without following the grievance process
- Agrees to **objectively evaluate all relevant evidence**, inculpatory and exculpatory, and **avoid credibility determinations** based on a person's status as a complainant, respondent or witness.
- Understands the **standard of evidence** for determining whether sexual harassment has occurred
 - preponderance of the evidence
 - clear and convincing evidence

Investigator Assurances Cont'd.

Investigation

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An impartial investigator meets with the parties to gather information

Notice to both parties of the allegations and of the policies alleged to have been violated.

Opportunity for parties to provide a list of witnesses and additional evidence.

Meetings with all relevant witnesses.

Opportunity for the parties to provide list of questions for the other party and witnesses

Investigation

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Gather all available and relevant evidence

Provide parties the opportunity to review all evidence and information before the report is finalized.

Provide parties a copy of the draft investigation report for review and comment

Provide parties opportunity to address investigative report with the decision maker.

Typical Investigation

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Interview
complainant(s)

Interview
respondent(s)

Interview witnesses

Written witness
statements

Interview
complainant
parent/guardian

Interview
respondent
parent/guardian

Examine physical
evidence

Review medical
information if
privilege is waived

Review student
records

Review social
history b/w parties

Interview teachers
and/or school staff

Review student
attendance
/grades

Review video
surveillance

Review
electronic/web
content

Consider history of
prior conflicts
and/or
problematic
behavior

Retaliation Prohibited

- All parties, including the witnesses, are protected
- No intimidation, threats, coercion or discrimination for reporting, testifying, refusing to participate etc.
- Includes charges for Code of Conduct violations that do not involve sex discrimination or harassment but arises out of same set of facts.

Investigator Tips

Prepare	Prepare the questions in advance
Deviate	Be prepared to deviate from written list of questions as the story unfolds
Create	Create an interview environment that feels safe - Don't be intimidating!
Listen	Listen carefully and objectively (non-biased)
Share	It is important for reporting parties to know who you are and what your role is

Investigator Tips

Connect	Connect with them before questioning
Assure	Assure them of no retaliation
Allow	Allow reporting parties to self-identify, so avoid assumptions about gender and sexual orientation.
Communicate	Be clear about how often you'll communicate with them throughout the process.
Share	Let them know what happens next.

Investigator Tips

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Start with open-ended questions that provide individuals control over how they share their accounts.

- “What can you tell me about what happened?”
- “Where would you like to start?”

This leaves the reporting party in control.

Follow up with soft-approach questions

- “Can you tell me more?”
- “Can you help me understand?”

Investigator Tips

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“Who, what, where, when, why, and how” questions

Summarize what you think you heard them say and repeat it back

Get a good sense of the timeline and the details

Pay attention to nonverbal cues

Take detailed notes of witness observations and information

Relevant questions and evidence

Focus on behavior rather than intention or opinion

Find out if witness knows of anyone else with information

No standard for "relevance"

Irrelevant/Precluded Evidence

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- Complainant's treatment records
 - Unless you receive prior written consent
- Legally recognized privilege
- Questions about complainant's sexual predisposition

Rape Shield

- May not ask questions about complainant's prior sexual behavior
 - Unless it is used to prove someone other than the respondent committed the offense
 - Or offered to prove consent
- Does not apply to respondents
- Evidence of a pattern of inappropriate behavior by respondent is relevant

Potential Questions



Where and when did it occur?



Who was involved?



What happened?



Did anyone else see it happen?



Have you talked to anyone about it since?



Has it happened before?



Do you know anyone else with information about it?

Respondent Interview

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Be

Be non-judgmental and unbiased

Approach

Approach with curiosity, seeking to hear respondent's side of the story

Ask

Ask about each of the allegations separately

Notes

Keep good notes of respondent's responses

Focus

Focus on behavior rather than state of mind or intent

Assessing Credibility

Credibility is the process of weighing the accuracy and veracity of evidence.

Investigator cannot begin with an assumption that one party is more credible than the other.

To assess credibility, evaluate the source, content, and plausibility of what is offered in light of other evidence.

Notice Requirements

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3. Evidentiary Notice

- Evidence directly related to the allegations
- In electronic or hard copy format
- With at least 10 days for the parties/advisors to
 - inspect
 - review and
 - respond to the evidence before the investigative report is finalized.

4. Investigative Report Notice

- Investigative report that fairly summarizes relevant evidence
- Provide at least 10 days to respond before the matter is heard by the decision-maker.
- Must include information about the opportunity to submit written, relevant questions that a party wants asked of any party or witness prior to a decision.

Preparing the Investigative Report

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Create an investigative report that fairly summarizes relevant evidence

01

Exclude privileged information

02

Many cases hinge on nuance and credibility so the report should identify this

03

Keep the principles of due process and equity at the forefront

04

Address each allegation separately, reporting facts that support or negate

Hearings

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Most K-12 schools are
opting not to hold live
hearings

If the school chooses to
hold live hearings, it
must ensure that the
decision-maker is fully
trained in the use of
technology

Decision Maker

A final written report must be issued and sent to all parties

No timeline for completing an investigation, but must be reasonable

Neither the Title IX Coordinator nor the Investigator may be the decision maker

A third party may act as decision maker

Different decision maker for appeals

- Decision-maker is neither the investigator nor the Title IX Coordinator
- **Free from conflicts of interest or bias** for or against complainant(s) or respondent(s)
- Received required Title IX **training**
- Understands that there is 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
- Agrees to treat complainants **equitably** by providing remedies any time a respondent is found responsible, and to treat respondents equitably by not imposing disciplinary sanctions without following the grievance process

Decision Maker Assurances

- **Objectively evaluate** all relevant evidence, inculpatory and exculpatory, and avoid credibility determinations based on a person's status as a complainant, respondent or witness
- Provide **remedies**, when a respondent is found responsible, that are designed to maintain the complainant's equal access to education. Such remedies may be disciplinary or punitive and may burden the respondent when necessary
- **Understands the standard of evidence** for determining whether sexual harassment has occurred
 - preponderance of the evidence
 - clear and convincing evidence

Decision Maker Assurances Cont'd.

Burden and Standard of Proof

- The school has the burden of proof, not the respondent
- The school must decide which standard of proof it is going to apply to ALL complaints:
 - **Preponderance of the Evidence:** met when the party with the burden convinces the fact finder that there is a greater than 50% chance that the claim is true.
 - **Clear and Convincing Evidence:** met when the evidence is highly and substantially more likely to be true than untrue; the fact finder must be convinced that the contention is highly probable.

Decision: Reasonable & Defensible

- To find responsibility, decision-maker must find:
 - the incident meets the definition of sexual harassment and
 - the incident occurred within the School's educational program or activity
- Failure to find both must result in dismissal of the complaint and no disciplinary sanctions under Title IX
- Final Determination must include:
 - A finding on each alleged violation
 - Rationale for each finding

“Determination Regarding Responsibility” Elements

- the **allegations** that could constitute sexual harassment;
- a **description of procedural steps** undertaken, including notifications to parties, interviews and site visits, methods used to gather evidence, and hearings;
- **findings of fact** that support the determination regarding responsibility;
- **conclusions** about the application of the school's code of conduct to the facts;
- an **explanation** regarding the result of each allegation, with a determination regarding responsibility, any disciplinary actions against the respondent, and any remedies to be provided to the complainant; and
- procedures and bases for **appeal**.

Available Sanctions upon finding responsibility (students)

- Loss of privileges
 - suspension of bus riding/transportation privileges
 - removal from extra-curricular activity
 - any other sanction authorized by the Student Code of Conduct
- Detention
- In-school suspension
- Out-of-school suspension
- Expulsion

Decision

Available Sanctions upon finding responsibility (staff)

- Leave of Absence
- Termination
- Removal from school
- Reassignment

Decision

Notice Requirements

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5. Response Notice

- Must provide the answers to the questions submitted
- Must allow for additional, limited follow-up questions from each party
- Must send follow-up questions and responses to other party

6. Final Determination Notice

Final written determination including

- statement of and rationale for result as to **each** allegation,
- including determination of responsibility,
- any disciplinary sanctions, and
- whether remedies to restore or preserve equal access to the educational program or activity will be provided.
- Right to appeal

Notice Requirements

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7. Appeal Notice

- Must provide notice that a party has appealed
- Must provide opportunity to respond in writing to the appeal

8. Appeal Decision Notice

- Result of appeal
- Rationale for decision
- The appeal decision is final

Appeal Process

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Either party is allowed an appeal for

- **Procedural irregularity** that affected the outcome
- **Newly discovered evidence** not reasonably available that could affect the outcome
- Investigator or Decision maker had a **conflict of interest or bias** that affected the outcome

Appeal Process

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- Appeal decision maker is different person/entity
- Written notice to the other party
- Parties may submit a written statement regarding the appeal
- Decision must be in writing
 - Result of appeal
 - Rationale for result
- Provided to both parties simultaneously

Record Keeping

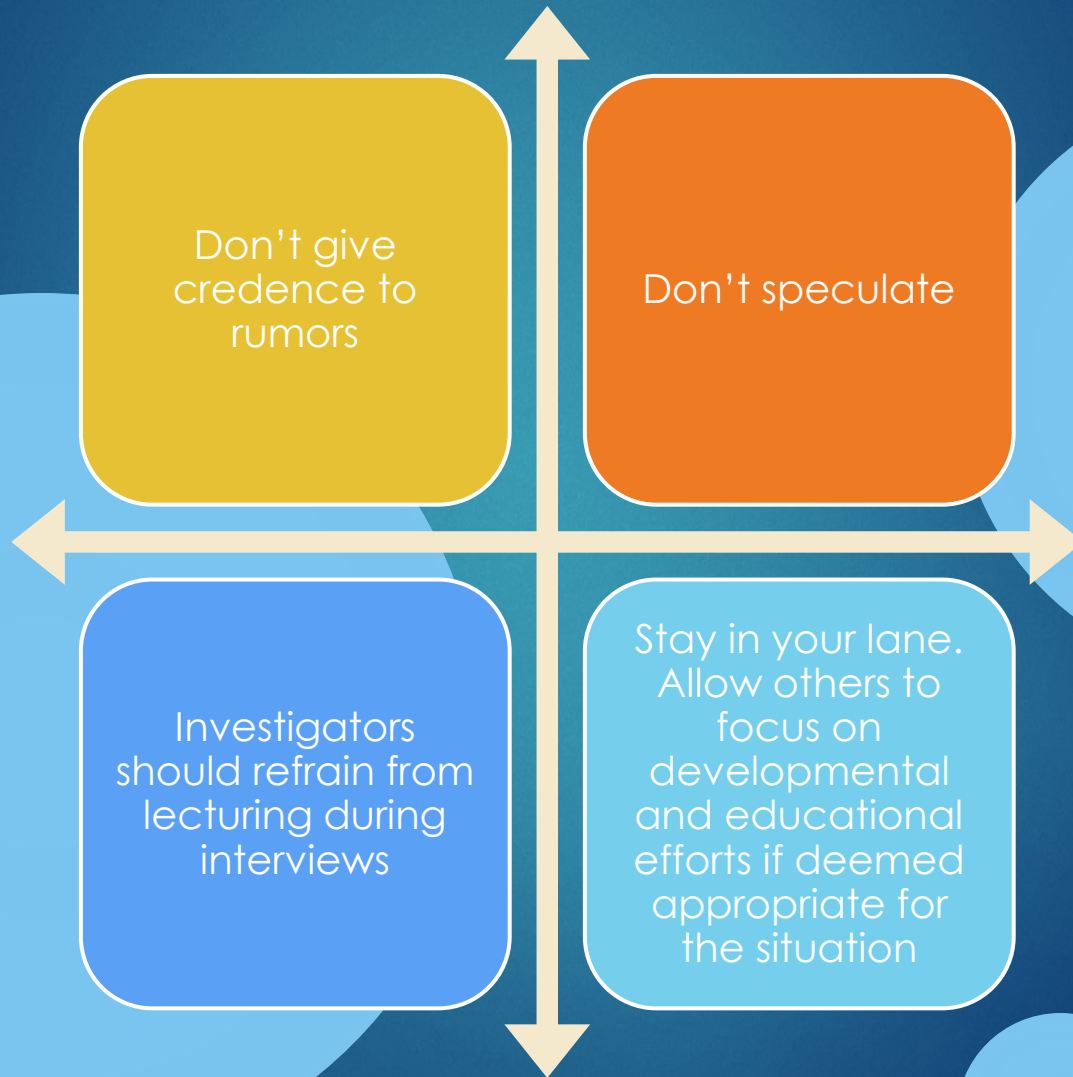
- 7 years
- Investigation documents
- Written determinations
- Disciplinary sanctions
- Supportive Measures
- Remedies provided
- Appeals
- Informal resolutions
- Training materials

- Essential to treat both parties equitably
- Address personal bias by:
 - Nurturing an attitude of humility
 - Nurturing a continuous curiosity about others and their points of view and experiences
 - Understanding microaggressions and how to avoid and address them.
- ▶ Race, Gender, Sexual Orientation, Ethnicity, Poverty

Anti-bias: Integrity of the Process

Anti-bias

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Anti-bias

- The investigator's role is to listen to and seek to understand the witnesses' and/or parties' perspectives while gathering facts and evidence and working towards rendering an appropriate finding
- Appreciate the nuances and uniqueness of those who come from a different background, gender, sexuality, culture, disability, heritage, generation, etc. from your own.
- When preparing questions in advance of interviews, evaluate for neutrality

- While investigators may have a general understanding of experiences common to certain groups
- it remains essential to not assume that the issues common to a certain group have been important to or experienced by a specific member of that population.
- Investigators and coordinators should develop an awareness of how their individual experiences and privilege may create expectations in their conversations with others.

Avoiding Stereotypes

Summary



Questions?

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You'll never regret a phone call...

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