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Title IX Training on U.S. Department of Education Final Regulations

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Delaware County Intermediate Unit**



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Presenters

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Training Content

This training will address the purpose of Title IX, federal requirements and the roles of the Title IX Coordinator, the investigator, the decision-maker and the informal resolution facilitator as directed by the U.S. Department of Education Title IX regulations issued on May 6, 2020.

This presentation will cover key definitions, the available standards of proof, the grievance process, notification and documentation requirements along with what is needed in conducting an investigation, a hearing, issuing an outcome determination letter and executing the appeals process.



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What this training does not accomplish

- This training is on the 2020 regulatory changes only and does not include the anticipated 2023 changes which were supposed to be issued by now.
- This training will give you the necessary foundation to act under the regulations. We anticipate future training will be on the revisions only to the law.



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Duty to Prohibit Discrimination in Education

Educational institutions have a **responsibility to protect every student's right to learn in a safe environment free from unlawful discrimination and to prevent unjust deprivations of that right.**

The Office for Civil Rights enforces several federal civil rights laws that prohibit discrimination in programs or activities that receive federal financial assistance from the Department of Education. It is the mission of the Office for Civil Rights to ensure equal access to education and to promote educational excellence throughout the nation through vigorous enforcement of civil rights.



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Title IX Key Questions

- What is Title IX?
A federal civil rights law that prohibits discrimination based on sex in education.
- What do the new regulations require?
They require all recipients (schools, LEAs, IHEs) to ensure that no student, employee or third party participating in or attempting to participate in an education activity or program is discriminated against based on sex. They do this by creating or revising Title IX procedures, identifying a Title IX Coordinator and other key personnel, training all key personnel, alerting all members of the school community about Title IX policies, and publishing the name of the Title IX Coordinator, policies, procedures and training materials on their website.
- Who is responsible?
Schools. They need to have the necessary key personnel (Title IX Coordinator, (possibly) Deputy Coordinators/Liaison, Investigators, Decision-Makers/Adjudicators, Informal Resolution Facilitators) identified, trained and in place to effectively respond to a Title IX Complaint.
- How do you effectively implement what is required?
Ongoing training, publishing and distributing to all members of the school community information about Title IX.





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Title IX

Part I: Understanding the Regulations

Key Personnel in Title IX Process

- Title IX Coordinator
 - Depending on the size of the school, may need to designate “Deputy Title IX Coordinator” and/or “Title IX liaison/investigators” in each school building
- Investigator
- Decision Maker(s) (or panel of decision makers)
- Advisor
- Informal Resolution Facilitator
- Appeal Decision Maker
- Possible other involved personnel:
 - HR Director
 - School Counselor
 - School Resource Officer



What Must the Key Personnel Know?

- Schools must ensure that Title IX coordinators, investigators, decision makers and any person who facilitates a formal process or informal resolution receive training on:
 - The definition of sexual harassment
 - The jurisdiction/scope of Title IX: Who and what is covered
 - How to conduct an investigation and an equitable grievance process
 - How to serve impartially
 - How to assess credibility
 - How to determine issues of relevance

§106.45(b)(1)(iii)



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Key Terms Repeated in the Regulations

- Prompt
- Equitable
- Supportive Measures
- Due Process
- Remedies

Schools must keep these terms in mind as they implement their policies and procedures.



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Conduct Covered Under Title IX

- **Sexual Harassment**

- Quid pro quo
- Verbal
- Physical
- Electronic

- **Sexual Assault**

- Rape
- Fondling
- Incest
- Statutory rape

- **Stalking**

- **Dating violence**

- Includes, but is not limited to, sexual or physical abuse OR the threat of such abuse

- **Domestic Violence**

- **Retaliation***

*(see pg. 96, footnote 257 in Final Regulations)



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Response Obligations

Actual knowledge of sexual harassment or a report of sexual harassment triggers the recipient's response obligations:

- Must be prompt
- Must not be deliberately indifferent
- Must provide supportive measures
- Must be confidential
- Must initiate grievance process
- Must conduct an investigation



School's Duty to Respond to Sexual Harassment

- An elementary and secondary school **must respond** whenever **any employee** has notice of sexual harassment or allegations of sexual harassment.
 - Students are not expected to have to identify to whom they should report an incident
 - Employees are mandatory reporters
 - Employees sit “in loco parentis” or “in the place of parents”

§106.44(a)



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Jurisdiction

- Protects any person for conduct that takes place “**in the United States**” *and*
- An “**education program or activity**” includes “locations, events, or circumstances over which the recipient exercised substantial control over **both the respondent and the context in which the harassment occurs**” and also includes “any building owned or controlled by a student organization that is officially recognized by a postsecondary institution.”

§106.44(a)



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Jurisdiction (Cont'd)

- Title IX obligations extend to sexual harassment incidents that occur off campus **if any** of three conditions are met:
 1. If the off-campus incident occurs as part of the school's "operations" pursuant to 20 U.S.C. 1687 and 34 CFR 106.2(h)
 2. If the school exercised substantial control over the respondent and the context of the alleged sexual harassment that occurred off campus pursuant to §106.44(a)
 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)

Pgs. 624-625



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Jurisdiction (Cont'd)

- **Exception:** Nothing in these final regulations prevents a school from addressing conduct that is outside the **Department's jurisdiction** due to the conduct constituting sexual harassment occurring outside the school's education program or activity or occurring against a person who is not located in the United States.
- Dismissal of a formal complaint because the allegations do not meet the Title IX definition of sexual harassment, **does not preclude** a school from addressing the alleged misconduct under other provisions of the **school's own code of conduct**.

§106.45(b)(3)



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Title IX Definitions

34 CFR §106



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Definitions

- Sexual Harassment
- Actual Knowledge
- Supportive Measures
- Formal Complaint
- Deliberate Indifference
- Grievance Process
- Standard of Proof: Preponderance of the evidence or clear and convincing
- Formal Resolution
- Informal Resolution: Mediation and/or Restorative Justice
- Due Process
- Outcome Determinations
- Appeal



Sexual Harassment

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

- (1) An employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct (also known as ***quid pro quo*** harassment)
- (2) Unwelcome conduct determined by a reasonable person to be so severe, pervasive, **and** objectively offensive that it effectively denies a person equal access to the recipient's education program or activity
- (3) "Sexual assault" as defined in the 20 U.S.C. 1092(f)(6)(A)(v)
- (4) "Dating violence" as defined in 34 U.S.C. 12291(a)(10)
- (5) "Domestic violence" as defined in 34 U.S.C. 12291(a)(8)
- (6) "Stalking" as defined in 34 U.S.C. 12291(a)(30)

*Definition (2) deviates from the Title VII standard.

*Definitions for (3)-(6) are found in the Clery Act and Violence Against Women Act (VAWA)



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Sexual Harassment (Cont'd)

- Elementary and secondary schools are not subject to the Clery Act
- However, elementary and secondary school recipients **must** look to the definitions of sexual assault, dating violence, domestic violence and stalking as defined in the Clery Act and VAWA in order to address those forms of sexual harassment under Title IX

[https://clerycenter.org/https://clerycenter.org/](https://clerycenter.org/)



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Sexual Assault

Sexual assault is defined as an offense that meets the definition of rape, fondling, incest or statutory rape as defined in the FBI's Uniform Crime Reporting System.

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



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Dating Violence

- Dating violence is defined as 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 the reporting party's statement and with consideration of the length of the relationship, the type of relationship, and the frequency of interaction between the persons involved in the relationship.
- For the purposes of this definition dating violence includes, but is not limited to, sexual or physical abuse or the threat of such abuse.
- Dating violence does not include acts covered under the definition of domestic violence.

34 U.S.C. 12291(a)(10)



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Domestic Violence (Cont'd)

- A felony or misdemeanor crime of violence committed:
 - By a current or former spouse or intimate partner of the victim
 - By a person with whom the victim shares a child in common
 - By a person who is cohabitating with, or has cohabitated with, the victim as a spouse or intimate partner
 - By a person similarly situated to a spouse of the victim under the domestic or family violence laws of the jurisdiction in which the crime of violence occurred
 - By any other person against an adult or youth victim who is protected from that person's acts under the domestic or family violence laws of the jurisdiction in which the crime of violence occurred

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



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Stalking

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

- Fear for the person's safety or the safety of others; or
- Suffer substantial emotional distress.

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



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Retaliation

Retaliation against any person for exercising their rights under Title IX is **prohibited**.

- “[N]o recipient or other person shall intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by Title IX or its implementing regulations, or because the individual has made a report or complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing under Title IX or its implementing regulations.”
- If the individual engaging in retaliatory acts is a student or third party, the recipient may take discipline against the student and issue a no-trespass order against the third party.
- The final regulations seek to prohibit retaliation in a broad manner and not only to the Complainant.
- The retaliation prohibition applies to acts against complainants, witnesses or any other individual involved in any manner with the investigation, proceeding or hearing.

§ 106.71



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Consent

The regulations do not require recipients/schools to adopt a particular definition of consent with respect to sexual assault.

- No specific definition other than that included in the Clery Act*. Schools can look to their local jurisdiction for a definition.
- The definition must apply equally to both parties.

[*https://codes.findlaw.com/us/title-20-education/20-usc-sect-1092.html](https://codes.findlaw.com/us/title-20-education/20-usc-sect-1092.html)

[*https://clerycenter.org/wp-content/uploads/2017/01/handbook-2.pdf](https://clerycenter.org/wp-content/uploads/2017/01/handbook-2.pdf)



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Complainant/Respondent

- **Complainant:** Individual alleged to be the victim of conduct that could constitute sexual harassment
 - Does not require a formal complaint to use this designation
- **Respondent:** Alleged perpetrator of conduct that could constitute sexual harassment
 - Does not need to be adjudicated or a formal complaint filed to use this designation



Actual Knowledge

Is defined as **notice** of sexual harassment or allegations of sexual harassment to a recipient's Title IX Coordinator or any official of the recipient who has authority to institute corrective measures on behalf of the recipient, or to **any employee of an elementary or secondary school**.

*Past OCR Guidance: Schools had a responsibility to respond promptly and effectively if the school (i.e. a Responsible Employee) **knew or should have known** about the sexually harassing behavior.*



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Notice

Is whenever any elementary and secondary school employee, any Title IX Coordinator, or any official with authority:

1. Witnesses sexual harassment
2. Hears about sexual harassment or sexual harassment allegations from a Complainant (i.e., a person alleged to be the victim) or a third party (e.g., the Complainant's parent, friend, or peer)
3. Receives a written or verbal complaint about sexual harassment or sexual harassment allegations or
4. By any other means



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Educational Program or Activity

- Locations, events or circumstances over which the school exercises **substantial control** over both the respondent and the context in which the harassment occurs
- and**
- Includes “any building owned or controlled by a student organization that is officially recognized by a postsecondary institution.”
 - Must be in the United States
 - Can be on campus or off campus
 - For Colleges/IHEs, includes fraternity or sorority houses
- “Program or activity” encompasses “all of the operations” of a recipient, which may **include computer and internet networks, digital platforms and computer hardware or software owned, operated by or used in the operation of the recipient.**



Deliberate Indifference

“A recipient (school) acts with deliberate indifference only when it responds to sexual harassment in a manner that is “**clearly unreasonable in light of the known circumstances**... because for a recipient with actual knowledge to respond in a clearly unreasonable manner constitutes the recipient committing intentional discrimination.”

- A school’s liability is premised on the school’s **actual knowledge and deliberate choice** to permit sexual harassment.
- A school’s decision not to investigate when the complainant does not wish to file a formal complaint will be evaluated by the Department under the deliberate indifference standard.

§106.44(a)



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Supportive Measures

- The Final Rule defines “supportive measures” as **individualized services reasonably available that are non-punitive, non-disciplinary, and not unreasonably burdensome** to the other party while designed to ensure equal educational access, protect safety, or deter sexual harassment.
- Such measures are designed to **restore or preserve equal access** to the recipient’s education program or activity without unreasonably burdening the other party, including measures designed to protect the safety of all parties or the recipient’s educational environment, or deter sexual harassment.

§106.3



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Supportive Measures

- Supportive measures may include **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.**
- The school must **maintain as confidential** any supportive measures provided to the complainant or respondent, to the extent that maintaining such confidentiality would not impair the ability of the recipient to provide the supportive measures.

§106.3



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Supportive Measures

- The final regulations do prescribe that a recipient's Title IX Coordinator **must** remain responsible for coordinating the effective implementation of supportive measures.

“The Title IX Coordinator must serve as the point of contact for the affected students to ensure that the supportive measures are effectively implemented so that the burden of navigating paperwork or other administrative requirements within the recipient/school’s own system does not fall on the student receiving the supportive measures”.

- Section 106.45(b)(1)(ix) requires the recipient's grievance process to describe the range of supportive measures available to complainants.
 - May or may not continue after a finding of non-responsibility



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Supportive Measures

- **Document:** If a recipient/school **does not provide** a complainant with supportive measures, then they **must** document the reasons why such a response was not clearly unreasonable in light of the known circumstances. Thus, if a recipient determines that a particular supportive measure was not appropriate even though requested by a complainant, the recipient must document why the recipient's response to the complainant was not deliberately indifferent.



Emergency Removal Process

- Final regulations expressly **authorize** schools to remove a respondent from the school's education programs or activities on an emergency basis, with or without a grievance process pending, as long as [following removal] ***notice and opportunity to challenge*** the removal is given to the respondent.
- ***Standard of Review***: A recipient's decision to initiate an emergency removal will also be evaluated under the deliberate indifference standard.



Emergency Removal Process (Cont'd)

A respondent can be removed if there is an immediate threat to the **physical health or safety of any students or other individuals** arising from the allegations of sexual harassment.

Prior to the emergency removal, a school must:

1. Conduct an individualized **safety and risk analysis**
 - Must be more than a “generalized, hypothetical, or speculative belief that the respondent may pose a risk to someone's physical health or safety” and
 - Must be individualized with respect to the particular respondent and must examine the circumstances “arising from the allegations of sexual harassment”
2. Determine that an immediate threat to the physical health or safety of any student or other individual arising from the allegations of sexual harassment justifies removal
3. Provide the respondent with notice and an opportunity to challenge the decision immediately following the removal

This provision may not be construed to modify any rights under the Individuals with Disabilities Education Act, Section 504 of the Rehabilitation Act of 1973, or the Americans with Disabilities Act



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Administrative Leave

A school can place a **non-student employee respondent** on administrative leave during the pendency of a grievance process.

This provision may not be construed to modify any rights under Section 504 of the Rehabilitation Act of 1973 or the Americans with Disabilities Act.



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Formal Complaint

A Formal Complaint is 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.

- At the time of filing a formal complaint, a complainant must be participating in or attempting to participate in the education program or activity of the recipient with which the formal complaint is filed.
- A formal complaint may be filed with the Title IX Coordinator in person, by mail, or by electronic mail, by using the contact information required to be listed for the Title IX Coordinator.
- The Department will hold schools responsible for a recipient's failure or refusal to investigate a formal complaint.

§106.30



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Formal Complaint

- A formal complaint is NOT required in order for a school to have actual knowledge of sexual harassment or allegations of sexual harassment
- Actual knowledge activates a school's legal obligation to respond promptly
 - By offering **supportive measures** to a complainant
 - And explaining to the complainant the process for filing a formal complaint
- A parent or guardian has the legal right to act on behalf of a complainant or respondent (e.g. as an Advisor or filing a formal complaint)

§106.30



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Due Process

- The U.S. Department made the revisions and enacted these final rules because

*“[D]ue process principles of **notice and a meaningful opportunity to be heard** and the importance of an **impartial** process before **unbiased** officials, set forth the procedures adapted for the practical realities of sexual harassment allegations in an educational context that are most needed to (i) improve perceptions that Title IX sexual harassment allegations are resolved fairly and reliably, (ii) avoid intentional or unintentional injection of sex-based biases and stereotypes into Title IX proceedings, and (iii) promote accurate, reliable outcomes, all of which effectuate the purpose of Title IX to provide individuals with effective protection from discriminatory practices.”*

Pg. 100 Final Regulations



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Grievance Process

- A consistent and transparent process of adjudication of a complaint:
 - Must treat both parties equitably
 - Must be free of conflicts of interest or bias for or against either party
 - Must provide Complainant with remedies if there is a finding/violation
 - Must not impose disciplinary sanction against Respondent without following grievance process and only if there is a finding of responsibility
 - Reasonably prompt
 - Process must not rely on or seek to destroy legally recognized privileges
 - School must identify the standard for evidence: Preponderance of the evidence vs. clear and convincing
 - Any provisions, rules, or practices that a school entity adopts as part of its grievance process for handling formal complaints of sexual harassment, **must apply equally** to both parties.



Informal Resolution Process

Mediation or restorative justice may be offered so long as both parties give voluntary, informed written consent to participate in informal resolution. A party can decide at any time before final determination to no longer proceed with the IRP.

- This option is not available and cannot be used for sexual harassment claims involving employees against students.
- School cannot require waiver of formal investigation as condition of enrollment.
- It must be managed by an Informal Resolution Facilitator who must be trained, unbiased and impartial.

§§106.45(b)(9) and 106.45(b)(10)



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Standard of Proof

Each institution/school must determine which standard of proof they will require for claims of sexual harassment.

- *Clear and convincing evidence*: This is a higher standard than preponderance of the evidence but less than beyond a reasonable doubt. The truth of the facts asserted is “highly probable.”

or

- *Preponderance of the evidence*: “More likely than not” standard of proof. This is met when there is a greater than 50% chance of the fact(s) being true.



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Roles & Responsibilities



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Title IX Coordinators, Investigators, Decision Makers & Informal Resolution Facilitators

- Responsible for the effective implementation of Title IX protections and the grievance process
- Must be trained on Title IX policies and procedures
 - All training must be posted on school's website
- Title IX Coordinators, investigators and decision makers, and persons who facilitate informal resolution processes are prohibited from having **conflicts of interest or bias** and retaliation is prohibited.



Title IX Coordinator

Employee designated to ensure compliance with regulations and to receive complaints

Must identify the name, title, office address, email address and telephone number of this employee on the school's website and post all Title IX materials (policy and training)



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What is the Role of the Title IX Coordinator?

- Monitoring the schools/recipient's compliance with Title IX
- Ensuring appropriate education and training is provided
- Coordinating the investigations, responses and resolutions of all reports under this policy
- Ensuring appropriate actions to eliminate sexual harassment, prevent its recurrence and remedy its effects
- Reviewing regularly the effectiveness of the efforts of the recipient to ensure that the educational setting is free from sexual harassment



Duties of Title IX Coordinator

- ❑ Contacts each complainant (i.e., person who is alleged to be the victim of sexual harassment) to discuss supportive measures
- ❑ Considers the complainant's wishes regarding supportive measures
- ❑ Informs the complainant of the availability of supportive measures with or without the filing of a formal complaint Explains to the complainant the process for filing a formal complaint.
- ❑ Must treat complainants and respondents equitably, meaning for a respondent, the recipient must follow a grievance process that ensures due process before imposing any disciplinary sanctions, if respondent is found responsible
- ❑ If a respondent is found to be responsible for sexual harassment, the school must effectively implement remedies for the complainant, designed to restore or preserve the complainant's equal educational access
- ❑ May impose disciplinary sanctions

§106.44(a)



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Who Can Be a Title IX Coordinator vs. Who Should Not Be a Title IX Coordinator

- Title IX does not categorically preclude particular employees/individuals from serving as Title IX Coordinators. Anyone who is properly trained can be the Title IX Coordinator.
- However, Title IX Coordinators should not have other job responsibilities that **may create a conflict of interest**. Because some complaints may raise issues as to whether or how well the school has met its Title IX obligations, designating the same employee to serve both as the Title IX Coordinator and the general counsel (which could include representing the school in legal claims alleging Title IX violations) poses a serious risk of a conflict of interest.
- Designating a full-time Title IX Coordinator will minimize the risk of a conflict of interest.



Multiple Reports of Alleged Conduct

- Title IX Coordinator **is not required** to file a formal complaint after receiving multiple reports about the same respondent, considering the following:
 - Potential effects on complainants, including the right to forego a formal complaint and confidentially seek supportive measures
 - Would remove Title IX Coordinator's discretion and could affect neutrality
 - Would require Title IX Coordinator to make credibility determinations



Investigator

- Assigned by the Title IX Coordinator
 - Title IX Coordinator can serve as the Investigator
- Must be impartial, unbiased and free from conflicts
- Oversees the prompt, thorough gathering of all facts based on the filing of formal complaint
- Effectively communicates with all participants throughout and involved in the investigation
- Provide notice of any good faith delays
- Understands relevance and creates an investigative report that fairly summarizes relevant evidence



What Should a Title IX Investigation Include?

The specific steps in a school's Title IX investigation will vary depending on the nature of the allegation, the age of the student or students involved, the size and administrative structure of the school, state or local legal requirements (including mandatory reporting requirements for schools working with minors), and what it has learned from past experiences.

- Definition:
 - The term “*investigation*” refers to the process the school uses to resolve sexual violence complaints.
- This includes the fact-finding investigation and any hearing and decision-making process the school uses to determine:
 - **(1) whether or not the conduct occurred; and,**
 - **(2) if the conduct occurred, what actions the school will take to end the sexual violence, eliminate the hostile environment, and prevent its recurrence, which may include imposing sanctions on the perpetrator and providing remedies for the complainant and broader student population.**
- The investigation must be adequate, reliable, impartial and prompt and include an opportunity for both parties to present witnesses and other evidence



Burdens of Proof and Gathering Evidence

It is the recipient's burden to impartially gather evidence and present it so that the decision-maker can determine whether the recipient has shown that the weight of the evidence is sufficient to reach the selected standard of proof.

- **There is no burden of proof on complainants or respondents.**

§ 106.45(b)(5)(i)



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Decision Maker

- Oversees the hearing or administrative determination proceeding or, when applicable, reviews appeals
 - Must be impartial, unbiased and free from conflicts
 - Must receive training on any technology to be used at a live hearing, and on issues of relevance of questions and evidence, including when questions and evidence about a complainant's sexual predisposition or prior sexual behavior are not relevant
 - Title IX Coordinator and Investigators cannot serve as the Decision Maker



Decision maker

- With or without a hearing, after the school has sent the investigative report to the parties 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. The decision-maker(s) must explain to the party proposing the questions any decision to exclude a question as not relevant.



Decision Making: Objective & Unbiased

- The school entity's decision maker needs to objectively evaluate the relevant evidence and reach conclusions about whether the respondent is responsible for the alleged sexual harassment.
- Decision makers need to use independent judgment and be free from conflicts of interest and bias.
- Decision makers will weigh the relevant evidence and decide whether it meets the standard of evidence for sexual harassment allegations.
- Who are appropriate decision makers within your school entity?



Outcome Determination

- Issued by the decision maker(s) who oversees and manages the administrative outcome proceeding or live hearing
- Must be a written determination regarding responsibility
- To reach this determination, the decision maker **must apply the standard of evidence**
- The recipient must provide the written determination to the parties **simultaneously**. The determination regarding responsibility becomes final either on the date that the recipient provides the parties with the written determination of the result of the appeal, if an appeal is filed, or if an appeal is not filed, the date on which an appeal would no longer be considered timely.



Outcome Determination (Cont'd)

- The written determination must include:
 - (A) Identification of the allegations potentially constituting sexual harassment
 - (B) 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
 - (C) Findings of fact supporting the determination
 - (D) Conclusions regarding the application of the recipient's code of conduct to the facts
 - (E) 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
 - (F) The recipient's procedures and permissible bases for the complainant and respondent to appeal



Informal Resolution Facilitator

- Serves as a mediator and oversees the informal resolution process seeking a resolution to a formal complaint that both parties agree, in writing, to resolve using restorative justice or mediation practices
- Must be impartial, unbiased and free from conflict



Impartiality

- Recipients **are not required** to use outside unaffiliated Title IX personnel to avoid conflicts and may use their own employees to comply with the final regulations.
- Administrative hierarchy, employment relationships and professional experiences or affiliations (such as a self-described survivor or feminist) are not automatically prohibited conflicts of interest.
- Recipients **have discretion to decide how best to implement the prohibition on conflicts of interest and bias**, including providing a process for parties to assert claims of conflict of interest or bias during the investigation.

§106.45(b)(1)(iii)



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Appeals

Parties are entitled to appeal

- An outcome determination
- A dismissal of a formal complaint
- Dismissal of any allegation in the formal complaint

The (3) three bases for an appeal are:

1. 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
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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**Title IX Final Regulations
Part II: Policy, Procedures & Training**

Implementing the New Regulations

**Investigations, Administrative Outcomes &
Appeals**



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Relevance

This term requires that the evidence or testimony directly relate to the issues disputed or discussed.

- Inculpatory and exculpatory evidence is considered relevant.
- Information protected by a legally recognized privilege is not relevant.
- Questions about a Complainant's prior sexual behavior or sexual predisposition are not relevant, unless:
 - Offer to prove someone other than Respondent is responsible
 - Offer to prove the Complainant provided Respondent with prior consent

§106.45(b)(1)(ii) & §106.45(b)(6)



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Inculpatory Evidence

- Inculpatory evidence is evidence that shows, or tends to show, a person's involvement in an act, or evidence that can establish guilt.



Exculpatory Evidence

- Evidence that tends to show a person's innocence is considered exculpatory evidence.



Credibility

That quality in a witness which renders their testimony worthy of belief.

Factors used to assess credibility:

- Observation of a witness or participant's general demeanor
- Opportunity for the witness/ participant to observe and provide the information they are giving
- Noting consistencies or inconsistencies in their narrative
 - Compare or document any prior inconsistent statements
- Any bias or motive to lie
- Probability or improbability of the person's description of the event: Does it have the ring of truth or make sense?

“A decision-maker may judge credibility based on, for example, factors of plausibility and consistency in party and witness statements. Specialized legal training is not a prerequisite for evaluating credibility, as evidenced by the fact that many criminal and civil court trials rely on jurors (for whom no legal training is required) to determine the facts of the case including the credibility of witnesses.” (pg. 1238)



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Investigation: Interviewing

Sample of general questioning:

- What happened?
- When did it happen?
- Where did it happen?
- If a witness, do you know what is alleged to have happened?
 - If so, where were you when it happened?
- If a witness, do you know the respondent and complainant?
 - If so, how long have you known them and how would you describe them (friend, acquaintance)?
- Have talked to others about what happened? Who and when?
- Did you write down what happened? (diary [video or otherwise], notes, blog)
- Have you posted or seen anything posted on social media about this incident?



Recordkeeping

- A school must maintain for a period of **seven years** records of:
 - Each sexual harassment investigation including any determination regarding responsibility and any required audio or audiovisual recording or transcript, any disciplinary sanctions imposed on the respondent, and any remedies provided to the complainant designed to restore or preserve equal access to the recipient's education program or activity
 - Any appeal and the result therefrom
 - Any informal resolution and the result therefrom
 - All materials used to train Title IX Coordinators, investigators, decision makers and any person who facilitates an informal resolution process. A recipient must make these training materials publicly available on its website, or if the recipient does not maintain a website the recipient must make these materials available upon request for inspection by members of the public.



Step by Step: Incident Report to Final Outcome Determination



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Step by Step: Incident Report to Final Outcome

- **Step One:** Incident Report received by Title IX Coordinator
- **Step Two:** Report reviewed and contact made with
 - Complainant, if known
 - Parent/legal guardian
 - If applicable, statewide child abuse reporting agency and/or law enforcement



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Step by Step: Incident Report to Final Outcome (Cont'd)

Step Three:

- The Title IX Coordinator must promptly contact the complainant confidentially to discuss:
 1. The availability of supportive measures
 2. Consider the complainant's wishes with respect to supportive measures
 3. Inform the complainant of the availability of supportive measures with or without the filing of a formal complaint
 4. Explain to the complainant the process for filing a formal complaint
 5. Also, review and any other applicable policy, such as grievance process for employees under employee contract or student code of conduct disciplinary process
 6. Recommend giving the complainant a brochure or "one pager" that contains all the information that was explained and/or how to access it on the district's website



Step by Step: Incident Report to Final Outcome

Step Four:

- Conduct a team internal assessment (i.e. Title IX Coordinator, Deputy Title IX Coordinator, Compliance Director, Principal or Asst. Principal, School Resource Officer). Use a checklist to determine what information is known.
- Is Complainant known or unknown?
- Is alleged perpetrator/respondent known or unknown?
- Has Complainant requested confidentiality or anonymity?
- If Respondent is known, based on content of report, what emergency measures need to be taken to keep parties safe (i.e. no contact order, change of classes).
- If **No Contact Order** is requested by Complainant or determined to be a necessary supportive safety measure, inform the Complainant in advance to note that confidentiality cannot be maintained by virtue of the nature of a no contact directive.
- If a report was made to a child abuse hotline or law enforcement, document if there is any directive or restriction from either entity directing the school to not proceed with outlined procedural next steps under Title IX.
- Notify school personnel who are in “need to know” roles of only the necessary information needed to ensure the safety of the parties and school community.
- Follow up with Complainant in person and via email to check in on their well-being.
- Follow up with parents of Complainant via phone, in person or email to check in on well-being of Complainant to receive any further concerns.
- Additional follow up with Complainant should be at regular intervals and with ongoing consultation with parents to make sure welcomed and not-intrusive.



Step by Step: Incident Report to Final Outcome (Cont'd)

Step Five:

- If a formal complaint is received by the school from the Complainant or Complainant's parent, the school should:
 - Jurisdiction/Scope Question:
 - Review the allegations and if the allegations in a formal complaint **do not meet** the definition of sexual harassment in the Final Rule, or **did not occur** in the school's education program or activity against a person in the United States, the school must dismiss such allegations for purposes of Title IX *but may still address the allegations in any manner the school deems appropriate under the school's own code of conduct or any other non-Title IX disciplinary policy.*
 - If there is sufficient information available to the school to conclude that the allegations do meet the definition of sexual harassment and did occur in the school's education program or activity against a person in the United States, then the Coordinator should re-discuss with Complainant and their parents the grievance process and explain the informal resolution process as an option.



Step by Step: Incident Report to Final Outcome (Cont'd)

- **Step Six:**

- Notify the Respondent and the Respondent's parents of the filing of a formal complaint
- Explain grievance process and the informal resolution process
- Offer supportive measures
- Discuss no contact directive/orders



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Step by Step: Incident Report to Final Outcome (Cont'd)

Step Seven:

- If Complainant or Respondent wants to pursue the informal resolution process, determine if the other party wants to voluntarily engage in the informal resolution process as well
- If so, then identify an impartial, neutral, trained party to serve as the informal resolution facilitator and assign the matter
- Provide the name and information about the informal resolution facilitator to see if either party can state if there is a basis as to why the person selected cannot be fair and impartial or is biased



Step by Step: Incident Report to Final Outcome (Cont'd)

Step Eight:

- If neither party wants to pursue the informal resolution process, then begin the formal investigation into the incident and issue a Notice of Investigation that states the nature of the complaint, when the complaint was received, what school district policies are alleged to have been violated and who is conducting the investigation.
- Identify an impartial, neutral, trained party to serve as the investigator and assign the matter.
- Provide the name and information about investigator to see if either party can state if there is a basis as to why the person selected cannot be fair and impartial or is biased.



Step by Step: Incident Report to Final Outcome (Cont'd)

Step Nine:

- Provide the Investigator with access to all relevant information and contact information for witnesses.
- Make sure the Investigator, if external, has all necessary child abuse/FBI clearances in order to meet with students and be in the school building.
- Get periodic updates from Investigator and update parties and their parents at the same time as to the status of the investigation.
- Issue the investigation report that fairly summarizes the relevant evidence, hard copy or electronic format, contemporaneously to the parties at least 10 days prior to a hearing or administrative outcome proceeding.



Step by Step: Incident Report to Final Outcome (Cont'd)

Step 10:

- Identify a decision maker who is unbiased, neutral and trained to either conduct a live hearing or render a decision based on their review of the investigation report and all other relevant evidence.
 - A live hearing is **NOT** required in K-12 schools. With or without a hearing, schools should provide the investigative report in advance to each party and the decision maker must provide each party the opportunity to submit written questions to the other party and witnesses and receive an answer before a determination regarding responsibility is reached.



Step by Step: Incident Report to Final Outcome (Cont'd)

Step 11:

Receive from the decision maker the Outcome Determination letter and deliver it to the Complainant and Respondent. Delivery should be contemporaneous to both parties.

- The Outcome Determination should include the decision maker's findings of fact, application of the standard of proof outlined in the policy, rationale, conclusion and sanction.
- Review the school code to determine if, based on sanction recommendation, the school board must review and vote to approve or reject the Outcome Determination and sanction recommendation.



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Step by Step: Incident Report to Final Outcome (Cont'd)

Step 12:

- Provide information to both parties about their right to appeal the decision, the basis for the appeal and when the party must file their appeal.

Step 13:

- If a timely appeal is filed, the appeal decision maker(s) must be identified, notice given to the parties of who is handling the appeal and the timeframe for when the appeal decision would be made.
- The decision maker on appeal must be trained, impartial and unbiased.



Step by Step: Incident Report to Final Outcome (Cont'd)

Step 14:

- Notify parties in writing of the appeal decision and that the decision is final.

Step 15:

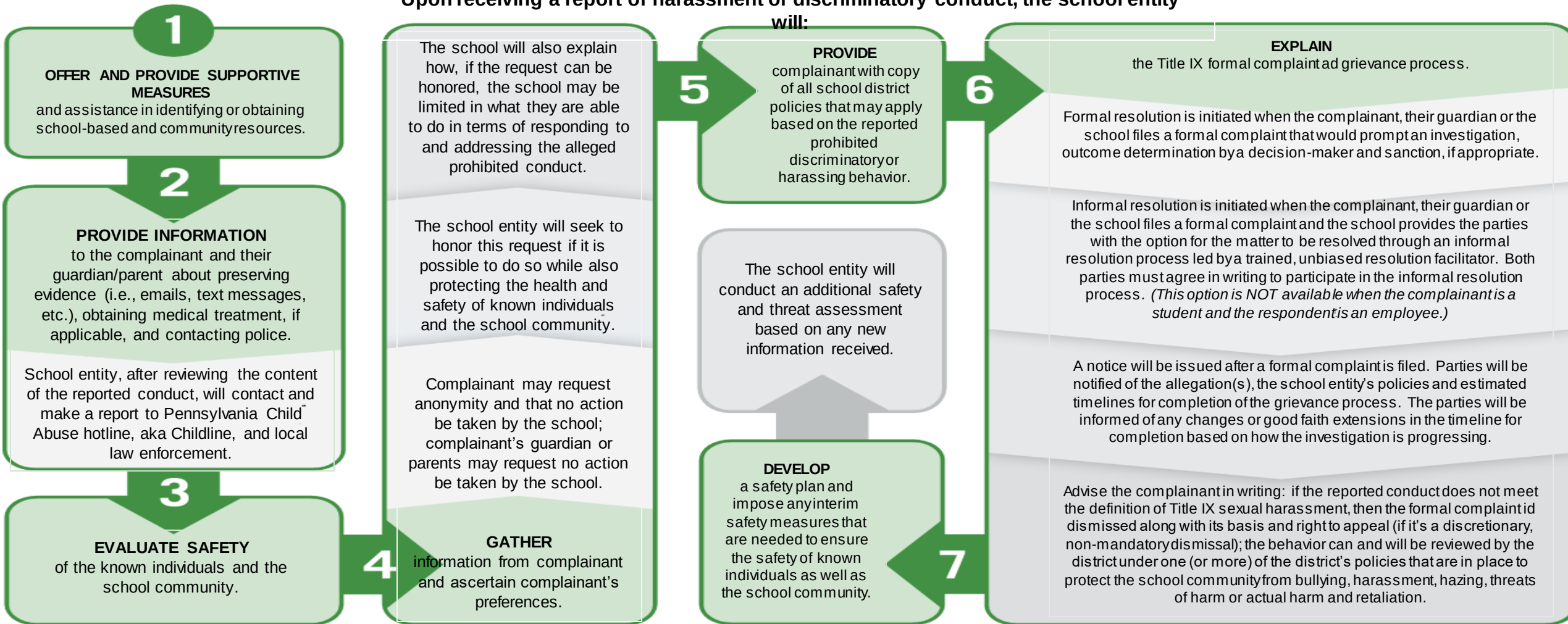
- Secure all documents and information gathered and preserve all information for seven years.



The Path of a Report of Harassment or Discriminatory Conduct

Initial Assessment of Report

Upon receiving a report of harassment or discriminatory conduct, the school entity will:



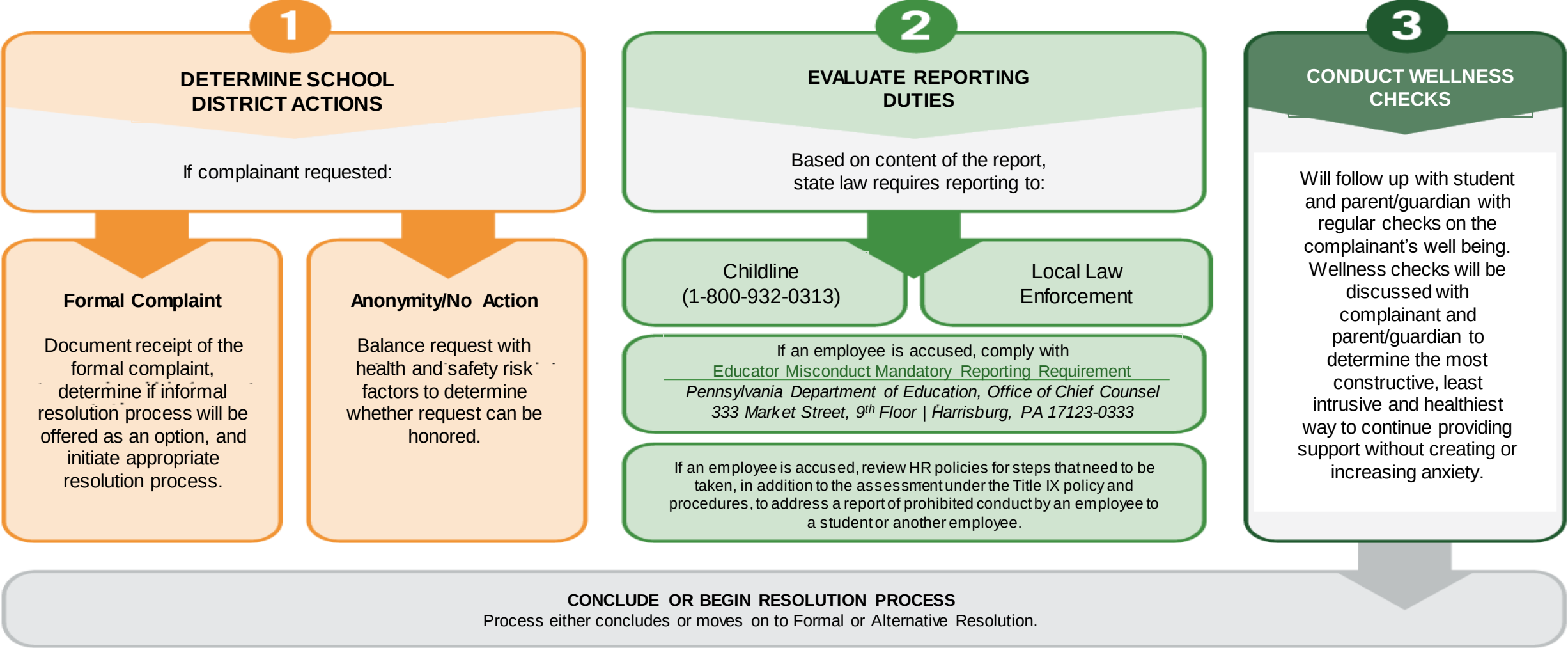
A REPORT TO LAW ENFORCEMENT MAY BE MADE AT ANY POINT THROUGH THIS PROCESS • RESOURCES AND SUPPORT ARE AVAILABLE THROUGHOUT THIS PROCESS



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The Path of a Report of Harassment or Discriminatory Conduct

Initial Assessment of Report



A REPORT TO LAW ENFORCEMENT MAY BE MADE AT ANY POINT THROUGH THIS PROCESS • RESOURCES AND SUPPORT ARE AVAILABLE THROUGHOUT THIS PROCESS

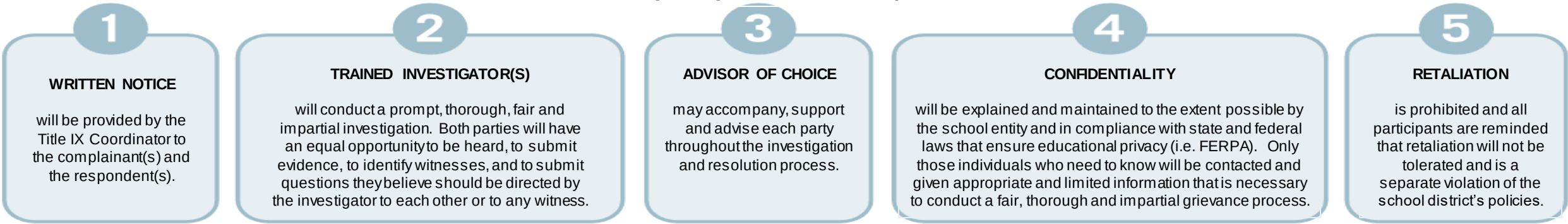


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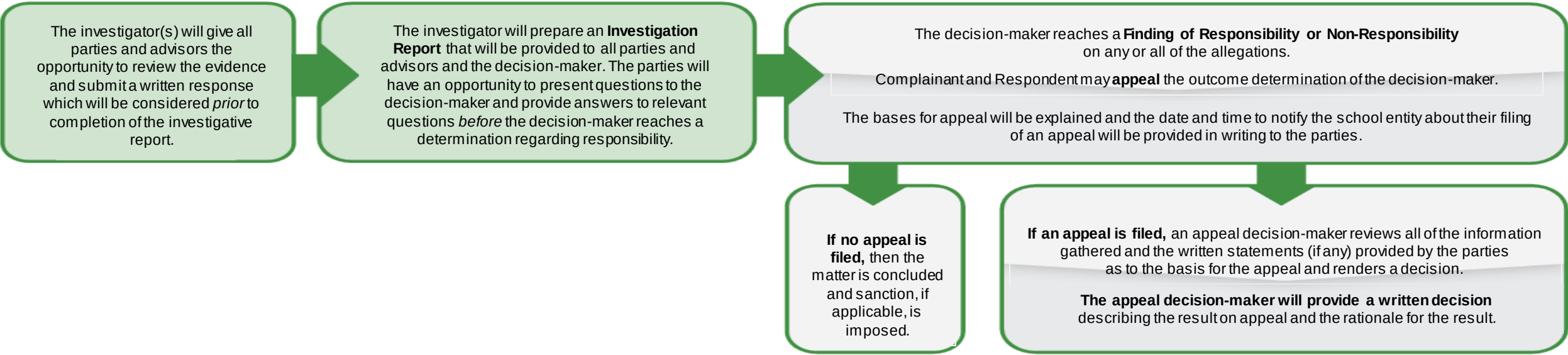
The Path of a Report of Harassment or Discriminatory Conduct

Initial Assessment of Report

At the beginning of the resolution process:



At the conclusion of an investigation:



A REPORT TO LAW ENFORCEMENT MAY BE MADE AT ANY POINT THROUGH THIS PROCESS • RESOURCES AND SUPPORT ARE AVAILABLE THROUGHOUT THIS PROCESS

Transparency, Confidentiality & FERPA

- Final regulations were enacted to ensure that recipients respond to sexual harassment by offering supportive measures designed to restore or **preserve a complainant's equal educational access without treating a respondent as responsible until after a fair grievance process.**
- The Department clarifies that schools (and, as applicable, parties) must follow relevant state and federal health care privacy laws throughout the grievance process. Nothing in the notice should divulge the complainant's (or respondent's) medical information or other sensitive information, nor does §106.45(b)(2) require disclosure of such information.
- Family Educational Rights and Privacy Act
 - Schools must have written permission from the parent or eligible student in order to release any information from a student's education record. However, [FERPA](#) allows schools to disclose those records, without consent, to the certain parties or under the specifically conditions outlined by the Department (34 CFR §99.31).



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Confidentiality

- §106.71(a) also **mandates confidentiality of the identity of anyone who makes a report or complaint about sex discrimination**. Includes: anyone who makes the report, the complainant, any witness, any person who is reported to be the perpetrator, and the respondent (except as permitted by FERPA).
- As explained more fully in the “§106.6(e) FERPA” subsection of the “Clarifying Amendments to Existing Regulations” section of this preamble, we note that **§106.6(e) of the final regulations makes it clear that the final regulations should be interpreted to be consistent with a recipient’s obligations under FERPA**.
- Schools **may require** advisors to use the evidence received for inspection and review under §106.45(b)(5)(vi) as well as the investigative report under §106.45(b)(5)(vii) only for purposes of the grievance process under §106.45 and **require them not to further disseminate or disclose these materials**. **Additionally, these final regulations do not prohibit a recipient from using a non-disclosure agreement** that complies with these final regulations and other applicable laws.



Parallel Processes/Other Federal or State Obligations

- Law enforcement
- Unions/Collective bargaining agreements
- HR/EEOC
- Special education



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Title IX & Law Enforcement: Two Distinct Systems

“A law enforcement investigation **does not relieve the school of its independent Title IX obligation** to investigate the conduct” and “resolve complaints promptly and equitably.”

“Police investigations may be useful for fact-gathering, but because the standards for criminal investigations are different, **police investigations or reports are not determinative of whether sexual harassment or violence violates Title IX.**”

“Conduct **may constitute unlawful sexual harassment** under Title IX **even if the police do not have sufficient evidence** of a criminal violation.”



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Delays: Law Enforcement Investigation

- The Department **does not require** a school to delay Title IX grievance during a law enforcement investigation.
 - Recipient must respond promptly to every complainant, with or without the filing of a grievance. The duty to respond is triggered when recipient is on notice .
- Recipient **may only delay short-term** based on “good cause,” which may include concurrent law enforcement investigation, but it should not be a long or indefinite delay.



Individuals With Disabilities

- In response to commenters' concerns, the final regulations revised §106.44(a) to require recipients to offer supportive measures as part of the recipient's prompt, non-deliberately indifferent response.
- The prompt response **must** include:
 - Title IX Coordinator promptly contacting complainant to discuss available supportive measures
 - Inform the complainant of the supportive measures available with or without the filing of a formal complaint
 - Explain the process for filing a formal complaint
- Recipients must meet these requirements while also complying with disability laws (IDEA, Section 504, ADA). These regulations do not address a recipient's obligations under applicable disability laws.
- To the extent that there is an overlap between supportive measures with Title IX and disability laws, the Title IX Coordinator is responsible for the implementation of such supportive measure.



Individuals With Disabilities (Cont'd)

- The Department responded to concerns re: students with disabilities having difficulty in comprehending sexual harassment and communicating to a recipient about an incident.
- Recipients are free to provide educational information to students to help with these concerns.
- The Department believes the expansion of actual knowledge to include notice to any ESE employee will aid in the communication.
- Recipients must react to complainants with impartiality and without bias.
- §106.45(b)(1)(iii) prohibits Title IX Coordinators, investigators, decision-makers and anyone involved in informal resolution process from having conflicts of interest or bias against complainants or respondents by requiring training that includes: “how to serve impartially, including by avoiding prejudgment of the facts at issue conflicts of interest, and bias.”



Individuals With Disabilities (Cont'd)

- To guard against concerns that stereotypes may lead to a recipient unfairly punishing a student with disabilities for reporting a sexual harassment, the final regulations added §106.71, which prevents retaliation:
 - §106.71 stated that “charges against an individual for code of conduct violations that do not involve sex discrimination or sexual harassment, but arise out of the same facts or circumstances as a report or complaint of sex discrimination, or report of formal complaint of sexual harassment, for the purpose of interfering with any right or privilege secured by Title IX or its implementing regulations, constitutes retaliation.”
 - Bullying can be a form of retaliation



Individuals With Disabilities (Cont'd)

- Any disability of Respondent or Complainant is part of the “surrounding circumstances” to be taken into considering when determining if conduct rises to sexual harassment.
- When the conduct of a Respondent with a disability is determined to be sexual harassment, the recipient has flexibility to impose consequences for action. The Department “does not second guess whether the recipient imposes a disciplinary sanction.”
 - Keep in mind:
 - Complainant is still entitled to remedies that restore or preserve the right to equal educational access
 - There can be no disciplinary sanctions without following the grievance process in §106.45



Special Education Considerations

- Notify Special Education Director and/or 504 Coordinator as soon as possible if a special education student is involved in any way in an investigation – whether an accused, accuser, witness, etc.
- Impact on IEP Team and Offers of FAPE
 - Special Ed team should be aware of any Title IX implications in the event the actions at issue prompt the need for changes to a student's IEP – FBA and other behavioral supports, schedule or program changes, a new evaluation, etc.
 - If your Title IX investigation of unidentified students produces information that could be relevant to a school's child find obligations, share the concern with the special education team to see if it warrants an IDEA and/or 504 Evaluation.



Special Education Considerations (Cont'd)

- Disciplinary Protections:
 - Schools cannot change the placement of a student (removal for more than 10 consecutive school days or a pattern of shorter removals cumulating to 10-15 school days) in response to an offense that is a manifestation of the student's disabilities. This applies to students eligible for services or protection under the IDEA and Section 504.
 - Schools can generally remove students for shorter periods of time that do not amount to a “change in placement” and should use those days strategically throughout the investigatory process.
 - Consulting special education administrators will ensure your investigatory procedures and ultimate determinations do not run afoul of these protections for identified students, while also honoring its obligations under Title IX.
- The two processes can likely run parallel to each other when coordination occurs early on in the process.



Equal Opportunity to Present Witnesses & Other Inculpatory/Exculpatory Evidence

Each party must have the opportunity to present fact and expert witnesses.

- Recipients may adopt rules governing how admissible relevant evidence is evaluated for weight or credibility by the decision maker.
 - Any rules adopted must be applied equally to both parties

§106.45(b)(5)(ii)



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Recipients Must Not Restrict Ability of Either Party to Discuss Allegations or Gather and Present Relevant Evidence

- This applies to discussions of “the allegations under investigation,” which means a formal complaint has been filed.
- The regulations do not require recipients to give respondents a copy of the formal complaint.

§106.45(b)(5)(iii)



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Advisors of Choice

Each party is entitled to an advisor throughout the grievance process.

- The recipient **may not limit the choice or presence** of an advisor.
- The advisor of choice may be, but is not required to be, a lawyer.
- Recipients may impose certain requirements on advisors:
 - Require advisors to use the evidence received for inspection and review as well as the investigative report only for purposes of the grievance process
 - Require advisors not to further disseminate or disclose these materials
 - Recipients may use a non-disclosure agreement that complies with the final regulations and other applicable laws

§106.45(b)(5)(iv)



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Advisors of Choice (Cont'd)

- **Union Representative:** Where an advisor is a union representative and there is a conflict between a union contract or practice and the final regulations, the **final regulations will have preemptive effect.**
- The prohibition on having conflicts of interest or bias does *not* apply to party advisors.
 - For example, the existence of a possible conflict of interest where an advisor is assisting one party and also expected to give a statement as a witness does not violate the final regulations.

§106.45(b)(5)(iv)



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Inspection & Review of Evidence Directly Related to the Allegations

Complainants and Respondents must have an equal opportunity to inspect and review the relevant and potentially relevant evidence.

- Both parties must be given sufficient time to meaningfully prepare arguments based on the evidence that further each party's view of the case
 - The parties may also present additional relevant facts and witnesses that the decision-maker should objectively evaluate before reaching a determination on responsibility.
- A recipient may require parties and advisors to refrain from disseminating the evidence reviewed
- A recipient may also permit or require the investigator to redact information not directly related to the allegations or that is barred from use

§106.45(b)(5)(vi)



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Inspection & Review of Evidence Directly Related to the Allegations (Cont'd)

The recipient is **required** to provide *at least 10 days* for inspection and review, but may give the parties more than 10 days to respond

- The recipient must still conclude the grievance process within the reasonably prompt time frames to which they have committed.
- The recipient may decide whether the number of days provided are counted as business days, school days, calendar days or otherwise.
- A school may require all parties to submit any evidence that they would like the investigator to consider prior to the time for inspection
- A school may also choose to allow both parties to provide additional evidence in response to their inspection and review of the evidence as well as an opportunity to respond to the other party's additional evidence
- Similarly, a recipient may choose whether to provide a copy of each party's written response to the other party to ensure fairness, transparency, and allow the parties to adequately prepare for any hearing

§106.45(b)(5)(vi)



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Recordkeeping

- A school must maintain for a period of **seven years** records of:
 - Each sexual harassment investigation including any determination regarding responsibility and any required audio or audiovisual recording or transcript, any disciplinary sanctions imposed on the respondent, and any remedies provided to the complainant designed to restore or preserve equal access to the recipient's education program or activity
 - Any appeal and the result therefrom
 - Any informal resolution and the result therefrom
 - All materials used to train Title IX Coordinators, investigators, decision makers and any person who facilitates an informal resolution process. A recipient must make these training materials publicly available on its website, or if the recipient does not maintain a website the recipient must make these materials available upon request for inspection by members of the public.

