



Title IX Grievance Process from Start to Finish

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What You'll Learn



- Definition of Sexual Harassment Under Title IX
- When Title IX Grievance Procedures Apply
- Title IX Grievance Process
- Interplay with Other Policies/Laws
- Best Practices
- Pitfalls
- Scenarios

Title IX's Definition of Sexual Harassment

- Sexual Harassment is conduct on the basis of sex. Title IX applies to students and employees.
- It can be defined in one or more of the following ways:
 1. A District employee conditioning an aid, benefit, or service on participation in an unwelcome sexual conduct (Quid Pro Quo - This for That)
 2. Unwelcome sexual conduct that is so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the District's education programs or activities
 3. Sexual assault, dating violence, domestic violence, or stalking as defined by identified statutes

When Do Title IX Grievance Procedures Apply?

- When there is an allegation of sexual harassment (as defined by Title IX) in a district's education program or activity.
- "Education program or activity" includes any location, event, or circumstance over which the District exercises substantial control over the harasser and the context in which the harassment occurs.
 - Includes conduct occurring at school, on a school bus, field trip, at an extracurricular activity, function, and program even if outside of school, and conduct during remote learning.
 - Does **not** include (but other laws cover):
 - Private social media outside of school (might be included if additional conduct occurs in a school program or activity as an outgrowth of the initial conduct)
 - Conduct outside the U.S.
- Title IX covers sex, including sexual orientation and gender identity, but not other protected statuses (e.g. race).
- Title IX applies to employees and students. Other laws also protect employees (like Title VII of the Civil Rights Act).

Review of Title IX Basics

- District's response to be equitable and prompt; emphasis on transparency, fairness, no bias or conflict, and may not be based on stereotypes.
- Districts must adopt grievance procedures to address formal complaints of sexual harassment.
- Grievance procedures require personnel be assigned to discrete roles: Title IX Coordinator, Investigator and Decision-Makers as well as Informal Resolution Facilitators.
- Grievance procedures to be used when a formal complaint is filed by a Complainant or initiated by the Title IX Coordinator.
- Informal reports/complaints can be brought by anyone: all submissions require a response, but only formal complaints require Title IX grievance procedures be followed.
- Retaliation for participation/non-participation in Title IX process is prohibited. Discipline for submitting a false claim is not considered retaliation.

Need to Respond to Sexual Harassment

- District must respond to allegations of sexual harassment of which it has actual knowledge.
- Failure to respond violates Title IX as deliberate indifference and may violate other laws.
- Actual knowledge by any employee is deemed actual knowledge by the District.
 - Ensure employees at all levels know how to make a report.
- Administrators need to know: as soon as a situation seems like it could involve Title IX, STOP and contact the Title IX Coordinator. Other than ensuring immediate needs are met (safety, calming a crying student, etc.), the first step is to contact the Title IX Coordinator, whether the complaint involves students or employees.
- Do not investigate, request written statements, etc.
 - This could violate the rights of the parties under Title IX to specific notices and procedures before and during the investigation.
 - This could preclude you from serving as an investigator or decision-maker in the formal process.

Recipient's Response

- The Title IX Coordinator must promptly contact the Complainant to discuss the availability of supportive measures, and consider the Complainant's wishes in doing so, advise of the right to file a formal complaint and how to do so. Respondent to also be offered supportive measures. Involve parents of minors.
- No punitive measures (e.g., discipline, transfer or other sanctions) to be taken until or unless the grievance process is completed and a determination of responsibility is made, i.e., due process. Accused employee may be placed on paid administrative leave.
- Does not prohibit immediate removal of a Respondent on an emergency basis to protect an individual from an immediate threat to physical health or safety, provided an individualized safety and risk analysis is performed. Notice and an opportunity to challenge the decision must be provided.
 - The right to remove does not supersede rights of students with disabilities under IDEA or Section 504.

Supportive Measures

- Supportive measures are:
 - non-disciplinary
 - non-punitive
 - individualized services as appropriate
- Some examples include:
 - course modifications
 - schedule changes
 - increased monitoring
- They must be offered even where a formal complaint has not been filed.
- Intent is to restore the status quo without unreasonably burdening the other party.

Informal Report

- An informal report of sexual harassment may be made by anyone (can be someone other than the subject of the sexual harassment i.e., staff, students, a third party, a parent).
- Forms are available for reporting sexual harassment but may be conveyed orally as well.
- **All informal reports are to be made to or brought to the attention of the Title IX Coordinator. If you learn about any situation, whether it involves students or employees, that could potentially implicate Title IX, you must notify the Title IX Coordinator.**
- School employees receiving an informal report or who otherwise possess actual knowledge of sexual harassment must notify the Title IX Coordinator. Completion of a written informal report form by the reporter or school personnel to whom it was reported is recommended.
- Title IX Coordinator will speak with the individual making the informal report to learn facts and identify the subject of the harassment in order to speak with the potential complainant(s) (subject(s) of reported sexual harassment).
- Informal report may be turned into formal complaints only by the Complainant or the Title IX Coordinator.

Formal Complaint: Grievance Procedures

- These grievance procedures only apply to Title IX sexual harassment when a formal complaint has been filed.
- Upon receipt of a formal complaint, a recipient must provide written notice to the parties, which includes:
 - notice of the allegations in sufficient detail (names, conduct alleged, date, location)
 - statement of presumption of non-responsibility for sexual harassment
 - notice of the right to use an advisor (need not be a lawyer)
 - notice of any provision in any Code of Conduct or similar policy about making false statements or providing false information
- Allow the parties to prepare a response prior to an *initial* interview.

Distinct Roles and Responsibilities

- Regulations expand the role and responsibilities of a Title IX Coordinator and requires that additional District personnel fill distinct roles in the grievance process.
- District must identify individuals to fill these roles:
 - Title IX Coordinator
 - Investigator
 - Decision-Maker
 - Decision-Maker on Appeal, if applicable
 - Facilitator of Informal Resolution
- Individuals filling all roles are to be trained.
- It is important to know the roles and responsibilities assigned to each person to ensure compliance with the law/policy/regulation and to ensure no overlapping of roles and to facilitate a better understanding of your role.



Which Personnel Fill These Roles?

Title IX Coordinator: Dr. Michelle Kelly-Baker

Additional roles may be assigned on case-by-case basis. Each person may only serve in one role per complaint, except that the Title IX Coordinator can serve as the investigator.

Typically:

- Investigators: Assistant Principals (student respondents); Human Resources staff (adult respondents)
- Decision-Maker: Principals (student respondents); Chief of Staff or Assistant Superintendents (adult respondents)
- Decision-Maker on Appeal: Superintendent (all)
- Informal Resolution Facilitators: May be school counselors (student respondents); Human Resources staff (adult respondents) other designated trained personnel

Roles may be outsourced (e.g. to counsel).

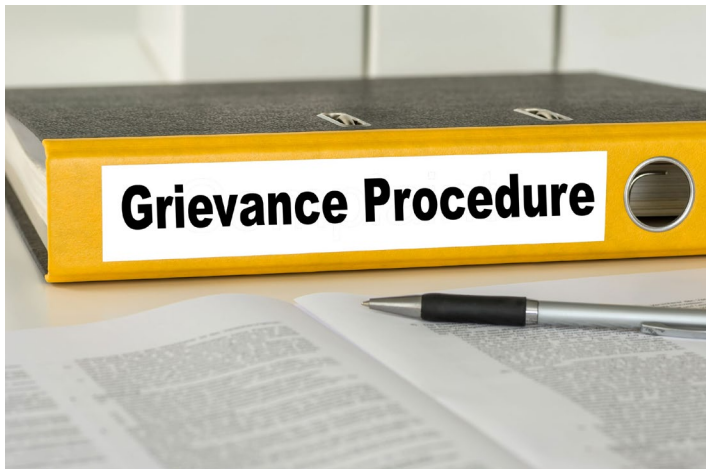
Do not assume what role you will play in the handling of the complaint. The role assignment will come from the Title IX Coordinator. Be sure to notify her of any concerns or conflicts of interest you may have in order to ensure proper assignment.

First Steps – Title IX Coordinator

- Meets with Complainant and reviews the Title IX policy/regulation and option to file a formal complaint.
- May assist with filing the formal complaint or file on their own.
- Discusses supportive measures with Complainant and Respondent (explaining this occurs with or without a formal complaint).
- Collaborates with school administrators and/or HR about implementation of supportive measures and need for modifications to the measures.
- Provides written notice of a formal complaint or directs such notice to be provided to the parties; sends or directs an additional notice if allegations are revised (initial notice must be sent prior to the conducting of an initial interview with a Respondent).
- Designates roles and monitors compliance with grievance procedures.



Formal Complaint: Grievance Procedures



- The burden of proof rests on the recipient (District), not either party.
 - Either preponderance of the evidence or clear and convincing evidence (as set by your policy)
- Both parties shall be given the opportunity to present witnesses and evidence.
- Focus on transparency – witnesses are named, evidence is shared, etc.
- “Gag orders” are prohibited.
- No discipline for Respondent for sexual harassment until process is complete.

Formal Complaint: Investigation

- Discuss and obtain signed nondisclosure agreements from the parties as early in the process as possible; preferably during initial interviews to enable sharing of evidence (as required). Title IX trumps FERPA.
- Investigator interviews parties and witnesses and gathers evidence.
- Keep notes of interviews, but maintain them as personal notes. Do not share with anyone or they become a student record, if involving a student. Prepare interview summaries to become part of the evidence.
- Interview summaries should include information that may lead to a credibility determination, but Investigator does not make credibility determinations.
 - “Johnny was giggling and crossing his fingers when he denied touching Rachel’s thigh.”
- Handle with formality (e.g. avoid texting about investigation, taking photos of evidence on your personal phone, etc.).
- Investigator provides both parties the evidence (including exculpatory evidence) with at least 10 days to submit comment. This is all of the raw evidence and interview summaries, not a report.
- Next, Investigator drafts investigation report summarizing the evidence. Investigator DOES NOT determine credibility or make findings of fact.
- TIP: Investigator should make sure the report is clear and specific enough that someone with no prior knowledge could understand it and have sufficient information. The Investigation Report must be thorough enough to allow the Decision-Maker to make a decision without relying on information obtained outside the process.

Formal Complaint: Investigator Handoff to Decision-Maker



- Investigation report is sent to both parties and the Decision-Maker.
- Investigator is no longer involved in the process.
 - Investigator may still handle implementation of supportive measures as needed. For example, if course modifications are needed, the assistant principal may be involved in adjusting the schedule, separate from serving as an investigator.

Formal Complaint: Decision-Maker

- Decision-Maker notifies parties of their rights to (1) submit a written response to the Investigator's report and (2) 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.
 - The Decision-Maker must exclude irrelevant questions and must explain to the party proposing the question any decision to exclude a question as not relevant. Questions may be seeking privileged information or information not allowed to be sought (e.g. Complainant's sexual history).
- After at least 10 days, Decision-Maker issues a determination with specific elements, most significantly findings of fact, conclusions as to whether sexual harassment occurred, and what remedies to apply. May need to *recommend* rather than make final disciplinary decision if other due process requirements exist (e.g., expulsion hearing, teacher termination hearing).

Formal Complaint: Final Decision/Written Determination of Responsibility

- The Decision-Maker issues a written determination that:
 - identifies the allegations constituting sexual harassment
 - describes the procedural steps taken from receipt of the complaint through the investigation
 - makes findings of fact supporting the determination
 - A finding of fact is an actual finding, not just what was reported.
 - Preferably refers to evidentiary standard rather than simply declaring fact.
 - makes conclusions (sexual harassment did or did not occur)
 - includes a statement of and rationale for each allegation, including a determination of responsibility, any sanctions imposed on the Respondent, and any remedies to restore or preserve equal access to education program or activity to be provided to the Complainant
 - describes the procedure and basis for a possible appeal
- The Title IX Coordinator is responsible for the effective implementation of any remedies.

Example of Factual Findings, Conclusions, and Remedies

- A preponderance of the evidence supports the allegation that Johnny touched Rachel's thigh in band class on three occasions. Johnny admitted to two of the occasions, claiming it was a joke. Although he denied the third occasion, Becky stated she observed Rachel crying immediately after band class. Further, Eddie provided a text message from Johnny 10 minutes after the incident in which he said, "I did it again." Rachel stopped attending band class the next day and has not returned.
 - It is found that Johnny is responsible for sexual harassment under Title IX.
 - To remedy the sexual harassment, Johnny will be referred for expulsion. Rachel will be provided weekly counseling, and a transition plan will be developed to help her return to band class.
- A preponderance of the evidence supports the allegation that Ms. Robinson told Benjamin that he would get an A if he kissed her. Benjamin provided text messages reflecting this statement as well as a statement to delete the messages from his phone.
 - It is found that Ms. Robinson is responsible for sexual harassment under Title IX.
 - To remedy the sexual harassment, Ms. Robinson, a tenured teacher, will be referred for termination proceedings. Benjamin will be provided counseling.

Formal Complaint: Dismissals

- Mandatory
 - Conduct **alleged in complaint**, even if proved, does not constitute sexual harassment as defined by Title IX
 - Conduct did not occur in District's education program or activity
 - Conduct did not occur against a person in the United States
- Permissive
 - Complainant notifies Title IX coordinator in writing that the Complainant wants to withdraw the formal complaint or any allegations therein
 - Respondent is no longer enrolled or employed by the District
 - Specific circumstances prevent District from gathering evidence sufficient to reach a determination re: the complaint
- Can still discipline under other provisions of code of conduct

Formal Complaints: Appeals

- Either party may appeal the decision of responsibility or dismissal of a formal complaint or allegation therein.
- Appeal may only be based upon and granted for the following reasons:
 1. a procedural irregularity that affected the outcome;
 2. new evidence that was not reasonably available at the time of the determination and could affect the outcome; and
 3. conflict of interest on the part of the Title IX Coordinator, the Investigator, or Decision-Maker.
- A District may, but need not, offer an appeal equally to both parties on an additional basis.
- Written notice of the appeal must be provided to both parties, and they shall be provided with an opportunity to submit a written statement in support of/challenging the appeal.
- Written decision on the appeal must be issued.



Formal Complaints: Informal Resolution

- Informal resolution may be offered by the Title IX Coordinator if a formal complaint is filed.
- A full investigation need not be conducted as long as written consent of both parties is obtained and the allegation does not involve an adult Respondent and a student Complainant.
- May include a broad range of strategies, including, but not limited to, mediation and restorative justice.
- Must be facilitated by trained personnel.
- Any party has the right to withdraw from the informal resolution process at any time and may resume the formal grievance process.



Special Considerations for Special Education

- The Title IX regulations do not provide specific guidance on applying the Title IX process to situations involving special education students, as either complainants or respondents.
- Title IX procedures require significant transparency such as notification of the identity of a complainant/respondent and requiring that collected evidence be shared with and among the parties/parents. This protocol creates many unanswered questions about the applicability to special education students.
 - Is an additional level of privacy owed to a special education student?
 - What information may or may not be shared about a special education student?
 - Is parental consent required to share records?

Special Considerations for Special Education

- What is Clear?
 - A complainant or respondent's status as a special education student or 504 student does not change whether a finding of responsibility will or can be made.
 - The focus is on the **conduct** and whether it meets the definition of sexual harassment. Intent or capacity to understand is not necessarily relevant to such a finding. Arguably, it might be relevant to a determination of a remedy.
 - The regulations make it clear that Title IX trumps FERPA.
 - Notwithstanding, consideration must always be given to providing due process consistent with state and federal law.
 - Nothing in Title IX should be construed to alleviate the District's obligations under the IDEA (e.g., emergency removal process).

Implementing Remedies While Complying with Special Education Laws

- Refer student for PPT for supportive measures and/or if found responsible for sexual harassment or other violation
- When the District seeks to change the placement of a special education student for a period of more than ten (10) school days in any given school year, the school must:
 - provide the parent with procedural safeguards; and
 - conduct a manifestation determination.
- Manifestation PPT must occur within 10 school days of any decision to change the placement of a child with a disability because of a violation of a code of conduct. The following questions must be addressed:
 1. Was the conduct in question caused by or did it have a direct or substantial relationship to the child's disability? Or...
 2. Was the conduct in question the direct result of the failure to implement the IEP?

What About Other Laws?

- Title VII/CFEPA – Employee victims only. Lower standard for conduct: severe or pervasive; conduct may occur outside of work setting. No specific investigation protocol.
- Teen Dating Violence/Bullying – Follow separate protocols.
- Child Abuse/Neglect – Report to DCF/police. District must still conduct investigation if formal complaint is filed.
- Other kinds of discrimination/harassment – Conduct investigation separate from Title IX for harassment covered by other laws (e.g. Title VI, ADA).
- Collective bargaining agreements – Need to comply with contract unless unlawful to do so. Discipline must follow the contract and may be grieved, etc.

Record Keeping

- Recipient must keep for seven (7) years records of each sexual harassment investigation, including, investigatory records, determinations regarding responsibility, disciplinary sanctions, remedies including supportive measures, appeals, and informal resolution and results.
- Identity of a person who files a complaint or reports sexual harassment must be protected to the extent permitted by law, and except as provided under the regulations, e.g., notice and evidence provided to the Respondent and representative.
- Recipient must keep for seven (7) years any materials used to train Title IX Coordinators, investigators, decision-makers, and any employee designated to facilitate an informal process. Training materials to be posted to the District's website.
- Must keep record of why District's response was not deliberately indifferent.

Best Practices



- Make sure this is a Title IX case before launching the process. Consider other avenues instead of or in addition to Title IX.
- Consider role assignment carefully at the outset.
- Follow all steps carefully using template documents.
- Ensure a thorough investigation with open-ended questions, use of corroborating evidence (e.g. videos), and witnesses.
- Make sure investigation report covers all relevant information.
- Keep roles discrete.
- Make sure written determination includes all required components and that any discipline is feasible considering other laws/collective bargaining agreements.

Pitfalls



- Not bringing the Title IX Coordinator into the situation right away.
 - Teachers/administrators should not be asking questions, investigating, etc. beyond addressing immediate needs.
- Assigning the wrong staff for the situation.
 - Does the Pupil Personnel Director know how to investigate/discipline staff, especially those in a union?
 - Guidance counselors of the students involved generally should not be used for any step other than informal resolution.
- Investigative report leaves too many questions so Decision-Maker lacks enough information to make a decision.
- Taking too long so that problems fester.
- Moving too fast and not being thorough (remember supportive measures allow for needs to be met while the process is pending).

Scenarios

- What questions does the scenario raise for you?
- Do you need more information? What information?
- What actions should be taken?
- If the allegations are true, do they constitute sexual harassment?
- Are additional investigations or policies relevant? Or are additional actions required?

Megan and Charlotte

Megan is a middle school student on the soccer team. It is well-known among her teammates that she is a lesbian, but she generally does not disclose her sexual orientation.

Recently, Charlotte, one of her teammates, has been making comments insinuating that Megan has a crush on her. She makes a dramatic show in the locker room of making sure that Megan cannot see her changing and loudly proclaims it is because Megan wants to “jump her bones.”

Megan confides to her coach about the situation and says she is thinking about quitting the team because of it, but insists that she does not want anything to be done. She explains that her parents are divorced and her father knows her sexual orientation, but her mother would hate her if she knew.

Jasmine and Trevor

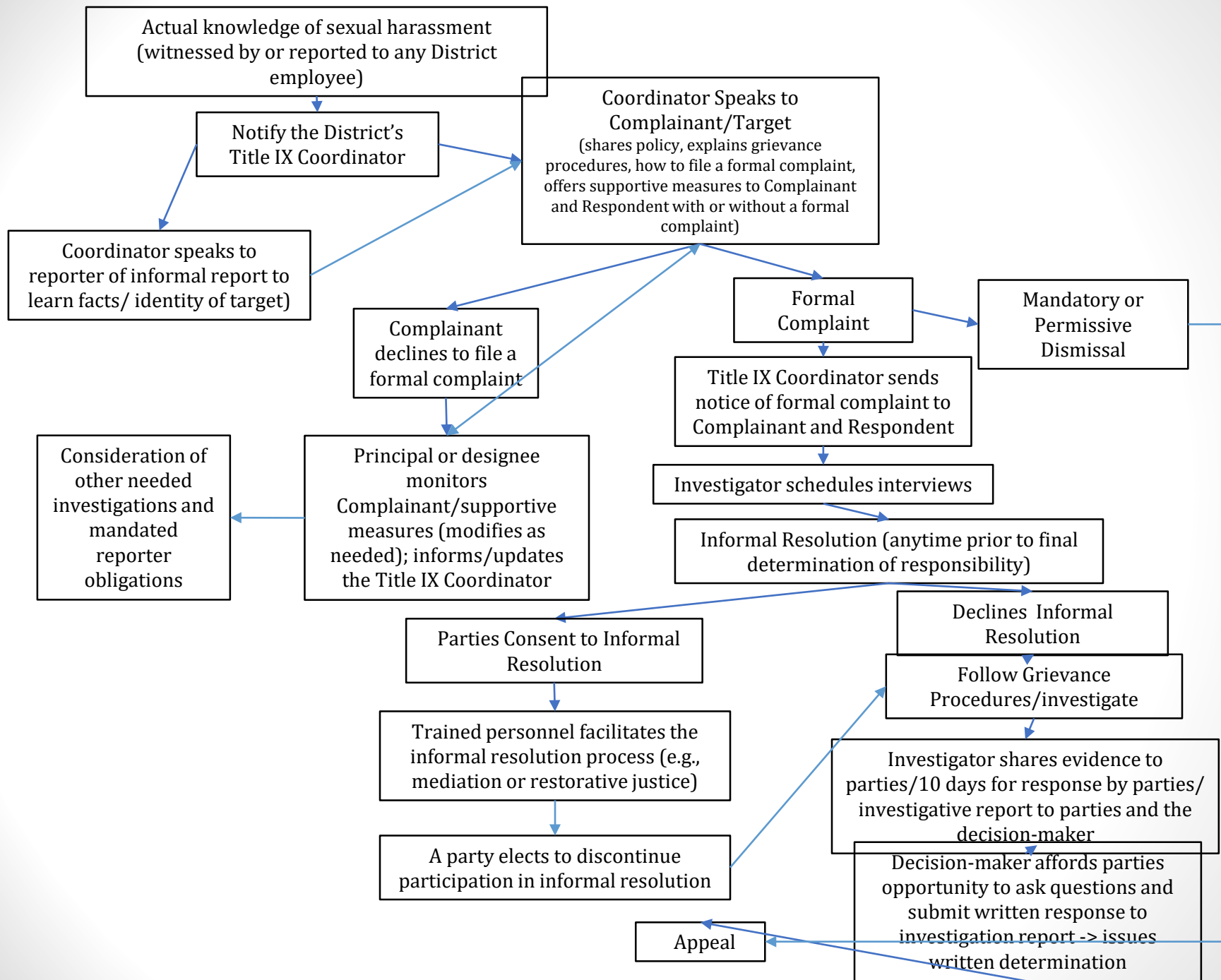
Jasmine is a 10th-grade student who is new to the district. Her sex assigned at birth is male and she presents as female. Trevor knows Jasmine from a summer camp the two attended a few years ago, when Jasmine was known as James. Nobody else in the high school knew Jasmine previously and Jasmine does not want others to know that she is transgender. Trevor posts photos from summer camp on Facebook, when Jasmine was clearly presenting as male, and tags her in them and captions the photos by calling her James. In school, he refers to Jasmine as “he/she/it – I can’t keep it straight” and “corrects” others when they call her Jasmine or use feminine pronouns when referencing her. Although she loves math, Jasmine has stopped attending this class, because Trevor is in it.

Mason and Liam

Mason and Liam are first-grade boys. One day, Mason touches Liam's private area while the two are in the bathroom. Liam giggles. When he returns to the classroom, he is still giggling and announces to his teacher, "Mason touched my peepee!" Liam's parents email the Superintendent the next day extremely angry about the incident and demand to know what the district is going to do about the matter.

Linda and Mr. Perry

Linda, the school secretary, complains to Human Resources that she is experiencing sexual harassment in the workplace. Specifically, she says that Mr. Perry, the school principal, makes inappropriate remarks to her on a daily basis. She reports that today he told her that she is way too pretty to be with her overweight husband and asks if she ever considered having an affair. She says he regularly boasts about his libido in front of her. Mr. Perry has been well-respected in the community for decades while Linda is known to exaggerate and has poor attendance.



Questions?