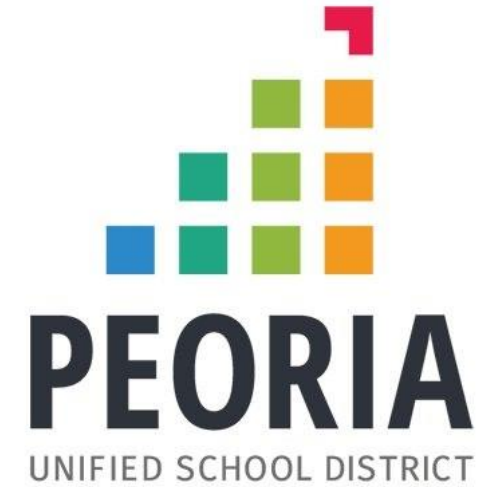


September 13, 2023



Title IX Training: Running an Investigation



UDALL | SHUMWAY
COUNSELORS AT LAW SINCE 1965

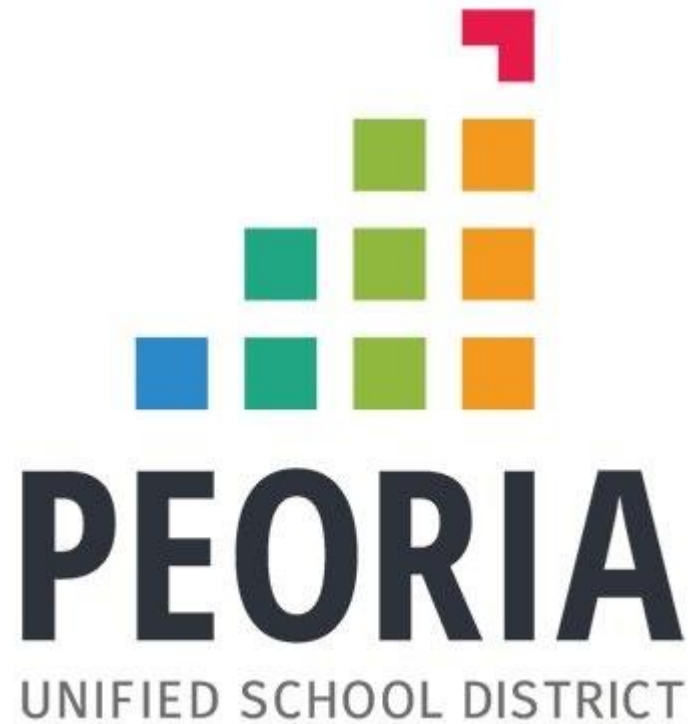
Introductions

Presented by:
Lawton Jackson
Udall Shumway PLC



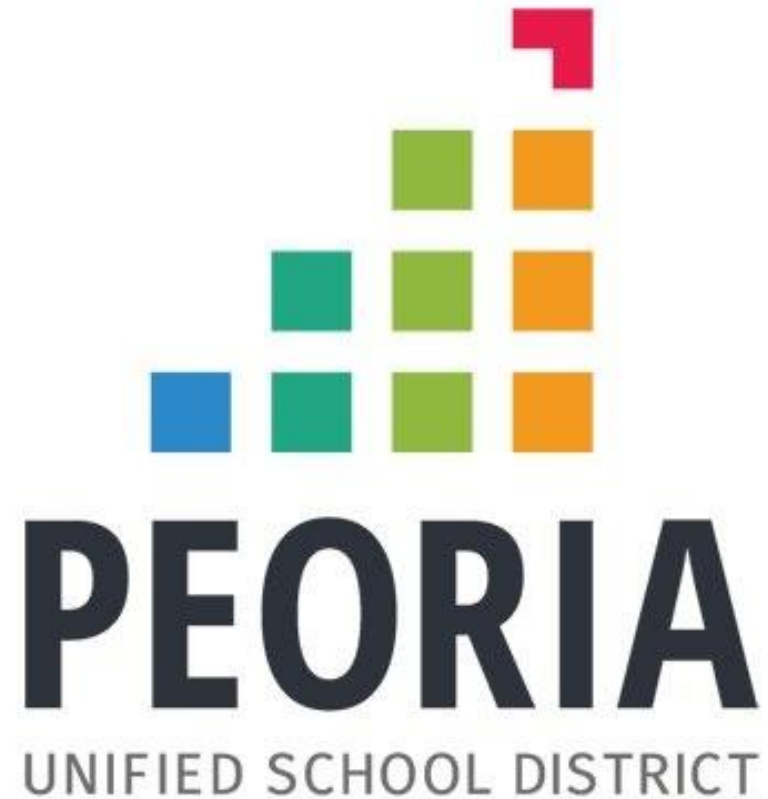
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Title IX Overview & Legal Requirements



Title IX Overview & Legal Requirements

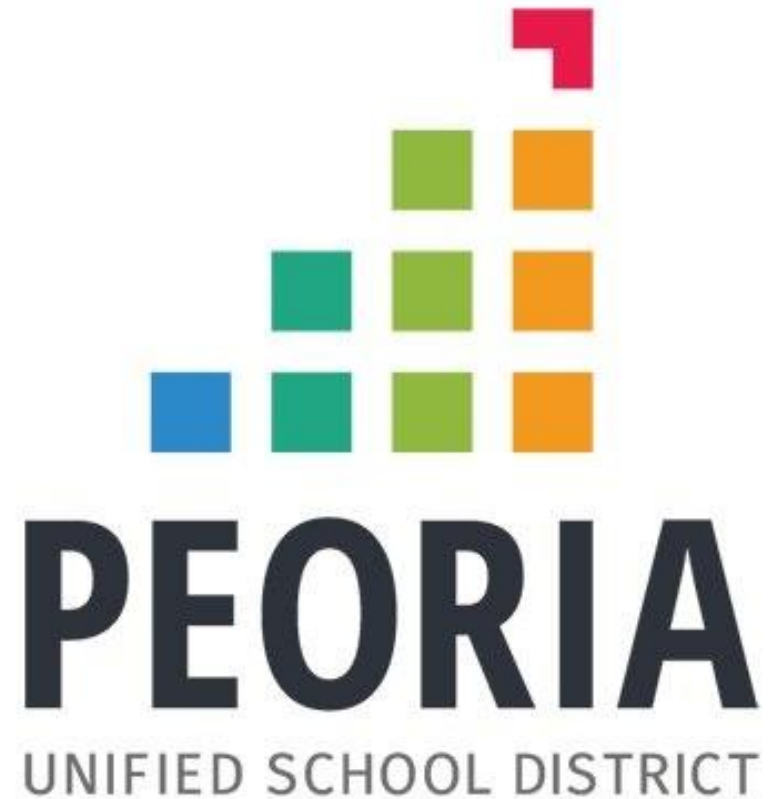
- Title IX states that:
- No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.



District Policies on Title IX and Sexual Harassment (Non-Title IX)

- [Non-Discrimination Policy AC](#)
- [Sexual Harassment \(Non-TIX\) ACA](#)
- [Sexual Harassment \(Non-TIX\) Regulation](#)
- [Sexual Harassment \(Non-TIX\) Exhibit](#)

- [Title IX Policy ACAA](#)
- [Title IX Regulation ACAA-R](#)



When Does a District Violate Title IX?

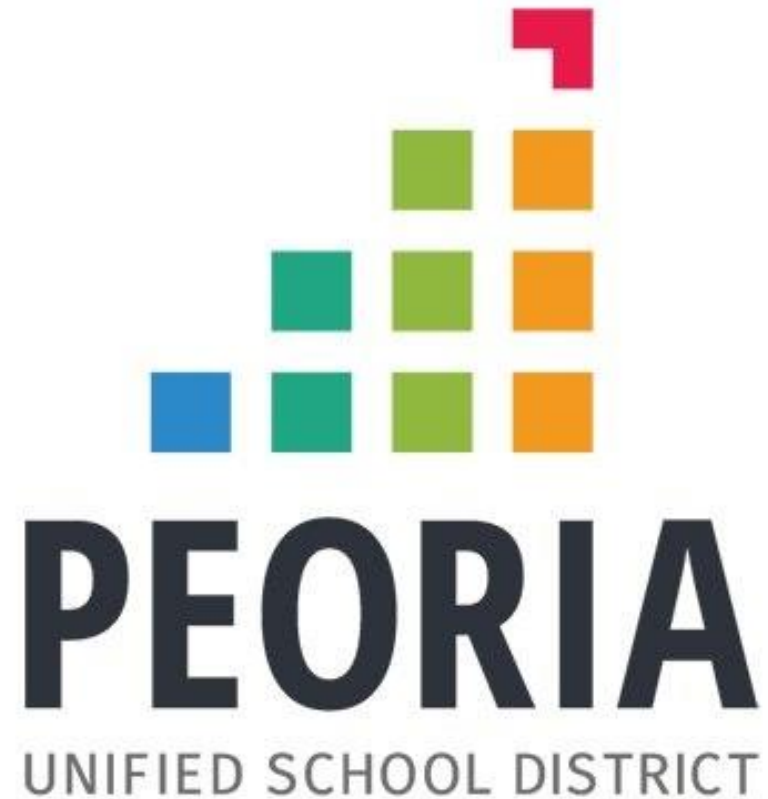
Actual knowledge of an allegation of sexual harassment;

Experienced by an individual in the School's educational program/activity; and

The School acts with deliberate indifference to that notice

AND

When it disciplines an alleged respondent in a "would be" or actual Title IX matter prior to the completion of the grievance process.



Title IX Sexual Harassment: Sexual Harassment = Conduct on the Basis of Sex that is One or More of the Following:



1. A school employee conditions the provision of an aid, benefit, or service of the school on an individual's participation in unwelcome sexual conduct;
2. Unwelcome sexual conduct that a reasonable person would find to be so severe, pervasive, and objectively offensive that it "effectively denies a person equal access" to the school's education program or activity; or
3. Sexual assault, dating violence, domestic violence, or stalking.

Sexual Harassment: Element 1

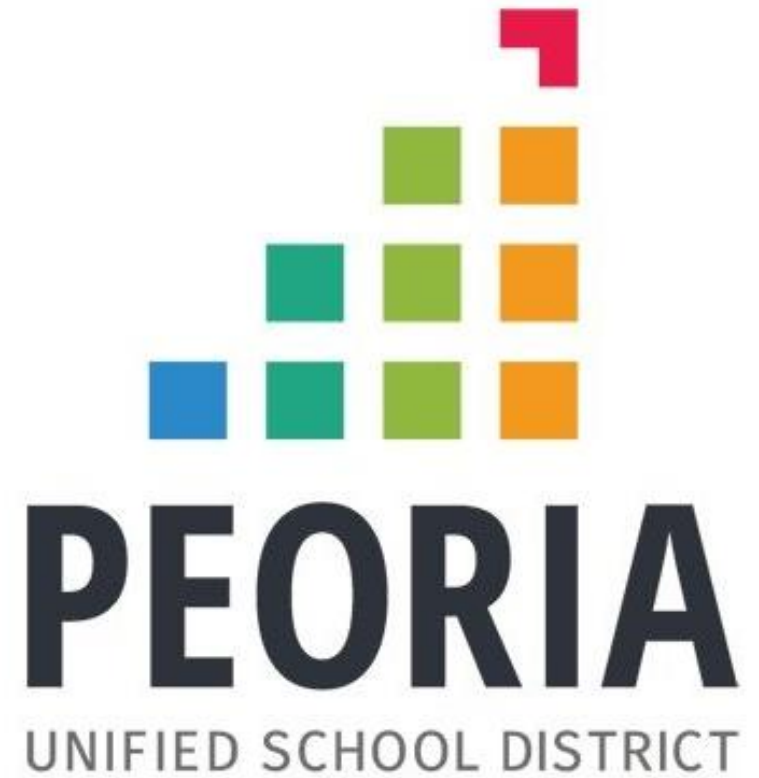
Element 1 is considered “*quid pro quo*” harassment:

- Does not require a severe, pervasive, and objectively offensive analysis
- By its very terms, it will deny access to the program and is *per se* actionable
- Examples: A teacher requires sexual favors for a better grade; a staff member demands sexual favors or s/he will post compromising pictures



Sexual Harassment: Element 2

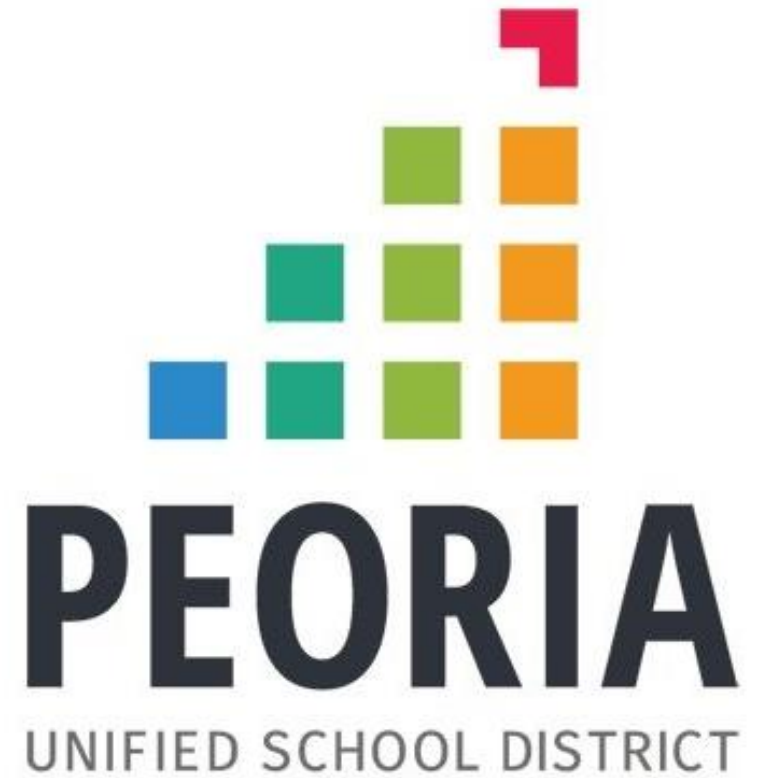
- This prong requires the unwelcome sexual conduct to be:
 - Severe AND
 - Pervasive AND
 - Objectively offensive
- Such that the victim is denied **equal access** to the School's programs and activities
- Narrowly tailored to protect 1st Amendment rights



Sexual Harassment: Element 3

Offenses based on violence (sexual assault, dating violence, domestic violence, stalking):

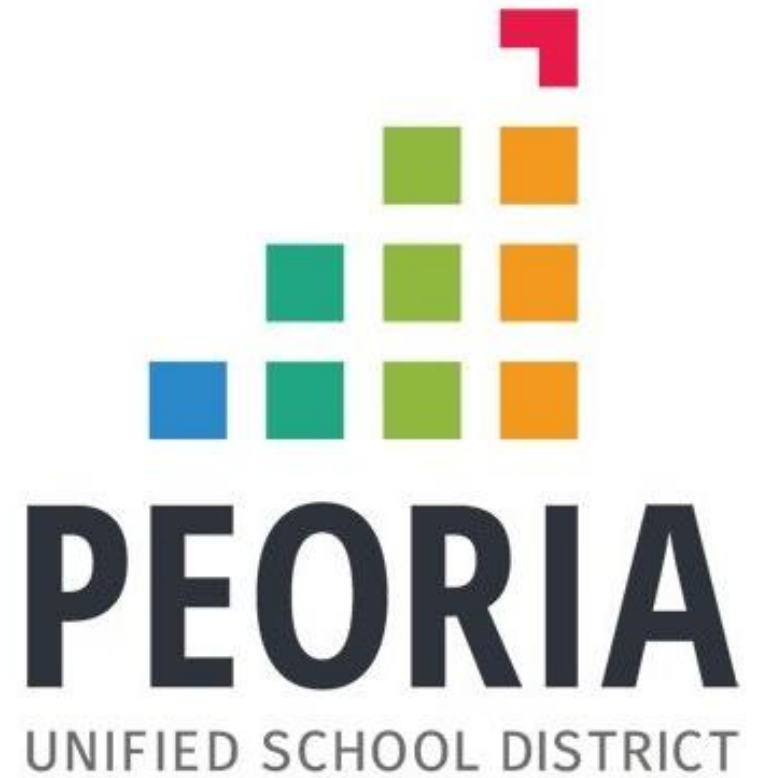
- Does not require severe and pervasive analysis
- When it occurs, equal access is denied
- Like Element 1, it is *per se* actionable



Sexual Assault

An offense classified as a forcible or nonforcible sex offense under the uniform crime reporting system of the Federal Bureau of Investigation. 20 U.S.C. 1092(f)(6)(A)(v)

- Any sexual act directed against another person, without the consent of the victim including instances where the victim is incapable of giving consent
- Including “forcible fondling” – touching of the private body parts of another person for the purpose of sexual gratification without consent

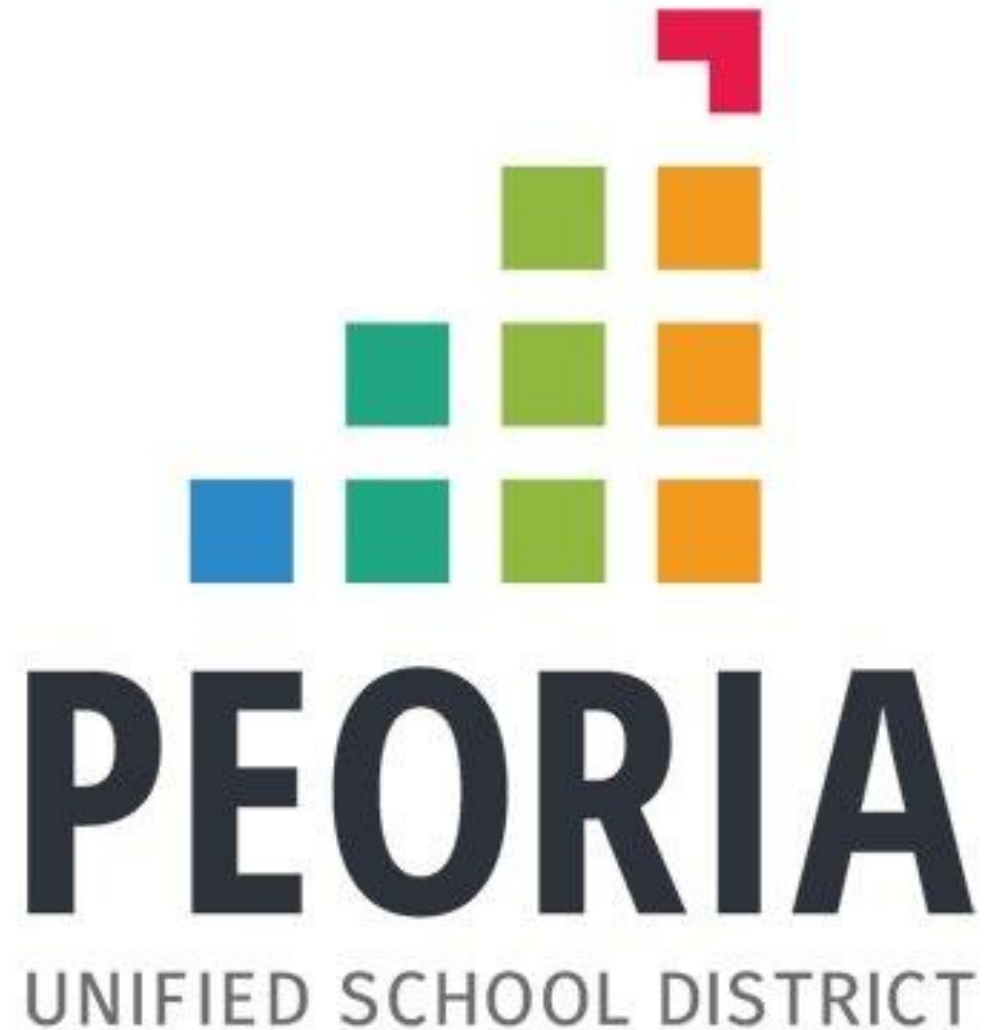


Stalking

Engaging in a course of conduct directed at a specific person that would cause a reasonable person to:

- A. Fear for his or her safety or the safety of others; or
- B. Suffer substantial emotional distress

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





Dating Violence

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:

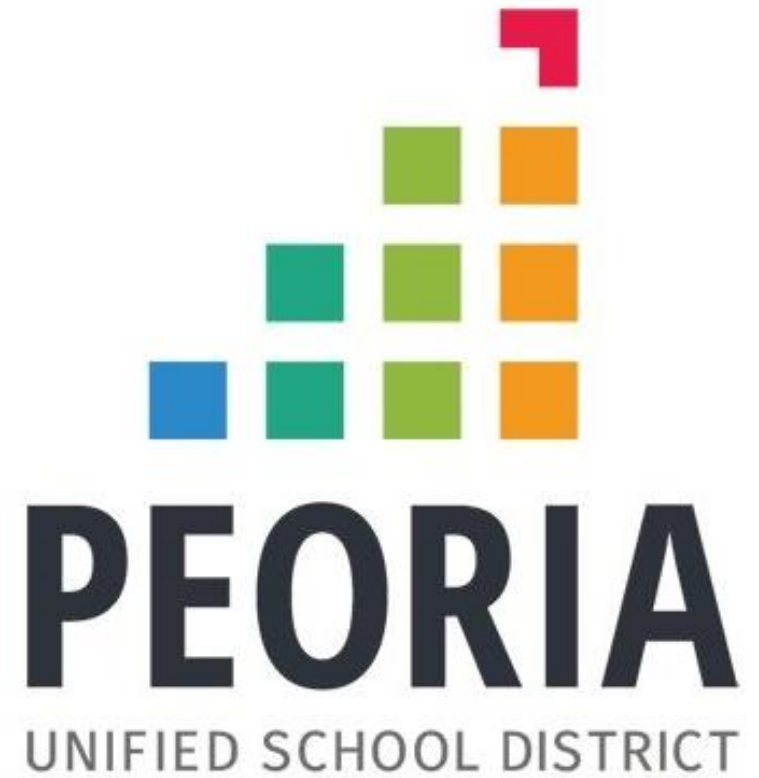
- 1) the length of the relationship;
- 2) the type of relationship;
- 3) the frequency of interaction between the persons involved in the relationship

34 U.S.C. 12291(a)(10)

Domestic Violence

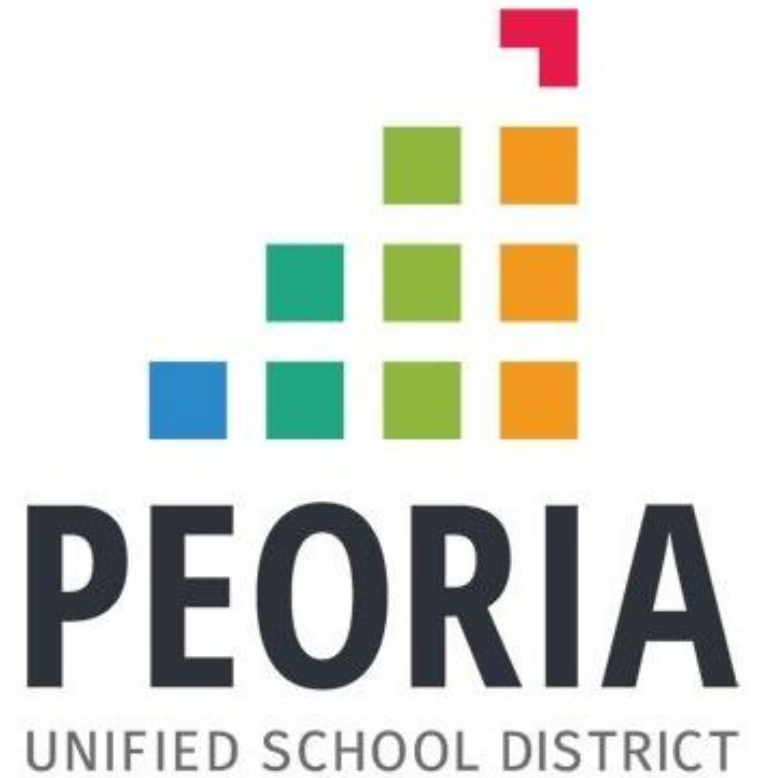
Violence committed by a current or former spouse or intimate partner of the victim, by a person with whom the victim shares a child in common, by a person who is cohabitating with or has cohabitated with the victim as a spouse or intimate partner, by a person similarly situated to a spouse of the victim under the domestic or family violence laws of [Arizona], or by any other person against an adult or youth victim who is protected from that person's acts under the domestic or family violence laws of [Arizona].

34 U.S.C. 12291(a)(8)



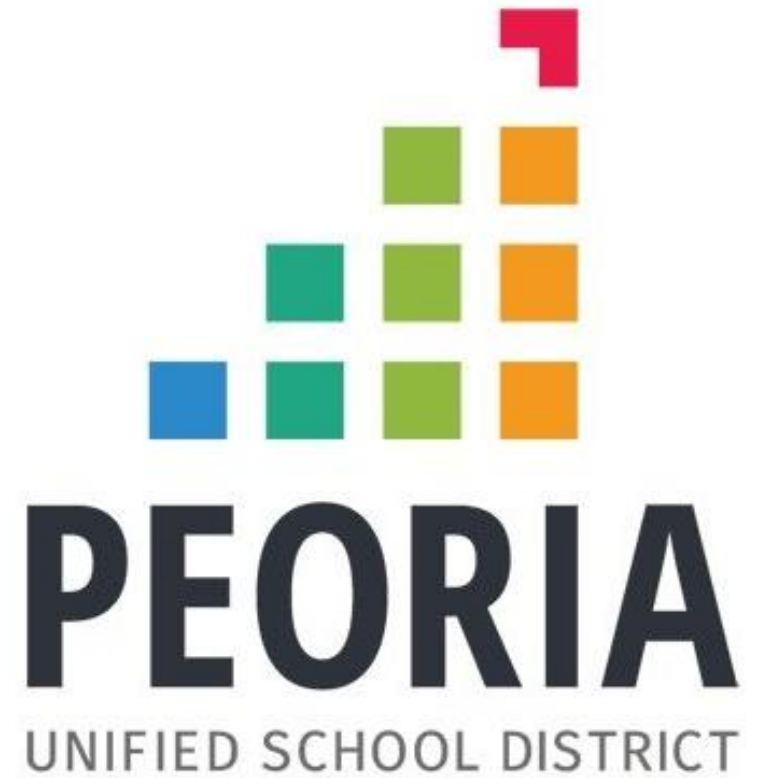
Formal Complaint Triggers the Investigation

- Formal complaint triggers responsibility to conduct an investigation that complies with the Network's grievance procedure
- Upon receipt of a formal complaint, the Title IX coordinator will provide a written notice to parties explaining basic rights during the process and will assign an investigator



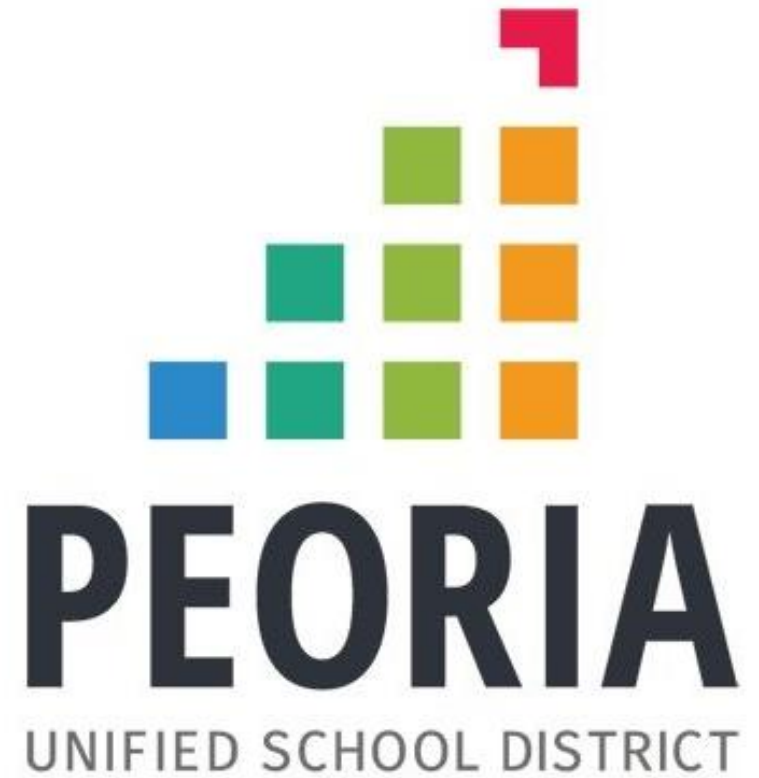
Procedural Requirements

- Respondent is presumed not responsible for conduct, and a determination will not be made until the conclusion of the grievance process
- Disciplining Respondent for TIX conduct or conduct directly connected to the TIX conduct = Retaliation.
- Both parties must have equal opportunity to present witnesses and evidence



Procedural Requirements

- Parties may have an advisor of their choice
- Advisor may be an attorney, but doesn't have to be
- Parents of minor students are not advisors, but do have the right to be there for their child



Procedural Requirements

- Parties
 - have the opportunity to inspect and review evidence collected during the investigation
 - should sign a non-disclosure agreement, which does not restrict either party's ability to discuss the allegations or gather and present evidence



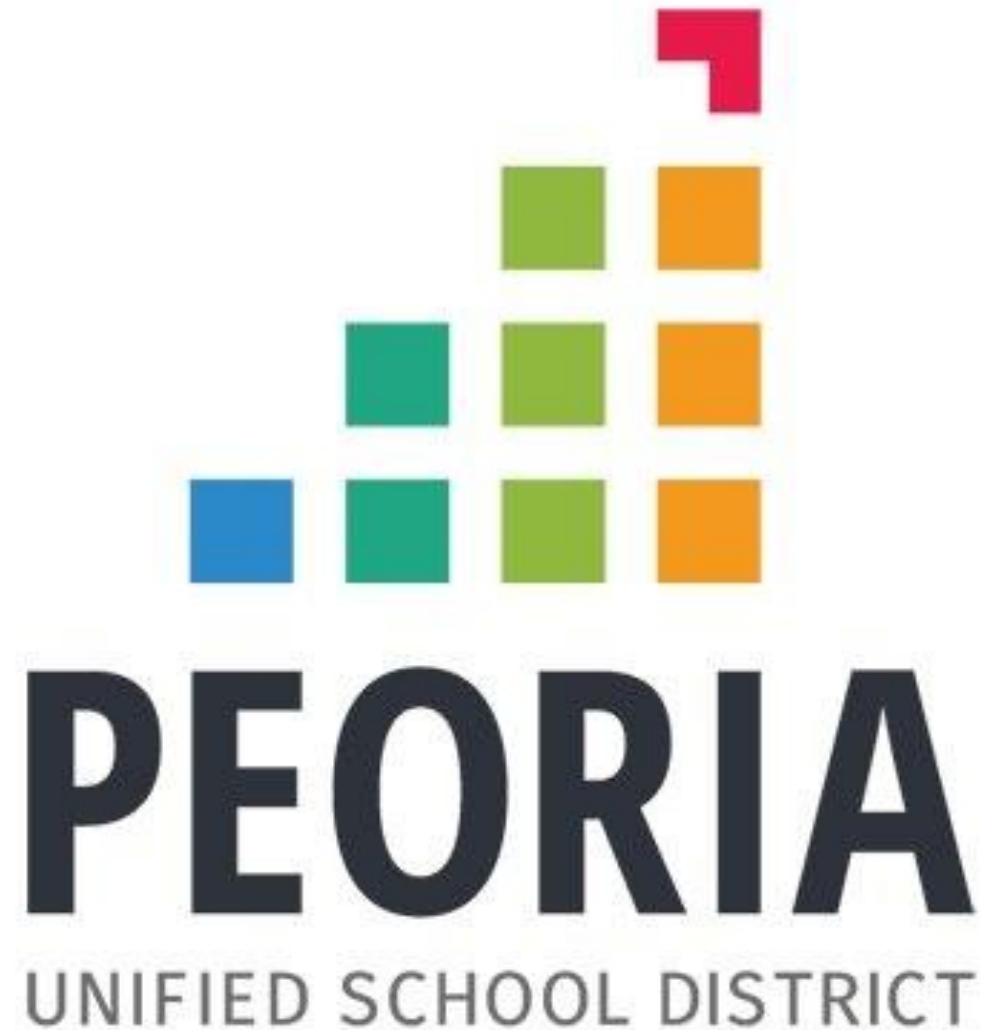
Expanding the Investigation

- If, during the course of the investigation, additional allegations are brought forward that were not included in the initial notice, alert the Title IX coordinator, who will:
 - provide written notice of the additional allegations to the parties
 - determine the course of action for the investigation of the addition allegations



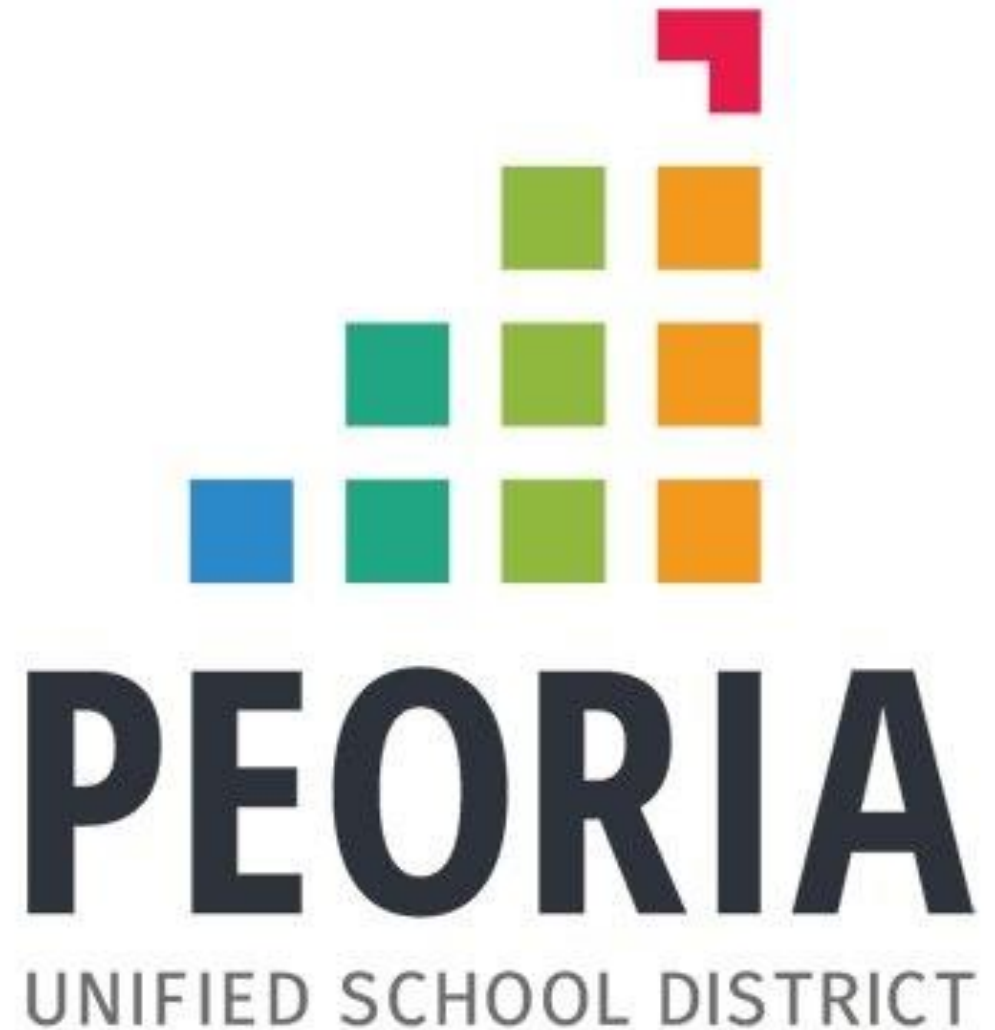
Timelines

- You must meet the timelines set out in the Network's policy
- The investigation must be reasonably prompt (specific number of days for completion of the process must be established)



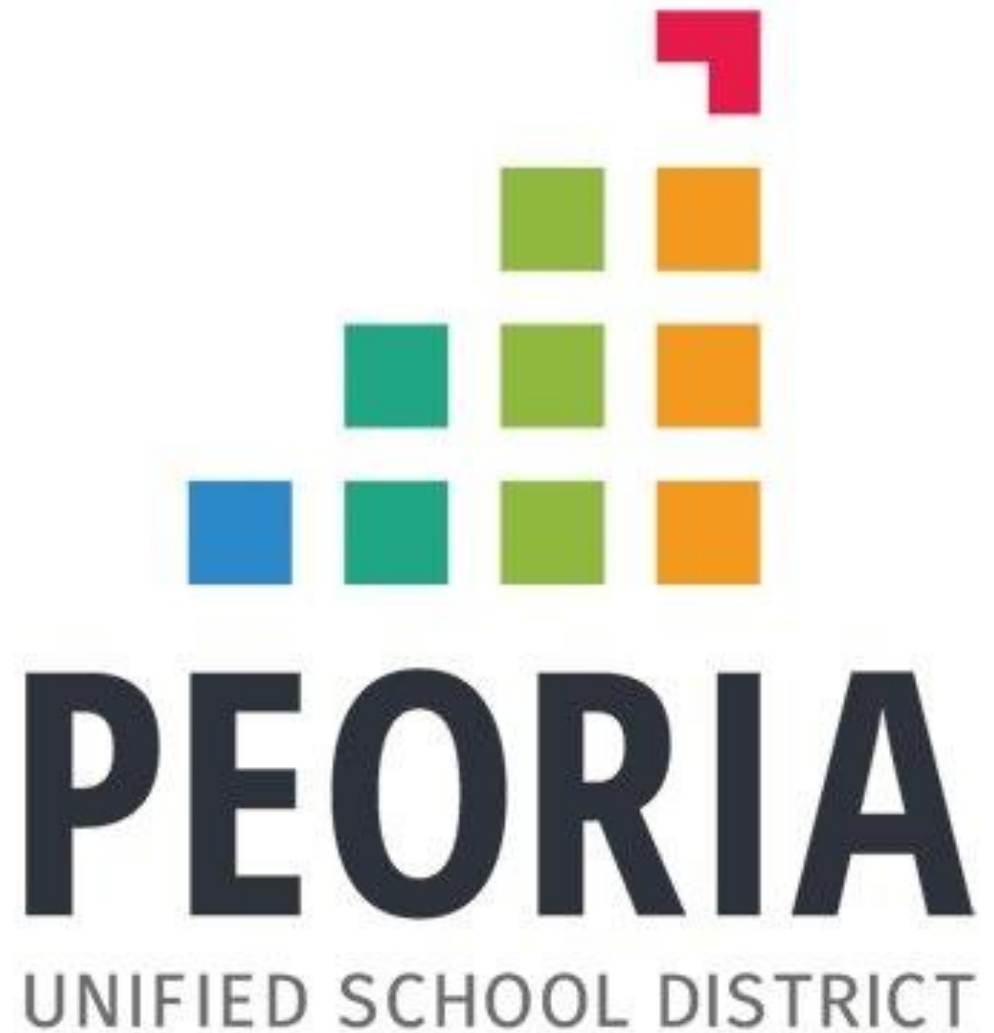
Timelines

- If there is a temporary delay for good cause, provide written notice to both parties explaining the reason for the delay
- Coordinator determines delay
- School administrative needs DO NOT create good cause for a temporary delay



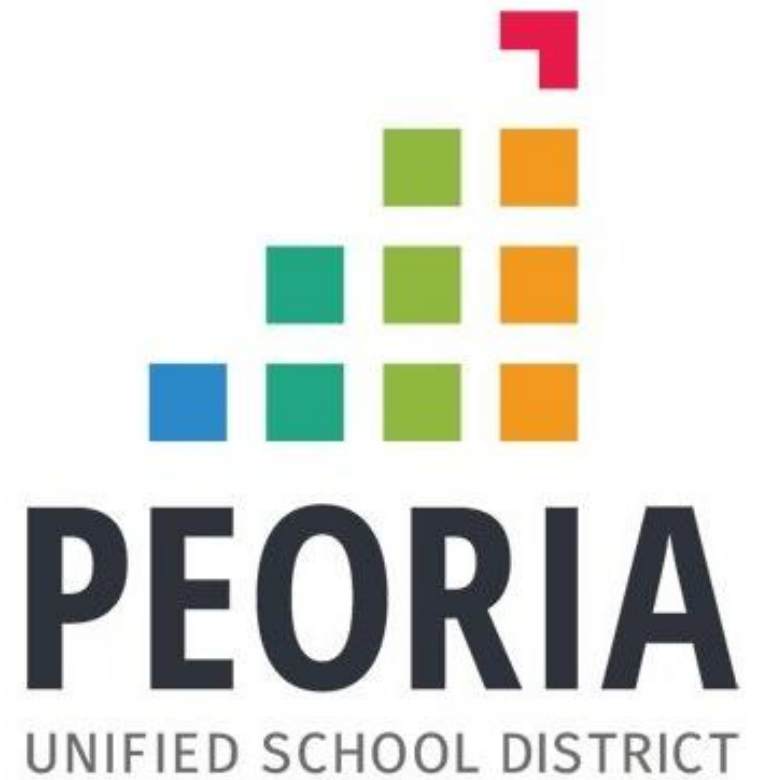


Investigation of Title IX Formal Complaint



Investigator Reminders

- **Be impartial and avoid bias**
- Presume that the respondent is not responsible for the alleged conduct, but do not let this limit your investigation
- Do not make assumptions about who can experience sexual harassment
- Follow the Network's grievance procedure and maintain a list of procedural steps that have been accomplished



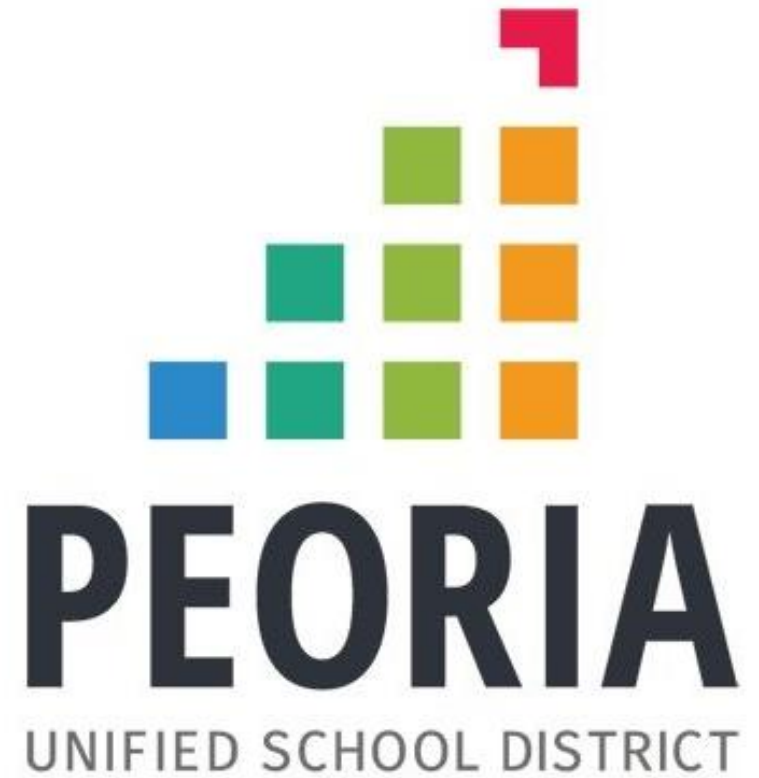
Investigations

- [Gather as Much Information as Possible](#)



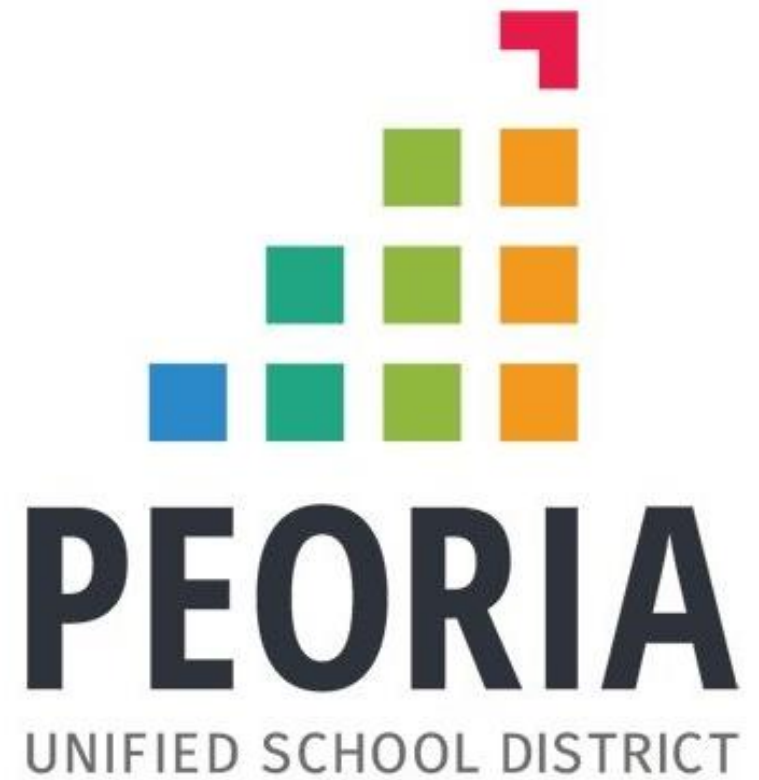
Who Investigates?

- Must be trained on Title IX regulations
- May be the Title IX Coordinator
- May not be the Decision-maker
- Can be a third party hired for this purpose
- Must not have a conflict of interest



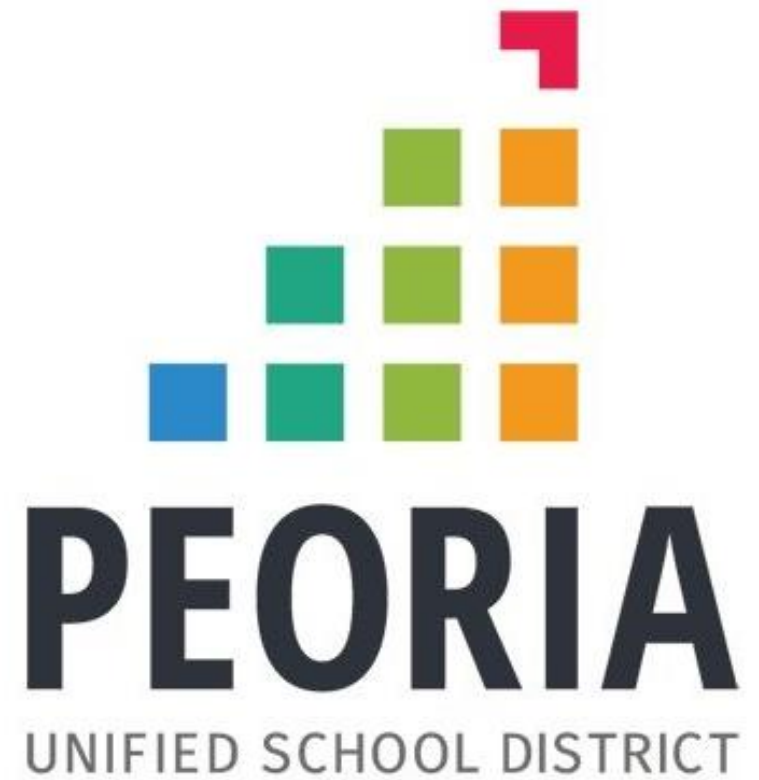
There Can Never Be Too Much Planning

- Map out a plan for your investigation
- Understand the allegations
- Understand the definition of sexual harassment so that you know what elements must be established



There Can Never Be Too Much Planning

- Whom will you interview?
- What documents must you see?
- Do you need student/staff records?
- Do you need to ask IT to run a server search?
- Do you need to get recordings from surveillance cameras?
- Do you need a police report?
- Do you need to gather other documentation?



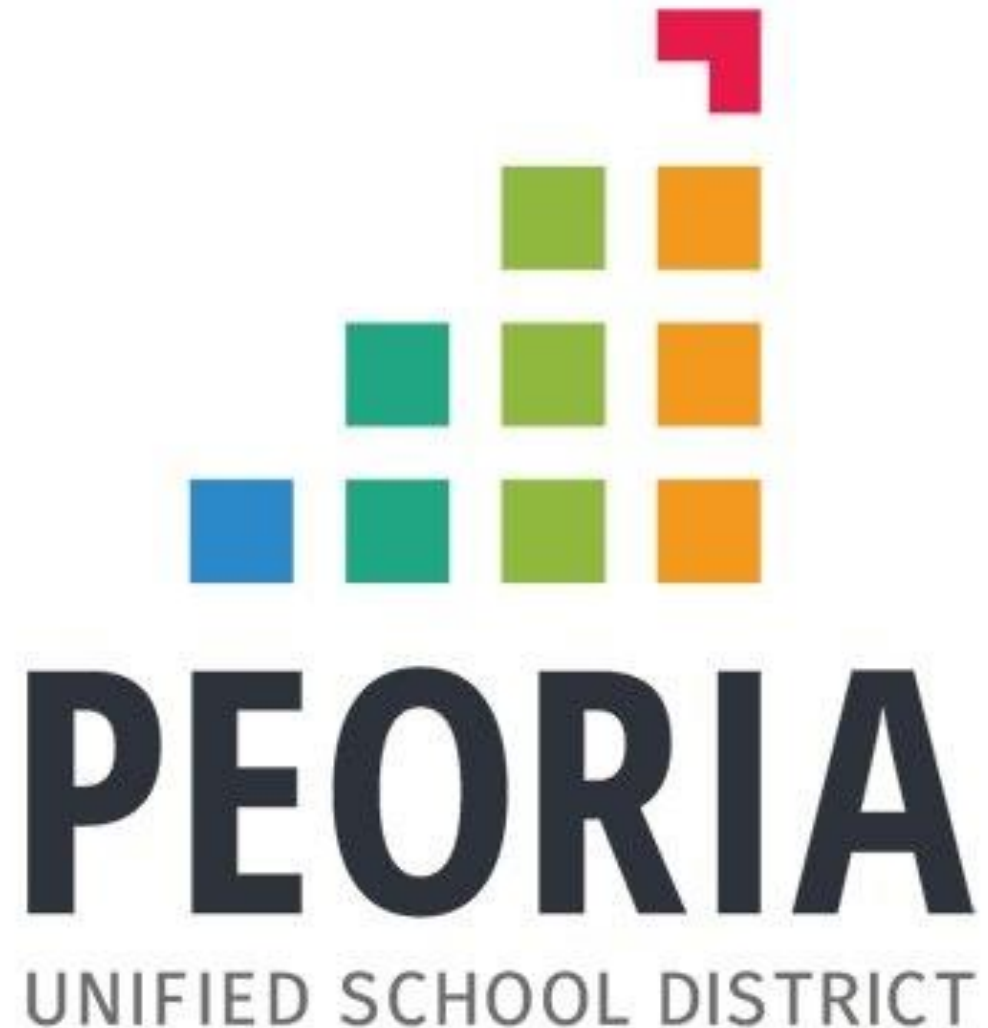
Obtain Necessary Evidence

- Do not require or rely on the parties to anticipate and provide you with the evidence you need
- You may not require a party to provide evidence (documentary or verbal) that would be legally protected under attorney-client privilege, doctor-patient privilege, or spousal privilege



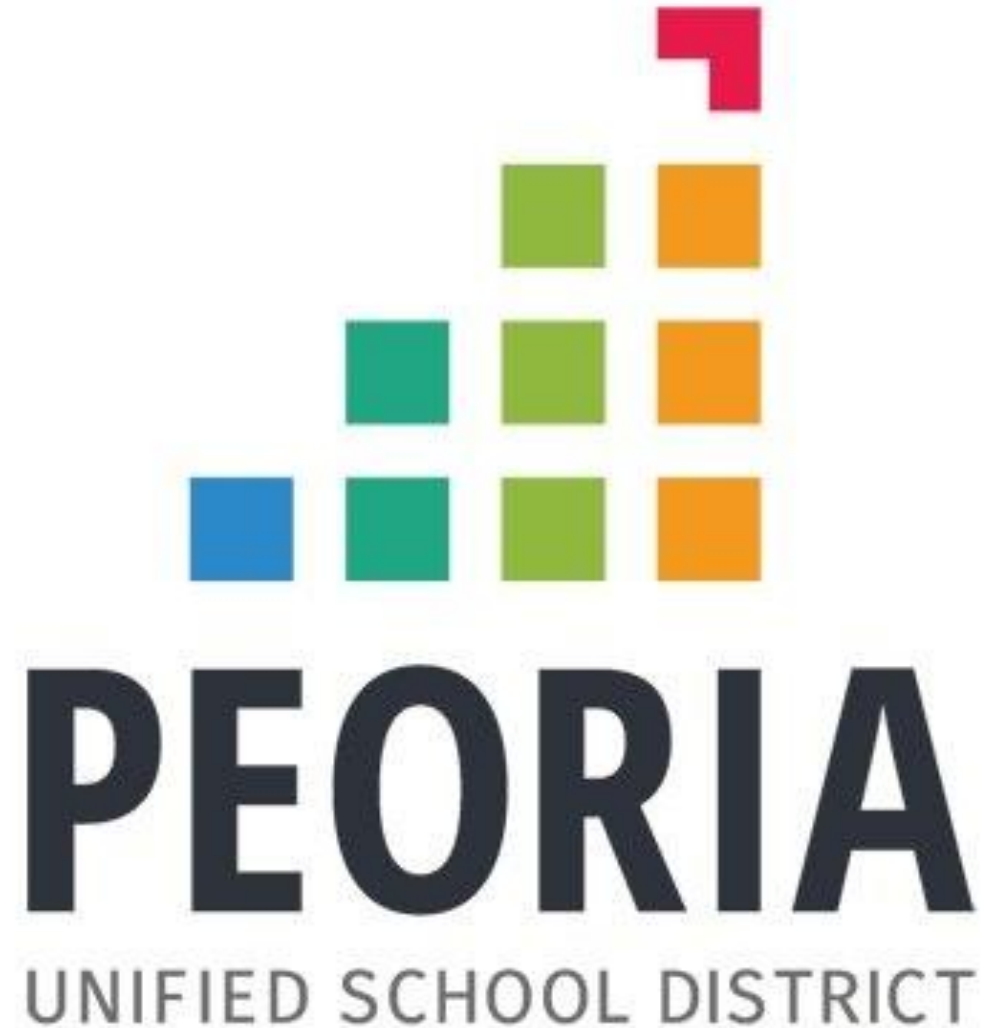
Obtain Necessary Evidence

- If the parties do want to provide otherwise privileged information, you must obtain written, voluntary consent (of parent or adult student) allowing the Network to include that evidence
- **Even if the school/Network has the medical evidence, it may not be used in the investigation without consent**



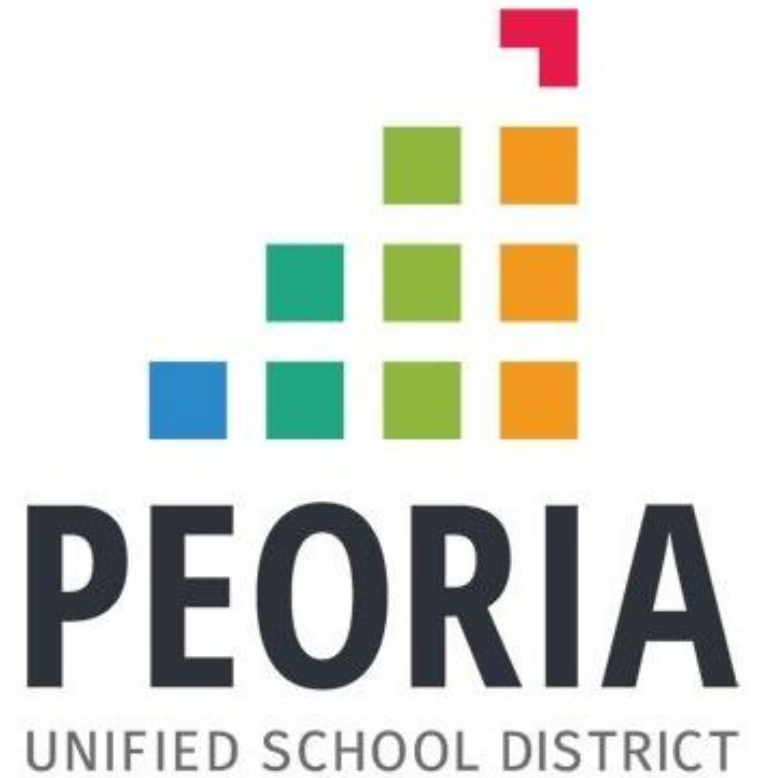
Pre-Interview

- Know the timeline to conclude investigation
 - Know applicable polices and legal statutes that apply (e.g. sexual harassment; sexual assault)
- Know police involvement and how that may
 - effect the timeline
 - Reference your checklist!



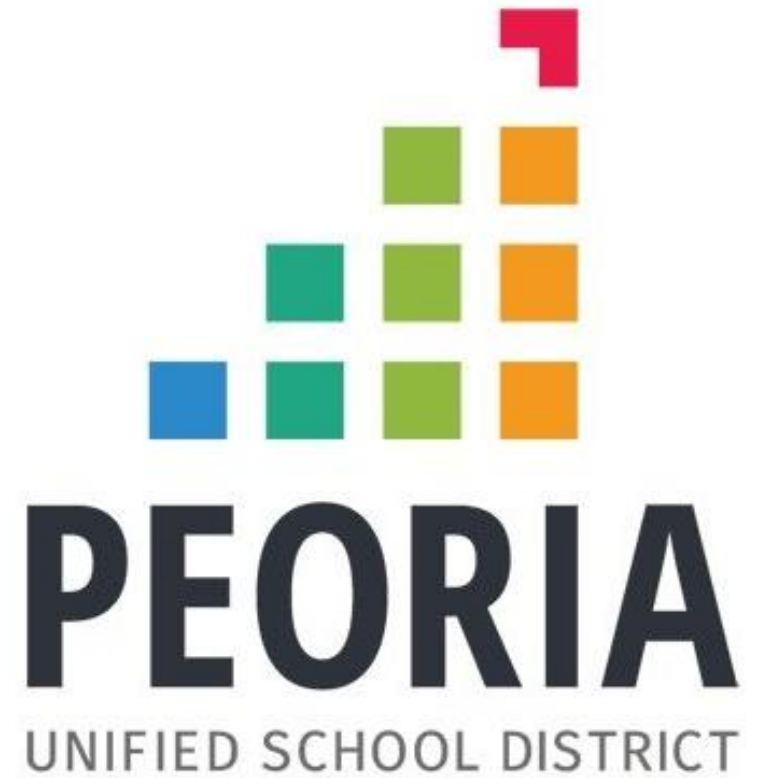
Pre-Interview Scheduling

- Review the formal complaint and understand the specifics of the allegation(s) and details of date(s), time(s), location(s)...
- For all interviews, provide written notice of interview: date; time; location; participants; and purpose of any investigation activity that requires a **party's presence**—provide notice with enough time for the party to prepare to participate



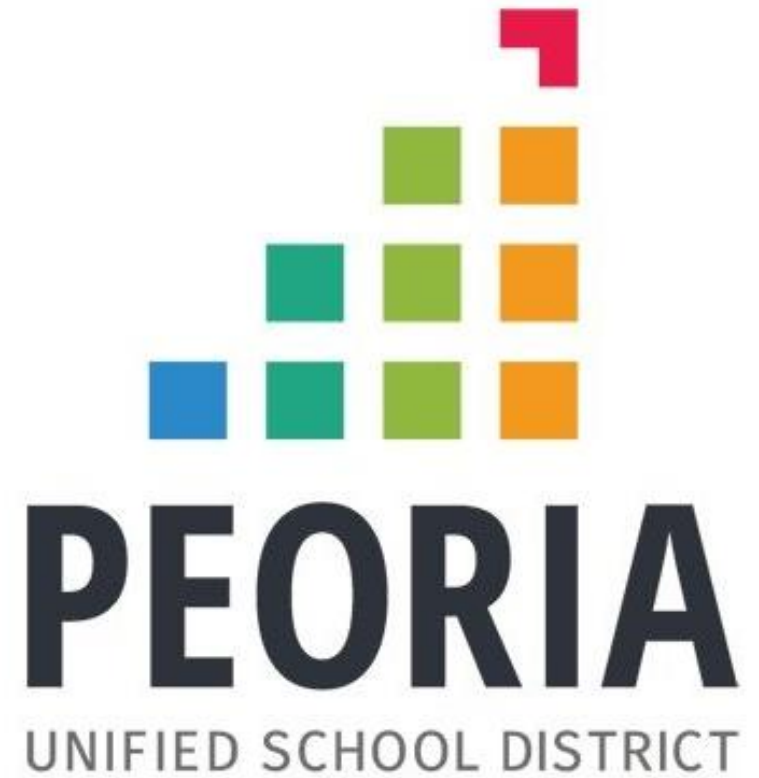
Pre-Interview Scheduling

- Minor students (under age 18): Parents stand in the shoes of the student; however, ensure student adequately understand the process
- Usually best to begin with the complainant, but be strategic in scheduling interviews
- Leave enough time between interviews so you don't have to rush



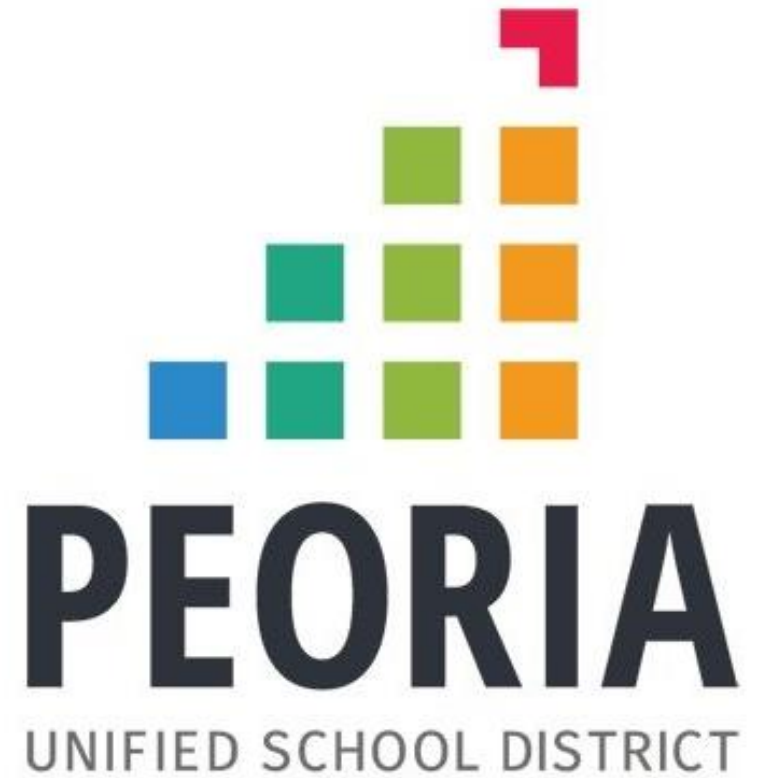
Pre-Interview, cont'd

- Consider:
- Age
- Disability (special education/504)
- Severity
- Order
- Advisors—adult, lawyer, family friend



Pre-Interview, cont'd

- Parents may be present for witness interview of child
- Ground rules for advisors—should be consistent; offer to both
- Language processing
- Interpreter



Pre-Interview: Outlining Questions

- You've identified the allegations and understand what information will be needed to make a determination, so use that to guide interviews
- Plan your interview outlines
 - Go with the flow
 - To the extent reasonable, ask both parties the same questions and then allow the interview to take you down different roads
 - Ask witnesses the same or similar questions



Pre-Interview, cont'd

- Character witnesses
- Recording
- Beware of own bias



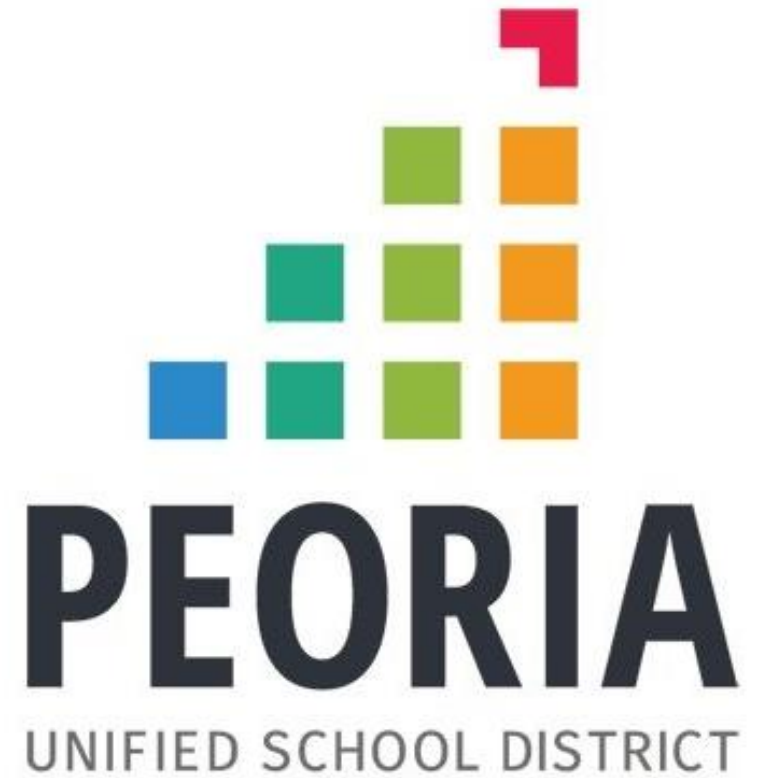
<https://www.youtube.com/watch?v=5mwn-WhsBfM>

Bias Tests



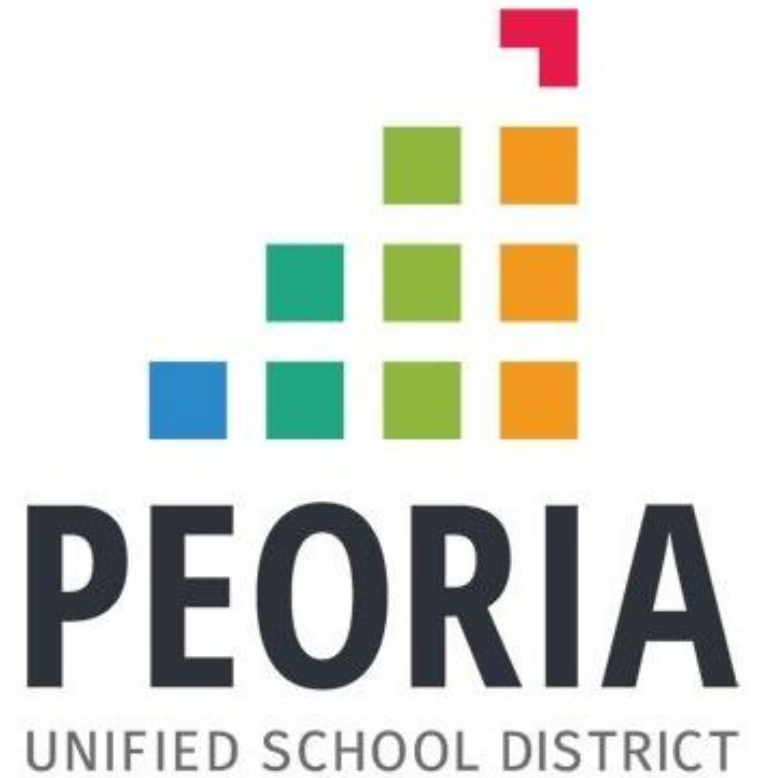
Style

- Qualities of the interviewer:
- only seek the truth
- be honest
- have integrity
- listen and evaluate responses
- remain emotionally detached
- be authentic



Style

- The purpose is to gather as much information as possible.
- Guidelines:
- Avoid putting words in mouth of witness
 - ASK: “How did ____’s behavior make you feel?”
 - DON’T ASK: “Did ____’s behavior upset you?”
- Avoid “why” questions
- Avoid conclusion questions
- Avoid compound questions



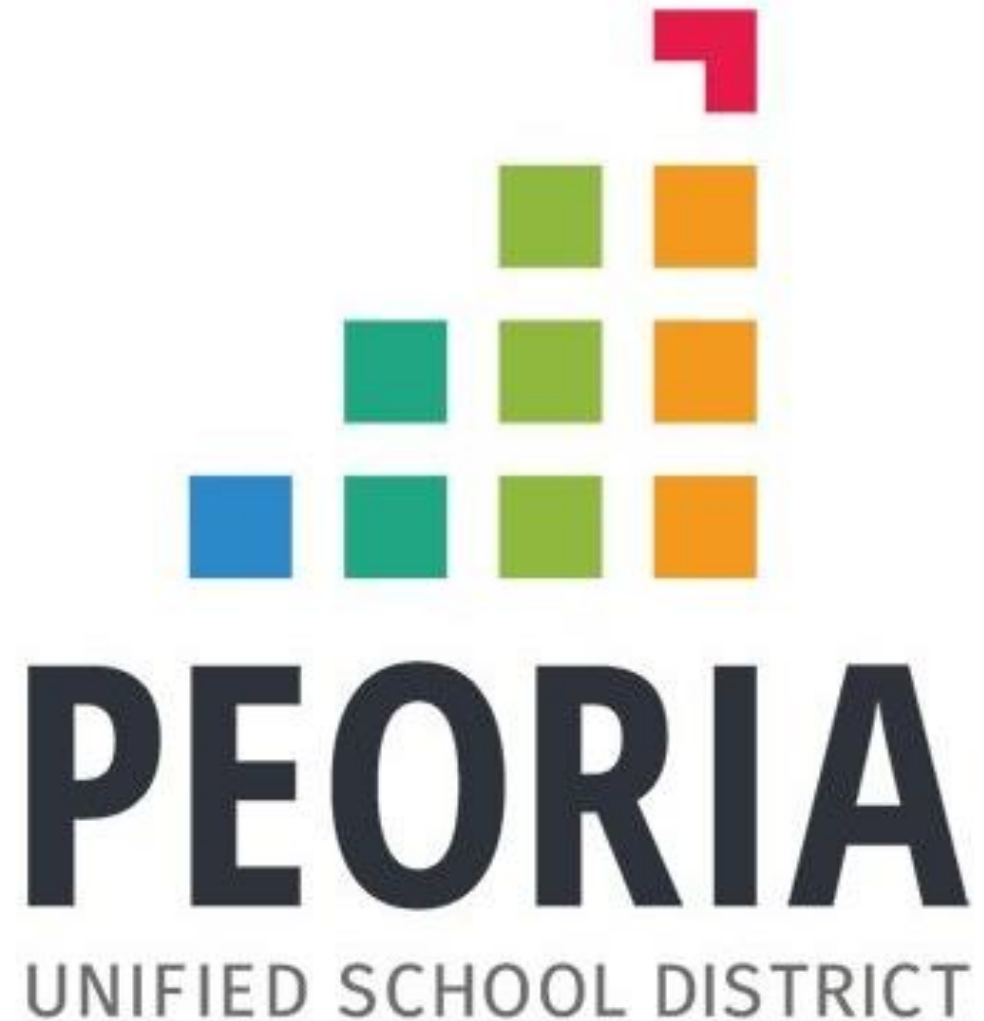
Phases of an Interview

- Introduction
- Questioning
- Summation
- Closure



Phase 1: Begin Interview

- Summarize Title IX
- Explain process
- Share purpose
- Give the organization's need
- Establish credibility
- Explain investigator role



Phase 1: Begin Interview

- Sense of formality
- Reassure no retaliation for participating
- Caution confidentially to both parties and the
 - Network
 - Put interviewee at ease
 - Develop rapport
 - Remember you are wearing your investigator hat

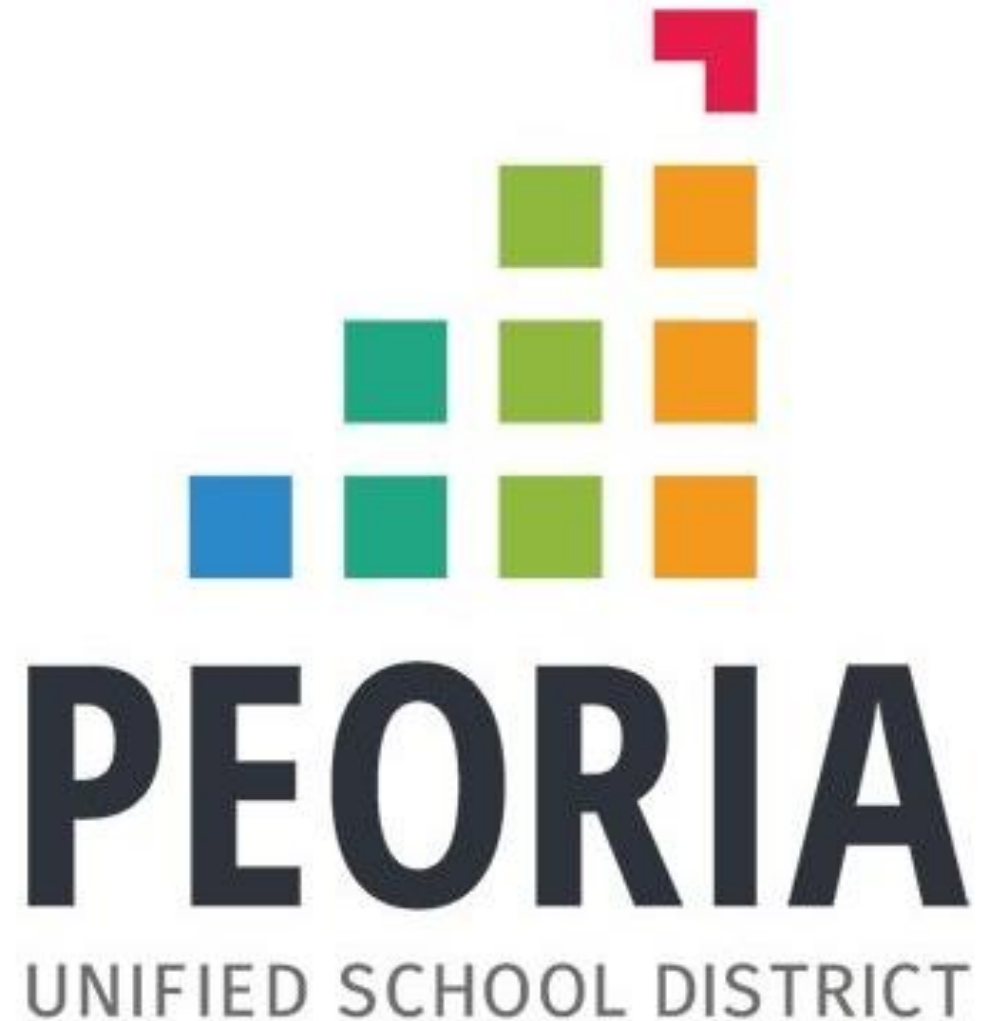


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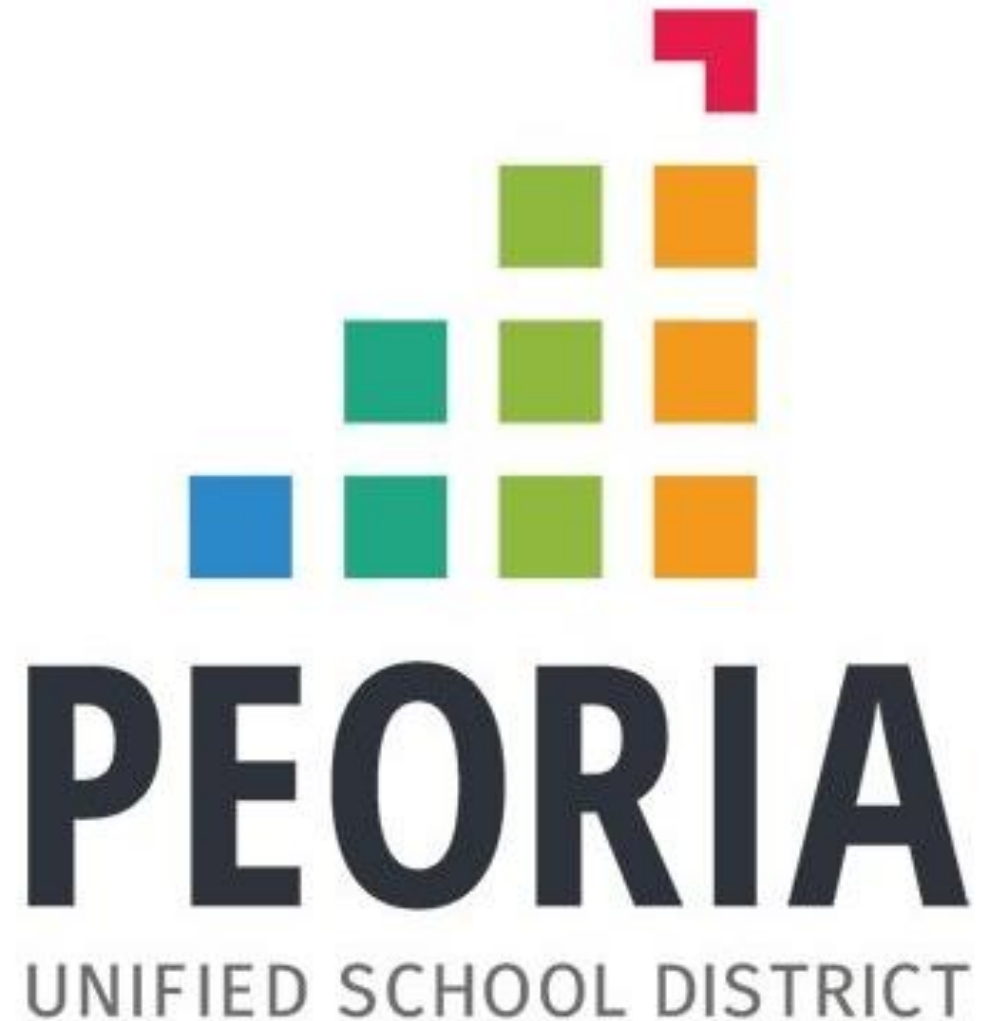
Phase 1: Expectations

- Explain expectations
- Recording by parties
 - you can decide whether you will allow or not
 - realistically can't control
- Tell the truth
- What the rules are for advisors



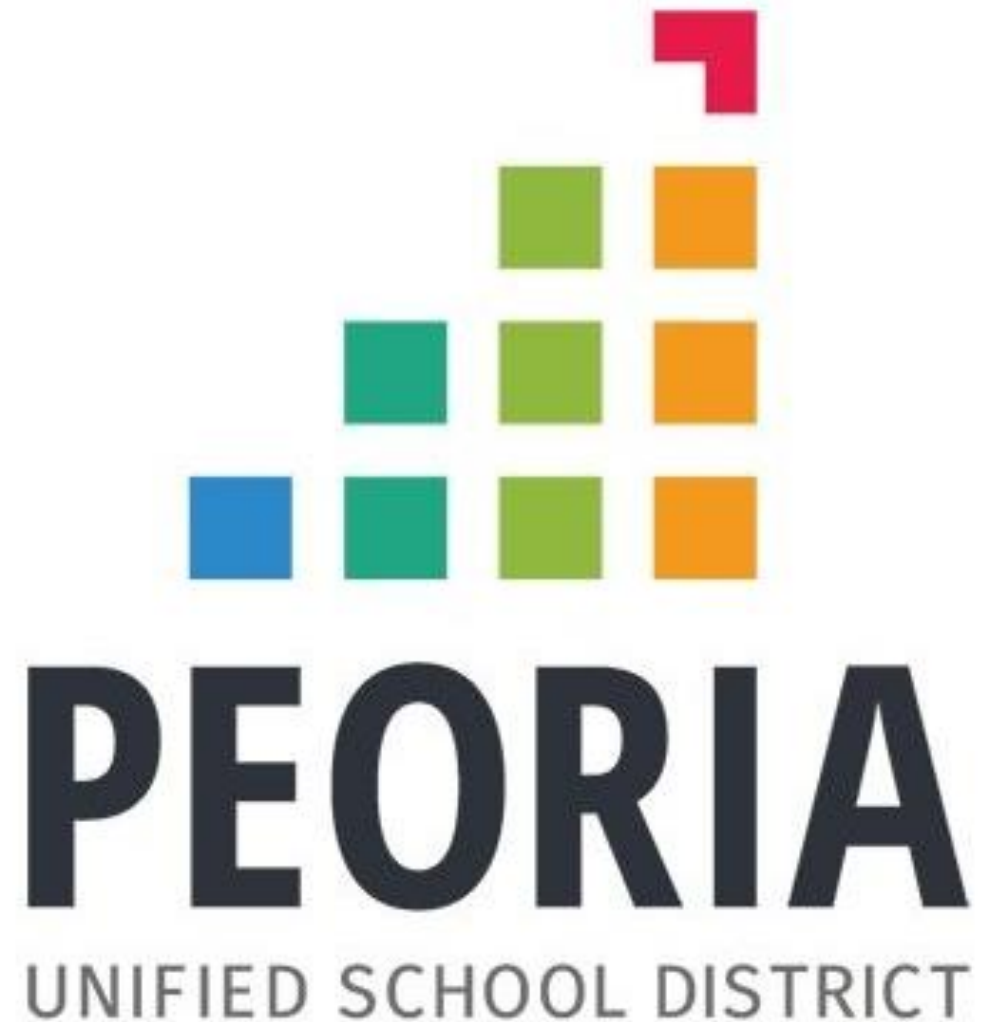
Phase 1: Expectations

- Explain expectations
- If interviewing virtually, confirm who is present with them
- Explain they don't have to provide evidence protected by privilege
- Explain they may not threaten, intimidate, or harass anyone who participates in this process



Phase 2: Questioning A Five-Step Process

- Ask
- Perceive response
- Evaluate response
- Drill down for details
- Record response accurately, with as many
 - quotes as possible



Questioning Pitfalls

- Arguing with what is presented
- Becoming angry
- Showing personal prejudice
- Lying
- Hurrying
- Interrupting
- Making assumptions
- Being dismissive
- Making promises



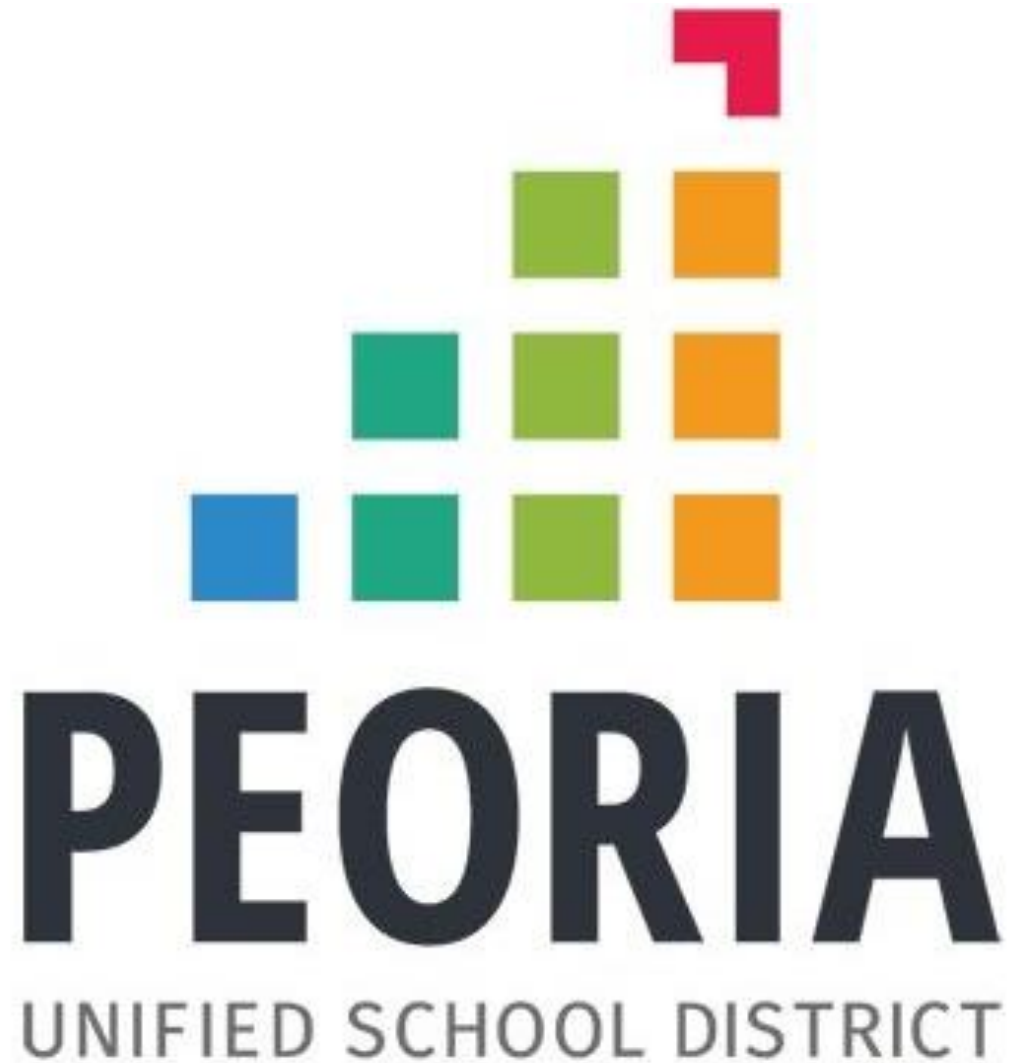
<https://www.youtube.com/watch?v=1G2U73V4Lul>



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Questioning Pitfalls

- Losing track of elements of definition that you must have evidence for
- Leading questions: “When you touched her arm, did you . . .”
- Degrading
- Putting too much value on inconsistencies
- Getting hung up on irrelevant information
- Accepting one-word responses
- Phrasing things negatively



Questioning Techniques

- Listen actively
 - Paraphrase
 - Repeat back
 - Read notes
 - Brief statements: “Yes,” “Go on,” “I see” ...
 - Body language: nod; eye contact...
- Give feedback on quality responses

Questioning Techniques



- Slows process
- Provides reflection and reference
- Get an answer

Questioning Techniques

Systematic order—timeline of events

One question at a time

- Wait for a response—do not feel need to fill the silence

Ask in another way later

Clarify fact from inference

- Use transition to obtain non-disclosed information

Open-Ended Questions

- “Explain what happened third hour”
- “What are some experiences you have had with...”
- Paraphrase/summarize back
- Start broad and narrow down
 - “Tell me more about...”
 - “What are some other details?”
- <https://www.youtube.com/watch?v=2QVxg-QgmOU>



Open-Ended Questions

- Hit a brick wall
 - Appeal to senses
 - “Do you remember a smell?”
 - “How did that make you feel?”
 - “Did you hear any sounds?”
 - Go back to timeline—fill in the blanks
 - Take a break, get a water, “take a call”



- Let them share
- Get detail
- Minimal interruption
- Limit digression

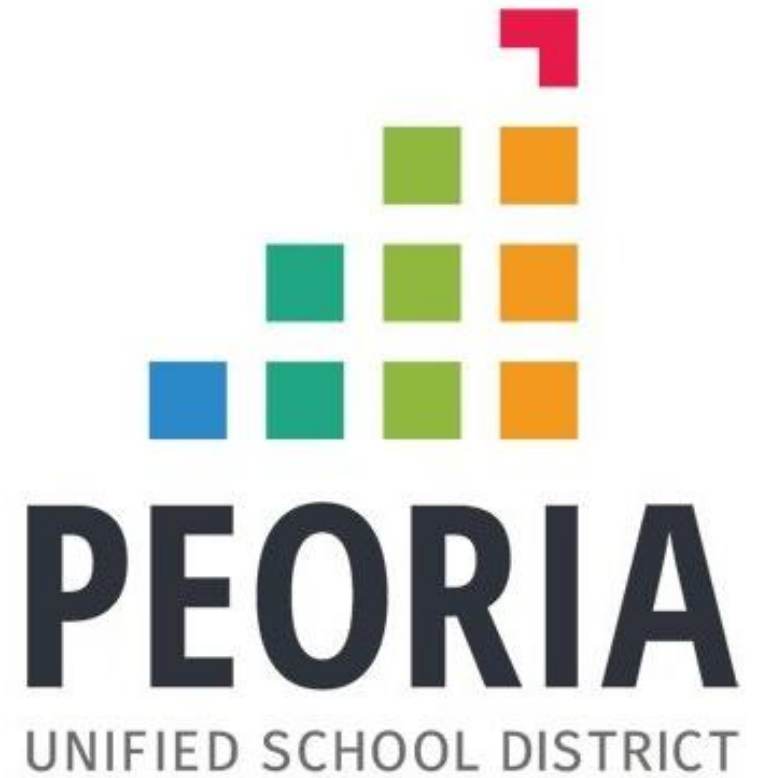


https://www.youtube.com/watch?v=_UGQx0VCLpQ

Free-Flow Responses

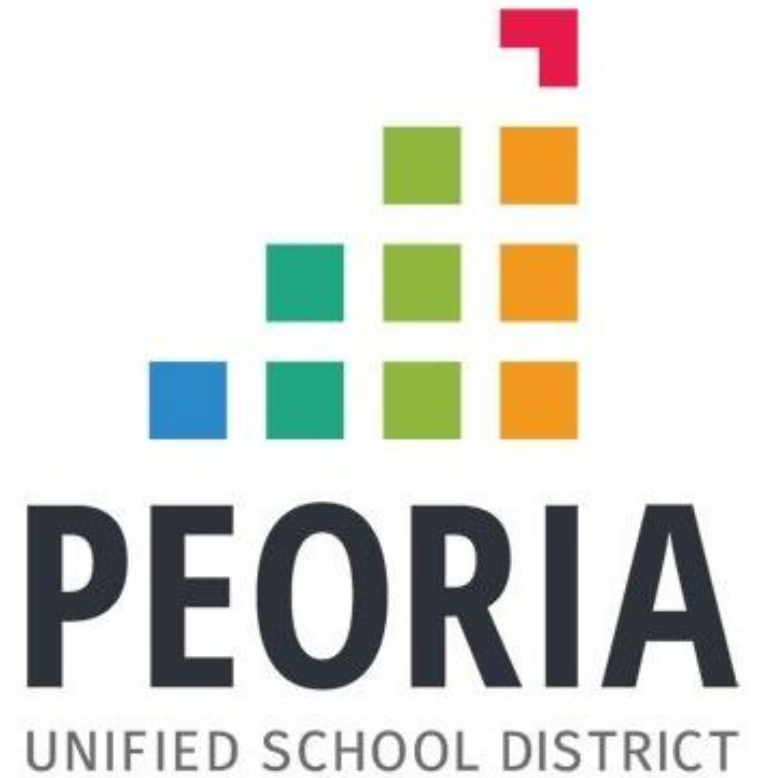
Phase 3: Summation of the Interview

- Ensure the pertinence and accuracy of information
- Ask if there is anything else
- Every time more information is given, ask again if there is any else
- Ask if there are others you should to speak with
- Ask for them to share relevant evidence/ documentation



Phase 4: Closure of the Interview

- Reassure regarding any concerns interviewee raised
- Leave door open for another meeting
- Offer to contact later if something comes to mind
- Inform you may be in touch if you need more information
- Thank and express empathy for their time and cooperation
- Provide contact information



Phase 4: Complainant & Respondent

- When you expect concluding interviews and
 - have the evidence sent to them
- Give non-disclosure agreement
- May sign now or return later, before evidence
- disclosure




Investigation Tips


- Written documentation of all communications
- Update the complainant and respondent periodically as to progress/status (not insight or details of the investigation)
- When possible, copy both parties **separately** on responses or inform the other party
- The need to delay: Notify the Title IX coordinator who will notify both parties

Investigation Tips

Report any child abuse information not previously reported directly to DCS



Report possible crimes to Title IX coordinator and law



enforcement (e.g. death threat, photos)

Investigation Tips

- Report to the Title IX coordinator:
 - Supportive measures are needed or need changes
 - Additional allegations are brought forward that were not included in the initial notice
 - New mandatory or optional dismissal comes to light
 - Informal resolution—if wanted by either party

Expanding the Investigation

If, during the course of the investigation, additional allegations are brought forward that were not included in the initial notice, alert the Title IX coordinator, who will:

- provide written notice of the additional allegations to the parties
- determine the course of action for the investigation of the addition allegations

Timelines

You must meet the timelines set out in the Network's policy and the law

The investigation must be reasonably prompt (specific number of days for completion of the process must be established)

Timelines

If there is a temporary delay for good cause, provide written notice to both parties explaining the reason for the delay

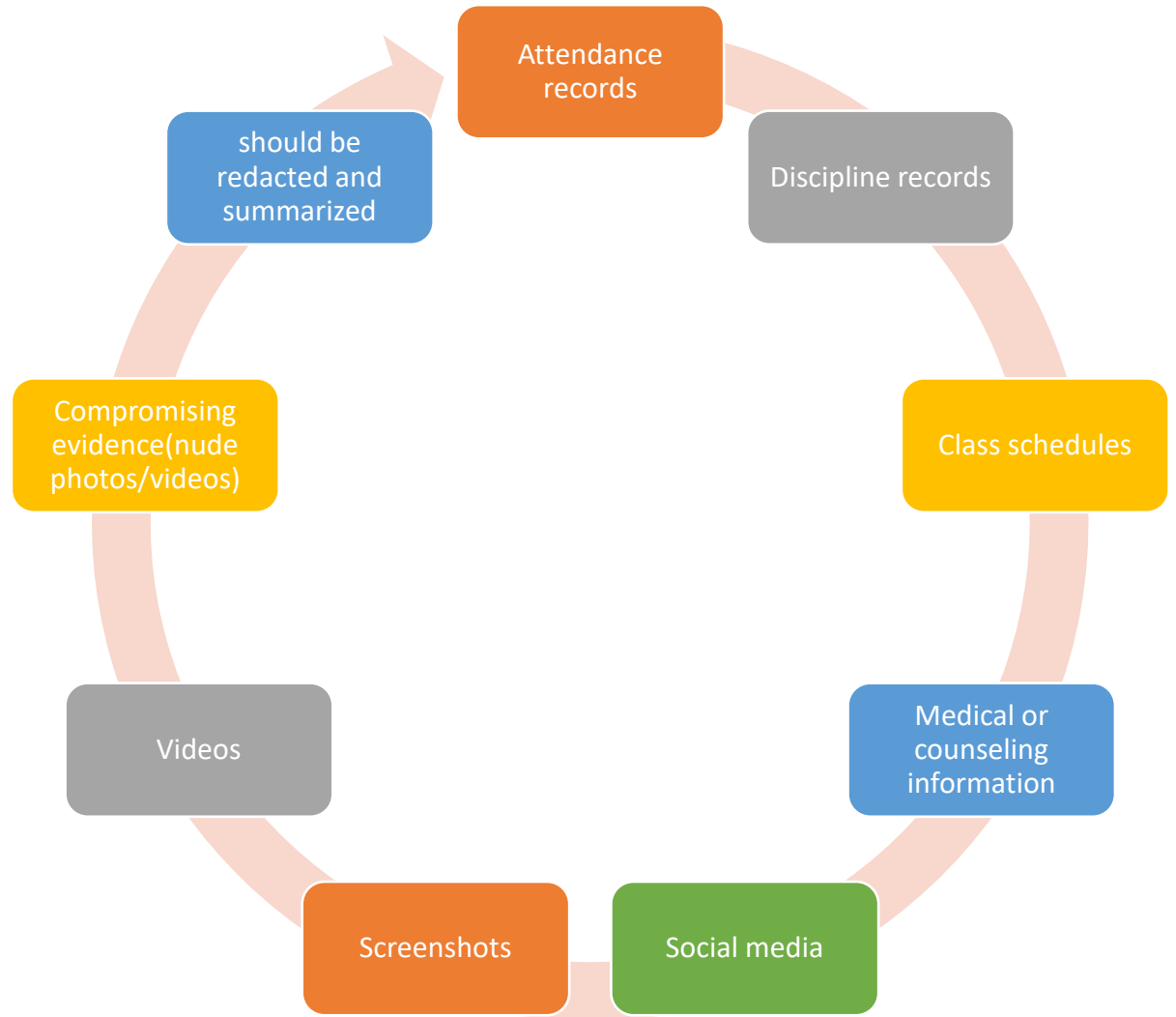
School administrative needs DO NOT create good cause for a temporary delay

Good Cause Delay

Non-exhaustive list of reasons that may create a good cause delay in completion:

- Concurrent law enforcement activity
- Witness availability
- Illness
- Unavailability
- School breaks
- Absence of a party
- Availability of a party's advisor
- Need for language assistance or ADA accommodations

Evidence/Documentation



Evidence/Documentation

Emails

Technology records

Police reports

Photos

Reasonable
standard

*Not every stone
needs to be
turned—but the
pertinent ones do*

Sexual History

The complainant's sexual predisposition and prior sexual behavior are not relevant, unless:

- they are needed to prove that someone other than the respondent committed the conduct alleged
- there are specific incidents of the complainant's prior sexual behavior with the respondent to prove consent

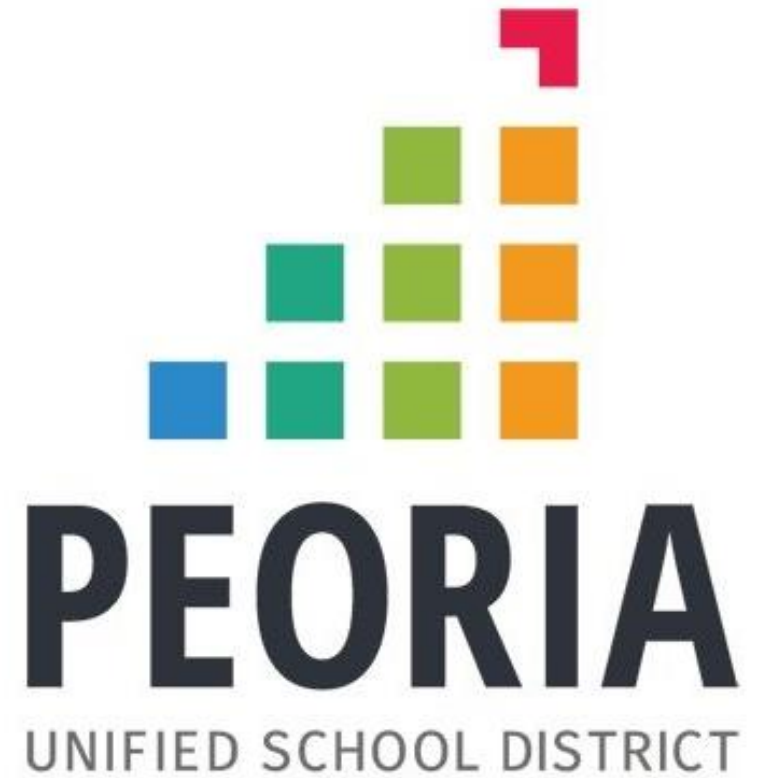
After the
Investigation
has
Concluded



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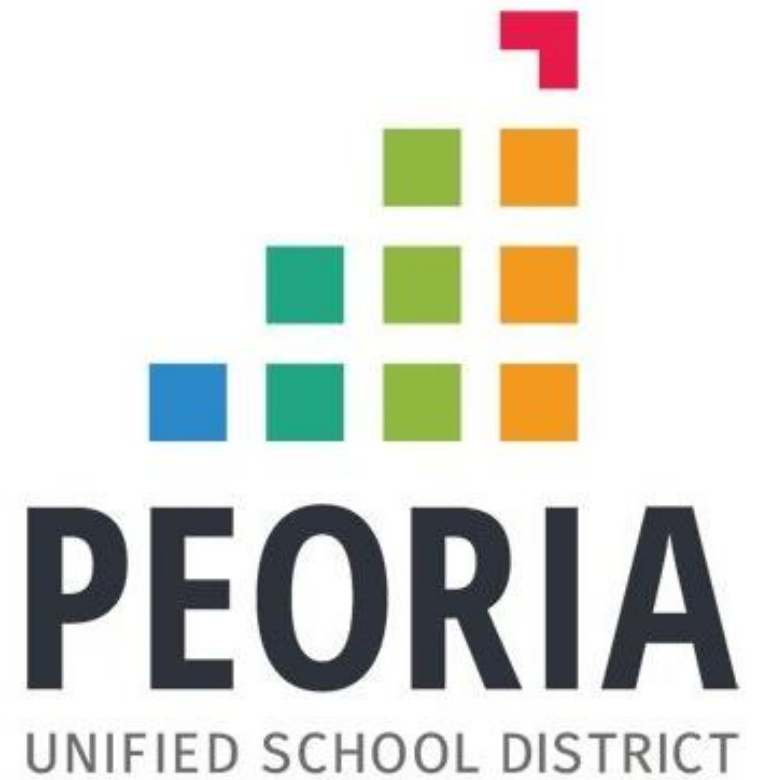
Evidence/Relevance

- Not your personally created reference materials to complete the report (e.g. personal notes; interview recordings)
- Information that will go into the report for the decision-maker
 - Statements
 - Documents
 - Records



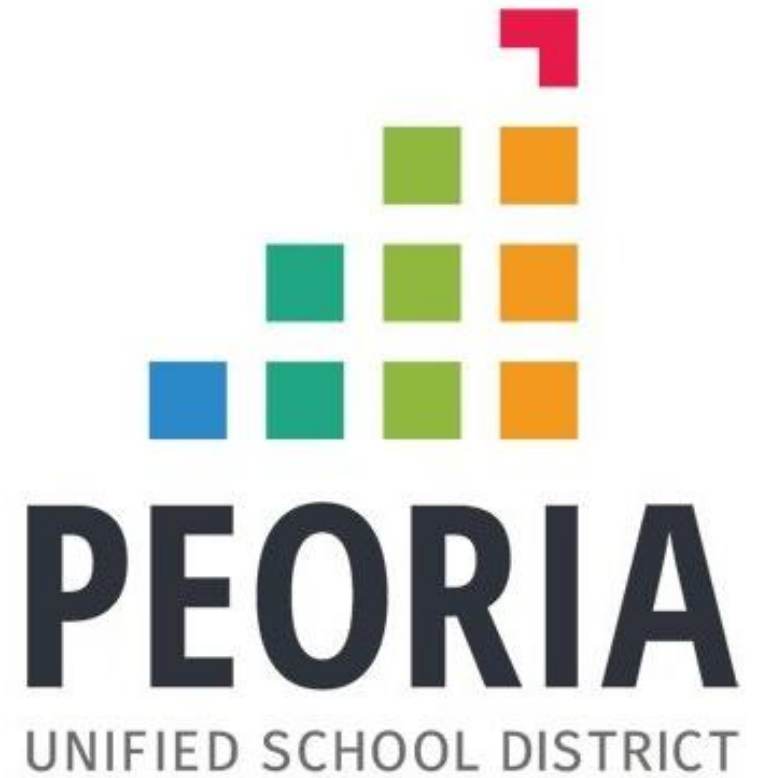
Redaction

- **Check** with Title IX coordinator regarding redaction of witness names
- **Must redact** information protected by privilege unless there is written consent
- **May** redact information in the evidence that is not directly related to the allegations
- **May not** redact confidential information that is directly related and relevant
- **Redact** disability information related to a 504 Accommodation Plan or an Individualized Education Plan, but give summary of relevant facts



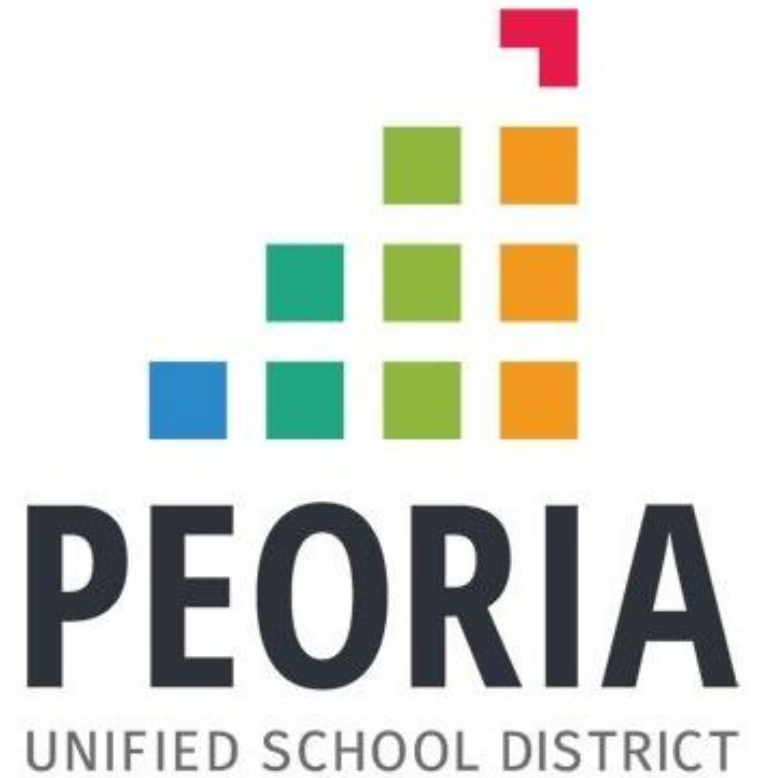
Evidence-Sharing

- Non-disclosures signed and returned
 - Send the copy of the signed NDA with evidence
 - Provide parties an equal opportunity to inspect and review (with necessary redactions) evidence gathered as part of the investigation that is ***directly related*** to the allegations raised in the formal complaint; include evidence on which you do not intend to rely in drafting your report



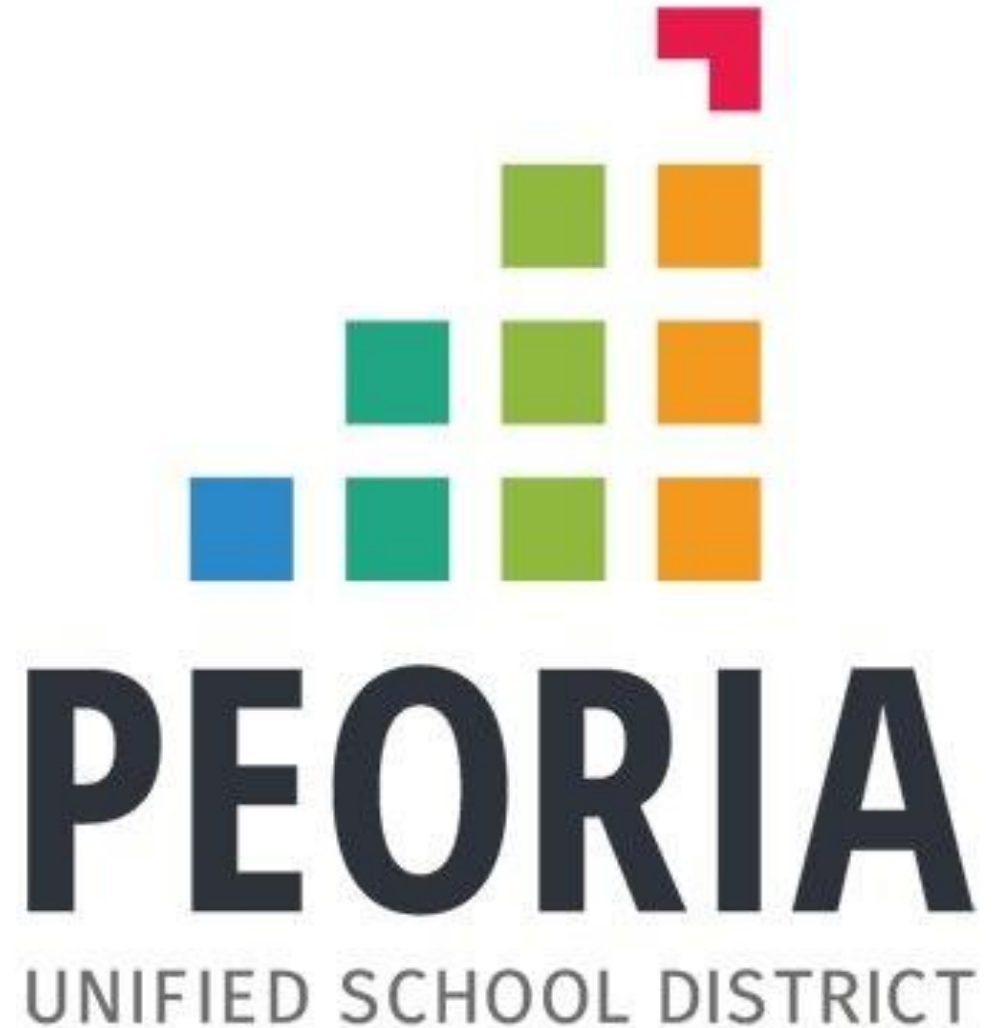
Evidence-Sharing

- Send the evidence to the parties in an electronic and/or hard copy format and allow the parties 10 days to submit a written response
- Send to both parties at the same time
- May begin **drafting** report



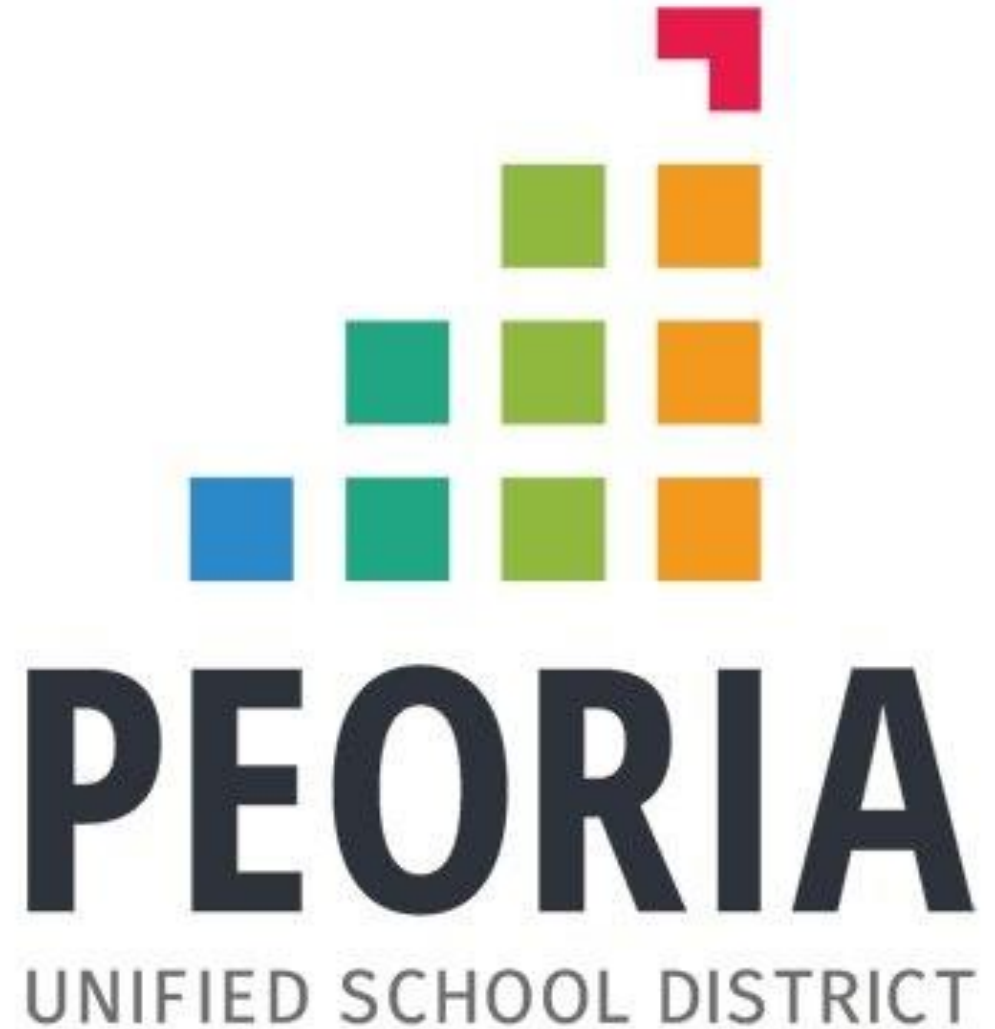
Evidence-Sharing

- Non-disclosure agreement **not** signed or returned
 - Inform Title IX coordinator
 - Provide opportunity for physical review of evidence
 - No copies or photographs of evidence permitted



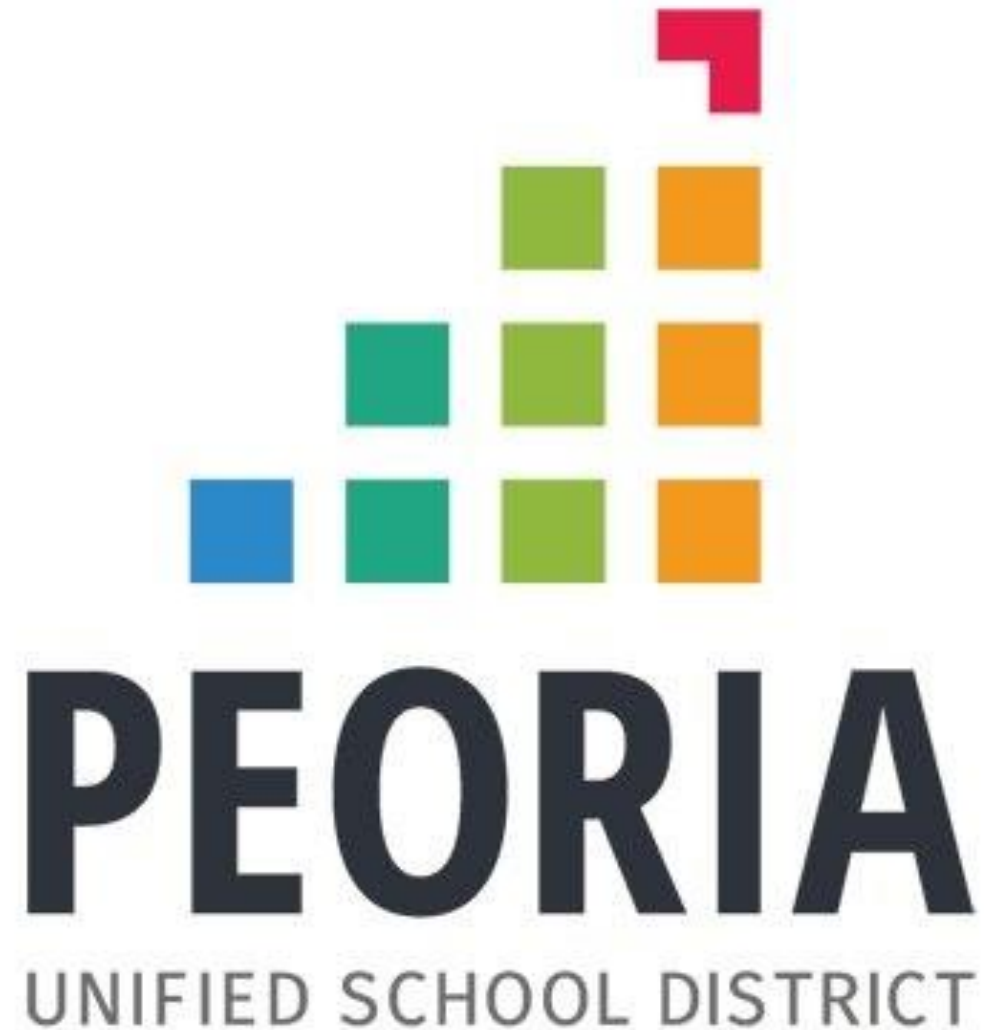
Additional Evidence: Post-Evidence Sharing

- The Network's Title IX coordinator will decide whether parties must provide all evidence PRIOR to the disclosure of evidence for review has been provided by the investigator OR whether to allow parties to provide additional evidence after disclosure evidence has been shared



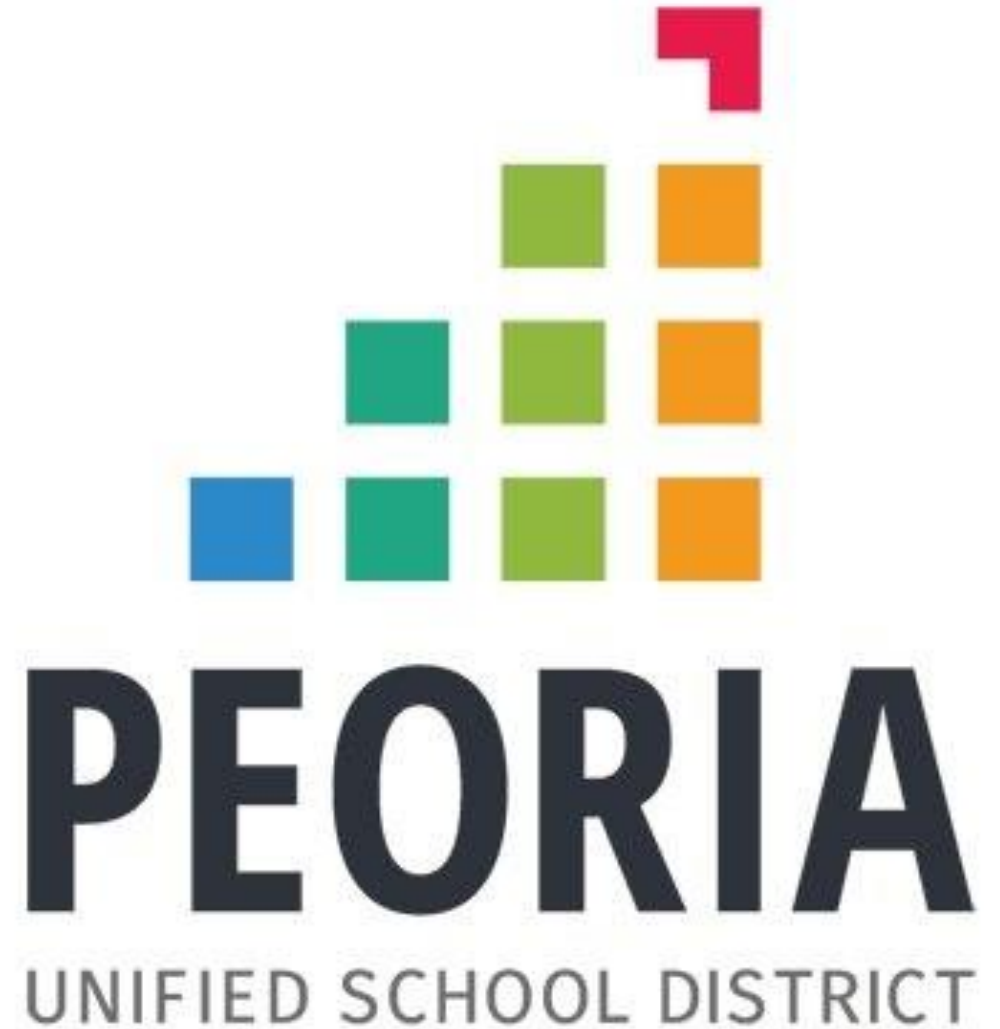
Review Written Responses

- Consider the written responses to be evidence provided by the parties
- Consider additional post evidence shared after disclosure if allowed
- Questions submitted should be given to the decision-maker to manage



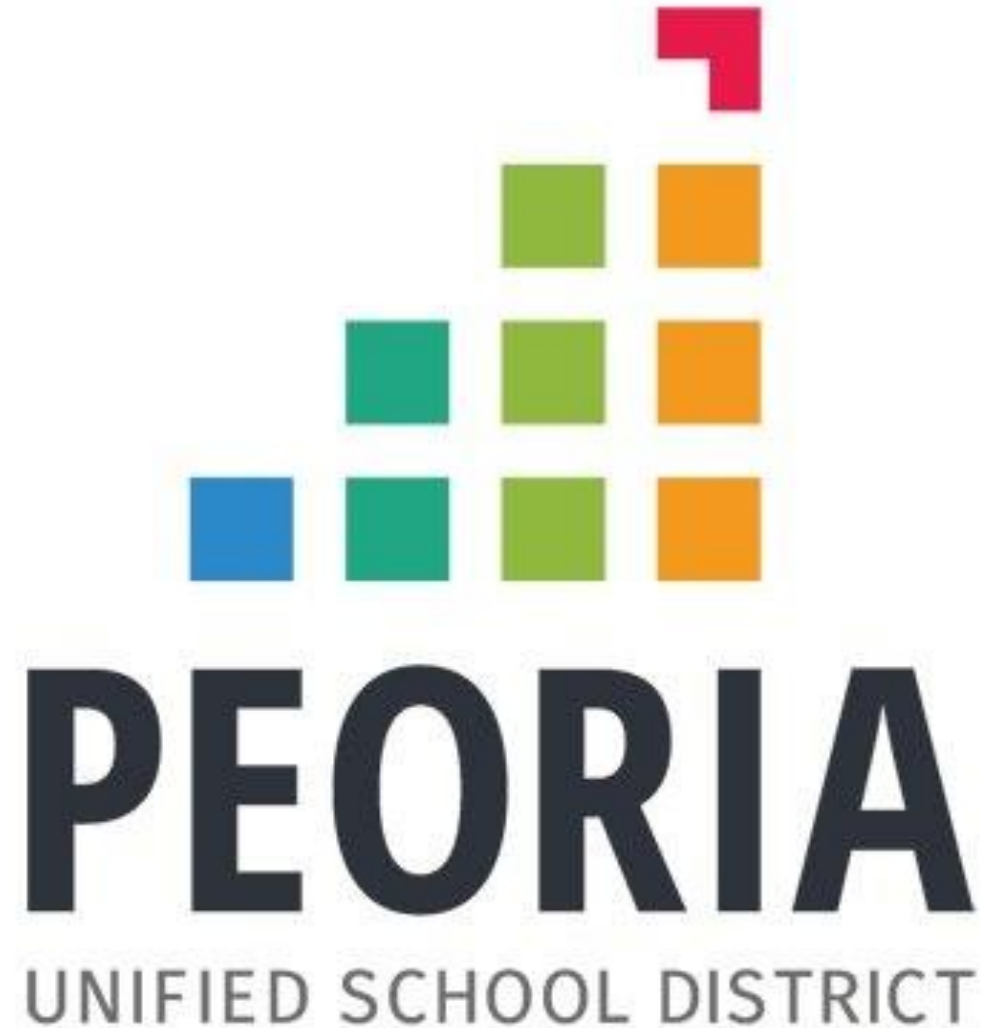
Report

- All evidence directly related whether relevant or not.
- The more information, the more comprehensive, the more transparent



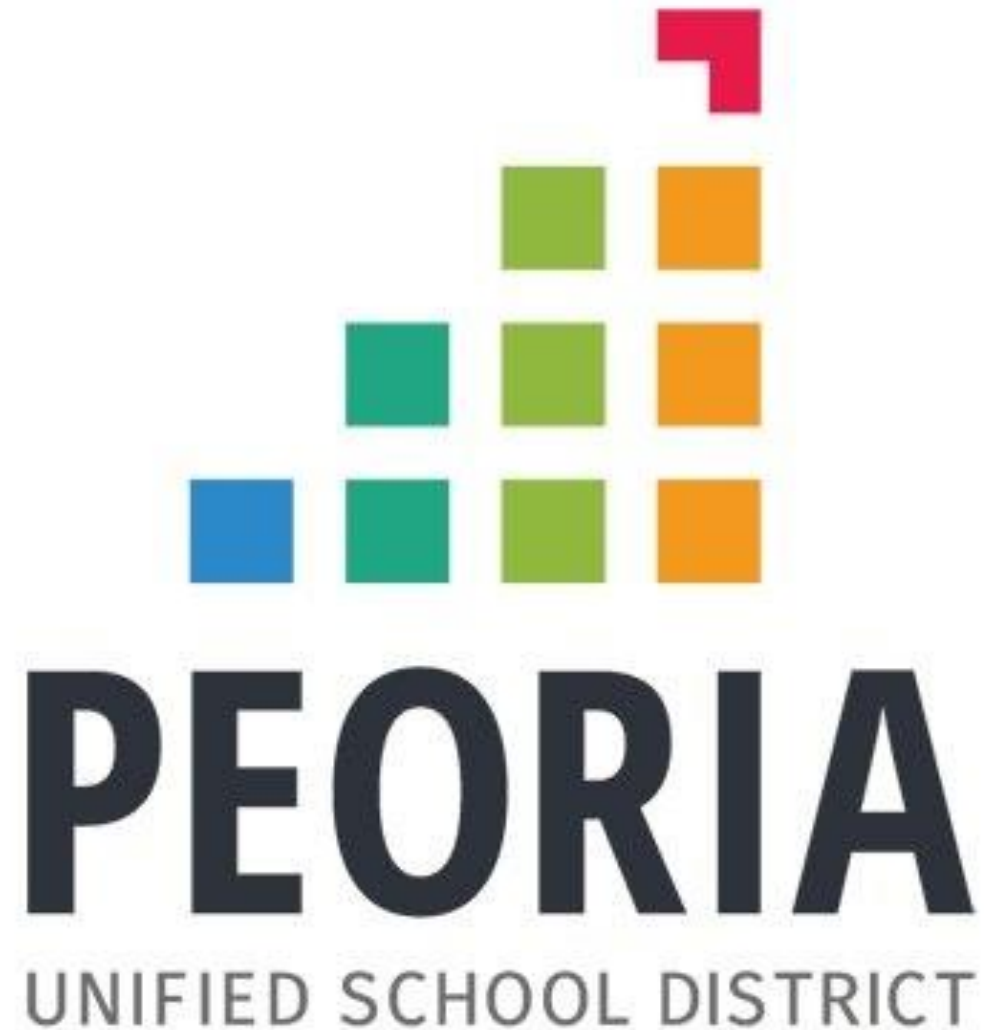
Report

- Be **thorough**
 - Include observations of witnesses—can report on credibility assessment
 - Details and witness observations
 - This is the only document the decision-maker will have; if you were the decision-maker, what would you NEED to know?
- Decision-maker should not need to contact investigator for clarification



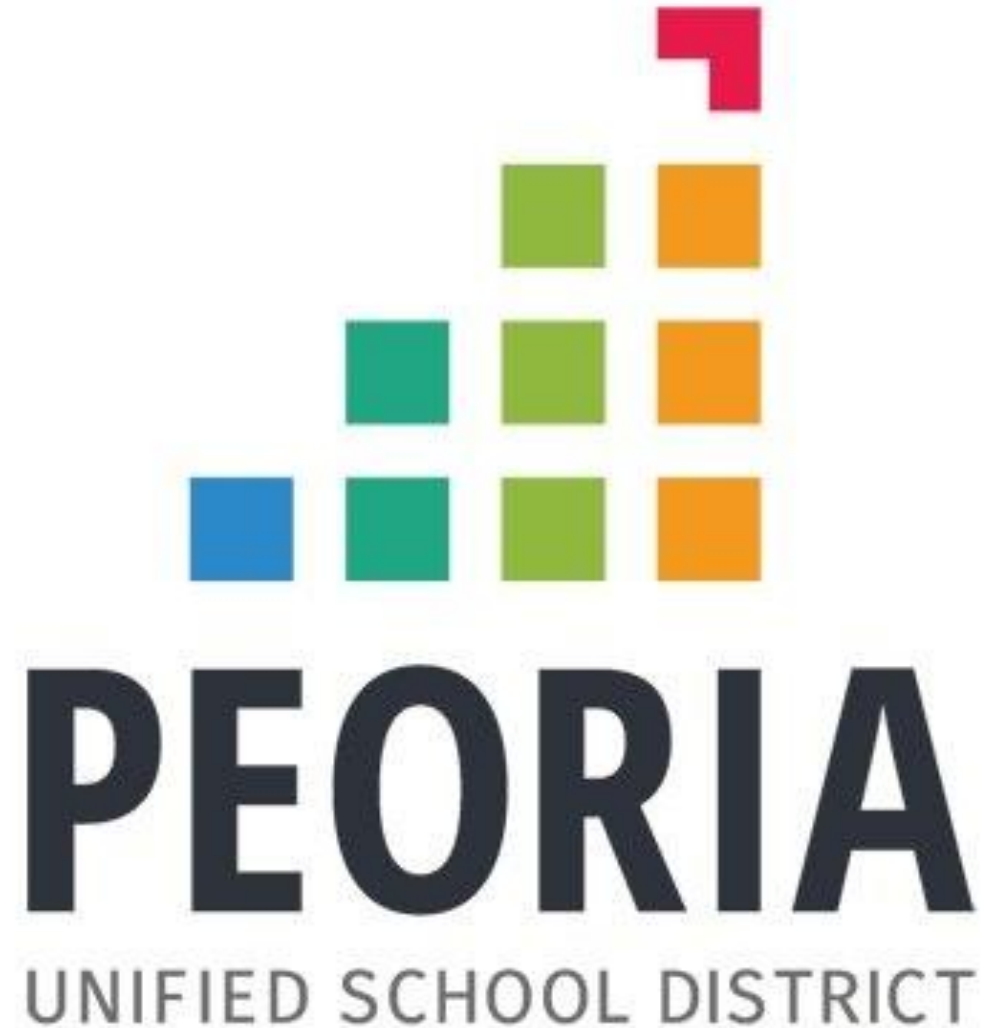
Decision-maker

- Preponderance—50% + a feather
- More probable that it happened than not
- Plausibility
- Consistency
- Validity



Report Submission

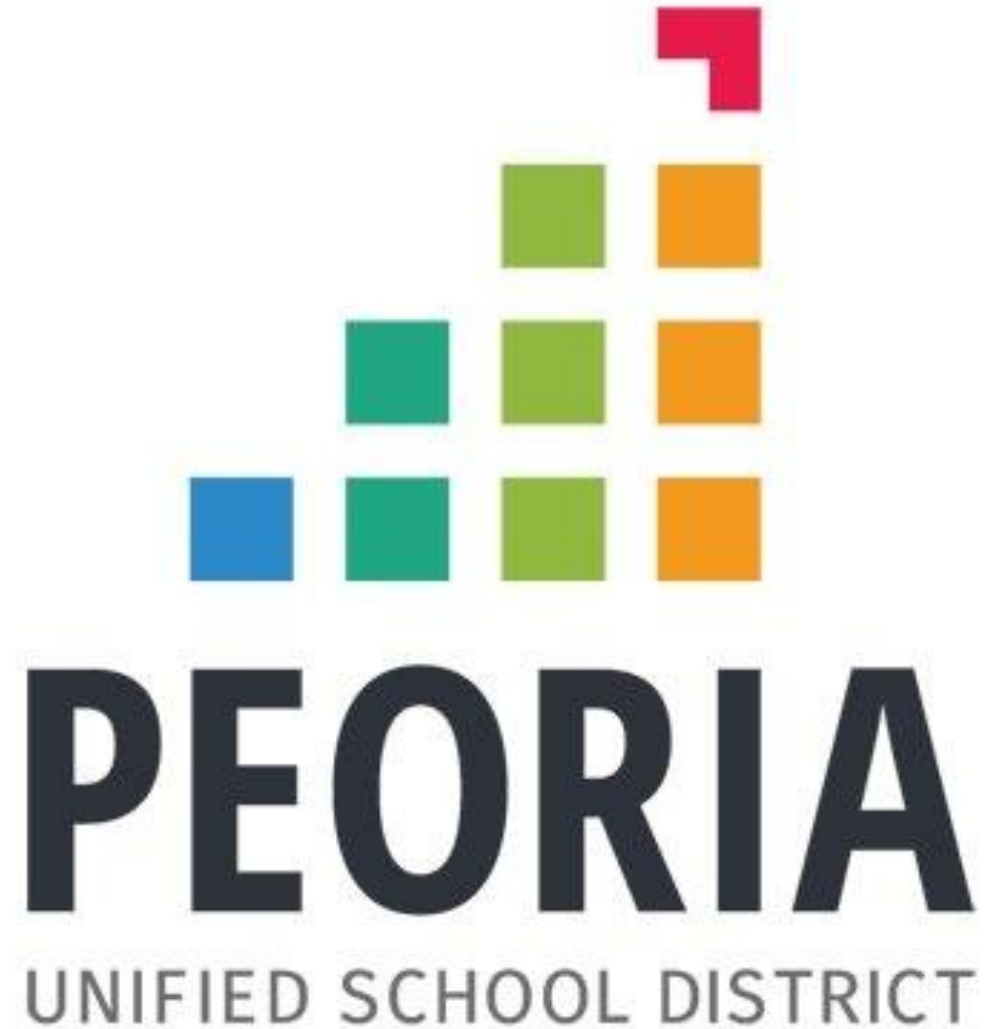
- Email to Title IX coordinator
- Email separately (read receipt) to both parties
- and copy Title IX coordinator on each and/or
- Mail hard copies
- Send at same time



FYI...

Procedurally—After Report Submission

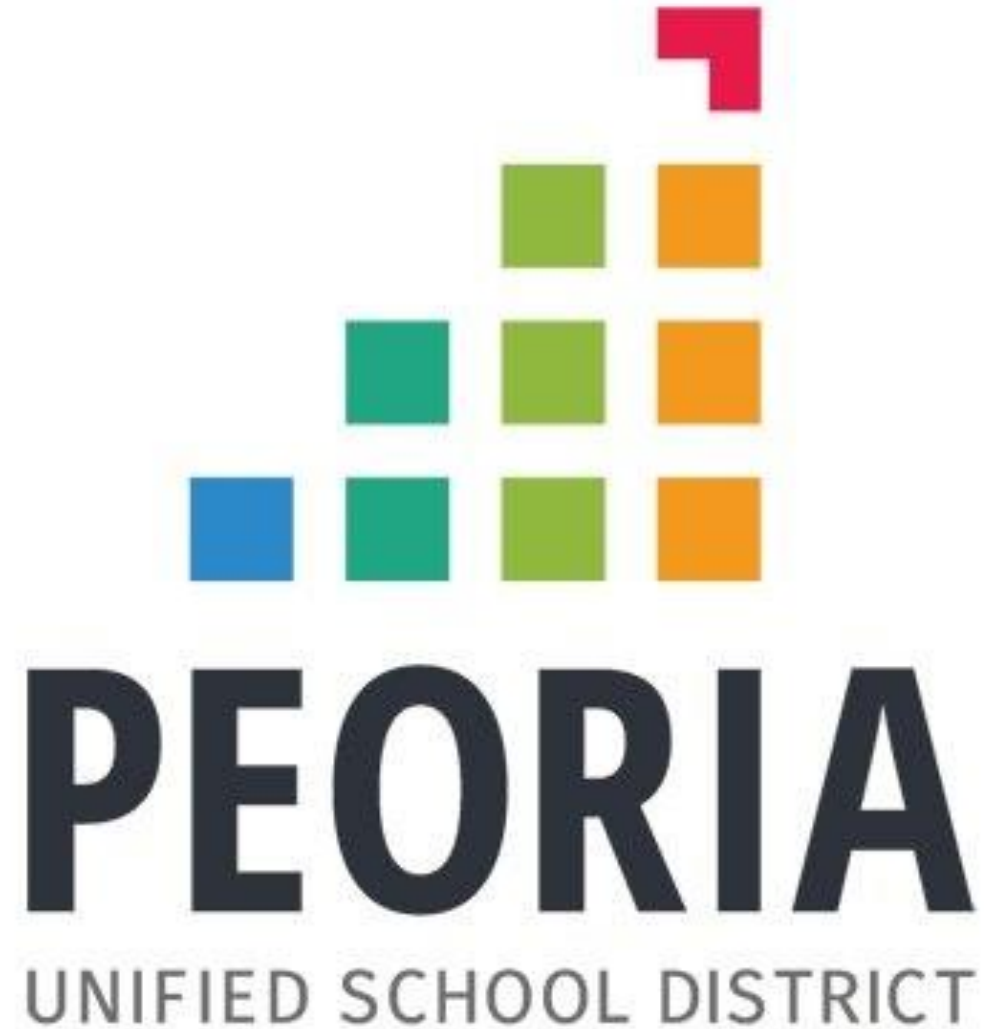
- Each party has at least 10 days to review the investigation report and provide a written response; Network can decide whether to allow additional time or limit it to 10 days
- Decision-maker will consider the written response in addition to the investigation report



FYI...

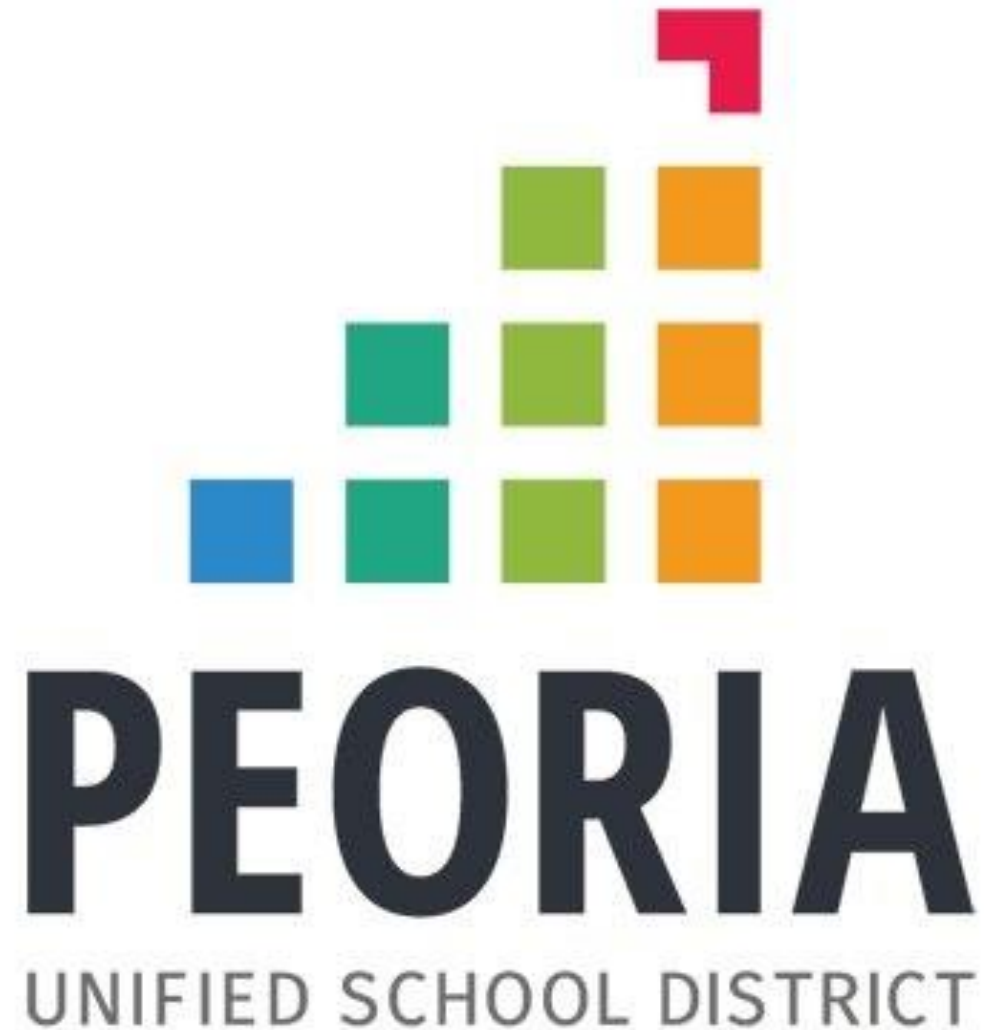
Procedurally—After Report Submission

- TIX Coordinator may choose whether the ten days should be business days, calendar days, or school days.
- Must give at least 10 days, may give more as long as grievance process can still be concluded within timeline set forth in grievance procedures.



Procedurally—After Report Submission

- The Network will not hold in-person hearings; however, after the investigation report is completed and before a determination is made, the parties must have the opportunity to review the investigation report and submit written, relevant questions to the decision-maker that the party wants asked of the other party or witnesses




Procedurally— After Report Submission

Each party may submit relevant questions to the decision-maker



If a question is excluded by the decision-maker, he/she must explain why the question is not relevant



Each party will be provided answers to its questions and then have a limited opportunity to ask limited follow-up questions

Interviewing Strategies

- Paraphrase; repeat back
- **Read notes aloud**
- Brief statements: “Yes,” “Go on,” “I see” ...
- **Give feedback on quality responses**
- Body language: nod; eye contact
- **Monitor interviewee body language;**
- **Timeline of events**
- One question at a time
- **Wait for a response**
- Ask in another way later
- **Clarify fact from inference**
- Open ended questions
- **Appeal to senses;**
- Take break; get water; “take a call”

Resources for Review

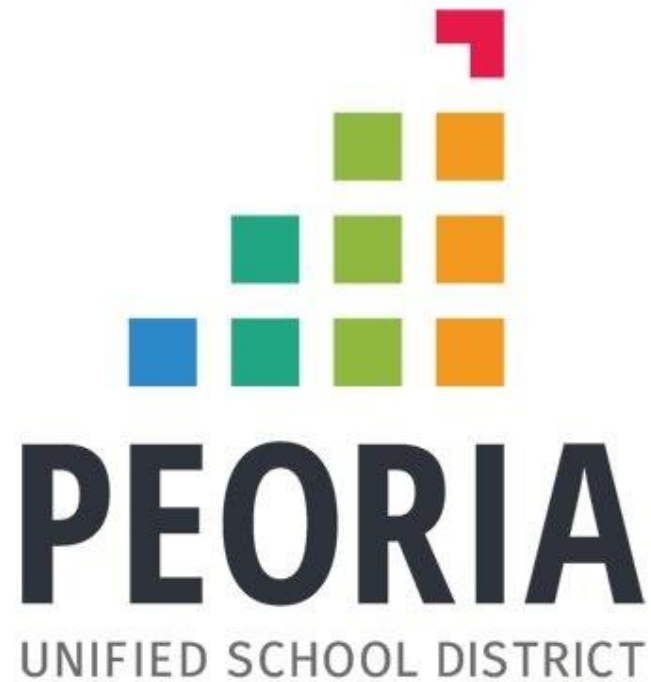
- [Summary of Major Provisions of the Department of Education's Title IX Final Rule](#)
- [Questions and Answers on the Title IX Regulations on Sexual Harassment \(July 2021\)](#)
- [TIX Federal Register](#)

Resource Forms & Templates

- Investigator Checklist
- Interview Notice
- Summary of Interview Template
- Medical and Counseling Consent
- Non-Disclosure Letter Agreement Template
- Investigative Report Template



Questions/Comments/Concerns



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