

# TRAINING FOR THE APPEALS COORDINATOR



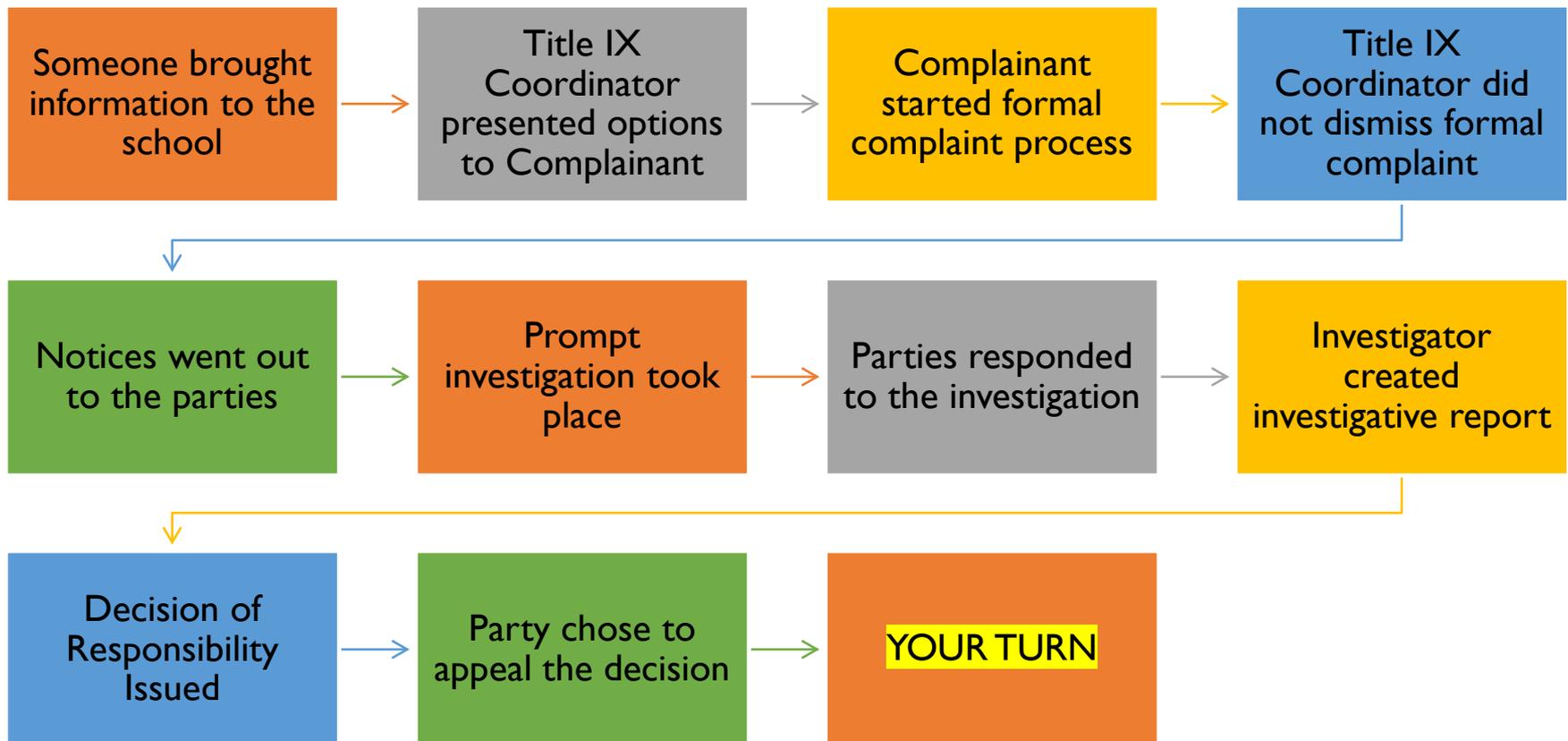
## IMPORTANT DEFINITIONS

- **Complainant:** an individual who is alleged to be the victim of conduct that could constitute sexual harassment
  - A complainant must be participating in or attempting to participate in the education program or activity of the School with which the formal complaint is filed.
- **Respondent:** an individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment
- **Formal Complaint:** a document filed by a complainant or signed by the Title IX Coordinator alleging sexual harassment against a respondent and requesting that the school investigate the allegation of sexual harassment

## IMPORTANT DEFINITIONS-SUPPORTIVE MEASURES

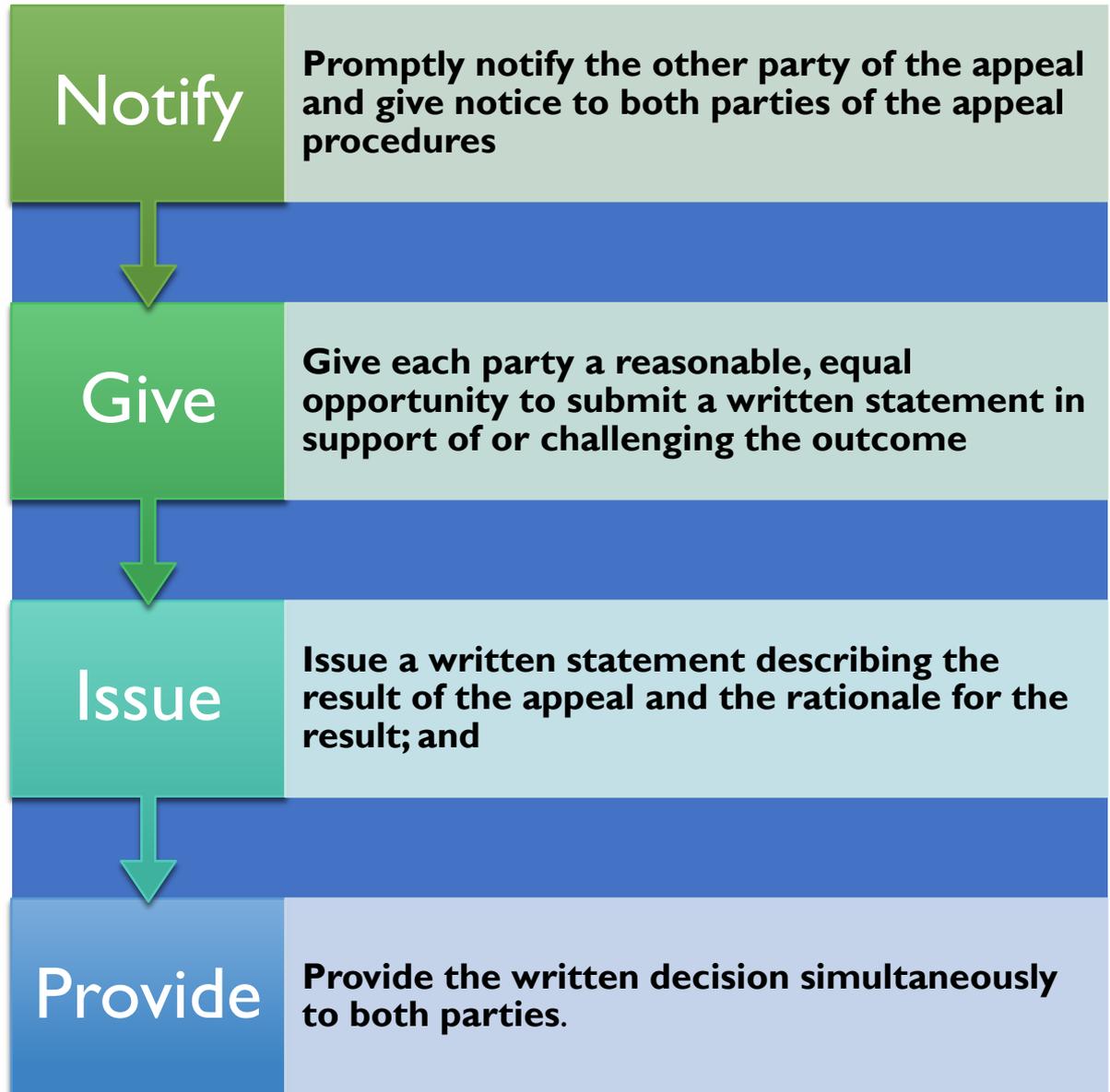
- **Supportive Measures:** non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, and without fee or charge to the complainant or respondent before or after the filing of a formal complaint or where no formal complaint has been filed. **Such measures are designed to restore or preserve equal access to the School's education program or activity without unreasonably burdening the other party, including measures designed to protect the safety of all parties or the School's educational program or activity, or deter sexual harassment**
- May include counseling, extensions of deadlines or other course-related adjustments, modifications of work or class schedules, campus escort services, mutual restrictions on contact between the parties, changes in work or housing locations, leaves of absence, increased security and monitoring of certain areas of the campus or other similar measures

# WHAT TOOK PLACE BEFORE YOU GOT INVOLVED?



# THE APPEALS PROCEDURE

EACH DISTRICT HAS THEIR OWN PROCEDURES, BUT A FEW THINGS ARE THE SAME



## THREE REASONS FOR APPEAL

**Procedural** irregularity that affected the outcome of the matter

**New evidence** that was not reasonably available at the time the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter; and

The Title IX Coordinator, investigator, or decision-maker had a **conflict of interest or bias** for or against the complainant or respondent generally or the individual complainant or respondent that affected the outcome of the matter.

## YOUR ROLE



Think of the Title IX  
process like a court of  
law



**YOU ARE THE APPEALS  
JUDGE**



REVIEWS RECORDS  
FROM TRIAL



REVIEWS EXHIBITS



REVIEWS LAWYER'S  
ARGUMENTS



REVIEWS JUDGES  
REASONING



APPLIES RECORD  
TO LAW



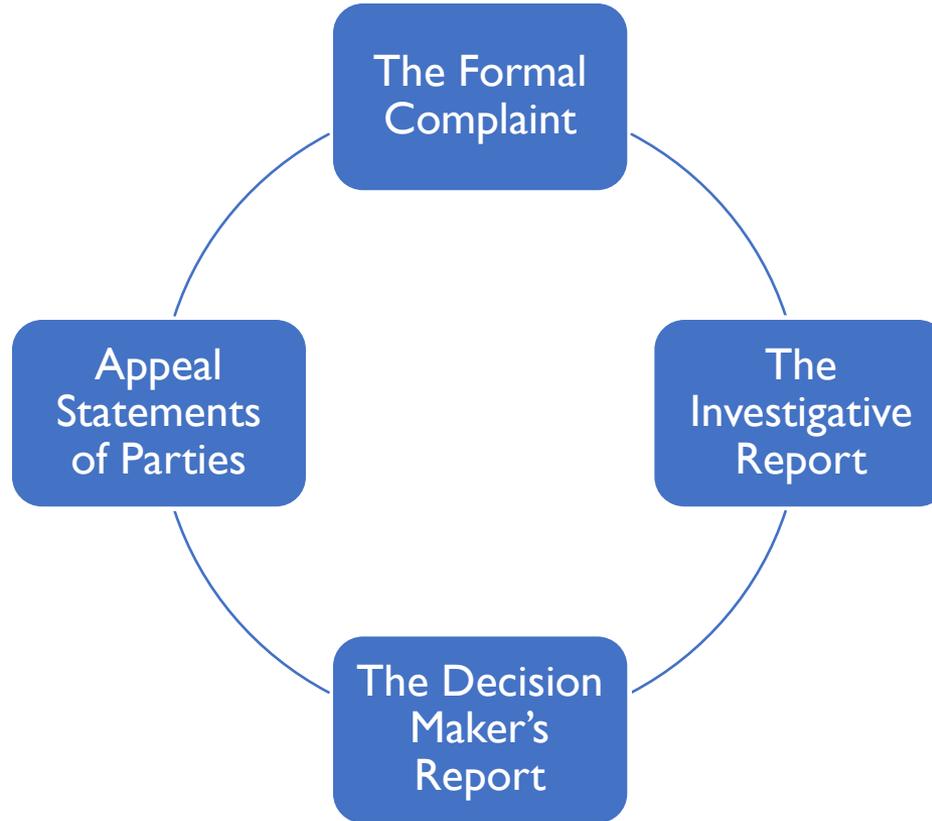
ORDERS A  
DECISION

WHAT DOES  
AN APPEALS  
JUDGE DO?



Decision Maker	Judge
Review's Investigator's Report	Review Records from Trial/Reviews Exhibits
Reviews Written Statements from Parties	Reviews Lawyers Arguments
Reviews Decision-Maker's Report	Reviews Judges Reasoning
Applies Court record to Permissible Appeal Reasons	Applies Record to Law
Orders a Decision	Orders a Decision

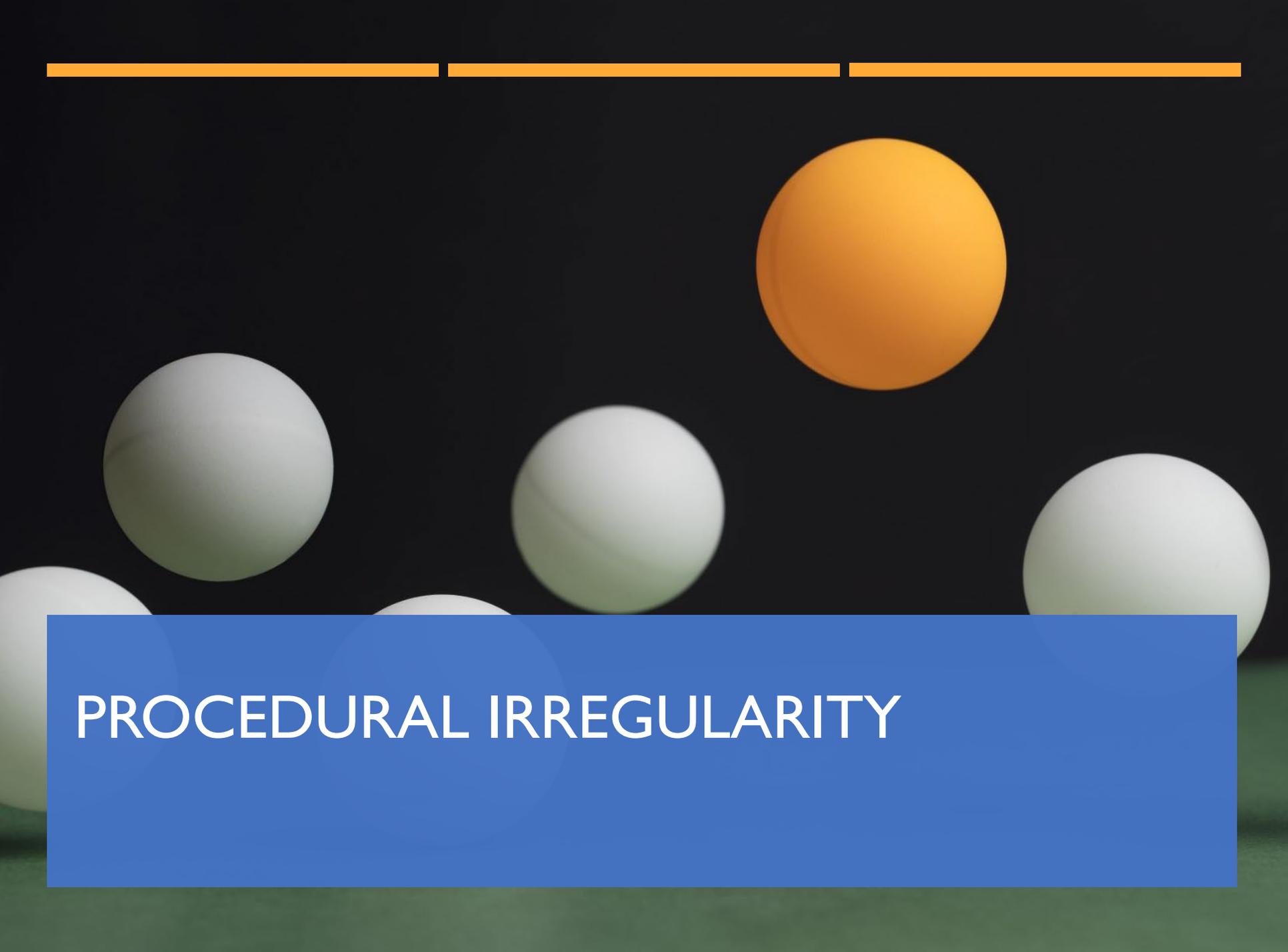
## DIFFERENCES BETWEEN YOUR JOB AND A JUDGE



TOOLS AT YOUR DISPOSAL

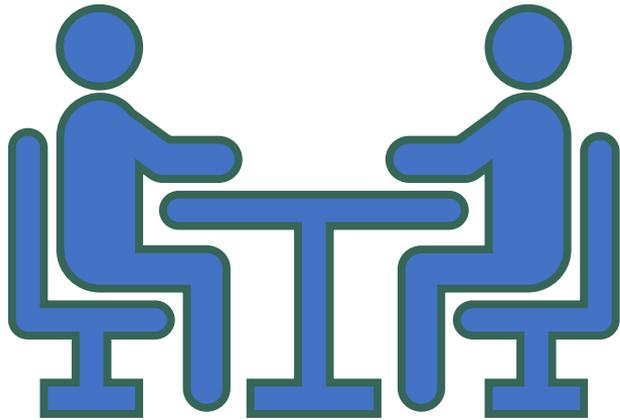
## DECISION-MAKER'S REPORT INCLUDES:

- The portion of the school's policies that was violated
- A description of the procedural steps that were taken by the school on the way to getting to the decision
- A findings of fact section
- A section that draws conclusions after applying the facts to the portion of the school's policy that applies
- A statement of rationale for the ultimate determination of responsibility
- Any disciplinary sanctions that the school will impose on the respondent, and state whether the school will provide remedies to the complainant
- A statement of rationale for any remedies for the complainant, addressing how those remedies will restore or preserve equal access; and
- A statement of the recipient's procedures, a statement that the parties have a right to appeal the initial determination regarding responsibility, and the permissible bases for appealing.

The background features a dark, almost black, space filled with several spheres. One large, bright orange sphere is positioned in the upper right quadrant. Below it and to the left are several smaller, white spheres, some of which are partially obscured or out of focus. At the top of the image, there are three horizontal orange bars of varying lengths, separated by small gaps. A solid blue rectangular box is located in the lower half of the image, containing the text 'PROCEDURAL IRREGULARITY' in white, uppercase letters.

# PROCEDURAL IRREGULARITY

# FIRST STEP OF ALL SEXUAL HARASSMENT ALLEGATIONS



- **Title IX Coordinator** promptly contacts the **complainant** to discuss:
  - the availability of supportive measures
  - consider the complainant's wishes with respect to supportive measures
  - inform the complainant of the availability of supportive measures with or without the filing of a formal complaint
  - and explain the process for filing a formal complaint.

## INITIAL MEETING

- Advise, Don't Dissuade
- Transparency!

## SECOND STEP- INVESTIGATIONS

### RIGHTS OF THE PARTIES

- The investigator must provide an **equal opportunity** for the parties to present witnesses, including fact and expert witnesses, and other inculpatory and exculpatory evidence.
- The investigator shall **not restrict the ability** of either party to discuss the allegations under investigation or to gather and present relevant evidence
- The investigator shall provide the parties with **the same opportunities** to have others present during any grievance proceeding, including the opportunity to be accompanied to any related meeting or proceeding by the advisor of their choice.
- *Investigator may establish restrictions on how an advisor participates (but those restrictions must apply equally to both parties' advisors)*

## SECOND STEP- INVESTIGATIONS

### RIGHTS OF THE PARTIES

- Up until the conclusion of the investigation, the parties shall have an **equal opportunity to inspect and review** any evidence obtained in the investigation that is directly related to the allegations raised in the formal complaint.
- *This includes evidence upon which the Investigator does not intend to rely in reaching a determination regarding responsibility and inculpatory or exculpatory evidence obtained from any source*

## RIGHTS OF THE PARTIES DURING THE INVESTIGATION

During the investigation the District retains the right to place a non-student employee respondent on **administrative leave** during the investigation

The district also retains the right to remove a student from the District's educational program prior to the conclusion of the investigation. **BUT**, in the event of a removal, the respondent shall have the opportunity to challenge the decision for removal.

# RIGHTS OF THE PARTIES DURING THE INVESTIGATION



- **PRIOR** to the conclusion of the investigation, the investigator shall send each party and the party's advisor, if any, the evidence that is subject to inspection and review in an electronic format or hard copy.
- **THEN**, the parties shall have at least 10 days to submit a written response, which the Investigator must consider
- **THEN**, the investigator will complete the investigative report and send to the parties, their advisors, if any, and the decision-maker.

# RIGHTS OF THE PARTIES DURING THE DECISION PROCESS

- Prior to coming to a determination, the decision-maker must afford each party the opportunity to:
  - **submit** written, relevant questions that a party wants asked of any party or witness,
  - **provide** each party with the answers, and
  - allow for additional, limited **follow-up** questions from each party.



BIAS

# IMPARTIALITY

- Impartial means that you do not have any **prejudice** towards the complainant or respondent i.e. lack of bias
- Impartial means that you will render a decision based ONLY on the **evidence**
- Impartial means you do not opine about the facts before considering ALL the **facts**
- Impartial means you avoid **conflicts of interest**: an investigator or decision maker should recuse themselves from a particular case if they have a conflict of interest

# AVOIDING BIAS



**Confirmation Bias**: placing more value on information that supports our existing belief



**Anchoring Bias**: being overly influenced by the first piece of evidence/information we receive



**Misinformation effect**: the tendency for post-event information to interfere with the memory of the original event. Knowledge of this effect has led to a mistrust of eyewitness information.



**Halo** effect: your overall impression of a person influences how you feel and think about their character. This especially applies to physical attractiveness influencing how you rate their other qualities.

## CREDIBILITY OF COMPETING FACTS

- The decision maker shall not consider the credibility of the evidence solely based on a person's status as the complainant, respondent, or witness.

# FACTORS TO HELP DETERMINE CREDIBILITY

Did the witness have an opportunity to see or hear the events about which he or she testified?

Did the witness have the ability to recall those events accurately?

Was the testimony of the witness plausible and likely to be true?

Was the testimony of the witness consistent or inconsistent with other testimony or evidence in the case?

Did the manner in which the witness testified reflect upon the truthfulness of that witness's testimony.

To what extent, if any, did the witness's background, training, education, or experience affect the believability of that witness's testimony.

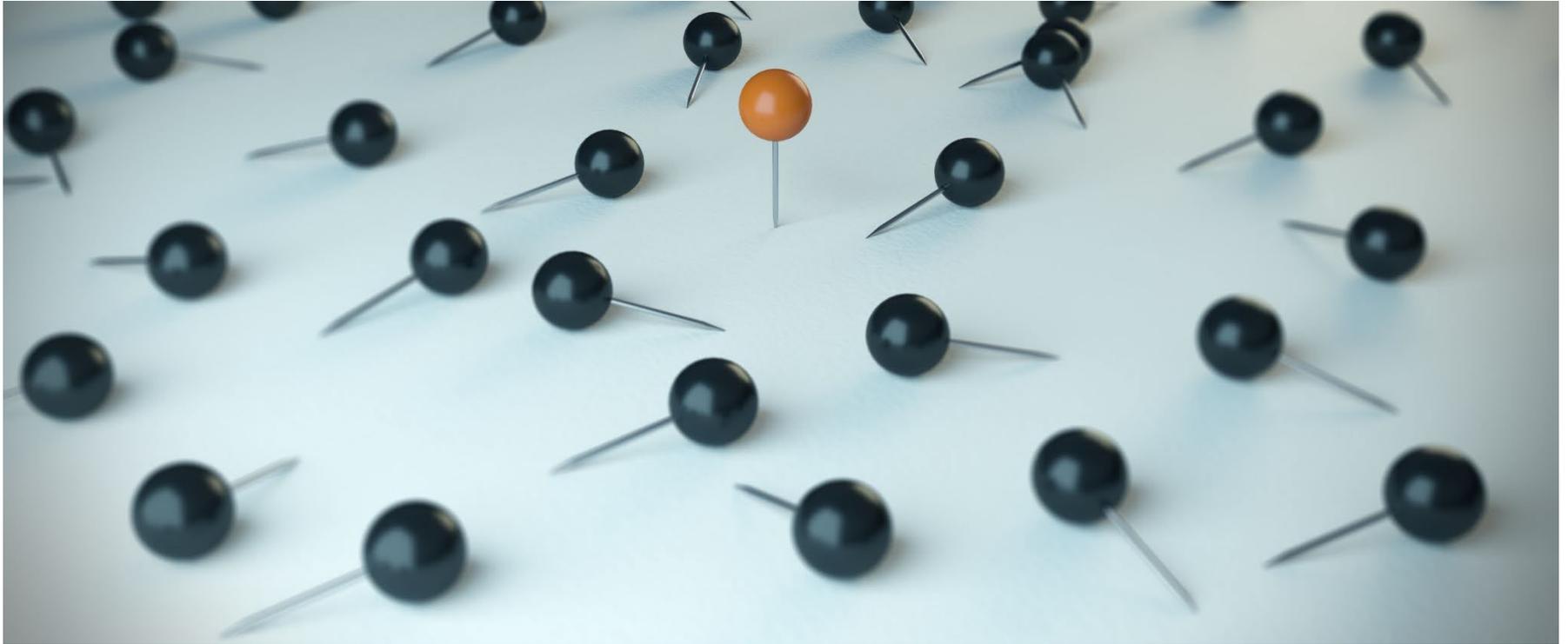
Did the witness have a bias, hostility or some other attitude that affected the truthfulness of the witness's testimony?

# MOTIVE

If a witness had a motive to lie, you may consider whether and to what extent, if any, that motive affected the truthfulness of that witness's testimony.

You may consider whether a witness has any interest in the outcome of the case

**You are not REQUIRED to reject the testimony of an interested witness or accept the testimony of a witness with no interest in the outcome**



NEW EVIDENCE

TITLE IX  
SEXUAL  
HARASSMENT  
DEFINITION

- Employee Quid Pro Quo
- Hostile Environment\*\*
- VAWA “Big Four”

# SEXUAL HARASSMENT-QUID PRO QUO

- **Definition:** An employee of the District conditioning an aid, service, or benefit of the District on an individual's participation in unwelcome sexual contact
- In this situation- you do not have to analyze severity or harm. It is presumed.
- This definition only applies to employees (not volunteers, or other students, etc.)

# SEXUAL HARASSMENT – VAWA BIG 4

- Sexual Assault 20 U.S.C. 1092(f)(6)(A)(v)
- Domestic Violence 34 U.S.C. 12291(a)(8)
- Dating Violence 34 U.S.C. 12291(a)(10)
- Stalking 34 U.S.C. 12291(a)(30)

## SEXUAL ASSAULT 20 U.S.C. 1092(f)(6)(A)(v)

- The term “sexual assault” means an offense classified as forcible or nonforcible sex offense under the uniform crime reporting system of the Federal Bureau of Investigation

# SEXUAL ASSAULT 20 U.S.C. 1092(f)(6)(A)(v)

- **Forcible Rape:** The penetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person, without the consent of the victim.

<b>Important Points:</b>	Rape by an object can be as traumatic as penile/vaginal rape
Includes instances in which the victim is unable to give consent because of temporary or permanent mental or physical incapacity	Recognizes that a victim can be incapacitated by drugs or alcohol and thus unable to consent
Physical resistance is not required to demonstrate lack of consent	Rape can occur to any gender
Recognizes legal incapacity to consent because of age	Nebraska: Age of sexual consent is 16. Statutory Rape = person below 15 + person 20 years or older. Sexual Assault of a child includes victim twelve years or younger

# DOMESTIC VIOLENCE 34 U.S.C. 12291 (a)(8)

- **Definition:** The term “domestic violence” includes 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 the domestic or family laws of the jurisdiction receiving grant monies, or by any other person against an adult or youth who is protected from that person’s acts under the domestic or family violence laws of the jurisdiction



# DOMESTIC VIOLENCE 34 U.S.C. 12291 (A)(8)

**How does “Domestic Violence” occur in a elementary or secondary school setting?**

**This definition is much more likely to occur in a post-secondary school environment.**

# DATING VIOLENCE 34 U.S.C. 12991 (a)(10)

- The term “**dating violence**” means violence committed by a person:
  - Who is or has been in a social relationship of a romantic or intimate nature with the victim; and
  - Where the existence of such a relationship shall be determined based on a consideration of the following factors:
    - The length of the relationship
    - The type of relationship
    - The frequency of interaction between the persons involved in the relationship
- **Takeaway: Do not dismiss complaints of violence or sexual assault if the victim and alleged perpetrator are “dating”**

## STALKING 34 U.S.C. 12291(a)(30)

- The term “**stalking**” means engaging in a course of conduct directed at a specific person that would cause a reasonable person to
  - Fear for his or her safety or the safety of others; or
  - Suffer substantial emotional distress



**THIS NEXT ONE  
IS A BIT  
COMPLICATED...**

# SEXUAL HARASSMENT-HOSTILE ENVIRONMENT

- **Definition:** 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 District's education program or activity.



# FACTORS TO ANALYZE

- SEVEREITY
- PERVASIVENESS
- OBJECTIVE OFFENSIVENESS

## BUT REMEMBER

- “Determined by a reasonable person to be ...”

## SCOPE OF EDUCATION PROGRAM OF ACTIVITY

- **Education Program or Activity Means:**  
locations, events, or circumstances over which the School exercised substantial control over both the respondent and the context in which the sexual harassment occurs.

# SCOPE OF EDUCATION PROGRAM OF ACTIVITY

- Title IX applies to **all** of a school's operations, including all of the academic, educational, extra-curricular, athletic, and other programs of the school, whether they take place in the facilities of the school, on a school bus, at a class or training program sponsored by the school at another location, or elsewhere within the United States.



RELEVANCE  
& BURDEN  
OF PROOF

# BURDEN OF PROOF- PREPONDERANCE OF THE EVIDENCE

**“More likely  
than not”**

**“Greater  
Weight of  
Evidence”**

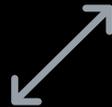
BURDEN OF  
PROOF-  
CLEAR AND  
CONVINCING  
EVIDENCE



Evidence that is highly and substantially more likely to be true than untrue



The fact finder must be convinced that the contention is highly probable



Closer to beyond a reasonable doubt than preponderance of the evidence



“85 to 90 percent certainty” versus “51 percent certainty”

# FEDERAL RULES OF EVIDENCE 401: TEST FOR RELEVANT EVIDENCE

- Evidence is relevant if:
  - (a) it has a 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.