

Title IX Role Training

Presented by:
Melissa D. Allen
February 22, 2024



Title IX Roles

- Title IX Coordinator
- Investigator
- Decision Maker
- Appeal Decision Maker
- Informal Decision Maker



Title IX Coordinator

- Must be a district employee
- Cannot be the same person as the Decision Maker or Appeal Decision Maker
- Responsible for the independent implementation of Title IX grievance process including any remedy or supportive measure.
 - Cannot discipline prior to completion of Title IX grievance process
34 CFR 106.44(a) and 106.45(b)(1)(i)
- Receives reports of sexual harassment and formal complaints
- May sign formal complaint if:
 - Receive report of sexual harassment and complainant does not want to file
 - A complainant wishes to file an anonymous complaint
- Recipient is responsible for notification of policy and contact information.
Regulations do not require this to be done by Title IX Coordinator. Consider having Title IX Coordinator be responsible or a staff member of HR.



Policy Notification

- Who must receive written notice: Students, Applicants for Admission, Parent/Legal Guardian of K-12, Employees, Applicants for Employment, Unions or Professional Organizations Holding Collective Bargaining or Agreements with Recipient
- Must notify each person entitled to notification of the following:
 - The recipient does not discriminate on the bases of sex in the education program or activity that it operates
 - This extends to admission and employment; questions regarding this will be referred to the Title IX Coordinator or Assistance Secretary, or both.
 - This is required by Title IX
 - The grievance procedure, including:
 - How to report or file a complaint of sex discrimination;
 - How to report or file a complaint of sex harassment; AND
 - How the recipient will respond.

34 CFR 106.8(a) & (c)



Policy Notification: Title IX Coordinator Contact Information

- Contact information:
 - Title IX Coordinator's name or title
 - Office address
 - Email address
 - Telephone number
 - Assure confidentiality in the contact method
- Where:
 - Prominently displayed on campus
 - Prominently displayed on website
 - Handbook: May be a substitute if district does not maintain website



Policy Notification: Website

- Must prominently publish and display Title IX information
- What must be displayed:
 - Title IX Coordinator's contact information
 - Title IX Policy, specifically the grievance policy
 - Training Materials: If cannot obtain consent to publish, must create own training materials to publish on website.
- While COVID-19 restrictions are gone, a district must notify students and employees of any changes made to the process due to COVID-19 or any other similar emergency



Investigator

- Cannot be the same person as either the Decision Maker roles
 - In order to keep each step independent, Title IX prohibits the Decision Maker from making a decision based on their own investigation.
- Additional training
 - Issues of relevance to enable the investigator to create an investigative report that fairly summarizes relevant evidence.

34 CFR 106.45(b)(1)(iii)



Decision Maker

- Cannot be the same person as the Title IX Coordinator, Investigator, or Appeal Decision Maker
 - If using district personnel, consider using an upper-level administrator
 - Can person appropriately be involved in potential discipline of a staff member? Access personnel files?
- Additional training:
 - Technology to be used at a live hearing
 - How to determine issues of relevance of questions and evidence
 - Including when a complainant's sexual predisposition or prior sexual behavior are relevant

34 CFR 106.45(b)(1)(iii)



Appeal Decision Maker

- Cannot be the Decision Maker that reached the determination regarding responsibility or dismissal, Investigator, or Title IX Coordinator
 - Consider appointing the Superintendent



34 CFR 106.45(b)(8)(iii)(B)

Informal Resolution Facilitator

- Title IX does not mandate the Resolution Facilitator to be or not be any particular person. This role can be filled by someone who has another Title IX role.
- When choosing the Resolution Facilitator, keep in mind that this is similar to mediation. A mediator is independent.
- Good practice, if possible, is to try to avoid appointing the Investigator or either of the Decision Maker roles as the Resolution Facilitator due to their roles in this process should the parties decide to return to the grievance process.



Requirements - All Roles

- Must receive training:
 - The definition of sexual harassment is in 34 CFR 160.30
 - Scope of the recipient's education program or activity
 - Recipient needs to provide this training
 - How to conduct an investigation and grievance process, including hearings, appeals, and informal resolution process.
 - How to serve impartially, including avoiding prejudgment of the facts at issue, conflicts of interest, and bias.
- Cannot have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent.
- Must not rely on sex stereotypes and must promote impartial investigations and adjudications of formal complaints of sexual harassment.



34 CFR 106.45(b)(1)

Conflict of Interest/Bias

- Conflict of Interest: Occurs when a person has a personal interest that conflicts with the interests of the investigation where that it compromises one's judgment.
 - Example: Either the complainant, respondent, or witness is related to the investigator or decision maker.
- Bias: Occurs when a person does not treat each person as an individual, but as a member of a class subject to prejudgment and prejudice.
 - Example: Assuming that all sexual harassment is committed by males against females.



How to Avoid Conflict of Interest/Bias

- Don't allow past behaviors by a party or feelings towards a party affect your judgment
- Focus on the evidence, not your feelings about any party or issue
- Avoid showing that you agree or disagree with either party or that you're on their side or not on their side. Don't say:
 - "Yes, I agree." "I understand what you are going through."
 - "In my opinion this is not sexual harassment, you're overreacting." "She's overreacting."
- Don't allow wishes of others (administration) to affect your judgment, focus on the evidence.
- Can I be fair and impartial?
- Can I prove that I can be fair and impartial?
- Conflict of interest and bias determination is unique to each case



Hypotheticals

- Your son's friend is the respondent.
 - Your son's best friend who is at your home at least once a week is the respondent.
- The respondent's parents previously filed a complaint against you.
- You have previously disciplined the female complainant for smoking marijuana with a boy in the bathroom after school.
- You volunteer for a domestic violence shelter.
- You believe that girls cannot sexually assault a person, only boys can.
- You think "What else does a transgender boy expect would happen when she insisted upon using the boy's locker room?"



Definitions

- Complainant: Individual that is the alleged victim of sexual harassment
- Respondent: Individual that is accused of sexual harassment
- Formal Complaint: A written document filed by complainant or signed by the Title IX Coordinator alleging sexual harassment and requesting an investigation into the allegations.
 - If filed by complainant, must have digital or physical signature or otherwise indicate the person filing the complaint
 - Title IX Coordinator signing the complaint does not make the Title IX Coordinator a party
 - May be filed by any person
 - May be filed in person, by telephone, mail, email, or any other means that results in a verbal or written report

34 CFR 106.30(a)



Definitions: Knowledge

Actual knowledge:

- Notice of sexual harassment or allegations of sexual harassment to a recipient:
 - Title IX Coordinator;
 - Any official of the recipient who has authority to institute corrective measures on behalf of the recipient (college); OR
 - Merely being able to report harassment or to inform a student regarding reporting of sexual harassment or being trained not sufficient.
 - Volunteers, contractors, alumni, etc.
 - Any employee of an elementary and secondary school
 - Any online learning, distance learning, independent study, charter school, etc.

34 CFR 106.30(a)



Definitions: Knowledge

Actual Knowledge (con't.):

- What does not constitute knowledge:
 - Imputation of knowledge based solely on vicarious liability or constructive notice
 - Vicarious Liability: Legally liable for actions of another
 - Constructive Notice: A legal fiction that a person received notice even though they did not actually receive it (i.e., notice to a party for certain types of legal actions that left the state can give notice in an approved newspaper).
 - What this means: Even though you should have known, if you did not actually know, it is not “actual notice” if notice is solely based on one of these principals.
- The only official of the recipient with actual knowledge is the respondent
 - District not held responsible for a staff member not self-reporting



34 CFR 106.30(a)

Definitions

- Consent: Regulations do not provide a definition of consent or require any particular definition.
 - The preamble to the Title IX regulations explains that a school has the flexibility to choose a definition of consent that “best serves the unique needs, values, and environment of the [school’s] own educational community.”
 - Colleges are required to have affirmative consent: Must have an active consent from the person.
 - CALCRIM defines consent as a person must act freely and voluntarily and know the nature of the act.
- Types of evidence:
 - Inculpatory: Tends to show a person is guilty
 - Exculpatory: Tends to show a person is not guilty



34 CFR 106.30

Definitions: Standard of Evidence

- Title IX regulations allow the recipient to choose between:
 - Preponderance of the Evidence: It is more likely than not that the allegations are true.
 - Clear and Convincing Evidence: Evidence is of such a convincing force that it demonstrates a high probability that the allegations are true. A higher standard than preponderance of the evidence.
- Must be written in the recipient's policy and must be the same for all investigations.
- Recommendation is preponderance of the evidence
- Employee investigation standards is preponderance of the evidence and will provide compliance with employee investigations.



34 CFR 106.45(b)(1)(vii)

Definitions: Education Program or Activity

- Includes locations, events, or circumstances over which the recipient exercised substantial control over both the respondent and context in which the sexual harassment occurs.
 - Review your district's individual programs and activities.
 - Any building owned or controlled by a student organization that is officially recognized by a post-secondary institution.
- (34 CFR 106.44(a))
- Participating in or attempting to participate in the education program or activity:
 - "A complainant who has left the school because of sexual harassment but expresses a desire to re-enroll if the recipient appropriately responds to the sexual harassment, is 'attempting to participate' in the recipient's education program or activity."

(Sept. 4, 2020 Q&A regarding Final Title IX Rule)



Definitions: Supportive Measures

- Definition: Non-disciplinary, non-punitive individualized services offered to both complainant and respondent.
- Purpose: Supportive measures are designed to “restore and preserve equal access to the recipient’s education program or activity” and deter sexual harassment.
- Requirements:
 - Must be offered regardless whether or not a formal complaint is filed
 - Services must be provided free of charge
 - Must not unreasonably burden the other party
 - Must keep supportive measures confidential to the extent possible
- Examples 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 and monitoring of certain areas of the campus, and other similar measures.
- If student has an IEP or 504, supportive measurements must be done in conjunction with IEP or 504 team.
 - Change of services, placement, etc.



34 CFR 106.30

Definitions: Support Person/Advisor

- Must allow either party the same opportunity to have a support person present during any portion of the grievance proceeding (interview, hearing, etc.)
- Cannot place restrictions on who the support person/advisor is
- May have restrictions regarding the support person’s participation
 - The restrictions must apply equally to both parties; AND
 - Must be written in your grievance policy
- Advisor may be:
 - Advisor
 - Attorney
 - Support Person
 - If involves employee, will likely have union representative or attorney
- Advisor will be allowed to inspect and review evidence pursuant to 34 CFR 106.45(b)(5)(vi)



34 CFR 106.45(b)(2)(i)(B)

Definitions: Sexual Harassment

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

- 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.
 - "Quid Pro quo"
- 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
 - Reasonable is not defined in the regulations
 - Does not require complete exclusion from education, but rather a denial of "equal" access. May include *skipping class, declining grades, difficulty concentrating in class, etc.*



34 CFR 106.30
34 CFR 106.45(a)

Definitions: Sexual Harassment

- People have a variety of responses to sexual harassment. Title IX does not require any type of manifestation of trauma.
- OCR addressed this in the Q&As issued on September 4, 2020:
 - "The 106.30 definition neither requires nor permits school officials to impose notions of what a 'perfect victim' does or says, nor may a recipient refuse to respond to sexual harassment because a complainant is 'high-functioning' or not showing particular symptoms following a sexual harassment incident."
 - "No concrete injury is required to conclude that serious harassment would deprive a reasonable person in the complainant's position of the ability to access the recipient's education program or activity on an equal basis with persons who are not suffering such harassment."



Definitions: Sexual Harassment

- “Sexual assault” as defined in 20 USC 1092(f)(6)(A)(v), “dating violence” as defined in 34 USC 12291(a)(10), “domestic violence” as defined in 34 USC 12291(a)(8), or “stalking” as defined in 34 USC 12291(a)(30).
 - Dating and Domestic Defined by VAWA: Former spouse, spouse, former cohabitant, cohabitant, someone have a child with, and have or previously have had dating or engagement relationship.
 - Includes same sex relationships
 - Sexual harassment includes harassment based on gender identity



34 CFR 106.30
34 CFR 106.45(a)

Definitions: Sexual Harassment

- Stalking (34 USC 12291(a)(30)): The term “stalking” means engaging in a course of conduct directed at a specific person that would cause a reasonable person to:
 - Fear for his or her safety or the safety of others; or
 - Suffer substantial emotional distress.
- Sexual assault (20 USC 1092(f)(6)(A)(v)): An offense classified as a forcible or nonforcible sex offense under the uniform crime reporting system of the Federal Bureau of Investigation.
 - Most require specific intent



Definitions: Sexual Harassment

- Dating Violence (34 USC 12291(a)(10)): The term “dating violence” means violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the victim.
 - The existence of such a relationship shall be determined based on consideration of the following factors:
 - The length of the relationship
 - The type of relationship
 - The frequency of interaction between the persons involved in the relationship.
- Domestic Violence (34 USC 12291(a)(8)): The term “domestic violence” includes felony or misdemeanor crimes of violence committed by a qualifying relationship or against an adult or youth victim who is protected from that person’s acts under the domestic or family violence laws of the jurisdiction.
- Recipient’s treatment of complainant and respondent in response to a sexual harassment complaint may constitute discrimination under Title IX.



Definitions: Retaliation

- August 2020 revisions created 34 CFR 106.71 defining retaliation
- Retaliation includes:
 - A recipient or other person intimidating, threatening, coercing, or discriminating against any individual:
 - For the purpose of interfering with any right or privilege pursuant to Title IX.
 - Because the individual has made a report or complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing.
 - Acts that violate code of conduct that do not involve sex discrimination or harassment but arise out of the same facts or circumstances as a report or complaint for the purposes of interfering with any right or privilege guaranteed by Title IX.
 - Making a report or formal complaint of sexual harassment for the purpose of interfering with any right or privilege secured by Title IX.



34 106.71(a)

Definitions: Retaliation

- Breaking confidentiality of the investigation can constitute retaliation, as the district is obligated to keep the identity of complainant, respondent, witnesses, and any person who has made a report or complaint confidential.
 - Exceptions to confidentiality:
 - As permitted by FERPA statutes and regulations
 - As permitted by Code of Federal Regulations regarding FERPA
 - Carrying out the purpose of Title IX, including investigations, hearings, or judicial proceedings arising thereunder



34 106.71(a)

Definitions: Retaliation

- What does not constitute retaliation:
 - Exercise of rights protected under First Amendment
 - Charging an individual with a code of conduct violation for making materially false statements in bad faith during the course of a grievance proceeding.
 - Determination of responsibility cannot be, alone, sufficient to conclude that any party made a materially false statement in bad faith.

34 CFR 106.71(b)
- Complaint of retaliation may be filed in accordance with the grievance procedure in 34 CFR 106.45.

34 CFR 106.71(a) & 34 CFR 106.8(c)



Hypotheticals

- Jane and John dated for two months. Jane reports that John is constantly waiting for her at the school's entry, follows her to class, asks her friends about her, and has sent threatening messages to her on Snapchat. John has now threatened to post a naked photo she sent him while they were dating.
- Same facts, but it is Mark and John that have dated.
 - Mark and John have dated for six months. A custodian, who knows that they were dating, observes them getting into an argument and Mark punches John.
- Student reports that her teacher told her that if she sent him a photograph of her in a bathing suit, she would get an A in the class and be one of the starters for the basketball team.
 - Jane reports that Mark, the captain of the football team, told her that if she sent him a nude photograph of herself, he would make sure that she was on the cheerleading team.



Grievance Procedure

- Recipients must adopt a grievance procedure that is consistent with the process outlined in 34 CFR 106.45 and 106.30 in a “prompt and equitable” manner.
- Current Title IX regulations apply to sexual harassment alleged to have occurred after August 14, 2020.



Grievance Procedure: Basic Principles

- Procedure must be applied equally to each party
- Treat both parties equitably by:
 - Providing remedies to complainant where a determination of responsibility is made against respondent.
 - Following the grievance process before implementing any disciplinary sanctions or other actions that are not supportive measures against respondent.
- Objective evaluation of all evidence, including inculpatory and exculpatory.
- Credibility determinations may not be based on a person's status as a complainant, respondent, or witness.



Grievance Procedure: Basic Principles

- Presumption of "Not Responsible"
- "Reasonably Prompt Time Frames" for conclusion of the grievance process
 - Includes informal resolution
 - Includes filing and resolving appeals
- Procedure must include the bases for complainant and respondent to appeal.
- Procedure must describe the range of supportive measures available to complainants and respondents.
- Cannot require or allow evidence that is otherwise protected by a legally recognized privilege, unless waived by the holder of that privilege.



Title IX and Other Federal or State Laws

- Obligations pursuant to Title IX are not alleviated by:
 - Effect of other state or local law requirements
 - Regulations or rules of private organizations if that organization receives federal financial assistance
- Title IX does not alter any of the following:
 - Any act of congress or federal regulations that prohibit discrimination such as Title VII of the Civil Rights Act, the Equal Pay Act, etc.
 - U.S. Constitutional right: A person's First Amendment right to freedom of speech, due process rights under the Fifth and Fourteenth amendments or any other right guaranteed against government action by the U.S. Constitution.
 - Obligation to follow FERPA
 - Parent or guardian's legal right to act on behalf of their student, subject to FERPA including, but not limited to, filing a formal complaint:
 - "If it would be 'clearly unreasonable in light of the known circumstances' for the recipient not to notify a parent or legal guardian of reported sexual harassment that affects that parent or guardian's student, the school must notify the parent or guardian of the Title IX matter."
 OCR Questions and Answers Regarding the Department's Title IX Regulations, January 15, 2021
 - May conflict with transgender student's right to confidentiality



34 CFR 106.6

Reporting Sexual Harassment

- Who can report:
 - Any person can report sex discrimination and/or harassment
 - Do not have to be the victim of the discrimination or harassment
- How to report:
 - May report in person, by mail, telephone, or email
 - Any other means that results in a verbal or written report to the Title IX Coordinator
 - Any other means designated by the recipient
- Confidentiality:
 - Due to reports being made to the Title IX Coordinator's email or telephone, only Title IX Coordinator should have access to them.
 - If mail is addressed to Title IX Coordinator, only the Title IX Coordinator should be opening the mail.



34 CFR 106.8(a)

Response to Report of Sexual Harassment

- If have *actual knowledge* of sexual harassment, recipient must respond in a way that is “not deliberately indifferent.”
 - “Clearly unreasonable in light of the known circumstances”
- Must treat both parties equitably by offering supportive measures
- Must follow grievance process
- Cannot impose disciplinary actions until investigation complete
- The Title IX Coordinator must promptly contact complainant:
 - To discuss the availability of supportive measures
 - Must consider complainant’s wishes with respect to supportive measures.
 - Must inform complainant that supportive measures are available whether or not they file a complaint.
 - Must explain the process for filing a formal complaint
 - Either complainant can file or Title IX Coordinator will file if deemed necessary
 - Must comply with these mandates regardless of whether or not complainant files a formal complaint
- Mandated reporting: Must file a report if required even if no formal complaint is filed



34 CFR 106.44(a)

Formal Complaint

- Must be signed by either the party filing the complaint or the Title IX Coordinator.
- Form content:
 - General explanation of Title IX
 - Identifying information of complainant, respondent, and any witnesses
 - Date and location of incident
 - Description of allegations
- Review: Title IX Coordinator may review the complaint to determine if it is appropriately handled as a Title IX complaint.
 - Title IX Coordinator may determine, based on the content, to dismiss the complaint.
 - If dismiss, still comply with mandated reporting requirements



Dismissal of a Formal Complaint

Mandatory Dismissal:

- Did not occur in the United States
- Would not constitute sexual harassment as defined by Title IX even if proven
 - Exercise caution, especially with alleged actions that are “severe, pervasive, and objectively offensive.”
- Conduct did not occur in the recipient’s education program or activity
 - Different than jurisdiction for discipline
 - Independent Study or any required online activity is the recipient’s education program or activity.



34 CFR 106.45(b)(3)(ii)

Dismissal of a Formal Complaint

Discretionary Dismissal:

- A complainant notifies the Title IX Coordinator in writing that they would like to withdraw their complaint
 - Inconsistency: Cannot dismiss if respondent is staff and complainant is student through the informal grievance procedure.
- Respondent is no longer enrolled or employed by the recipient
 - Exercise caution
- Specific circumstances prevent the recipient from gathering evidence sufficient to reach a determination as to the formal complaint or allegations therein.



34 CFR 106.45(b)(3)(ii)

Dismissal: Lack of Jurisdiction

- In order to have jurisdiction under Title IX, must have occurred in a recipient's education program or activity.
- Not the same as for student discipline
- Recipient's education program or activity includes locations, events, or circumstances over which the recipient exercised substantial control over both the respondent and context in which it occurs.
 - Examples: Events occurring on campus, school-sponsored activities off-campus (sports games or field trips), traveling to and from off-campus events, classes online, independent study, distance learning, etc.



Dismissal of Formal Complaint

- Complaint can also be dismissed at later point if it is discovered during the investigation that evidence requires dismissal for any of the mandatory or discretionary reasons.
- If dismiss, even for mandatory reason, action is not precluded under other provisions of the recipient's code of conduct.
- If dismiss, must provide written notification to both parties, simultaneously, of the dismissal
 - Must describe the reason for the dismissal
- Either party may appeal dismissal of the formal complaint
 - This goes to Appeal Decision Maker



34 CFR 106.45(b)(2)(ii)

Response to Formal Complaint

- Must follow grievance process in 34 CFR 106.45
 - Board policies and regulations provided by GAMUT:
 - Employees: BP and AR 4119.11, 4219.11, 4319.11, 4119.12, 4219.12, 4319.12 and 4030
 - Students: BP and AR 5145.3, 5145.7, 5145.71
- Must investigate a formal complaint
- Offer informal resolution
 - Both parties must agree
 - Cannot offer if complainant is student and respondent is staff
 - Inform parties that informal resolution is available at any point prior to determination.
- Provide complaint and any evidence that may have been provided with complaint to investigator.



34 CFR 106.44(b)

Filing of Formal Complaint: Written Notification

- Recipient must provide written notice to both parties after filing formal complaint and notice must include:
 - Recipient's grievance process, including informal resolution
 - May attach to letter
 - Notify Informal Resolution Facilitator, if different person, to send both parties written notification of informal resolution process
 - Notice of the allegations of sexual harassment
 - Must include sufficient details known at the time of the written notification:
 - Identity of the parties involved in the incident
 - Include student names
 - Description of the conduct
 - Date and location of the alleged incident
 - If complainant cannot recall specific date, provide as narrow of a time frame as possible.
 - Must allow sufficient time to prepare a response before any of the initial interviews.



34 CFR 106.45(b)(2)(i)(B)

Filing of Formal Complaint: Written Notification

- Written notice must include (con't.):
 - Right to inspect and review all evidence pursuant to 34 CFR 106.45(b)(5)(vi)
 - Respondent is presumed not responsible
 - Determination will be made at the end of the grievance process
 - Each party may have an advisor of their choice
 - Inform the parties of any provision of the recipient's code of conduct that prohibits knowingly making false statements or knowingly submitting false information during grievance process.
- Not required but consider including the name of each person in each role so that the party may raise concerns about any conflict of interest or bias.
 - If your policy states that this information must be included in written notification, must include it.



34 CFR 106.45(b)(2)(i)(B)

Informal Resolution

- While informal resolution is required to be offered immediately after filing of formal complaint, parties may agree to it at any point during the grievance process prior to a determination.
- Cannot require either party to participate
 - May not require as a condition of enrollment or continuing enrollment, or employment or continuing employment, or enjoyment of any other right, waiver of the right to an investigation and adjudication of formal complaints of sexual harassment consistent with this section.
- Must provide written notice to both parties that includes:
 - 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;
 - Any party has the right to withdraw from the informal resolution at any time prior to a determination;
 - The process to 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.
- Must obtain both parties voluntary, written consent to participate in informal resolution
- Cannot offer if respondent is staff accused of sexually harassing a student
- If accepted by both parties, there is a pause in the grievance process



34 CFR 106.45(b)(9)

Emergency Removal of Student Pending Investigation

- Recipient may remove respondent from the education program or activity on an emergency basis
- Requirements:
 - Must perform an individualized safety and risk analysis
 - Does not require any particular risk analysis
 - Assure tool that is used has been validated
 - Analysis results in a determination that there is an immediate threat to the physical health or safety of any student or other individual
 - Excludes threats to mental health
 - Provide respondent with notice and an opportunity to immediately challenge the determination
- Must also consider suspension and expulsion rules in the Education Code
 - Section 48900.2 only allows suspension of students in grades 4-12
 - Section 48915(c)(4) requires the Superintendent or designee to recommend expulsion, regardless of grade, who commits sexual assault or battery.
- Does not modify any rights under IDEA, 504, or ADA
 - Must still follow procedures for changing a student's placement that has an IEP or 504



34 CFR 106.44(c)

Removal of Employee Pending Investigation

- Employee: The regulations do not preclude administrative leave for a non-student employee, but follow Education Code, collective bargaining agreement, and BP/AR.
- Follow any relevant Education Codes addressing removal of employees
- The statute does not modify any rights under 504 or ADA



34 CFR 106.44(d)

Employee Considerations

- May place a non-student on administrative leave pending the outcome of the investigation.
- While the National Labor Relations Board allows an employer to order an employee to abide by confidentiality, in a Title IX investigation, cannot issue a “gag order.”
 - Employee is permitted to speak to others about the allegations and are permitted to gather and present evidence. (34 CFR 106.45(b)(5)(iii).)
 - The no “gag order” rule only applies to Title IX investigations
- Recommendation: Request, not order, that the employee abide by confidentiality
 - In order to keep this process fair and not taint other witnesses, our expectation is that you not disclose information about your interview or information that you provided during interview to others.



34 CFR 106.44(d)

Employee Considerations

- Confidentiality:
 - Under labor laws, have right to confidentiality during investigation
 - Should advise that will keep information confidential to the extent possible
 - Never promise that you will not disclose information given during investigation
- Determinations in labor investigation must be by preponderance of the evidence
- District can be liable for a defective investigation:
 - An employer who fails to follow its own complaint policy/procedures and uses a potentially biased investigator and fails to interview witnesses for potentially exculpatory information evidences pretext for purposes of claims of discrimination in violation of public policy, FEHA.

Nazir v. United Airlines, Inc. (2009)



Delays in the Grievance Procedure

- Title IX allows for a temporary delay or limited extension of time frame for good cause
- Requires written notice to complainant and respondent of the delay or extension and the reasons for the action.
 - Should be more than just “due to good cause”
- Good cause may include (illustrative list in 34 CFR 106.45(b)(1)(v)):
 - Absence of a party, party’s advisor, or witness;
 - Concurrent law enforcement activity;
 - Need for language assistance; OR
 - Accommodations for either party or witness’s disability.
- COVID-19: Allowed for delays, and regulations allow for possible future delays for pandemics.
 - OCR COVID-19 Guidelines issued September 28, 2020, state that the “Department trusts recipients to make sound determinations regarding the length of a brief delay; we believe recipients are in the best position to make these decisions....”
 - OCR has warned that recipient should not delay investigation on the basis that in-person interviews are “cumbersome or not feasible.”



34 CFR 106.45(b)(1)(v)

Investigator: Receives Complaint

- If either party declines informal resolution, matter goes to the Investigator.
- Investigator must provide written notice of the following to each party whose participation is invited or expected of the date, time, location, participants, and purpose of:
 - All hearings
 - Investigative interviews
 - Meetings
- Written notice must be given with sufficient time for the party to prepare to participate.



34 CFR 106.45(b)(5)(v)

Consolidation

- If during the course of the investigation, additional related allegations are discovered, they may be consolidated
 - Must arise out of the “same facts or circumstances”
 - It could be same two parties, but complainant discloses additional acts during interview
- If same two parties, must send written notification of new allegations to respondent.
- If a new respondent or complainant, must also provide all notices up to this point; comply with procedure.



34 CFR 106.45(b)(2)(ii) & (b)(4)

Determining Relevant Evidence

- Determining relevant evidence is ultimately the duty of the Decision Maker, but an Investigator must understand in order to complete a fair investigation.
- The final Title IX rule does not define relevant evidence
- Does not adopt the Federal Rules of Evidence for hearings
- May not adopt rules that contravene those evidentiary requirements prescribed in 34 CFR 106.45. This causes evidence that would be inadmissible at a criminal trial to be admissible in a Title IX investigation.
 - For example, the Preamble to Title IX states that a recipient “may not adopt a rule excluding relevant evidence whose probative value is substantially outweighed by the danger of unfair prejudice; although such a rule is part of the Federal Rules of Evidence.”
 - Similarly, it also states may not adopt rules excluding relevant evidence, such as lie detector results and rape kits.

(Preamble to Title IX, pp. 980-82)

- Three types of evidence deemed irrelevant in the Title IX regulations:
 - A party’s treatment records without consent
 - Information protected by a legally recognized privilege
 - Complainant’s prior sexual history



Determining Relevant Evidence

- Decision Maker has discretion in considering evidence: Title IX “does not prescribe rules governing how admissible, relevant evidence must be evaluated for weight or credibility by a recipient’s decision maker, and recipients thus have discretion to adopt and apply rules in that regard, so long as such rules do not conflict with section 106.45 and apply equally to both parties.”
(Preamble to the Title IX Rule, at pp. 980-82)
- Decision Maker determines the weight or credibility to give to any particular evidence as long as that rule is applied equally to both sides



Requirements of an Appropriate Investigation

- Burden of proof and gathering evidence rests on the recipient, not the parties.
- Cannot access or consider a party’s records maintained by any treating professional unless the party or parent, if minor, consents.
34 CFR 106.45(b)(5)(i)
- Cannot restrict the ability of either party to discuss the allegations or ability to gather and present relevant evidence; no “gag order” may be issued.
34 CFR 106.45(b)(5)(iii)



Requirements of an Appropriate Investigation

- Must provide an equal opportunity for the parties to present:
 - Fact or expert witnesses
 - Inculpatory Evidence: Incriminating evidence, tends to prove guilt
 - Exculpatory Evidence: Exonerating evidence, tends to prove not guilty

34 CFR 106.45(b)(5)(ii)
- Investigation by law enforcement does not nullify obligation to complete Title IX investigation; must still complete investigation.
 - Consider how you want to work with law enforcement
 - Do not depend whether or not charges were filed in making your determination of responsibility as law enforcement uses a different standard.



Investigation

- Determine order of statements/interviews of complainant, respondent, and witnesses
 - This information must be in the written notification
- Determine if want to record interview
 - Must have person's consent to record
- Use words that the witness uses
- Is what the reporting person's age or ability appropriate?
- Review prior discipline and reports of incidents
 - Be mindful of any privacy concerns – only look where you are allowed to look
- Surveillance cameras at location
- Social media of those involved
- Notes/letters/photos of those involved – most likely electronic. Go through cell phone, iPad, computer, etc.
 - Must comply with search and seizure laws



Investigation

- Photographs:
 - Area of occurrence
 - Those involved: Damage to clothing, injuries, etc.
 - Only photograph what you have consent to photograph
- Schedules and attendance of those involved, including witnesses
- Any evidence going to credibility of any witness
- Motive to lie: Did teacher recently give student bad grade? Did student respondent recently break up with student complainant?
- Has person been dishonest in the past?
- If involves student, contact parents – anything relevant going on at home?
 - Be mindful of student's privacy rights if student is LGBTQ+



Investigation: Interviews/Statements

- If involves potential criminal conduct, do not have to advise a student of Miranda rights (Fifth Amendment right to remain silent). Miranda only applies if a peace officer is conducting a custodial interrogation designed to elicit an incriminating statement.
- Know who the complainant, respondent, and witnesses are
- Rapport building
- Do not be immediately confrontational
- Ages/grade level
- Understand the person's mental capabilities – determine if in special education
- Is investigator bilingual or need an interpreter?
- Recognize that the act might appear minimal to you as the investigator, but that it was extremely traumatic to the complainant.



Investigation: Interviews/Statements

- Ask open ended questions
- Can ask questions to clarify
- Avoid promises, oral agreements, and coercion
- Use the words the person your interviewing uses
- May need to clarify that speaking of the same body parts when allegations involve touching
- At the end, ask if there is anything else the person wants you or the district to know and let the person know that they can contact you with any additional information they might have.



Investigation: Interviews/Statements

Victims of sexual harassment and abuse have suffered trauma; use trauma informed care in conducting interviews.

- Trauma: An event, or series of events, that overwhelms the central nervous system. Trauma occurs when one's ability to defend, protect, or say no is overwhelmed. Trauma is what occurs when your solution (active response to threat) does not work. (Empoweringeducation.org)
- It is about considering/treating the whole person, not just the immediate incident
- Ask "What happened to you?" Do not ask, "What's wrong with you?" "What's wrong?"
- Key concepts to speaking with a person using trauma informed care:
 - Safety
 - Trustworthiness
 - Choice
 - Collaboration
 - Empowerment

Center

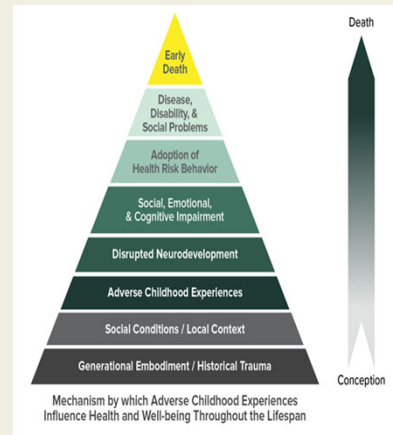
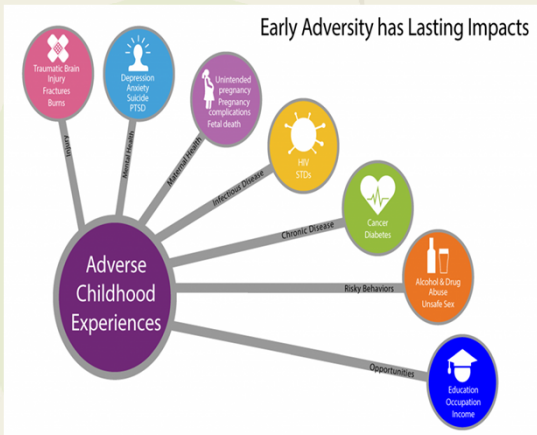
Office for Victims of Crime, Training and Technological Assistance



Investigation: Interviews/Statements

- During interviews, be aware that you do not know the child's complete history and they may have suffered other trauma.

Adverse Childhood Experiences (ACEs)



Investigations: Interviews/Statements Employees

- Weingarten Rights: If it reasonably appears employee could be subject to discipline, employee has right to have union representative present.
 - Representative cannot be intrusive or unduly adversarial
- Employee that is mere witness to events and not suspected of being culpable do not typically have Weingarten rights unless required by personnel rules, collective bargaining agreement, or past practice.
 - May have union representative due to reasons unknown to investigator. For example, teacher may not have reported suspected harassment by another employee and believe they will be subject to discipline.
- Spielbauer Warning: If the employee invokes their Fifth Amendment right to remain silent, he or she can be ordered to answer questions. The statements may not be used in a criminal proceeding but may be used in a discipline proceeding.
 - Must give a Spielbauer warning:
 - You do not have a right to refuse to answer these questions. Should you refuse, you may be guilty of insubordination, an offense that can and will lead to discipline up to and including termination. Any information you provide to us, however, will not be used against you in any criminal proceeding.

Hypotheticals

- A female fourth grade student reports that her male classmate has been showing her videos of people “doing bad stuff” on his cell phone. She has previously told him that she does not want to “see that stuff.”
 - Same student reports that the classmate was showing her videos of sex acts on his phone.



Investigation: Search and Seizure

- The Fourth Amendment protects an individual’s justified expectations of privacy against unreasonable government intrusions.
 - In relation to students, a district (recipient) must have reasonable suspicion to search
 - Exception: If school policy provides for searches of lockers or desks because it has been made clear to students that those two places remain property of the district.
 - Exercise caution: Must be equally and consistently enforced
 - See Sample Policy 5145.12
 - Law enforcement required to have probable cause
 - First question to ask: Who has expectation of privacy in location or item to be searched?
 - Must have reasonable suspicion regarding that person or consent from that person.



Investigation: Search and Seizure Consent

- Consent must be informed and voluntary
 - Consent is not voluntary if student is acquiescing to a show of authority
 - Example: “You don’t have anything in your pockets you don’t want me to see, do you”? Student responds, “no.” Staff says, “then you wouldn’t mind me searching, would you”?
- Parent/guardian cannot consent to search the personal property of a minor if student has expectation of privacy.
 - Example: Parent consents to law enforcement searching child’s room. Inside the room is a locked box. Parent and child say belongs to child. Child refuses consent to search locked box. Law Enforcement searches based on parent’s consent.
 - Parent cannot consent under these circumstances. *In re Scott K.* (1979) 24 Cal.3d 395.



Investigation: Search and Seizure Reasonable Suspicion

- Information that is basis of reasonable suspicion cannot be stale
- Reasonable suspicion to further search may be developed during search
 - Must be in a place that you were already entitled to be searching
 - Example: Principal had reasonable suspicion to search student’s purse for cigarettes. Principal sees cigarettes immediately upon opening purse. Picks up cigarettes and sees paper he associates with wrapping marijuana cigarettes. Principal continues to search purse for marijuana and locates marijuana and large amount of cash.
 - Developed reasonable suspicion to search remainder of purse for marijuana. *NJ v. TLO* (1985) 469 US 325



Investigation: Search and Seizure

- The legality of a search of student depends on the reasonableness of it. This requires a twofold inquiry:
 - Was the search justified at inception?
 - Under ordinary circumstances, search of a student by a teacher or other school official will be “justified at its inception” when there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or rules of the school.
 - Was the search permissible in scope?
 - A search will be permissible in its scope when the manner in which the search is conducted is reasonably related to the objectives of the search and are not excessively intrusive in light of the age and sex of the student and the nature of the infraction.



Investigation: Search and Seizure

- Education Code section 49050 states that no school employee shall conduct a search that involves:
 - (a) Conducting a body cavity search of a pupil manually or with an instrument.
 - (b) Removing or arranging any or all of the clothing of a pupil to permit a visual inspection of the underclothing, breast, buttocks, or genitalia of the pupil.



Investigation: Search and Seizure Involving Cell Phones

- Sample Board Policy 5145.12: May search cell phone without consent, “only if a school official, in good faith believes that an emergency involving danger of death or serious physical injury to the student or others requires access to the electronic device information.”
- Student may have expectation of privacy in cell phone, even though parent owns/pays for cell phone.
- Ask student for consent to look at phone, if not an emergency
- Take photos of what is on phone or have it forwarded to you
- If receive images that contain nude children, remove immediately from any electronic accounts and contact law enforcement. It is child pornography and illegal to possess.



Investigation: Law Enforcement Involvement

- Law enforcement involvement is one reason listed in the regulations for a reasonable delay.
 - If law enforcement investigation takes too long, may not be able to wait.
- If have a district policy, should follow that to the extent it does not interfere with both parties' due process rights.
- Generally, advise cooperating with law enforcement to the extent legally permissible
- Law Enforcement Investigation:
 - Pre-text call
 - Multiple interviews of victim
 - Interview of suspect
 - Will Miranda apply?
 - Investigative techniques



Investigation: Report

- Only specific requirement is that the report “fairly summarizes relevant evidence.”
34 CFR 106.45(b)(5)(vii)
- Summarize all evidence
- Exculpatory and inculpatory evidence
 - 34 CFR 106.45(b)(5)(vi) requires Investigator include evidence for inspection that recipient does not intend to rely on to make a determination.
- All witness statements
 - Do not have to provide transcript of interview but must provide all information in report.
 - If do record, do not have to provide copy of interview, but it is evidence that must be available for inspection.



Investigation: Report

- Description of any physical evidence; videos, photos, etc.
 - Generally, advise not providing copies of videos, photos, to either party
 - Must keep original if piece of evidence
- Cite to any applicable policies and/or code of conduct that are considered.
- Investigator is not making any conclusions in regard to responsibility but can state conclusions as to credibility and other observations regarding the interviews.
 - Neutrally state opinions as to credibility.
- Assume that it will be released to public or used in future lawsuit.



Investigation: Written Notification to Parties

- Once complete report, must provide to both parties, and advisor if applicable, for review.
- Provide draft report along with written notification:
 - Reminder that have right to inspect evidence and respond to it
 - Right to submit additional evidence
 - Provide date to submit additional information/evidence
 - Provide date that report will be finalized
- Must allow minimum of 10 days for inspection of evidence and to submit a written response if choose to.
- Not required, but can add, if not providing additional information, notify Investigator of that decision so that report can be finalized earlier.



34 CFR 106.45(b)(5)(vii)

Investigation: Finalizing Report

- Must incorporate statements received in response to evidence
 - Those statements become part of the evidence that is subject to inspection by parties. Must allow other party to inspect.
- Once have received all evidence submitted by both parties or the deadline date has passed, can then finalize report.
- The investigation report is not to include any opinions as to responsibility, only presenting the evidence that was gathered during the investigation.
 - Limited statements regarding credibility allowed.
- Must provide finalized report simultaneously to both parties.
- Forward report and evidence to Decision Maker.
- Parties have a right to have report 10 days prior to hearing or time of determination.



(34 CFR 106.45(b)(5)(vii))

Title IX Hearing

- Only postsecondary recipients are required to have a hearing, K – 12th grade are not required to have a hearing.
 - Recommend not having a live hearing for K – 12.
- If a party does not have an advisor, the recipient must provide an advisor of the recipient's choice without fee or charge to the party
 - May or may not be an attorney
- Decision Maker must permit each party's advisor to ask questions of any witness
 - Parties are not allowed to ask questions of witnesses
 - Limitations as what advisor may ask does not apply to post-secondary hearings
- Only relevant cross-examination and other questions may be asked of a party or witness
- If a party or witness refuses to submit to cross-examination at the hearing, the Decision Maker must not rely on that person's statements.
- Must create audio or audio-visual recording or transcript of any live hearing and make available to either party



(34 CFR 106.45(b)(6)(i))

Decision Maker: Receive Investigation Report

- Decision Maker must notify both parties that they have received the investigation report.
- Provide written notification:
 - Each party has a right to submit written, relevant questions the party wants any of the witnesses or the other party asked.
 - Decision Maker will provide those answers to all parties
 - Will allow for additional, limited questions from each party.
 - Provide a reasonable date for party to submit questions by.
 - Right to argue value of the evidence – essentially argue your case.
- Parties must have 10 days between receiving final report and start of this portion of the grievance process.



Decision Maker: Determining Relevant Evidence

- Three types of evidence that is deemed irrelevant in the Title IX regulations:
 - A party's treatment records without consent
 - Medical and mental health related records
 - Information protected by a legally recognized privilege
 - Recognized in California:
 - Lawyer/Client
 - Physician/Patient
 - Psychotherapist/Patient
 - Clergy/Penitent
 - Sexual Assault Counselor/Victim
 - Domestic Violence Counselor/Victim
 - Human Trafficking Caseworker/Victim
 - Complainant's prior sexual history



Decision Maker: Determining Relevant Evidence Exclusion of Prior Sexual History

- Evidence of a complainant's sexual history is generally not relevant and should be excluded
 - Examples:
 - She had sex with Sam, therefore, she had consensual sex with John.
 - Evidence regarding a reputation for being promiscuous.
- Evidence can be considered if it is directly relevant to an issue
 - Examples:
 - Complainant previously consented to a sexual act with respondent, therefore, he/she/they consented during the current incident; relevant to the respondent's state of mind.
 - The evidence will explain an injury the complainant has or other evidence.
- Title IX specifies the only two conditions that sexual history may be asked:
 - Someone other than respondent committed the act
 - Specific incidents between respondent and complainant to prove consent



34 CFR 106.45(b)(6)(ii)

Hypotheticals

- Jane files a complaint alleging that John touched her buttocks and breasts on the bus on the way home from a field trip. John attempts to introduce evidence that on the previous field trip Jane allowed Mark to touch her breasts on the trip home.
 - John attempts to introduce evidence that the weekend prior to the field trip he and Jane “made out” at a party and she allowed him to touch her buttocks and breasts. He believed that because she acted the same way at the party and on the bus that she was consenting to the touching on the bus.
- Jane files a complaint alleging that John had raped her in the campus restroom. Jane had injuries, including a black eye, that she said John inflicted during the assault. John attempts to introduce evidence that Jane had sex with Mark in the restroom and that Mark had punched Jane while they were in the restroom.



Decision Maker: Determining Relevant Evidence

- If determine that a question is not relevant, Decision Maker must explain to the party proposing the question the reason(s) for excluding the question(s):
 - Example: The question regarding consensual sex between complainant and John Doe is not relevant as cannot prove that she consented to the act with respondent, nor does it prove that another person committed the act respondent is alleged to have committed.



Decision Maker: Determining Weight to Give Evidence

- Each side must be given the opportunity to argue the weight and credibility the Decision Maker should give to each piece of evidence.
 - Essentially a hearing by way of written questions and statements.
- Was the person offering the evidence credible?
 - May consider Investigator's opinions as to credibility.
- How is the evidence relevant to the issues?
- Does it go to a party's credibility?
- Did that person have any motive for coming forward?
- Does it tend to prove or disprove a material fact?
- How many levels of hearsay?
- Does it tend to show the respondent has committed similar acts in the past?
- Does it directly prove or disprove an element you must find in order to make a determination of responsibility?



Hypotheticals

- Samantha files a complaint alleging that Mr. Smith, her PE teacher, makes comments to her about her physical appearance every day and tells her he wishes she was 18. Mr. Smith presents evidence that Samantha lied earlier in the year about why her homework in a different class was not completed.
 - Mr. Smith presents evidence that two months prior, Samantha falsely reported that a student named Mark had slapped her buttocks during PE class.
 - Samantha provides a credible witness that says she has witnessed Mr. Smith making comments about Samantha's appearance and provides credible details. Witness states that she is not fond of Samantha, but what she saw was wrong.
- Sally files a complaint alleging that Tom has been verbally sexually harassing her and that it has caused her to have severe anxiety prior to class. Tom seeks to gain access to her domestic violence counselor because he believes the domestic violence she has been subjected to is the cause of her anxiety, not him.



Decision Maker: Determination of Responsibility

- Decision Maker must make a determination of responsibility based on the standard of proof selected by the district in their written policy
- The determination must be in writing
- Written determination must be provided to parties simultaneously
- Determination is final on:
 - Date appeal is issued; or
 - Date on which appeal must be filed; appeal no longer timely



Remedies

- Cannot be implemented against respondent until grievance procedure is completed.
 - Conflicts with Education Code timelines on discipline
- Must be designed to restore or preserve equal access to the recipient's education program or activity.
 - They may include supportive measures, such as a stay away order
 - Need not be non-disciplinary, non-punitive, and need not avoid burdening respondent.
 - Can now discipline student
- The range of disciplinary sanctions and remedies are required to be listed in the recipient's policy.



34 CFR 106.45(b)(1)(i) & (vi)

Decision Maker: Written Determination

Written report must include:

- Identification of the allegations as defined in 34 CFR 106.30 (sexual harassment) or 34 CFR 106.71 (retaliation)
- Detailed description of the procedural steps taken from the receipt of formal complaint through conclusion
 - Includes: Notifications to the parties, interviews with parties/witnesses, site visits, methods used to gather evidence and hearings held
- Findings of fact supporting the determination
- Any conclusions made in regard to any potential code of conduct violations



Decision Maker: Written Determination

Written report must include (con't.):

- A statement of, and the rationale for, the result of each allegation. This must include:
 - Determination regarding responsibility as to each allegation
 - Any disciplinary sanctions the recipient should impose on respondent
 - Any recommended remedies the recipient should provide the complainant to restore or preserve equal access to the recipient's education program or activity.
 - If the allegations have a specific intent requirement, include basis and rationale for making that determination.
- The recipient's procedures and permissible bases for either party to appeal the determination.



34 CFR 106.45(b)(7)(ii)

Appeal Decision Maker: Appeal Process

- Appeal procedures must be implemented equally for both parties.
 - Policy should have a time frame for making appeal. There is no time frame described in the Title IX regulations but should be reasonable: two to three weeks.
- A dismissal of a complaint or a finding of responsibility can be appealed.
- District must offer appeal to both parties for these three bases:
 - Procedural irregularity that affected the outcome of the matter
 - New evidence that was not reasonably available at the time of the determination of responsibility that could affect the outcome
 - The Title IX Coordinator, Investigator, or Decision Maker had a conflict of interest or bias that affected the outcome
- Recipient may add additional basis for appeal but must be made available equally to both parties.



34 CFR 106.45(b)(8)(i) & (ii)

Appeal Decision Maker: Appeal Process

- Must provide written notice to the other party when appeal is filed. Written notice must include:
 - Name of party that appealed the decision
 - Basis of the appeal
 - That each party has a right to submit a written statement either in support of or challenging the outcome.
 - Provide reasonable date to provide written statement
 - Reasonable would be two to three weeks
- Must implement appeal procedures equally for both parties
- Must issue written decision containing the result of appeal and the rationale for the result
- Must provide written appeal decision simultaneously to both parties



(34 CFR 106.45(b)(8)(i) & (ii))

Appeal Decision Maker: Written Determination

- The only guidance provided in the Title IX regulations is that the written decision describe “the result of the appeal and the rationale for the result.”
- Recommendation:
 - Brief summary of process:
 - Date complaint was filed
 - Date determination was made
 - Date received appeal; include basis for the appeal
 - Any documents reviewed by appeal decision maker
 - Brief description of the allegations and determination
 - May need to provide additional information if the basis of the appeal is new evidence
 - Description of any written statements in support of or challenging the determination
 - Title IX regulations do not state that other party has right to review and respond to either party’s written statement
 - A statement of, and the rationale for, the determination as to the appeal
 - Unless appeal is based on new evidence, do not have to make determination as to the actual allegation



34 CFR 106.45(b)(8)(i) & (ii)

Informal Resolution Facilitator: Process

- Different than supportive measures
 - May include strategies such as arbitration, mediation, or restorative justice
- Recipient may offer informal resolution if:
 - A formal complaint has been filed;
 - A determination of responsibility has not been made;
 - The respondent is not an employee; AND
 - Both parties agree to participate.
- Must obtain both parties written consent to participate
- Cannot require either party to participate in informal resolution or waive right to investigation or adjudication as a condition of enrollment, continued enrollment, employment, continued employment, or enjoyment of any other right.



34 CFR 106.45(b)(9)

Informal Resolution Facilitator: Process

- If one party requests informal resolution, recipient must provide written notice to parties disclosing:
 - Allegations in the complaint
 - Requirements of informal resolution process, including circumstances under which it precludes parties from resuming the formal complaint process
 - Policy must allow any party the right to withdraw and resume the formal complaint process prior to agreeing to a resolution
 - This must be written in the Title IX grievance policy
 - Any consequences resulting from participating in informal resolution, including that the records will be maintained or could be shared



34 CFR 106.45(b)(9)

Informal Resolution Facilitator: Conducting a Resolution Session

- Do both parties agree on how to proceed?
- Understand alleged conduct
- What resolution is sought?
 - What would make victim feel safe? Stay away order?
 - Avoid revictimizing: making victim move classes
 - Does complainant just want respondent to understand the issue?
 - Think about restorative justice: Engagement, accountability, and restoration
- If it involves student with IEP or 504, does anyone from IEP or 504 team need to be involved?
- Not required by Title IX, but good practice to write resolution out and have both parties sign.



Title IX Records

- Must maintain the following for seven years:
 - Investigation - Keep everything: Investigation report, decision report, any determination of responsibility, any audio/audiovisual recording or transcript, disciplinary sanctions, and remedies
 - Any appeal and result
 - Any informal resolution and result
 - All materials used to train each of the five roles
 - Must post these materials on website or if don't have website, make them available
 - Be aware of copyright issues: Must create own materials if not given consent to publish. (Office for Civil Rights Blog 202000518.)
 - Yearly student/parent notices are not sufficient if have website, statute specifically states what must be on website



34 CFR 106.45(b)(10)

Title IX Records

- If just received complaint or had notice, but did not go through full grievance process, a recipient must create and maintain for seven years:
 - Records of any actions, including supportive measures, taken in response to the report or complaint
 - If don't provide supportive measures, must document the reasons it was not "clearly unreasonable in light of the known circumstances."
 - Document basis for its conclusion that its response was not deliberately indifferent
 - Document that it has taken measures designed to restore or preserve equal access to the recipient's education program or activity



34 CFR 106.45(b)(10)

Title IX Records: FERPA

- The records created in the Title IX grievance hearing are likely “student records” of the perpetrator and victim
- Title IX specifies that a school cannot hide behind FERPA to avoid Title IX obligations
- Parent Inspection of Records: Should not let parent inspect until completion of entire grievance process
- Hearing to Challenge Student Records: Should only allow the parent, person responsible for creating the record and Superintendent at the hearing. Should not allow parent to turn hearing into a Title IX hearing to retry the Title IX complaint.
 - Strictly follow the process for challenging a student’s record.
- Law Enforcement Records: If law enforcement was involved in investigation, those reports are not “student records” pursuant to FERPA.



Special Education Considerations

- Grievance process will always be more than 10 days because the process takes 20 plus days to complete, excluding an appeal.
- Do the actions trigger child find?
- Do supportive measures trigger IDEA or 504?
- If student has an IEP or 504, do the actions indicate an FBA, BIP, or other assessment is needed?
- Can you use the misconduct data to support a change in placement?
- A special education student can seek monetary damages for failure to protect from harassment or assault



Special Education Considerations

- Must work closely with special education staff (IEP team) to assure compliance with Title IX and IDEA/504
 - May have to attend IEP or manifestation meetings
- Supportive Measures: Likely will need to be addressed in IEP
 - Change placement, change in schedule, counseling, etc.
- Accessibility issues regarding the grievance procedure
 - Will special education student and parent be able to access evidence and attend any interview, hearing, propose questions, etc.?
 - Advocates and other members of IEP team may want to access records for the IEP meeting, but it involves other students who may be entitled to confidentiality.
- Emergency Removal: If disabled student is the accused, a manifestation will be required if emergency removal is more than 10 days.
 - Only exception would be “serious bodily injury” exception that would allow 45 days.



Standard of Review

- Review:
 - US Department of Education’s Office for Civil Rights (“OCR”) has authority to review recipients’ action
 - Complainant or respondent can also sue recipient civil
 - The Assistant Secretary will not find that the recipient acted with deliberate indifference solely because the Assistant Secretary would have reached a different determination based on an independent weighing of the evidence.
- Standard:
 - Did recipient respond appropriately: A recipient with actual knowledge of sexual harassment must respond promptly in *a manner that is not deliberately indifferent*.
 - Was response clearly unreasonable in light of the known circumstances?
- Recipient’s handling of Title IX complaint can be reviewed regardless of whether or not a formal complaint was filed
 - Same standard applies to both scenarios.



34 CFR 106.44(b)(2)

Hypotheticals

- A female general education student reports that a male student with down syndrome is constantly hugging her and sometimes kisses her cheek. She has tried to nicely tell him to stop and has tried avoiding him going through the hallway that he is in, but he still finds her at lunch time to hug her.
 - Female student told her teacher last month
- Special education student reports that a general education student touched her inappropriately.



Hypotheticals

- A sixth grade female student reports that a sixth grade male student told her that he liked her.
 - Sixth grade male student has left numerous notes for her at her desk saying that he liked her. He follows her around school all day and asks her friends numerous questions about her. She has made it clear to him that she does not like him. He has started slapping her on the buttocks and telling her "you're my girl now." He has also threatened that he will beat-up her younger brother.
- A fourth grade student reports that her teacher hugs her everyday when she gets to school and when she leaves. He does not hug any other student. She has missed several days due to being ill and her grades are falling.
 - She has told the playground aide that she does not want to go to class because her teacher keeps making her feel "weird" by hugging her.
- A custodian finds inappropriate photos and notes between two sixth grade students. The notes indicate that John has been demanding more photos from Emma and threatening to put more on social media if she does not provide more.



Hypotheticals

- Over a weekend, Sam posts several inappropriate photographs with sexually explicit comments of Isabella on social media. Isabella had sent the photographs to him when they dated. Isabella sees the posts and is very upset and humiliated.
- Other boys add sexually explicit comments to the photos.
- Several of the boys make comments to Jane about the photographs during the week at school.
- Jane refuses to come to school and leaves the campus when her parents drop her off.



Thank You For Your Attention

These materials have been prepared by Schools Legal Service for informational purposes only and are not intended as legal advice. This information is not intended to create and does not constitute an attorney-client relationship between the parties. Persons receiving this information should not act on it without seeking professional counsel.

© 2024 Schools Legal Service. All Rights Reserved.

No part of this publication may be reproduced in any form or by any electronic, mechanical or other means (including the use of information storage and retrieval systems) without prior written permission from the General Counsel of Schools Legal Service. Permission is granted to members of Schools Legal Service to reprint and distribute this work for internal use with full acknowledgment of this copyright.

