Title IX Training

Complaint Managers/Investigators

Oswego CUSD 308

August 31, 2022

Maureen Lemon

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LEARNING OBJECTIVES

Sexual harassment prohibition basics

Obligations as Title IX Complaint Manager / Investigator

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TITLE IX OVERVIEW

Enacted in 1972

To eliminate discrimination on the basis of sex in educational programs

Applies to K-12 and higher education

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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 subjected to discrimination under any educational program or activity receiving federal financial assistance.

20 U.S.C. Section 1681

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Title IX prohibits sex-based discrimination in:

Comparable Facilities

Access to classes and schools

Extra-curricular activities

Athletics

Pregnancy

Standards for measuring skill/progress in PE classes

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Laws prohibiting sexual harassment

EMPLOYEES	STUDENTS
Illinois Human Rights Act	Illinois Human Rights Act
Title IX	Title IX
Title VII	105 ILCS 5/27-23.7
State Officials & Employees Ethics Act	105 ILCS 110/3.10

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Board policies addressing sexual harassment

EMPLOYEES	STUDENTS
5:10- Equal Employment Opportunity & Minority Recruitment	7:10- Equal Educ. Opportunities
5:20- Workplace Harassment Prohibited	7:20- Harassment of Students Prohibited
	7.180- Preventing Bullying, Intimidation & Harassment
	7.185- Teen Dating Violence

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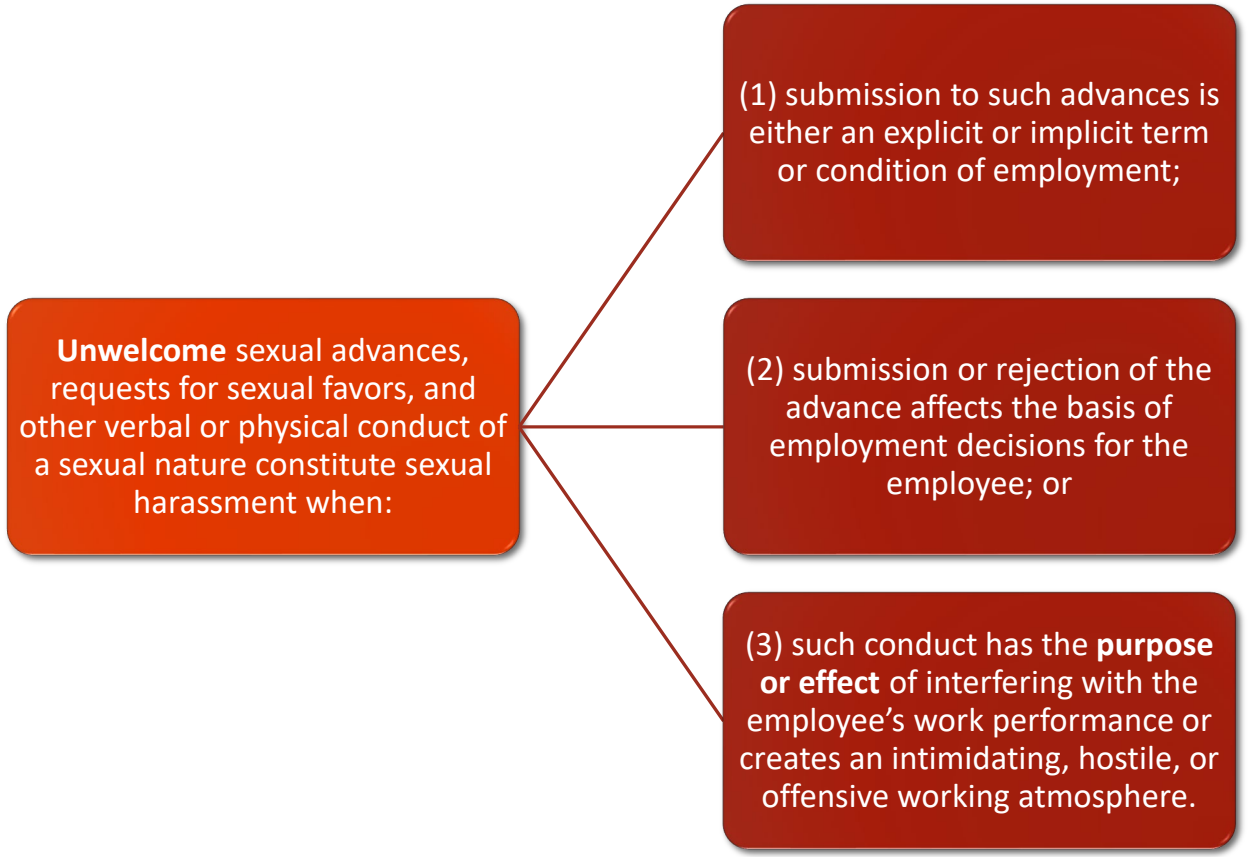
Sexual Harassment in the Workplace (Title VII)



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2 Types of Sexual Harassment under Title VII

Quid Pro Quo

Hostile Work Environment

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Hostile Environment

A hostile work environment occurs when an employer creates or permits the existence of an atmosphere of sexually offensive conduct or speech that is so **pervasive** and **offensive** that a **reasonable** employee could not tolerate working under such conditions.

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What is pervasive and severe?

Courts look at the totality of the circumstances.

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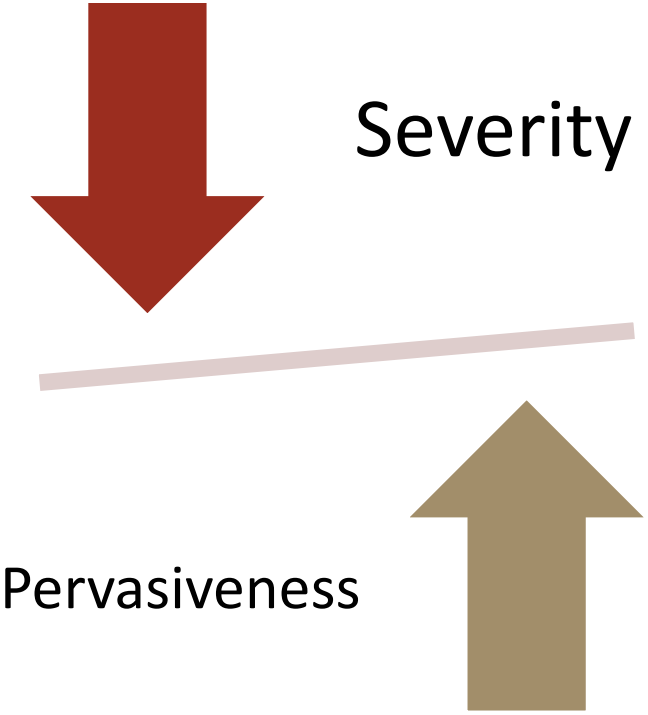
What is pervasive and severe?



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Standards used to assess hostile environment claim

OBJECTIVE STANDARD: Is the conduct pervasive or severe enough to create an objectively hostile or abusive work environment; would a reasonable person in the plaintiff's position find the work environment hostile or abusive?

SUBJECTIVE STANDARD: Did the plaintiff subjectively truly perceive the environment to be hostile or abusive? If not, the conduct has not altered the work conditions and no Title VII violation occurred.

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Sexual Harassment under Title IX: eff. 8/14/20

QUID PRO QUO

SEXUAL ASSAULT, VIOLENCE, STALKING

HOSTILE ENVIRONMENT

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#1:

QUID PRO QUO

THIS FOR THAT

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#2:

SEXUAL ASSAULT, etc.

Sexual assault
(20 U.S.C. §1092(f)(6)(A)(v))
Dating violence
(34 U.S.C. §12291(a)(10))
Domestic violence
(34 U.S.C. §12291(a)(8))
Stalking
(34 U.S.C. §12291(a)(30))

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Sexual Assault

An offense classified as a forcible or nonforcible sex offense under the FBI's uniform crime reporting system.

Forcible Rape
Forcible Fondling
Statutory Rape

Forcible Sodomy
Incest Assault
Assault with object

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“Consent”
720 ILCS 5/11-1.70

(a) a freely given agreement to the sexual act in question. Lack of verbal or physical resistance or submission by the victim resulting from the use of force or threat of force by the accused shall not constitute consent. The victim’s manner of dress at the time of the offense shall not constitute consent.

(c) A person who initially consents to a sexual act is not deemed to have consented to any sexual conduct that occurs after he or she withdraws consent during the course of that sexual conduct.

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Consent

- Informed
- Freely given
- Of age
- Mentally and physically capable of consent
- Not incapacitated

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Consent

Active, not passive

"NO" means "NO"

Silence means "NO"

May be withdrawn at any time

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Dating Violence

Violence committed by a person:

(A) who is or has been in a social relationship of a romantic or intimate nature with the victim; and

(B) where the existence of such a relationship is determined based on considering the following factors:

(i) The length of the relationship.

(ii) The type of relationship.

(iii) The frequency of interaction between the persons involved in the relationship.

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Domestic Violence

Felony or misdemeanor crimes of violence committed by a current or former spouse or intimate partner of the victim, by a person with whom the victim shares a child in common, by a person who is cohabitating with or has cohabitated with the victim as a spouse or intimate partner, by a person similarly situated to a spouse of the victim under domestic or family violence laws, or by any other person against an adult or youth victim who is protected from that person's acts under domestic or family violence laws.

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Stalking

Engaging in a course of conduct directed at a specific person that would cause a reasonable person to:

(A) fear for his or her safety or the safety of others; or

(B) suffer substantial emotional distress.

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#3:

HOSTILE ENVIRONMENT

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

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Unwelcome conduct: Totality of Circumstances

Even if one voluntarily participates in it?

Even if one remains silent?

Ask whether a ‘reasonable person’ would find this conduct unwelcome?

A child under age 18 cannot ‘welcome’ inappropriate conduct based on sex.

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School District Liability under Title IX

KEY U.S. SUPREME COURT CASE

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Davis v. Monroe County Bd. of Ed. 526 U.S. 629 (1999)

From Dec. 1992 until May 1993, a 5th grade boy did the following toward Davis, a female classmate:

- "I want to feel your boobs" & "I want to get in bed with you"
- Touched her breasts and genitals
- Placed a doorstop in his pants and made sexually suggestive gestures at her
- Rubbed up against her in a sexually suggestive way

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Davis v. Monroe County Bd. of Ed. 526 U.S. 629 (1999)

Davis and her mother each repeatedly reported the behavior to multiple teachers. After she complained for 3 months, Davis' assigned seat was finally moved away from the male student.

When Davis tried to speak with the principal, she was told, "If he wants to talk with you, he'll call you." When Davis' mother spoke with the principal, he stated, "I guess I'll have to threaten him a little harder." No action was taken.

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Davis v. Monroe County Bd. of Ed. 526 U.S. 629 (1999)

Davis' grades declined during the five-month period.

Davis wrote a suicide note and told her mother that she didn't know how much longer she could keep the male student off her.

The conduct stopped when the male student pleaded guilty to sexual battery.

The family sued under Title IX.

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Davis v. Monroe County Bd. of Ed. 526 U.S. 629 (1999)

RULING: A school district may be liable for **peer-to-peer** sexual harassment under Title IX if:

1) The harassment is so **severe, pervasive and objectively offensive** that it has a concrete, negative effect on one's ability to receive an education, and
2) The district had **actual knowledge** of the harassment, and
3) The district was **deliberately indifferent** to the harassment.

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Davis v. Monroe County

"Indeed, at least early on, students are still learning how to interact appropriately with their peers. It is thus understandable that, in the school setting, students often engage in insults, banter, teasing, shoving, pushing, and gender-specific conduct that is upsetting to the students subjected to it."

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Davis v. Monroe County

"Damages are not available for simple acts of teasing and name-calling among school children, however, even where these comments target differences in gender. Rather, in the context of student-on-student harassment, damages are available only where the behavior is *so severe, pervasive, and objectively offensive* that it denies its victims the equal access to education that Title IX is designed to protect."

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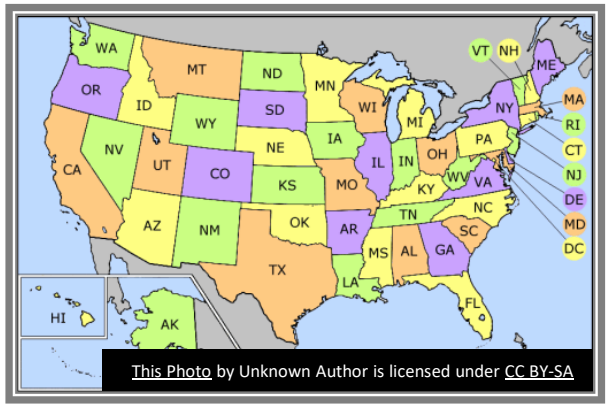
WHEN must a school respond to Title IX Sexual Harassment?

When it has actual knowledge of the sexual harassment

In an educational program or activity of the recipient

Against a person in the United States



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WHO has to have ACTUAL KNOWLEDGE (Notice)?

Any employee!

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WHAT is an Educational Program or Activity?

Includes locations, events, or circumstances over which the recipient exercises ***substantial control*** over:

1. The respondent, and
2. The context in which the sexual harassment occurs

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WHAT IS THE SCOPE OF YOUR EDUCATIONAL PROGRAM?

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Title IX Basic Definitions

Recipient = School district

Complainant = The alleged victim

Respondent = The alleged perpetrator/harasser

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LOOKING FOR THE TITLE IX ISSUES

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In all situations
Ask “whom should I call?”

DCFS?

911?

Parent?

TIX Coord’r?

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Student Sexual Abuse Claim against School Employee

See Board Policy 5:90: Abused & Neglected Child Reporting

Limits the role of school personnel to interrogate student victim

Limits the timing of when school personnel can interrogate student victim

105 ILCS 5/22-85

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RESPONSE TO TITLE IX ALLEGATION

What should everyone do?

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Notify Title IX Coordinator immediately! (See Policy 2:265)

By any individual (not just the victim)

By any means (email, telephone, mail, in person)

At any time, day or night

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To avoid Title IX liability, **HOW** must the school district respond?

Promptly

In a manner that is not deliberately indifferent

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What is ‘deliberately indifferent’?

A response that is clearly unreasonable

under the circumstances

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RESPONSE TO ALLEGATION OF TITLE IX SEXUAL HARASSMENT

REASONABLE UNDER THE CIRCUMSTANCES

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GRIEVANCE PROCESS

Notice of Allegation

Preliminary Steps

Investigation

Decision

Appeal

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GRIEVANCE PROCESS

#1

Notice of Allegation

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Notice of Sexual Harassment / Allegations of Sexual Harassment *to Title IX Coordinator*

- By any individual (not just the victim)
- By any means (email, telephone, mail, in person)
- At any time, day or night

ODHC FORM 1: Sexual Harassment Incident Report Form

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GRIEVANCE PROCESS

#2

Preliminary Steps

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INITIAL RESPONSE

Title IX Coordinator *Promptly* Contacts Complainant to:

01

Discuss availability of supportive measures

02

Consider Complainant's wishes

03

Explain process to file a formal complaint

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Treat Complainant and Respondent *equitably*

1. Offer ***supportive measures*** to the Complainant

2. Follow the Title IX ***grievance process*** before imposing discipline against Respondent

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SUPPORTIVE MEASURES

Non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, and without fee or charge to complainant or respondent before or after the filing of a formal complaint or where no formal complaint has been filed.

Designed to restore or preserve equal access to the school's education program/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.

ODHC FORM 2A-D: Notice of Available Supportive Measures

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SUPPORTIVE MEASURES

- Counseling
- Extension on deadlines
- Modified work / class schedule
- No-contact order
- Leave of Absence
- Increased Campus Security
- Other

ODHC FORMS 3A&B: Notice of Supportive Measures Provided

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Supportive Measures

School must maintain as **CONFIDENTIAL** any supportive measures, to the extent possible

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Administrative Leave of Employee Respondent

Pending grievance process

ODHC FORM 6: Notice of Administrative Leave

Comply with Section 504 and ADA

Follow Board policies / union contract provisions

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Emergency Removal of Student Respondent

ODHC FORM 7: Notice of Emergency Removal

1. After individualized safety and risk analysis

2. Justified by an immediate threat to the physical health or safety of the student or other individual arising from allegations of sexual harassment

3. Given notice and opportunity to challenge the decision immediately following removal

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Emergency Removal of Student Respondent

Pending Title IX Grievance Process

Comply with IDEA, Section 504 and ADA

Follow Board policies re: suspension / expulsion

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Formal Complaint

Document *filed* by a Complainant *or signed* by the Title IX Coordinator

Alleging sexual harassment against a respondent

Requesting an investigation

ODHC FORM 4: Formal Complaint Form

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When should Title IX Coordinator Sign a Formal Complaint?

Age of alleged victim?

Seriousness of alleged conduct?

Pattern of alleged conduct?

Use of weapons or violence?

- TIXC ≠ Complainant if TIXC signs formal complaint

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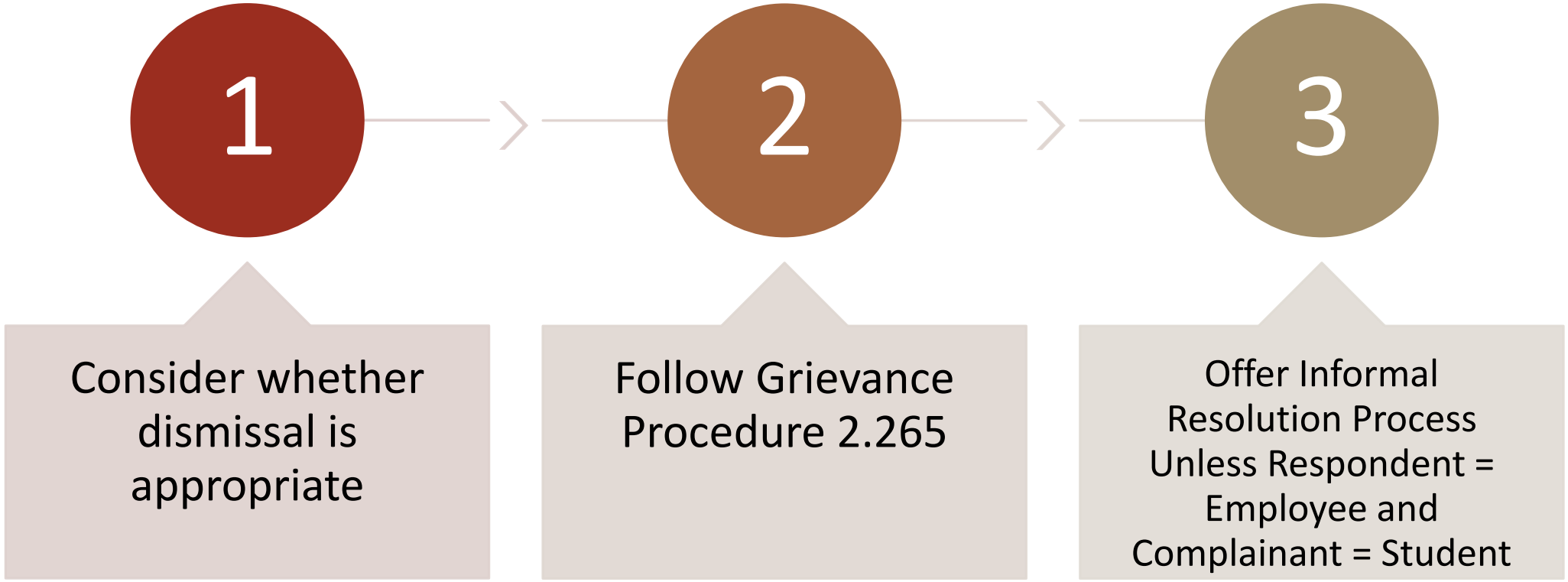
Steps upon Formal Complaint



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DISMISSAL OF FORMAL COMPLAINT

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Mandatory Dismissal of Formal Complaint

The allegations, even if true, do not meet the Title IX sexual harassment definition

The conduct did not occur in the educational program or activity

The conduct did not occur in the United States

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Permissive Dismissal of Formal Complaint

The Complainant notifies TIXC in writing that they want to withdraw the formal complaint or any of its allegations

The Respondent is no longer enrolled or employed by the school district

Specific circumstances prevent school district from gathering evidence sufficient to reach determination

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If Formal Complaint is Dismissed:

NOTIFY PARTIES IN WRITING

EITHER PARTY MAY APPEAL

INVESTIGATE UNDER ANOTHER BOARD POLICY?

ODHC FORM 8: Notice of Dismissal of Formal Complaint

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Grievance Process Timeline

‘Reasonably prompt’

Policy 2:265-AP2: Within 90 school business days after receipt of a formal complaint

School business days = days the District’s main office is open

May be delayed / extended for a limited time for Good Cause

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Good Cause for Temporary Delay / Extension of Time

- The absence of a party, party advisor or witness
- Concurrent law enforcement activity
- Need for language assistance or disability accommodation

ODHC FORM 26

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INFORMAL RESOLUTION PROCESS

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Informal Resolution Process (IRP) Written Notice

Allegations

IRP requirements, including circumstances under which it precludes the parties from resuming the formal complaint arising from same allegations

At any time prior to resolution, a Party may withdraw from IRP and resume grievance process

Consequences resulting from participating in IRP, including records that will be maintained or could be shared

ODHC FORM 14: Informal Resolution Process Participation Agreement

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Limitations on Informal Resolution Process

1. Parties must voluntarily consent in writing to participate
2. Cannot use unless a formal complaint has been filed
3. Cannot use if Respondent is no longer employed or enrolled
4. Cannot use if Complainant is student and Respondent is employee
5. Cannot use if determination re: responsibility has been made

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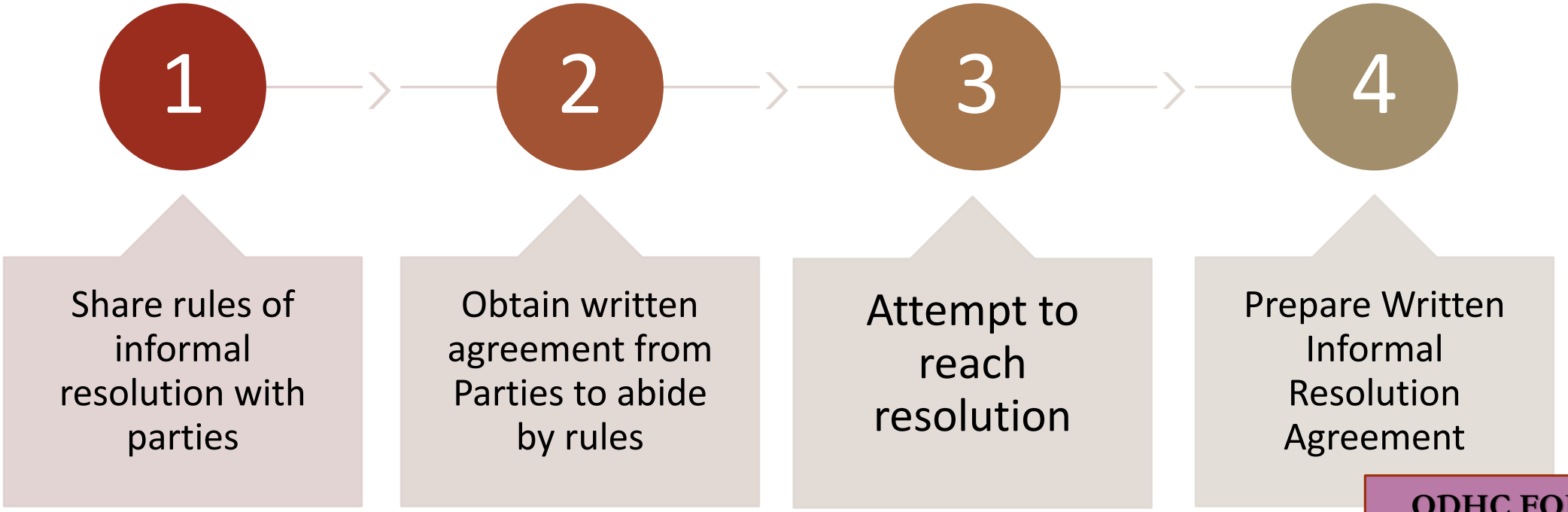
Informal Resolution Facilitator Duties



ODHC FORM 15: Informal Resolution Agreement

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FORMAL COMPLAINT RESPONSE

Title IX Coordinator Must:

01

Send written notice to Parties of Formal Complaint

02

Assign Investigator

03

Ensure compliant investigation

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WRITTEN NOTICE TO PARTIES

OF FORMAL COMPLAINT

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WRITTEN NOTICE TO PARTIES OF FORMAL COMPLAINT

- Allegations including sufficient details known at the time (party identities, conduct allegedly constituting sexual harassment, date and location of incident)
- Presumption that Respondent is not responsible and a determination regarding responsibility is made at the conclusion of the process
- Each party may have ADVISOR of own choice, including attorney
- Each party may inspect and review evidence

ODHC FORM 5A-B: Notice of Formal Complaint

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WRITTEN NOTICE TO PARTIES OF FORMAL COMPLAINT (cont'd)

- Given with sufficient time to prepare a response before initial interview
- Reference school code of conduct that prohibits knowingly making false statements or knowingly submitting false information
- Include copy of grievance process (Board Policy 2:265 and procedures)
- [Supplement later if ADDITIONAL ALLEGATIONS are added to investigation]

ODHC FORM 25: Notice of Additional Allegations

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In addition to parent/guardian

May be ‘any one’

May attend all meetings, hearings and interviews

Participation may be limited as long as limits apply equally to all parties

Advisor of Choice

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GRIEVANCE PROCESS

#3

Investigation

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INVESTIGATOR ASSIGNMENT

ODHC FORM 9: Investigator Assignment Notice

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Investigator Duties

Be	Confer	Identify	Gather
prompt, thorough and impartial	with TIXC, H.R. Dept., attorneys	and interview witnesses	relevant information and evidence

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Investigator Duties

Obtain	Maintain	Share	Prepare
Written statements	Thorough, accurate notes	Evidence with Parties and advisors	Written Investigative Report that summarizes relevant evidence

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Investigator Qualifications

- Trained
- Impartial
- Unbiased
- No actual / perceived conflict of interest

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Impartial

Without prejudging the facts

Treating all Parties with dignity, respect and sensitivity

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Bias

Against / in favor of Complainants, ***in general***

Against / in favor of Respondents, ***in general***

Against / in favor of ***this*** Complainant

Against / in favor of ***this*** Respondent

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Conflict of Interest

Personal relationship with a Party?

Professional relationship with a Party?

Institutional conflict of interest?

Other?

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COMPLIANT COMPLAINT INVESTIGATION

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Investigation Requirements

- School has burden of proof / gathering evidence to make responsibility determination
- Cannot access party's medical treatment records without voluntary written consent
- Parties have equal opportunity to present witnesses (fact/expert)
- Parties have equal opportunity to present inculpatory and exculpatory evidence

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Investigation Requirements

- Cannot restrict parties from discussing **ALLEGATIONS** under investigation or to gather/present relevant evidence

ODHC FORM 11A-B: Party Rights and Non-Disclosure Agreement

- Parties have equal opportunity to have others present, including chosen ADVISOR, at meetings / interviews

- May limit advisor's participation in proceedings

ODHC FORM 13: Advisor's Participation and Non-Disclosure Agreement

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Investigation Requirements

- Parties have right to not be subjected to retaliation
- Witnesses have the right to not be subjected to retaliation

ODHC FORM 12: Notice of Witness Rights

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Written Notice to Party of Investigative Interview or Other Meeting

Send prior to any meeting / interview / hearing with sufficient time to prepare:

- ❑ Date
- ❑ Time
- ❑ Location
- ❑ Participants
- ❑ Purpose

ODHC FORM 10A-E
Investigator Meeting Notice

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RETALIATION

No school or 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 any investigation, proceeding, or hearing.

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RETALIATION

. . . . includes charging an individual with a code of conduct violation that does not involve sex discrimination / sex harassment, but arises out of the same facts or circumstances, for the purpose of interfering with Title IX rights/privileges.

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Investigation Requirements

- Parties have equal opportunity to inspect / review evidence that is directly related to the allegations raised in the formal complaint ***including evidence the school does not intend to rely in reaching a determination of responsibility and inculpatory / exculpatory evidence regardless of source***
- Prior to completion of Investigative Report, each party / advisor receives evidence subject to inspection / review in electronic format or hard copy
- Each Party has 10 school business days to submit a response to evidence, which will be shared with other Party / advisor

ODHC FORM 16: Notice to Parties of Evidence Review

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INVESTIGATOR BEST PRACTICES

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Investigation Checklist

BE PROMPT

BE CONFIDENTIAL

MAKE NO ASSUMPTIONS

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Request for Factual Information

In ALL interviews, obtain details regarding:

- Date / Time / Location
- Who was present
- What happened / Antecedents / reactions
- Who knows about the incident – how?
- Any documents / records / recordings of the incident
- Motives

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"**WEINGARTEN" Rights** – The right to union representation in any discussion that could lead to discipline or affect one's working conditions. The employee has the right to refuse to answer questions without union representation.

"**GARRITY" Warning** – Notifies the employee that he/she must answer your questions *or* be disciplined for insubordination. Answering the questions in the workplace cannot be used against the employee in a criminal proceeding.

Interviewing Employee Respondent

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Investigation Checklist #2

Assess

- Claims and Defenses
  - Security video / audiotapes; phone records; texts, etc.
  - Materials provided by Parties and others

Involve

- Title IX Coordinator

  H.R.

  Student Services

  Legal counsel

Consider

- Whether additional (re)interviews are necessary;

  Whether to add new allegations;

  Whether to dismiss

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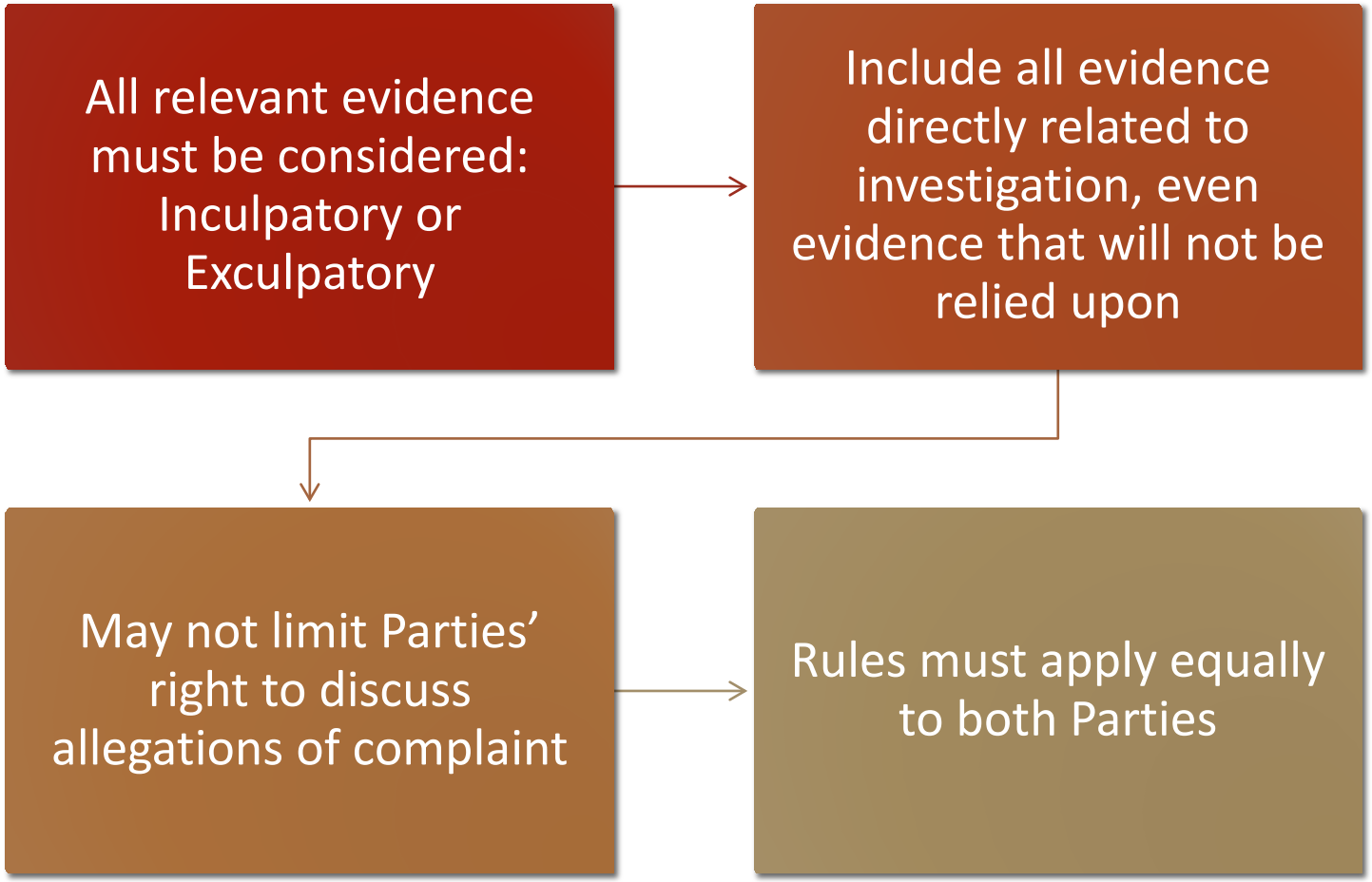
Due Process Concerns



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Relevant Evidence

01

Ask: Is the evidence pertinent to proving whether a fact material to the allegations under investigation are more or less likely to be true?

02

Regarding the alleged policy violation? Regarding an individual's credibility?

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“Irrelevant” evidence

- Not material to the allegations under investigation
- Protected by legally-recognized privilege, unless waived
- Party’s treatment records made/maintained by physician, psychiatrist, psychologist, or other professional without the Party’s voluntary, written consent
- Complainant’s sexual history unless offered to prove someone other than Respondent committed the conduct or to prove consent with Respondent

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“Credibility”

Is the individual / information reliable? Accurate?

If there corroborating testimony / evidence?

Is there a reason for inaccuracy? Memory error? Avoidance?

Are the inconsistencies relevant?

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Investigative Report

- Description of Allegations
- Applicable Board policies and procedures
- Detailed timeline of investigation
- Fair summary of relevant evidence

ODHC FORM 17: Investigative Report Template

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Send Investigative Report:

To Decision-Maker

In electronic format or hard copy

With Complaint and all evidence

ODHC FORM 19: Investigative Report Cover Letter to Decision-Maker

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Send Investigative Report:

To Parties (and advisor)

In electronic format or hard copy

For review and written response

ODHC FORM 18: Investigative Report Cover Letter to Parties Inviting Response / Questions

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Party Right to Submit Response / Questions

10 school business days to submit response

To Decision-Maker

May include relevant questions for other Party or witness identified in Investigative Report

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GRIEVANCE PROCESS

#4

Decision

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Decision-Maker Review of Questions

Notify Party / witness of submitted questions

Notify Party of excluded questions

ODHC FORM 20: Notice to Party/Witness of Submitted Questions

Notify Parties of answers to submitted questions

Allow limited follow-up questions?

ODHC FORM 21: Notice to Party of Excluded Questions

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Decision-Maker Duties

Apply	• ***preponderance of evidence*** standard
Decide	• if Board policy/ies were violated
Be	• fair and unbiased
Prepare	• Written Determination of Responsibility

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Preponderance of evidence standard

More likely than not

50.1%

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Decision-Maker Written Determination of Responsibility includes:

- Allegations of sexual harassment
- Procedural steps taken [receipt of complaint through determination, including notifications to parties, interviews, site visits, methods used to gather evidence]
- Findings of fact supporting determination
- Conclusions regarding application of school policies/procedures to facts

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Decision-Maker Written Determination of Responsibility includes:

Statement of and rationale for the result:

- Determination of responsibility
- Any disciplinary sanctions against Respondent
- Remedies provided to Complainant designed to restore / preserve equal access to educational program/activity

- Appeal procedures and bases

ODHC FORM 22: Decision-Maker's Written Notice of Determination Template

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GRIEVANCE PROCESS

#5

Appeal

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Appeal by either Party of:

DISMISSAL OF FORMAL COMPLAINT

DETERMINATION REGARDING RESPONSIBILITY

ODHC FORM 23: Notice of Appeal

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Bases of Appeal (that affected outcome):

1. Procedural irregularity
2. New evidence that was not reasonably available when decision was made
3. Title IX Coordinator, investigator(s), or decision-maker(s) had a conflict of interest or bias

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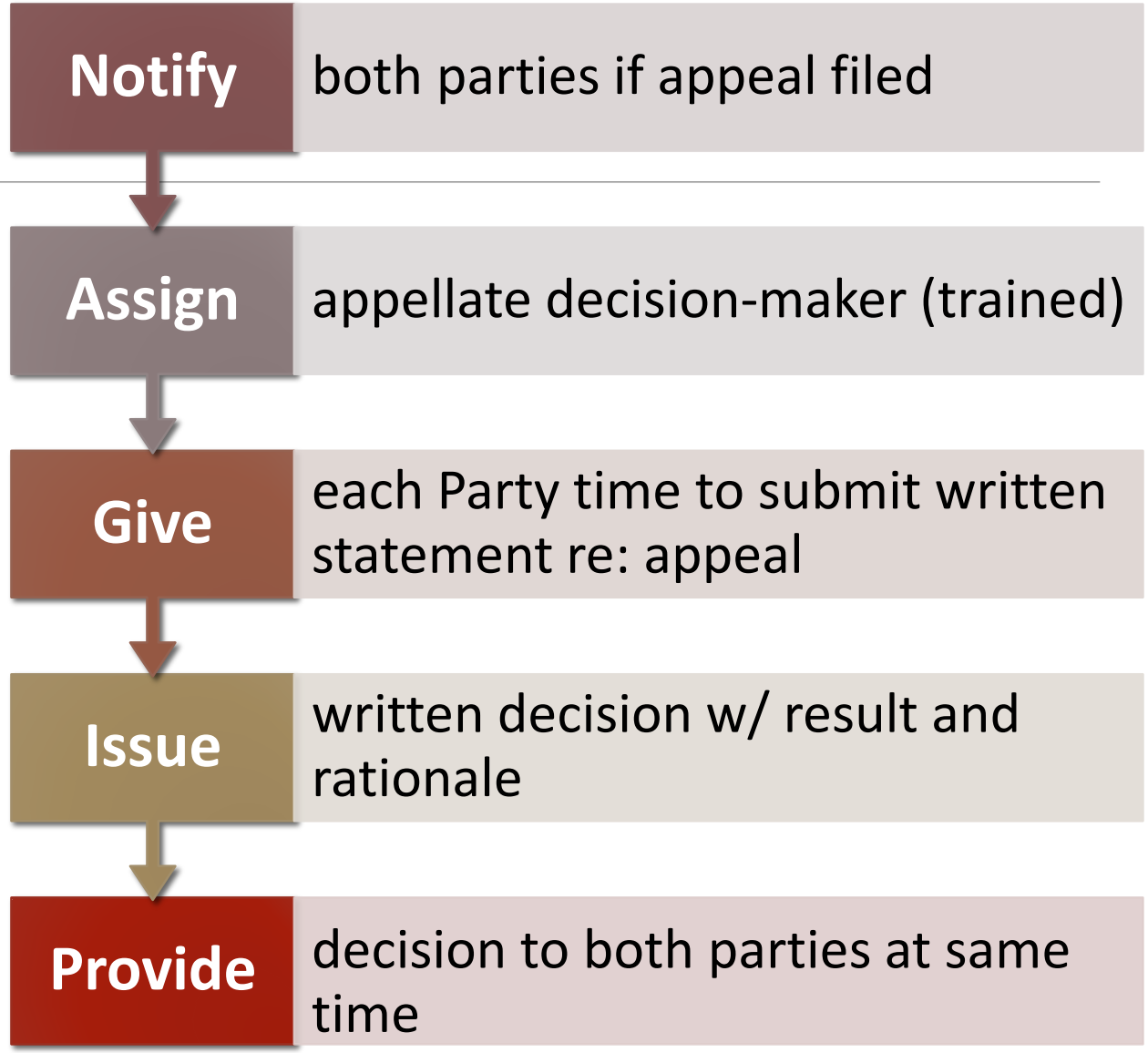
Appeal Process



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Appellate Decision-Maker Duties

Limit	inquiry to basis of appeal
Review	Investigative Report or other materials
Be	fair and unbiased
Prepare	Written Appeal Decision

ODHC FORM 24: Appellate Decision-Maker Decision

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If formal Title IX Complaint

Prescriptive investigatory process: **Policy 2:265**

No **discipline** can be issued until process is concluded

Results in Fact-finding report, Decision and Appeal

Complainant and Respondent both see all relevant evidence

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Options if *NOT* Title IX Complaint

Regular student disciplinary matter?

Regular employee disciplinary matter?

Investigation under Policy 2:260?

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Bullying Prevention
105 ILCS 5/27-23.7
(Board Policy 7:180)

Any severe or pervasive physical or verbal act or conduct, including communications made in writing or electronically, directed toward a student or students that has or can be reasonably predicted to have the effect of one or more of the following:

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(1) placing the student or students in reasonable fear of harm to the student's or students' person or property;

(2) causing a substantially detrimental effect on the student's or students' physical or mental health;

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(3) substantially interfering with the student's or students' academic performance; or

(4) substantially interfering with the student's or students' ability to participate in or benefit from the services, activities, or privileges provided by a school.

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Teen Dating Violence
105 ILCS 110/3.10 (Board Policy 7:185)

"Teen dating violence" means (when one or both persons are 13 – 19 years old):

(1) A pattern of behavior in which a person uses or threatens to use physical, mental, or emotional abuse to control another person with whom they are dating, or

(2) Behavior by which a person uses or threatens to use sexual violence against another person with whom they are dating

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RECORD KEEPING REQUIREMENT FOR EACH REPORT OR FORMAL COMLAINT OF SEXUAL HARASSMENT

Maintain for 7 years:

- Records of any action taken, including supportive measures
- Basis for conclusion that response was not deliberately indifferent
- Statement that measures taken designed to restore / preserve equal access to the education program/activity
- If supportive measures not provided, documented reasons for why response was not clearly unreasonable in light of known circumstances

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QUESTIONS?

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