



Title IX for the Title IX Team: Title IX Coordinators, Investigators, Decision-makers, and Facilitators



Topics Covered

- Overview of Title IX
- Definition Of Sexual Harassment
- The District's Grievance Process
- How To Serve Impartially
- How To Conduct An Investigation
- Decision-making, Relevance



Title IX

20 U.S. Code § 1681. Sex

“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.”



The 2020 Amendments

The amended Title IX regulations now define sexual harassment and establish detailed procedures for how educational institutions subject to Title IX (referred to as “recipients”) must respond to allegations of sexual harassment.



The 2020 Amendments

- **34 C.F.R. § 106.8:** Designation of a Title IX Coordinator; adoption of a grievance procedure and grievance process, and notice/dissemination of policies
- **34 C.F.R. § 106.30:** Important new definitions
- **34 C.F.R. § 106.44:** Requirements for districts to respond to each report or complaint of sexual harassment of which the district has actual knowledge
- **34 C.F.R. § 106.45:** Requiring districts to establish and administer a grievance process for formal complaints of sexual harassment; training and recordkeeping requirements
- **34 C.F.R. § 106.71:** Non-retaliation and confidentiality



Training Requirements 34 C.F.R. § 106.45(b)

The Title IX Coordinator, investigator, decision-maker, and any informal facilitator must receive training on the following:

- The definition of sexual harassment in §106.30;
- The scope of the school district's education program or activity;
- How to conduct an investigation;
- The District's grievance process, including hearings, appeals, and informal resolution processes; and
- How to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias.

Training Requirements, cont.

- **Investigators** must receive training on issues of relevance in connection with the investigator's duty to create an investigative report that fairly summarizes relevant evidence.
- **Decision-makers** must receive training on issues of relevance of questions and evidence, including when questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant.
- Training materials shall not rely on sex stereotypes and will promote impartial investigations and adjudications of formal complaints of sexual harassment.



Title IX Coordinator- 34 C.F.R. § 106.8(a)

Districts must “designate” and “authorize” an individual to coordinate the District’s Title IX compliance efforts, to be known as the “Title IX Coordinator.”



Role of the Title IX Coordinator-

- Receive reports and complaints of violations of Title IX
- Responsible for ensuring that the district meets its obligations with respect to Title IX notices, staff training, and record-keeping.
- Identify and implement “supportive measures” and, in appropriate cases, remedies
- May sign formal complaint
- NO decision-making abilities, but not automatically disqualified from acting as investigator



Policy and Notice Requirements -

34 C.F.R. § 106.8

District's must provide notice to the following groups:
applicants for admission and employment; students; parents
or legal guardians; unions or professional organizations
holding agreements with the recipient, of:

- its nondiscrimination policy and grievance procedures, including how to file or report sexual harassment and how the recipient will respond,
- the Title IX coordinator's name or title, email address, office address, and telephone number.



Reporting Allegations of Sexual Harassment - 34 C.F.R. § 106.8(a)

- Any person may report
- In person, by mail, by telephone, or by email, using the contact information listed for the Title IX Coordinator, or by any other means that results in the Title IX Coordinator receiving the person's report.
- At any time, including non-business hours, by using the telephone number or email address, or by mail to the office address, listed for the Title IX Coordinator.



Responding to allegations of sexual harassment - 34 C.F.R. § 106.44

- Responding to **notice/report** of sexual harassment
- Responding to a **formal complaint** of sexual harassment,
 - Formal Complaint = document filed by a complainant or signed by the Title IX Coordinator alleging sexual harassment against a respondent and requesting that the recipient investigate the allegation of sexual harassment. 34 C.F.R. § 106.30(a).



Liability = Failure to Respond

A district must respond promptly to actual knowledge of sexual harassment in an education program or activity of the recipient against a person in the United States in a manner that is not deliberately indifferent.

34 C.F.R. § 106.44(a).



Respond Promptly to

- 1. Actual knowledge*
- 2. Sexual Harassment*
- 3. Education Program or Activity*
- 4. Against a Person in the United States*
- 5. In manner that's not Deliberately Indifferent.*



1. Actual Knowledge

“Actual knowledge” of sexual harassment = notice of sexual harassment given or allegations of sexual harassment made to **any employee**. 34 C.F.R. § 106.30(a).



Employee Duty to Report

Any employee who received a report of sexual harassment, or has knowledge that a student or employee is a victim of sexual harassment, including through direct observation, shall **report it to the Title IX Coordinator.**

File: ACA-R/GBA-R



Examples of “Knowledge”:

- Witnessing an incident/series of incidents
- Verbal or written report of an incident or allegation from a student, parent, staff member
- Receiving multiple reports that, taken together, provide a different picture of a person’s conduct than each incident standing alone
- The filing of a formal complaint or any report under the district’s Title IX grievance procedure or grievance process.



2. “Sexual Harassment”, defined

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.
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).

Quid Pro Quo “Sexual Harassment”

- District employee conditions an aid, service, or benefit of the District on an individual’s participation in unwelcome sexual conduct.
- Severity and harm are presumed
- Only applies when employee is an actor (not a volunteer, another student, etc.)



Hostile Environment Sexual Harassment

- 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.

Severe, Pervasive, Objectively Offensive

- Severe: has to be more than just juvenile behavior
- Pervasive: multiple incidents of harassment
- Objectively Offensive: behavior that would be considered offensive by a reasonable person (not merely offensive to the victim personally)

Doe v. Univ. of Kentucky, No. 19-5126 (6th Cir. 2020)



Severe, Pervasive, Objectively Offensive

- “Severe, pervasive, and objectively offensive” is harder to meet the younger the children involved are. *Gabrielle v. Park Forest-Chicago Heights, Illinois Sch. Dist.*, 163 F.3d 817 (7th Cir. 2003)
- Ability to receive an education (grades) is a factor. *Hawkins v. Sarasota Sch. Bd.*, 322 F.3d 1279 (11th Cir. 2003)



Severe, Pervasive, Objectively Offensive

- Soccer Coach often in front of the entire team, singled out individual players and asked questions about whether, with whom, and how often they were having sex
- Conduct was ongoing and occurred at all times and places—including team meetings, practices, and while the team was traveling.

Jennings v. Univ. of N.C., 482 F.3d 686 (4th Cir. 2007)



Severe, Pervasive, Objectively Offensive

- One incident of male student flicking chest of female student (she kned him in the groin in response) was not S, P, and OO. *Sanchez v. Brawley Elem. Sch. Dist.*, 719 Fed. Appx. 723 (9th Cir. 2018)
- Two isolated incidents, the touching of Complainant's right shoulder by a student named "Sam," and the touching of her breast by another student were not S, P, and OO. *Adusumilli v. Ill. Inst. of Tech*, 191 F.3d 455 (Ill. 1999)



VAWA/Clery “Sexual Harassment”

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



Sexual Assault 20 U.S.C. 1092(f)(6)(A)(v)

“Sexual assault” means an offense classified as a forcible or nonforcible sex offense under the uniform crime reporting system of the FBI.



Sexual Assault 20 U.S.C. 1092(f)(6)(A)(v)

Sex Offenses, Forcible—Any sexual act directed against another person, without the consent of the victim including instances where the victim is incapable of giving consent.

- Forcible Rape
- Forcible Sodomy
- Sexual Assault with an Object
- Forcible Fondling



Sexual Assault 20 U.S.C. 1092(f)(6)(A)(v)

Forcible Rape— The carnal knowledge of a person, forcibly and/or against that person's will or not forcibly or against the person's will in instances where the victim is incapable of giving consent because of his/her temporary or permanent mental or physical incapacity.



Sexual Assault 20 U.S.C. 1092(f)(6)(A)(v)

Forcible Sodomy—Oral or anal sexual intercourse with another person, forcibly and/or against that person's will or not forcibly or against the person's will in instances where the victim is incapable of giving consent because of his/her youth or because of his/her temporary or permanent mental or physical incapacity.



Sexual Assault 20 U.S.C. 1092(f)(6)(A)(v)

Sexual Assault With An Object—To use an object or instrument to unlawfully penetrate, however slightly, the genital or anal opening of the body of another person, forcibly and/or against that person's will or not forcibly or against the person's will in instances where the victim is incapable of giving consent because of his/her youth or because of his/her temporary or permanent mental or physical incapacity.



Sexual Assault 20 U.S.C. 1092(f)(6)(A)(v)

Forcible Fondling—The touching of the private body parts of another person for the purpose of sexual gratification, forcibly and/or against that person's will or not forcibly or against the person's will in instances where the victim is incapable of giving consent because of his/her youth or because of his/her temporary or permanent mental or physical incapacity.



Sexual Assault 20 U.S.C. 1092(f)(6)(A)(v)

Nonforcible: Unlawful, nonforcible sexual intercourse.

- Incest—Nonforcible sexual intercourse between persons who are related to each other within the degrees wherein marriage is prohibited by law.
- Statutory Rape—Nonforcible sexual intercourse with a person who is under the statutory age of consent.

////// Dating Violence 34 U.S.C. 12291(a)(10)

Violence committed by a person—

- Who is or has been in a social relationship of a romantic or intimate nature with the victim; and
- Where the existence of such a relationship shall be determined based on a consideration of the following factors:
 - The length of the relationship.
 - The type of relationship.
 - The frequency of interaction between the persons involved in the relationship.



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

Felony or misdemeanor crimes of violence committed by

- a current or former spouse or intimate partner of the victim,
- a person with whom the victim shares a child in common,
- a person who is cohabitating with or has cohabitated with the victim as a spouse or intimate partner,
- a person similarly situated to a spouse of the victim under the domestic or family violence laws of the jurisdiction receiving grant monies,
- 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 the jurisdiction.

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

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

- fear for his or her safety or the safety of others; or
- suffer substantial emotional distress.



3. Education Program or Activity

Any location, events, or circumstance over which the recipient exhibits substantial control over **both** the alleged harasser and the “context” in which the harassment occurred. (*Davis*)

34 C.F.R. § 106.44(a).



Online Activity

School District's "Operations" includes computer and internet networks, digital platforms, and computer hardware or software owned or operated by, or used in the operations of the district.



OCR: “§ 106.30 sexual harassment definition does not make sexual harassment dependent on the method by which the harassment is carried out; use **of e-mail, the internet, or other technologies** may constitute sexual harassment as much as use of in-person, postal mail, handwritten, or other communications.”



Off-Campus Behavior:

A school district's Title IX obligations extend to sexual harassment incidents that occur off campus:

- (1) if the off-campus incident occurs as part of the school district's "**operations**"; and
- (2) if the school district exercised substantial control over the respondent and the context of alleged sexual harassment that occurred off campus.



Off Campus Activity :

- Consider factors such as whether the district funded, promoted, or sponsored the event or circumstance where the alleged harassment occurred.
- However, no single factor is determinative.



Off-Campus examples from the Preamble

- In *Doe v. East Haven Board of Education*, the Second Circuit held that the plaintiff sufficiently alleged sexual harassment to which the district was deliberately indifferent where the harassment consisted of **on-campus taunts and name-calling** directed at the plaintiff after she had reported being **raped off campus** by two high-school boys.

85 C.F.R. 30026, at 30200.



Lapka v. Chertoff, 517 F.3d 974 (7th Cir. 2008)

- Conduct was workplace (sexual) harassment even though the alleged rape occurred while the plaintiff and assailant were socializing after hours in a private hotel room
- Rationale: the bar was part of the training facility where the plaintiff and assailant were required to attend work-related training sessions and thus were on “official duty” while at that facility, including the bar located in the facility...



“so the event could be said to have **grown out of** the workplace environment” and the plaintiff and assailant were trainees expected to eat and drink at the facility and “return to dormitories and hotel rooms provided by” the employer such that “[e]mployees in these situations can be expected to band together for society and socialize as a matter of course” ...

85 C.F.R. 30026, at 30200, n. 877.



4. Against a Person in the United States

Under Title IX, schools only need to address sex discrimination occurring against a person *in the United States*



5. Deliberate Indifference –

A recipient is deliberately indifferent if its response is clearly ***unreasonable in light of known circumstances.***

34 C.F.R. § 106.44(a).



Initial Response

34 C.F.R. 106.44(a),
.30(a)

Must treat complainants and respondents equitably:

- Offer “supportive measures”
- Follow District grievance process **before** disciplining or sanctioning respondent (File: ACA-R/GBA-R)



Screening Reports of Sexual Harassment:

- Before initiating Title IX response procedures, Title IX Coordinator may consider whether allegations (and any additional information that may be gathered), if true, would potentially meet the definition of sexual harassment under Title IX, occurred in the district's program or activity, and in the U.S.
- If not, follow Code of Conduct, Bullying, Harassment Policies



Title IX Coordinator must respond promptly:

- Contact the complainant to discuss the availability of “supportive measures”
- Consider the complainant’s wishes with respect to supportive measures
- Inform the complainant of the availability of supportive measures with or without the filing of a formal complaint
- Explain the process for filing a formal complaint

District Notice Form, File: ACA-E1



Title IX Coordinator must also:

1. Coordinate with appropriate administrators to provide supportive measures to the complainant. (Remember confidentiality.)
2. Document the provision of supportive measures, or if supportive measures are not provided, document the reasons why such response was not clearly unreasonable *in light of the known circumstances*. (Memo to file)



“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 before or after the filing of a formal complaint or where no formal complaint has been filed.
- Designed to restore or preserve equal access to the district’s education program or activity without unreasonably burdening the other party, while protecting the safety of all parties and the district’s educational environment; and deterring sexual harassment.

“Supportive Measures” *Examples*

- *Counseling*
- *Deadline Extensions, Course-related adjustments*
- *Schedule Changes*
- *Increased Monitoring or Supervision*
- *Mutual restrictions on contact*

Complete removal of respondent from an activity would likely be considered punitive, except for “emergency removals” for students and “administrative leaves” for employees



“Supportive Measures”

- Confidential
- TIXC is responsible for coordinating and implementation
- Ongoing and continuous part of responding to any incident, report, or complaint
- If the allegations, even if proven, not sexual harassment, no obligation to provide (or continue) supportive measures. But, may provide outside of Title IX if appropriate.



Emergency Removals

- 34 C.F.R. 106.55(c)
- Based on an individual **safety and risk analysis**
- Necessary to protect a student or other individual from an immediate threat to **physical** health or safety.
- Must provide notice and opportunity to challenge the decision immediately after the removal
- Consider other laws (e.g. IDEA/504 change of placement)



Administrative Leave: 34 C.F.R. 106.44(d)

- Available measure for employees only
- Consider WTEL 30-day investigation period



**Formal
Complaint**
34 C.F.R. 106.30(b)

“A document filed by a complainant or signed by the Title IX Coordinator alleging sexual harassment against a respondent and requesting that the recipient investigate the allegation of sexual harassment.”



Dismissal of Formal Complaint

- Mandatory if alleged conduct
 - Not sexual harassment if true
 - Did not occur in the school's program or activity
 - Did not occur in the US
- Permissive/Discretionary
 - Complainant requests to withdraw
 - Respondent's enrollment or employment ends
 - Specific circumstances prevent recipient from gathering evidence sufficient to reach a determination (e.g. passage of time, lack of cooperation by complainant)



Dismissal of Formal Complaint

- If dismissed, the district must promptly send written notice to both parties at the same time of the dismissal and reasons for dismissal
- Dismissal decisions are appealable
- If the formal complaint is not dismissed upon receipt, the Title IX Coordinator must initiate the grievance process.



Basic Requirements of Grievance Process

34 C.F.R. 106.45(b)(1)

- Treat parties equitably
- Objective evaluation of all evidence
- No conflicts of interest or bias
- Presumption that respondent not responsible
- Reasonably prompt time frames
- Description or list of possible discipline/other remedies
- Statement of standard used (preponderance of evidence)
- Appeal procedures and bases
- Range of supportive measures available
- No breach of privilege without waiver



Treat Parties Equitably

- Provide **remedies** to a complainant only after a determination of responsibility against a respondent has been made
- Follow a grievance process before imposing any **disciplinary sanctions**, or other actions that are not supportive measures, against a respondent



Objective Evaluation

- Objectively evaluate all available evidence, both inculpatory and exculpatory
- Don't make credibility determinations based on a party's status as complainant, respondent, or witness



Impartiality, Conflicts of Interest, Bias

“...any individual designated by a recipient as a Title IX Coordinator, investigator, decision-maker, or any person designated by a recipient to facilitate an informal resolution process, **[shall] not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent.**”

34 C.F.R. § 106.45 (b)(1)(iii)



Impartiality, Conflicts of Interest, Bias

“ . . . Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process, [shall] receive **training** on . . . how to conduct an investigation and grievance process including hearings, appeals, and informal resolution processes, as applicable, and how to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias.”

34 C.F.R. § 106.45 (b)(1)(iii)



Conflict of Interest

A conflict of interest occurs when a party has competing interests or loyalties because of their duties to more than one person or organization.

Conflict of Interest: a conflict between the private interests and the official or professional responsibilities of a person in a position of trust or a conflict between competing duties.

See <https://www.merriam-webster.com/dictionary/conflict%20of%20interest>.



Prejudgment and Impartiality

- Prejudgment occurs when a party passes judgment or makes a decision prematurely or without sufficient objective consideration or investigation. 85 FR 30026, at 30252
- Partial: inclined to favor one party more than the other. See <https://www.merriam-webster.com/dictionary/partial>.

Bias

- A tendency, inclination, or prejudice toward or against something or someone.
- Often based on stereotypes, rather than actual knowledge of an individual or circumstance
- Can lead to rash decisions or discriminatory practices

Psychology Today: <https://www.psychologytoday.com/us/basics/bias>



Reducing Bias

“Everyone has some degree of bias. It’s human nature to assign judgment based on first impressions. Also, most people have a lifetime of conditioning by schools, religious institutions, their families of origin, and the media. However, by reflecting critically on judgments and being aware of blind spots, individuals can avoid stereotyping and acting on harmful prejudice.”

Psychology Today: <https://www.psychologytoday.com/us/basics/bias>



////// Bias: USDOE (85 C.F.R. at 30252)

- Encourages an objective (whether a **reasonable person** would believe bias exists), common sense approach to evaluating whether a particular person serving in a Title IX role is biased
- Cautions against applying sex-stereotypes (generalizations) that might unreasonably conclude that bias exists. Ex:
 - all self- professed feminists, or self-described survivors, are biased against men
 - that a male is incapable of being sensitive to women
 - that prior work as a victim advocate, or as a defense attorney, renders the person biased for or against complainants or respondents



Prior Affiliations (85 FR 30026, p. 30252).

- Prior work as a victim advocate, or as a defense attorney, doesn't render a person biased for or against complainants or respondents.
- The very training required by § 106.45(b)(1)(iii) is intended to provide Title IX personnel with the tools needed to serve impartially and without bias such that the prior professional experience of a person whom a recipient would like to have in a Title IX role need not disqualify the person from obtaining the requisite training to serve impartially in a Title IX role.



Act Impartially

Treat complainants and respondents equitably under the regulations; presumption of non-responsibility to a respondent until a decision is rendered in the grievance process.

§106.45(b)(1)(iv).

- Avoid sex stereotypes. (85 C.F.R. at 30254).
- The obligation under Title IX is to treat each person as an individual, not as a member of a class subject to prejudgment and prejudice on the basis of sex.
- Understand bias may also be based on race or socio-economic status.



Act Impartially

- Objectively examine relevant evidence before reaching determination: Title IX personnel should objectively examine relevant evidence, and avoid prejudgment of facts, before reaching a determination on responsibility. (pp. 30214, 30252).
- Give both parties equal opportunity to present witnesses and evidence. (p. 30222).

Impartiality

Continue to evaluate issues of bias and conflicts of interest throughout the grievance process: Example, consider whether involvement in emergency removal process results in bias or conflict of interest for or against the complainant or respondent. (p. 30235).

- Example: If a Title IX Coordinator restricts a party from providing evidence, then the Title IX Coordinator would be violating these final regulations and may even have a conflict of interest or bias, as described in §106.45(b)(1)(iii). (p. 30432).



Possible Bias

- Training materials were one-sided
- Failure to conduct an adequate investigation and objectively pursue the evidence
- Failure to reveal information learned during the investigation to both parties
- Investigator advocated for certain discipline
- TIX team made statements demonstrating favor towards complainants or respondents



Possible Bias

- Failure to follow policies
- Failure to follow established procedures for Title IX investigations and hearings
- Decision-maker was influenced by other school officials in reaching a decision
- Decision-maker had professional connections with one of the party's parents



Can you serve impartially?

- Can you serve objectively?
- Can you serve without predetermination?
- Do you have a conflict of interest?
- Will you base decisions on the relevant facts?
- Will you investigate further when necessary (avoid jumping to conclusions)?
- Will you follow the District's grievance process?
- Will you provide Title IX/District Policy procedural and due process rights?
- Will you apply the Title IX/District Policy definitions of sexual harassment?



Investigating
Formal
Complaints

34 C.F.R. 106.45(b)(5)



First Step: NOTICE

- Written Notice to known parties “upon receipt of a written complaint”
- Provided by Title IX Coordinator
- In sufficient time to allow respondent to prepare a response before any initial interview
- Must be supplemented if new allegations added to investigation

- District File: ACA-E1



First Step: Notice Requirements

- Notice of grievance process, informal resolution process
- Notice of allegations, w/ sufficient detail to allow respondent to prepare a response (names of parties, conduct alleged, date/location of conduct,)
- Statement that Respondent presumed not responsible
- Statement that responsibility determined at conclusion of grievance process
- Rights to an attorney or advisor
- Rights to inspect and review evidence



Investigation Requirements 34 C.F.R. 106.45(b)(5)

- District has burden of proof and of gathering evidence, not the parties
- Parties have equal opportunity to present witnesses and evidence
- Don't restrict either party's ability to discuss allegations or gather and present evidence
- Parties have same opportunities to have others present, including an attorney or advisor



The Investigation

- Must act promptly but thoroughly
- After initial screening for Dismissal, Title IX Coordinator will assign the investigator
- Investigator will interview both parties, any witnesses, and anyone else that can provide relevant information
- Evidence may include emails, letters, electronic messages/posts, video surveillance



The Investigation

- Identify the specific allegations – what is the conduct alleged to have occurred?
- Identify the specific violations - which law or policy is alleged to have been violated?
- Identify the parties – more than one respondent or potential complainant?
- Identify the witnesses – this list may change
- Credibility determinations – not based on bias, generally left to the decision-maker



Interview Notice 34 C.F.R. 105.45(b)(5)(v)

Provide to a party, whose participation is invited or expected, written notice of the date, time, location, participants, and purpose of all hearings, investigative interviews, or other meetings, with sufficient time for the party to prepare to participate.”



Interviewers

- Record vs Take Notes – consistency
- Notice of nonretaliation
- Don't promise confidentiality
- Gather facts, not opinions or guesses
- Create scripted list of questions to ask, but ask follow up questions if necessary
- Ask who, what, when, where, why and how. Don't ask leading questions.
- Use specific terms and ask for specific details, even if uncomfortable. Don't paraphrase – record verbatim statement



Parties' Rights -

The District shall...

- Provide an equal opportunity for the parties to present witnesses, including fact and expert witnesses, and other inculpatory and exculpatory evidence
- Not restrict the ability of either party to **discuss** the allegations under investigation or to gather and present relevant evidence
- Provide opportunities to have others present during any grievance proceeding, including an advisor or attorney

34 C.F.R. § 106.45 (b)(5)



Retaliation

- Title IX and District policy prohibit holding a party's participation or refusal to participate against them.
- Advise parties that they do not have to participate in interviews or provide a statement.

34 C.F.R. § 106.71(a)



Burden of Proof

The school is responsible for proving or disproving the allegations.

- Complaint doesn't have to prove conduct occurred
- Respondent doesn't have to prove "innocence"



Police Involvement

- Know obligations to report to law enforcement
- Cooperate with law enforcement performing their own investigation
- Law enforcement activity is good cause to delay reasonably prompt timelines. 34 C.F.R. § 106.45.

Investigative Report 34 C.F.R. 106.45(b)(5)

- Both parties and their advisors have an equal opportunity to review all evidence; such evidence must be provided prior to the completion of the final investigation report and in time to give the parties at least 10 days to prepare a written response, which the investigator must consider prior to completing the investigation report
- Written investigation report must fairly summarize all **relevant** evidence.
- Report must be provided to the parties for their review and written response, at least 10 days before a determination of responsibility.



Relevant Evidence

- Evidence having a tendency to make the existence of any fact that is of consequence to the decision more or less probably that it would be without the evidence
- Could either be inculpatory or exculpatory



Determination of Responsibility

34 C.F.R. 106.45(b)(7)

The decision maker, who cannot be the investigator or the Title IX coordinator, must apply the recipient's standard of evidence and issue a written determination of responsibility using that standard



Decision-making – Party Questions

1. After receipt of the investigative report and 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.



Decision-making – Party Questions

2. Questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant, unless such evidence about the complainant's prior sexual behavior is offered to prove:
 - i. That someone other than the respondent committed the conduct alleged by the complainant, or
 - ii. If the questions and evidence concerns specific incidents of the complainant's prior sexual behavior with respect to the respondent and is offered to prove consent.

3. The decision-maker must explain to the party proposing the questions any decision to exclude questions as not relevant.



Decision-making –

4. The decision-maker must make an objective evaluation of all relevant evidence, both inculpatory (evidence that tends to establish a Respondent's responsibility for alleged sexual harassment) and exculpatory (evidence that tends to clear or excuse a Respondent from allegations of sexual harassment).

5. The decision-maker must not make credibility determinations based on a person's status as a complainant, respondent, or witness.



Preponderance of the Evidence:

The preponderance of the evidence requires a determination that it is **more likely than not** that the respondent engaged in the alleged sexual harassment.

Same standard applies to both students and employees



Written Determination of Responsibility:

- Identify the allegations
- Describe the procedural steps taken (receipt of the complaint to determination)
- Include findings of fact
- Include conclusions (apply code of conduct to the facts)
- Include a statement of, and a rationale for, the result as to each allegation, including a determination of responsibility, any disciplinary sanctions, and whether remedies to restore or preserve equal access to the recipient's education program or activity will be provided to the complainant;
- Explain procedures and permissible basis for appeals



Discipline & Remedial Measures:

- If a determination is made that a respondent violated the policy, the decision-maker will determine appropriate **sanctions** for the respondent.
- If a determination is made that a respondent violated the policy, the district will determine appropriate **remedies** for the complainant.



Appeals –

Right to appeal determination of responsibility or dismissal of a complaint/allegations, for ONLY the following reasons:

1. a **procedural** irregularity that affected the outcome;
2. **new evidence** that was not reasonably available at the time of the determination and could affect the outcome;
3. **conflict of interest** on the part of the Title IX coordinator, investigator, or decision maker that affected the outcome.



Appeals –

For all appeals, a school district must:

1. Notify the other party in writing when an appeal is filed and implement appeal procedures equally for both parties;
2. Ensure that the appeal decision-maker complies with the standards set forth in 34 C.F.R. § 106.45(b)(1)(iii);
3. Give both parties a reasonable, equal opportunity to submit a written statement in support of, or challenging, the outcome;
4. Issue a written decision describing the result of the appeal and the rationale for the result, which shall be issued within any timeline specified in the local Title IX grievance process, unless the appeal decision-maker notifies the parties that additional time is needed; and
5. Provide the written decision on appeal simultaneously to both parties.



Successful Appeal

- The appeal decision-maker may adjust the determination directly.
- If the error or other basis for granting the appeal related only to the decision-making step, the matter may be returned for further review of the investigative report by a new decision-maker(s).
- If the grounds for appeal relate to the investigation, or warrant additional investigation, the appeal decision-maker(s) may either re-open the record or refer the matter for further investigation before proceeding.



Timing of Disciplinary Measures

Disciplinary sanctions and any remedies shall not be enforced until the determination of the complaint becomes final:

- 1. If no appeal is filed, on the date on which an appeal would no longer be considered timely; or
- 2. If an appeal is filed, on the date that the district provides the parties with the written determination of the result of the appeal.



Informal Resolution 34 C.F.R. 106.45(b)(9)

- Allowed at any time during the **formal complaint** process if:
 - Both parties provided written notice of rights
 - Both parties written, voluntary consent obtained
- Not permitted for a complaint alleging an **employee** harassed a student



District Recordkeeping Obligations

Actions Taken/Supportive Measures Implemented

- For 7 years, keep records of any actions/supportive measures taken in response to a report or formal complaint.
- Document the basis for conclusion that the response was not deliberately indifferent
- Document measures designed to restore or preserve equal access
- If supportive measures are not provided to the Complainant, then the district must document the reasons why such a response was not clearly unreasonable in light of the known circumstances.



District Recordkeeping Obligations

Investigation Records (7 years)

- Each sexual harassment investigation including any determination regarding responsibility, any disciplinary sanctions imposed on the Respondent, and any remedies provided to the Complainant designed to restore or preserve equal access to the District's education program or activity
- Any appeal and the result therefrom
- Any Informal Resolution and the result therefrom



District Recordkeeping Obligations

Training Records (7 years)

- All materials used to train Title IX Coordinators, Investigators, Decision-Makers, and any person who facilitates an Informal Resolution process.
- Links to training materials must be provided on district website



Retaliation

No school district or other person may intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by Title IX or the Title IX regulations, 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 the regulations.



First Amendment

- The exercise of rights protected under the 1st Amendment does not constitute retaliation
- Schools must not restrict rights protected under the U.S. Constitution when applying Title IX
- It's not enough to just be offended by content of speech



Confidentiality

Keep confidential identity of anyone who made a report/complaint of sex discrimination, including anyone who made a report/filed a formal complaint of sexual harassment, any complainant, any individual who has been reported to be the perpetrator of sex discrimination, any respondent, any witness, except:

- As may be permitted by the FERPA; or
- As required by law; or
- To carry out the purposes of the Title IX regulations, including the conduct of any investigation, hearing, or judicial proceeding arising thereunder.



Confidentiality

Supportive measures provided to the complainant or respondent are confidential, to the extent that maintaining such confidentiality would not impair the ability of the school district to provide the supportive measures.