

# Title IX

Virginia Beach City Public Schools  
Decision-Maker Training

# What is Title IX?

- Title IX of the Education Amendments of 1972
- Protects people from discrimination based on sex in education programs or activities that receive federal financial assistance.
- Enforced by the Office of Civil Rights (“OCR”).
- Governs the way in which institutions must handle accusations of sexual harassment to ensure that investigations are transparent and fair.
- “No person in the United States shall, on the basis of sex, be excluded from participation in, or be subjected to discrimination under and education program or activity receiving Federal financial assistance.”

# Sexual Harassment

- If the School Division has actual knowledge of sexual harassment in an education program or activity of the school division against a person in the United States, it must respond promptly in a manner that is not deliberately indifferent.

# “Actual Knowledge”

- “Actual knowledge” means notice of sexual harassment or allegations of sexual harassment to the School Division’s Title IX Coordinator or any official of the School Division who has authority to institute corrective measures on behalf of the School Division **or to any employee** of an elementary or secondary school.
  - Administrators
  - Teachers
  - Staff
- Imputation of knowledge based solely on vicarious liability or constructive notice is insufficient to constitute actual knowledge.

# Education Program or Activity

- Locations, events, or circumstances over which the School Division exercised substantial control over both the respondent and the context in which the sexual harassment occurs.
- “Program or activity” encompasses all of the School Division’s operations including, but not limited to: computer and internet networks; digital platforms and computer hardware or software owned or operated by, or used in the operations of, the School Division.
- Title IX does not impose a duty to report purely off-campus conduct.

# Education Program or Activity

- Includes conduct that occurs in a building owned or controlled by a student organization that is officially recognized by the School Division.
- Does not include conduct that occurs on an international field trip or at any location outside the United States.
- Does not include conduct that occurred off-campus but has an on-campus effect.
  - Can be addressed through other applicable VBCPS policies and regulations.

# Deliberate Indifference

- A School Division is “deliberately indifferent” if its response to sexual harassment is clearly unreasonable in light of the known circumstances.

# Three Categories of Sexual Harassment

- **Quid pro quo**
- **Statutory Offenses:** Sexual assault, dating violence, domestic violence, stalking.
- **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 [School Division]’s education program or activity.”

# Sexual Harassment: Quid pro quo

- An employee of the School Division conditions the provision of an aid, benefit, or service of the School Division on an individual's participation in unwelcome sexual conduct.
- Must be reported.

# Sexual Harassment: Defined by Statute

- “Sexual assault” as defined by 20 U.S.C. 1092(f)(6)(A)(v)
- “Dating violence” as defined by 34 U.S.C. 12291(a)(10)
- “Domestic Violence” as defined by 34 U.S.C. 12291(a)(8)
- “Stalking” as defined by 34 U.S.C. 12291(a)(30)
- Any conduct meeting these definitions must be reported.

# Sexual Harassment: 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 [School Division]’s education program or activity.”
- Must be reported.

# Other Definitions

- **Complainant:** an individual who is alleged to be the victim of conduct that could constitute sexual harassment under Title IX.
- **Respondent:** an individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment under Title IX.
- **Supportive Measures:** non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, and without fee or charge to the Complainant or the Respondent.
- **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 Division investigate the allegation of sexual harassment.

# Response to Sexual Harassment

- The School Division must respond when it has actual knowledge of sexual harassment that occurred within the School Division's education program or activity.
- **All** School Division employees are responsible for reporting suspected sexual harassment to the Title IX Coordinator *in writing*.
- Regardless of whether a Formal Complaint is filed, the Title IX Coordinator must confer with the Complainant regarding the availability of supportive measures when the School Division has actual knowledge of sexual harassment.

# Response: No formal complaint

- Title IX Coordinator will promptly contact Complainant to:
  - discuss availability of supportive measures,
  - consider 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 to the process for filing a Formal Complaint.

## Response: No formal complaint

- If the School Division intends to impose disciplinary sanctions against a Respondent for sexual harassment as defined by Title IX, Title IX Coordinator will initiate the School Division's grievance process by signing a Formal Complaint.
- If the alleged incident involves actions against a student by an employee, Title IX Coordinator shall immediately forward complaint to Department of Human Resources for further investigation, and if appropriate, to Child Protective Services and/or Law Enforcement.

# Response: Supportive Measures

- Designed to restore or preserve equal access to the School Division's education program or activity without unreasonably burdening the other party, including measures designed to protect the safety of all parties or the School Division's educational environment, or deter sexual harassment.
- Examples 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, leaves of absence for student Complainants or Respondents, increased security and monitoring of certain areas of campus, and other similar measures.

# Response: Supportive Measures

- Can be provided to Complainants, Respondents, and any other members of the VBCPS community who are affected by sexual misconduct.
- May be sought or provided before or after the filing of a Formal Complaint, or where no Formal Complaint has been filed.
- Title IX Coordinator is responsible for coordinating the effective implementation of supportive measures.
- When possible, must maintain confidentiality with respect to supportive measures.

# Grievance Process: Overview

- When is the Grievance Process required?
  - When a Formal Complaint has been filed (either by a Complainant or the Title IX Coordinator); or
  - The School Division intends to discipline a Respondent for behavior that constitutes “sexual harassment” as defined by Title IX.
  - If no Formal Complaint is filed, the grievance process cannot start.
- What is the scope of the Grievance Process?
  - The grievance process shall apply only to:
    - “sexual harassment” in a School Division’s “education program or activity”
    - against a person in the United States.

# Formal Complaint

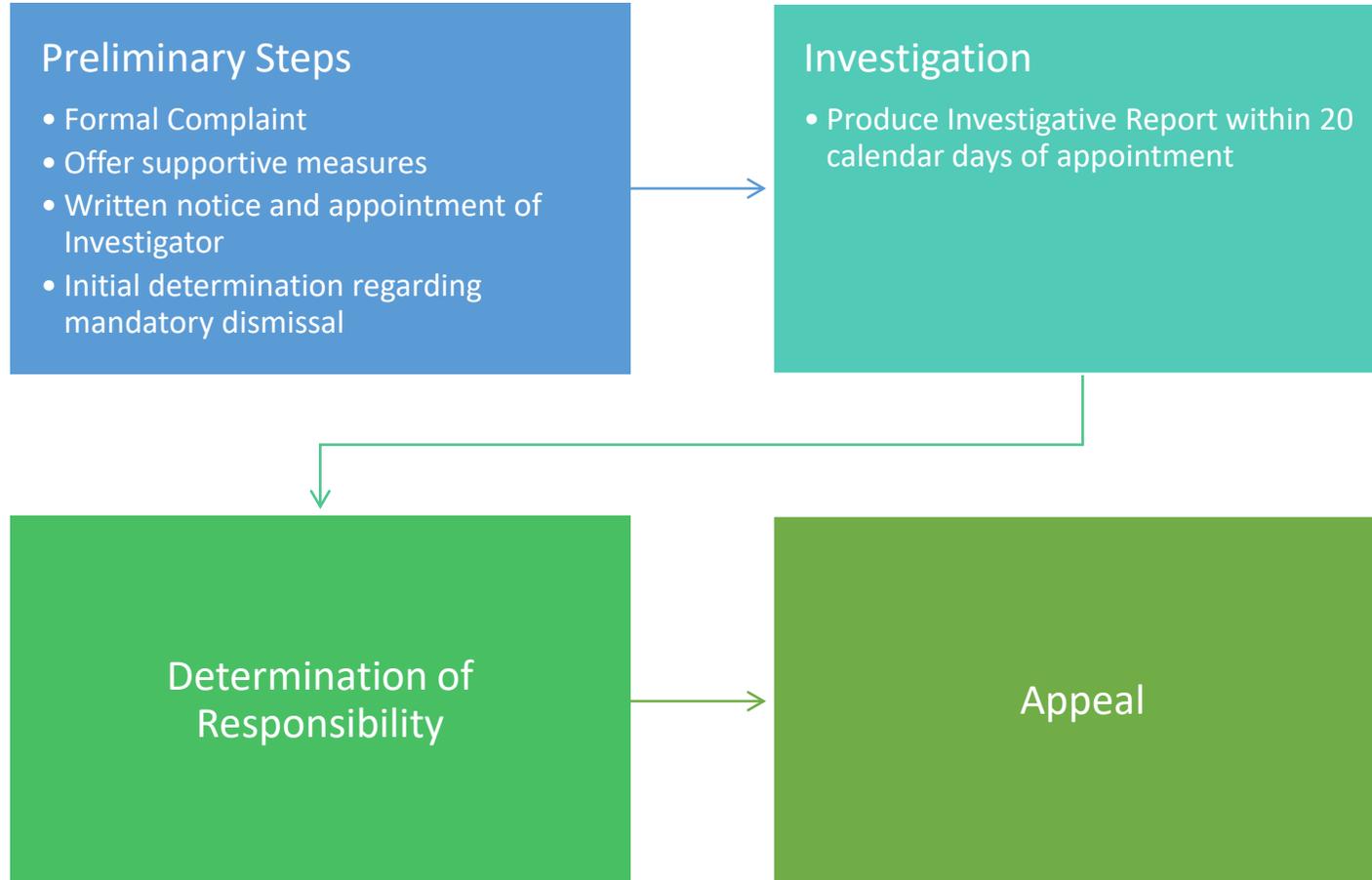
## Who may file a Formal Complaint?

- The Title IX Coordinator, the Complainant, or the minor aged Complainant's parent or legal guardian.
- At the time of filing, Complainant must be participating in or attempting to participate in the education program or activity of the School Division.

## How is a Formal Complaint filed?

- May be filed with the Title IX Coordinator in person, by mail, or by electronic mail.
- Must be a document or electronic submission that contains the Complainant's physical or digital signature, or otherwise indicates that the Complainant (or person authorized to act on the Complainant's behalf) is the person filing the complaint.

# Steps in the Grievance Process



# Conflict of Interest & Bias

- Any individual designated by the School Division as a Title IX Coordinator, Investigator, Decision-Maker, or any person designated by the School Division to facilitate an informal resolution process, must not have a conflict of interests or bias for or against complainants or respondents generally or an individual complainant or respondent.
- The prohibition against bias and conflict of interests is intended to minimize premature judgment of the facts related to the grievance throughout the Title IX grievance process. It is also intended to minimize partiality in the decision-making process.

# Grievance Process: Preliminary Steps

- Promptly contact the Complainant regarding the availability of supportive measures;
- Within 2 business days of receipt of complaint, provide written notice to the parties of the complaint and grievance process, and appoint an Investigator;
- Within 3 business days, make an initial determination regarding mandatory dismissal; and
- Consider appropriateness of emergency removal and consolidation of multiple complaints.

# Appointment of Investigator

- Investigator will be appointed by the Title IX Coordinator at the time of the written notice to the parties.
- Any individual designated as an Investigator must not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent.

# Mandatory Dismissal

- Within 3 business days of receipt of the complaint, and before assigning an Investigator, the Title IX Coordinator will conduct an initial investigation and review of the allegations in the Formal Complaint.
- **Must** dismiss a Formal Complaint prior to commencing an investigation if the conduct alleged:
  - would not constitute sexual harassment as defined by Title IX, even if proved; or
  - did not occur against a person in the United States.
- Upon dismissal, promptly send written notice and reason(s) for dismissal to the parties.

# Discretionary Dismissal

- Title IX Coordinator **may** dismiss Formal Complaint or any allegations therein, if at any time during the investigation:
  - A Complainant notifies the Title IX Coordinator in writing that the Complainant would like to withdraw the Formal Complaint or any allegations therein;
  - Respondent is no longer enrolled or employed by the School Division; or
  - Specific circumstances prevent the School Division from gathering evidence sufficient to reach a determination as to the Formal Complaint or allegations therein.
- Upon such dismissal, Title IX Coordinator will promptly send written notice and reason(s) for dismissal simultaneously to the parties.

# Grievance Process: Investigation

- Investigator will conduct factual investigation of allegations and allow both parties equal opportunity to submit and review evidence.
- Within 20 calendar days of appointment, Investigator will produce Investigative Report fairly summarizing the evidence.
- Parties must be provided at least 10 calendar days to review and respond to the evidence before completion of the Investigative Report.

# Investigation

- Investigation may include:
  - Interviewing Complainant, Respondent, and witnesses;
  - Reviewing law enforcement investigation documents;
  - Reviewing relevant student or employee files; and
  - Gathering and examining other relevant documents, social media, and evidence.
- The investigator bears the burden of gathering evidence and will attempt to collect all relevant information and evidence.
- The investigation file should contain all information gathered during the investigation that is potentially relevant to the alleged misconduct.
  - Relevant evidence is any evidence that may tend to make the allegations at issue more or less likely to be true.

# Investigation

- Parties can (and should) present evidence and identify witnesses to the Investigator so that they may be considered during the investigation.
- Parties must have an equal opportunity to present witnesses and evidence.
- Parties cannot be restricted from discussing the allegations or gathering/presenting evidence.
- Parties may not retaliate against any person because they participate or refuse to participate in the grievance process
- Confidential information must be kept confidential and must not disclose such information outside the grievance process.

# Investigation

- Parties must have equal opportunity to have others present during any meeting/interview, including opportunity to be accompanied by an advisor of their choice, who may be, but is not required to be, an attorney.
- Investigative meetings
  - Parties must receive advanced written notice of any meeting.
  - Notice must include the date, time, location, participants, and purpose of meeting.
  - Notice can be provided by email.

# Investigation

- Both parties must have an equal opportunity to inspect and review any evidence obtained as part of the investigation.
- School Division will not access, consider, disclose, or otherwise use a party's records that are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in their capacity, or assisting in that capacity, and which are made and maintained in connection with the provision of treatment to the party, unless the party voluntarily consents in writing to their use in a formal grievance process.

# Investigation

- Within 20 calendar days of appointment, Investigator will produce Investigative Report fairly summarizing the evidence.
- Investigative Report will be sent simultaneously to both parties.
- The parties will have at least 10 calendar days to submit a written response, if any, to the Investigative Report, for the Decision-Maker to consider.

# Grievance Process: Determination of Responsibility

- Upon completion of the Investigative Report, the Title IX Coordinator will promptly designate a Decision-Maker to make an ultimate determination of responsibility.
  - Cannot be the same person as the Title IX Coordinator or Investigator.
  - Must not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent.

# Responsibilities of Decision-Maker

- Conduct an objective evaluation of all relevant evidence, including both inculpatory and exculpatory evidence, and issue a written determination of responsibility.
- Facilitate and allow the parties to submit written questions for the other parties and witnesses to answer.

# Facilitation of Written Questions

- Before reaching a determination regarding responsibility, 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.
- The Decision-Maker must explain to the party proposing the questions any decision to exclude a question as not relevant.
- The parties' initial set of relevant questions, if any, must be submitted to the Decision-Maker within 10 calendar days of receiving the Investigative Report.

# Facilitation of Written Questions

- The Decision-Maker may in his/her discretion grant lesser weight to last-minute information or evidence introduced through the exchange of written questions that was not previously presented to the Investigator.

# Facilitation of Written Questions: Bases to Exclude Questions

- **Irrelevant:** question seeks information that is not directly related to any of the allegations or evidence in the record.
- **Sexual predisposition/history:** questions about Complainant's sexual predisposition or prior sexual behavior are not relevant, unless such questions:
  - are offered to prove that someone other than the Respondent committed the conduct alleged by the Complainant, or
  - concern specific incidents of the Complainant's prior sexual behavior with respect to the respondent and are offered to prove consent.
- **Privilege:** question seeks disclosure of information protected under a legally recognized privilege, and there has not been a waiver of that privilege.

# Review of Evidence

- Presumption that Respondent is not responsible for the alleged conduct until a determination of responsibility is made after reviewing the evidence.
- Decision-Maker must consider all relevant evidence, including both inculpatory and exculpatory evidence.
- Credibility determinations cannot be based on status as Complainant, Respondent, or witness.
- Questions/evidence about Complainant's sexual predisposition or prior sexual behavior are not relevant unless one of the exceptions is met.
- Cannot rely on information protected under a legally recognized privilege, without waiver of that privilege.

# Written Determination

- Within 20 calendar days of appointment of the Decision-Maker, the Decision-Maker must issue a written determination of responsibility.
- Determination based on a preponderance of the evidence.
  - The burden of proof is met and a Respondent may be found responsible if the Decision-Maker determines that it is more likely than not that the Respondent committed the conduct alleged.
- Primary question is whether a preponderance of the evidence demonstrates that the Respondent's behavior constitutes "sexual harassment" as defined by Title IX.

# Written Determination

- Written determination must include:
  - Identification of the allegations potentially constituting sexual harassment;
  - A description of the procedural steps taken;
  - Findings of fact supporting the determination;
  - Conclusions regarding the application of the School Division's Code of Student Conduct and the grievance process to the facts;
  - A statement of, and rationale for, the result as to each allegation, including:
    - determination regarding responsibility;
    - any disciplinary sanctions imposed on the Respondent; and
    - whether remedies designed to restore or preserve equal access to the School Division's education program or activity will be provided to the Complainant;
  - The School Division's procedures and permissible bases for the Complainant or Respondent to appeal.

# Written Determination

- Must be provided to the parties simultaneously.
- Supportive measures may also be provided to the Complainant.
  - If the supportive measures do not impact the Respondent, they should not be disclosed in the written determination.
  - Instead, written determination should simply provide that “remedies will be provided to the Complainant.”
- The determination becomes final either:
  - on the date the School Division provides the parties with written determination of the result of the appeal, if an appeal is filed, or
  - if an appeal is not filed, on the date on which an appeal would no longer be considered timely.
- Title IX Coordinator is responsible for effective implementation of any remedies and supportive measures.

# Grievance Process: Appeal

- Both parties have right to appeal determination of responsibility or dismissal on the following bases:
  - Procedural irregularity that affected outcome of the matter;
  - New evidence that was not reasonably available at the time of determination or dismissal, that could affect the outcome of the matter; or
  - Title IX Coordinator, Investigator(s), or Decision-Maker(s) had conflict of interest or bias for or against complainants or respondents generally or individual complainant or respondent that affected the outcome of the matter.
- The issues for consideration on appeal are limited to the bases described above. If the appeal does not challenge the outcome on any one of these enumerated bases, the appeal must be denied.

# Appeal

- Written appeal must be filed with Title IX Coordinator with 3 business days of the determination or dismissal.
- The Title IX Coordinator will promptly notify the other party in writing of the appeal and appoint a Decision-Maker for the appeal.
- Cannot be the same person as the Decision-Maker that reached the determination regarding responsibility or dismissal, the Investigator(s), or the Title IX Coordinator.
- Any individual designated as a Decision-Maker for an appeal must not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent.

# Responsibilities of Appeal Decision-Maker

- Review appeals of a determination of responsibility or dismissal of a Formal Complaint.
- Review the parties' written statements in support of, or challenging the outcome.
- Issue a written decision describing the result of the appeal and the rationale for the result.
- Determination on appeal is based on the existing record and the parties' written submissions, if any.

# Appeal

- Both parties will have a reasonable, equal opportunity to submit a written statement in support of, or challenging, the outcome. Any such statement must be submitted within 5 calendar days of appointment of the Decision-Maker on appeal.
- Within 10 calendar days of appointment of the Decision-Maker on appeal, the Decision-Maker will issue a written decision, provided simultaneously to both parties, describing the result of the appeal and the rationale for the result.
- No further appeal is available under Title IX.

# Delays/Extensions

- Any time period required by the grievance process may be temporarily delayed or extended for good cause with written notice to both parties of the delay or extension and the reasons for the action.
- Good cause may include considerations such as the absence of a party, a party's advisor, or a witness; concurrent law enforcement activity; or the need for language assistance or accommodation of disabilities.
- Such extension will be for a reasonable time period, but not longer than thirty (30) business days from the date that the action was originally due.

# Informal Resolution

- The Complainant or Respondent may request in writing at any time that informal methods, such as mediation, be utilized to address the allegations in a Formal Complaint.
- The Title IX Coordinator may place the grievance process on hold while the informal resolution process is ongoing.
- Either party may terminate the informal resolution process at any time.

# Informal Resolution: Procedure

- At any time prior to reaching a determination regarding responsibility on the allegations in a Formal Complaint, and upon written request to the Title IX Coordinator by either party, the School Division may facilitate an informal resolution process, such as mediation, that does not involve a full investigation and adjudication.
- The Title IX Coordinator must provide the parties written notice disclosing the allegation, the requirements of the informal resolution process including the circumstances under which it precludes the parties from resuming a Formal Complaint arising from the same allegations.

# Informal Resolution: Procedure

- The Title IX Coordinator must obtain the parties' voluntary, written consent to the informal resolution process.
- At any time prior to agreeing to a resolution, any party has the right to withdraw from the informal resolution process and resume the grievance process with respect to the Formal Complaint, and any consequences resulting from participating in the informal resolution process, including the records that will be maintained or could be shared.

# Informal Resolution: Limitations

- A Complainant or Respondent cannot be compelled to participate in any informal resolution process.
- The School Division may not require as a condition of enrollment or continuing enrollment, or employment or continuing employment, or enjoyment of any other right, waiver of the right to an investigation and adjudication of Formal Complaints of sexual harassment consistent with these guidelines.
- The School Division cannot offer or facilitate an informal resolution process to resolve allegations that an employee sexually harassed a student.

# Retaliation

- Retaliation against an individual who makes a complaint or participates in the grievance process is strictly prohibited.
- Intentional false reporting or misrepresentation of complaints or evidence regarding complaints is strictly prohibited and may result in appropriate action being taken by the School Division.
- The School Division will keep the identity of any Complainant, Respondent, or witness confidential, except as required by law.
- The exercise of rights protected under the First Amendment does not constitute retaliation.



Questions?

