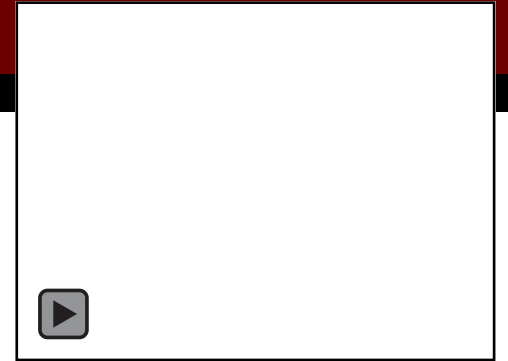


Title IX Sexual Harassment Regulations: Investigators



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Training Agenda

- Title IX Sexual Harassment
- District's obligations to address alleged sexual harassment
- Title IX grievance process and the role of investigators
- Practical tips about conducting investigations
- How to prepare an investigative report



Title IX Overview





What is Title IX?

“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.**”

-Title IX of the Education Amendments of 1972





“Sexual Harassment” Definition - § 106.30(a)

“**Sexual Harassment**” = 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 (i.e., quid pro quo sexual harassment);
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).

“**Education program or activity**” = any location, event, or circumstance over which the recipient exhibits substantial control over both the alleged harasser and the context in which harassment occurred

SH definition does not turn on method of harassment; can be via e-mail, internet, or other technologies, as well as in-person, mail, handwritten, or other communications





General Response Standard - § 106.44(a)

- A recipient with **actual knowledge**
- of **sexual harassment** (as defined on previous slide)
 - in an **education program or activity** of the district
 - against a person **in the United States**,
- must **respond promptly**
- in a manner that is **not deliberately indifferent**.

“**Actual knowledge**” means notice of sexual harassment or allegations of sexual harassment to a recipient’s Title IX Coordinator, any ISD official who has authority to institute corrective measures on behalf of the ISD, or to any employee of an elementary and secondary school.

“**Education program or activity**” includes locations, events, or circumstances over which the district exercised substantial control over both the respondent and the context in which the sexual harassment occurs

New regulations do not apply to sexual harassment alleged to have happened outside the U.S.

- Districts may still address this under the student code of conduct.
- Note that other Title IX prohibitions *do* apply outside the U.S.

“**Deliberately indifferent**” means clearly unreasonable in light of the known circumstances.

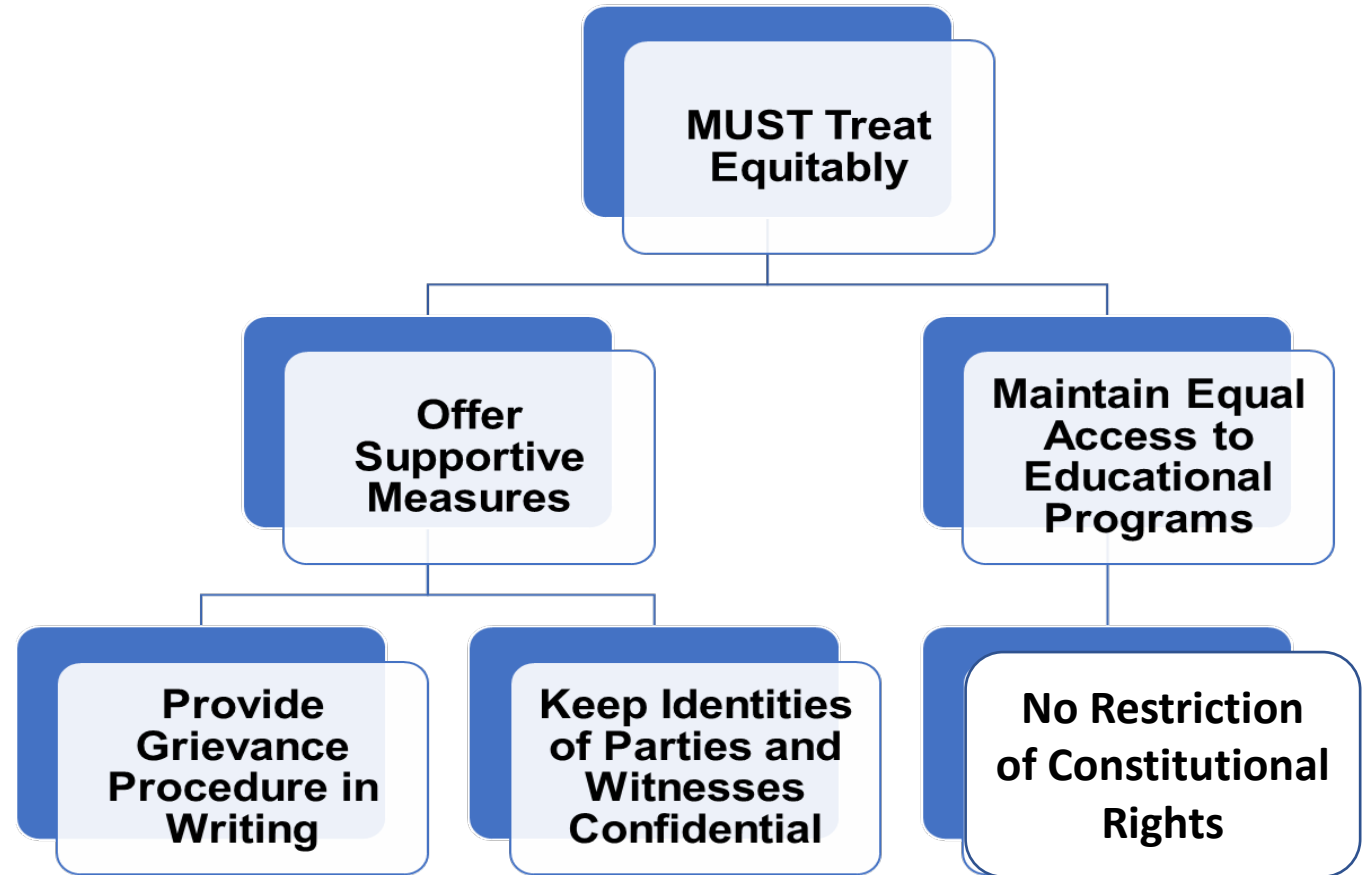




Rights of the Parties in Connection with District's Response to Sexual Harassment

“A district's response must treat complainants and respondents equitably by:

- **offering supportive measures** to a complainant, and
- **following a grievance process** that complies with § 106.45 **before the imposition of any disciplinary sanctions** or other actions that are not supportive measures against a respondent.”



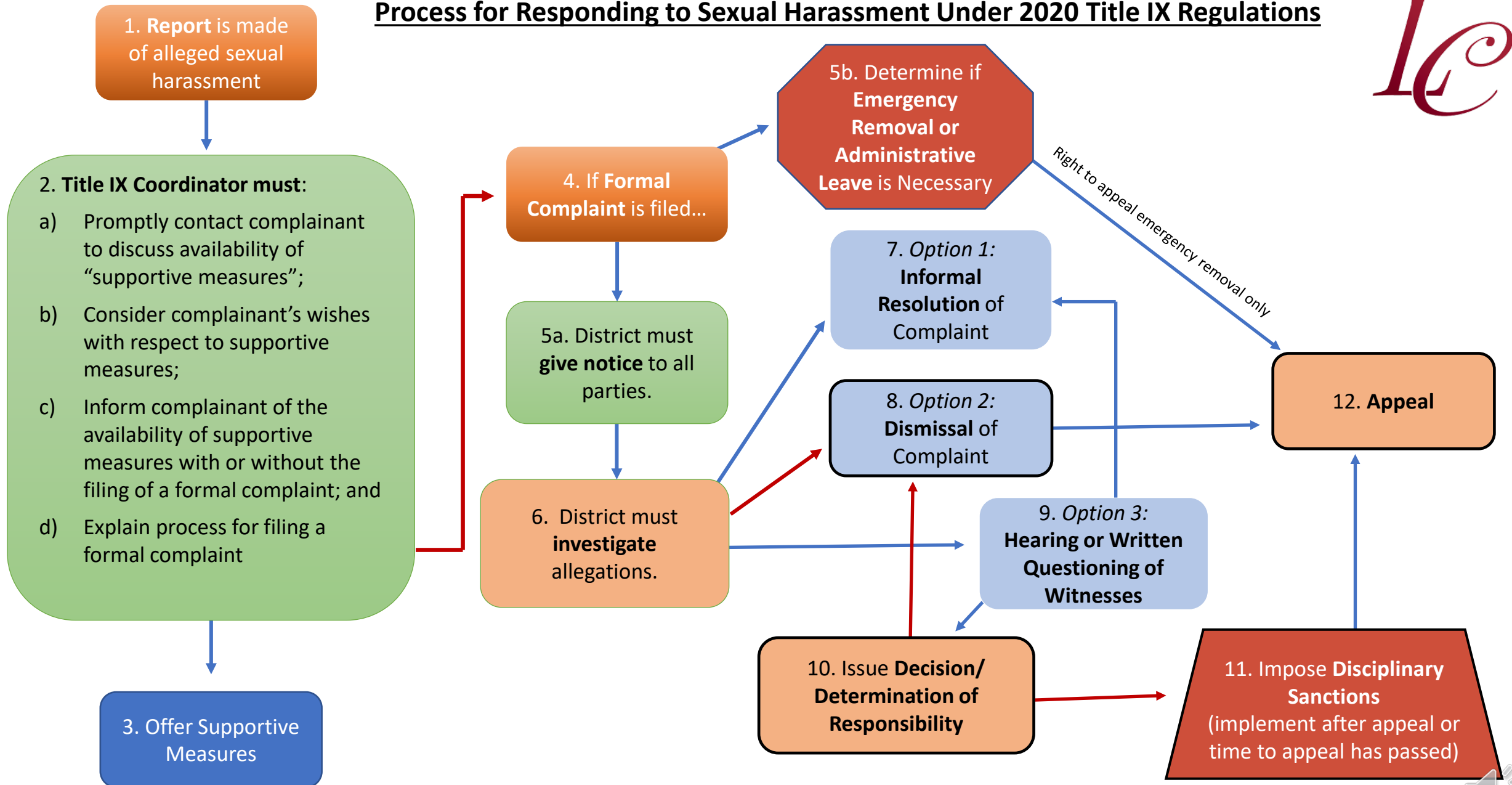


Response to a Formal Complaint § 106.44(b)

In response to a formal complaint, districts must follow a **grievance process** that complies with § 106.45 before imposing disciplinary sanctions against a Respondent.



Process for Responding to Sexual Harassment Under 2020 Title IX Regulations





Required Title IX Personnel



Title IX Coordinator

Investigator

Decision Maker

**Appellate
Decision Maker**

**Informal Resolution
Facilitator**



Overarching Considerations for All Title IX Personnel



Avoidance of Bias & Conflicts of Interest

All Title IX personnel must serve impartially and free from conflicts of interest or bias against the individual complainant and respondent involved in a formal complaint or against complainants and respondents generally.

- Bias includes but is not limited to bias against an individual's sex, race, ethnicity, sexual orientation, gender identity, disability, immigration status, or financial ability.





Prompt Timelines

Absent good cause for the District to delay an investigation, the Title IX formal-complaint process, beginning with filing or signing of the formal complaint and ending with the determination of responsibility, should be completed within a **reasonable time frame**.

- Your district's Title IX grievance process will establish that time frame.
- Days used for any voluntary informal resolution process do not count towards the time frame for concluding the formal complaint process.
- The day a document is filed is "day zero." The next District business day is "day one."





Modifying Timelines

- **All time limits shall be strictly followed** unless modified by the parties' mutual written consent or extended by the District for good cause. If the District grants an extension of time for one party, the same time extension must also be granted to the other party.
- If the District temporarily delays or extends timelines associated with the formal complaint process, the Title IX Coordinator shall provide a written explanation to the parties of the good cause basis for the delay or extension.
 - Permissible modifications to timelines include the absence of a party, a party's advisor, or a witness; concurrent law enforcement activity; the need for language assistance or accommodation of disabilities; or other good cause as determined by the Title IX Coordinator.
- The District shall make reasonable attempts to schedule meetings at a time mutually agreeable to all parties. However, extensions should not unnecessarily extend the timeline established in District policy for concluding the formal complaint process.





Confidentiality

The District must keep information confidential as required by law *except as necessary to*:

- provide supportive measures,
- conduct proceedings under the formal complaint process, when disclosure is required by law, or when permitted by the District in compliance with FERPA and state law, or
- otherwise carry out the purposes of the Title IX Regulations

- District may not restrict the ability of the parties to discuss the allegations under investigation or to gather and present relevant evidence.
- **A complainant's identity, if known, must be disclosed to the respondent once a formal complaint is filed** by a complainant or signed by the Title IX Coordinator.





Confidentiality of Parties' Identities

Other than the limited exceptions to confidentiality discussed on the previous slide, **Districts must keep confidential the identities** of anyone who has reported sexual harassment or who is alleged to be a perpetrator of sexual harassment.

OCR Warning

If a District discloses the identity of a party in circumstances other than the three limited confidentiality exceptions, OCR may deem the disclosure to be an act of improper **retaliation** against a party.





Role of Parents/Guardians and Advisors

Parents/guardians may act on their child's behalf at any time during Title IX Grievance Process.

Each party may be accompanied by an **advisor** of the party's choice during the interview with the investigator or other meetings during the formal complaint process.

Advisor may be, but is not required to be, an attorney.





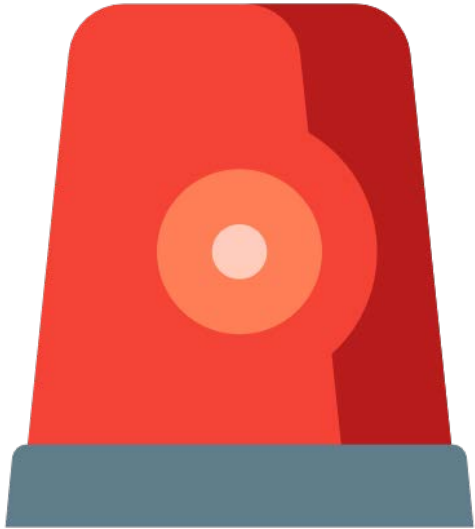
Advisors & Confidentiality

1. In order to preserve the confidentiality of student information protected by FERPA, the District may require the parent of a minor student to sign a release form indicating consent to allow the District to release information related to the allegations to the designated advisor.
2. District must inform any designated advisors that confidential information received during the Title IX formal complaint process, including the evidence received for inspection and review as well as the investigation report, may be used only for purposes of the Title IX formal complaint process and may not be further disclosed or disseminated.
3. Note: Any restriction or requirement regarding an advisor must apply equally to all parties.





Required Reporting



- At any point during a District's investigation that evidence is uncovered that requires reporting to law enforcement, CPS, SBEC, or another entity, District employees must take the necessary actions to do so in compliance with law or board policy.





Equitable Treatment

- A District's treatment of complainants, respondents, witnesses, and any other person involved in a formal complaint process must not discriminate on the basis of sex.
- All parties involved must be treated fairly, with dignity, respect, and sensitivity and without bias, prejudice, or reliance on stereotypes.





Presumption of Nonresponsibility

All District actions must presume that the respondent is **not responsible** for the alleged conduct until after a final determination in a formal complaint process.

In a formal complaint process, a respondent may face Title IX disciplinary sanctions for sexual harassment only after a fair process determines responsibility.

However, even if a Title IX formal complaint is not filed or signed, the District may investigate and respond to prohibited conduct in accordance with board policies and the Student Code of Conduct.





Standard of Evidence: Preponderance of the Evidence

TASB Model Grievance Process: “The District uses the preponderance of evidence standard of evidence to determine responsibility unless stated otherwise in FFH(LOCAL).”

➤ Same standard must apply to all formal complaints (employees and students)

51%

“Preponderance of the Evidence” means that a proposition is more likely than not to be true.





Privileged Information

Districts cannot use information protected under a legally recognized privilege unless the person holding the privilege has waived it.

If a party seeks or uses information protected under a legally recognized privilege, the party must provide written documentation indicating that the individual holding the privilege has waived the privilege and consents to use of the information for purposes of the formal complaint process.



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District Bears the Burden of Proof

The **burden of proof** and **burden of gathering evidence** sufficient to reach a determination regarding responsibility **rests with the District** and not with the parties.



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- **Parties have right to participate fully and robustly** in investigation process if they choose by gathering evidence, presenting fact and expert witnesses, reviewing the evidence gathered, responding to investigative report, and asking questions of other parties and witnesses before the determination of responsibility.





Understanding “Relevance”

Evidence is considered relevant if:

- (1) it has **any tendency to make a fact more probable or less probable** than it would be without the evidence; and
- (2) the **fact is of consequence** in determining the complaint.

Rape-Shield Protections for Complainants

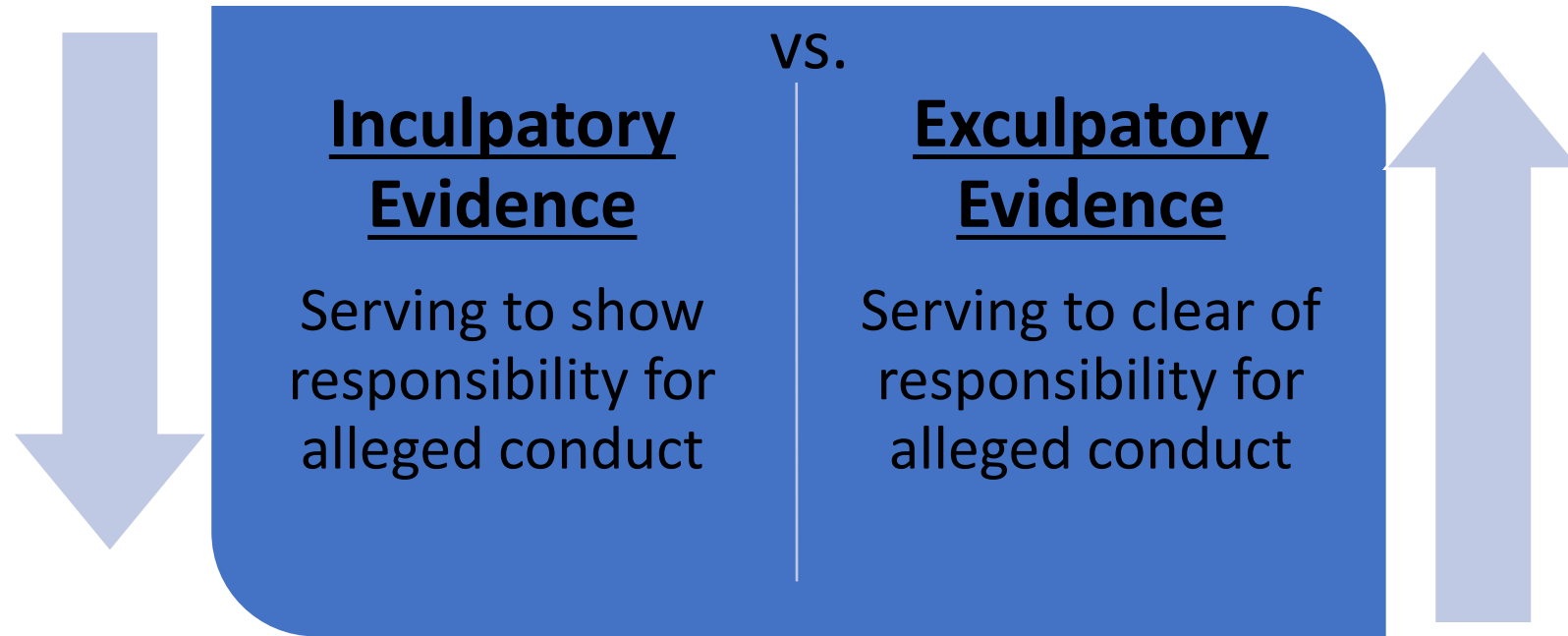
Evidence about a **complainant’s prior sexual behavior or sexual predisposition is not relevant** unless the evidence:

- is offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or
- concerns specific incidents of the complainant’s prior sexual behavior with respect to the respondent and is offered to prove consent.





Exculpatory vs. Inculpatory Evidence



Districts must consider both exculpatory and inculpatory evidence and must provide the parties an equal opportunity to present and review such types of evidence.



TITLE IX INVESTIGATORS

Formal Complaint

Investigation

**Determination of
Responsibility by
Decision Maker**





Who May Be An Investigator?

The Title IX Coordinator may serve as an investigator, appoint a trained District employee to serve as an investigator, or, in consultation with the Superintendent, appoint an external third-party investigator, to investigate the allegations in a formal complaint.





Time Frame for Investigation

Investigation must be completed in a **reasonably prompt** manner.

- Consult your district policy to determine the specific time frame applicable to Title IX investigations in your district.
- Investigation should be completed within time frame specified in District policy absent good cause for delay.



- **10 days:** Prior to completion of the investigative report, the district must send to each party and the party's advisor, if any, the evidence subject to inspection and review in an electronic format or a hard copy.
 - The parties must have at least 10 days to submit a written response, which the investigator must consider prior to completion of the investigative report.
- **10 more days after completion of investigative report:** The completed investigative report must be sent to each party and the party's advisor, if any, in electronic or hard copy format, at least 10 days prior to a hearing or other time of determination regarding responsibility to allow the parties an opportunity to review and prepare a written response.





Beginning the Investigation

After receiving the written complaint, the **investigator will meet promptly with each party** to conduct initial interviews, gather information, and collect evidence.

- Parties may also present fact and expert-witness testimony in the form of written statements.
- Investigator **must provide written notice** to any party whose participation is invited or expected of the **date, time, location, participants, and purpose** of any investigative interview or other meetings, with sufficient time for the party to prepare to participate.





Planning the Complainant Interview

- ❑ A sufficient amount of time should be set aside for the initial interview. Complainants can be very emotional and embarrassed when discussing a very private matter. Investigator must allow time for the conversation to wander and to develop rapport in order to reduce stress.
- ❑ When scheduling the interview, remind the Complainant that he/she is allowed to have an advisor of their choice accompany them to the interview.
- ❑ Choose a site for the interview that will make the Complainant comfortable and where privacy is assured, such as an adequately sized office. If an advisor attends, place them somewhere in the room where visual cues with the Complainant are inhibited, such as side-by-side or a little behind the Complainant.





Interviewing the Complainant

- ❑ Be sensitive, objective, and avoid the appearance of bias.
- ❑ Begin the interview by describing its purpose, the District's strong desire to eliminate sexual harassment, and its non-retaliation policy. Inform the Complainant who to contact if he/she experiences retaliation.
- ❑ Invite Complainant to explain the allegations in the Formal Complaint. Avoid making any statements about the allegations or asking targeted questions until after Complainant has the opportunity to describe the allegations free from your input or leading questions.
 - ❑ Tip: If Complainant is reluctant to discuss the allegations, try to discuss neutral topics to develop a rapport and allow the Complainant to gain a comfort level with you.





Interviewing the Complainant

- ☐ After listening to the Complainant recount the allegations without interruption, ask for details regarding **Who, What, When, Where, Why, and How.**
 - ☐ Ex: What specifically did the Respondent allegedly say or do? Did it happen more than once? How often? Get details of each incident. What was happening before the alleged incident? What happened after?
- ☐ Ask if there were **any witnesses** to any of the alleged conduct or other evidence supporting the allegations.
- ☐ Take notes to review after interview and identify any specific questions to ask Respondent.





Wrapping Up the Complainant Interview

- ☐ Outline the timetable of the investigation and the actions the investigator will take.
- ☐ Inform the Complainant that he or she will be kept apprised of the investigation and will have the opportunity to review the evidence gathered in the investigation and to prepare a written response before the completion of the investigative report.
- ☐ Thank the Complainant for their time and willingness to discuss the allegations.





Planning the Respondent Interview

- ❑ A sufficient amount of time should be set aside for the initial interview. Respondents can be very emotional or defensive as a result of being accused of sexual harassment. Investigator must allow time for the conversation to wander, to develop rapport in order to reduce stress, and to allow for periods of de-escalation to maintain calm.
- ❑ When scheduling the interview, remind the Respondent that he/she is allowed to have an advisor of their choice accompany them to the interview.
- ❑ Choose a site for the interview that will make the Respondent feel comfortable and where privacy is assured, such as an adequately sized office. If an advisor attends, try to place them somewhere in the room where visual cues with the Respondent are inhibited, such as side-by-side or a little behind the Respondent.





Interviewing the Respondent

- ❑ Be sensitive, objective, and avoid the appearance of bias.
- ❑ Begin the interview by describing its purpose, the District's prohibition against sexual harassment, and its non-retaliation policy. Inform the Respondent who to contact if he/she experiences retaliation as a result of the allegations. Remind the Respondent that she/he is presumed not responsible for the alleged conduct until after the conclusion of the Title IX Grievance Process.
- ❑ Invite Respondent to begin the conversation by telling you what he or she knows about the allegations in the Formal Complaint and what his or her response is to those allegations. (The Respondent will have received notice of the allegations in advance of this interview.) Ask broad, open-ended question to try to get Respondent talking. Avoid making any statements about the allegations or asking targeted questions until after Respondent has the opportunity to describe the allegations free from your input or leading questions.
 - ❑ Tip: If Respondent is reluctant to discuss the allegations, try to discuss neutral topics to develop a rapport and allow the Respondent to gain a comfort level with you.
 - ❑ If Respondent declines to give you a narrative discussion of the allegations, then try asking broad questions to facilitate the discussion.





Interviewing the Respondent

- ☐ After providing the Respondent an opportunity to discuss the allegations without interruption, ask targeted questions regarding the specific allegations in the Formal Complaint. Ask for response to Who/What/When/ Where/Why/How details from Complainant's interview.
- ☐ Ask Respondent if there is any evidence supporting his/her response and that he/she believes may disprove/refute the allegations.
- ☐ Any witnesses?
- ☐ Take notes.





Wrapping Up the Respondent Interview

- ☐ Outline the timetable of the investigation and the actions the investigator will take.
- ☐ Inform the Respondent that he or she will be kept apprised of the investigation and will have the opportunity to review the evidence gathered in the investigation and to prepare a written response before the completion of the investigative report.
- ☐ Thank the Respondent for their time and willingness to discuss the allegations. Ensure Respondent has your contact information so that he/she can provide any additional information/evidence that Respondent may think of after the interview.





Emergency Removal of Respondent

If you develop concerns based on Respondent's interview that the Respondent may pose of risk to the physical health and safety of themselves or to the Complainant or to any other person as a result of the sexual-harassment allegations:

- Inform the Title IX Coordinator immediately so a threat assessment may be conducted.
- Contact law enforcement if warranted.





Interviewing Non-Party Witnesses

- ☐ Contact other witnesses as soon as possible. Find out if there are any availability problems to determine the order of interviewing. Keep track of who suggested interviewing a particular witness. Prepare a list of questions to ask.
- ☐ Do not promise absolute confidentiality to witnesses. The District is obligated to provide all relevant evidence to both parties involved in the Title IX Grievance Process, including the identities of any witnesses who provided such evidence. Additionally, the parties have the right to ask written questions to any witness who provides information during the investigation that is relevant to the allegations of sexual harassment.
- ☐ Do not share the details of the complaint with non-party witnesses other than those they need to know in order to provide information in the investigation.





Interviewing Non-Party Witnesses

- ☐ Do not ask if they have seen or experienced “sexual harassment” by the Respondent. Instead, ask about specific behaviors they have observed.
- ☐ Ask if, from their point of view, the alleged harasser was bothering the Complainant and why.
- ☐ Ask if there are others who might be able to comment on the interaction or if there is any documentation of which they are aware that might relate to the alleged behavior.
- ☐ Ask if the Complainant complained to them about the Respondent’s behavior.





Interviewing Non-Party Witnesses

- ❑ Explain the District's definition of sexual harassment, and give each witness a copy of it in writing.
- ❑ Explain the need to limit speculation and conversation about the matter outside of the interview in order to protect the witness from allegations of defamation. Also explain the district's policy against retaliation for participating as a witness in an investigation and to whom any retaliation should be reported.
- ❑ Find out if any witnesses anticipate leaving the area for any period of time. If so, it may be appropriate to get a signed statement about the incident prior to their departure. Counsel should be consulted about the proper form of such a statement to preserve it for use in any subsequent legal proceedings.
- ❑ Determine if a written statement should be obtained from any other witnesses. Such statements are discoverable and may lock a witness into a set of facts that the witness may want to change later. Again, consult with legal counsel about the advisability of obtaining such signed statements.





Misc. Procedural Matters: Interviews

- Transcribe notes from interviews as soon as possible after they occur.
Make a separate report of the interview containing your impression of the witness's credibility, demeanor, or nonverbal behavior, if such observations are noted and warranted.
- Maintain a current list of addresses and phone numbers of all individuals contacted during investigation.





Gathering Other Evidence

- Remember that the **burden of gathering evidence** is on the District.
- Obtain and review relevant employment or student records and any evidence identified during the interviews.
- Note: In situations in which a **Complainant's medical or treatment records** may be relevant to a Formal Complaint, a District may not obtain that information unless it first obtains the Complainant's consent.





Inspection of Evidence

In order to afford each party the opportunity to respond meaningfully to the evidence prior to the conclusion of the investigation, evidence submitted by the parties or obtained as part of the investigation that is directly related to the allegations raised in a formal complaint must be made available to both parties by the investigator for the parties' inspection and review.

- This includes evidence upon which the District's decision maker may choose not to rely when reaching a determination regarding responsibility, as well as inculpatory or exculpatory evidence.
-
- ☐ Prior to completion of the investigative report, the investigator must send to each party and the party's advisor, if any, the evidence subject to review and inspection in an electronic format or hard copy.
 - ☐ Each party must be allowed 10 days from the date of receipt of the evidence to inspect and review the evidence and to submit a written response that the investigator will consider when completing the final investigative report.





Completing the Investigative Report

The investigative report **must fairly summarize all relevant evidence** and may include the following content:

- ☐ Identification of the allegations potentially constituting sexual harassment;
- ☐ Any procedural steps taken by Title IX personnel from the receipt of the formal complaint through the conclusion of the investigation, including any notifications to the parties, interviews, site visits, and methods used to gather evidence;
- ☐ Responses of each party to the allegations in the formal complaint;
- ☐ Evidence obtained by the District;
- ☐ Relevant evidence considered by the investigator;
- ☐ The parties' responses to the evidence after review and inspection;
- ☐ Findings of fact; and
- ☐ Identification of any District policies or codes of conduct implicated by the facts, including referrals to FFH for Investigations for Reports Other Than Title IX, FFI, or other District processes initiated as a result of the investigation.

The investigator must simultaneously provide the completed investigation report to both parties. The investigator must also send a copy of the investigation report to the Title IX Coordinator, who will immediately assign a decision maker and provide him/her a copy of the investigation report.





Your Role After the Investigation

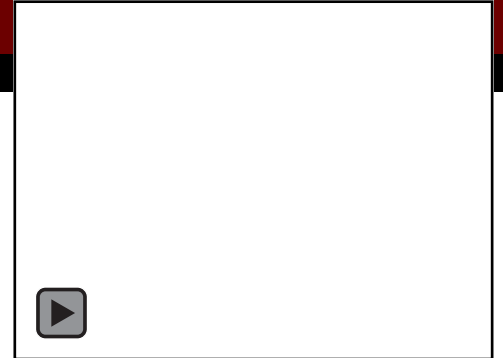
- You may be called as a witness in the next stage of the grievance process and required to answer written questions submitted by the Complainant or Respondent.
- The decision maker is permitted to have discussions with the investigator concerning the investigator's opinions or recommendations, as long as those discussions do not interfere or inhibit the decision maker from making an independent, objective evaluation of all relevant evidence in reaching a determination of responsibility.



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