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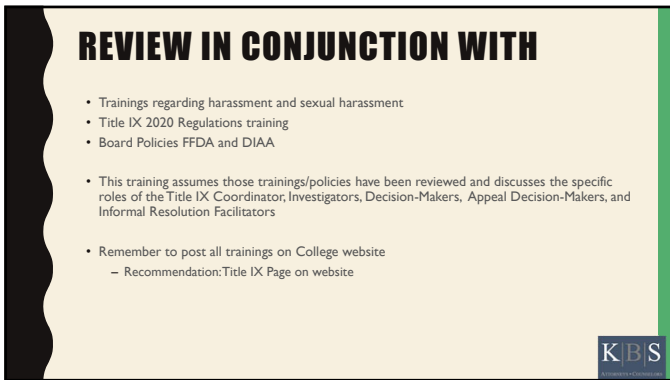
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## SEXUAL HARASSMENT DEFINITION (REMINDER)

- Quid Pro Quo: Employee conditioning the provision of an aid, benefit, or service of the College on an individual's participation in unwelcome sexual conduct
  - Employee only (cannot be student-student)
- Hostile Environment: Unwelcome sexual conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the College's education program or activity
- Sexual assault, dating violence, domestic violence, stalking



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## REPORTING (REMINDER)

- Any person may report at any time
- Any employee with "actual knowledge" must report
- Report can be oral or written



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## FORMAL COMPLAINT (REMINDER)

- After a report is made
- The alleged victim (Complainant) or the Title IX Coordinator can make a formal complaint which requests that the College investigate the allegation(s) of sexual harassment
- Complainant = alleged victim
- Respondent = alleged perpetrator



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## MORE DEFINITIONS (REMINDER)

- Education Program or Activity: location, events, or circumstances over which the College exercises substantial control over both Respondent and the context in which the sexual harassment occurs
  - Must be in the United States
- Actual knowledge: when a report is made to any employee
- Deliberate Indifference: Schools must respond promptly to Title IX sexual harassment in a manner that is not deliberately indifferent, which means a response that is not clearly unreasonable in light of the known circumstances.



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## TITLE IX COORDINATOR

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## TITLE IX COORDINATOR

- Main point of contact regarding Title IX
- Must designate on website and handbooks with name, number, email
- Can have more than one
- Can have deputy Title IX Coordinators
- Supervises the process (clearinghouse)
  - Assigns investigators
  - Assigns decision-makers, appeal decisions makers
  - Assigns facilitators
  - Ensures compliance with final sanctions



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**TITLE IX COORDINATOR  
WHEN A REPORT COMES IN**

- Contact Complainant and Respondent to discuss supportive measures
  - To both parties
  - Available with or without a formal complaint
- Explain the complaint process
- Ensure no disciplinary sanctions are put in place against Respondent until grievance process is complete
  - However, can take emergency measures
  - Can place an employee on administrative leave with pay (only the College President can approve that placement)



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**TITLE IX COORDINATOR  
SUPPORTIVE MEASURES**

- Individualized services to preserve and restore equal access to education programs/activities
- Examples (include)
  - Stay away agreements; mutual restrictions
  - Increased monitoring; escort
  - Counseling
  - Extensions of deadlines/course changes
  - Schedule changes



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**TITLE IX COORDINATOR  
WHAT DO WHEN A COMPLAINT IS MADE**

- Complaint received
  - Unlike Board Policy FNG, there is no deadline to file
  - Can consolidate
  - Must provide written notice:
    - Grievance process
    - Allegations of sexual harassment
    - Statement that the Respondent is presumed NOT responsible for the alleged conduct until a determination is made at the conclusion of the grievance process
    - Inform parties that they may have an advisor of their choice
    - Inform of policy/student code of conduct that prohibits knowingly making false statements/submitting false information during an investigation



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## TITLE IX COORDINATOR COMPLAINANT DOES NOT WISH TO FILE

- Even if a formal complaint is not filed, can investigate and respond to prohibited conduct in accordance with Policy and Student Handbook
  - Except when threat to community → must investigate
  - As long as we can respond to prevent future harassment of Complainant and others, do not have to investigate if Complainant does not want
  - And must explain the consequences to the Complainant of not filing a formal complaint
  - Document if Complainant does not follow
- Can sign a formal complaint on behalf of Complainant
  - A Complainant's wishes with respect to whether the school investigates should be respected unless the Title IX Coordinator determines that signing the formal complaint is not clearly unreasonable in light of the known circumstances
  - Can also initiate grievance procedures where discipline is appropriate



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## TITLE IX COORDINATOR WHEN A COMPLAINT IS DISMISSED

- Decides whether to dismiss a formal complaint
- Must be dismissed
  - Allegations do not constitute sexual harassment as defined
  - Did not occur in College program or activity
    - Consider in person effects of out of activity/program conduct
  - Did not occur in the United States
- Can (discretionary) be dismissed
  - Complainant no longer wants to pursue (wants to withdraw)
  - Respondent is no longer in the College
  - The investigation cannot be completed
- Must provide written notice of dismissal
  - Dismissal can be appealed



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Complaint process over-seer

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From Formal Complaint to Completion - approximately 60 days

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But things may slow it down

- Law enforcement investigation
- Complexity
- Availability of Evidence
- Global Pandemic
- Other temporary delays for good cause

## TITLE IX COORDINATOR

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**TITLE IX COORDINATOR RECORDKEEPING**

- Record keeping
  - Make sure all materials used to train Title IX personnel are publicly available on the school's website
  - Document and keep records of all sexual harassment reports and investigations and appeals
  - Maintain any records of informal resolution process
  - Maintain records of supportive measures taken in response to report or complaint of sexual harassment
  - 7 years



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**FORMAL COMPLAINT PROCESS FOR TITLE IX COMPLAINTS**

- Must be placed on College's website
- Process must contain at least 12 basic requirements...



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**TITLE IX COORDINATOR FORMAL COMPLAINT PROCESS**

- Treat Complainants and Respondents equally
- Provide remedies where a determination of responsibility for sexual harassment has been made
- Follow grievance process before disciplinary sanctions
  - Except for emergency actions and removals as necessary
- Objectivity in review of evidence



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**FORMAL COMPLAINT PROCESS  
12 BASIC REQUIREMENTS**

- 1. Equitable treatment of Complainants and Respondents
- 2. Objective evaluation of all relevant evidence
- 3. Requirement that Title IX Coordinator, investigator, decision-maker, or informal resolution facilitator not have a conflict of interest or bias
- 4. Presumption that the Respondent is not responsible for the alleged sexual harassment until a determination is made at the conclusion of the Title IX formal complaint process.
- 5. Timeframes that provide a reasonably prompt conclusion of the Title IX formal complaint process, including time frames for appeals and any informal resolution process, and that allow for temporary delays or the limited extension of time frames with good cause and written notice as required by law.
- 6. Description of the possible disciplinary sanctions that may be implemented following a determination of sexual harassment



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**FORMAL COMPLAINT PROCESS  
12 BASIC REQUIREMENTS**

- 7. A statement of the standard of evidence to be used to determine responsibility for all Title IX formal complaints of sexual harassment
- 8. Procedures and permissible bases for the Complainant and Respondent to appeal a determination of responsibility or a dismissal of a Title IX formal complaint or any allegation therein
- 9. A description of the supportive measures available to the Complainant and Respondent
- 10. Prohibition on using or seeking information under a legally recognized privilege unless the individual holding the privilege has waived the privilege.
- 11. Additional formal complaint procedures required by law including written notice of a formal complaint, consolidation of formal complaints, recordkeeping, and investigation procedures
- 12. Other local procedures as determined by the College President.



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**FORMAL COMPLAINT PROCESS –  
EVIDENTIARY STANDARD**

- Board Policy FFDA
  - Standard: Preponderance of the Evidence



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**IMPARTIALITY  
BIAS  
CONFLICT OF  
INTEREST**

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**ROLES**

- Can use College employees in roles or can outsource
- Title IX Coordinator may be investigator but may not be Decision-Maker
- Investigator may not be decision-maker
- Investigators, Decision-Makers, Appeal Decision-Makers, and Informal Resolution Facilitators must be:
  - Impartial
  - Free from Bias
  - Free from Conflict of Interest

**KBS**

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**IMPARTIAL**

- This means being free from bias
- "Treating all rivals and disputants equally; fair and just"
- Neutral
- Nondiscriminatory
  - Example: Avoid sex stereotyping
- Decisions based on objective criteria rather than bias, prejudice

**KBS**

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## BIAS

- Concern about "cover-ups" or protection of one person or institution based on who the investigator/decision-maker is and their role
- "prejudice in favor of or against one thing, person, or group compared with another, usually in a way that is considered to be unfair."
- Perceived does not mean actual



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## CONFLICT OF INTEREST

- Aligned interests
- Conflicting interests
- Perceived does not mean actual



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## BOTTOM LINE...

- Go in with an open mind
- Go in with a clean slate
  - Example: Avoid prejudgment of facts, witnesses, and parties
- Be free from stereotypes based on anything, including sex stereotypes
- Do you have a conflict of interest? Perceived or real?
- Keep out all personal beliefs
- If you don't think you can do it or should do it... say something!
  - To Title IX Coordinator



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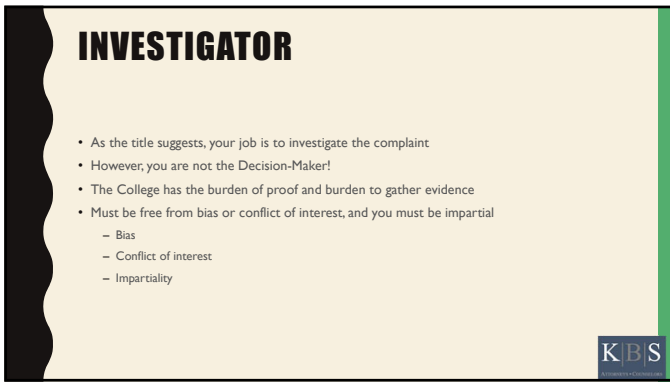
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## INVESTIGATOR

- As the title suggests, your job is to investigate the complaint
- However, you are not the Decision-Maker!
- The College has the burden of proof and burden to gather evidence
- Must be free from bias or conflict of interest, and you must be impartial
  - Bias
  - Conflict of interest
  - Impartiality




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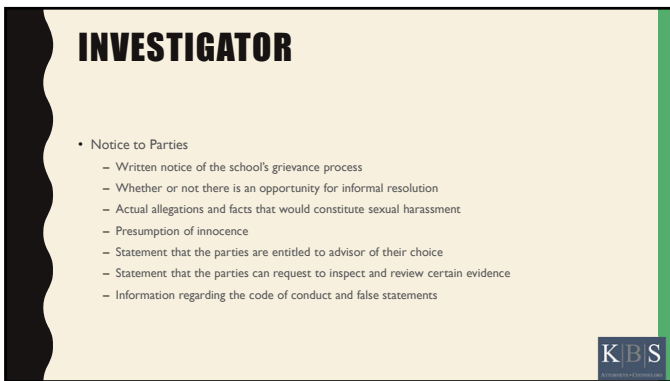
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## INVESTIGATOR

- Notice to Parties
  - Written notice of the school's grievance process
  - Whether or not there is an opportunity for informal resolution
  - Actual allegations and facts that would constitute sexual harassment
  - Presumption of innocence
  - Statement that the parties are entitled to advisor of their choice
  - Statement that the parties can request to inspect and review certain evidence
  - Information regarding the code of conduct and false statements




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**INVESTIGATOR**

- Review the evidence that has been provided
- What are you researching/What are the allegations
- Review allegations within the context of the definition of sexual harassment
- What do you need to know?
- Create a list of needed evidence (changes along the way)
- Create a list of anticipated witnesses (changes along the way)
- Create an outline of questions for witnesses (but listen and adjust as necessary)
- \*Notes may be discoverable
- Make sure witnesses have space to share information you may not have asked about specifically



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**INVESTIGATOR**

- Require a party's written consent before using the party's medical, psychological, or similar treatment records
- Must give both parties equal opportunity to present the relevant evidence that they gather
- Can't restrict the ability of either party to discuss allegations or to gather and present relevant evidence
- Both parties are guaranteed the right to advance notice, in writing, whenever they are invited or expected to participate in an interview, meeting, or hearing
- Must provide both parties the opportunity to have an advisor
- Must give both parties equal opportunities to inspect and review the evidence obtained in the investigation, if the information is directly related to the allegations
- Parties must be allowed to submit written questions to be provided to other party
- Must give both parties a meaningful opportunity to respond to evidence



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**INVESTIGATOR**

- Investigative Reports
  - After gathering evidence, prepare an investigative report on the allegations
  - But do not reach a conclusion
  - Must give both parties at least 10 days to respond to evidence in writing
    - If response submitted, must consider that response before finalizing investigative report
  - Investigate report finalized and provided to both parties
  - Still do not reach a conclusion



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## INVESTIGATOR

- A hearing is not required for K-12 institutions.
- However must allow parties to submit written questions
- Written, relevant questions must be asked of any party or witness
- Answers must be provided
- Allow limited, additional follow up questions



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## INVESTIGATOR

- Best practices in questioning the Complainant, Respondent, and Witnesses:
  - Explain the groundwork for conducting the interview and hold all interviewees to the same standards of conduct and decorum
  - Maintain control of the interview, both in the substance of the questions and answers and in the conduct of those in the room (interviewees and their advisors)
  - Begin with general, more open-ended questions and work your way to more specific questions
    - Generalized questions can go to the elements of the alleged offense
    - Specific questions should be built off documentary evidence evaluated before the interview, information obtained from prior interviews, and other known facts
  - Keep in-mind that interviews are meant to determine disputed issues of fact, and questions should be directed at solving the disputed fact questions



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## NOTES ON EVIDENTIARY STANDARDS

- What is "inculpatory" and "exculpatory" evidence?
  - Inculpatory evidence shows or tends to show Respondent's responsibility
  - Exculpatory evidence shows or tends to show the Respondent is not responsible



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## NOTES ON EVIDENTIARY STANDARDS

- Relevance
  - OCR’s Title IX Guidance provides, “The final regulations do not define relevance, and the ordinary meaning of the word should be understood and applied.”
  - Federal Rule of Civil Procedure 401 provides a commonly understood definition of 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.



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## NOTES ON EVIDENTIARY STANDARDS

- Evidence about the Complainant’s sexual predisposition or prior sexual behavior is 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;
  - 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.



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## NOTES ON THE INVESTIGATIVE REPORT

- The investigator MUST NOT reach any conclusions—REMEMBER, conclusions in a sexual harassment complaint are reserved for the Decision-Maker
- The purpose of the investigative report is to put the Decision-Maker in the best position to make a thorough, well-reasoned, and supported decision
- Organization and clarity are key in the investigative report
  - The most natural way for a neutral third-party to understand a story is to present it to them chronologically
  - Show your work! Cite to the sources of information gathered in your investigation
  - Proofread to ensure that the investigative report meets the College’s standards of professionalism and propriety



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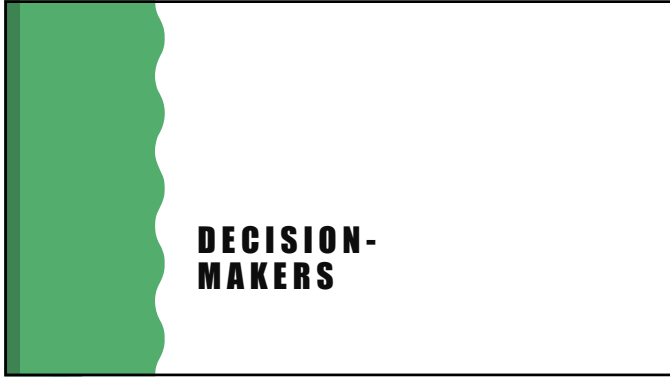
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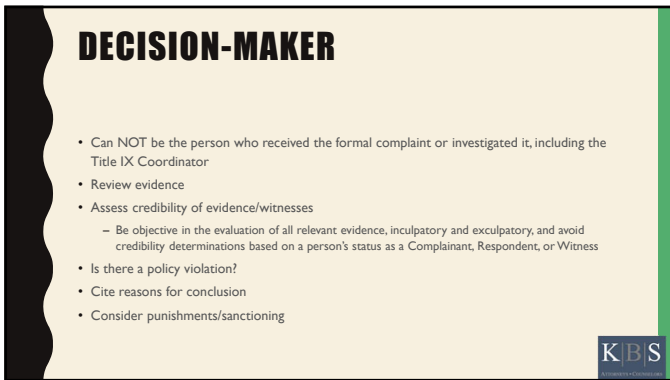
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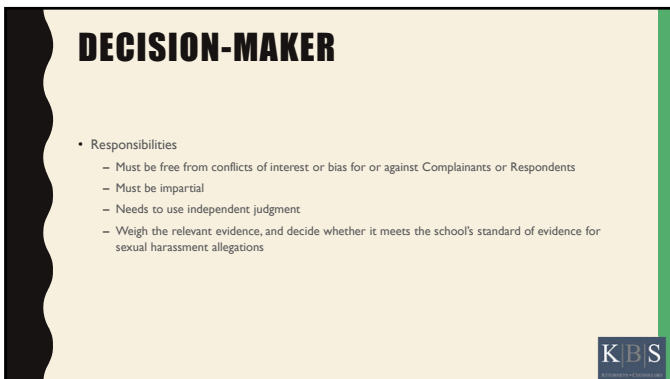
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## DECISION-MAKER

- Live Hearings & Cross-Examination
  - The school's grievance process must provide for a live hearing:
    - At the live hearing, the decision-maker(s) must permit each party's advisor to ask the other party and any witnesses all relevant questions and follow-up questions, including those challenging credibility.
    - Such cross-examination at the live hearing must be conducted directly orally, and in real time by the party's advisor of choice and never by a party personally.
    - At the request of either party, the recipient must provide for the entire live hearing (including cross-examination) to occur with the parties located in separate rooms with technology enabling the parties to see and hear each other.
    - Only relevant cross-examination and other questions may be asked of a party or witness. Before a complainant, respondent, or witness answers a cross-examination or other question, the decision-maker must first determine whether the question is relevant and explain to the party's advisor asking cross-examination questions any decision to exclude a question as not relevant.
    - If a party does not have an advisor present at the live hearing, the school must provide, without fee or charge to that party, an advisor of the school's choice who may be, but is not required to be, an attorney to conduct cross examination on behalf of that party.
    - If a party or witness does not submit to cross-examination at the live hearing, the decision-maker(s) must not rely on any statement of that party or witness in reaching a determination regarding responsibility; provided, however, that the decision-maker(s) cannot draw an inference about the determination regarding responsibility based solely on a party's or witness's absence from the live hearing or refusal to answer cross-examination or other questions.
    - Live hearings may be conducted with all parties physically present in the same geographic location or, at the school's discretion, any or all parties, witnesses, and other participants may appear at the live hearing virtually.
    - Schools must create an audio or audiovisual recording, or transcript, of any live hearing.



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## DECISION-MAKER

- Presumption of innocence
- Standard of evidence (school decides) (must be consistent)
  - Clear and convincing
    - Sufficient evidence has been presented to make it highly probably to be true that the Respondent engaged in the alleged sexual harassment
  - Preponderance of evidence \*\*\* (this is our standard of review)
    - More likely than not that the Respondent committed the alleged sexual harassment



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## DECISION-MAKER

- How to determine relevant evidence
  - Does it help to answer the allegations
  - Is it about the individuals involved
  - Is it allowable?
    - NO: sexual behavior or predisposition
      - EXCEPT to determine someone other than Respondent committed the behavior
      - EXCEPT specific incidents related to Complainant and Respondent offered to prove consent
    - NO: information protected by legal privilege
    - NO: party's treatment records (absent voluntary consent)



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**DECISION-MAKER**

- Written Decision must include:
  - Identification of the allegations potentially constituting sexual harassment
  - Description of the procedural steps that were taken by the school on the way to getting to that point (notifications to parties, methods used to gather other evidence, etc.)
  - Findings of fact supporting the determination
  - Conclusions regarding the application of the Code of Conduct to the facts
  - Statement of and rationale for the ultimate determination of responsibility for each allegation and any disciplinary sanctions imposed on the Respondent
  - Statement of and rationale for any remedies for the Complainant, addressing how those remedies will restore or preserve equal access
  - Statement of the College's procedures and basis for appeal
    - Can set deadlines for appeal (put in decision)
  - \*\*Must be sent to the parties simultaneously



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**APPEAL  
DECISION  
MAKER**

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**APPEAL DECISION-MAKER**

- Grounds for appeal
  - Procedural irregularity affected outcome of the matter
  - New evidence has been discovered that was not reasonably available at the time of the determination on responsibility or dismissal
  - Conflict of Interest of Title IX Coordinator, Investigator, or Decision-Maker, and the conflict of interest affected the outcome
  - Schools can offer additional grounds for appeal, so long as the grounds apply on an equal basis to the parties



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## APPEAL DECISION-MAKER

- Can NOT be the Decision-Maker, Investigator, or Title IX Coordinator
- Notify parties in writing and implement appeal procedures equally
- Both parties have equal opportunity to submit written statement supporting or challenging the outcome
- After considering parties' written statements, issue written decision and send it to the parties simultaneously
- Determination about whether the Respondent is responsible for the sexual harassment becomes final after appeal decision



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## RETALIATION (REMINDER)

- The College or any person may not intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by Title IX because the individual has:
  - Made a report or complaint
  - Testified
  - Assisted
  - Participated in or refused to participate in any manner in an investigation, proceeding, or hearing



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## INFORMAL RESOLUTION FACILITATORS

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**INFORMAL RESOLUTION PROCESS**

- Applies after a formal complaint is filed
- Both parties must consent
- Cannot use if employee - student



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**FACILITATORS**

- Impartial
- Free from bias
- Free from conflict-of-interest



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**FACILITATORS**

- Informal resolution may be of interest to some Complainants
- Both parties have to agree
- Must file formal complaint first
- Can engage in informal process anytime before decision-maker makes final determination
- Can never do informal resolution when the allegation is sexual harassment of a student by an employee



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**FACILITATORS**

- Who should informal facilitators be?
- Trained in mediation?
- Trained in conflict resolution?
- Trained in restorative practices?



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**FACILITATORS**

- Give space to tell story
- Give space to share what they want to get out of process
- Be prepared to share lists of supportive measures
- Do you meet together in the same room or separate rooms?
- Remain neutral; do not push
- Require confidentiality



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**FACILITATORS**

- If an agreement is reached
  - Put in writing
  - Be specific with the terms so there is not room for misinterpretation
  - Require confidentiality
  - Insert consequences for breach of terms or breach of confidentiality
    - Student Handbook
  - Have check in provisions?



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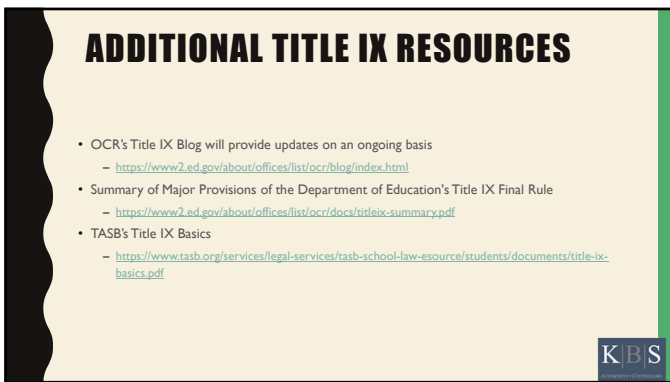
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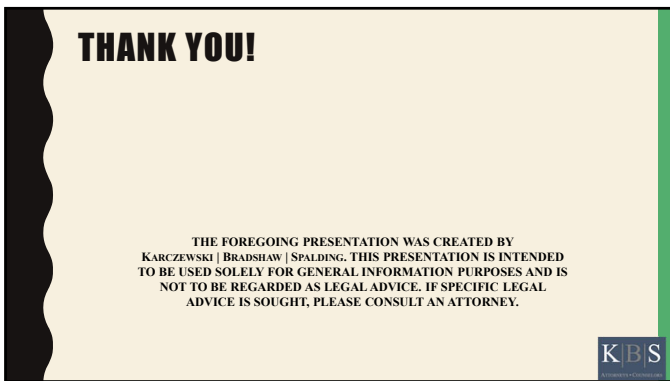
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