

## Title IX Training for Coordinators, Investigators, and Other Administrators

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### Title IX Agenda

- Review of definitions and procedure
- The Investigation
- Relevancy/Impartiality
- Responsibilities for Admins that are not the Title IX Coordinator
- Responsibilities for Title IX Coordinator
- Common Issues

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## Definitions and Procedure

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### Title IX Statute

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

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## Title IX Sexual Harassment Team Members

Position	Scope of Responsibility	Requirements
Title IX Coordinator	Person designated to coordinate and conduct intake reports and complaints, initiate formal complaints if necessary, and implement supportive measures and remedies, as necessary.	N/A
Investigator	Person designated to investigate, gather evidence, and compile an investigation report. Dismisses if mandatory or permissive.	May be the Title IX Coordinator.
Decision-Maker	Person who conducts an objective evaluation of all relevant evidence, administers question and answer period and rules on relevancy, issues a written determination regarding responsibility, dismisses if required.	Must not be the same person as the Title IX Coordinator or the Investigator.
Appeal Designee	Person designated to handle appeal, if any.	Must not be the same person as the Title IX Coordinator, Investigator, or Decision-Maker.

## Title IX Sexual Harassment Parties

Complainant	An individual who is alleged to be the victim of conduct that could constitute sexual harassment
Respondent	An individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment.
Advisor	An individual that may accompany the complainant or respondent to any related meeting or proceeding in order to offer them support. The reporting party may choose to have an advisor (not required), who may be, but is not required to be, an attorney.
Witness	An individual that have or could potentially have information related and/or relevant to the alleged incident.

## Scope of “Educational Program or Activity”

- “locations, events, or circumstances over which [the school/district] exercised substantial control over both the respondent and the context in which the sexual harassment occurs . . .”

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## Definition of “Sexual Harassment”

- Conduct **on the basis of sex** that satisfies one or more of the following:
  - (1) An employee of the school conditioning the provision of an aid, benefit, or service of the school on an individual’s participation in unwelcome sexual conduct (quid pro quo sexual harassment);
  - (2) Unwelcome conduct determined by a reasonable person to be so severe, pervasive, AND objectively offensive that it effectively denies a person equal access to the school’s education program or activity; or
  - (3) “Sexual assault”, “dating violence”, “domestic violence”, or “stalking” (as defined under Clery Act)

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An employee of the school conditioning the provision of an aid, benefit, or service of the school on an individual's participation in unwelcome sexual conduct (quid pro quo sexual harassment)

- Quid pro quo-#1
  - Encompasses situations where the quid pro quo nature of the incident is implied from the circumstances.
  - Ex: if you do or don't do x, I will or won't do x
  - Applies to all of a school's employees
  - May involve a power differential
  - "unwelcome" as used in the first and second prongs of the definition of sexual harassment is a subjective element

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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 school's education program or activity

- "Catch-all"-#2
  - Focus factually on the nature of the misconduct itself – not on the victim's response to the misconduct.
  - Determinations of severity, pervasiveness, and objective offensiveness depends on a constellation of factors including the ages and numbers of parties involved, disability status, positions of authority of involved parties etc.
  - Whether harassing conduct is "objectively offensive" must be evaluated under a reasonable person standard, as a reasonable person in the complainant's position.
  - No intent aspect.
  - Does not require that a complainant has already suffered loss of education before being able to report sexual harassment

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Sexual “Sexual assault”, “dating violence”, “domestic violence”, or  
“stalking” (as defined under Clery Act)

- Sexual assault” means an offense classified as a forcible or nonforcible sex offense under the uniform crime reporting system of the Federal Bureau of Investigation.
- “Dating violence” means violence committed by a person—
  - (A) who is or has been in a social relationship of a romantic or intimate nature with the victim; and
  - (B) where the existence of such a relationship shall be determined based on a consideration of the following factors:
    - (i) The length of the relationship.
    - (ii) The type of relationship.
    - (iii) The frequency of interaction between the persons involved in the relationship.

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- “Domestic violence” includes felony or misdemeanor crimes 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 receiving grant monies, or 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.
- “Stalking” means engaging in a course of conduct directed at a specific person that would cause a reasonable person to—
  - (A) fear for his or her safety or the safety of others; or
  - (B) suffer substantial emotional distress.

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## Can still use other policies to discipline if Title IX definition does not apply

- “If the conduct alleged in the formal complaint would not constitute sexual harassment as defined . . . then the recipient must dismiss the formal complaint with regard to that conduct for purposes of sexual harassment under title IX”
- BUT such a dismissal does not preclude action under another provision of the recipient’s code of conduct.

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## Actual Knowledge Responsibilities

- **The school is deemed to have actual knowledge of sexual harassment allegations if ANY staff member has knowledge.**
- The School is REQUIRED to respond promptly when it has actual knowledge in a way that is not deliberately indifferent.
- ACTUAL KNOWLEDGE=Notice of sexual harassment or allegations of sexual harassment **to:**
  - The Title IX Coordinator, OR
  - Any official of the recipient who has authority to institute corrective measures on behalf of the school, OR
  - **Any employee of an elementary and secondary school**
- **NOTICE IS NOT JUST A REPORT TO THE TITLE IX COORDINATOR**
- ALL STAFF MUST REPORT any notice of sexual harassment or allegations of sexual harassment SAME DAY

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## Grievance Procedure for Sexual Harassment Formal Complaints

1. Report
2. Supportive measures and information on formal complaint
3. Formal complaint
4. Written notice to parties
5. Investigation
6. Inspection and review of evidence
7. Investigative report with review and written response
8. Question and Answer period
9. Written determination
10. Appeal on certain bases
11. Notice of appeal and opportunity to respond
12. Final written decision on appeal

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## Report Received

Title IX Coordinator must promptly reach out to the individual who is alleged to be the victim of conduct that could constitute sexual harassment (aka the complainant) to:

1. discuss 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, and
4. explain to the complainant the process for filing a formal complaint.

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## Provide Details on Grievance Process and Formal Complaints

- § 106.44 Recipient's response to sexual harassment (a) . . . "The Title IX Coordinator must **promptly contact the complainant to discuss the availability of supportive measures as defined in § 106.30, consider the complainant's wishes with respect to supportive measures, inform the complainant of the availability of supportive measures with or without the filing of a formal complaint, and explain to the complainant the process for filing a formal complaint.**"
- Have a meeting
- Provide a copy of the grievance policy
- Document conversations in writing for school records

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## Discuss Availability of and Coordinate Effective Implementation of Supportive Measures

- § 106.44 Recipient's response to sexual harassment (a) . . . "The Title IX Coordinator **must promptly contact the complainant to discuss the availability of supportive measures as defined in § 106.30, consider the complainant's wishes with respect to supportive measures, inform the complainant of the availability of supportive measures with or without the filing of a formal complaint,** and explain to the complainant the process for filing a formal complaint."
- DOCUMENT interactions regarding supportive measures and rationale for offering or rejecting any requests, as well as which ones provided.
- § 106.30 Definitions. *Supportive Measures* . . . "The Title IX Coordinator is **responsible for coordinating the effective implementation of supportive measures.**"
  - Remain as point of contact
  - Follow-up
  - Keep confidential—to the extent would not impair the ability to provide

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## Supportive Measures

- *Supportive measures*” means non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, and without fee or charge to the complainant or the respondent.
- Such measures are designed to restore or preserve equal access to the School’s education program or activity without unreasonably burdening the other party, including measures designed to protect the safety of all parties or the School’s educational environment, or deter sexual harassment.
- 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 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 School to provide the supportive measures.

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## Formal Complaint

- *“Formal complaint”* means a document filed by a complainant or signed by the Title IX Coordinator alleging sexual harassment against a respondent and requesting that the School 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 School with which the formal complaint is filed.

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## Written Notice to Parties

- Upon receipt of a formal complaint (or later as additional allegations become known), the School has to provide the following written notice to the parties who are known
  1. Notice of the School's grievance process that complies with this section, including any informal resolution process.
  2. Notice of the allegations of sexual harassment potentially constituting sexual harassment, including sufficient details known at the time and with sufficient time to prepare a response before any initial interview.
  3. Notice 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.
  4. Notice to the parties that they may have an advisor of their choice, who may be, but is not required to be, an attorney, and may inspect and review evidence.
  5. Notice of any provision in the School's code of conduct that prohibits knowingly making false statements or knowingly submitting false information during the grievance process.

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## Investigation and Evidence Review

- The Investigator is to create an investigative report that fairly summarizes relevant evidence.
- Prior to completion of their investigative report, the investigator must send to each party and the party's advisor, if any, the evidence subject to inspection and review in an electronic format or a hard copy.
- The parties must have at least ten (10) business days to submit a written response, which the investigator will consider prior to completion of the investigative report.

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## Decision-Maker's Role Starts After the Investigative Report is Finalized

- After finalization of the investigative report, the investigator sends the investigative report to each party, and affords them at least 10 days to review and respond *prior to the determination regarding responsibility*.

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## Question and Answer Period

- Before issuing a determination of responsibility, the decision-maker 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 reviews the questions prior to submitting them to the party or witness.
- The decision-maker must explain to the party proposing the question any decision to exclude a question as not relevant.
- There should be reasonable time limits for submitting questions, for answers, and for follow-up.

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## Written Determination

- Provided simultaneously to the parties;
- 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;
- Findings of fact supporting the determination;
- Conclusions regarding the application of the School's code of conduct to the facts;
- A statement of, and rationale for, the result as to each allegation
  - A determination regarding responsibility,
  - any disciplinary sanctions the School imposes on the respondent,
  - whether remedies designed to restore or preserve equal access to the School's education program or activity will be provided by the School to the complainant;
- Procedures and permissible bases for appeal.

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## Appeal Bases

Appeal is available after the Decision-Maker issues determination of responsibility OR after Complaint is dismissed.

Required appeal bases include:

(A) Procedural irregularity that affected the outcome of the matter;

(B) 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;

(C) 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; or

(D) Any other bases allowed equally to either party.

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## Appeal

- Different decision-maker
- Notice to the other party
- Opportunity for both parties to submit a written statement in support of, or challenging, outcome
- Written decision describing the result of the appeal and the rationale for the result and provided simultaneously to the parties
- Make sure no conflict of interest or bias
- Train

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## Final Decision

- The written determination of responsibility is considered final when
  - The date to file an appeal has expired and no appeal was filed, or
  - The appeal process is complete if an appeal was filed
- Only when the written determination of responsibility is final may sanctions and/or remedies be applied.

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## Overarching Requirements for Sexual Harassment Grievance Procedure

1. Have Presumption that Respondent is Not Responsible
2. Exclude Privileged Information
3. Follow Grievance Procedure Before Imposing Sanctions
4. No Bias or Conflict of Interest
5. Consider All Relevant Evidence Under Proper Standard (Preponderance or Clear and Convincing)
6. Follow Reasonably Prompt Timelines
7. Emergency Removal/Administrative Leave Permitted in Certain Instances
8. Remember Grounds for Dismissal
9. Informal Resolution Process After Formal Complaint Is Optional
10. Train Staff
11. Keep Records
12. No Retaliation
13. Maintain Confidentiality

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## Emergency Removal

- BEFORE removal
  - Undertake an individualized safety and risk analysis, and
  - 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.
- Provide the respondent with notice and an opportunity to challenge the decision immediately following the removal.
- Follow the IDEA and Section 504 before any removals.

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## Grounds for Dismissal

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

then the School must dismiss the formal complaint with regard to that conduct for purposes of sexual harassment under Title IX.

- However, such a dismissal does not preclude action under another provision of the School's code of conduct.

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## Permissive Grounds for Dismissal

The School may also dismiss the formal complaint or any allegations therein, if at any time during the investigation:

1. a complainant notifies the Title IX Coordinator in writing that the complainant would like to withdraw the formal complaint or any allegations therein;
2. the respondent is no longer enrolled or employed by the School; or
3. specific circumstances prevent the School from gathering evidence sufficient to reach a determination as to the formal complaint or allegations therein.

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## Informal Resolution

- Not required to offer informal resolution
- Cannot require participation or require that the student or employee waive their right to the grievance process
- ONLY AFTER A FORMAL COMPLAINT IS FILED--Cannot go forward with an informal process for sexual harassment allegations prior to there being a formal complaint
- Obtain voluntary written consent
- Not permitted for allegations that an employee sexually harassed a student
- Written notice to the parties is required, disclosing:
  1. the allegations,
  2. the requirements of the informal resolution process including the circumstances under which it precludes the parties from resuming a formal complaint arising from the same allegations,
  3. that at any time prior to agreeing to a resolution, any party has the right to withdraw from the informal resolution process and resume the grievance process with respect to the formal complaint, and
  4. any consequences resulting from participating in the informal resolution process, including the records that will be maintained or could be shared

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## Keep Documentation

- Make sure the school has a process in place and a retention procedure for keeping Title IX records
- Maintain for a period of seven years
- Essentially ALL Title IX records
  - Records regarding EACH sexual harassment investigation
    - Determination of responsibility
    - Any recordings or transcript from any hearing
    - Disciplinary sanctions
    - Remedies provided
  - Records regarding any appeal and result
  - Records regarding any information resolution and result
  - All materials used to train (also put on website)

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- ALSO records of any actions in response to actual knowledge of sexual harassment, including any supportive measures, taken in response to a report or formal complaint of sexual harassment.
- DOCUMENT the basis for the conclusion that the school's response was not deliberately indifferent, and document that the school has taken measures designed to restore or preserve equal access to the recipient's education program or activity.
- If you do not provide a complainant with supportive measures, then you must DOCUMENT the reasons why such a response was not clearly unreasonable in light of the known circumstances.

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## The Investigation

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## Conducting the Investigation

- Requirement 1: Trained Investigator
- Requirement 2: Equitable Treatment of Parties
- Requirement 3: Impartial Assessment (no prejudgment, no bias, no conflict of interest)
- Requirement 4: Evidence Review
- Requirement 5: Detailed Written Investigative Report

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## Timeline and Notices

- 30 business days.
- Temporary delays can be granted for good cause.
- Investigation should start immediately.
- Written notice of the details regarding investigative meetings, including the purpose.

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## The Duty to Investigate

- The thoroughness of the investigation is critical to the school's ability to determine whether or not misconduct or harassment occurred and which type of disciplinary action, if any, is required as a matter of law or organizational policy.
- Failure to carry out an adequate investigation may contribute to potential liability for the school.

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## Burden of Proof 106.45(b)(5)(i)

- Schools cannot restrict either party's ability to discuss the allegations or gather and present evidence, HOWEVER . . .
- Burden of proof sufficient to reach a determination regarding responsibility, rest on the school.
- Burden of proof is on school to conduct investigation, interview witnesses, gather evidence.

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## Impartiality Regarding Burden of Proof

- The school and investigator must remain neutral and impartial during the investigative process.
  - Schools should not act as police to try to uncover evidence to prove guilt.
  - Schools should not act as defense attorney to try to get alleged perpetrators cleared.
- Objective is truth-seeking mission.

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## Investigation

- Be neutral
- Stay open
- No prejudgments
- No bias
- No conflict of interest
- Don't rely on sex stereotypes
- Don't make assumptions
- Gather the facts

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- Burden of gathering evidence is on the school
- Allow parties equal opportunity to present evidence and present witnesses
- Don't restrict the ability of either party to discuss the allegations
- Allow each party to have an advisor present
- Provide requisite notice and allow time to prepare for interviews and meetings
- Allow parties (and advisors if any) to inspect/review evidence (that is directly related to the allegations) and respond
- Send parties (and advisors if any) the evidence prior to completion of the investigative report and give 10 business days to respond
- Consider responses
- Send parties (and advisors if any) the investigative report 10 business days before any hearing or determination of responsibility
- Remember, you are not the decision-maker


 The logo for Dickinson Wright, featuring the company name in a serif font with a stylized 'W' and a yellow swoosh element.

- Do not require, allow, rely upon, or otherwise use questions or evidence that constitute or seek disclosure of, information protected under a legally recognized privilege, unless the person holding such privilege has waived the privilege
- Do not access, consider, disclose, or otherwise use a party's records that are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in the professional's or paraprofessional's capacity, or assisting in that capacity, and which are made and maintained in connection with the provision of treatment to the party, unless the school obtains that party's voluntary, written consent to do so for a grievance process under this section (or their parent's if not an eligible student as defined in 34 CFR 99.3)


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## Interview

- Determine witness list and in what order to interview
- Craft questions in advance of interview, subject to addition/change
- Have relevant evidence and policies/handbooks with you during interview
- Ask open-ended questions, then more detailed as necessary to clarify
- Keep detailed notes with exact quotes if possible
- Explain that there can be no retaliation
- Use complainant and respondent when referring to parties
- Be sensitive; consider how you word your questions carefully
- Ask for copies of documents/evidence mentioned
- Notify of next steps and follow-up as necessary

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## Guidelines for Talking to Complainant

- Take the complaint seriously
- Listen objectively, without personal bias
- Focus on the facts and relevant details
- Document details

Ask Questions, such as:

- "Please describe the situation."
- "Where/when did the behavior/incident occur?"
- "Who was involved?"
- "Were there any witnesses?"
- "Did you talk w/ anyone else about it?"
- "Has this happened to you before?"
- "To anyone else you know of?"
- "What would you like to see happen?"

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## Guidelines for Talking to Respondent

- Insure that the meeting place is private.
- Explain the purpose of the meeting.
- Be serious and to the point.
  
- Focus on the behavior, not intentions.
- Be unbiased. Listen and be nonjudgmental.
- Ask for separate response to each allegation.

Document the meeting.

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## Guidelines for Interviewing Witnesses

- Explain purpose of meeting
- Describe the circumstances generally (time & location only)
- Focus on witness' observations, not opinions
- Talk w/ all witnesses in quick succession

Ask Questions to determine if the witness:

- was in the location where harassment alleged?
- observed any potentially harassing conduct?
- knows who was involved in the incident?
- can identify others who were present?
- was also target of unwelcome behavior?

Document all the information provided by the witnesses.

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## Maintaining Confidentiality

- Section 106.71 requires schools to keep party and witness identities confidential except as permitted by law or FERPA, and as needed to conduct an investigation or hearing (30316)

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## Evidence And Investigative Report

- Prior to completion of investigative report, school must send to the parties and their advisors all evidence (inculpatory and exculpatory) compiled that is directly related to the allegations and provide at least 10 business days to review and respond in writing.
  - Inculpatory = evidence that tends to incriminate
  - Exculpatory = evidence that tends to clear someone of guilt
- The investigator shall prepare an investigative report that fairly summarizes relevant evidence and share the report (10 business days prior to the decision) with the parties and their advisors for review and response.

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## For Investigators: Tips for writing Investigation Report

- Be detailed/specific
- Use polices/procedures
- Use direct quotes when possible
- Provide background
- Include allegations
- State who was interviewed and when
- Fairly summarize relevant evidence—cite to the record, attach exhibits
- Remember privilege
- Remember presumption that the respondent is not responsible for the alleged conduct

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**Relevancy**

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## What is Relevant? (NOT based on Rules of Evidence)

- Any fact, testimony, other evidence related to a material issue involving the Complainant's allegation or the Respondent's defense that helps the decision makers come to a determination under the standard of evidence.
- Under preponderance of the evidence standard, ask does this fact, testimony, or evidence help me determine whether there was more likely than not a violation?

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## Related-to vs. Relevant Evidence

- **Related-to =**
- Investigator must collect all evidence that is related to the allegations whether or not relevant
  - Includes evidence otherwise excluded under rape shield protections
  - Excludes evidence subject to privilege, medical records
- **Relevant =**
- Relevant evidence is all evidence related to, except that which is protected under the rape shield provisions (and not otherwise privileged, medical records)
- Evidence pertinent to proving whether facts material to the allegation are more or less likely to be true

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## Rape Shield Law – Complainants

- 34 CFR 45(b)(6)(i)
- Evidence and questions regarding complainants sexual predisposition or prior sexual behavior are not relevant.
- Unless
  - Offered to prove someone else committed alleged conduct
  - Offered to prove past sexual relationship with Respondent to establish consent

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## Rape Shield Law - Respondents

- Rape shield protection does not apply to Respondents.
- “The Department reiterates that the rape shield language . . . Does not pertain to the sexual predisposition or sexual behavior of respondents, so evidence of a pattern of inappropriate behavior by an alleged harasser must be judged for relevance as any other evidence must be.”

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## Privileged Evidence Excluded

- Precludes a recipient from using information or evidence protected by a legally recognized privilege unless the holder of the privilege has waived the privilege.
  - Medical records
  - Mental health treatment records
  - Attorney-client communications
  - Spousal privilege

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When investigating, the school “cannot access, consider, disclose, or otherwise use a party’s records that are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in the professional’s or paraprofessional’s capacity, or assisting in that capacity, and which are made and maintained in connection with the provision of treatment to the party, unless the recipient obtains that party’s voluntary, written consent to do so for a grievance process under this section.”

“A recipient’s grievance process must . . . not require, allow, rely upon, or otherwise use questions or evidence that constitute, or seek disclosure of, information protected under a legally recognized privilege, unless the person holding such privilege has waived the privilege.”

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**Emphasis on Impartiality**

1. You must treat parties equitably
2. You must avoid prejudgment of the facts at issue.
3. You must avoid conflicts of interest and recuse yourself when conflicts occur.
4. You must avoid bias in the process in favor of either Complainants or Respondents.

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## Being Impartial

### DO . . .

- treat parties equitably
- acknowledge unfair societal biases
- acknowledge unfair personal biases
- have awareness of your own biases
- ensure that the evidence is considered in its entirety, without outside influence or preconceived notions.

### DON'T . . .

- act in favor of either party
- base credibility determinations on a person's status as complainant, respondent, witness, etc.
- base credibility determinations on a person's demographic or personal characteristics
- judge a party "due to inability to recount each specific detail of an incident in sequence, whether such inability is due to trauma, the effects of drugs or alcohol, or simple fallibility of human memory." (Preamble 30323)

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## Treating Parties Equitably 106.45(b)(1)(i)

Treat complainants and respondents equitably:

- Complainants = Provide remedies to a complainant where a determination of responsibility for sexual harassment has been made against the respondent.
- Respondents = Follow a grievance process that complies with Title IX before the imposition of any disciplinary sanctions or other actions that are not supportive measures against a respondent.

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## Avoiding Prejudgment of the Facts at Issue

To pass judgment prematurely or without sufficient reflection or investigation.

- Avoid rumors and speculation regarding alleged incident.
- Keep an open mind and listen to all the facts presented.
- Let the evidence and standard of proof guide your determination.
- Avoid filling in evidentiary gaps with statistics, personal beliefs, or information about trauma.
- Each case is unique and different.

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## 106. 45(b)(1)(iii) Title IX Personnel Must be Conflict of Interest And Bias Free

(iii) Require that any individual designated by a recipient as a Title IX Coordinator, investigator, decision-maker, or any person designated by a recipient to facilitate an informal resolution process not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent. A recipient must ensure that Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process receive training on the definition of sexual harassment in § 106.30, the scope of the recipient's education program or activity ...

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## Avoiding Conflicts of Interests

- Conflicts of interests are not specifically defined in the regulations.
- A situation in which the concerns or aims of two different parties are incompatible, such as when a person could derive a financial, professional, personal, or other benefit from his official actions or decisions.
- If there are any potential or actual conflicts of interests, the impacted Title IX Coordinator, Investigator, Decision-Maker, Appeals Designee should recuse themselves or be removed.

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## Avoiding Bias

- Prejudice in favor of or against one thing, person, or group compared with another.
- No bias against a particular complainant or respondent.
- No bias against complainants or respondents generally.
- Must not rely on gender, racial, economic, other stereotypes.

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## Examples of Bias

- Situation where investigator or decision-maker has prior involvement or knows complainant, respondent, or witness **and** has made a credibility determination regarding that person.
- Situation where information “gleaned” by the investigator is shared with the decision-maker outside the investigation report (in meetings to discuss pending cases, in passing while at work, etc.).
- Other biases exhibited during grievance process.

Race	Sexual Orientation
Ethnicity	Socio-economic Class
Gender	Age

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“Whether bias exists requires examination of the particular facts of a situation and the Department encourages recipients to apply an objective (whether a reasonable person would believe bias exists), common sense approach to evaluating whether a particular person serving in a Title IX role is biased, exercising caution not to apply generalizations that might unreasonably conclude that bias exists...bearing in mind that the very training required by 106.45(b)(1)(iii) is intended to provide Title IX personnel with the tools needed to serve impartially and without bias such that the prior professional experience of a person whom a recipient would like to have in a Title IX role need not disqualify the person from obtaining the requisite training to serve impartially in a Title IX role.”

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## Duty to Avoid Prejudgment, Bias, And Conflicts of Interest

- Your focus is the integrity of the process.
- Truth-seeking objective.
- Focus is not on reaching an outcome.
- Disclose all potential and actual conflicts.
- Recognize and understand what your biases are so that you can put them aside or recuse yourself.
- Cultural competency – understand your unconscious bias.

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**Duties**

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## Responsibilities for Admins that are NOT the Title IX Coordinator

- CALL THE TITLE IX COORDINATOR IMMEDIATELY
- Report all knowledge of sexual harassment or alleged sexual harassment or any sex discrimination or alleged sex discrimination
- DO NOT start the investigation yourself
- DO NOT impose discipline for alleged sexual harassment or sex discrimination, without ensuring that the Title IX process is followed or does not apply

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## Responsibilities for Staff that are NOT the Title IX Coordinator

- If a report is made to you and you are unable to involve the Title IX Coordinator before details are given by the reporter, immediately pass on all information received from the reporter to the Title IX Coordinator.
- Be familiar with the Title IX definition of sexual harassment
- Be familiar with the scope of the district's educational program or activity
- Discuss police involvement with legal and Title IX Coordinator

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## Responsibilities for Staff that are NOT the Title IX Coordinator *cont.*

- Assist with supportive measures as requested
- Assist with any resolutions from informal resolution agreements
- Assist with remedies as requested
- Keep parties and information confidential
- Direct students/parents to the Title IX policy and Title IX Coordinator when information is requested
- Recognize and report acts of retaliation

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## Responsibilities for Staff and Administrators that are NOT the Title IX Coordinator *cont.*

- Report knowledge of allegations of sexual harassment or sex discrimination to the Title IX Coordinator EVEN IF the Complainant/reporter does not want you to
- Know that you may not be told what the final decision is after Title IX proceedings conclude—need to know basis
- Refer parties to the Title IX Coordinator for status updates on pending grievance procedure

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## Title IX Coordinator Responsibilities

- Designations of Title IX team (make sure everyone is properly trained)
- Posting notices, contact info, and training docs
- Provide notice to school community
- Confirm training completion
- Review/Update policies and procedures (including Handbooks)
- Timely review/handle reports
- Keep documentation

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## Title IX Coordinator Responsibilities *Cont.*

- Be available/accessible for reports
- Determine what Policy/Procedure to apply
- Provide details on grievance process and formal complaints
- Discuss availability of and coordinate effective implementation of supportive Measures
- Consider signing formal complaint if not filed by Complainant
- Provide Notices to Respondent and Complainant
- Consider Dismissal

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## Title IX Coordinator Responsibilities *Cont.*

- Consider removal/admin leave
- Informal resolution process management (can designate to someone properly trained)
- Ensure grievance process (as applicable) is followed and all notices provided
- Coordinate the effective implementation of any remedies

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## Title IX Coordinator *MAY* also

- Coordinate notices, party inspection and review of evidence and investigative report
- Coordinate appeal process
- Perform investigation

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## Common Issues

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### Common Issue #1

#### Performing investigation and applying discipline before Title IX process

- The fact that the Title IX grievance procedure applies should be determined prior to the start of an investigation.
- An investigation cannot start until a formal complaint is filed and notices are sent to the parties.
- Discipline cannot be imposed until the grievance process is complete.
- You can still emergency remove in certain circumstances (after doing an analysis and determining 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, and following your emergency removal procedures).
  - Remember Ohio limitations on emergency removals for grades K-3
  - If special ed, remember to follow IDEA
  - They have a right to contest
- You can still place on admin leave (after consulting with HR) in certain circumstances.

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## Common Issue #2

### Proper notices are not given

- Prior to beginning the investigation, you have to provide notices to the parties with certain required information (this includes notice to the alleged perpetrator of the harassment).
- Notice of any meeting or interview of the parties has to:
  - Be in writing
  - Give time to prepare
  - State who will be present
  - Provide a minimum of 2 days' notice for interviews
- If you are not meeting timelines within the policy, you have to provide notice to the parties with the reason.

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## Common Issue #3

### Investigation is not complete

- The school cannot restrict either party's ability to discuss the allegations or gather and present evidence, HOWEVER . . .
- **The burden of proof sufficient to reach a determination regarding responsibility, rests on the school.**
- The burden of proof is on school to conduct investigation, interview witnesses, gather evidence.
- Objective is truth-seeking mission.
- The thoroughness of the investigation is critical to the school's ability to determine whether or not misconduct or harassment occurred and which type of disciplinary action, if any, is necessary
- Failure to carry out an adequate investigation may contribute to potential liability for the district.

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## Common Issue #4

### Not including all directly related evidence for party review

- Prior to completion of investigative report, school must provide both parties an equal opportunity to inspect and review any evidence obtained as part of the investigation that is directly related to the allegations raised in a formal complaint, including the evidence upon which the school does not intend to rely in reaching a determination regarding responsibility and inculpatory or exculpatory evidence whether obtained from a party or other source, so that each party can meaningfully respond to the evidence prior to conclusion of the investigation.
- **Do not pick and choose what you include** in your draft investigative report. The parties have the right to see all evidence that is directly related.

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## Common Issue #5

### 10-day periods are not met

- There are TWO 10-day periods within the policy for party review
  1. 10 days to review the evidence directly related to the allegations prior to completion of the investigative report; AND
  2. 10 days to review the final investigative report and provide written response prior to the issuance of the determination regarding responsibility
- The question and answer period can occur during the second 10-day review period.
- Do not send the *final* investigative report to the decision-maker or the parties until after 10 days have passed for the parties to review the evidence

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## Common Issue #6

### Information is being shared outside of need-to-know

- The recipient must keep confidential the identity of any individual who has made a report or complaint of sex discrimination, including any individual who has made a report or filed a formal complaint of sexual harassment, any complainant, any individual who has been reported to be the perpetrator of sex discrimination, any respondent, and any witness, except as may be permitted by [FERPA], or as required by law, or to carry out the purposes of [Title IX], including the conduct of any investigation, hearing, or judicial proceeding arising thereunder.

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## Common Issue #6

### Information is being shared outside of need-to-know (cont'd)

- When multiple administrators or staff members are cc'd on decisions or notices, you may be breaching confidentiality
- The more who know, the more who you may be opening up to retaliation claims
- The individuals who receive the determination regarding responsibility should be those who need to know to implement remedies or discipline.

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## Common Issue #7

### When to initiate formal complaint against the wishes of the Complainant

- The Title IX Coordinator can file a formal complaint to start an investigation when the Complainant does not want to file a formal complaint.
- Determination needs to be documented in writing.
- Often occurs with allegations of sexual harassment pertaining to staff members as the alleged perpetrators, because you cannot perform an investigation without a formal complaint, and you'll need to look into such allegations.
- Also occurs with allegations of sexual harassment pertaining to students when the alleged conduct if true would be subject to discipline. You cannot discipline without following the grievance procedure.

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**POST THESE (and all) TRAINING MATERIALS  
ON YOUR WEBSITE**

Posting is REQUIRED

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## Disclaimer

- These training materials are informational in nature and should not be construed as legal advice and are not provided to address specific grievance situations.
- Consult with your supervisor/legal counsel as necessary to address specific Title IX report and grievance situations and investigations.

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Chelsea focuses her practice primarily in the areas of education and employment law. She provides legal services to community schools, management companies, community school sponsors, career-technical schools, and other educational institutions, on a variety of issues, including but not limited to:

- Title IX;
- Employee leaves of absence and accommodations;
- Discrimination, harassment, and retaliation allegations and investigations;
- Employment contracts;
- Civil litigation matters;
- School policies, procedures, and handbooks;
- State and Federal laws and regulations, and Ohio Department of Education and Workforce oversight;
- Public ethics and board governance;
- Student discipline;
- Special education; and
- Unemployment and workers' compensation.

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