

1

Agenda

- Quick Review of Institutional Requirements
- Quick Review of Definition
- Responding to Sexual Harassment
 - General Response
 - Responding to Formal Complaint
- Dismissal Process
 - Mandatory and Permissive
- Grievance Process
- Investigating
- Report Writing
- Hearings/Decision-Making
- Appeals
- Informal Resolution
- Emergency Removal
- New Proposed Regulations

2



Institutional Requirements

Policy/Grievance Procedure

Title IX Coordinator

Notice

Recordkeeping

3

Definition of Sexual Harassment

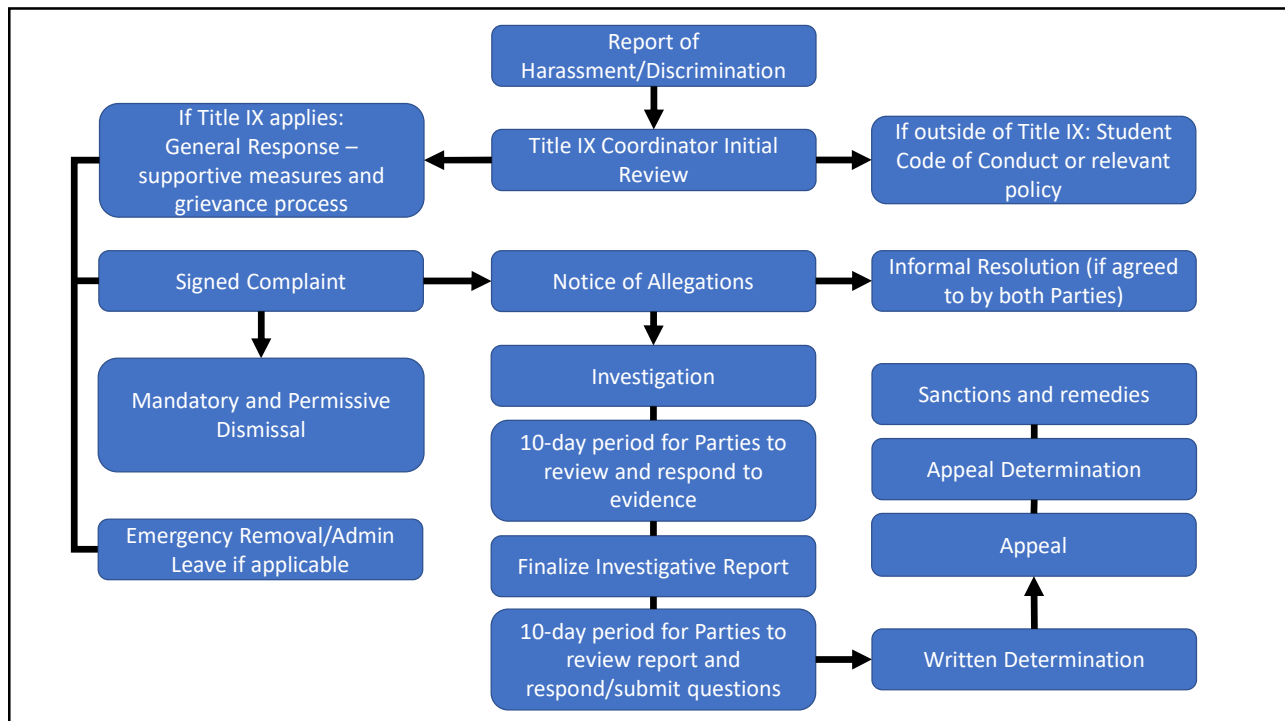
- “Sexual Harassment” is defined in three ways under the new regulations:
 - (1) An employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual’s participation in unwelcome sexual conduct;
 - (2) Unwelcome conduct determined by a reasonable person 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).

4

Definition of Sexual Harassment

- Three-prong definition (34 C.F.R. § 106.3(a))
 - Quid pro quo
 - “Unwelcome conduct” (or “Hostile environment”)
 - Sexual violence as defined by Federal law

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Responding to Sexual Harassment

The Title IX regulations contemplate two types of responses to sexual harassment:

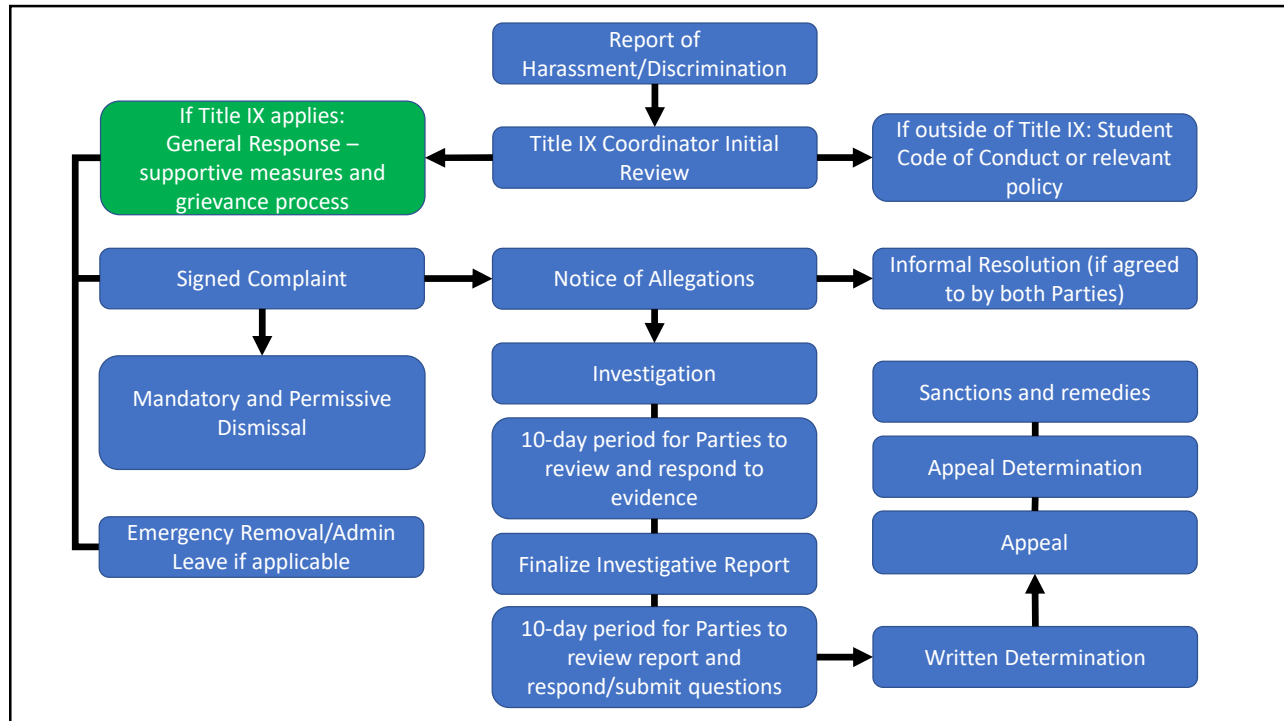
1. General response to sexual harassment
2. Response to a formal complaint

7

TYPE 1:
GENERAL
RESPONSE



8



9

General Response to Sexual Harassment

- The Title IX regulations provide that 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.” 34 C.F.R. § 106.44(a).
- What triggers the need to make a “general response”?
- What is a “general response”?

10

What triggers the need to make a “general response” to sexual harassment?

1. Actual knowledge
2. Of sexual harassment
3. In an education program or activity of the recipient
4. Against a person in the United States

11

1. Actual Knowledge

- Actual knowledge
 - For purposes of K-12, “actual knowledge” of sexual harassment is notice of sexual harassment or allegations of sexual harassment to any employee. 34 C.F.R. 106.30(a).
 - This does not require the filing of a formal complaint, or even a written complaint. This could be something that an employee observes or that is reported to an employee.

12

2. Of Sexual Harassment

- Actual knowledge
- Of sexual harassment
 - Three-prong definition of “sexual harassment”
 - Quid pro quo
 - “Unwelcome conduct” (or “Hostile environment”)
 - Sexual violence as defined by Federal law

13

3. In an Educational Program or Activity

- Actual knowledge
- Of sexual harassment
- In an education program or activity of the recipient. The “education program or activity” includes locations, events, or circumstances over which the school division exercised substantial control over both the respondent and the context in which the sexual harassment occurs and, in the K-12 context, would include the following:
 - Regular school day and after school activities
 - On the school bus
 - School-sponsored extracurricular activities, sports, and fieldtrips (within the U.S.)
 - Recognized school clubs
 - Virtual/remote instruction
 - Regional program/school that is not part of the main campus
 - Participation in dual enrollment courses at a community college sponsored by the school division
 - Private or residential placements
 - Going to and from school
 - Employment context

14

4. Against a Person in the United States

- Actual knowledge
- Of sexual harassment
- In an education program or activity of the recipient
- Against a person in the United States
 - This means that the conduct must occur in the U.S.

15

If all four factors are satisfied

- If the school division has
 - Actual knowledge
 - Of sexual harassment
 - In an education program or activity of the recipient
 - Against a person in the United States
- Then the school division must make a “general response.”

16

What is a “general response” to sexual harassment?

- The Title IX regulations provide that 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.” 34 C.F.R. § 106.44(a).
- The Title IX regulations outline specific steps that must be taken.

17

Steps that must be taken to comply with the “General Response” requirement

- The Title IX Coordinator must promptly take the following steps:
 - contact the complainant (alleged victim) 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 to the complainant the process for filing a formal complaint.

34 CFR § 106.44(a).

18

Who is the Complainant?

Who is the Respondent?

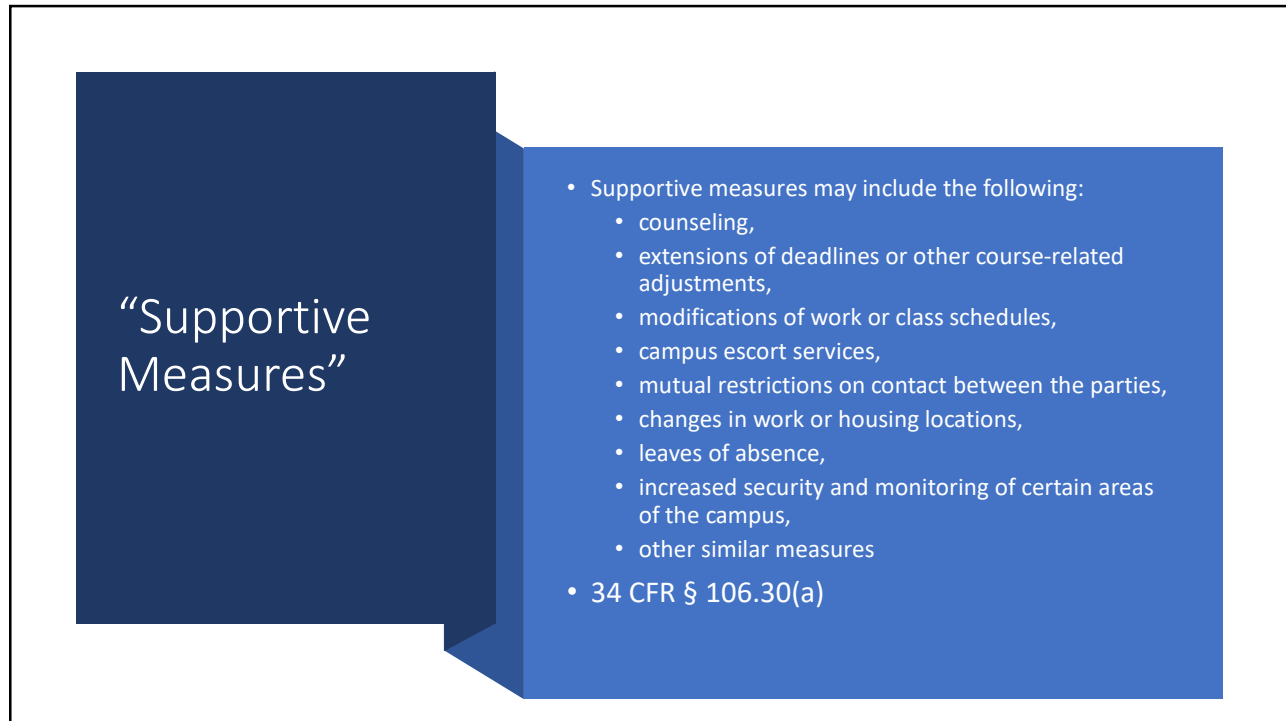
- Definition of Complainant and Respondent
 - Complainant – “[A]n individual who is alleged to be the victim of conduct that could constitute sexual harassment.”
 - The Complainant will always be the victim even if the complaint was filed by someone else, including the parent on behalf of a student who is under 18.
 - Respondent – “[A]n individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment.”

19

“Supportive Measures”

- What are “supportive measures”?
 - The term supportive measures “means 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”
 - Supportive 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.”

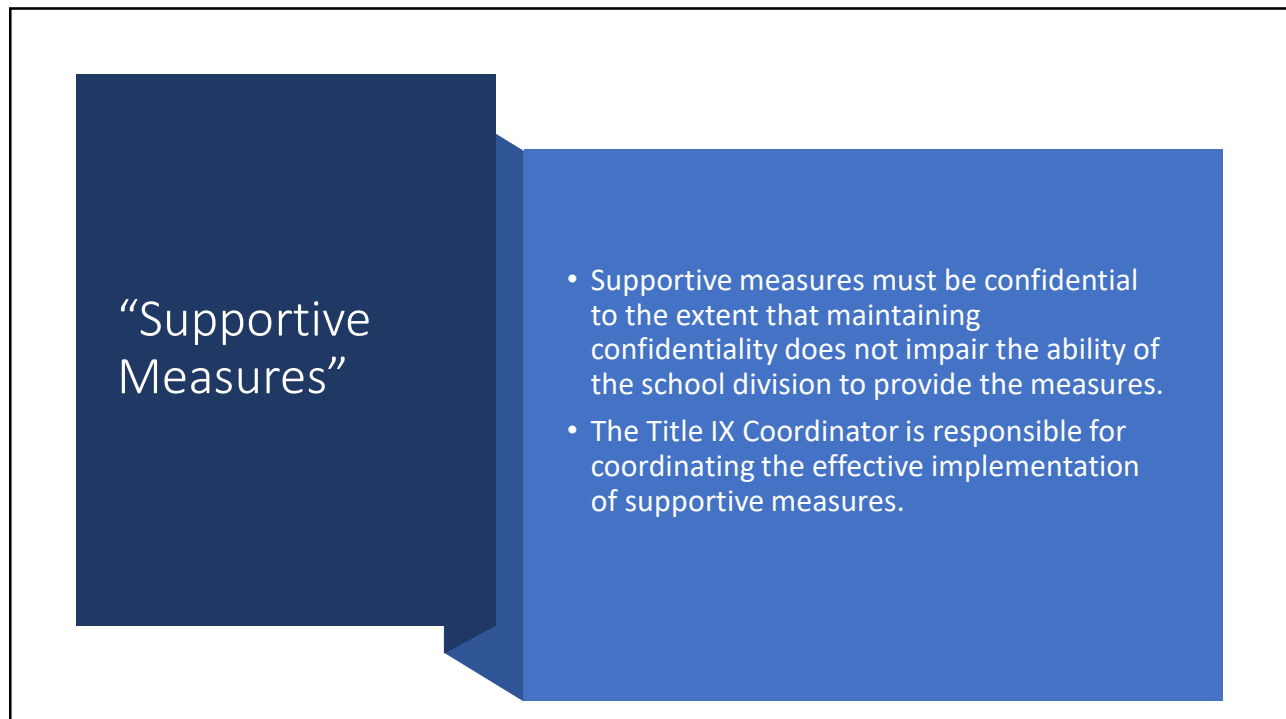
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“Supportive Measures”

- Supportive measures may include the following:
 - 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,
 - other similar measures
- 34 CFR § 106.30(a)

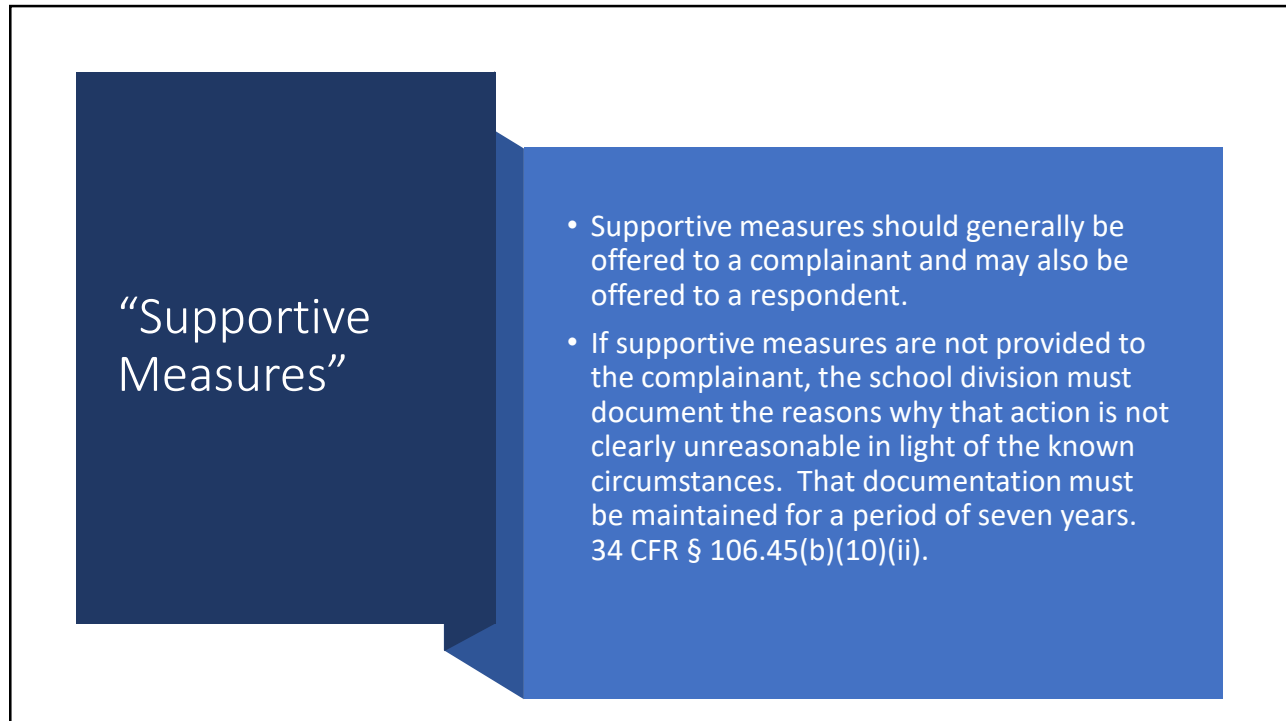
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“Supportive Measures”

- Supportive measures must be confidential to the extent that maintaining confidentiality does not impair the ability of the school division to provide the measures.
- The Title IX Coordinator is responsible for coordinating the effective implementation of supportive measures.

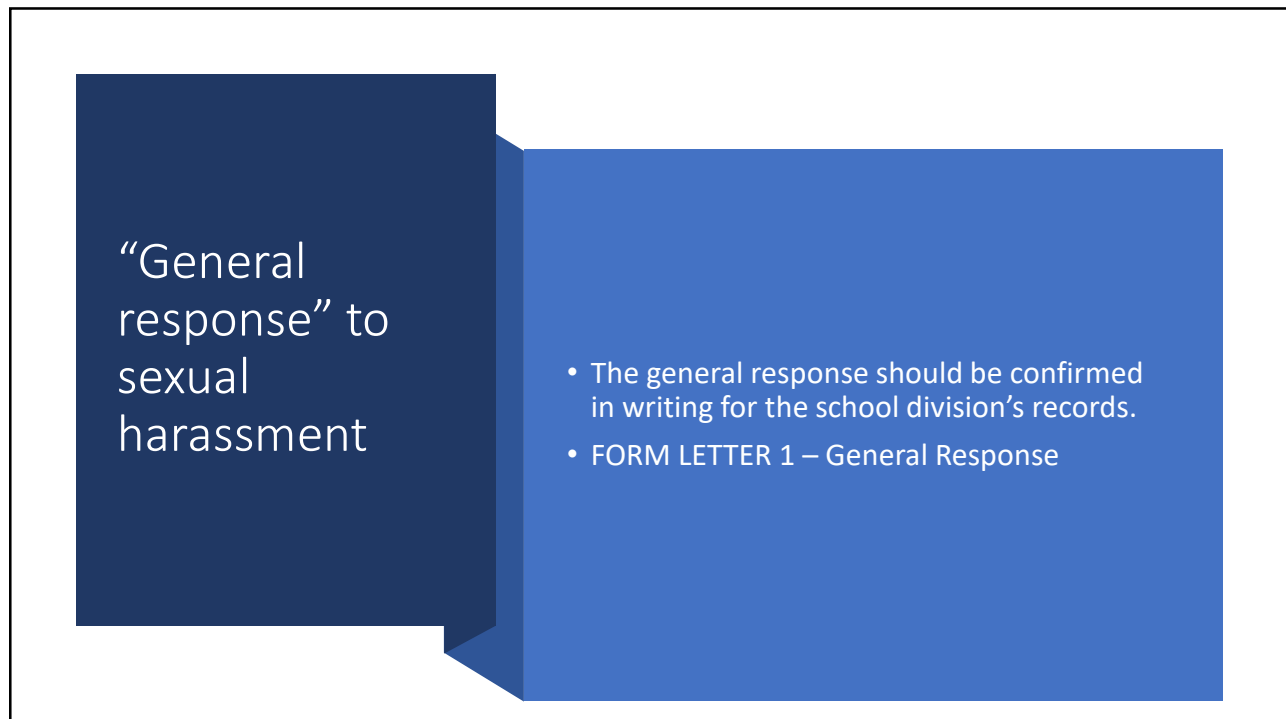
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“Supportive Measures”

- Supportive measures should generally be offered to a complainant and may also be offered to a respondent.
- If supportive measures are not provided to the complainant, the school division must document the reasons why that action is not clearly unreasonable in light of the known circumstances. That documentation must be maintained for a period of seven years. 34 CFR § 106.45(b)(10)(ii).

23



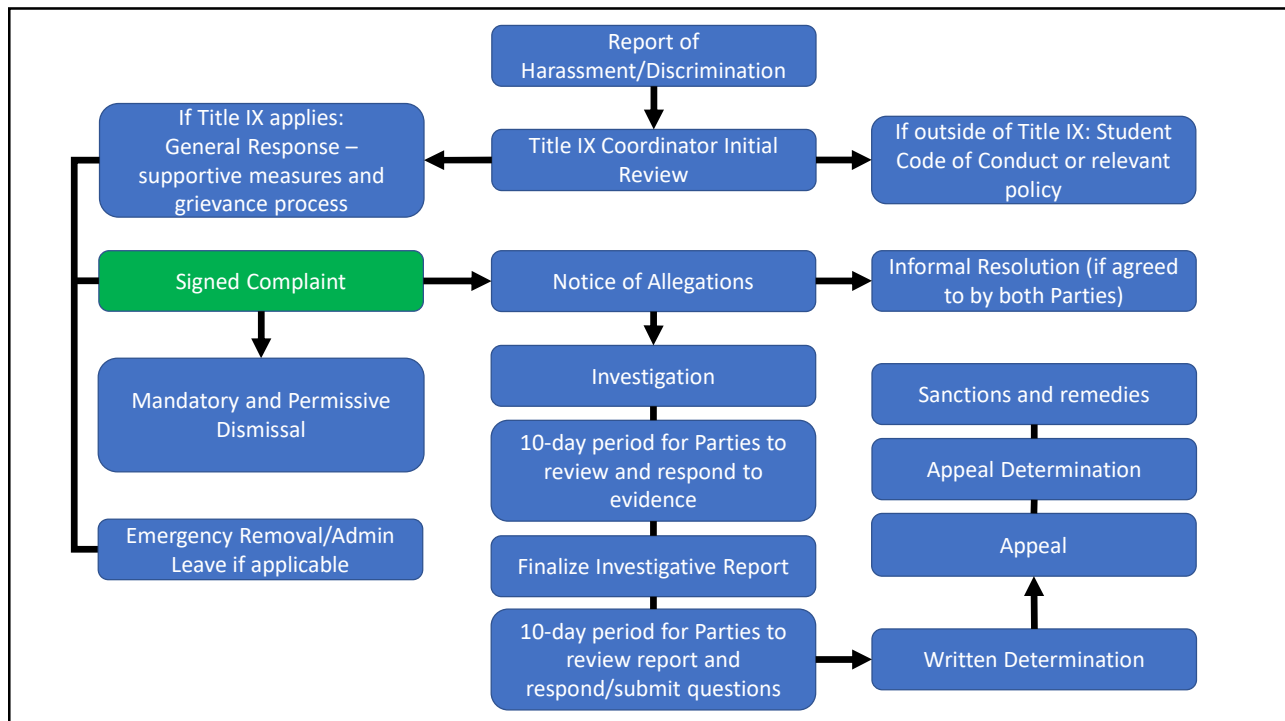
“General response” to sexual harassment

- The general response should be confirmed in writing for the school division’s records.
- FORM LETTER 1 – General Response

24



25



26

Responding to Formal Complaint

- The Title IX regulations contemplate two types of responses to sexual harassment:
 - General response to sexual harassment
 - **Response to a formal complaint**

27

Responding to Formal Complaint

- In response to a “formal complaint” of sexual harassment, the school division must give notice of the allegations and then follow its Title IX grievance procedure, unless the formal complaint is subject to mandatory or permissive dismissal.

28

Responding to Formal Complaint

- In response to a “formal complaint” of sexual harassment, the school division must give notice of the allegations and then follow its Title IX grievance procedure, unless the formal complaint is subject to mandatory or permissive dismissal.
 - Define formal complaint.
 - Notice of allegations.
 - Dismissals – mandatory and permissive
 - Grievance procedure

29

Definition of Formal Complaint

- “Formal Complaint” means 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. 34 CFR § 106.30
 - If the formal complaint is filed by the complainant, it must be signed by the complainant either physically or digitally or otherwise indicate that the complainant is the person filing it.
 - If the formal complaint is filed by the Title IX Coordinator, it must be signed by the Title IX Coordinator.

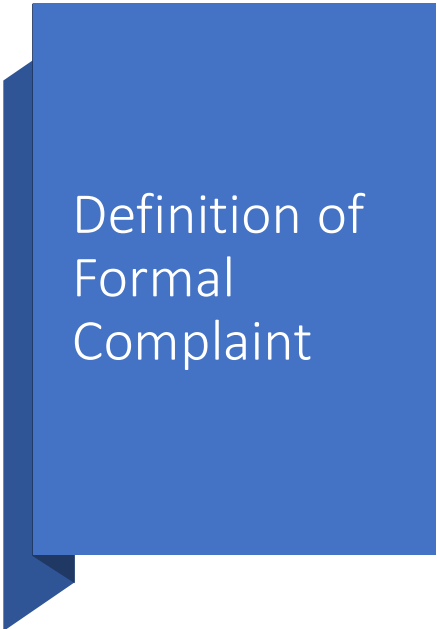
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Definition of Formal Complaint

- If the formal complaint is filed by the Title IX Coordinator, it must be signed by the Title IX Coordinator.
 - Why might the Title IX Coordinator file a Complaint if the Complainant does not want to move forward?

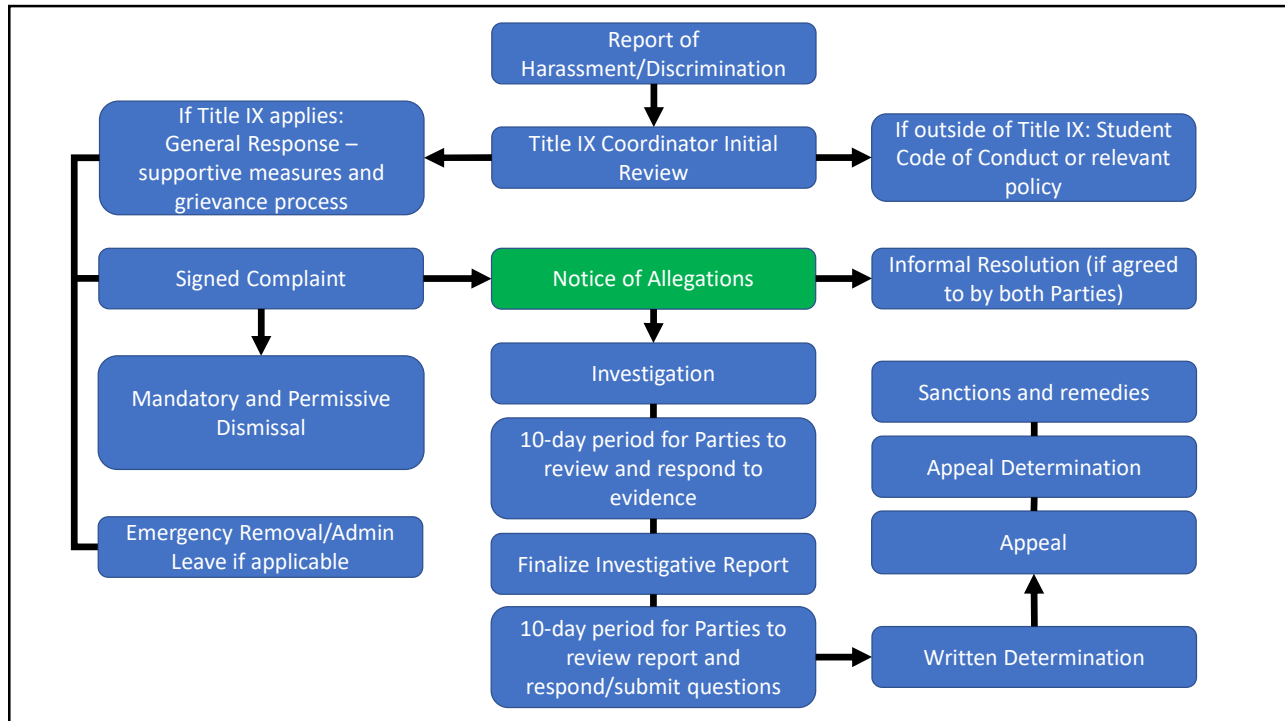
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Definition of Formal Complaint

- At the time a formal complaint is filed, the complainant must be “participating in or attempting to participate in” the school division’s education program or activity.
 - If the complainant is a former student who has graduated or disenrolled or a former employee who left employment, the complainant cannot file a formal complaint.
 - Instead, the Formal Complaint must be filed by the Title IX Coordinator.

32



33

Notice of Allegations

34 CFR § 106.45(b)(2)

NOTICE

- Upon receipt of a formal complaint, the school division must provide written notice to the known parties of the following:
 - Notice of the grievance process, including any informal resolution process
 - Notice of the allegations, with sufficient details known at the time and sufficient time to prepare a response before any initial interview, including the following:
 - The identities of the parties, if known.
 - The alleged conduct.
 - The date and location of the incident, if known.

34

Notice of Allegations

34 CFR § 106.45(b)(2)

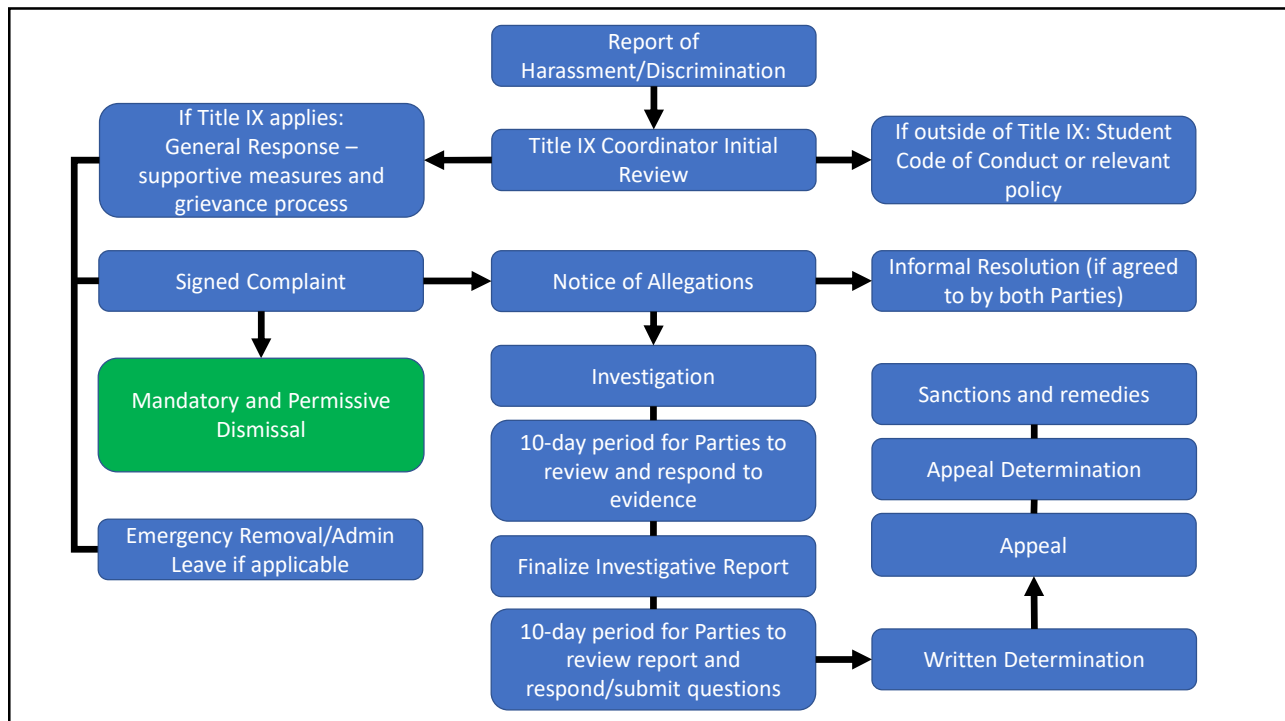
• Upon receipt of a formal complaint, the school division must provide written notice to the known parties of the following:

- A statement that the respondent is presumed not responsible and that responsibility will be determined at the conclusion of the grievance process.
- Notice of right to have an advisor (may be but not required to be an attorney) to inspect and review evidence.
- Notice of any Code of Conduct provision prohibiting false statements or the submission of false information.
- Availability of supportive measures.

• FORM LETTER 2 – Notice of Allegations

NOTICE

35



36

Mandatory and Permissive Dismissal 34 CFR § 106.45(b)(3)



- Mandatory Dismissal
 - The school division must dismiss a formal complaint (or allegations therein) if:
 - The alleged conduct would not constitute sexual harassment even if proved,
 - The alleged conduct did not occur in the educational program or activity, or
 - The alleged conduct did not occur against a person in the United States.

37

Mandatory and Permissive Dismissal 34 CFR § 106.45(b)(3)



- Permissive Dismissal.
- The school division may dismiss a formal complaint (or allegations therein) if at any time during the investigation or hearing:
 - The complainant notifies the Title IX Coordinator in writing that the complainant would like to withdraw the complaint,
 - The respondent is no longer enrolled or employed in the school division, or
 - Specific circumstances prevent the recipient from gathering evidence sufficient to reach a determination.

38

Mandatory and Permissive Dismissal 34 CFR § 106.45(b)(3)



- The dismissal of a formal complaint does not prevent the school division from proceeding under another policy or code of conduct.
- If a formal complaint is dismissed, the school division must provide prompt written notice to the parties of the dismissal and the reason(s).
- FORM LETTER 3 – Notice of Dismissal


39

10 Basic Requirements for Grievance Process 34 CFR § 106.45(b)(1)


The school division's grievance process must meet these ten basic requirements:

1. Treat both parties equitably by providing remedies to a complainant when a determination of responsibility is made against the respondent and by following the grievance process before any disciplinary sanction or action other than supportive measure is taken against a respondent.
 - **Note: This has implications for student disciplinary actions. [But see Emergency Removals, next session]**
2. Requires an objective evaluation of all available evidence including inculpatory and exculpatory evidence and provide that credibility determinations may not be based on status as complainant or respondent.

40

<p>10 Basic Requirements for Grievance Process 34 CFR § 106.45(b)(1)</p>	<ol style="list-style-type: none"> 3. Requires that the Title IX Coordinator and any investigator, decision maker, or person facilitating informal process not have a conflict of interest against complainants or respondents generally or individually and that all these individuals receive training. 4. Includes a presumption that the respondent is not responsible until a determination is made at the conclusion of the grievance process.
	

41

<p>10 Basic Requirements for Grievance Process 34 CFR § 106.45(b)(1)</p>	<ol style="list-style-type: none"> 5. Requires reasonably prompt timeframes for conclusion of the grievance process and also allows for a temporary delay or extension of time limits for good cause with written notice to both parties. <ul style="list-style-type: none"> • Good cause may include 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. 6. Describe or list possible disciplinary outcomes and remedies that may be implemented following a determination of responsibility.
	

42

10 Basic
Requirements
for Grievance
Process 34
CFR §
106.45(b)(1)

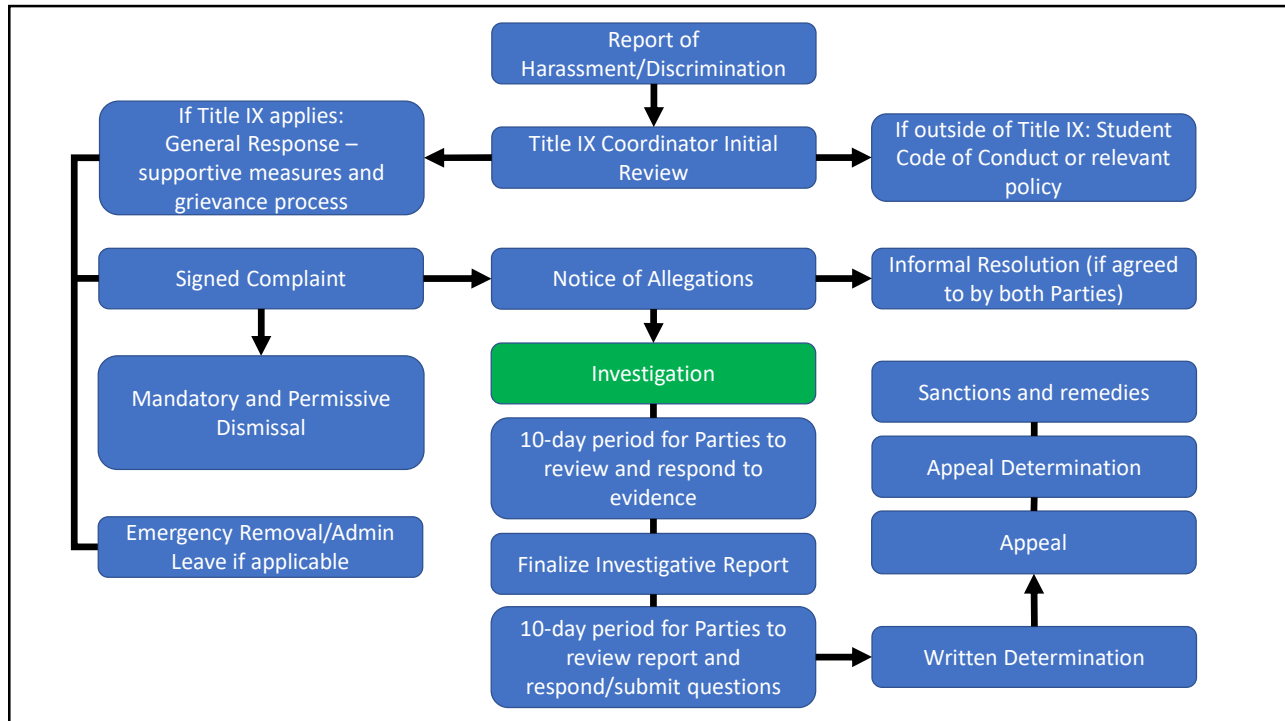
7. Adopt and state a standard of review – preponderance of the evidence or clear and convincing evidence – which must be used for all formal complaints.
 - Preponderance of the evidence means more likely to be true than not.
 - Clear and convincing evidence means highly and substantially more likely to be true than not.
8. Include the procedures and permissible bases for the complainant and respondent to appeal.

43

10 Basic
Requirements
for Grievance
Process 34
CFR §
106.45(b)(1)

9. Describes the range of supportive measures available to both parties.
10. Does not allow questions or evidence that seeks privileged information unless the privilege is waived.

44



45



Investigation of Formal Complaint
34 CFR § 106.45(b)(5)

46

Investigation of Formal Complaint 34 CFR § 106.45(b)(5)



The school division must investigate all formal complaints (except those that are dismissed) consistent with seven requirements. The school division must:

1. Ensure that the burden of proof and the burden of gathering evidence rest on the school division and not on the parties.
2. Provide an equal opportunity for both parties to present witnesses and inculpatory and exculpatory evidence.
3. Not restrict the ability of either party to discuss the allegations under investigation and gather and present evidence.

47

Investigation of Formal Complaint 34 CFR § 106.45(b)(5)



The school division must investigate all formal complaints (except those that are dismissed) consistent with seven requirements. The school division must:

4. Provide both parties equal opportunities to participate and be represented throughout the process. Any restrictions on the extent to which an advisor may participate in the proceedings must apply equally to both parties.
5. Provide written notice of all hearings, interviews, or other meetings with sufficient time to prepare.

48

Investigation of Formal Complaint 34 CFR § 106.45(b)(5)



The school division must investigate all formal complaints (except those that are dismissed) consistent with seven requirements. The school division must:

6. Provide equal opportunity to inspect and review any evidence so that both parties can respond. This includes evidence on which the school division does not intend to rely. The evidence must be provided to both parties at least 10 days prior to the completion of the written report and both parties must be given at least 10 days to respond, which response must be considered.
7. Create a written report that fairly summarizes relevant evidence and, at least 10 days prior to a hearing (if any) or determination, provide the report to both parties and their advisors for their review and written response.

49

Investigation of Formal Complaint 34 CFR § 106.45(b)(5)

Who conducts the investigation?

- The Investigator may be the Title IX Coordinator or another employee.
- The Investigator cannot be the Decision-Maker or the Appeal Decision-Maker.
- Anyone who conducts investigations must be trained.
- The investigator “must serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest or bias.”
 - Impartiality, prejudgment, conflict of interest and bias are all related concepts.



50

Investigation of Formal Complaint 34 CFR § 106.45(b)(5)

- The investigator “must serve **impartially**, including by avoiding prejudgment of the facts at issue, conflicts of interest or bias.”
- What does it mean to be impartial?
 - Impartial: unbiased, disinterested (Black’s Law Dictionary)
- An impartial investigator will listen to the information provided by each party with equal consideration and without making judgments until the investigation is completed.
- Avoid sympathy or personal perspective on the allegations.
- Apply an objective, commonsense approach to evaluate whether a particular person is impartial



51

Investigation of Formal Complaint 34 CFR § 106.45(b)(5)

- The investigator “must serve **impartially**, including by **avoiding prejudgment of the facts at issue**, conflicts of interest or bias.”
- What does it mean to prejudge the facts?
 - Prejudging the facts would be making factual determinations before completing the investigation.
- Investigators must not reach conclusions before reviewing all the evidence.



52

Investigation of Formal Complaint 34 CFR § 106.45(b)(5)

- The investigator “must serve impartially, including by avoiding prejudgment of the facts at issue, **conflicts of interest** or bias.”
- What does it mean to have a “conflict of interest”?
 - The Title IX regulations do not provide a definition of conflict of interest.
 - The commentary states that school divisions “have significant control, and flexibility” in this area.
- Conflict of interest: a real or seeming incompatibility between one’s private interests and one’s public or fiduciary duties (Black’s Law Dictionary)
 - Examples?



53

Investigation of Formal Complaint 34 CFR § 106.45(b)(5)

- The investigator “must serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest or **bias**.”
- What does it mean to have bias?
 - According to the preamble, whether bias exists requires examination of the particular facts of a situation, and the school division should apply an objective, common sense approach to evaluating whether a particular person might be biased.
- Avoid generalizations/assumptions such as,
 - All self-professed feminists or survivors are biased against men;
 - Men are incapable of being sensitive to women’s concerns
 - A person’s work for complainant or victim creates bias for that party



54

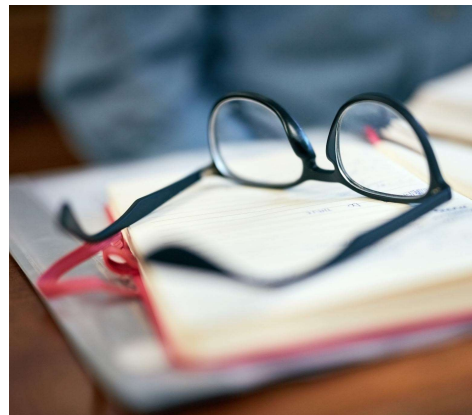
Conducting Effective Investigations

- Determining who to interview
 - Complainant
 - Respondent
 - Eyewitnesses
 - Others with relevant information
 - Witnesses the complainant identifies
 - Witnesses the respondent identifies
- Determining order of interviews
 - Generally, the complainant will be interviewed first and the respondent last.
 - Consider whether there is any benefit to strategically ordering other interviews.

57

Witness Interviews Generally

- Send Notice of Interview before conducting any interview
- FORM LETTER 4 – Notice of Interview



58

Witness Interviews Generally

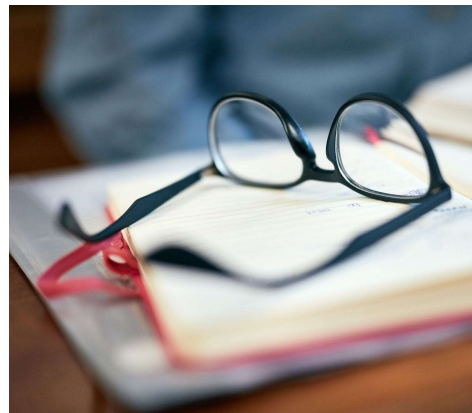
- All interviews should be conducted in a private space and should be discreet.
- Conduct interviews promptly, while memories are freshest.
- Interview each witness separately.
- Listen more than you talk.
- Begin by briefly explaining the purpose of the interview, without too much detail.
- Explain the process and your role and that no conclusions have been reached.



59

Witness Interviews Generally

- Ask open-ended questions.
 - Who, what, when, where, why, and how
- Follow up and get the details
 - Tell me more about ...
 - What happened next?
 - What else?
- But, after asking open-ended questions, don't be afraid to ask direct questions.
 - Did you say ...?
 - Did you do ...?



60

Witness Interviews Generally

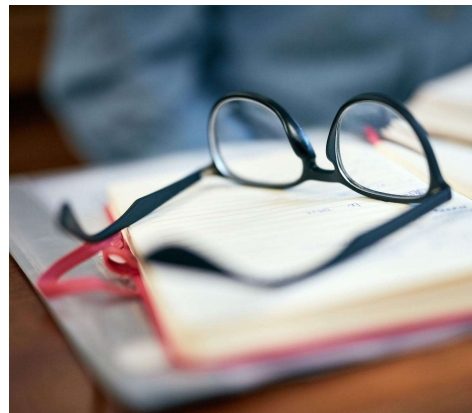
- Take detailed notes of every interview.
 - Consider having a second person designated to take notes.
 - Complete your notes immediately following the interview when the details are still fresh.



61

Witness Interviews Generally

- Take detailed notes of every interview.
- In addition to making note of the witness's answers, also make note of the witness's demeanor during the interview – but do not make credibility determinations yet.
 - For example, did the witness appear calm and collected or fidgety and sweaty? Did the witness answer each question promptly and look you in the eye or take a long time to come up with answers and display signs of distress?
 - Be careful not to mistake signs of trauma and memory recall with credibility signals



62

Witness Interviews Generally

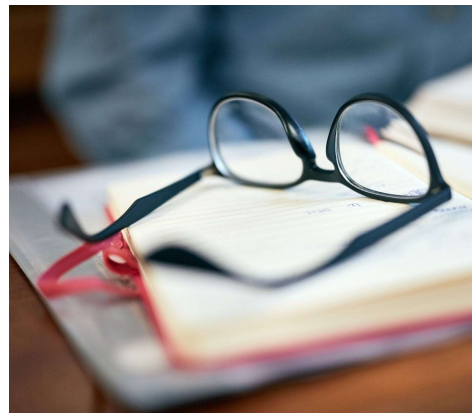
- Get it in writing.
 - But avoid just asking all the witnesses to give a written statement. You must sit down with each witness and ask probing questions.
 - After interviewing the witness, prepare a written statement or notes and have the witness read and sign the notes.



63

Witness Interviews Generally

- You cannot promise anonymity or complete confidentiality.
 - You can assure that witness that you will maintain confidentiality to the extent possible and that the investigation is handled on a need-to-know basis.
- Explain prohibition on retaliation and how the witness can report retaliation.
- Each interview should be planned in advance but should not be “scripted.”



64

The Actual Interview

- Set the tone.
 - Explain the purpose of the interview and the process.
 - Explain your role as objective fact finder.
 - Be courteous but try not to imply that you are a friend.
- Confirm that the individual believes you can be fair and objective.
- For the complainant, start with the written, formal complaint and have complainant confirm the completeness of complaint.
 - In an orderly fashion, ask questions to elicit the details of each allegation or incident in the complaint. Chronological order is often best.
- For a witness, start with general questions and follow up to get details.
 - Then specifically ask about the incidents the individual witness. Ask questions to confirm the details of the incident, even if the witness did not observe the alleged incident. For example, can the witness confirm that the parties were present?

65

The Actual Interview

- Focus on one incident or allegation at a time. Get all the details before moving to the next incident or allegation.
- Oftentimes, the individual will move forward to other events or circumstances that may or may not be relevant to the current incident or allegation being discussed.
 - Listen carefully and take notes. If unclear what the connection is, ask clarifying questions.
 - If complainant provides no connection, direct the complainant back to the incident or allegation you are currently on.

66

The Actual Interview

- For each incident, attempt to get the following details:
 - Date and time
 - Location
 - Names of everyone present
 - Detailed description of the events
 - Exact words said or gestures used, get quotes whenever possible
 - Reactions of all parties and witnesses
 - Any impact on school environment from the incident
 - Any effort by complainant or others to stop the incident/behavior

67

The Actual Interview

- Request copies of any documents, video, text messages, social media posts, etc. that the individual has that are relevant.
 - If the individual did not keep the messages, etc., ask why not. Explore other avenues to obtain copies. Did the individual send screenshots to anyone else at the time? Can phone records corroborate that the messages were sent, etc.
 - Consider requesting copies before the interview, so that you can ask questions about them. Otherwise, a follow up interview may be necessary.

68

The Actual Interview

- Once you have gotten all the details, ask whether there is anything else that the individual wants you to know. Follow up as appropriate.
- Ask who else you should speak with. Who are the vital witnesses.
- For the complainant, ask how the issue could be resolved. Is there a preferred resolution?
- For the respondent, ask about any possible motives for the complaint. Get details.
- To conclude the interview, describe the procedure that you will follow and expected timelines.

69

The Actual Interview

- Have the individual review your notes, make any changes, and sign.
- Advise the individual to notify you immediately of any retaliation or additional incidents of harassment.
- For the complainant consider whether additional supportive measures are appropriate based on information learned during the interview.
- Explain the prohibition on retaliation.

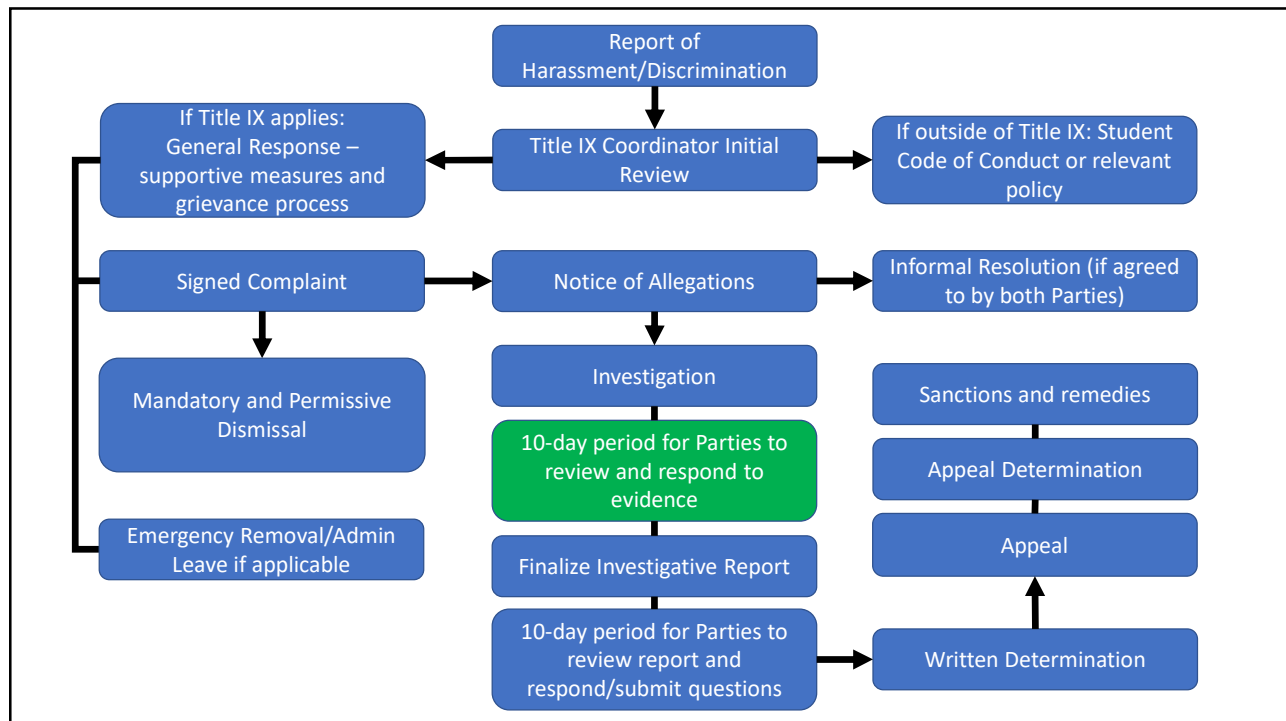
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Completing the Investigation

- Review all interview notes and documents collected.
- Consider whether any additional or follow up interviews are necessary.
 - If so, identify the specific information needed to keep the additional interviews on target.
- Consider whether there are any other documents, videos, etc. that have not already been collected.





71



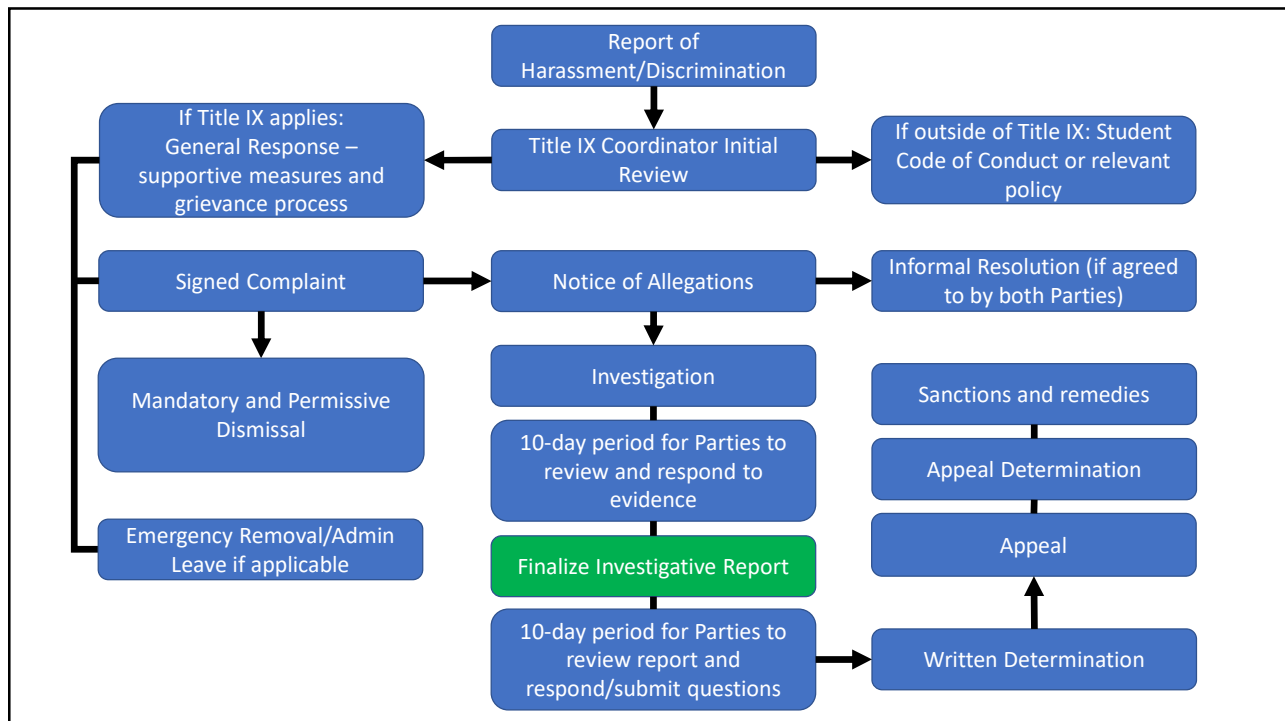
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Completing the Investigation

- **Remember** that once the investigation is complete but before the report is finalized, both parties must be given the opportunity to (1) inspect and review any evidence that is “directly related to the allegations raised in the formal complaint, including evidence upon which the recipient does not intend to rely and inculpatory and exculpatory evidence” and (2) respond.
 - 34 CFR § 106.45(b)(5).
- The evidence must be sent to both parties and their advisors, if any, in electronic format or hard copy.
- The parties must be provided at least 10 days to submit a written response, which the investigator must consider prior to the completion of the investigation report.

73



74



Writing the Report

- The Title IX regulations require that the investigator create a written report that “fairly summarizes relevant evidence.” 34 CFR § 106.45(b)(5).
- The regulations do not set forth any other required elements for the report but see requirements for decision-maker’s written decision. 34 CFR § 106.45(b)(7).

75



Writing the Report

- What does relevant mean?
- Black’s Law Dictionary defines “relevant” to mean “logically connected and tending to prove or disprove a matter in issue; having appreciable probative value – that is, rationally tending to persuade people of the probability or possibility of some alleged fact.”
- Material that is not relevant to the allegations in the complaint should not be included in the report.

76



Writing the Report

- The investigator **must** consider any information that the complainant or respondent submitted after their opportunity to review the evidence so be sure to include a summary of any such information in the report.
- Writing the investigation report requires the investigator to evaluate the evidence.

77



What should be in a report?

- Introduction
 - Name of the complainant and respondent and date of complaint
 - Brief summary of the allegations
 - List of supportive measures implemented at the outset.
- Applicable School Board Policy
 - Citation to the relevant policies and excerpts of relevant provisions, if appropriate
- Investigative Procedure
 - A summary of the investigation process, including names of all witnesses and identifying all documents, etc.

78



What should be in a report?

- **Statement of Facts**
 - The allegations in the formal complaint
 - The respondent's response to each allegation
 - The facts relevant to each allegation, including other witness's statements and documents, etc. that support or refute the allegation
 - Any information that the complainant or respondent submitted after their opportunity to review the evidence
- **Conclusions**
 - Reach a conclusion as to each allegation and explain how the conclusion was reached.
 - Explanation of credibility determinations
 - Explain how conflicts were resolved


79



Writing the Report

- **Evaluating Evidence**
 - Credibility determinations
 - Determine the weight to give each witness's statements and other pieces of evidence
 - Consider the following
 - Consistency
 - Was the person's statement internally consistent?
 - Was it consistent with other witness's statements?
 - Bias
 - Does this person have any biases?
 - Personal relationships
 - What is the person's relationship to the complainant/respondent and how might that impact the weight you give their statements?
 - Motive

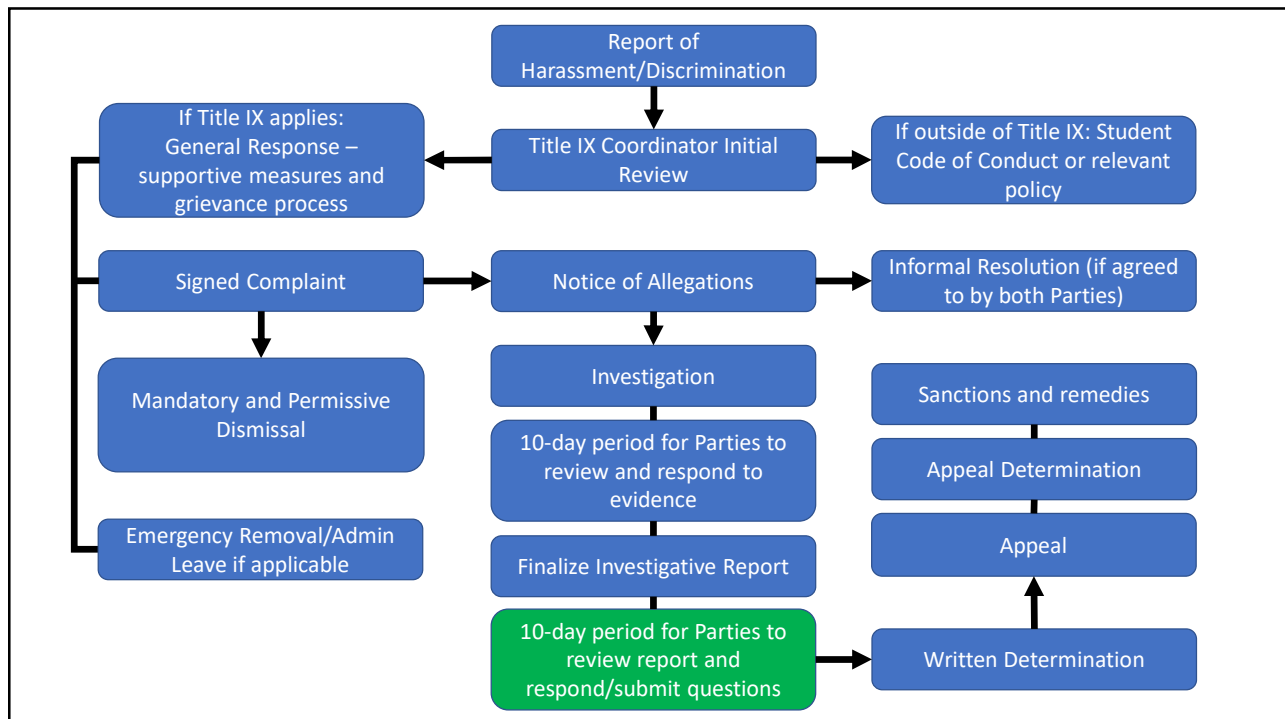
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Writing the Report

- **General Tips:**
 - Write clearly and succinctly.
 - Use proper grammar and write professionally.
 - Use the active voice and provide necessary details.
 - COMPARE: "The victim was called derogatory names. The incident was reported to the gym teacher the next day."
 - WITH: "Sarah reported that on November 10, 2021, Joe repeatedly called her derogatory names, including 'bitch,' 'slut,' and 'whore.' Sarah verbally reported this incident to Mrs. Smith, the gym teacher, the following day, on November 11, 2021."

81



82

Hearing by Decision-Maker 34 CFR § 106.45(b)(6)



- In the K-12 context, a live hearing is not required.
- However, after the investigation report has been sent to the parties, the decision-maker must afford 10 days for each party to submit written, relevant questions that a party wants asked of any party or witness, provide each party with the answers, and allow for additional, limited follow-up questions from each party.
 - The school division is free to set a reasonable timeline for submitting “limited follow-up questions.”

83

Hearing by Decision-Maker 34 CFR § 106.45(b)(6)



- Limitation on Subject Matter
 - Questions and evidence about the complainant’s sexual predisposition or prior sexual behavior are not relevant, unless offered to prove either
 - That someone other than the respondent committed the alleged conduct, 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.

84

Hearing by Decision-Maker 34 CFR § 106.45(b)(6)



- Limitation on Subject Matter
 - **Remember** that the basic requirements for the grievance process includes a prohibition on questions or evidence that seeks privileged information unless the privilege is waived. 34 CFR § 106.45(b)(1).
 - Attorney-client privilege
 - Physician-patient privilege
 - Therapist-patient privilege
 - Spousal privilege

85

Hearing by Decision-Maker 34 CFR § 106.45(b)(6)



- Decision-maker may exclude questions that are not relevant but must explain the decision to exclude.
- Consider instructing the parties that when submitting written questions, the parties must do so in a respectful manner (i.e., without using profanity or irrelevant personal attacks).
- What if a witness refuses to provide answers to written questions?
 - The commentary stresses that nothing in the regs compel anyone to participate in the Title IX process, including supplying subsequent answers.

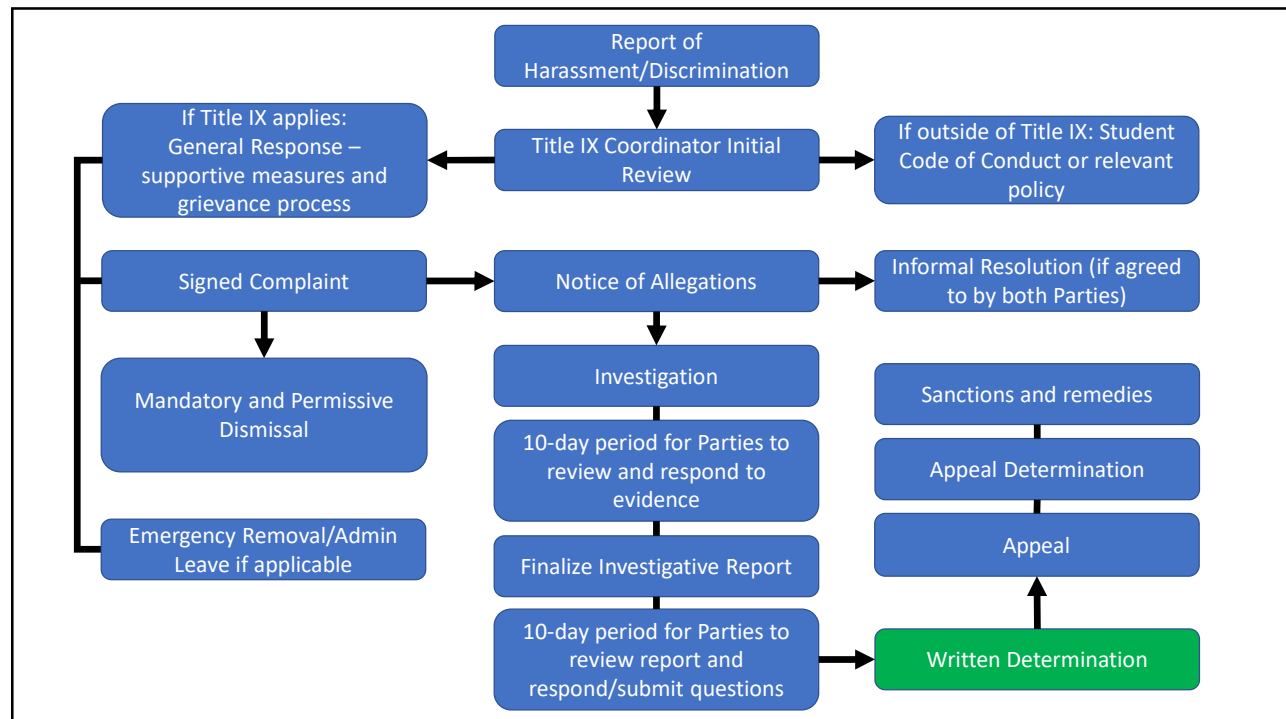
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Hearing by Decision-Maker 34 CFR § 106.45(b)(6)



- The process of submitting and answering written questions must be completed before the decision-maker issues a decision.
- Consider intersection with state law regarding discipline of students.
 - The US Department of Education takes the position that the Title IX regulations trump state law.

87



88

Rendering a Decision 34 CFR § 106.45(b)(7)

The decision-maker (who must be a different person from the Title IX Coordinator and the investigator) must apply the standard of review that has been adopted and issue a written determination or responsibility that includes six elements:

1. Identification of the allegations that potentially constitute sexual harassment.
2. A description of the procedural steps taken.
3. Findings of fact.
4. Conclusions regarding the application of the code of conduct to the facts.
5. A statement of and rationale for the result for each allegation, including a determination of responsibility, disciplinary sanctions, and whether remedies will be provided to complainant.
6. Procedures and bases for appeal.



89

Rendering a Decision 34 CFR § 106.45(b)(7)

- The decision is final only after the time period to file an appeal has expired or if the party does file an appeal, after the appeal decision has been sent to the parties.



90

Rendering a Decision

- Remember that the decision maker is determining whether the conduct alleged occurred and, if so, whether it meets the definition of sexual harassment.
- Three-prong definition
 - Quid pro quo
 - “Unwelcome conduct” (or “Hostile environment”)
 - Sexual violence as defined by Federal law



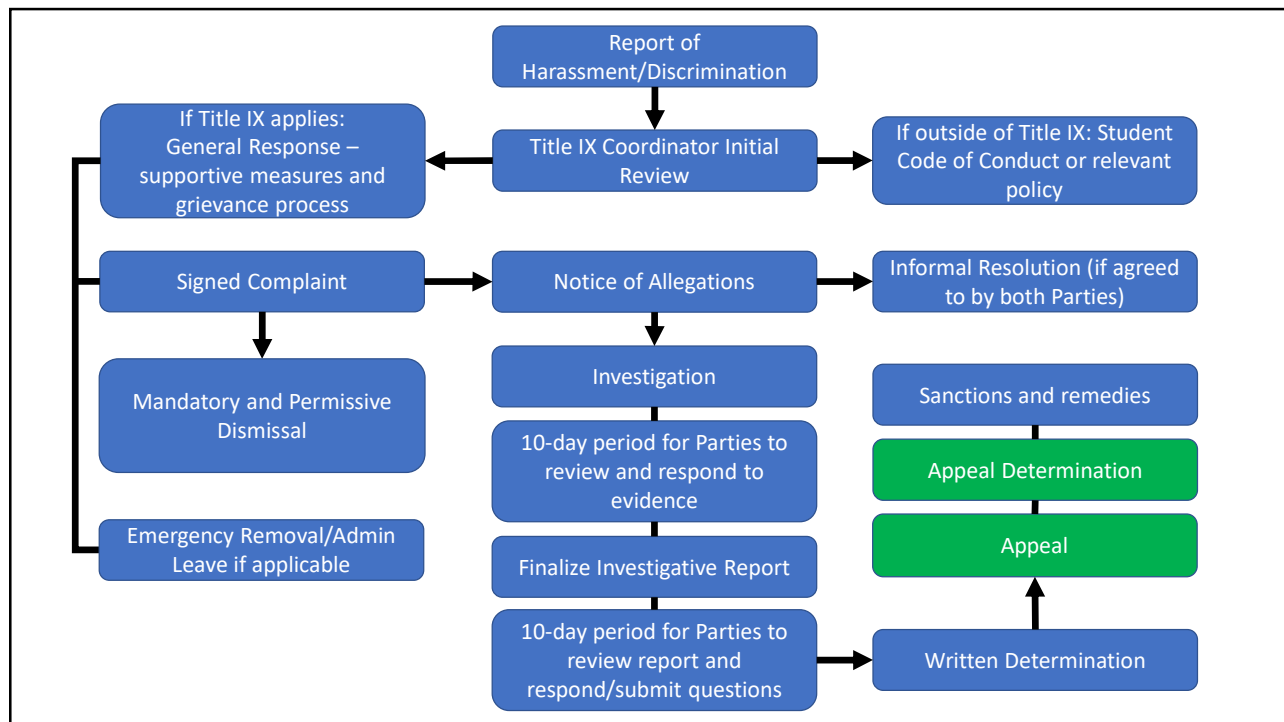
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Rendering a Decision

- Quid pro quo
 - "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"
- “Unwelcome conduct” (or “Hostile environment”)
 - "Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity."
- Sexual violence as defined by Federal law
 - "'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)."



92



93

Appeal 34 CFR § 106.45(b)(8)



- Both parties have the right to appeal a determination of responsibility and the dismissal of a formal complaint or any allegations on the following bases:
 - A procedural irregularity that affected the outcome
 - New evidence not reasonably available at the time the determination was made and that could affect the outcome
 - The Title IX Coordinator, investigator, or decision maker had a conflict of interest or bias for or against complainants or respondents generally or individually that affected the outcome of the matter
 - Any additional bases the school division chooses to offer (but must be available to both parties)

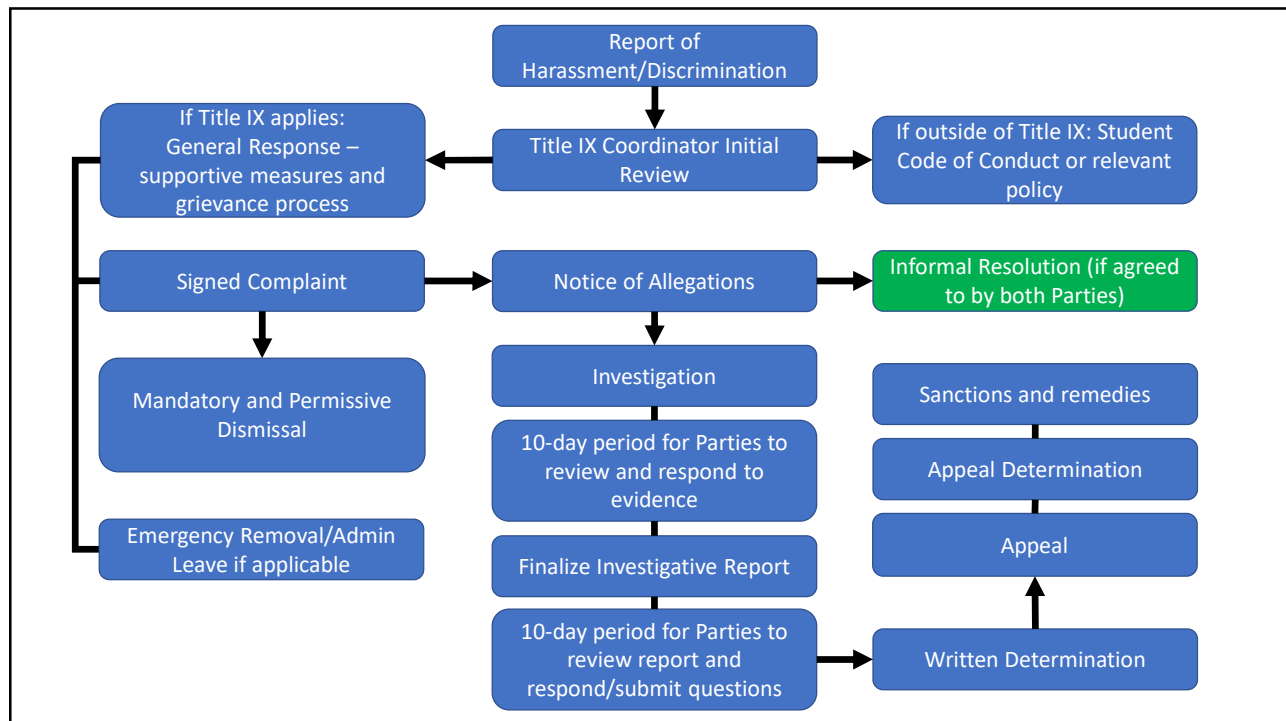
94

Appeal 34 CFR § 106.45(b)(8)



- For all appeals, the school division must
 - Notify the non-appealing party in writing and implement appeal procedures equally for both parties
 - Ensure the decision maker on appeal is not the same person as the original decision maker, investigator, or Title IX Coordinator
 - Ensure that the decision maker on appeal meets all the qualifications as the original decision maker in terms of training and conflict of interest
 - Give both parties an equal opportunity to submit a written statement in support of or challenging the outcome
 - Issue a written decision that is provided simultaneously to both parties and that describes the result and rationale

95



96

Informal
Resolution 34
CFR
106.45(b)(9)

- The Title IX regulations permit school divisions to offer informal resolution but its use is limited.
- Informal Resolution (1) cannot be mandatory, (2) cannot be used unless a formal complaint has been filed, and (3) cannot be used to resolve allegations that an employee sexually harassed a student.
- Must be voluntary

97

Informal
Resolution 34
CFR
106.45(b)(9)

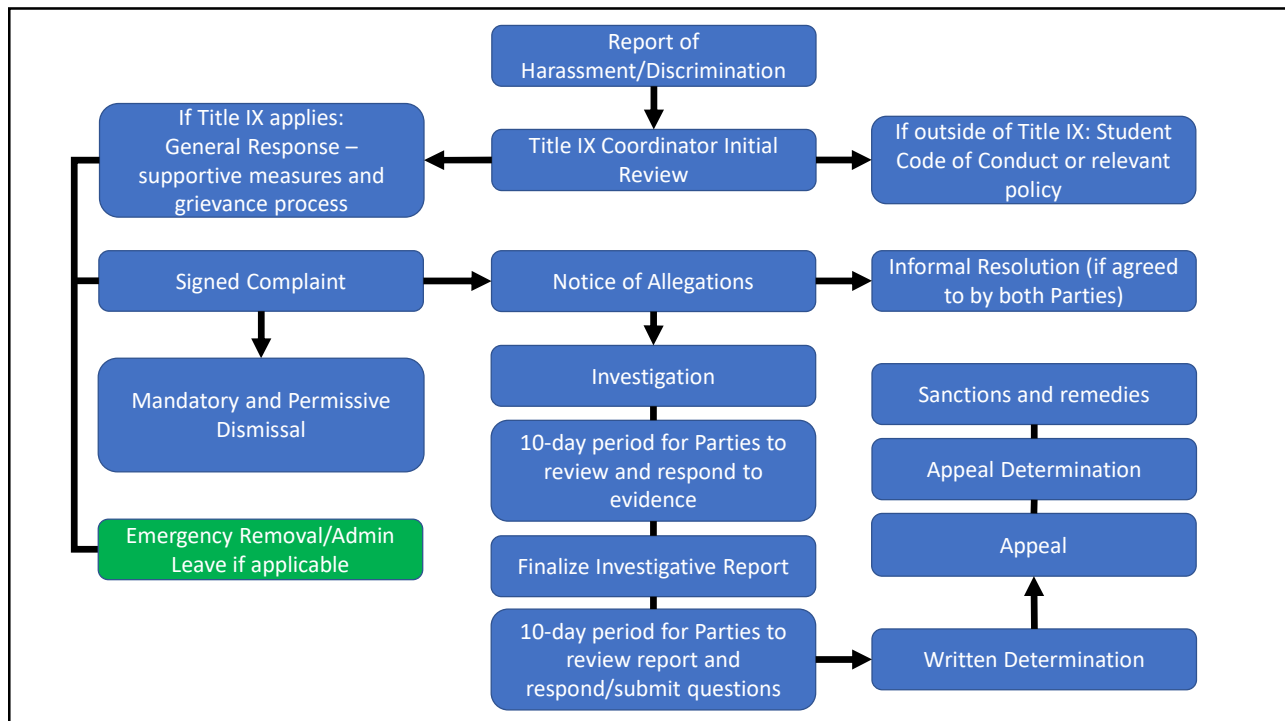
- Any time before reaching a determination regarding responsibility, the school division may facilitate an informal resolution process (such as mediation), that does not involve a full investigation and adjudication, if the school division
- Provides to the parties a written notice disclosing:
 - the allegations,
 - the requirements of the informal resolution process including the circumstances under which it precludes the parties from resuming a formal complaint arising from the same allegations, provided, however, that at any time prior to agreeing to a resolution, any party has the right to withdraw from the informal resolution process and resume the grievance process with respect to the formal complaint, and
 - any consequences resulting from participating in the informal resolution process, including the records that will be maintained or could be shared; and
- Obtains voluntary written consent from both parties.

98

Informal Resolution 34 CFR 106.45(b)(9)

- Must be completed in a reasonably prompt timeframe.
- Commentary (p. 1370) – “Informal resolution may encompass a broad range of conflict resolution strategies, including, but not limited to, arbitration, mediation, or restorative justice.”
- The commentary acknowledges (p. 1370) that an informal resolution may result in disciplinary action, including suspension and expulsion taken against the respondent.
- Note, however, if that is the case, the written notice must state any such possible consequences.

99



100

Emergency Removal 34 CFR § 106.44(c)

- Remember that 34 CFR § 106.45(b)(1) prohibits taking any “disciplinary sanctions or other actions that are not supportive measures” against the respondent until the grievance process has been concluded.
- Significant impacts on discipline process for students and, to some extent, employees.
- Limited exception for emergency removal.

101

Emergency Removal 34 CFR § 106.44(c)

- A school division may remove the respondent from the 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.”

102

Emergency Removal 34 CFR § 106.44(c)

- Must still comply with other laws, including IDEA, 504, ADA.
- According to the commentary, “Emergency removal under § 106.44(c) is not a substitute for reaching a determination as to a respondent’s responsibility for the sexual harassment allegations; rather, emergency removal is for the purpose of addressing imminent threats posed to any person’s physical health or safety, which might arise out of the sexual harassment allegations.” (Commentary p. 727)

103

Emergency Removal 34 CFR § 106.44(c)

- Additionally, the threat must be one “arising from the allegations of sexual harassment”, that the allegations themselves or circumstances arising from the allegations may form the basis of the threat.
- “For example, if a respondent threatens physical violence against the complainant in response to the complainant’s allegations that the respondent verbally sexually harassed the complainant, the immediate threat to the complainant’s physical safety posed by the respondent may ‘arise from’ the sexual harassment allegations.” (Commentary p. 728)

104

Emergency Removal 34 CFR § 106.44(c)

- Emergency Removal is a high threshold: “An emergency removal under § 106.44(c) separates a respondent from educational opportunities and benefits, and is permissible only when the high threshold of an immediate threat to a person’s physical health or safety justifies the removal.” (Commentary p. 756).

105

Emergency Removal 34 CFR § 106.44(c)

- Intersection with risk assessment under state law:
- “[W]e decline to require recipients to follow more prescriptive requirements to undertake an emergency removal (such as requiring that the assessment be based on objective evidence, current medical knowledge, or performed by a licensed evaluator). While such detailed requirements might apply to a recipient’s risk assessments under other laws, for the purposes of these final regulations under Title IX, the Department desires to leave as much flexibility as possible for recipients to address any immediate threat to the physical health or safety of any student or other individual.” (Commentary P. 727-28)

106

Emergency Removal 34 CFR § 106.44(c)

- Intersection with risk assessment under state law:
- Nothing in these final regulations precludes a recipient from adopting a policy or practice of relying on objective evidence, current medical knowledge, or a licensed evaluator when considering emergency removals under § 106.44(c).” (Commentary P. 728)
- “To the extent that other applicable laws establish additional relevant standards for emergency removals, recipients should also heed such standards. To the greatest degree possible, State and local law ought to be reconciled with the final regulations, but to the extent there is a direct conflict, the final regulations prevail.” (p. 731)

107

Emergency Removal 34 CFR § 106.44(c)

- Post-Removal Challenges
 - Requires notice and an opportunity to be heard, otherwise flexible
 - Notice and opportunity to be heard must be provided immediately
 - “The term “immediately” will be fact-specific, but is generally understood in the context of a legal process as occurring without delay, as soon as possible, given the circumstances. “Immediately” does not require a time frame of “minutes” because in the context of a legal proceeding the term immediately is not generally understood to mean an absolute exclusion of any time interval. “Immediately” does not imply the same time frame as the “reasonably prompt” time frames that govern the grievance process under § 106.45, because “immediately” suggests a more pressing, urgent time frame than “reasonable promptness.”

108

Emergency Removal 34 CFR § 106.44(c)

- A post-removal challenge “is not designed to resolve the underlying allegations of sexual harassment against a respondent, but rather to ensure that recipients have the authority and discretion to appropriately handle emergency situations that may arise from allegations of sexual harassment. As discussed above, the final regulations revise the language in § 106.44(c) to add the phrase “arising from the allegations of sexual harassment,” which clarifies that the facts or circumstances that justify a removal might not be the same as the sexual harassment allegations but might “arise from” those allegations.” (p. 744)

109

Emergency Removal 34 CFR § 106.44(c)

- Emergency removal may be labeled as a suspension or expulsion under state law. “[T]he final regulations prohibit suspending or expelling a respondent without first following the § 106.45 grievance process, or **unless an emergency situation justifies** removal from the recipient’s education program or activity (which removal may, or may not, be labeled a “suspension” or “expulsion” by the recipient).” (Commentary p. 753).

110

Emergency Removal 34 CFR § 106.44(c)

- **May a school division assign a respondent to alternative education pending the grievance process absent facts that would establish “emergency removal?”**
- Maybe. According to the commentary: “Whether an elementary and secondary school recipient may implement an “alternate assignment” during the pendency of an investigation (or without a grievance process pending), in circumstances that do not justify an emergency removal, when such action is otherwise permitted by law, depends on whether the alternate assignment constitutes a disciplinary or punitive action or unreasonably burdens the respondent (in which case it would not qualify as a supportive measure as defined in § 106.30). (p. 751-52)

111

Emergency Removal of Students

- What does this all mean from a practical standpoint?
 - A student respondent cannot be disciplined (or be subjected to any other adverse action) before the completion of the grievance process, unless grounds for emergency removal exist.
 - In the absence of grounds for emergency removal, the student stays in place until the conclusion of the grievance process, unless there is an alternative educational placement that does not unreasonably burden the respondent.
 - BUT REMEMBER, you must also follow state law as well as IDEA, 504, and ADA.

112

Administrative Leave 34 CFR § 106.44(d) (Employees)


- A school division may place employee respondents on administrative leave during pendency of the grievance process (but not before the grievance process is initiated).
- The standard for emergency removal does not apply to administrative leave.
- Additionally, the post-removal notice and opportunity to challenge do not apply to administrative leave.

113

Administrative Leave 34 CFR § 106.44(d) (Employees)

- The regulations do not specify whether the administrative leave must be with or without pay (or with or without benefits).
- BUT school divisions must still comply with state law, Va. Code § 22.1-315.
 - Superintendent/designee can suspend an employee with pay for up to 5 days. After 5 days, the employee must be given notice of the reasons for the suspension and the right to a hearing on the suspension before the school board.
 - Only the school board can suspend an employee without pay, after notice and opportunity for a hearing.


114



Administrative
Leave 34 CFR
§ 106.44(d)
(Employees)

- The practical impact of this section is that employee respondents will likely rarely be removed under the emergency removal provisions because it will be a far lower bar to use administrative leave/suspension.
- The commentary recognizes that this section sets up a different standard for student respondents and employee respondents.
 - “[T]he final regulations permit, but do not require, what may amount to an interim suspension of an employee-respondent (i.e., administrative leave without pay) even though the final regulations prohibit interim suspensions of student-respondents.” (p. 772)

115




Administrative
Leave 34 CFR
§ 106.44(d)
(Employees)

- Must still comply with other laws, including 504, ADA.

116



117


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PLLC

Proposed Title IX Regulations

- Released June 2022
 - Comment period ended September 2022, with over 235,000 comments submitted.
- In January 2023, the Office of Management and Budget suggested that the new regulations could become finalized as soon as May 2023.
 - This is a short turnaround, as the last round of regulations took over 18 months from the time of released until finalized and an additional three months before effective date. For comparison, only 124,000 comments were received.
- Will May 2023 happen?
 - We just don't know. Also, it is unclear when the regulations would go into effect after they become final.
- Will review some key provisions of the proposed regulations today to contrast them against existing regulations, so that you can start thinking about and anticipating the changes.

118

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Expanded Definition

CURRENT	PROPOSED
Applies to only "sexual harassment," which has three subparts: (1) quid pro quo; (2) hostile environment; and (3) sexual violence.	Applies to "sex discrimination," which includes the 3-prong sexual harassment, AND other types of discrimination, such as disparate treatment, equity in athletics, retaliation, failure to accommodate, etc. Also, covers pregnancy, sexual orientation, and gender identity.


119

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Quid Pro Quo & Hostile Environment

CURRENT	PROPOSED
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	An employee, agent, or other person authorized by the recipient to provide an aide, benefit, or service under the recipient's education program or activity explicitly or impliedly conditioning the provision...
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	Unwelcome sex-based conduct that is sufficiently severe or pervasive, that based on the totality of the circumstances and evaluated subjectively and objectively, denies or limits a person's ability to participate in or benefit from...


120

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Expanded Jurisdiction?

CURRENT	PROPOSED
Applies to conduct that occurs in an <u>education program or activity</u> against a person in the <u>United States</u>	[C]onduct that occurs under a recipient's education program or activity includes... conduct that is subject to the recipient's disciplinary authority. A recipient has an obligation to address a sex-based hostile environment..., even if [it] occurred outside the recipient's education program or activity or outside the United States.


121

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Interplay with IDEA & 504

- “If a complainant or respondent is an elementary or secondary student with a disability, the Title IX Coordinator must consult with the student’s Individualized Education Program (IEP) team..., or the group of persons responsible for the student’s placement decision..., to help ensure that the recipient complies with the requirements of the [IDEA and Section 504].”


122

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Supportive Measures & Emergency Removal

- **Supportive Measures**
 - May temporarily burden a respondent, but must terminate upon the conclusion of the grievance process.
 - Cannot be more restrictive of the respondent than is necessary to restore or preserve the complainant's access to education program or activity.
 - Supportive measure is subject to review by a "impartial employee."
- **Emergency Removal**
 - Previously: "determines that an immediate threat to the physical health or safety of any student or other individual"
 - Now: "determine that an immediate and serious threat to the health or safety of students, employees or other persons"
 - Removal of "physical."

123

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"Major Stages of Grievance Procedures"



- Evaluation
- Investigation
- Determination
- Appeal

124

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Evaluation

- Written or Oral Complaint triggers the grievance process
- No more mandatory dismissal
- Permissible dismissal includes:
 - Unable to identify respondent after taking reasonable steps to do so
 - Respondent is not participating in education program or activity
 - Complainant voluntarily withdraws any or all allegations and the receipt determines that the remaining allegations, if any, could not constitute sex discrimination even if proven
 - Recipient determines that the conduct, even if proven, would not constitute sex discrimination, after taking reasonable efforts to clarify the allegations with the complainant.

125

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Investigation & Determination

- **Single-Investigator Model.** The decisionmaker can be the same person as the Title IX Coordinator or investigator.
- **No more 10-day period** for review of evidence or for asking questions of parties or witness.
 - Rather, must “provide each party with a **description** of the evidence that is relevant to the allegations of sex discrimination and not otherwise impermissible, as well as a reasonable opportunity to respond.”
- **Timeframe.** The school division must establish “reasonable prompt timeframes for the major states of the grievance procedures.”

126

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Appeal

- Required for dismissal on any of the permissive grounds.
- Regs do not identify any basis for appeal.
- Decisionmaker for appeal cannot be the individual who did not take part in an investigation or dismissal.
- HOWEVER, there is no requirement for appeal in K12 context on a determination.
 - But is it a good idea, especially when there's an appeal for everything else.

127

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Questions?

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128



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