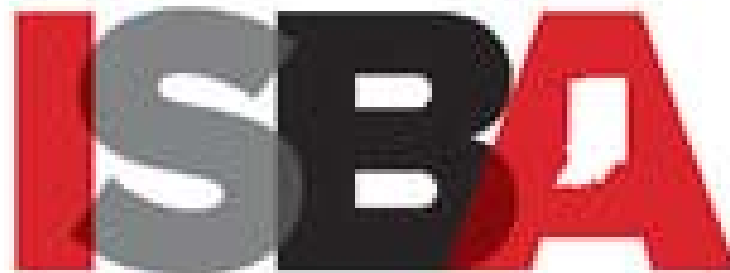


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Title IX Training

October 9, 2020



INDIANA SCHOOL BOARDS
ASSOCIATION

NOBLESVILLE : FISHERS : TIPTON : MERRILLVILLE : ZIONSVILLE

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ATTORNEYS AT LAW



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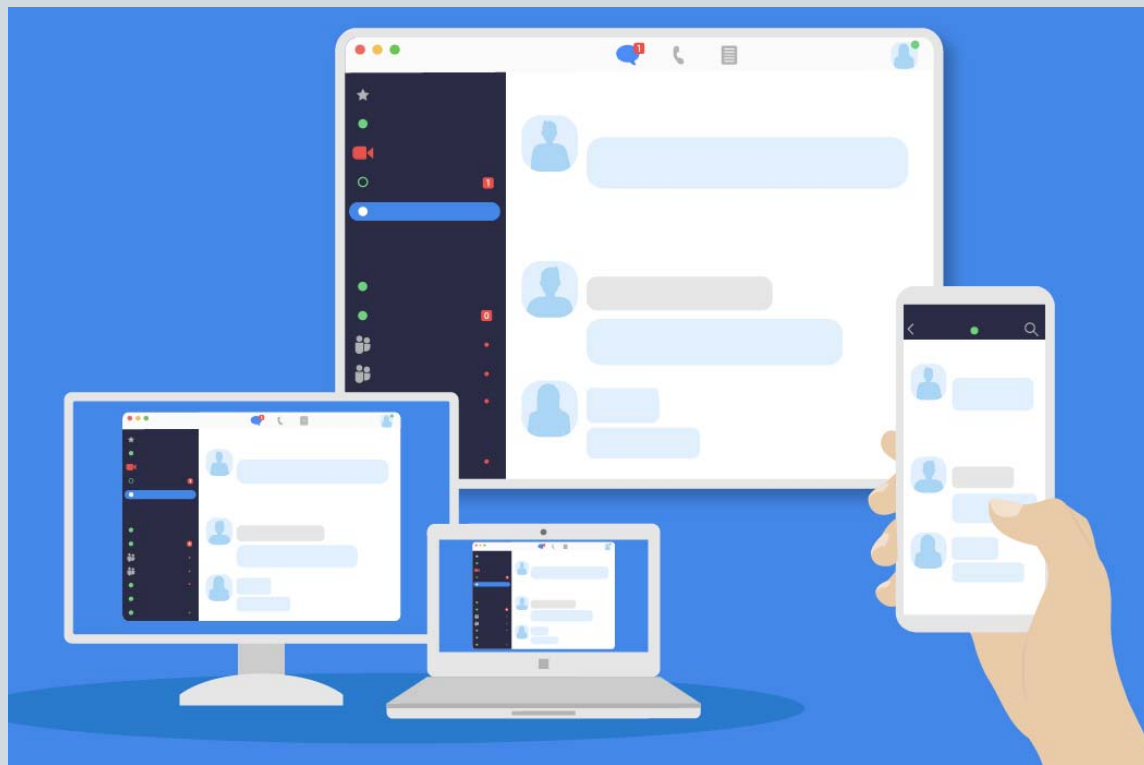
Zoom Etiquette

Please do the following:

1. Rename your Zoom tile with your Level, District, First and Last Name
 - a) Click on the 3 dots next to your picture in the upper right hand corner
 - b) Level - EL, MS, HS (i.e., HS, CCHA, Andrew Manna)
 - c) If district-level, pick one!
2. Turn on camera
3. Mute your microphone

Questions?

Use Chat to ask questions!



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.

By the Numbers

- Proposed Rules issued **1.5 years** ago
- **124,000 comments**
- Only formal regulations issued **since 1997**
- **25 pages** of regulations
- **2007 pages** of preamble (explanation)
- **August 14, 2020** compliance

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The New Standard

United States Supreme Court History for Title IX

Cannon v. University holds:

- a private right of action under Title IX
- avoiding use of federal funds to support discriminatory practices
- provides protection for individuals

Franklin v. Gwinnett County Public Schools holds:

- money damages available for intentional discrimination

Private Right of Action

- Private individual rights are enforced by administrative agencies like the Office of Civil Rights and courts.
- Administrative Agencies can place federal funds at risk while judicial/court proceedings do not.



Cases that developed the judicial/court standard

Gebser v. Lago Vista Indp School Dist (1998)

- If school engages in deliberate indifference then it has engaged in discrimination.

Davis v. Monroe (1999)

- If committed by a peer, then same standards apply.
- If it is so severe, pervasive and objectively offensive that it denies victims equal access to education.
- Created a “Three Part Test.”

Gebser/Davis are the starting point for the US DOE’s interpretation of Title IX.

Prior U.S. Department of Education Interpretations

1997 Guidance

- Previously, the Dept interpretations were broader and more like strict liability
- School was to take action when it was severe, persistent or pervasive and based on constructive notice

2001 Guidance

- In 2001, Dept Guidance they felt they did not have to use Gebser/Davis because it was a private action lawsuit
- Described sexual harassment as unwelcome conduct of a sexual nature

Old Standards

OCR (Administrative/injunctive)	<u>Davis</u> (action for damages)
Knows or reasonably should have known	Actual knowledge
Severe, pervasive, or persistent	Severe, pervasive, and objectively offensive
Interferes with or limits participation in educational benefits	Must effectively bar access to educational benefit
Response must include effective measures to address and eliminate harassment	Response must not be clearly unreasonable

2020 Interpretation by the U.S. Department of Education

- Department believes adaptations of *Gebser/Davis* arise in the context of a school's response to reports, allegations or incidents of sexual harassment including respect for freedom of speech and allowing local schools to make decisions on appropriate remedies
- Department is persuaded by the Supreme Court that elementary and secondary schools are unlike the workplace so something may be said at the school level that is excusable based on age/maturity of students whereas it would not be in workplace

2020 Interpretation by the U.S. Department of Education

Appropriate to have a judicial and administrative enforcement under the same standards.



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ATTORNEYS AT LAW

Definitions

Sexual Harassment, Type 1

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

1. A school employee conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct

This is the quid pro quo (something for something else) type.

Sexual Harassment, Type 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

- With the 3rd prong covering most everything physical, this prong is focused on verbal or written/electronic forms of harassment.
- Standard is subjective with respect to the unwelcome-ness of the conduct (i.e., whether the complainant viewed the conduct as unwelcome), but as to elements of severity, pervasiveness, objective offensiveness, and denial of equal access, determinations are made by a reasonable person in the shoes of the complainant.

Why severe “*and*” pervasive?

Rationale for preventing a hostile workplace environment free from any severe or pervasive sexual harassment that alters conditions of employment does not allow for the social and developmental growth of young students learning how to interact with peers in the elementary and secondary school context and fostering robust exchange of speech, ideas, and beliefs in a college setting. Thus, the Department does not believe that aligning the definitions of sexual harassment under Title VII and Title IX furthers the purpose of Title IX or benefits students and employees participating in education programs or activities.

In other words, U.S. Dept. of Education thinks the nature of education means a higher quantity of low grade offensive speech must be tolerated as part of free expression.

While non-severe instances of unwelcome harassment may negatively impact a person, and schools retain authority to address such instances, Title IX is focused on sex discrimination that jeopardizes educational access.

In other words, U.S. Dept. of Education thinks sex-based conduct toward students must be severe to rise to the level of sexual harassment.

Sexual Harassment, Type 3

"Sexual assault" (as defined by the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act at 20 USC 1092 (f)(6)(A)(v));

"dating violence" (as defined by the Violence Against Women Act at 34 USC 12291 (a)(10));

"domestic violence" (as defined by the Violence Against Women Act at 34 USC 12291 (a)(8)); or

"stalking" (as defined by the Violence Against Women Act at 34 USC 12291 (a)(30)).

More on SH Type 3

- “Fondling,” defined under the Clery Act (referring to the FBI’s Uniform Crime Reporting system), as “the touching private body parts of another person for the purpose of sexual gratification, without the consent of the victim,” is the only type of sexual harassment that depends on the intent or purpose of the perpetrator or victim.
- While the sexual harassment definition does not identify “grooming behaviors” as a distinct category of misconduct, some grooming behaviors may constitute sexual harassment, and behaviors that do not constitute sexual harassment may still be deemed inappropriate behavior addressed under other areas of policy, procedure, and/or handbook.

Complainant

com·plain·ant

/kəm'plānənt/

Noun: complainant; plural noun: complainants

Complainant means an individual who is *alleged to be the victim* of conduct that could constitute sexual harassment.

Respondent

re·spond·ent

/rə'spɒndənt/

noun: respondent; plural noun: respondents

Respondent means an individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment.

Formal Complaint

for·mal com·plaint

/'fôrməl/ /kəm'plānt/

noun: formal complaint; plural noun: formal complaints

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.

Supportive Measures

Supportive measures means...

Offered as appropriate

Without fee or charge

Designed to restore or preserve equal access to the education program or activity:

- without unreasonably burdening the other party
- including measures designed to protect the safety of all parties or the educational environment, or deter sexual harassment.

Nondisciplinary, nonpunitive individualized services

As reasonably available

To the complainant or respondent

Before or after the filing of a formal complaint or where no formal complaint has been filed.

Types of Supportive Measures

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
Monitoring of
Certain Areas of
the Campus

Other Similar
Measures

Supportive Measures

Unreasonable Burden

- Schedule and housing adjustments do not necessarily constitute an “unreasonable” burden on a respondent.
- Removal from sports teams (and similar exclusions from school-related activities, such as student government) also require a fact-specific analysis, but whether the burden is “unreasonable” does not depend on whether the respondent still has access to academic programs – must analyze whether a respondent’s access to the array of educational opportunities and benefits offered by the recipient is unreasonably burdened.

Supportive Measures do NOT include Discipline

- Possible disciplinary sanctions described or listed in a school's grievance process are not "supportive measures."

Example: If a school has listed ineligibility to play on a sports team or hold a student government position, as a possible disciplinary sanction that may be imposed following a determination of responsibility, then school may not take that action against a respondent without first following the grievance process.

- If, on the other hand, the school's grievance process does not describe or list a specific action as a possible disciplinary sanction that the recipient may impose following a determination of responsibility, then whether such an action (for example, ineligibility to play on a sports team or hold a student government position) may be taken as a supportive measure for a complainant is determined by analysis of whether the action is punitive and does not unreasonably burden the respondent.

Inherently Punitive or Not?

No/Not Punitive/Can Do Without the Grievance Process

1. Educational conversations
2. Sending students to the principal's office
3. Changing student seating or class assignments

So, such actions may be taken to maintain order, protect student safety, and counsel students about inappropriate behavior.

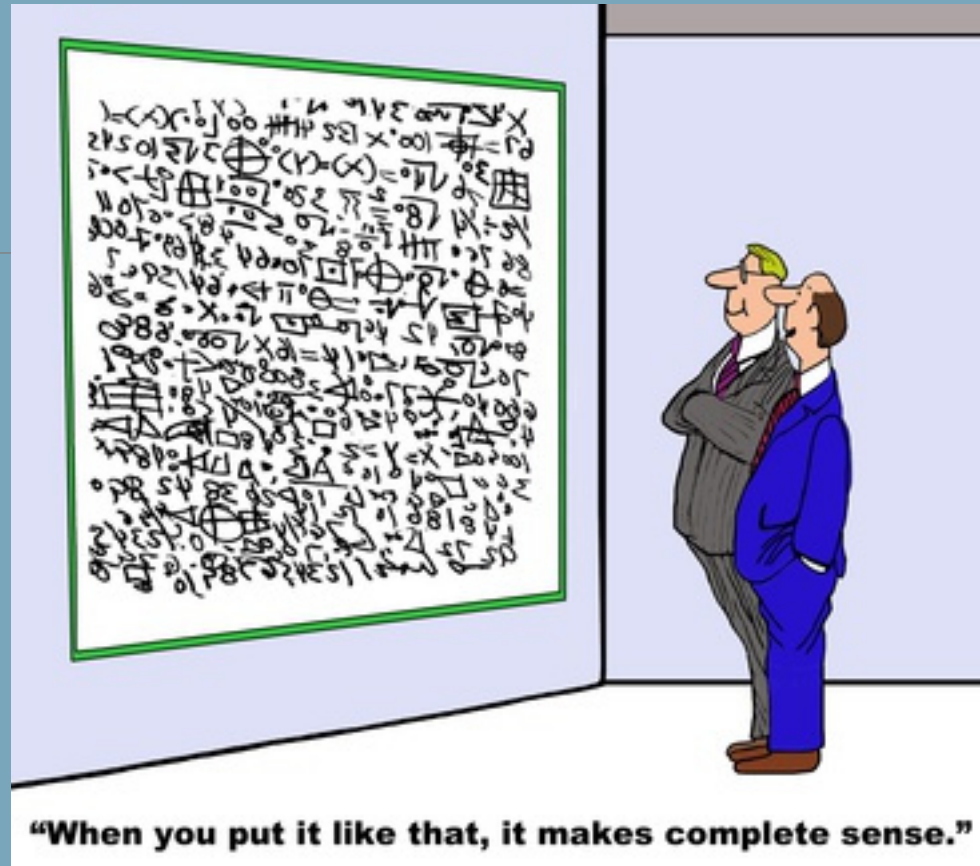
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Yes/Punitive/Cannot Do Without the Grievance Process

By contrast, expulsions and suspensions constitute disciplinary sanctions (and/or constitute punitive or unreasonably burdensome actions) that could not be imposed unless a result of the grievance process.

Post-Exoneration Supportive Measures

- School has discretion whether to continue supportive measures after a determination of non-responsibility.
- Determination of non-responsibility does not necessarily mean that the complainant's allegations were false or unfounded but rather could mean that there was not sufficient evidence to find the respondent responsible.



Not Defined

Days (Not defined!)

“The Department does not require a specific method for calculating “days,” and schools have flexibility to adopt the method that works best for operations; for example, could use calendar days, school days, or business days, or a method the recipient already uses in other aspects of its operations.”

For sake of simplicity, we at CCHA recommend use of **instructional days** throughout the procedures.

Consent (Not defined!)

ED's assistant secretary for civil rights will not require recipients to adopt a particular definition of consent with respect to sexual assault.

- Left to the discretion of recipients, many of whom are under State law requirements to apply particular definitions of consent for purposes of campus sexual misconduct policies.
- Schools must clearly define consent and must apply that definition consistently.

Harry Potter

AND THE
SORCERER'S HOME



What Triggers A School's Obligation to Respond?

§ 106.44(a): 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 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.

Actual Knowledge

Actual knowledge means **notice** of sexual harassment or allegations of sexual harassment to a school corporation's Title IX coordinator or any school official who has authority to institute corrective measures on behalf of the school, or **to any employee of an elementary and secondary school**. As used in this definition, "notice" **includes (but is not limited to) a report** of sexual harassment to the Title IX coordinator as described in 34 CFR Sec. 106.8(a).

Actual Knowledge

Staff Reporting Obligation

- It's like child abuse - every employee has an immediate reporting obligation, and a report to any employee is a "filing."
- Coach counts if they are an "employee." With direct payment by schools, all lay coaches/ECA sponsors are likely employees.

Actual Knowledge

Reporting Procedure

- Must prominently display Title IX coordinator contact info on website and state that any person may report sexual harassment
 - in person
 - by mail
 - by telephone, or
 - by e-mail

using that contact information (or by any other means that results in the Title IX Coordinator receiving the person's verbal or written report), and that a report may be made at any time (including during non-business hours) by using the telephone number or e-mail address , or by mail to the office address, listed for the Title IX Coordinator.

Educational Program or Activity 34CFR 106.44 (a)

- Schools must respond when sexual harassment occurs in the school's education program or activity, against a person in the United States.
- Education program or activity includes locations, events, or circumstances over which the school exercised substantial control over both the respondent and the context in which the sexual harassment occurs, and also includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution.

Triggers Title IX	Probably doesn't trigger Title IX
Harassment in the school building or on school property	House party on the weekend
Harassment in school or extracurricular activities	International field trip or study abroad
Teacher visiting student's home to deliver book and engaging in sexual harassment while there	
Prom in a rented ballroom	
Student using personal cell phone to perpetuate online harassment during class time	Student using personal cell phone to perpetuate online harassment at home on weekend
For colleges: Greek houses or off-campus housing owned or controlled by student organization	Harassment committed by a student or staff from a different school (i.e., harassment happened at "away" volleyball game)

Defining Scope

Each school must define the scope of their educational program or activities

- Title IX Coordinator, investigator, decision-maker, and person who facilitates an informal resolution process, must be trained on this
- Scope must be defined in the public training materials so everyone knows.

Example of Defining Scope

For the purposes of Title IX, the scope of the Corporation's educational program or activities includes locations, events, or circumstances over which the Corporation exercises substantial control over both the respondent and the context in which the sexual harassment occurs *[only for postsecondary: and also includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution.]*

This includes all activities taking place within a school building or on Corporation property; any athletic, extracurricular, or co-curricular activity officially recognized by the Corporation and led by a Corporation employee; computer and internet networks, digital platforms, and computer hardware or software owned or operated by, or used in the operations of, the Corporation.

Off Campus or Not Enrolled

- In general, off-campus, off-hours assaults will not trigger school liability. Off-campus incidents only incur liability if:
 1. if the off-campus incident occurs as part of the recipient's "operations" pursuant to 20 U.S.C. 1687 and 34 CFR 106.2(h);
 2. if the recipient exercised substantial control over the respondent and the context of alleged sexual harassment that occurred off campus pursuant to § 106.44(a); or
 3. if a sexual harassment incident occurs at an off-campus building owned or controlled by a student organization officially recognized by a postsecondary institution pursuant to §106.44(a).
- If complainant is no longer enrolled when the complaint is filed, or if the perpetrator is no longer enrolled or employed, no reason for the school to do a investigate because the school can't do anything.

Caution: “Off campus activities”

- If harassment occurred off campus and then on campus, School must respond to the on campus incident. It *may* also respond to the associated off campus behavior (ex: *Doe v. East Haven Board of Education*, student was raped off campus but then taunted on campus)
- Nothing says that School can't respond to off-campus behavior on its own accord
- Federal courts have held schools liable for sexual harassment that occurs off campus where the underlying sexual harassment or assault causes the complainant to experience a hostile environment on campus (*Gebser/Davis*). Those cases are still valid caselaw and can still lead to civil liability, so we need to keep in mind the various standards here.

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ATTORNEYS AT LAW

Reports

Formal Complaint v. Report

Formal Complaint

A complainant (or a third party) may report sexual harassment to a school for a different purpose than desiring an investigation. Thus, if an investigation is an action the complainant desires, the complainant must file a written document requesting an investigation.

No requirement as to a detailed statement of facts.

Report

Disclosure or report may be entirely separate from a complainant's later decision to pursue a grievance process by filing a formal complaint.

Respondent may be removed from an education program or activity on an emergency basis (immediate threat to physical health or safety of any individuals arising from the allegations), whether or not a formal complaint is pending.

Response to Report

Response obligations must include offering supportive measures to each complainant (alleged victim), and specifically having the Title IX Coordinator contact the complainant to discuss the availability of supportive measures with or without the filing of a formal complaint, consider the complainant's wishes regarding supportive measures, and explain to the complainant the process for filing a formal complaint.

No Formal Complaint

- Process ends unless Title IX Coordinator “signs” the complaint;
 - When?
 - **Decision not to investigate is “clearly unreasonable”**
 - Meant to be rare occurrence;
 - Ongoing concern for Complainant or other alleged victims; anonymous report with significant concerns; or involvement of an employee.
- Supportive measures continue or discontinue at the Title IX Coordinator’s discretion.
 - Depends on the type of supportive measures, time period

The Berenstain Bears *and* TOO MUCH TIME HOME



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ATTORNEYS AT LAW

Formal Complaint

Formal Complaint *Filing*

- May be filed **in person, by mail, or by e-mail 24/7** using the listed contact information for the Title IX Coordinator.
- Without formal complaint (by either complainant or Title IX coordinator signature) no investigation or adjudication procedures required, but supportive measures must be offered.
- Must initiate grievance process (investigation) if complainant decides to file a formal complaint

Regulations use grievance process, investigation, and formal complaint interchangeably.

Formal Complaint *Features*

- Strong **due process** protections for complainant who decides to participate in a grievance process
- Non-student employee placed on **admin. leave** during grievance process
- **No specific timeline** for filing except that, at the time of filing a formal complaint, the complainant must be participating in or attempting to participate in the recipient's education program or activity (which could include a graduate who wanted to participate in alumni programs or get an additional degree).
- Signing a formal complaint **does not mean** a Title IX Coordinator becomes a party to a grievance process.

Formal Complaint *Confidentiality*

Schools must keep confidential the identity of:

- any individual who has made a report or complaint of sex discrimination, including any individual who has made a report or filed a formal complaint of sexual harassment
- any complainant
- any individual who has been reported to be the perpetrator of sex discrimination, any respondent, and any witness, except as permitted by FERPA, required by law, or as necessary to carry out the purposes of 34 CFR part 106 to conduct any investigation, hearing, or judicial proceeding arising thereunder, which includes a grievance process.

Anonymity

- Report can be anonymous;
- Formal Complaint **CANNOT** be anonymous, unless identity of the Complainant is unknown.

Presumption of Non-Responsibility

- **New requirement** - 106.45(b)(1)(iv).
- Derives from “*fundamental concept of fairness.*”
- Process **must** include a presumption that the **respondent is not responsible for the alleged conduct** until a determination regarding responsibility is made at the conclusion of the grievance processes

Rationale for the Presumption

- Mitigate perception that respondents are responsible.
- Restore public confidence in Title IX proceedings.
- Has nothing to do with the respondent's credibility, believability or truthfulness.
- Credibility determinations should not be based on party's status as a complainant or respondent.

Written Notice of Allegations

- Must be issued upon receipt of a “**formal complaint.**”
- Must be in **writing.**
- Must be sent to **all known parties.**
- Must be sent regardless of any concurrent law enforcement investigation (i.e., cannot be delayed).

Written Notice Must Include

1. Information about the School's **grievance processes** (i.e., include a copy of or link to the policy and processes) - 106.45(b)(2)(i)(A).
2. A statement that the **respondent is presumed not responsible** for the alleged conduct and that a determination regarding responsibility is made at the end of process - 106.45(b)(2)(i)(B).

Written Notice Must Include

3. Notice of the allegations in **sufficient detail** to allow the parties to prepare a response before an initial interview, including:
 - a. **Identities** of the parties involved in the incident (by full name),
Note: once a “formal complaint” has been filed the complainant’s identity must be disclosed.
 - b. The **conduct** that amounts to sexual harassment, and
 - c. **Date and location** of the alleged incident. 106.45(b)(2)(i)(B).

Written Notice Must Inform Parties

4. They may have an **advisor of their choice**, who may be, but is not required to be, an attorney - 106.45(b)(2)(i)(B).
5. Of any **provision in the School's Code of Conduct** that prohibits knowingly making false statements or knowingly submitting false information during the grievance process (if one exists) - 106.45(b)(2)(i)(B).

Written Notice May Include

- Information about **retaliation** prohibitions and procedures for reporting retaliation.
- Information about process for requesting **supportive measures**.
- Information about the **investigative process**.
- Information about where to direct **questions**.

Written Notice Must Be Updated

- If, in the course of an investigation, **additional allegations** arise that were not included in the initial written notice and those allegations are investigated, the School must provide the parties notice of the additional allegations - 106.45(b)(2)(ii).

Mandatory Dismissal

When **must** a formal complaint be dismissed (106.45(b)(3)(i))?

1. If the conduct alleged in the formal complaint, even if true, would **not constitute sexual harassment**.
2. If the conduct did not occur in the School's education **program or activity**.
3. If the conduct did not occur against a person **in the United States**.

Note: Dismissal of a formal complaint under a School's Title IX procedures does not preclude action under another provision in the Code of Conduct. Nor does it preclude a School from providing supportive measures.

Permissive Dismissal

When **may** a formal complaint be dismissed (106.45(b)(3)(ii))?

1. If a **complainant** notifies the Title IX Coordinator in writing that the complainant would like to **withdraw** the formal complaint or any allegations in it.

2. If the **respondent is no longer enrolled** or employed by the recipient.

Consider: whether the respondent poses an ongoing risk, whether a determination provides a benefit to the complainant, or whether the School has control over the respondent sufficient to issue sanctions.

3. If the **specific circumstances prevent the recipient from gathering evidence** sufficient to reach a determination as to the formal complaint or allegations therein.

What Happens Upon Dismissal

- School must promptly **send written notice of the dismissal** and the reasons for it **simultaneously** to the parties - 106.45(b)(3)(iii).
- **Right of appeal** is triggered.

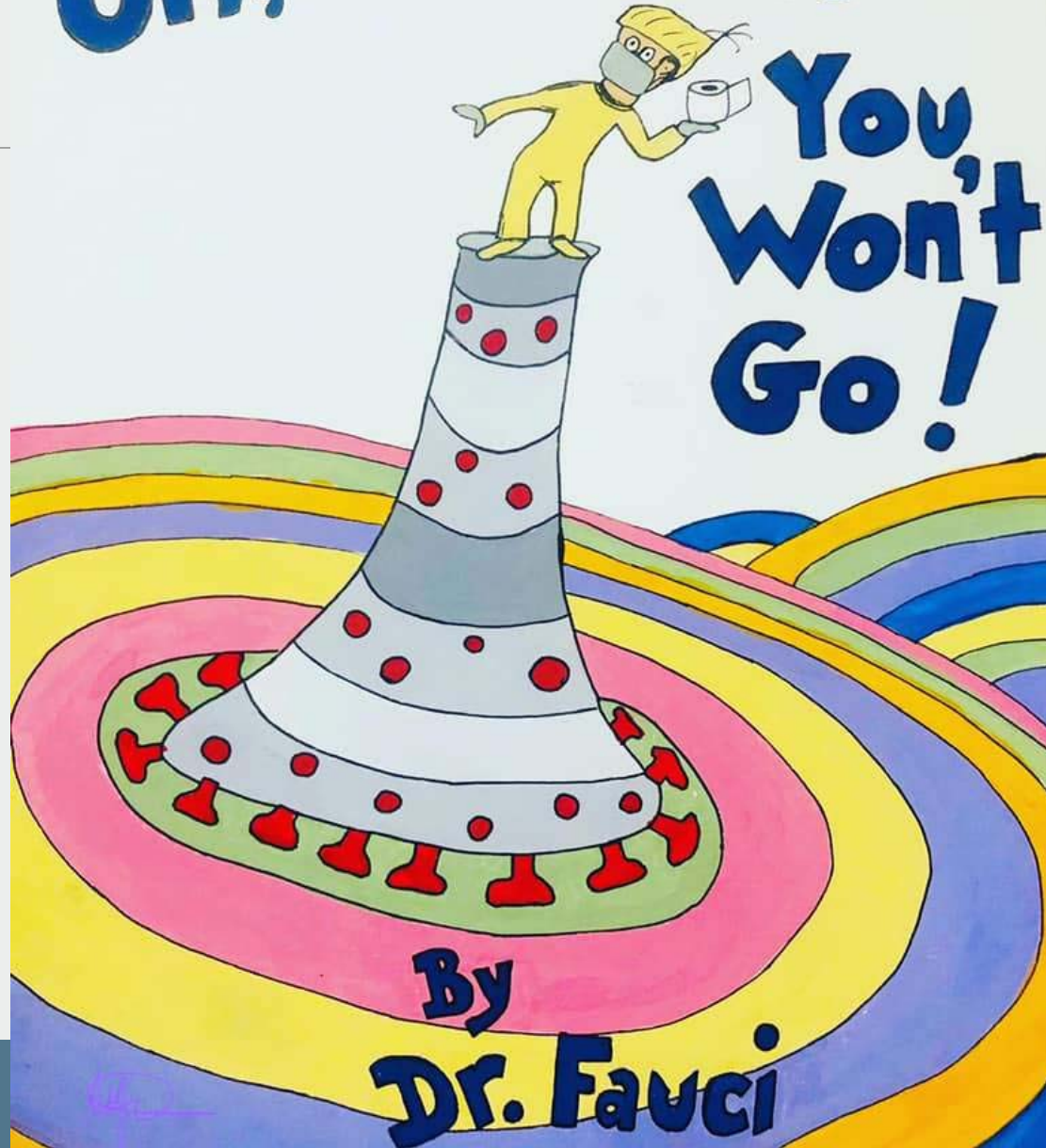
Consolidation of Formal Complaints

Where the allegations of sexual harassment **arise out of the same facts and circumstances**, formal complaints may be consolidated – 106.45(b)(4).

1. Against more than one respondent.
2. By more than one complainant against one or more respondents.
3. By one party against the other party.

Oh, the Places

**You
Won't
Go!**



**By
Dr. Fauci**

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ATTORNEYS AT LAW

Grievance Process

Burden of Proof

“Ensure that the burden of proof and the burden of gathering evidence sufficient to reach a determination regarding responsibility **rest on the recipient** and not on the parties...”

106.45(b)(5)(i)

- School must remain objective and impartial;
- Exception for records made or maintained by a physician, psychiatrist, psychologist, or other recognized professional – unless you have the party’s voluntary written consent.

Conflicts of Interest

- Two types: Legal conflicts (less common in this situation) and Perceived conflicts (more common)
- Person named as Harasser or Witness ≠ Member of investigatory team
- If district-level administrator, board member, or Title IX Coordinator is named as Harasser or Witness, good idea to call in outside investigator

No Limits On...

- Parties have equal opportunity to **present witnesses (fact and expert) and other inculpatory and exculpatory evidence**. 106.45(b)(5)(ii).
- Recipient must not restrict a parties **ability to discuss the allegations under investigation** or **gather and present evidence**. 106.45(b)(5)(iii).
 - Does not apply to discussion of **information** not “the allegations under investigation” i.e. evidence or the report.
 - Does not apply where an individual reports sexual harassment but does not file a formal complaint.
 - Does not limit a school’s ability to restrict parties from contacting each other.

Standard of Evidence

- Schools have discretion to choose the standard of evidence:

“State whether the standard of evidence to be used to determine responsibility is the **preponderance of the evidence** standard or the **clear and convincing evidence** standard, apply the same standard of evidence for formal complaints against students as for formal complaints against employees, including faculty, and apply the same standard of evidence to all formal complaints of sexual harassment;” 106.45(b)(1)(vii).

- Check CBA for standard of evidence required for complaints against employees.
- Can be a standard School uses specifically for Title IX.

Relevancy

- The final regulations deem certain information not relevant to the grievance process:
 - Information protected by a legally recognized **privilege** (106.45(b)(1)(x));
 - Evidence about a **complainant's prior sexual history** (106.45(b)(6)(i)-(ii)); and
 - Any medical, psychological, and similar records unless the party has given voluntary, written consent (106.45(b)(5)(i)).

Evidence that Must Be Deemed Irrelevant, with Exceptions

Questions and evidence about a Complainant's sexual predisposition **must always** be deemed irrelevant, and therefore excluded.

Questions and evidence about a Complainant's prior sexual history **must** be deemed irrelevant, and therefore excluded- with two limited exceptions:

1. Where Respondent contends that someone other than the respondent committed the misconduct
2. Where the question(s) or evidence concern incidents between the Complainant and Respondent and are offered to prove consent.

Advisors of Choice

Parties may be accompanied to any related meeting or proceeding by the “**advisor of their choice, who may be, but is not required to be, an attorney**” 106.45(b)(5)(iv).

- School may not limit the choice or presence of an advisor for either party.
- School may establish **restrictions regarding the extent to which the advisor may participate in the proceedings** as long as the restrictions apply equally to both parties.

Single Investigatory Model Prohibited

“The decision-maker(s), who cannot be the same person(s) as the Title IX Coordinator or the investigator(s), must issue a written determination regarding responsibility.” 106.45(b)(7)(i).

- Title IX Coordinator not required to investigate, but cannot be the decision maker.

Interview Complainant

- Identify – who, what, when, where.
- Specific descriptions of incident(s)
- Similar experiences in the past
- Determine what offended Complainant
- Impact on Complainant
- Discuss complainant's response
- Identify Witnesses
- What relief is being requested

Other Interviews

- Potential witnesses named by Complainant
 - Purpose for interview – investigating allegations against {Individual}
 - Complainant indicated you might have information
 - Who/when/why/how of what you did or did not witness or hear
 - Ask that they not discuss the interview (NDA)
 - Explain no retaliation for telling the truth

In closing

- Any other information?
- Contact me if you remember anything, or if observe anything relevant.

Respondent Interview

- Define the allegation at issue
- Ask to identify situations where he/she harassed others or engaged in behavior in violation of rule
- Confront with general allegations
- Confront with more specifics
- **Note responses**
- Permit him/her to offer evidence/witnesses
- Ask that they not discuss the interview (NDA)
- Explain no retaliation against complainant

Other Interviews

- Potential witnesses named by Respondent
 - Same general questions as other witnesses
 - Ask that they not discuss the interview (NDA)
 - Explain no retaliation against complainant
- Complainant and/or Respondent (Follow Up)
 - If necessary
 - Clarify allegations and inconsistencies
 - Gather additional information

Review of Records and Evidence

Review Personnel/Student Files

- Look for patterns
- Prior relationships

Review other Contemporaneous Evidence

- Video
- Log Sheets
- Phone and e-mail records
- Records made at the time of allegations

Analyzing the Evidence

Credibility Decisions

- Bias
- History of Similar Conduct
- Corroboration
- Other Discipline
- Eye contact, voice tone, demeanor during interviews.

Determine if Substantiated

- Review notes, statements and other evidence

Inspection and Review of Evidence

Must provide **all evidence**, even that not relied upon to the parties for inspection, parties have 10 days to respond

Evidence must be “directly related to the allegations”

- Non-treatment records and information, such as a party’s financial or sexual history, must be directly related to the allegations at issue in order to be reviewed by the other party.
- School has discretion on how to provide the evidence.
- May redact information not directly related to the allegations.
- “Confidential” information may not be redacted if directly related to the allegations.

106.45(b)(5)(vi)

Non-Disclosure Agreement

NON-DISCLOSURE AGREEMENT ¶

¶
→ This NON-DISCLOSURE AGREEMENT (the “**Agreement**”) made as of the _____ day of [month], [year] (the “**Effective Date**”), by and between [School Name] (“**School**”) and _____ [by and on behalf of (Student Name if under 18)] (“**Receiving Party**”), sets forth the terms and conditions of the confidential disclosure of and restrictions on the use of records/information by each party. ¶

¶
Consistent with Federal regulations, the School must provide due process protections to alleged victims and alleged perpetrators of sexual harassment in its educational program and activity. 34 CFR Part 106. The regulations provide several instances where sensitive information may be exposed including, but not limited to: i) all parties must receive notice of the allegations contained in a formal complaint, 34 CFR 106.45(b)(2); ii) both parties have an opportunity to inspect and review any evidence directly related to the allegations, 34 CFR 106.45(b)(5)(vi); iii) both parties may review the investigative report created at the conclusion of any investigation, 34 CFR 106.45(b)(5)(vii). The regulations further provide that each party may have an advisor of his or her choice and that such advisor shall also have access to the information described above. 106.45(b)(5)(iv). In an effort to allow both parties to gather and present relevant evidence under 34 CFR 106.45(b)(5)(iii) while protecting the sensitive information contained therein, this Agreement is hereby entered into by the above-listed parties. ¶

- ¶
- For purposes of this Agreement, “Confidential Information” shall include any and all statements, records, video, photographs, or knowledge related to the allegations made in a Title IX investigation by the School. If Confidential Information is in written form, the School shall label or stamp the materials with the word “Confidential” or some similar warning. If Confidential Information is transmitted orally, the School shall promptly provide a writing indicating that such oral communication constituted Confidential Information. ¶
 - The Receiving Party shall hold and maintain the Confidential Information in strictest confidence for the sole and exclusive benefit of the School. Receiving Party shall not, without prior written approval of the School, use for Receiving Party’s own benefit, publish, copy, or otherwise disclose to others, or permit the use by others for their

Investigative Report

“Create an investigative report that fairly summarizes relevant evidence and, **at least 10 days** prior to a hearing (if a hearing is required under this section or otherwise provided) or other time of determination regarding responsibility, send to each party and the party’s advisor, if any, the investigative report in an electronic format or a hard copy, **for their review and written response.**”

106.45(b)(5)(vii)

- The regulations do not proscribe how to incorporate the parties’ response into the final determination.

Issues of Relevance to Create an Investigative Report

- Evidence is relevant if it has “any tendency” to make a fact that is “of consequence” to the determination of sexual harassment “more or less probable than it would be without the evidence.”
 - The evidence must be directed to a matter of consequence, essentially the definition of sexual harassment.
 - The evidence must be probative – it must make something more or less probative. It does not have to be in dispute. Whether something is more or less likely is guided by logic and human experience.

Issues of Relevance to Create an Investigative Report

Example: Defendant in bank robbery case was overheard saying he wanted to rob the bank, human experience tells us that when someone says they will do something, they are more likely to do it.

Submission of Written Questions

After the recipient has sent the investigative report to the parties pursuant to paragraph (b)(5)(vii) of this section and before reaching a determination regarding responsibility, **the decision-maker(s)** 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.

106.45(b)(6)(ii)

Written Questions

- Schools have discretion to set a reasonable limits on what constitutes “limited follow up questions.”
- No power to compel witness participation/no subpoena powers.
- Questions may overlap with ten-day period when the parties review the investigative report – so not to extend the process.
- Discretion to adopt rules of decorum for the written questions – i.e. no profanity...
- The decision maker has the obligation to permit only relevant questions to be asked and must explain to the party posing the question any decision to exclude a question not relevant.

Optional Hearing

“For recipients that are elementary and secondary schools, and other recipients that are not postsecondary institutions, the recipient’s grievance process may, but need not, provide for a hearing.”

106.45(b)(6)(ii)

- May, but need not provide a hearing for K-12.
- Footnote in comments indicate decision to hold a hearing could be made on a case-by-case basis.

Determination

Must include:

- Identification of the allegations potentially constituting sexual harassment;
- A description of the procedural steps taken from the receipt of the formal complaint through the determination, including any notifications to the parties, interviews with parties and witnesses, site visits, methods used to gather other evidence, and hearings held;
- Findings of fact supporting the determination;
- Conclusions regarding the application of the recipient's code of conduct to the facts;
- A statement of, and rationale for, the result as to each allegation, including a determination regarding responsibility, any disciplinary sanctions the recipient imposes on the respondent, and whether remedies designed to restore or preserve equal access to the recipient's education program or activity will be provided by the recipient to the complainant; and
- The recipient's procedures and permissible bases for the complainant and respondent to appeal.

Record Retention

- Must retain records for seven years. 106.45(b)(10).
- Including:
 - Each sexual harassment investigation;
 - Any appeal and result therefrom;
 - Informal resolution;
 - Training materials; and
 - Responses to reports – i.e. supportive measures.

Appeals

- Must provide some sort of appeal option.
- Must allow appeals for **at least** the following:
 1. There was a **procedural irregularity** that affected the outcome of the matter;
 2. **New evidence** that was not reasonably available at the time the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter; or
 3. The Title IX Coordinator, investigator(s), or decision-maker(s) had a conflict of interest or **bias for or against** Complainants or Respondents generally or the individual Complainant or Respondent that affected the outcome of the matter.

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Informal Process

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

New provision gives schools discretion to offer and facilitate informal resolution

- Why?
 - Less adversarial option
 - Desirable in cases where no factual disputes
- What format? Mediation or Restorative Justice

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

When can informal resolution be offered?

- After formal complaint has been filed
- After providing parties with Notice of the grievance process
- After all parties provide VOLUNTARY, WRITTEN consent to the process
 - Not available Employee/Student cases
- Anytime prior to reaching a determination regarding responsibility

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

Discipline, up to and including expulsion permitted

Facilitators

- Must receive training on:
 - Definition of sexual harassment
 - Scope of institution's education program or activity;
 - How to conduct informal resolution processes
 - How to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest or bias
- Serving as a Witness:
 - Up to recipients to decide

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

Concerns raised in Notice & Comment process:

- Public Records Requests: will notice of informal process, written consent, etc., create records required to be disclosed under records requests
- “Voluntary” Consent
- Consistency with other areas of law

Title IX Grievance Procedures

Notes before we start

- All timelines are instructional/school days
- * Asterisk denotes suggestions, not mandated
 - Example: Regulations say “prompt” response to actual knowledge of harassment. We suggest that means 2 school days.
- Suggested roles for school staff:
 - Investigator = Title IX Coordinator
 - Decisionmaker = Superintendent
 - Appeal = One school board member

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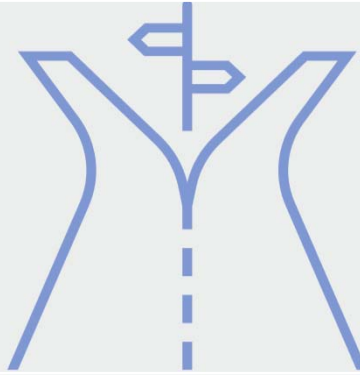
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INVESTIGATOR

Title IX Coordinator

1. Lead on investigation (use building-level admin as needed)
2. Responsible for communication with parties



DECISIONMAKER

Superintendent

1. Makes ultimate decision
2. Hands out discipline if necessary



APPEAL

One school board member

1. Can fluctuate depending on availability/training
2. Doesn't taint the entire board if there is a teacher cancellation hearing or student expulsion appeal

Title IX Grievance Procedures Flowchart

Report. School has actual knowledge of alleged Title IX violation.

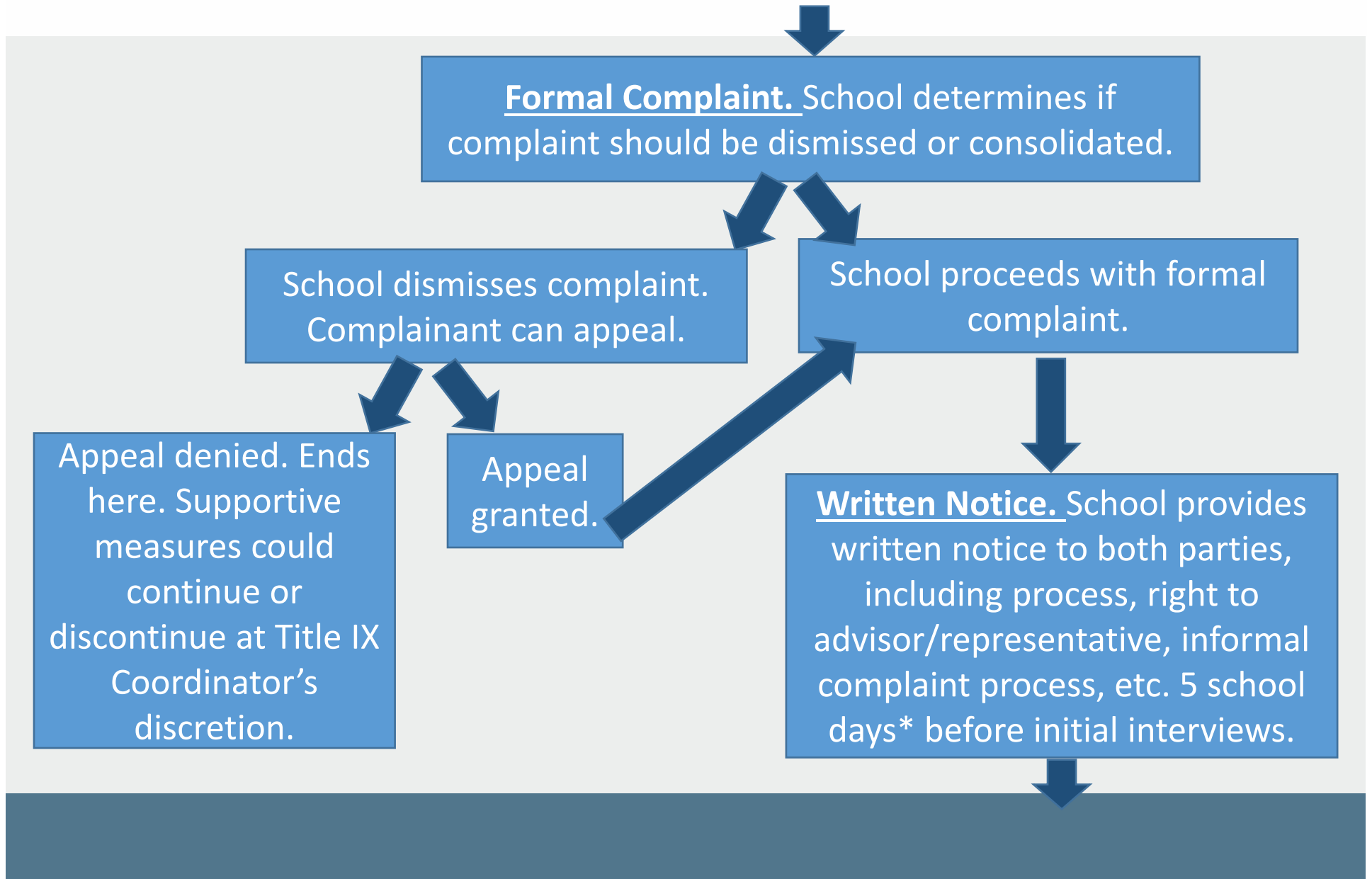
Initial Response. Title IX Coordinator contacts Complainant (alleged victim) within 2 school days* to discuss supportive measures, if Complainant wants to file formal complaint, etc. Determination if emergency removal is appropriate.

Complainant doesn't want formal complaint. Ends here unless Title IX Coordinator moves forward on own. Supportive measures could continue or discontinue at Title IX Coordinator's discretion.

Formal Complaint. Complainant files formal written complaint within 10 school days* of conversation with Title IX Coordinator. School determines if complaint should be dismissed or consolidated.

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Written Notice. School provides written notice 5 school days* before initial interviews.



Informal Resolution. Both parties agree to informal resolution (not available in all situations). No investigation.

Investigation of Allegations. School may interview/take statements from parties (may have representative present), witnesses, review educational and personnel records, legal or medical records if provided, etc. Both parties can present evidence. Will usually take 30 school days.*

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graph TD; A[Investigation of Allegations. Will usually take 30 school days.*] --> B[Review of Evidence. Both parties provided all evidence, given 10 school days to respond. Non-disclosure agreements require before evidence exchange.]; B --> C[Investigative Report. Investigator provides report to both parties summarizing relevant evidence.];
```

Investigation of Allegations. Will usually take 30 school days.*

Review of Evidence. Both parties provided all evidence, given 10 school days to respond. Non-disclosure agreements require before evidence exchange.

Investigative Report. Investigator provides report to both parties summarizing relevant evidence.

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Suggested Roles*

*Investigator =
Title IX*

*Coordinator
(with help from building-
level admins to conduct
investigation)*

*Decisionmaker =
Superintendent*

*Appeal =
One school board
member*

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graph TD; A[Investigative Report] --> B["'Hearing' / Exchange of Questions. Live hearing required in postsecondary. Can hold live hearing in K-12 but not recommended."]; B --> C["Instead, each party can submit to the Decisionmaker written, relevant questions to be asked of the other party or witness. Each party can submit written response to investigative report. Both submissions are due 10 school days* after receipt of the report. Decisionmaker collects answers to questions, provides opportunity for follow-up questions. Usually takes 30 school days.*"]; style A fill:#4a86e8,color:#fff; style B fill:#4a86e8,color:#fff; style C fill:#4a86e8,color:#fff;
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Investigative Report

“Hearing”/Exchange of Questions. Live hearing required in postsecondary. Can hold live hearing in K-12 but not recommended.

Instead, each party can submit to the Decisionmaker written, relevant questions to be asked of the other party or witness. Each party can submit written response to investigative report. Both submissions are due 10 school days* after receipt of the report. Decisionmaker collects answers to questions, provides opportunity for follow-up questions. Usually takes 30 school days.*

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Hearing/Exchange of Questions.

Decision. Decisionmaker issues written decision, including disciplinary sanctions if applicable, within reasonable time

Appeal. Either party may appeal final determination within 10 school days of receiving it.

Appeal Granted. One school board member* considers appeal within 45 school days.* If appeal granted, Board Member directs Decisionmaker to make changes.

Appeal Denied. One school board member* considers appeal within 45 school days.* Appeal denied. Ends here.

Note: Appeal of Title IX decision may affect expulsion hearing (for students) or contract cancellation process (for teachers)

Charlotte's web

lqdu



BY
E. B. White

PICTURES BY
Garth Williams

Hypothetical #1

A teacher reports to you, the Title IX Coordinator for your district, that 2 female students, Rosa and Tyra, were sexually assaulted by a male student, Ralph. When you contact Rosa and Tyra, they both deny anything happened between them and Ralph. How do you proceed?

What if instead of denial, Rosa wishes to proceed with investigation anonymously?

Hypothetical #2

You receive a report that there was a big party over the weekend where Ivan allegedly sexually assaulted Alicia. A concurrent report was made to local law enforcement. When you, the district's Title IX Coordinator, contact Alicia, she reports that other students have been harassing her in the hallway about the weekend's events.

- Do you investigate?
- What if law enforcement asks you to delay your investigation in favor of theirs?

Hypothetical #3

Keesha reports allegations of sexual harassment and racial discrimination. How should you address the two different types of discrimination?

Hypothetical #4

15 year old male student with a significant cognitive disability and low vision is accused of grabbing the chest of a 7 year old girl who is eligible as OHI for ADHD and anxiety at the bus stop.

Title IX complaint is filed, Where do you begin?

Questions?
Thank You.