

Title IX Investigative Training

Framingham Public Schools
Single-session trainings held:
July 28, 2021, August 18, 2021, and August 26, 2021
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About Us

Sanghavi Law Office is a group of attorneys experienced in civil rights law and dedicated to helping schools and other organizations address issues of discrimination and harassment. In addition to advising clients, we conduct investigations, audits and climate assessments, review policies and procedures, serve as hearing officers and advisors, and provide training.

Learning Objectives

- ▶ Overview of Title IX
- ▶ General Obligations under Title IX
 - Definition of Sexual Harassment
 - The scope of the institution's education program or activity
 - Issues of relevance, including how to apply rape shield provisions
 - How to conduct a grievance process
- ▶ What is Sexual Harassment?
- ▶ Case Law Discussion
- ▶ Framingham Public Schools Policy and Grievance Procedure for Discrimination, Including Harassment and Retaliation
- ▶ Title IX Investigations

Overview of Title IX

What is Title IX?

- ▶ Title IX states that “No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance .

”

...

Where Are We Now?

- ▶ Under the Trump Administration
 - New DCL and Q&A issued on September 22, 2017
 - Final Rule issued on May 19, 2020 became effective on August 14, 2020
 - Q&A from January 2021
- ▶ Under the Biden administration
 - Q&A issued on July 20, 2021

JULY 2021 Guidance

- ▶ The Education Department's interpretation of the Trump-era rules, released July 20, makes it clear that those 2020 regulations represent "minimum steps" for educators. It also says that while schools must presume that a person alleged to have committed the misconduct isn't responsible, schools "should never assume a complainant of sexual harassment is lying or that the alleged harassment did not occur."
- ▶ In addition, the guidance spells out that while elementary and secondary schools are not required to conduct live hearings with cross examinations of different parties, elementary and secondary schools must respond any time that any school employee "has notice that sexual harassment might have occurred." And schools may respond to allegations of sexual misconduct that doesn't meet the definition of sexual harassment spelled out in the 2020 regulations.

What Is Sexual Harassment?

What is Sexual Harassment?

From the Title IX Rule:

Sexual harassment means conduct on the basis of sex that satisfies one or more of the following:

- (1) An employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct;
- (2) Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity; or
- (3) "Sexual assault" as defined in 20 U.S.C. 1092(f)(6)(A)(v), "dating violence" as defined in 34 U.S.C. 12291(a)(10), "domestic violence" as defined in 34 U.S.C. 12291(a)(8), or "stalking" as defined in 34 U.S.C. 12291(a)(30).

General Obligations under Title IX

Jurisdiction: where and when harassment occurs

- ▶ Must have occurred within the United States
- ▶ Buildings or other locations that are part of the school's operations, including remote learning platforms;
- ▶ Off-campus settings if the school exercised substantial control over the respondent and the context in which the alleged sexual harassment occurred (e.g., a school field trip to a museum);
 - For more information on how a school can determine whether it has substantial control over the respondent and context in an off-campus setting)
- ▶ Off-campus buildings owned or controlled by a student organization officially recognized by a postsecondary school, such as a building owned by a recognized fraternity or sorority.

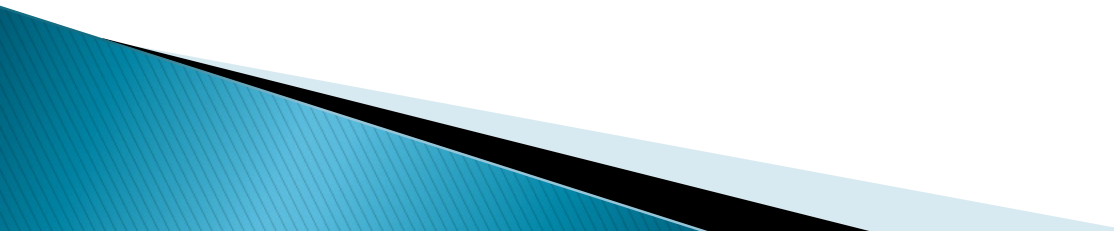
Notice of the District's Policy

- ▶ OCR also has historically explained that a grievance procedure cannot be prompt or equitable unless students know it exists, how it works, and how to file a complaint.
- ▶ Thus, the procedures should be written in language appropriate to the age of the school's students, easily understood, and widely disseminated.

What Constitutes Notice?

- ▶ “Actual knowledge means notice of sexual harassment or allegations of sexual harassment to a recipient’s Title IX Coordinator or any official of the recipient who has authority to institute corrective measures on behalf of the recipient, or to any employee of an elementary and secondary school.
 - Imputation of knowledge based solely on vicarious liability or constructive notice is insufficient to constitute actual knowledge.
 - This standard is not met when the only official of the recipient with actual knowledge is the respondent.
 - The mere ability or obligation to report sexual harassment or to inform a student about how to report sexual harassment, or having been trained to do so, does not qualify an individual as one who has authority to institute corrective measures on behalf of the recipient.
 - “Notice” as used in this paragraph includes, but is not limited to, a report of sexual harassment to the Title IX Coordinator as described in § 106.8(a).” (Title IX Final Rule)

What Triggers an Institution's Response

- ▶ A recipient with actual knowledge of sexual harassment in an education program or activity of the recipient against a person in the United States, must respond promptly in a manner that is not deliberately indifferent.
 - ▶ A recipient is deliberately indifferent only if its response to sexual harassment is clearly unreasonable in light of the known circumstances. §106.44(a)
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Obligation to Provide Supportive Measures: Actual Knowledge, With or Without Formal Complaint

- ▶ The Title IX Coordinator must promptly contact the complainant to discuss the availability of supportive measures as defined in § 106.30, 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 to the complainant the process for filing a formal complaint. §106.44(a)

Supportive Measures

- ▶ Supportive measures means nondisciplinary, non-punitive individualized services offered as appropriate, as reasonably available, and without fee or charge to the complainant or the 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 recipient's education program or activity without unreasonably burdening the other party, including measures designed to protect the safety of all parties or the recipient's educational environment, or deter sexual harassment.
- ▶ The recipient must maintain as confidential any supportive measures provided to the complainant or respondent, to the extent that maintaining such confidentiality would not impair the ability of the recipient to provide the supportive measures.
- ▶ The Title IX Coordinator is responsible for coordinating the effective implementation of supportive measures.

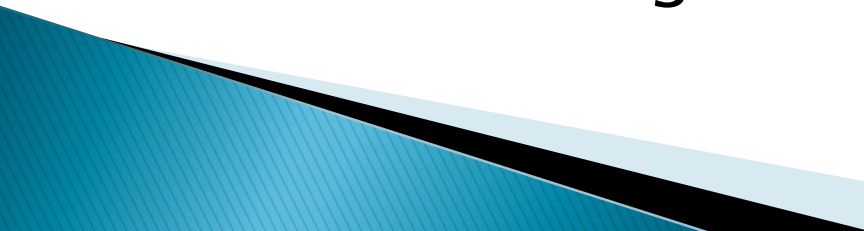
What Supportive Measures Include

- ▶ Supportive measures 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, and other similar measures.

Emergency Removal

Nothing in this part precludes a recipient from removing a respondent from the recipient's education program or activity on an emergency basis, provided that the recipient undertakes an individualized safety and risk analysis, determines that an immediate threat to the physical health or safety of any student or other individual arising from the allegations of sexual harassment justifies removal, and provides the respondent with notice and an opportunity to challenge the decision immediately following the removal. This provision may not be construed to modify any rights under the Individuals with Disabilities Education Act, Section 504 of the Rehabilitation Act of 1973, or the Americans with Disabilities Act. §106.44 (c)

General Requirement of Grievance Procedures

- ▶ Equitable Treatment
 - ▶ Objective Evaluation of Relevant Evidence
 - ▶ No conflicts of interest or bias
 - ▶ Presumption of not responsible
 - ▶ Prompt timeframe (reasons for delay)
 - ▶ Describe Range of Sanctions and Remedies
 - ▶ Describe Standard of Evidence
 - ▶ Describe Mandatory Appeals Process and Bases for Appeals
 - ▶ Describe Range of Supportive Measures
- 

Obligation to Initiate a Formal Grievance Process: Formal Complaint

- ▶ In response to a formal complaint, a recipient must follow a grievance process that complies with §106.45. at §106.44 (b)(1)

Right of the parties to submit questions

- ▶ The 2020 amendments state that elementary and secondary schools “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 followup questions from each party.”
- ▶ In addition, the decision-maker “must explain to the party proposing the questions any decision to exclude a question as not relevant.”

Retaliation

- ▶ “No recipient or other may intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by title IX or this part, or because the individual has made a report or complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing under this part.” § 106.71
- ▶ This does not include the exercise of rights under the First Amendment.
- ▶ Charging an individual with a code of conduct violation for making a materially false statement in the course of grievance proceeding does not constitute retaliation.

Relevance

- ▶ The recipient's grievance process must require an objective evaluation of all relevant evidence—including both inculpatory and exculpatory evidence—and provide that credibility determinations may not be based on a person's status as a complainant, respondent, or witness;
- ▶ Questions and evidence about the complainant's sexual predisposition or prior sexual behavior are 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,
 - or 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.

Determination/Standard of Proof

- ▶ Under the Title IX Rule, the grievance process must state the standard of evidence or proof to be used to determine responsibility
 - Framingham Public Schools uses the preponderance of the evidence standard.
 - The preamble explains that the preponderance-of-the-evidence standard means the decision-maker must determine whether alleged facts are more likely than not to be true. (July 2021 Q&A)
- ▶ For additional information, please see 34 C.F.R. § 106.45(b)(1)(vii).

Remedial Measures

- ▶ “Remedies must be designed to restore or preserve equal access to the recipient’s education program or activity.” (34 C.F.R. § 106.45(b)(1)(i))
- ▶ Remedial measures can be a continuation of supportive measures
 - May be disciplinary or punitive; and
 - Need not avoid burdening the respondent.
- ▶ Following a determination of responsibility, the district is free to set the remedial measures it deems appropriate.

Notice of Resolution

- ▶ The recipient must provide the written determination to the parties simultaneously.
- ▶ The determination regarding responsibility becomes final either on the date that the recipient provides the parties with the written determination of the result of the appeal, if an appeal is filed, or if an appeal is not filed, the date on which an appeal would no longer be considered timely.

What must the notice of resolution include under Title IX?

- ▶ Identification of the allegations potentially constituting sexual harassment as defined in § 106.30;
- ▶ A description of the procedural steps taken from the receipt of the formal complaint through the determination;
- ▶ Findings of fact supporting the determination;
- ▶ Conclusions regarding the application of the recipient's code of conduct to the facts;
- ▶ A statement of, and rationale for, the result as to each allegation, including a determination regarding responsibility, any disciplinary sanctions the recipient imposes on the respondent, and whether remedies designed to restore or preserve equal access to the recipient's education program or activity will be provided by the recipient to the complainant; and
- ▶ The recipient's procedures and permissible bases for the complainant and respondent to appeal.

Parent/Guardian Rights

- ▶ The 2020 amendments permit a parent or legally authorized guardian to act on behalf of the complainant or respondent.
- ▶ Whether a parent or guardian has the legal right to act on behalf of a complainant or respondent “would be determined by State law, court orders, child custody arrangements, or other sources granting legal rights to parents or guardians.”
- ▶ If a parent or guardian has a legal right to act on a complainant or respondent’s behalf, this authority applies throughout all aspects of the Title IX matter, including throughout the grievance process.

Time Frames

- ▶ The 2020 amendments require that a school's grievance process for formal complaints of sexual harassment include reasonably prompt time frames for concluding the process, including filing and resolving appeals and for any informal resolution processes the school offers.
- ▶ Note: no part of the process may be subject to an open-ended time frame.
- ▶ The institution has discretion to set its own time frames, and must resolve the grievance procedure in the time frame it sets.
- ▶ The reasonableness of the time frame depends on the context of the educational program or activity.
- ▶ A temporary delay of the grievance process or the limited extension of time frames, is permitted, with good cause, 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.

Case Law

Considerations for Investigations

Caselaw: Monetary Relief Available Under Title IX

**Franklin v Gwinnett County Public Schools, 503
U.S. 60 (1992)**

- ▶ Supreme Court rules unanimously that plaintiff's filing Title IX lawsuits are entitled to receive punitive damages when intentional action to avoid Title IX compliance is established.

Caselaw: Actual Notice of Harassment

Gebser v. Lago Vista (1997)

- ▶ The question in this case is when a school district may be held liable in damages in an implied right of action under Title IX for the sexual harassment of a student by one of the district's teachers.
- ▶ "We conclude that damages may not be recovered in those circumstances unless an official of the school district who at a minimum has authority to institute corrective measures on the district's behalf has actual notice of, and is deliberately indifferent to, the teacher's misconduct."

Deliberate Indifference

Davis v Monroe County Board of Education, 526 US 629 (1999)

- ▶ case in which the U.S. Supreme Court on May 24, 1999, ruled that, under Title IX, **school boards are liable for failing to stop student-on-student sexual harassment under certain circumstances.**
- Deliberate Indifference A recipient is deliberately indifferent only if its response to sexual harassment is clearly unreasonable in light of the known circumstances. §106.44(a)

Framingham Policy

Framingham Public Schools– ACAB Policy

POLICY AND GRIEVANCE PROCEDURE FOR DISCRIMINATION, INCLUDING HARASSMENT AND RETALIATION

Online Policy Manual at:

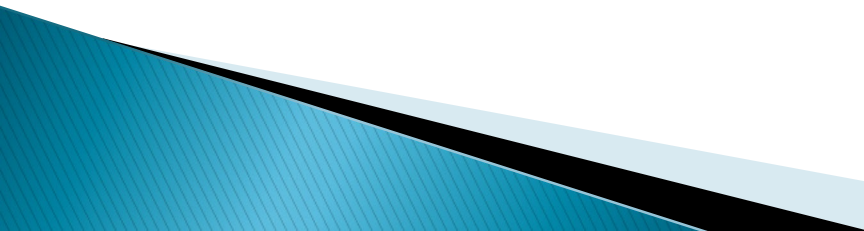
https://z2policy.ctspublish.com/masc/browse/framinghamset/framingham/ACAB/z2Code_ACAB

ACAB Policy

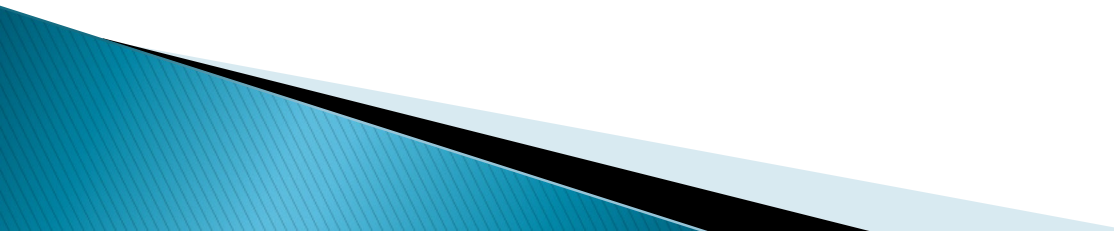
- ▶ It is the policy of the Framingham School Committee to maintain a **work and education environment in the Framingham Public Schools that is free of discrimination, including harassment**, based on race, color, national origin, ancestry, age, gender *[Sex]*, sexual orientation, gender identity, religion, disability, veteran's status, or any other status protected by federal or state law.
- ▶ The Framingham Public Schools **will not tolerate unlawful discrimination, sexual harassment** and other forms of harassment.

Respond Promptly and Equitably

The Framingham School Committee takes allegations of discrimination, including harassment and retaliation, seriously.

- ▶ The District will **respond promptly and equitably to all complaints or reports that a violation of this policy has occurred.**
 - ▶ Where a violation is found, the Framingham Public Schools will take **appropriate disciplinary and corrective action to eliminate the conduct and prevent its reoccurrence.**
- 

DEFINITIONS: Discrimination

- ▶ 1. "**DISCRIMINATION**" means interfering with or preventing a student from enjoying the advantages, privileges or courses of study of a school, or discriminating against an employee in compensation or in terms, conditions or privileges of employment, because of that person's race, color, national origin, ancestry, sex, sexual orientation, gender identity, disability or religion, or any other status as protected under state and federal nondiscrimination laws.
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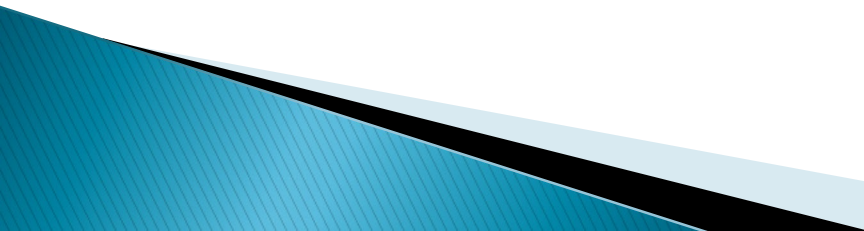
DEFINITIONS: Harassment

- ▶ 2. "**HARASSMENT**" means unwelcome or inappropriate verbal, written, electronic or physical conduct relating to an individual's actual or perceived race, color, national origin, ancestry, sex, sexual orientation, gender identity, disability or religion that creates a hostile environment for the individual.
- ▶ A hostile environment is created when the conduct is sufficiently severe, persistent or pervasive so that it interferes with or limits the ability of a student to participate in or benefit from the district's programs, or the ability of an individual to work in the Framingham Public Schools.

Examples– Hostile Environment

- ▶ Below are examples of violations of this Policy in circumstances where the verbal, written, electronic or physical conduct has the purpose or effect of creating a hostile environment:
 - ▶ **"SEXUAL HARASSMENT"** is unwelcome or inappropriate conduct of a **sexual nature**. It includes unwelcome sexual advances, requests for sexual favors and other verbal, non-verbal, electronic or physical conduct of a sexual nature.
 - ▶ **"SEXUAL HARASSMENT"** also means any sexual advances, requests for sexual favors and other verbal or physical conduct of a sexual nature **when such advances, requests or conduct has the purpose or effect of unreasonably interfering with an individual's work or education** by creating an intimidating, hostile, humiliating or sexually offensive work or educational environment.
 - ▶ **"SEXUAL HARASSMENT"** also includes acts of verbal, non-verbal or physical aggression, intimidation or hostility **based on sex or sex-stereotyping, even if those acts do not involve conduct of a sexual nature.**

Quid Pro Quo Sexual Harassment

- ▶ **"QUID PRO QUO SEXUAL HARASSMENT"** means any sexual advances, requests for sexual favors and other verbal or physical conduct of a sexual nature when:
 - ▶ (1) submission to or rejection of such advances, requests or conduct is made either explicitly or implicitly a term or condition of the provision of the benefits, privileges or placement services for a student or as a basis for evaluation of academic achievement; or
 - ▶ (2) submission to or rejection of such advances, requests or conduct is made either explicitly or implicitly a term or condition of employment or as a basis for employment decisions.
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Jurisdiction– Section III, ACAB Policy

- ▶ This policy applies to **all sites and activities** the Framingham Public Schools **supervises, controls, or where it has jurisdiction under the law,**
 - including on school grounds;
 - on property immediately adjacent to school grounds;
 - at school-sponsored or school-related activities; at functions or programs whether on or off school grounds;
 - at school bus stops; on school buses or other vehicles owned, leased or used by the school district;
 - or through the use of technology or an electronic device owned, leased or used by the Framingham Public Schools.

Jurisdiction Cont.


- ▶ This policy also applies to conduct at a location, activity, function or program that is not school-related or through the use of technology or an electronic device that is not owned, leased or used by the Framingham school district
 - if the act or acts in question create a hostile environment at a school;
 - infringe on the rights of others at a school;
 - and/or materially and substantially disrupt the education process or the orderly operation of a school or school-sponsored activity or event.

Reporting Harassment

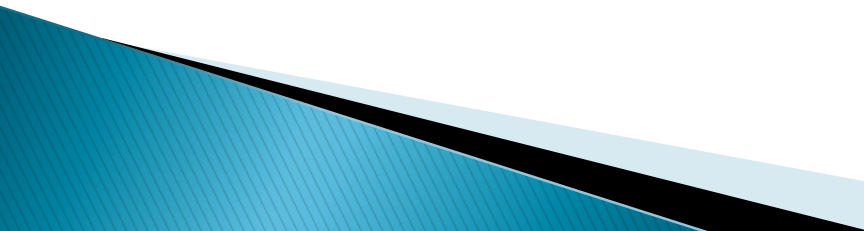
- ▶ Any Framingham Public Schools employee, volunteer or independent contractor who witnesses, receives a complaint or report of, or has knowledge or belief that a student, employee or volunteer has been the subject of discrimination, including harassment or retaliation, ...
 - (a) shall inform the principal or designee, or the District Title IX/Equity Coordinator, as soon as possible, but by no later than the end of that school day, and
 - (b) shall also transmit a written report to the principal or designee by no later than the beginning of the next school day.

Reporting Harassment

▶ **STUDENT REPORTING**

- ▶ to the principal or designee, or the District Title IX/Equity Coordinator OR to any school or district employee.
 - ▶ report the act(s) within one hundred twenty (120) calendar days of the alleged occurrence, or from the date the student reasonably becomes aware of the occurrence. The reporting time may be extended for good cause.
 - ▶ The Principal or designee shall immediately notify the District Title IX/Equity Coordinator of the complaint or report.
 - ▶ If the complaint or report is against a building Principal, it shall be filed directly with the District Title IX/Equity Coordinator or designee.
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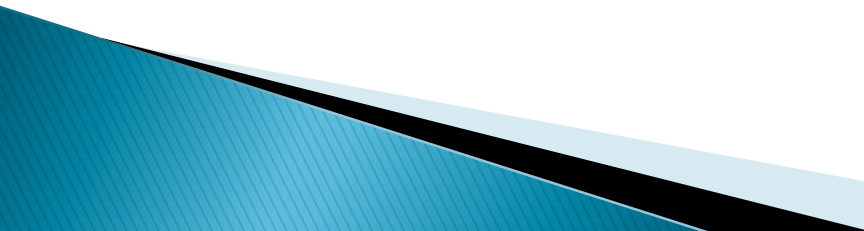
Grievance Procedure

- ▶ Complaint Against Student: the Principal, or designee shall commence investigation, and forward copy of written complaint to Title IX Equity/ Coordinator
 - ▶ Complaint Against School Employee: referred to the Director of HR with copy to Principal or Title IX Equity Coordinator; HR will conduct the investigation in consultation with principal and/or Title IX Equity Coordinator
 - ▶ If Conflict of Interest with the Principal, then Superintendent or Title IX Equity Coordinator shall direct another district employee to conduct the investigation.
- 

Grievance Procedure, Cont.

- ▶ Investigation will proceed even if alleged victim chooses not to fill out written complaint or reporting form
- ▶ Investigation, to extent feasible, will proceed even if identity of alleged victim(s) is unknown or cannot obtain cooperation from alleged victim(s)
- ▶ Notification of parents of alleged victim and perpetrator, within 48 hours of receiving a complaint (consistent with FERPA)
- ▶ Superintendent or Title IX/Equity Coordinator may grant waiver from requirement that parent/guardian be notified (if in the best interest of the alleged victim or perpetrator, such as place the student at risk)

Formal or Informal Process

- ▶ After receiving a complaint or report, Principal (or designee) will determine if resolving complaint through Formal or Informal Procedure.
 - ▶ INFORMAL: only application for allegation of other prohibited conduct (Section II) and where parties agree to participate.
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Formal Resolution Procedure

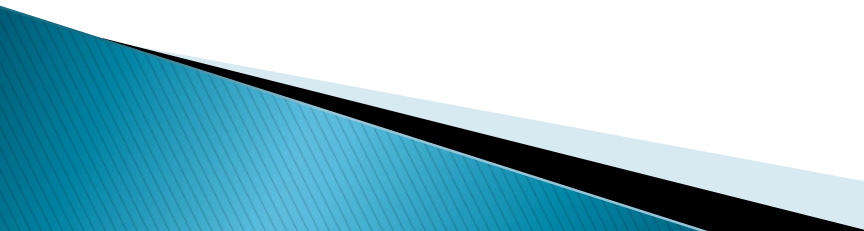
Applies if:

- 1) Complaint or report involves severe, persistent or pervasive harassment or other serious form of discrimination or retaliation
- 2) If there is a pending Formal Resolution Procedure against the alleged perpetrator
- 3) Alleged perpetrator has been previously found to have violated this policy after Formal resolution procedure
- 4) Alleged conduct involves physical harm to a person (serious enough that it may place a person at physical risk)
- 5) Incident has resulted in criminal charges
- 6) Alleged perpetrator is an employee, volunteer or independent contractor
- 7) Involved a referral to MA Dpt of Children and Families
- 8) other otherwise deemed appropriate under the circumstances

Informal Resolution Procedure

- ▶ Meeting separately with the parties (no later than 2 school days from receipt of complaint or report)
 - 1) review and explain the procedures/ answer questions
 - 2) Explain prohibition against retaliation
- ▶ Volunteer Resolution
 - 1) If appropriate, after completing information gathering or investigation needed to reach a voluntary resolution, Principal will propose resolution
 - 2) The primary focus of the voluntary resolution is to effectively correct the problem and end the reported conduct, which may include and result in disciplinary action.
- ▶ Failure of Volunteer Resolution

C. FORMAL RESOLUTION PROCEDURE

- ▶ 1. Meeting Separately with Parties
 - ▶ 2. Prompt Investigations (initiated no later than 2 school days after report)
 - ▶ 3. Investigative Activities
 - ▶ 4. Communication During Investigation
 - ▶ 5. Interim Measures to Protect Safety
 - ▶ 6. Victim Assistance
 - ▶ 7. Confidentiality
 - ▶ 8. Findings and Recommendations
 - ▶ 9. Basis for Determining Whether Policy Violated (Preponderance)
 - ▶ 10. Reporting Substantiated incidents to Superintendent
 - ▶ 11. Communication with Parties Upon Completion of Investigation
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DISCIPLINARY CONSEQUENCES

IMPOSING DISCIPLINE ON STUDENTS:

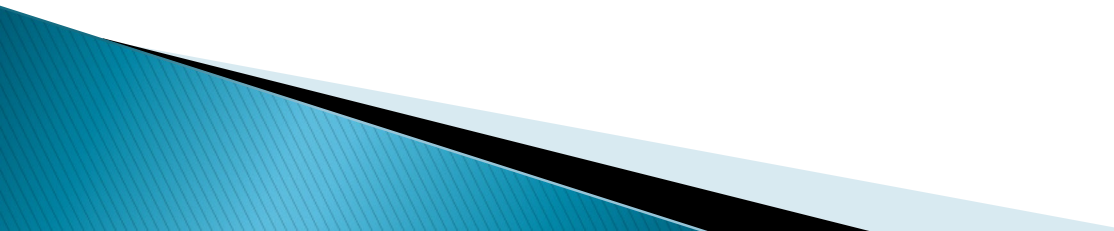
- Written warning
- Short-term or long-term suspension/ expulsion
- Or other action consistent with School Handbook and Code

DISCIPLINE FOR STUDENTS WITH DISABILITIES:

Must comply with IDEA and Section 504



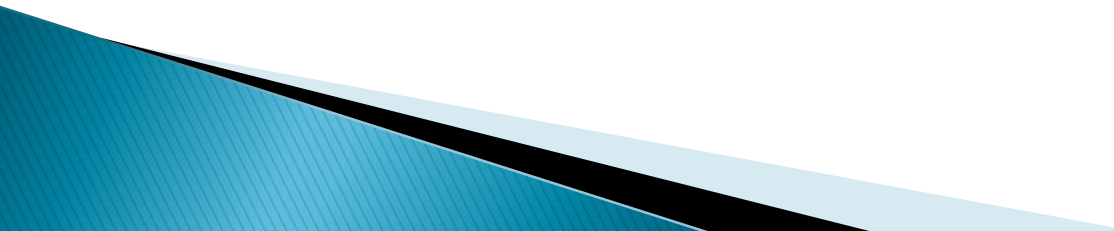
APPLYING CORRECTIVE MEASURES FOR STUDENTS

- Safety plan
 - Classroom transfer
 - Denying access to school sponsored functions
 - Denying access to areas of a school
 - Increased adult supervision
 - Non-contact orders
 - Parent/Guardian conferences
 - Voluntary apology
 - Counseling
 - Awareness training
- 

PREVENTION AND REMEDIATION

Reasonably calculated to remedy the effects of discrimination, including harassment, and retaliation, on the victim and the school community and provide a safe school climate.

Remedial Action:

- Counseling
 - Victim assistance services
 - Tutoring
 - Special Education support for students with disabilities
 - Modifying school-wide policies or practices
 - Sponsoring anti-harassment/discrimination training
 - Informing broader community of issues that affect it as a whole
- 

APPEALS

- ▶ **1. FIRST LEVEL APPEAL FOR THE COMPLAINANT:** The complainant may appeal the investigative determination, or the corrective or remedial action taken for him/her, if any, to the principal or designee within ten (10) calendar days of receipt of notice of the determination. The principal or designee will review the case and determine whether to reopen the investigation. Written notice of the principal or designee's decision shall be provided to the complainant within ten (10) calendar days of the filing of the appeal, except for good cause, as documented in writing.
- ▶ **2. SECOND LEVEL APPEAL FOR THE COMPLAINANT:** The complainant may appeal, in writing, the principal or designee's decision to the Superintendent or designee within ten (10) calendar days. The Superintendent or designee shall review the case and determine whether to reopen the investigation. Written notice of the decision shall be provided to the complainant within ten (10) calendar days of the filing of the appeal, except for good cause, as documented in writing.
- ▶ **3. APPEAL FOR THE PERPETRATOR:** A student disciplined under this policy is referred to the student code of conduct, and for employees, applicable collective bargaining agreements; and for students and employees, to applicable federal and Massachusetts state laws.

OTHER LEGAL REMEDIES

“At any time, whether or not an individual files a complaint or report under this policy, an individual may file a complaint with the Office for Civil Rights, U.S. Department of Education, or with other governmental agencies, or may initiate a civil action.”

- ▶ EEOC
- ▶ DESE, Program Quality Assurance

Retaliation– Prohibited

The Framingham School Committee also treats retaliation as a form of discrimination. Retaliation as defined by this policy is prohibited.

"RETALIATION" means an **adverse action** against any person for opposing any act or practice reasonably believed to be discriminatory as prohibited by applicable law and/or this policy, or for reporting or filing a complaint, for aiding or encouraging the filing of a report or complaint, or for cooperating in an investigation of discrimination, including harassment or retaliation [*Protected Activity*].

Retaliatory acts include overt or covert acts of reprisal, interference, punishment or harassment against an individual or group.



Title IX Investigations

Initial Steps



As Soon as Complaint Is Received – Consider Supportive Measures

- ▶ Safety Measures
- ▶ Academic Support
- ▶ Work Accommodations
- ▶ Counseling
- ▶ Others specific to Framingham Public Schools?

Documentation in Investigations

– Some Types

- ▶ Case plan
 - Should be updated throughout investigation
- ▶ Interview notes
- ▶ Evidence gathered
- ▶ Report of findings
- ▶ Internal communication
- ▶ Communication with parties and witnesses

Documentation – Considerations

- ▶ Accurate and thorough documentation is essential. The case file:
 - May not be protected by attorney–client privilege
 - May be subject to discovery requests; and
 - May be an exhibit in Framingham Public Schools’ defense against a future claim

Developing a Case Plan

Developing a Case Plan

▶ Policies

- Identify and review all relevant policies.
- Identify elements that will need to be met to constitute a violation.
- Treat each allegation separately.
- Treat each separate physical act separately, even if described as one incident.

▶ Time frames

- Expected time frame of investigation?

Developing a Case Plan (cont'd)

▶ Planning interviews

- Who will you interview: Is the person relevant? Will interviewing them impact either party?

▶ Order of interviews

- Any reason not to interview the complainant first? Respondent second?
- Any concern that certain individuals will talk to each other? How can that be handled?
- Usual practice is to conduct second interviews with parties after you have spoken with all witnesses

▶ Other Evidence

- What other information will be useful in making a determination in the case?

Conducting Interviews



Logistics

- ▶ How to conduct the interview – Generally in person
- ▶ Schedule more time than you think you need
 - Reduces time and disruption from calling/emailing with follow-up questions
 - How much time is too much?
- ▶ Start on time
- ▶ Take all necessary steps to protect privacy
 - Think about location of interviews
 - Be careful of notes/paperwork that you keep out during investigations
 - Avoid interviewees seeing each other

Interview Plan

- ▶ Have a clear vision of the interview goals
 - Generally, to secure the best information possible
 - Specifically, to obtain answers to the questions material to the case
- ▶ Be aware of the types of information you might obtain:
 - First hand, second hand, or third hand information regarding actions
 - Information about possible motives or attitudes
 - Interpretation of written documentation
 - New sources of documentation

Planning Interviews

- ▶ Create a list of questions for each interviewee (who, what, where, when, why).
 - Questions should help determine whether respondent has violated your policy
- ▶ Take care not to make assumptions about what the interviewee knows

Planning Interviews

- ▶ Be conscious of the sequence of your questions and the effect on the flow of the interview
- ▶ The sequence of questions can be used in different ways:
 - As a tool to orient the witness
 - To cushion difficult questions amidst less provocative lines of questioning
- ▶ Be prepared to deviate from your script

Key Information to Share (generally at the start of the interview)

- ▶ Share, in general terms, the purpose of the investigation (*e.g.*, “to determine whether there has been a violation of school policy”)
- ▶ Provide information about interviewer’s role
- ▶ Discuss confidentiality and privacy
 - Inform individuals how you will use the information provided and with whom it will be shared.
 - Explain difference between confidentiality and privacy.
 - Do not promise confidentiality.
- ▶ Discuss retaliation
 - Protection from and prohibition against
 - Applies to all individuals involved in the matter

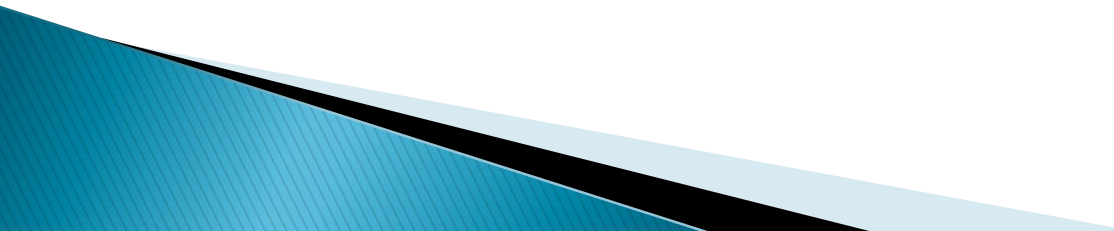
Key Information to Share (cont'd)

- ▶ Share information about case process
- ▶ For respondent, ensure he or she understands the allegations that have been made
- ▶ For witnesses, provide only as much information as is necessary to elicit needed information

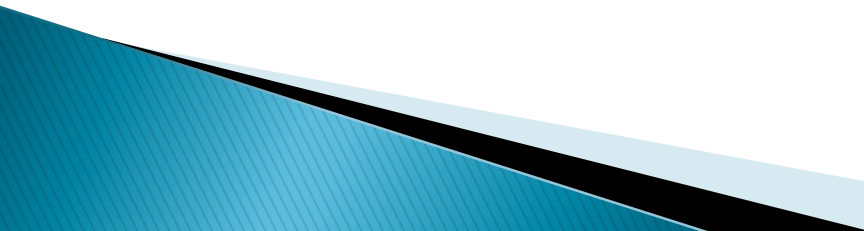
Key Information to Share (cont'd)

- ▶ Explain relevant amnesty protections, if appropriate
- ▶ When sharing information:
 - Use clear, simple statements
 - Encourage the interviewee to ask questions if they need more information or clarity

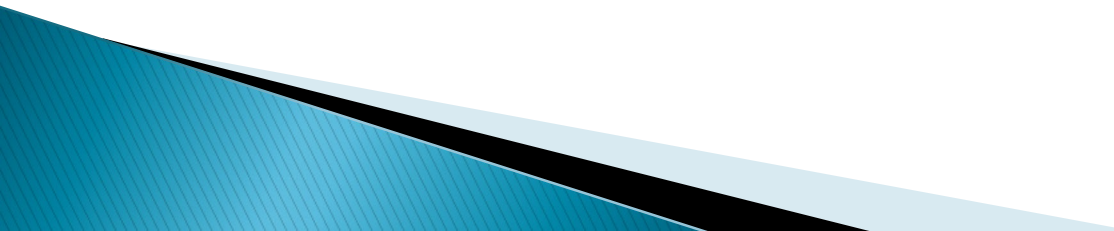
Managing Expectations

- ▶ When sharing information about case process, set realistic expectations about communication and timeframes
 - ▶ Do not make promises about results or what will be done
 - ▶ You can appear understanding, but at every step of the way, you need to maintain an unbiased role – neither party should expect that you are there to push their account
- 

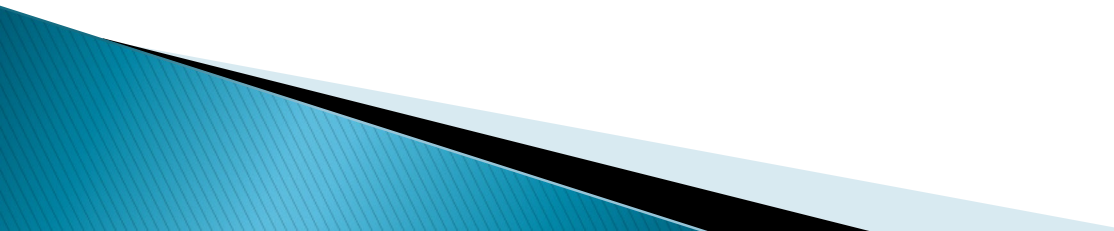
Taking Notes

- ▶ Decide how you will take notes.
 - ▶ Be conscious of the effect of notetaking on the interview process
 - Can make the witness feel you are not truly listening
 - Can make the witness feel “put on the spot”
 - Can distract the interviewer from listening attentively and forming follow-up questions
 - ▶ Notes should accurately summarize questions and responses
 - ▶ Note the witness’s words as accurately as possible.
 - ▶ Do not guess, interpret, or infer.
 - ▶ Carefully note conditional wording (“I think,” “Kind of”).
 - ▶ Note demeanor, but distinguish from responses.
- 

Vocabulary

- ▶ Use vocabulary appropriate to the age and understanding of the witness
 - ▶ Define legal terms in understandable language
 - ▶ Avoid jargon and acronyms unless you know the witness is comfortable with them
 - ▶ Ask questions to determine how an interviewee understands key terms, including idioms
 - ▶ For sexual terms in particular, ask interviewee to define
 - ▶ In general, adapt to the witness's terminology
- 

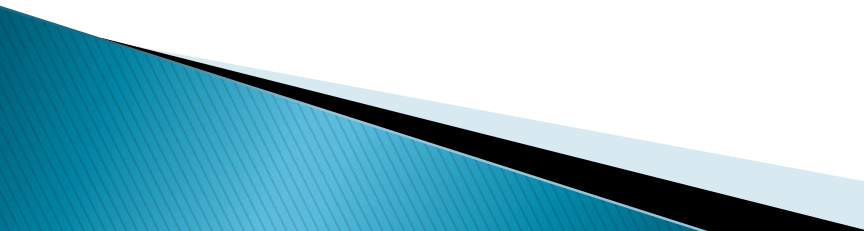
Obtaining Detailed Accounts

- ▶ Offer interviewees an opportunity to tell their story in narrative form
 - ▶ Try not to interrupt
 - ▶ Be prepared to prompt or focus the interviewee if needed
- 

Obtaining Detailed Accounts (cont'd)

- ▶ Focusing the interview:
 - Direct the interview by responding to relevant comments and paying less attention to irrelevant comments
 - Interrupt tactfully when necessary
- ▶ Be prepared to follow up after listening to obtain as much detail as possible

Effective Questioning

- ▶ Keep questions short
 - ▶ Avoid compound questions
 - ▶ In general, ask open-ended questions
 - ▶ Clarify with direct questions
 - ▶ Avoid judgmental questions
 - ▶ Don't shy away from asking difficult questions, but be mindful of emotional impact
 - ▶ Use silence as a tool
- 

Effective Follow Up

- ▶ Use follow-up questions to:
 - clarify important information
 - develop underlying facts and details
 - test contradictions
 - find out the factual basis for an opinion
 - check degree of certainty and accuracy of quotes
 - obtain better evidence when an interviewee's answers are vague or conditional
 - assess consistency of answers
- ▶ Follow up rather than making assumptions

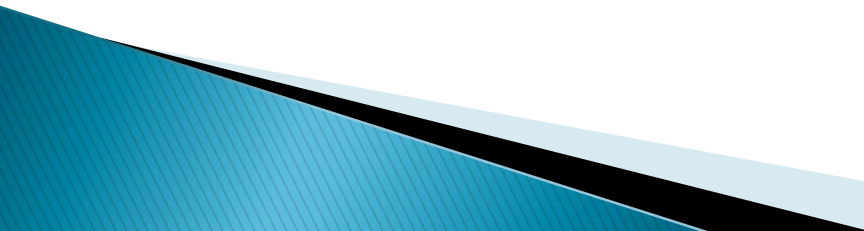
Effective Follow Up (cont'd)

- ▶ Ask for documentation
 - If interviewee has computer or phone with him/her, review any relevant texts or emails
 - Ask the interviewee to forward you copies of messages, during the interview, if possible
 - If there is ongoing communication, try to obtain the full set of messages, not just selected items
- ▶ Ask about other witnesses
 - Obtain names and contact information, if available
 - Ask questions to help determine the relevance of what the witness might have to say

Problem solving

- ▶ Not getting an answer
 - Explain what you are trying to understand but aren't hearing ("I still don't understand ___").
 - Restate the question.
- ▶ A concern someone may be lying
 - Seek ways to verify information provided.
 - e.g. FB, texts, conversation with friends, planner, journal.
 - Probe veracity (e.g. is there a reason/motive that individual might lie?).
 - Address motivation if possible – Fear? Embarrassment? Protectiveness? – and restate the importance of candor.

Problem solving (cont'd)

- ▶ Interviewee is responding negatively
 - Remain calm, take stock of your role, and don't take it personally
 - Listen closely and watch non-verbal cues to gauge total message.
 - Try to identify the source of the problem, and if appropriate, acknowledge your understanding of the problem in simple terms
 - If appropriate, back away from a controversial subject and return to it when the witness has regained composure
- 

Problem Solving (cont'd)

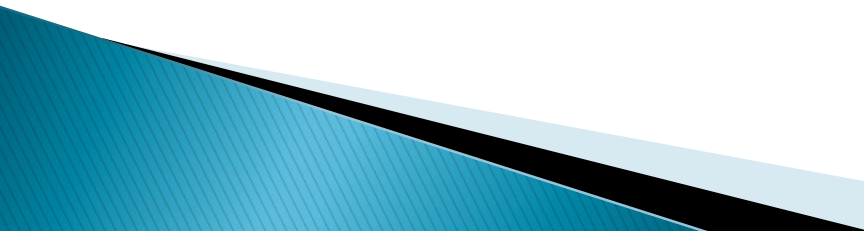
- ▶ You are responding negatively
 - Be aware of your response and what might be generating those feelings
- ▶ Avoid judging, psychoanalyzing, or lecturing

Problem solving (cont'd)

- ▶ **Uncooperative Interviewee**
 - Focus on underlying interests and engage the interviewee in seeking solutions

- ▶ **Overly Cooperative Interviewee**
 - Some witnesses may be highly susceptible to influence, even in the interview process
 - Avoid suggestive, directive, or leading questions
 - Follow up in a variety of ways to obtain unfiltered facts
 - Stress the value of the interviewee's candid, objective assessment

Problem solving (cont'd)

- ▶ Sensitive topics
 - Acknowledge that some topics are difficult to discuss
 - ▶ Dealing with Difference
 - Be cognizant of differences such as cultural background, gender identification, and disability
 - Recognize layers of concerns involved in participation in the process and engagement with underlying facts
 - Show sensitivity by mirroring language and using active listening
- 

Trauma

- ▶ Who can experience trauma?
 - Anyone
 - Can be from events involved in the case or prior events, e.g., triggering
- ▶ How could it impact what is contained in the report?
- ▶ Be mindful not to assume credibility solely based on trauma.
 - Trauma awareness does not mean that a different standard is used to assess the account of a complainant as compared to other witnesses

Bias

- ▶ Bias is something we all have in some way. It is our brains interpret and categorize information.
- ▶ How does it come into the process of interviewing and/or making a determination?
- ▶ How do beliefs/biases about sexual misconduct come into play?
- ▶ How might you minimize the effects of bias?

Interviewing – Concluding

- ▶ Before you end the interview:
 - Ask whether interviewee has other information he/she wants to share with you.
 - Ask whether he/she has any other documentation relevant to the case.
 - Ask whether there is anyone else the interviewee believes it would be important for you to interview.
 - Advise the interviewee not to share anything gleaned from this interview with other parties or witnesses.
 - Discuss the likelihood of additional interviews (especially for the parties)
 - Double-check to make sure you have answers to all your questions!

After an Interview

- ▶ Consider preparing a chronology of events as soon as possible after interviews. If you have many interviews over several days, it may be helpful to do this after each day of interviews.
- ▶ Conduct follow-up calls/emails as soon as possible, if necessary.
- ▶ Keep track of information outstanding, to ensure it's obtained.
- ▶ Ensure notes are clear and legible.

Creating a Report

Documenting the Results of the Investigation

Creating a Report

A thorough report should contain:

- ▶ the allegation(s).
- ▶ identification of parties, advisors, witnesses, as appropriate.
- ▶ dates of interviews and actions taken.
- ▶ a description of the investigator's attempt to interview parties/witnesses who declined to participate.
- ▶ A description of documents examined.
- ▶ A description of the investigator's attempt to obtain documents or physical evidence that was not obtained.

Creating a Report (cont'd)

A thorough report should contain (cont'd):

- ▶ a description of the relevant policies.
- ▶ a summary of the factual information presented during the investigation phase
- ▶ a separate section where the investigator(s) point out relevant consistencies or inconsistencies (if any) between different sources of information
 - **Consistency with other sources:** Is interviewee's information consistent with information from other sources?
 - **Internal consistency:** Is the interviewee's information internally consistent?
- ▶ a separate section describing the investigator(s') perception of the demeanor of the individuals interviewed
 - **Demeanor:** Are there clues in language used, demeanor that help show greater credibility

Creating a Report (cont'd)

- ▶ A clear statement regarding whether respondent violated district policy, if applicable.
 - The conclusion must determine whether the information is sufficient to find, by a preponderance of the evidence, that the respondent violated a policy.
 - Contact the Title IX Coordinator or HR Director, if you need assistance making this determination.
 - For student and faculty cases, the matter will go to the appropriate Board.

Reaching a Conclusion

Did a Violation Occur?

Reaching a Conclusion

- ▶ Look back at applicable sections of Policy.
- ▶ Consider all the information.
 - Do not guess at facts
 - Do not make assumptions
- ▶ Apply definitions to your case.
- ▶ Apply preponderance of the evidence.
 - 51 percent or “more likely than not”
 - That a fact exists
 - That a violation of the Policy has occurred
 - Evidence has to meet the 51 percent threshold to result in a finding of responsibility

Reaching a Conclusion, cont'd

- ▶ Do not rush to judgment.
- ▶ Consider the full context of the information you have received.
 - *E.g.*, an apology is not necessarily dispositive
- ▶ Verified facts and uncorroborated information
- ▶ Be proactive in addressing inconsistencies and explanations that appear implausible.
- ▶ Do you think additional information is available and further investigation necessary?
- ▶ Consider the type of evidence and try to weigh it accordingly (*e.g.*, opinion, speculation, hearsay)

Questions?

Scenario