

***TITLE IX TRAINING***  
***OFFICE OF CIVIL RIGHTS***  
***FINAL REGULATIONS***  
***2020***  
***[K – 12 Schools]***

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# Virtual Live Training Requests

- WE ARE RECORDING!
- Please Mute Yourself
- Questions in the Chat
- Because this is a virtual live presentation, a request is made of the attendees to place questions in the chat to be asked by the moderator at the end of the session. Time will be reserved at the end of each session for question and answer

# What You Will Learn

This two-part training that will address:

- The purpose of Title IX
- Roles of the Title IX Coordinator, the investigator, the decision-makers and the informal resolution facilitator
- Key definitions
- Grievance process
- Notification and documentation requirements
- Conducting investigation, hearing, issuing an outcome determination letter and executing the appeals process.

# What You Will Learn

## Training Day 1: The What and Why Overview and Understanding

- What is Title IX
- Key Definitions Part I
- Key Title IX Roles
- Decisions to be made:
  - Personnel to fill various required roles
  - Standard of Proof
  - Decision-makers
  - Informal Resolution process

# What You Will Learn

## Training Day 2: The How Implementing the New Regulations

- Incident Report to Formal Complaint to Investigation
- Key Definitions Part II
- How to Conduct the Investigation
- Hearing Process
  - Post-Investigation/Pre-Hearing
  - Hearing or Administrative Outcome
  - Outcome Determination Letter
- Appeal Process

# **Title IX Final Regulations**

## **Part II: Implementing the New Regulations: Investigations, Administrative Outcomes and Appeals**

# KEY CONCEPTS

- Notification
- Publication
- Implementation
- Communication
- Documentation
- Conclusion

# Implementation

- Following training – There must be successful and consistent implementation of the policies and procedures
- Recommended that schools create forms to assist in:
  - Making sure information is properly recorded/memorialized
  - Making sure required information is given to the recipients
  - Ensure consistency and transparency in the process

# Implementation

Examples of the types of forms:

- Incident reporting form
- Internal incident/risk assessment form
- Complainant information brochure on supportive measures and informal resolution or formal complaint options
- Mutual no contact order
- Formal complaint form
- Notice of Investigation Letter
- Notice of Hearing
- Outcome Determination Letter
- Right to Appeal

# Documentation

- Document, Document, Document
- It cannot be overstated that school **MUST** keep accurate records.
- The Who, What, When, How and Why
- Who received the report
- Who made the report
- When was the report received and when any other steps were taken

# Documentation

- What steps were taken: Notice to Title IX Coordinator, call to parents/legal guardians of student, call to law enforcement, call to Childline
- What support was provided to the complainant (person reporting)
  - For example, applying interim measures (i.e. Putting a Safety Plan in Place) to make sure the complainant is safe in school and not restricted in participating in school programs and activities
- Schools must also document their reasons why each response to sexual harassment was not deliberately indifferent– clearly unreasonable in light of known circumstances.

# Definitions: Part II

- Relevance
- Credibility
- Rape Shield
- Hearing Proceeding
- Outcome Determination
- Appeal
- Recordkeeping

# Relevance

- Requires that the evidence or testimony directly relate to the issues disputed or discussed
- Inculpatory and exculpatory evidence is considered relevant
- Information protected by a legally recognized privilege is not relevant.
- Questions about a complainant's prior sexual behavior or sexual predisposition are not relevant, unless:
  - Offered to prove someone other than respondent is responsible OR
  - Offer to prove the complainant provided respondent with prior consent

34 CFR §106.45(b)(1)(ii) & §106.45(b)(6)

# Inculpatory Evidence

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

# Exculpatory Evidence

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

# Credibility

That quality in a witness which renders their testimony worthy of belief. Factors used to assess credibility:

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

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

(pg. 1238)

# Rape Shield

Depending on the particular state law, no testimony or evidence of a complainant's past sexual behavior shall be permitted in the live hearing.

**“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.”** (pg. 2025)

# Live Hearing Proceeding

Not required in Elementary and  
Secondary Schools...  
BUT

# Live Hearing Proceeding

If a school does decide to hold a live hearing to determine the outcome of a complaint investigation, the live hearing:

1. Must include **cross examination of all parties and witnesses** by an Advisor
  - **No statement can be used if the statement is not subject to cross-examination**
  - Observing *demeanor* is not possible without live cross-examination
2. Parties may be **present** at the hearing in the same geographic location or **participate virtually** with appropriate technology.
3. Objective evaluation of all relevant evidence by a trained impartial decision- maker or decision-making panel.
4. Credibility determination not based on status of complainant, respondent or witness.
5. **Must have a transcript** or audio/visual recording of the hearing.

# Administrative Determination Proceeding

- For recipients that are elementary and secondary schools, grievance process may, but need not, provide for a hearing.
- With or without a hearing, after the school has sent the investigative report to the parties and **before reaching a determination regarding responsibility, the decision-maker(s) must:**
  - Afford each party the opportunity to submit written, relevant questions that a party wants asked of any party or witness
  - Provide each party with the answers, and
  - Allow for additional limited follow-up questions from each party. The decision-maker(s) must explain to the party proposing the questions any decision to exclude a question as not relevant.

# Outcome Determination

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

# Outcome Determination

The written determination must include:

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

# Appeals

Parties are entitled to appeal

- (1) an outcome determination or
- (2) a dismissal of a formal complaint or
- (3) dismissal of any allegation in the formal complaint

# Appeals

The three (3) bases for an appeal are:

1. Procedural irregularity that affected the outcome of the matter;
2. New evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter;
3. The Title IX Coordinator, investigator(s), or decision-maker(s) had a conflict of interest or bias for or against complainants or respondents generally or the individual complainant or respondent that affected the outcome of the matter.

# Recordkeeping

**MUST** maintain for a period of **seven (7) years** records of:

- Each sexual harassment investigation including any determination regarding responsibility and any required audio or audiovisual recording or transcript, any disciplinary sanctions imposed on the respondent, and any remedies provided to the complainant designed to restore or preserve equal access to the recipient's education program or activity;
- Any appeal and the result therefrom;
- Any informal resolution and the result therefrom; and
- All materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process.

# **Step by Step: Incident Report to Final Outcome Determination in 15 Steps**

# Step by Step: Incident Report to Final Outcome

## Steps One and Two: Report and Contact

# Step by Step: Incident Report to Final Outcome

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

N.B. If the complainant is unknown but the reporter is known, contact that individual

# Step by Step: Incident Report to Final Outcome

## Step Three: Information to Complainant

# Step by Step: Incident Report to Final Outcome

## ➤ Step Three:

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

# Step by Step: Incident Report to Final Outcome

## Step Four: Initial Assessment

# Step by Step: Incident Report to Final Outcome

➤ **Step Four:** Conduct a team internal assessment (i.e., Title IX Coordinator, Deputy Title IX Coordinator Compliance Director, Principal or Asst. Principal, School Resource Officer). Use a checklist to determine what information is known:

- Is Complainant known or unknown?
- Is alleged perpetrator/respondent known or unknown?
- Has Complainant requested confidentiality or anonymity?
- If Respondent is known, based on content of report, what emergency measures need to be taken to keep parties safe (i.e., no contact order, change of classes).
- If No Contact Order is requested by Complainant or determined to be a necessary supportive safety measure, inform the Complainant in advance to note that confidentiality cannot be maintained by virtue of the nature of a no contact directive.

# Step by Step: Incident Report to Final Outcome

## Step Four[cont..].

- If a report was made to a Child Abuse hotline or law enforcement, document if there is any directive or restriction from either entity directing the school to not proceed with outlined procedural next steps under Title IX
- Notify school personnel who are in “need to know” roles of only the necessary information needed to ensure the safety of the parties and school community
- Follow up with Complainant in person and via e-mail to check in on their well-being
- Follow-up with parents of Complainant via phone, in person or e-mail to check in on well-being of Complainant to receive any further concerns
- Additional follow-up with Complainant should be at regular intervals and with ongoing consultation with parents to make sure welcomed and not-intrusive

# Step by Step: Incident Report to Final Outcome

## Step Four[cont.].

- Formal investigation based on report or formal complaint, if filed
- Notify school personnel who are in “need to know” roles of only the necessary information needed to ensure the safety of the parties and school community
- Additional follow-up with Complainant should be at regular intervals and with ongoing consultation with parents to make sure welcomed and not-intrusive

**Step by Step:  
Incident Report to Final Outcome**

**Step Five:  
Determine Jurisdiction  
and Scope Question**

# Step by Step: Incident Report to Final Outcome

## Step Five:

- Determine **Jurisdiction/Scope Question:**
  - Do allegations meet the definition of sexual harassment in the Final Rule?
  - **Did the event occur** in the school's education program or activity against a person in the United States
  - IF answer to either question is NO - - DISMISS as to Title IX
  - *May still address the allegations in any manner the school deems appropriate under the school's own code of conduct or any other non-Title IX disciplinary policy.*
- If there is sufficient information to conclude that the allegations meet definition of sexual harassment and occurred in the school's education program or activity against a person in the United States, then the Coordinator should again review grievance process and explain the informal resolution process as an option to Complainant

# Step by Step: Incident Report to Final Outcome

## Step Six: Notify Respondent

# Step by Step: Incident Report to Final Outcome

## ➤ Step Six:

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

# Step by Step: Incident Report to Final Outcome

## **Step Seven: Consider Informal Resolution Process**

# Step by Step: Incident Report to Final Outcome

## Step Seven: [only if formal complaint filed]

- If Complainant or Respondent wants to pursue the informal resolution process, determine if the other party wants to voluntarily engage in the informal resolution process as well
- If so, identify an impartial, neutral, trained party to serve as the informal resolution facilitator and assign the matter.
- Poll each party to determine if there is a basis as to why the person selected cannot be fair and impartial or is biased

34 CFR §106.45(b)(9)

# Informal Resolution: §106.45(b)(9)

Final regulations support and expand informal resolution:

- **Pros:** Benefits of informal resolution
    - Empowers victims to pursue a grievance without the possible discomfort of a full formal process.
    - Increases flexibility to address unique situations.
    - Increases choice by allowing both parties to choose the option that is right for them to resolve the grievance.
    - Can enhance party anonymity.
  - **Cons:** Limitations of informal resolution
    - Lacks procedural safeguards of a more formal grievance process.
    - Less appropriate mechanism to address allegations of sexual misconduct than a more formal grievance process.
- \*\* No Requirement that recipients establish or offer an informal resolution process.

# Informal Resolution: When Available?

- §106.45(b)(9) was revised to state that informal resolution is only available after a formal complaint has been filed.
- Informal resolution available when:
  - 1) Formal complaint has been filed;
  - 2) Recipient determines that informal resolution is appropriate; and
  - 3) Both parties provide fully informed written consent for informal resolution.

# Informal Resolution: Voluntary Consent

- Voluntary consent can only be obtained after written notice is provided to each party of the allegations, the process of the informal resolution, the confidentiality implications, potential punishments or consequences, and that either party can withdraw at any time prior to the final resolution.
- Consent cannot be the product of coercion or undue influence.
- Parties need not confer with an advisor prior to providing consent to entering an informal resolution process.
- Recipients are prohibited from requiring the parties participate in informal resolution.

# Informal Resolution: When Unavailable?

- Informal resolution is never available to resolve a formal complaint that an employee sexually harassed a student.
- Either party can withdraw their consent for the informal resolution process at any time and resume the grievance process with respect to a formal complaint.
- Recipients are prohibited from forcing students or employees to waive their right to a formal grievance process or requiring the parties to participate in an informal resolution process.

# Informal Resolution: How Does It Work?

- **After a formal complaint is filed**, written notice of the allegations is sent to both parties.
- The written notice must include the informal resolution processes the recipient has chosen to make available.
- The written notice must provide details such as:
  - The allegations;
  - The requirements of the informal resolution process;
  - The privacy and/or confidentiality implications of participating in informal resolution;
  - Any consequences that may result from participation in the informal process;
  - The explicit right to withdraw from the informal resolution prior to the final determination at any time.
- Both parties must provide informed and voluntary written consent.

# Informal Resolution: Who May Facilitate?

- Individuals facilitating informal resolution must be free from conflicts of interest, bias, and trained to serve impartially.
- Must have completed the anti-conflict of interest, anti-bias, and all training requirements
- Note: an individual facilitating an informal resolution may become a witness in a subsequent formal grievance proceeding PROVIDED that possibility was explained to the parties in the written notice and the parties provided their prior express consent. (p. 1367).

# Informal Resolution: Greater Sense of Autonomy

- Nothing in the informal process requires that the parties confront each other or even be in the same room.
- Mediation often involves the parties in separate rooms and the mediator conversing with each party separately.
- Increased confidentiality.
  - Recipients must fulfill recordkeeping and disclosure requirements of Title IX.
  - Recipients must disclose to the parties prior to obtaining their express consent of the records that will be maintained and those that can and cannot be shared.
  - And the possibility of confidentiality requirements as a condition of the final agreement

# Informal Resolution: Restorative Justice

- Nothing in the regulations prohibit recipients from using restorative justice as an information resolution process to address sexual misconduct incidents.
- Generally, the respondent admits responsibility at the start of the restorative justice process.
- Nothing in the final regulations dictates the form of disciplinary sanctions a recipient may or must impose on a respondent.

# Step by Step: Incident Report to Final Outcome

## Step Eight: Investigation

# Step by Step: Incident Report to Final Outcome

## Step Eight:

- If no informal resolution process, then begin the formal investigation into the incident
- Issue a *Notice of Investigation* that states the nature of the complaint, when the complaint was received, and what school district policies are alleged to have been violated and who is conducting the investigation.
- Identify an impartial, neutral, trained party to serve as the investigator and assign the matter.
- Provide the name and information about investigator to see if either party can state if there is a basis as to why the person selected cannot be fair and impartial or is biased.

# What Should A Title IX Investigation Include?

- The specific steps in a school's Title IX investigation will vary depending on:
  - Nature of the allegation
  - Age of the student or students involved
  - Size and administrative structure of the school
  - State or local legal requirements (including mandatory reporting requirements for schools working with minors), and what it has learned from past experiences
- Definition: "*investigation*" refers to process the school uses for sexual harassment complaints

# What Should A Title IX Investigation Include?

- Includes the fact-finding investigation, hearing and decision-making process the school uses to determine:
  - Whether or not the conduct occurred
  - If the conduct occurred, what actions the school will take to end the sexual violence, eliminate the hostile environment, and prevent its recurrence, which may include imposing sanctions on the perpetrator and providing remedies for the complainant and broader student population
- The investigation must be adequate, reliable, impartial and prompt and include an opportunity for both parties to present witnesses and other evidence

# Section 106.45

## School's Response to Formal Complaints

# Reasonably Prompt Time Frames

Recipients **must** designate a reasonable time frame for each phase of the grievance process:

- The reasonableness of the time frame is evaluated based on the recipient's operation of an education program or activity.
- The time frame **must** include the time for appeals and any informal resolution process.
- Open-ended or indefinite grievance processes are **prohibited**.

Delays or extensions of the designated timeframes are permitted, but not required, so long as they are:

- Temporary and limited;
- Supported by good cause (i.e., concurrent police activity or absence of a witness), and;
- Communicated in writing to the parties with an explanation for the delay.

34 CFR §106.45(b)(1)(v)

# Describing Possible Disciplinary Sanctions and Remedies

A recipient has discretion to:

- **List** the possible disciplinary sanctions and remedies the recipient may implement following a determination of responsibility, or
- **Describe the range** of possible disciplinary sanctions and remedies the recipient may implement following a determination of responsibility.

34 CFR §106.45(b)(1)(vi)

# Written Notice of Allegations

After receiving a formal complaint, a recipient must provide written notice to the parties of the recipient's grievance procedures and the allegations:

- Sufficient details.
  - The parties involved, date, and location of incident (if known at the time);
  - The section of the recipient's code of conduct allegedly violated (if applicable); and
  - The alleged conduct constituting sexual harassment.
- Sufficient time for the respondent to prepare a response before any initial interview.
  - What constitutes "sufficient time" will be determined by the circumstances.
- A statement that the respondent is presumed not responsible and that a determination regarding responsibility is made at the conclusion of the grievance process.

34 CFR §106.45(b)(2)

# Written Notice of Allegations (cont.'d)

- The notice **must also** inform the parties:
  - That they may request to inspect and review evidence
  - That each party has a right to an advisor of choice
  - 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
- If the recipient's code of conduct is silent on false statements and/or submitting false information, this reference is not required in the written notice.
- If the school decides later to investigate allegations not included in the original notice, the school must provide notice of the additional allegations to the parties.

34 CFR §106.45(b)(2)

# Written Notice of Allegations (cont.'d)

The recipient must send notice to the parties regarding essential case developments such as where:

- Additional allegations become part of the investigation;
- Allegations or the entire formal complaint have been dismissed;
- Any short-term delay or time frame extension has been granted; and the determination regarding responsibility has been made.

34 CFR §106.45(b)(2)

# Burdens of Proof and Gathering Evidence

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

- **There is no burden of proof on complainants or respondents.**
- Use of a party's medical, psychological, and other treatment records is prohibited unless the party provides voluntary, written consent.

34 CFR §106.45(b)(5)(i)

# Objective Evaluation of All Relevant Evidence

An investigator must gather evidence directly related to the allegations even if the recipient does not intend to rely on such evidence.

- The recipient must objectively evaluate evidence that is available in a particular case.
- The evidence itself need not be “objective” (i.e., corroborating evidence).
- Recipients must not base evaluations of testimony based on inferences of a person’s status as a complainant, respondent, or witness.

34 CFR §106.45(b)(1)(ii)

# Presumption of Non-Responsibility

- The respondent is presumed **not responsible** for the alleged conduct until a determination has been made at the end of the grievance/hearing process.
- Purpose of the presumption:
  - To ensure the burden of proof remains on the recipient (not on the respondent or complainant);
  - To ensure the applicable standard of evidence is correctly applied; and
  - To ensure the recipient does not treat the respondent as responsible until the conclusion of the grievance process.

34 CFR §106.45(b)(1)(iv)

# Investigation: Interviewing

## Sample of general questioning

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

## Equal Opportunity to Present Witnesses and Other Inculpatory/Exculpatory Evidence

- Each party must have the opportunity to present fact and expert witnesses.
- Recipients may adopt rules governing how admissible relevant evidence is evaluated for weight or credibility by the decision-maker
- Any rules adopted must be applied equally to both parties

34 CFR §106.45(b)(5)(ii)

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

- Applies to discussions of “the allegations under investigation,” which means a formal complaint has been filed.
- The regulations do not require recipients to give respondents a copy of the formal complaint.
- The opportunity to communicate with witnesses or potential witnesses is not reserved solely for the school.

34 CFR §106.45(b)(5)(iii)

# Advisors of Choice

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

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

- 34 CFR §106.45(b)(5)(iv)

## Advisor (cont.'d)

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

34 CFR §106.45(b)(5)(iv)

# Inspection and Review of Evidence Directly Related to the Allegations

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

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

34 CFR §106.45(b)(5)(vi)

# Inspection and Review of Evidence Directly Related to the Allegations (cont.'d)

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

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

34 CFR §106.45(b)(5)(vi)

# Step by Step: Incident Report to Final Outcome

## Step Nine: Complete Investigation

# Step by Step: Incident Report to Final Outcome

## ➤ Step Nine:

- Provide the Investigator with access to all relevant information and contact information for witnesses.
- Make sure the Investigator, if external, has all necessary Child Abuse/FBI clearances in order to meet with students and be in the school building.
- Periodic updates from Investigator and update parties and their parents at the same time as to the status of the investigation.
- Share the draft Investigation report at the same time with the parties. **Allow 10 days for parties to provide a response.**
- Issue final investigation report, hard copy or electronic format, contemporaneously to the parties **at least 10 days prior to a hearing** or administrative outcome proceeding.

# An Investigative Report that Fairly Summarizes Relevant Evidence

The school entity must send the parties and their advisors **an investigative report that fairly summarizes relevant evidence**, in an electronic format or a hard copy, **for their review and written response, with at least 10 days for the parties to respond before any hearing** (if a hearing is provided) **or the determination of responsibility**.

- ❖ Where there are multiple complainants, respondents, or both, a recipient may issue a single investigative report.
- ❖ A party can request that the report not be sent to their advisor, but **the default practice** should be to send it to the advisor to avoid shortening the 10-day review period.

34 CFR §106.45(b)(5)(vii)

# Step by Step: Incident Report to Final Outcome

## Step Ten: Hearing Process

# Step by Step: Incident Report to Final Outcome

## ➤ Step Ten:

- Identify a decision-maker who is unbiased, neutral and trained to either conduct a live hearing on the complaint or render a decision based on review of the investigation report and all other relevant evidence.
- With or without a hearing, schools should:
  - Provide the investigative report in advance to each party
  - Decision-maker must provide each party the opportunity to submit written questions to the other party and witnesses
  - Time to receive an answer before a determination regarding responsibility is reached.

# Grievance/Hearing Process

- Grievance process must provide notice and meaningful opportunity to be heard and include:
  - Presumption of innocence
  - Reasonably prompt time frames for the grievance process;
  - Informs all parties of critical information about the recipient's procedures, including the range of remedies and disciplinary sanctions a recipient may impose, the standard of evidence applied by the recipient to all formal complaints of sexual harassment under Title IX, the recipient's appeal procedures, and the range of supportive measures available to both parties.

# Grievance Process (cont.'d)

- Requires **written notice** of the allegations to both parties;
- Keeps the burden of proof and burden of gathering evidence on the school while protecting every party's right to consent to the use of the party's own medical, psychological, and similar treatment records;
- Provides the parties equal opportunity to present fact and expert witnesses;
- Does not restrict the parties from discussing the allegations or gathering evidence;
- Require schools to:
  1. Investigate formal complaints;
  2. Describe when a formal complaint is subject to mandatory or discretionary dismissal;
  3. Notify the parties of any dismissal; and
  4. Authorize discretionary consolidation of formal complaints when allegations of sexual harassment arise out of the same facts or circumstances.

## Grievance Process (cont.'d)

- Decision-maker NOT the Title IX Coordinator or the investigator
- Must simultaneously send the parties a written determination explaining the reasons for the outcome.
- Requires recipients to offer appeals equally to both parties on the bases that
  - procedural deficiencies, or
  - newly discovered evidence, or
  - bias or conflict of interest affected the outcome.

34 CFR §§106.45(b)(6)- (b)(8)

# Grievance Process (cont.'d)

- Gives the parties equal opportunity to have an advisor for live hearing who can conduct cross examination in IHE
- If an ESE conducts a live hearing, the parties have an equal opportunity to submit written questions for the other parties and witnesses to answer before a determination regarding responsibility is reached
- Requires written notice when a party's participation is invited or expected for an interview, meeting, or hearing
- Provides both parties equal opportunity to review and respond to the evidence gathered during the investigation
- Sends both parties the recipient's investigative report summarizing the relevant evidence, prior to reaching a determination regarding responsibility

34 CFR §§106.45(b)(2) and (b)(5)(i)-(vii)

# Step by Step: Incident Report to Final Outcome

## Step Eleven: Outcome Determination

# Step by Step: Incident Report to Final Outcome

## Step Eleven:

- Receive from the decision-maker the Outcome Determination letter
- and deliver the outcome determination to the Complainant and Respondent.
- Delivery should be contemporaneous to both parties.
- The Outcome Determination should include the decision-maker's findings of fact, application of the standard of proof outlined in the policy, rationale, conclusion and sanction.
- Review the School Code to determine if, based on sanction recommendation, the school board must review and vote to approve or reject the outcome determination and sanction recommendation.

# Formal Complaint Dismissal

Schools may dismiss a formal complaint if:

- The complainant notifies the Title IX Coordinator in writing that the complainant wishes to withdraw
- The conduct did not take place in the United States
- The respondent is no longer enrolled or employed by recipient,
- The specific circumstances prevent the recipient from gathering evidence sufficient to reach a determination
- The alleged conduct not sexual harassment under Title IX

# Notice of Dismissal

Recipients **are required** to send the parties written notice of any dismissal decision.

- Recipients are also **required** to promptly send the Parties written notice so the parties know when a formal complaint (or allegations) has been dismissed including the reason for the dismissal.
- Notice is **required** for both mandatory and discretionary dismissals, including the reason for the dismissal.

34 CFR §106.45(b)(3)(iii)

# Dismissal of a Formal Complaint: Appeal

If a school dismisses a formal complaint or any allegations in the formal complaint, the complainant should:

1. Know why any of the complainant's allegations were dismissed  
**and**
2. Be able to challenge such a dismissal by appealing on certain grounds.

# Final Outcome Decisions

- A “final” decision/determination means the written determination containing the information required in §106.45(b)(7):
  - A determination regarding responsibility.
  - The specific disciplinary sanctions imposed on the respondent; and
  - *Whether* remedies were provided to the complainant to restore equal access to education (NOT what those remedies were).

# Final Outcome Decisions

- Identify allegations
- Describe procedural steps and notices provided to parties
- Statement of facts found supporting the determination
- Statement of conclusions applying code of conduct to facts
- Statement of reasons for conclusion and determination of responsibility on each allegation
- Statement of any disciplinary actions and how designed to restore equal access to education
- Statement of process for appeal

# Final Outcome Decisions: When “Final”?

- **A Written Determination becomes “Final” only after:**
  - The time period to file an appeal has expired; or
  - If a party does file an appeal, after the appeal decision has been sent to the parties.
  
- **Timing of Appeal:**
  - Final regulations require recipients designate “reasonably prompt” time frames for concluding appeals.
  
- **Final Outcome Decision Becomes Final on the Date That:**
  - Written determination of appeal is simultaneously provided to both parties, or
  - The date on which the appeal rights lapse if no appeal is taken.

# Disclosure of Disciplinary Decisions

- Regulation discuss interplay between recipient's obligations under the Family Education Rights and Privacy Act (FERPA) and Title IX: . (pg.1475)
- FERPA addresses the conditions permitting a recipient's disclosure, without an alleged victim's consent, to publicly make available the final results of a disciplinary proceeding without:
  - Recipients have discretion to disclose personally identifiable information regarding student respondents who have been found responsible for violating Title IX, without the respondent's consent.
  - Such disclosures are permissible and not mandatory
- The Department **does not regulate what information schools must share with one another when a student transfers to a different school**, and declined to do so in these regulations.

# Sanctions on Respondent

- The department believes that recipients should have the flexibility and discretion to suspend or expel respondents from campus as a disciplinary sanction.
- Expulsion or suspension may follow a determination of the respondent's responsibility following informal resolution or the formal grievance process.

**Step by Step:  
Incident Report to Final Outcome**

**Steps Twelve and  
Thirteen:  
Appeal Procedure**

# Step by Step: Incident Report to Final Outcome

## Step Twelve:

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

## Step Thirteen:

If a timely appeal is filed, the appeal decision maker(s) must be identified, notice given to the parties of who is handling the appeal and the time frame for when the appeal decision would be made

- NOTE: decision-maker on appeal must be trained, impartial and unbiased.

# Appeals: §106.45(b)(8)

- Recipients MUST offer both parties an appeal from the following decisions/determinations:
  - Determination regarding responsibility; or
  - Recipient's dismissal of formal complaint; or
  - Recipient's dismissal of any allegations contained in a formal complaint.

# Appeals: Must Provide to Both Parties

- A meaningful and equal opportunity to submit written statements supporting or challenging the outcome.
- A reasoned written determination, provided simultaneously to both parties, explaining the appeal results and the rationales on which the results are based.
- Under the final regulations, the appeal rights for complainants and respondents are identical.

# Appeals: Decision-Maker Requirements

The individuals hearing an appeal must meet the following requirements:

- Must be different from the Title IX coordinator, investigators, or decision-makers that reached the initial determination
- Strict separation of the appeal decision-makers from the individuals who investigated and adjudicated the underlying case is critical to maintain neutrality.

Must satisfy the robust anti-bias training requirements:

- The definition of sexual harassment in § 106.30;
- How to conduct an investigation, a hearing, and an appeal;
- How to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias;
- Issues of relevance to create an investigative report that fairly summarizes relevant evidence.

A third-party, independent of recipient, is NOT required to handle an appeal. (1363)

# Appeals: Grounds for Appeal

- Recipients MUST offer appeals on AT LEAST the following three (3) grounds:
  1. Procedural irregularity that affected the outcome;
  2. Newly obtained evidence that was not reasonably available when the determination of responsibility was made; and
  3. The Title IX coordinator, investigator, or decision-maker had a general or specific conflict of interest or bias against either party that affected the outcome.
- Recipients *may* offer appeals equally to both parties on additional grounds.
  - Example: May offer appeal based on severity of punishment.

# Appeals: Severity of the Sanction

- Whether the parties can appeal based solely on the severity of the sanctions is left to the recipient's discretion.
- If recipient does allow for appeals based upon the severity of the sanction, both parties must have equal opportunity to appeal on that basis.
- Department will not second guess recipient's disciplinary decisions.

– See also *Davis v. Monroe County Board of Education*. 526 U.S. 629 (1999)

# Appeals: Timing

- The deadline to file an appeal after an initial determination is left to the discretion of the recipients but must apply equally to both complainant and respondent.
- The appeal process must be concluded under “designated and reasonably prompt time frames”. (pg.1356)
- Goal is for the final determination in a Title IX grievance to be both 1) Accurate and 2) Reasonably Prompt.

# Appeals: While an Appeal is Pending

- While initial determination is on appeal, but prior to the final determination:
  - Supportive Measures remain available to restore or preserve either parties equal access to education, e.g.:
    - Mutual no-contact order;
    - Academic course adjustment.
- Respondent likely to continue to enjoy the presumption of non-responsibility until final determination after appeal. ( pg.1357)
  - §106.45(b)(1)(iv): presumption of non-responsibility is intended to ensure that respondents are not treated as responsible until ultimate resolution of grievance process.

**Step by Step:  
Incident Report to Final Outcome**

**Steps Fourteen and  
Fifteen:  
Appeal Decision and  
Recordkeeping**

# Step by Step: Incident Report to Final Outcome

## Step Fourteen:

Notify parties in writing of the appeal decision [reasons for and result] and that the decision is final.

## Step Fifteen:

Secure all documents and information gathered and preserve all information for seven (7) years. 34 CFR §106.45(b)(10)

# U.S. Department of Education Resources

- OCR Summary of Major Title IX provisions - <https://www2.ed.gov/about/offices/list/ocr/docs/titleix-summary.pdf>
- OCR Video Presentation on New Title IX Regulations - <https://www.youtube.com/watch?v=TdfT5R8ibm4&feature=youtu.be>
- OCR Final Rule Overview of Title IX Regulations - <https://www2.ed.gov/about/offices/list/ocr/docs/titleix-overview.pdf>
- U.S. Department of Education Press Release on Sexual Assault in K-12 schools [https://www.ed.gov/news/press-releases/secretary-devos-announces-new-civil-rights-initiative-combat-sexual-assault-k-12-public-schools?utm\\_content=&utm\\_medium=email&utm\\_name=&utm\\_source=govdelivery&utm\\_term=](https://www.ed.gov/news/press-releases/secretary-devos-announces-new-civil-rights-initiative-combat-sexual-assault-k-12-public-schools?utm_content=&utm_medium=email&utm_name=&utm_source=govdelivery&utm_term=)

# Resources on Sexual Harassment

<https://www2.ed.gov/about/offices/list/ocr/docs/qa-title-ix-201709.pdf>

# ***QUESTIONS***

# **THANK YOU**

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