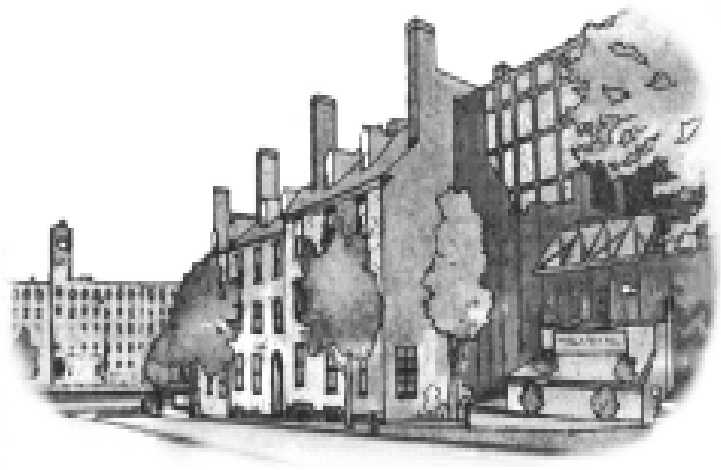
Navigating and Implementing the Title IX Regulations: Training for Title IX Coordinators, Investigators and Decision-Makers

Presented to Merrimack School District Administrators

March 25, 2026



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A Word of Caution

No two cases are exactly alike. This material is designed to provide educators with an understanding of the Title IX regulations. This material does not include every aspect of the law pertaining to Title IX. You are strongly encouraged to seek a legal opinion from your legal counsel regarding any specific case. In addition, these amended regulations are being challenged in several courts across the country. This material discusses federal regulations that are subject to change, and the onus is on the reader to ensure that there has been no change to the status of the regulations.

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Overview

The purpose of this material is to assist educators in understanding the new federal regulations pertaining to Title IX. This material does not include every aspect of the law. You are strongly encouraged to seek a legal opinion from your legal counsel regarding any specific case. This material discusses federal regulations that are subject to change, and the onus is on the reader to ensure that there has been no change to the status of the regulations.

I. Title IX, 20 USC 1681(a)

Title IX states:

> No person . . . shall, on the basis of sex, be excluded from participation in, be denied the benefit of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.

20 USC 1681(a).

Title IX is applicable to all school districts that receive federal financial assistance. See 20 U.S.C. § 1681(a).

Title IX offers both substantive as well as procedural protections. See 20 USC § 1681(a); see also 34 C.F.R. § 106.71 (providing that Title IX applies the procedural provisions applicable to Title VI of the Civil Rights Act of 1964).

In 1979, the Supreme Court of the United States clarified that the objectives of Title IX are two-fold: to "avoid the use of Federal resources to support discriminatory practices" and to "provide individual citizens effective protection against those practices." Cannon v. University of Chicago, 441 U.S. 677, 704 (1979).

The United States Supreme Court has held that Title IX may be enforced through a private right of action, and that plaintiffs may obtain damages for violations of Title IX. Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60, 76 (1992) (damages); Cannon v. Univ. of Chicago, 441 U.S. 677, 717 (1979) (private right of action). The Court has also held that plaintiffs alleging unconstitutional gender discrimination in schools may bring suit under 42 U.S.C. § 1983, based on the Equal Protection Clause of the Constitution. Fitzgerald v. Barnstable Sch. Comm., 555 U.S. 246 (2009).

In addition, Title IX discrimination may occur when there is a "significant gender-based statistical disparity," such as "practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified." Franchi v. New Hampton Sch., 656 F.Supp. 2d 252, 261 (D.N.H. 2009) (citations omitted) (noting that an allegation that a private school "regularly discharges students with eating disorders, resulting in the dismissal of more girls than boys since girls are the ones

who usually suffer from them" may be sufficient to state a claim for discrimination under Title IX).

II. The Title IX Regulations

In May 2020, the United States Department of Education ("Department" or "Department of Education") released the Final Regulations under Title IX. The amended regulations took effect on August 14, 2020. The full text of the regulations and comments are available online at: https://www.govinfo.gov/content/pkg/FR-2020-05-19/pdf/2020-10512.pdf.

A. Definitions

The regulations and District policy ACAC contain a number of definitions, including the following.

1. "Sexual Harassment"

Conduct on the basis of sex (as defined by Title IX), occurring in a school system education program or activity that satisfies one or more of the following:

(1) "A school district employee conditioning an aid, benefit, or service of education program or activity on an individual's participation or refusal to participate in sexual conduct irrespective of whether the conduct is welcomed by the student or other employee;

(2) Unwelcome sex-based/related conduct determined by a reasonable person to be so severe, pervasive, AND objectively offensive that it effectively denies a person equal access to the education program or activity (this standard requires consideration of all the facts and circumstances, including, but not limited to, the ages and disability statuses of the harasser and victim and the number of individuals involved and their authority; OR

(3) Sexual assault, dating violence, domestic violence, or stalking as defined in state or federal law.

Policy ACAC; see also 34 CFR § 106.30.

Conduct that may constitute sexual harassment includes, but is not limited to:

- Sexually suggestive remarks or jokes;
- Verbal harassment or abuse;
- Displaying or distributing sexually suggestive pictures, in whatever form (e.g., drawings, photographs, videos, irrespective of format);

- Sexually suggestive gesturing, including touching oneself in a sexually suggestive manner in front of others;
- Harassing or sexually suggestive or offensive messages that are written or electronic;
- Subtle or direct propositions for sexual favors or activities;
- Touching of a sexual nature or groping; and
- Teasing or name-calling related to sexual characteristics or the belief or perception that an individual is not conforming to expected gender roles or conduct.

See also Policy ACAC. However, the above are just examples, and the conduct would need to meet the definition of "sexual harassment," above to constitute a violation of Title IX.

2. "Actual Knowledge"

Actual Knowledge is defined as:

> *Actual knowledge* "occurs when the District's Title IX Coordinator or **ANY** employee of one of the District's schools (other than a "respondent" or alleged harasser) receives a notice, report or information or becomes aware of sexual harassment or allegations of sexual harassment."

Policy ACAC; see also 34 CFR 106.30(a).

Actual knowledge does not necessarily trigger the obligation to investigate, but it does trigger the obligation to provide supportive measures.

Per Policy ACAC, District employees are required to "without delay" inform the Title IX Coordinator of alleged sexual harassment." Policy ACAC.

3. "Deliberate Indifference"

The phrase "deliberate indifference" is now no longer analyzed coextensively with actual knowledge, but rather can be found in the regulations' General Response to Sexual Harassment, 34 C.F.R. § 106.44 (a):

> "A recipient with actual knowledge of sexual harassment in an education program or activity of the recipient against a person in the United States, must respond promptly in a manner that is not deliberately indifferent."

The regulations state that a district is deliberately indifferent "only if its response to sexual harassment is **clearly unreasonable in light of the known circumstances**." 34 C.F.R. § 106.44(a) (emphasis added). Under the deliberate indifference standard, upon receiving a report of sexual harassment, at a minimum, the District has an obligation to offer supportive measures to the complainant and to follow its grievance

process prior to imposing any disciplinary sanctions or other actions that are not supportive measures against a respondent.

4. "Supportive Measures"

"Supportive measures" are defined as "free, non-disciplinary, non-punitive individualized services and shall be offered to the complainant, and may be offered to the respondent, as appropriate. These measures may include, but are not limited to, the following:

1. Counseling;
2. Course Modifications;
3. Schedule changes; and
4. Increased monitoring or supervision.

Such measures shall be designed to restore or preserve equal access to the District's education programs and activities without unreasonably burdening the other party, including measures designed to protect the safety of all parties or the District's educational environment, and/or deter sexual harassment. Supportive measures shall remain confidential…"

Policy ACAC; 34 C.F.R. § 106.30.

Supportive measures may also include:

- extensions of deadlines or other course-related adjustments,
- modifications of work or class schedules,
- mutual restrictions on contact between the parties,
- changes in work locations,
- leaves of absence,
- increased security and monitoring of certain areas of the school, and
- other similar measures.

34 C.F.R. § 106.30.

The duty to provide supportive measures is triggered upon actual knowledge of a sexual harassment or allegations of sexual harassment and occurs regardless of whether there is a need to implement an emergency removal. See 34 C.F.R. § 106.44(a) and (c).

The comments to the regulations elaborate that the supportive measures must be tailored to the complainant/respondents' unique circumstances, and the Department of Education explained that its main focus is to ensure that districts take action to restore and preserve a complainant's equal educational access, while also leaving discretion to districts to make disciplinary decisions only when respondents are found

responsible. Further, supportive measures cannot be punitive, such as prohibiting participation in athletics or other student organizations.

5. "Formal Complaint"

It is the filing of a formal complaint that triggers the District's duty to investigate a Title IX Complaint.

34 C.F.R. § 106.30(a) defines "Formal complaint" as:

> "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 under § 106.8(a), and by any additional method designated by the recipient."

Policy ACAC also clarifies that the complaint may be filed by the complainant's parent/guardian.

In cases where a complainant declines to file a formal complaint and indicates that they do not wish to file a formal complaint, the District is still obliged to offer supportive measures to the complainant. See e.g. 34 C.F.R. § 106.44(a).

The District must investigate allegations in a formal complaint, however, the regulations include provisions pertaining to mandatory dismissal and permissive dismissal of formal complaints. 34 C.F.R. § 106.45(b)(3).

A formal complaint must be dismissed if the allegations, even if true, would not constitute sexual harassment, if they did not occur in the District's education program or activity, or did not occur against a person in the United States. Id. However, such dismissal does not preclude from taking action against the respondent based on another provision of its code of conduct. Id.; see also Policy ACAC.

The District may dismiss the formal complaint, or any allegations contained in the complaint, if the complainant notifies the Title IX Coordinator in writing that the complainant would like to withdraw the complaint for any allegations therein, the respondent is no longer enrolled or employed by the recipient, or specific circumstances prevent the recipient from

gathering evidence sufficient to reach a determination as to the formal complaint or allegations therein. Id.; see also Policy ACAC.

The Superintendent must be consulted with regard to potential dismissal of a complaint. Policy ACAC.

The District must provide prompt written notice of the dismissal and any reasons therefore, simultaneously to both parties. Id.

6. "Education Program or Activity"

Districts are responsible for Title IX enforcement within an "education program or activity." An "education program or activity" is broadly defined to include locations, events, or circumstances over which the institution exercises substantial control. 34 C.F.R. § 106.44(a). However, the amended regulations clarify that Title IX applies only to conduct that occurs in the United States, not to any incident that occurs on foreign soil, including during a school-sponsored study abroad program or other activity. See 34 C.F.R. § 106.8(d).

Examples include but are not limited to: field trips (except for international trips), extracurricular activities, district provided transportation, any district sponsored events or activities occurring on school grounds.

7. "Complainant and Respondent"

The "complainant" is the "individual who is alleged to be the victim of conduct that could constitute sexual harassment." The "respondent" is the "individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment." 34 C.F.R. 106.30; Policy ACAC.

8. Additional definitions found in Policy ACAC

There are several other terms that are defined by Policy ACAC:

- "Days" is defined as "calendar days, but shall exclude non-weekend days on which the SAU office is closed (e.g., holidays, office-wide vacations), or any weekday during the school year on which school is closed (e.g., snow days)."

- "Decision Maker" is defined as the person tasked with the responsibility of making an initial determination of responsibility (may be referred to as the "initial decision maker") or the responsibility to decide an appeal (may be referred to as the "appeals" or "appellate decision maker") with respect to formal complaints of sexual harassment.

- "Determination of Responsibility" is defined as "the formal finding by the decision-maker on each allegation of Sexual Harassment contained in a Formal Complaint that the Respondent did or did not engage in conduct constituting Sexual Harassment under Title IX."

Policy ACAC.

IV. Conducting an Effective Title IX Investigation

The Title IX Grievance Process commences upon the filing of a formal complaint of sexual harassment. 34 C.F.R. § 106.45(b).

The investigator's role in the Title IX process is that of a fact finder. All individuals involved in the Title IX grievance process (Title IX Coordinator, Investigators, Decision-makers and appellate decision-makers) must be free from conflicts of interest or bias. 34 C.F.R. § 106.45(b). The conflict-of-interest requirement extends to both the individuals who are involved in the formal complaint (complainant, respondent and any witnesses) along with complainants or respondents in general. See also Policy ACAC.

The term "bias" is defined as "a mental inclination of tendency; prejudice; predilection"; "actual bias" as "genuine prejudice that a judge, juror, witness or other person has against some person or relevant subject"; "implied bias" as "Bias, as of a juror, that the law conclusively presumes because of kinship or some other incurably close relationship; prejudice that is inferred from the experiences or relationships of a judge, juror, witness, or other person." See Black's Law Dictionary (11th Ed., 2019).

The term "conflict of interest" means "a real or seeming incompatibility between one's private interests and one's public or fiduciary duties." See Black's Law Dictionary (11th Ed., 2019).

If an investigator (or the Title IX Coordinator or any other individual involved in decision-making, informal resolution or appeals processes) has or appears to have a conflict of interest, or bias, then best practice is to select a different individual to serve in that role.

A. Minimum Requirements for Title IX Investigations

The regulations and Policy ACAC outline the minimum requirements for Title IX investigations:

- The parties (complainant and respondent) must have an equal opportunity to present witnesses, including both fact and expert witnesses and other witnesses. Districts cannot restrict the parties' ability to discuss the allegations or gather and present evidence.
- The parties must be allowed to have an advisor of their choosing present at any meeting or grievance proceeding.

    - Districts are still permitted to establish restrictions regarding the extent to which the advisor may participate in the proceedings, so long as the restrictions apply equally to both parties.
- The district must provide written notice to the parties in advance of any meeting or interview conducted as part of the investigation or adjudication in which they are expected or invited to participate.
- Districts cannot access or rely upon any treatment records maintained by a healthcare provider, including the school's student health center, unless the party provides consent.
- Both parties must have an equal opportunity to inspect and review evidence obtained as part of the investigation that is directly related to the allegations raised in a formal complaint, including evidence which the investigator does not intend to rely in reaching a determination regarding responsibility and inculpatory or exculpatory evidence, so that each party can meaningfully respond to the evidence prior to the conclusion of the investigation.

34 C.F.R. § 106.45(b)(5); see also Policy ACAC.

B. The Role of the Title IX Coordinator

Policy ACAC outlines some of the responsibilities of the Title IX Coordinator. These include, but are not limited to, the following:

- Meeting with a complainant and informing the parent/guardian once the Coordinator becomes aware of allegations of conduct that could constitute sexual harassment;

- Identification and implementation of supportive measures;

- Signing or receiving formal complaints of sexual harassment;

- Engaging with the parents/guardians of any parties to any formal complaint of sexual harassment;

- Coordinating with District and school-level personnel to facilitate and assure implementation of investigations, and remedies, and helping to assure that the District otherwise meets its obligations associated with reports and complaints of sexual harassment;

- Coordinating with the Superintendent with respect to assignment of persons to fulfill the District's obligations, both general and case specific, relative to this Policy;

- Coordinating with District and school-level personnel to assure appropriate training and professional development of employees and others; and,

- Helping to assure that appropriate systems are identified and maintained to centralize sexual harassment records and data.

Policy ACAC.

C. Do the Allegations Trigger Other Reporting Duties?

The receipt of a complaint may trigger a reporting duty on the part of the administration. Therefore, it is vital that the administrator know whether or not the law requires that they report the complaint, and to whom the complaint must be reported. By diligently adhering to these reporting obligations the administrator can reduce liability and fulfill their statutory obligations to protect students.

When the investigation is complete (either due to the appeals period expiring or after any appeal has been resolved), administrators should assess whether any additional reporting duties have been triggered.

a. Reporting to Law Enforcement.

Any complaint alleging a crime should be reported to law enforcement. Administrators have a civic duty to report alleged crimes by their students and employees.

In addition, administrators may have a statutory duty to report crimes which occur within the "Safe School Zone," in accord with the "Safe School Zones" Act (RSA 193-D:1 et seq.).

b. Reporting Complaints of Abuse and Neglect.

School officials are under a statutory obligation to report suspected abuse and neglect. RSA 169-C:29. The primary body to whom this reporting obligation runs is the New Hampshire Department of Health and Human Services, Division for Children, Youth and Families. When a complaint is made of potential abuse by an educator, the complaint, if credible, triggers a reason to suspect abuse and a concomitant reporting requirement to the NH Department of Education.

c. Reporting to the Risk Manager/Liability Insurer.

Certain reports may give rise to potential liability on the part of the District. A lack of timely notice to your liability carrier can compromise coverage. You should assume that the liability carrier will request any documentation you create as to the complaint.

d. Reporting to the State Department of Education.

Educators having reason to suspect that another educator has abused or neglected a student have a duty under NH Regulation Ed 510.05 to report that suspected educator to:

- ❒ Their immediate supervisor, superintendent, or both;
- ❒ The Bureau of Credentialing, Department of Education; and
- ❒ The Department of Health and Human Services.

Ed 510.05(e).

In addition, any credential holder must "report any suspected violation of the code of conduct following school, school district, or SAU reporting procedures." See Ed 510.05(a); see also Ed 510.05(c).

D. Notice to the Complainant, Respondent and Other Parties

Once a complainant files a formal complaint of sexual harassment, the Title IX Coordinator must provide written notice to the complainant and the complainant's parent/guardian, and to the respondent (if known) and the respondent's parent/guardian, as well as to any other known parties. The notice must include the following:

- Notice of the district's grievance process, including any informal resolution process, AND
- Notice of the allegations of sexual harassment, "including sufficient details known at the time and with sufficient time to prepare a response before any initial interview." Sufficient details include:
    - the identities of the parties involved in the incident, if known,
    - the conduct allegedly constituting sexual harassment, and
    - the date and location of the alleged incident, if known.
- A statement that the respondent is presumed not responsible for the alleged conduct and that a determination regarding responsibility is made at the conclusion of the grievance process.
- Notice to the parties that they may have an advisor of their choice, who may be, but is not required to be, an attorney;
- Notice that each party is entitled to inspect and review evidence; and
- Notice of any provision in the recipient's code of conduct that prohibits knowingly making false statements or knowingly submitting false information during the grievance process.

34 C.F.R. § 106.45(b)(2); Policy ACAC. If, during the course of an investigation, the scope of the investigation is expanded to include allegations that were not included in the above notice, the District must provide notice of the additional allegations. Id.

If the alleged conduct may also violate other District policies, the parties should also be put on notice of any other applicable policies.

The regulations require that the respondent be presumed not responsible until the conclusion of the grievance process. 34 C.F.R. § 106.45(b)(1)(iv). This presumption is intended to reflect principles of due process and uphold the requirement that investigators and decision-makers serve impartially without prejudging the facts at issue.

E. The Scope and Conduct of the Investigation

The scope of the investigation will vary from case to case, depending on the nature of the complaint. In all cases, however, it will be necessary to interview and take statements from the complaining party and any witnesses. Nearly all investigations will involve document review, including District policies, witness statements given prior to the formal investigation and personnel files of any employees under investigation.

It is important to document all steps of the investigation process, including attempts to contact the complainant, respondent and any witnesses. The investigator's file should include information about who was interviewed, when and where the interview occurred, who was present, what was said, and what documents were reviewed. The investigator's goal is to conduct a thorough and fair investigation.

The parties to the complaint must have an equal opportunity to present witnesses and relevant evidence.

1. <u>Conducting Interviews</u>

The investigator should keep a separate, confidential file for each complaint. Notes of all interviews and discussions should be kept by the investigator. Where appropriate, written statements should be obtained from the complaining party, from the respondent, and, if applicable, from witnesses.

The investigator's notes should include: who was interviewed, when the interview occurred (both the date and the length of time), where the interview occurred, who was present, what was said, and what documents were reviewed.

Interviews should be conducted in a neutral setting, and both parties must be provided with an equal opportunity to provide the investigator with evidence and suggest potential witnesses.

The investigator should provide the individual being interviewed with written notice of the date, time, location, and identification of parties who will be present during the interview.

When conducting interviews, it will be important to begin with open-ended questions, such that questions are being phrased in a manner that is not leading.

a. Garrity Warnings

If an employee is being questioned about matters pertaining to his or her own alleged misconduct, the investigator should consider whether a Garrity warning is required prior to conducting the interview. A Garrity warning is provided to inform the employee that, in accordance with the United States Supreme Court's decision in Garrity v. New Jersey, 385 U.S. 493 (1967), any information or evidence which is gained while an employee is under threat of discharge from government employment is compelled, and therefore cannot be used against the employee in criminal proceedings. However, such information can be used against the employee in administrative proceedings relating to the employment. The Federal Court of Appeals for the First Circuit has interpreted Garrity as applying only in circumstances where the public employee faces automatic dismissal for refusing to cooperate with the investigation. See United States v. Indorato, 628 F.2d 711 (1st Cir. 1980, *cert. denied*, 449 U.S. 1016 (1980)). The New Hampshire Supreme Court has followed the Indorato decision and ruled that the Garrity protections are triggered only when failure to cooperate subjects the employee to automatic dismissal from public employment. State v. Litvin, 147 N.H. 606 (2002).

If a Garrity warning is required, the employee should be presented with a written document explaining the nature of the requested interview, the employee's right against self-incrimination in criminal proceedings, and the intended use of the interview by the employer. The document should also explain the requirement and importance of cooperating in the interview and answering questions related to the employment and warn of any potential discipline, including dismissal, if applicable, for failing to cooperate. It is strongly recommended that an investigator seek the assistance of counsel in presenting a Garrity warning document to an employee under investigation.

b. State Law Considerations

Our State law may place some limitations an investigator's ability to obtain information from social media accounts. Among other things, the statute prohibits districts from "requiring or requesting a student or prospective student to access a personal social media account in the presence of any employee of the district in a manner that enables the employee to observe the contents of the personal social media account." RSA 189:70, I.

The term "social media account" is defined as "an account, service, or profile on a social networking website that is used by a current or prospective student primarily for personal communications. This definition shall not apply to an account opened or provided by [a district] and intended to be used solely on behalf of the [district]." RSA 189:70, IV(b); see also RSA 189:70, III (The statute does not apply to personal social media accounts that are created or provided by the educational institution if the student

has been provided advance notice that the account may be monitored at any time by district employees).

The statute permits the adoption of a policy that permits: "Conducting an investigation, without requiring or requesting access to a personal social media account through username, password, or other means of authentication, for the purpose of ensuring compliance with applicable law or educational institution's policies against student misconduct based on the receipt of specific information about activity associated with a student's social media account. In the case of a minor, the educational institution may request the student's parent or guardian to provide specific data from the student's social media account." RSA 189:70, II.

2. Pre-decision access to Evidence

Before concluding the investigation and prior to completing the investigative report, the investigator must provide the parties and their advisors, if any, with an equal opportunity to inspect and review any evidence obtained during the investigation that "is directly related to the allegations raised in a formal complaint," even if the investigator will not rely on that evidence in reaching a determination. All inculpatory and exculpatory evidence must be included. 34 C.F.R. § 106.45(b)(5)(vi).

Relevant evidence is defined as "evidence tending to prove or disprove a matter in issue." Black's Law Dictionary (11th Ed. 2019). Conversely, "irrelevant evidence' is "[e]vidence not tending to prove or disprove a matter in issue." Id. Relevant evidence will be directly related to the allegations in the complaint, and therefore, must be disclosed to the parties and the evidence should be described in the investigative report.

"Exculpatory evidence" is any evidence tending to establish that the Respondent did not engage in the conduct that is alleged to constitute sexual harassment. See Black's Law Dictionary (11th Ed. 2019). In contrast, "Inculpatory evidence" is evidence showing or tending to show that the Respondent did engage in the conduct alleged to constitute sexual harassment. Id.

Evidence that is directly related to the complaint but does not tend to prove or disprove the allegations, must also be provided to the complainant and respondent as part of their review process.

Evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant, unless it is offered to prove that someone other than the respondent committed the alleged conduct, or if the evidence concerns specific incidents of the complaint's prior sexual behavior with the respondent and is offered to prove consent.

The parties have at least 10 days to review the evidence and submit a written response to the investigator. **The investigator must consider these written responses prior to completing his/her report.** See Policy ACAC.

3. The Investigation Report

At the conclusion of the investigation, the investigator must create an investigative report that fairly summarizes relevant evidence, including witness credibility, discrepancies in information received by the parties, inculpatory and exculpatory information and relevant district policies, and the manner in which the policies were made known to the school population or parties to the formal complaint.

The investigative report must be provided to the parties, Title IX Coordinator and the decision-maker in a secure electronic format or a hard copy, and the parties must be given at least 10 days to provide the Title IX Coordinator with a written response to the investigative report. 34 C.F.R. § 106.45(b)(5)(vii); Policy ACAC.

The report should include the following information:

- The identification of the parties;
- A description of the allegations;
- Identification of the individuals who participated in the investigation;
- A description of the steps taken by the investigator, including dates of initial notification to the parties, interviews with witnesses, individuals who attended the interview(s);
- Reference to applicable District policies/rules/regulations and how they are made known to the parties;
- A description of the evidence (exculpatory and inculpatory) that pertains to the allegations in the complaint;
- Whether there is any documentary or physical proof of the allegation;
    - Whether the investigator requested documentary or other physical evidence pertaining to the allegations, and if so, how the parties responded;
- An assessment as to the credibility of the individuals who participated in the investigation;
- Any consistencies/inconsistencies (discrepancies) in testimony;
- The objectiveness (lack of bias) of the witnesses;
- Whether there is any motive for any person to falsify a story or lie;

- Any relevant information provided by the parties following their review of the relevant evidence;

- Any other information that will assist the decision-maker in making a determination as to whether the allegations are founded or unfounded.

See Policy ACAC.

As a general rule, investigation reports should include the following sections:

- Introduction
  - This section should summarize the allegations in the complaint and identify the Complainant and Respondent
- Procedural History
  - Describe the contacts with the Complainant, Respondent and witnesses, including dates of initial contact, dates of interview(s), and identification of individuals who attended the interviews;
- Standard of Review and Applicable Policies
  - Identification and brief description of the Title IX policy and the applicable standard of review
  - Identify any other policies that may apply to the allegations
  - Identify where the policies are located/how they are distributed to the school population
- Summary of the Evidence
  - Summaries of the interviews with the parties and witnesses and any documents or evidence reviewed as part of the investigation
- Findings of Fact
  - This section should include a detailed summary of the findings of fact and an explanation as to how the investigator reached those findings, including an assessment of the credibility of individuals interviewed.

F. The Role of the Decision-Maker

The decision-maker must be an individual other than the investigator and Title IX Coordinator and should not have had any prior involvement with the investigation. The decision-maker must also be free from bias and conflicts of interest, and should recuse him/herself, if any such conflict or bias exists.

The decision-maker is tasked with reviewing the investigative report and making an objective determination as to whether the allegations are founded or unfounded.

After the parties and decision-maker have received the final investigative report, and at least 10 days prior to the determination regarding responsibility, the decision-maker must provide “each party with 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." 34 C.F.R. § 106.45(b)(5)(vii) and (6)(ii). "Questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant, unless such questions and evidence about the complainant's prior sexual behavior are offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or if the questions and evidence concern specific incidents of the complainant's prior sexual behavior with respect to the respondent and are offered to prove consent. The decision-maker must explain to the party proposing the questions any decision to exclude a question as not relevant." 34 C.F.R. § 106.45(b)(6)(ii); Policy ACAC.

This process provides both parties with the opportunity to pose written questions regarding the investigation report. The decision-maker facilitates the question and answer process, with questions being provided to the decision-maker for subsequent submission to the other party or witnesses. The decision-maker may exclude questions that are not relevant, but must explain the rationale for the exclusion.

The decision-maker must consider all of the evidence gathered during the question-and-answer period, as well as the investigator's report, before the issuance of a written determination.

The District's policy provides that each party has 10 days to submit written, relevant questions to the decision-maker. The decision-maker will then provide the questions to the party/witness, with copies to each party, and they will have "no less than 10 days" to provide the decision-maker with written responses to the questions. The decision-maker will provide the questions and answers to both parties. The parties then have 5 days for supplemental follow-up questions (to be submitted to the decision-maker) and 5 days for answers to those questions. Policy ACAC.

A. Standard of Proof

Policy ACAC includes a preponderance of the evidence standard.

- Preponderance of the evidence means that the decision-maker believes that there "is a greater than 50% chance that the claim is true."

Policy ACAC. In other words, it is "more likely than not" that the allegations reported as sexual harassment are true. This is the burden of proof in most civil trials, in which the jury is instructed to find for the party that, on the whole, has the stronger evidence, however slight the edge may be. See also Black's Law Dictionary (11th Ed. 2019) (defining "preponderance of the evidence").

The same evidentiary standard must be applied to claims involving employees, as well as those involving students.

B. Written Determination

After the question-and-answer period has concluded, the decision-maker issues a written determination, which must include:

- The date of the determination;
- Identification of the allegations potentially constituting sexual harassment;
- A description of the procedural steps taken from the receipt of the formal complaint through the determination, including notification to the parties, interviews with parties and witnesses, site visits, and methods used to gather other evidence;
- Findings of fact supporting the determination;
- Conclusions regarding the application of the District's code of conduct to the facts;
- A statement of the result as to each allegation, including a rationale for each result. This must also include:
    - A determination regarding responsibility;
    - Any disciplinary sanctions to be imposed on the respondent;
    - Whether remedies designed to restore or preserve equal access to the District's education program or activity will be provided by the District to the complainant; and
    - the District's procedures (including the timeframe for appealing) and permissible bases for either party to appeal.

34 C.F.R. § 106.45(b)(7); see also 34 C.F.R. § 106.6(e) ("The obligation to comply with [the Title IX regulations] is not obviated or alleviated by the FERPA statute . . . or FERPA regulations"); Policy ACAC.

Policy ACAC provides that the written determination must be issued within 10 days after the close of the question and answer period for follow-up questions. Policy ACAC.

This written determination must be provided to the parties simultaneously, as well as the Title IX Coordinator and Superintendent; the Title IX Coordinator is responsible for effective implementation of any remedies (34 C.F.R. § 106.45(b)(7)(iv)). Id. at pg. 19.

The written decision becomes final after the conclusion of any appeals process, or the expiration of the appeals period contained in the District's Title IX policy. See 34 C.F.R. § 106.45(b)(7)(iii).

V. Right to Appeal

The issuance of the written determination, including dismissal of a formal complaint or any allegations therein, triggers the right to appeal. 34 C.F.R. § 106.45(b)(8). Either party may appeal the determination of responsibility or a dismissal of a complaint (or allegation in a complaint) by notifying the Superintendent in writing, with a copy to the Title IX Coordinator. Policy ACAC.

The appeal must be filed within 10 days of the date of the initial determination of responsibility or the decision dismissing the formal complaint. Upon receipt of an appeal, the Title IX Coordinator must provide the other party with written notice that an appeal has been filed. Both parties have 10 days from the date they receive notice of the appeal to submit a written statement in support of, or challenging, the underlying outcome.

34 C.F.R. § 106.45(b)(8)(i) and Policy ACAC provide three limited bases for appeals by either party:

- Procedural irregularity that affected the outcome;
- New evidence that was not reasonably available when the determination of responsibility or dismissal was made that could affect the outcome; and
- The Title IX Coordinator, investigator, or decision-maker had a conflict of interest or bias that affected the outcome.

If the request for appeal does not meet the above criteria, the parties should be notified that the appeal has been denied and the rationale for the dismissal. The appeal is limited to the determination of responsibility and non-disciplinary measures; appeals of specific disciplinary sanctions are made in accord with applicable laws/regulations/collective bargaining agreements. Policy ACAC.

Within 3 days from the date of the receipt of the written appeal, the Superintendent shall appoint an appellate decision-maker. See Policy ACAC. The appellate decision-maker must be an individual other than the Title IX-Coordinator, investigator, or initial decision-maker. The appellate decision-maker should review the underlying decision with deference and should not substitute his/her judgment for that of the decision-maker.

After the appellate decision-maker is appointed, the Superintendent will provide the parties with a Notice of Appeal, including a copy of the request for written appeal and all of the applicable deadlines and timeframes in the appeal stage. See Policy ACAC.

Pursuant to Policy ACAC, each party has 10 days from the date the Notice of Appeal is delivered to the parties to submit a written statement to the appellate decision maker, Title IX Coordinator and other party. This statement may be in support of, or challenge, the determination of responsibility or dismissal of the complaint.

If the basis for the appeal is newly discovered evidence, the party filing the appeal must submit the evidence or a summary of the evidence along with the written statement. The written statements will be provided to the other party, Title IX Coordinator, Superintendent and appellate decision-maker.

The appellate decision-maker is tasked with reviewing the investigative report, the decision-maker's final report, and any information submitted by the parties during

the appeal process and determining whether the initial decision was clearly erroneous (either made on unreasonable grounds, or without any proper consideration of the circumstances). If the appeal is based on new evidence, then appellate decision-maker may either make a determination of responsibility regarding that evidence or may remand the matter back to the investigator.

The appellate decision-maker must issue a written decision, within 10 days of receiving the parties' written statements, which must be simultaneously provided to both parties at the conclusion of the appeals process. The written decision should specify the basis for the appeal and the decision as to the appeal, with specific findings to support the decision. The decision on appeal is final. Policy ACAC.

If the underlying decision was upheld, any disciplinary sanctions imposed by the decision-maker take effect after the conclusion of the appeals process.

VI. Additional Considerations

A. Informal Resolution

Districts are permitted to offer informal resolution once a formal complaint has been filed. Districts maintain general discretion as to when informal resolution may be offered; however, a district is prohibited from offering or facilitating an informal resolution process where the allegations in the formal complaint allege that an employee sexually harassed a student. 34 C.F.R. § 106.45(b)(9).

Prior to proceeding with an informal resolution process, both parties must give voluntary, informed, written consent. Either party may withdraw from the informal resolution process and resume the grievance process with respect to the formal complaint at any point. Id.; Policy ACAC.

If the parties elect to participate in informal resolution, the District must appoint an individual to facilitate the informal resolution process. This individual must be free from conflicts of interest and bias and may not be serving in another role in the investigation.

Allegations involving violence or physical harm may not be appropriate for informal resolution. If the informal resolution process is successful, it will likely result in a written agreement between the Complainant, Respondent and the District, and may include additional supportive measures for both parties, overseen and enforced by the District.

B. Prohibition Against Retaliation

The regulations expressly prohibit retaliation against any individual for exercising his/her right under Title IX, including participating in or refusing to participate in the filing

of a complaint, the investigation, or any proceeding. 34 C.F.R. § 106.71 (emphasis added); see also Policy ACAC.

Examples of conduct that may constitute retaliation include, but are not limited to:

- Cutting a student athlete from a team or preventing a student from participating in an extra-curricular activity, after the student files a complaint alleging a violation of Title IX;
- Penalizing a student or staff member who declines to participate as a witness in a Title IX investigation;
- Penalizing a student or staff member who participates as a witness in a Title IX investigation.