

Title IX for K-12 Schools

Obligations and Responsibilities Under the Law



BY: THE ARNOLD LAW FIRM, LLC

What is Title IX?

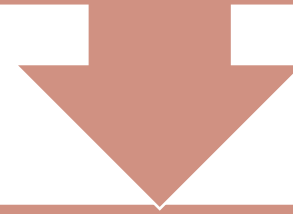
Title IX of the Education
Amendments Act, 1972:



"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."

What is Title IX's "Final Rule"?

Final Rule was established to clarify the implementation and enforcement of Title IX of the Education Amendments of 1972.



The Final Rule created the following changes:

Defined sexual harassment

Created a formal grievance process

Mandated live hearings for the grievance process as colleges/universities

Created a Knowledge/Notice standard for schools



Most Recent Changes in Title IX Law

- ▶ DOE released new Title IX Regulations on May 6, 2020
- ▶ First significant changes to Title IX since 1975
- ▶ Effective date for new regulations was August 14, 2020



Who does Title IX apply to?



Title IX applies to educational institutions that receive federal financial assistance.



Covers students and employees.




What is defined as Sexual Harassment or Discrimination?

CONDUCT ON THE BASIS OF SEX THAT MEETS ONE OR MORE OF THE FOLLOWING:

A school employee conditioning the provision of aid, benefits, or services on the individual's participation in unwelcome sexual conduct (quid pro quo);



Unwelcome conduct that a reasonable person would determine to be so severe, pervasive and objectively offensive that it denies a person equal access to the education program or activity; or



Sexual assault (as defined in the Clery Act), or dating violence, domestic violence or stalking (as defined in the Violence Against Women Act)

Easy way to remember...

Quid Pro Quo

SPOO

Physical Acts



"SPOO CHART"

Severe	Pervasive	Objectively Offensive
Physical	Widespread	Reasonable Person Standard
Non-Consensual	Openly Practiced	Age & Relationship Between Parties
Complainant's Ability to Escape Harassment	Well Known by Student/Employee	Intimidation, Ridicule, Humiliation
Threats	Occur with Regularity	Number of Persons Involved
Violence	Intensity/Duration	"I Know it, When I See It"

What is an Educational Activity?

“Education program or activity” is broadly defined to include locations, events, or circumstances over which the school exercises substantial control over both the respondent and the context in which the sexual harassment occurs.

What it means to be excluded from - denial of access.

Prevented or restricted from participating in or benefiting from educational programs or activities on the basis of their sex (exclusion, unequal treatment, retaliation, hostile environment, etc.)

Concrete injury is not required. Complainants do not need to have dropped out of school, failed a class, had a panic attack, or otherwise reached a 'breaking point' or exhibited specific trauma symptoms.

Denial of equal access to education also does not require that a person's total or entire educational access has been denied

TITLE IX & Final Rule Requires the following:

Respond

- Schools must respond to complaints/allegations/notices of Title IX related conduct in a timely manner and without deliberate indifference.

Trained
People

- Schools must have trained personnel in key roles in order to implement Title IX effectively and correctly, and must list training materials on website.

Policy

- Schools must have a Title IX Policy.

Records

- Schools must maintain Title IX records for 7 years.

Follow
Process

- Schools must follow the Rule's steps with regard to informal complaints and formal complaints (grievance process) and must offer supportive measures.

KEY PERSONNEL:

Complainant

Respondent

Title IX
Coordinator

Investigator

Decision
Maker

Appeals
Decision
Maker

Complainant:

An individual who is alleged to be the victim of conduct that could constitute sexual harassment. (this includes parents of student, if victim is a student).



Respondent:

An individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment.



Coordinator:

Responsible for the Title IX process and compliance with all rules and obligations for the School

Can also be the "investigator"



Investigator:

Follow investigative steps and process outlined in Final Rule.

Conduct a fair and impartial investigation.

Create an investigative report that fairly summarizes relevant evidence.

Decision Maker:

- Serve as the decision-maker in Title IX matters
- Determine whether the Code of Conduct has been violated based upon the evidentiary standard adopted by the school
- Conduct an independent assessment of the evidence (remain uninvolved during the Title IX investigation)
- Remain free from conflict of interest and bias
- Determine appropriate discipline when a Code of Conduct violation has been found
- Draft a written determination that outlines the rationale for the finding(s)





Appeals Decision Maker:

- Make a determination on a party's request for an appeal
- Review written submissions from parties
- Review investigative report and all evidence from the underlying investigation
- Case review is limited to the grounds listed in the appeal request
- Draft a written determination that outlines the rationale for the outcome



Who are Advisors?

- The complainant and respondent are entitled to have one (1) advisor of their choosing.
- The advisor may attend any meeting or interview during the Title IX Grievance Process.
- Advisors may include: Parent, Family Friend, Attorney, Coach, Youth Pastor, etc.

Recipient:

THE EDUCATIONAL INSTITUTION
REQUIRED TO RESPOND.



How is conduct reported?



- Any person may report sexual harassment, regardless of whether the reporting person is the alleged victim of the conduct.
- A report can be made in person, by telephone, by mail, or by electronic mail to the Title IX Coordinator. No specific method for reporting is required.
- Title IX Coordinator must be informed.

Knowledge is Notice:

When any school-based employee has knowledge of sexual harassment or allegations of sexual harassment, schools are REQUIRED to respond timely and without deliberate indifference.

Two Types of Complaints:



Informal Complaints



Formal Complaints

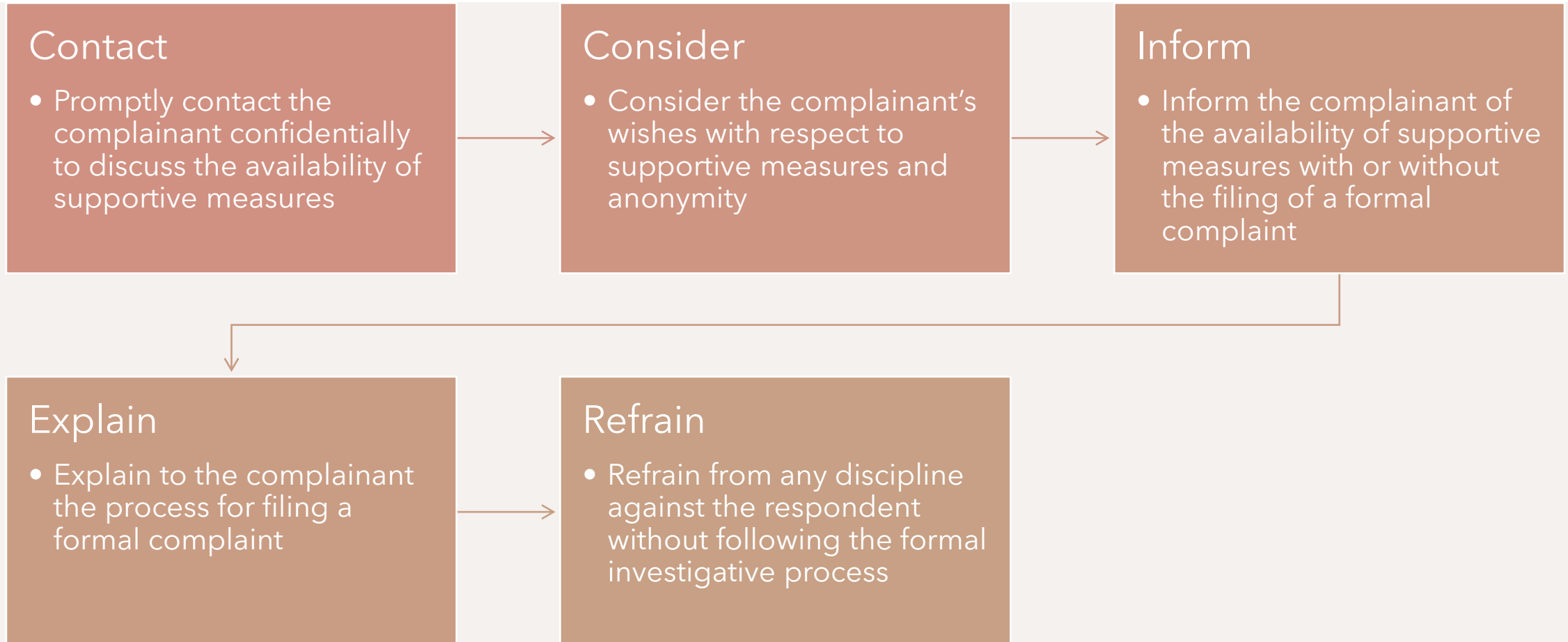


Informal Complaints:

- Any disclosure of Title IX related conduct that is not a signed, written complaint requesting a Title IX investigation.



Responding to Informal Complaints:



What are supportive measures?



Things a school can do to ensure that the complainant has equal educational access.



Coordinator must keep track of what is offered, refused, accepted, and implemented.



May not be punitive in nature.

What are supportive measures?

Reasonably available to school

Non-punitive in nature to either respondent or complainant

Protect and provide safety

Financially reasonable to school (free)

Examples: (changing schedules, no contact contracts, make up exams, excused absences, counseling, etc.)

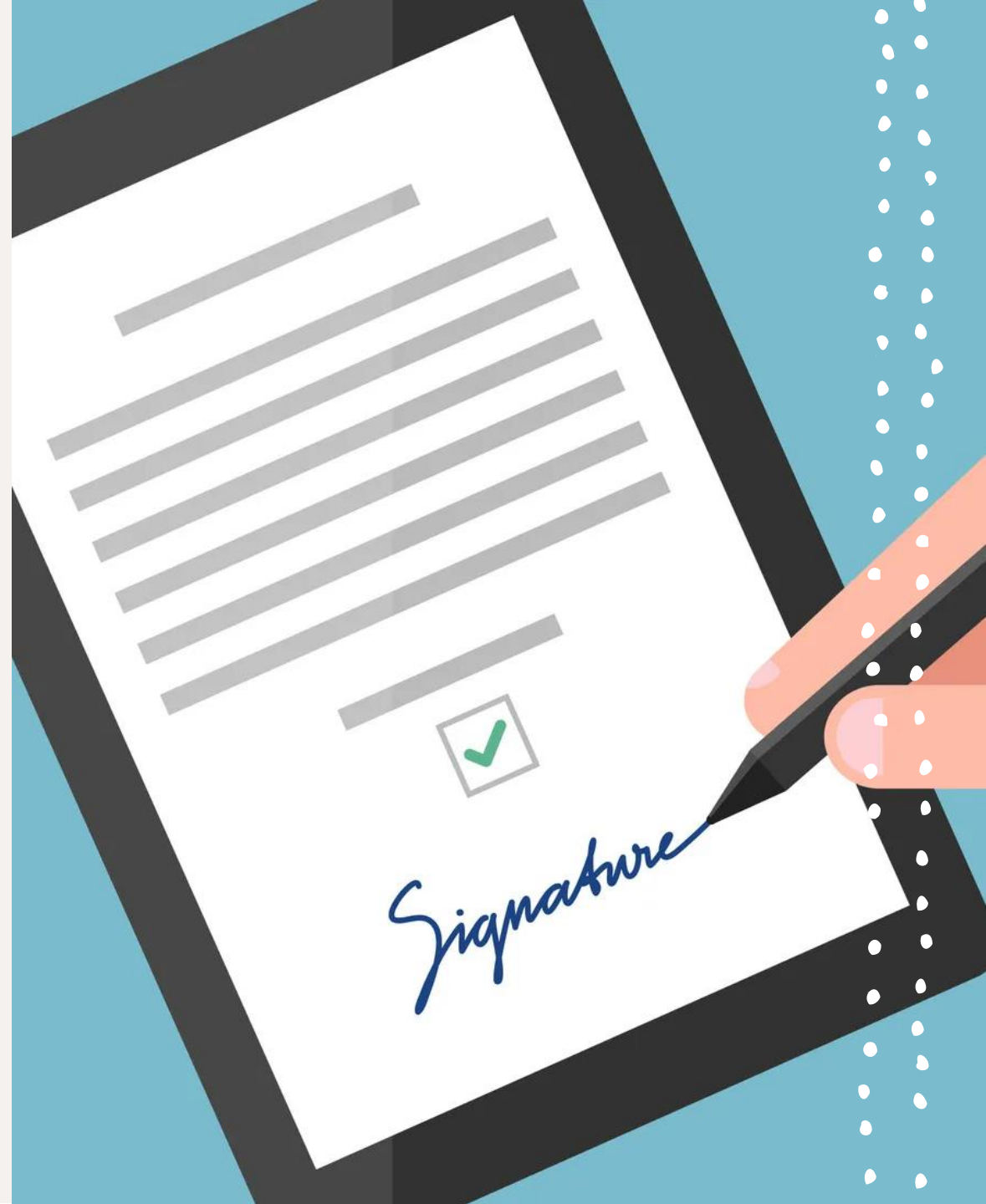
Additional Things to Consider:

Title IX's Final Rule is not a substitute for other obligations to report certain incidents (DCF, Law Enforcement, Professional Institutions)



Formal Complaints:

SIGNED, WRITTEN
DOCUMENT OUTLINING
TITLE IX RELATED
CONDUCT AND
ASKING/REFERENCING
INVESTIGATION
(34 CFR 106.30)



Formal Complaints:

Once the formal complaint is filed, schools must immediately determine the following:

Do the allegations meet the definition of sexual harassment?

Did the conduct occur in an educational program or activity?

Did the allegations occur against a person in the United States?

If all three requirements are met, then schools must follow the grievance process

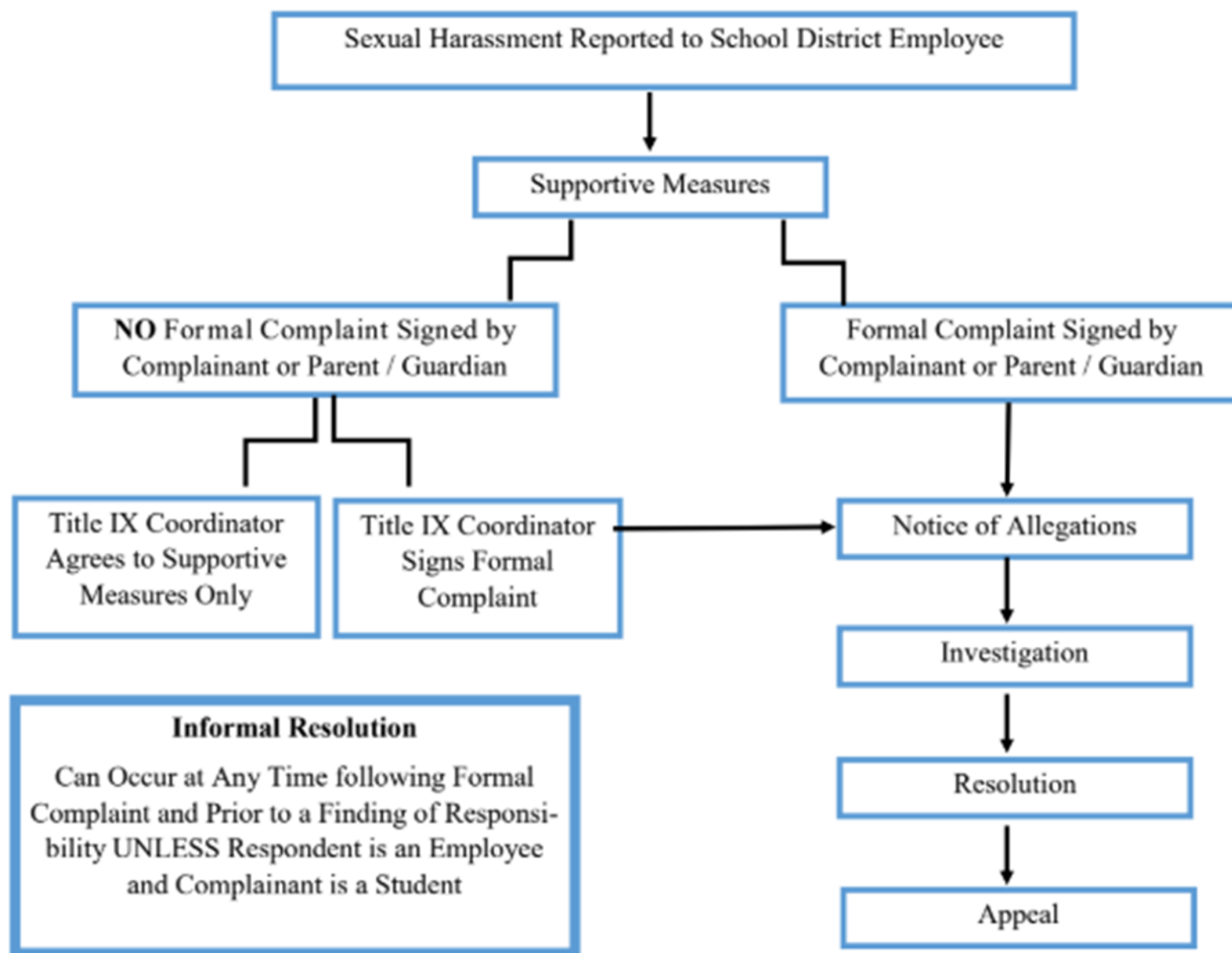


Formal Complaints:

Anyone can file a formal complaint.

Title IX Coordinator must file a complaint if supportive measures (non-discipline) would not be enough.

Title IX K-12 Process Flow Chart



Grievance Process:



Specific obligations are outlined in 34 U.S.C. 106.45



A recipient's treatment of a complainant or a respondent in response to a formal complaint of sexual harassment may constitute discrimination on the basis of sex under title IX.



Process must be adhered to prior to any disciplinary action.

Grievance Process also Requires...



Notice of Allegations to be sent at start of investigation, which has strict requirements



Rules for contents of Investigative Reports and dissemination of evidence to all parties.



Rules for the content of any Written Determination made by the decision maker.

Standard of Review

- 34 CFR 106.45(b)(1)(vii)
- Schools may select either a “preponderance of the evidence” or a “clear and convincing” standard to be used when determining responsibility under Title IX.
- Must use same standard to for all complaints.
- NOTE: If following district policy - ensure same standard is applied.



DISMISSAL OF COMPLAINT:

34 U.S.C. 106.45(b)(3)

```
graph TD; A[34 U.S.C. 106.45(b)(3)] --> B[School may dismiss a complaint if:]; B --> C[Complainant notifies School in writing of desire to withdraw the formal complaint or any allegation therein (part of the complaint), or]; C --> D[Respondent is no longer enrolled or employed by the recipient, or]; D --> E[Specific circumstances prevent the School from gathering evidence sufficient to reach a determination as to the complaint or the allegations therein.];
```

School may dismiss a complaint if:

Complainant notifies School in writing of desire to withdraw the formal complaint or any allegation therein (part of the complaint), or

Respondent is no longer enrolled or employed by the recipient, or

Specific circumstances prevent the School from gathering evidence sufficient to reach a determination as to the complaint or the allegations therein.

NOTICE OF ALLEGATIONS:

WHEN COMMENCING A GRIEVANCE PROCESS, A NOTICE OF ALLEGATIONS MUST BE SENT TO ALL PARTIES.

SEE 34 U.S.C. 106.45(B)(2)



Notices must include:

The identities of parties involved;

The conduct allegedly constituting sexual harassment;

The date and location of the alleged incident;

A statement that the respondent is presumed not responsible for the alleged conduct;

The school's grievance process;

A statement that a determination regarding responsibility is made at the conclusion of the grievance process

A statement informing the parties that they may have an advisor of their choice who may be, but is not required to be, an attorney

A statement advising parties that they may inspect and review evidence; and

A statement informing the parties of any provision in the recipient's Code of Student


Conduct that prohibits knowingly making false statements or knowingly submitting false information

DISMISSAL OF COMPLAINT:

34 U.S.C. 106.45(3)



If the conduct alleged in the formal complaint would not constitute sexual harassment as defined in § 106.30 even if proved, did not occur in the recipient's education program or activity, or did not occur against a person in the United States, then the recipient must dismiss the formal complaint with regard to that conduct for purposes of sexual harassment under Title IX




Dismissal does not preclude action under another provision of the recipient's code of conduct.

INVESTIGATIONS (Grievance Process)

SPECIFIC OBLIGATIONS FOR INVESTIGATIONS
ARE OUTLINED IN 34 CFR 106.45(B)(5)

Investigations Require:

Ensure that the burden of proof and the burden of gathering evidence sufficient to reach a determination regarding responsibility rest on the recipient and not on the parties provided that the recipient 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 (if a party is not an "eligible [student](#)," as defined in [34 CFR 99.3](#), then the recipient must obtain the voluntary, written [consent](#) of a "parent," as defined in [34 CFR 99.3](#));

A decorative horizontal line consisting of a series of small, light-colored dots, spanning the width of the page at the bottom.

Investigations Require:

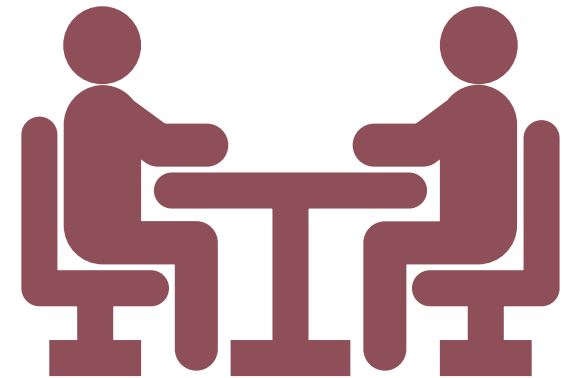
Provide an equal opportunity for the parties to present witnesses, including fact and expert witnesses, and other inculpatory and exculpatory evidence;

Not restrict the ability of either party to discuss the allegations under investigation or to gather and present relevant evidence;

Provide, to a party whose participation is invited or expected, written notice of the date, time, location, participants, and purpose of all hearings, investigative interviews, or other meetings, with sufficient time for the party to prepare to participate;

Investigations Require:

Provide the parties with the same opportunities to have others present during any grievance proceeding, including the opportunity to be accompanied to any related meeting or proceeding by the advisor of their choice, who may be, but is not required to be, an attorney, and not limit the choice or presence of advisor for either the complainant or respondent in any meeting or grievance proceeding; however, the recipient may establish restrictions regarding the extent to which the advisor may participate in the proceedings, as long as the restrictions apply equally to both parties;



Investigations Require:

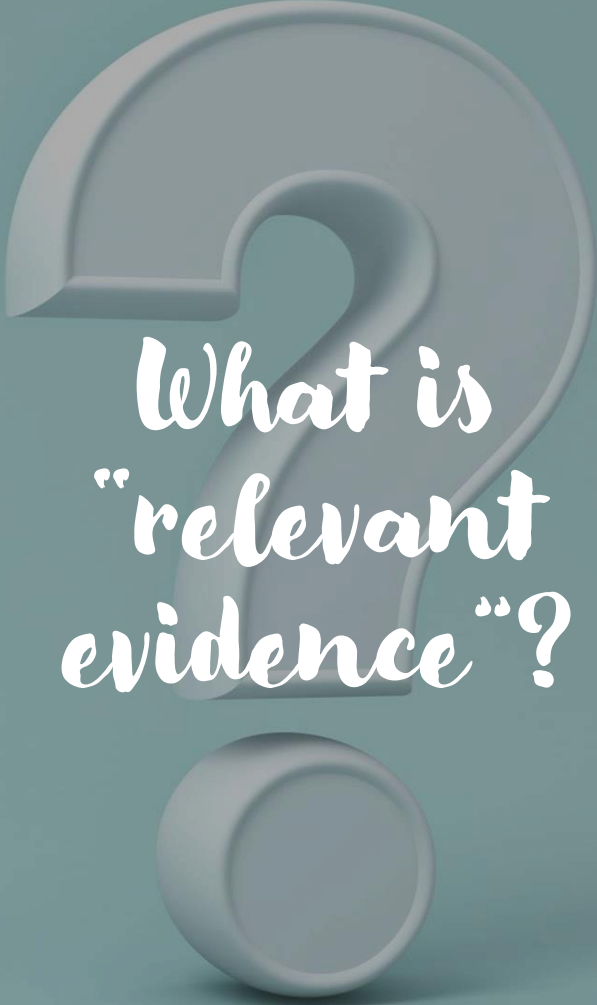
Provide both parties an equal opportunity to inspect and review any evidence obtained as part of the investigation that is directly related to the allegations raised in a formal complaint, including the evidence upon which the recipient does not intend to rely in reaching a determination regarding responsibility 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. Prior to completion of the investigative report, the recipient 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, and the parties must have at least 10 days to submit a written response, which the investigator will consider prior to completion of the investigative report. The recipient must make all such evidence subject to the parties' inspection and review available at any hearing to give each party equal opportunity to refer to such evidence during the hearing, including for purposes of cross-examination;



Investigations Require:

Create an investigative report that fairly summarizes relevant evidence and, at least 10 days prior to a hearing (if a hearing is required under this section or otherwise provided) or other time of determination regarding responsibility, send to each party and the party's advisor, if any, the investigative report in an electronic format or a hard copy, for their review and written response.





What is "relevant evidence"?

- "Relevance" is not defined in the Rule. Ordinary meaning of the word should be understood and applied.
- Common meaning: Having something to do with the matter being considered.
- Legal Definition: having some value (no matter how small) that tends to prove or disprove a material fact at issue.
- Includes both inculpatory and exculpatory.
- Cannot be evidence that is clearly identified by the Final Rule as "not relevant".
- Credibility decisions cannot be based on a person's status as a complainant, respondent, or witness.
- Directly related evidence is not synonymous with "relevant".
- Weight of evidence is not the same as relevance.

Relevant Evidence is NOT:

- Privileged and protectable information cannot be considered as relevant information during an investigation of a formal Complaint.


- This includes:

Information protected by a legally recognized privilege, unless waived, such as attorney-client communications, spousal communications, confessions to a clergy member, and so on medical, psychological, and similar treatment records unless voluntary written consent is provided

Evidence of complainant's sexual history is not relevant, **unless** an exception applies (to prove consent; to prove another person committed act - see below).

RAPE SHIELD PROTECTIONS:

Title IX personnel must keep in mind rape shield protections when assessing evidence. Every relevance analysis in the Title IX formal grievance process must include a consideration of rape shield protections



Title IX's rape shield protections relate to a complainant's sexual history and provide that questions and/or evidence about the complainant's sexual predisposition or prior sexual behavior are presumptively not relevant and should not be considered.

RAPE SHIELD PROTECTIONS (Continued):

- However, there are two, narrow exceptions to this rule. Questions and/or evidence about a complainant's sexual predisposition or prior sexual history may be considered when:

The questions and/or evidence are offered to prove that someone other than the respondent committed the conduct alleged by the complainant;
or

The questions and/or evidence relate to specific incidents of the complainant's prior sexual behavior with respect to the respondent and are offered to prove consent.

WRITTEN DETERMINATION

See 34 CFR (b)(7).

Requires a written determination when concluding the grievance process.

Written Report must be sent to both parties simultaneously and must include specific information.

WRITTEN DETERMINATION MUST INCLUDE:

Identification of the allegations potentially constituting sexual harassment as defined in § 106.30

A description of the procedural steps taken from the receipt of the formal complaint through the determination, including any notifications to the parties, interviews with parties and witnesses, site visits, methods used to gather other evidence, and hearings held;

Findings of fact supporting the determination;

Conclusions regarding the application of the recipient's code of conduct to the facts;

A statement of, and rationale for, the result as to each allegation, including a determination regarding responsibility, any disciplinary sanctions the recipient imposes on the respondent, and whether remedies designed to restore or preserve equal access to the recipient's education program or activity will be provided by the recipient to the complainant; and

Procedures and permissible bases for the complainant or respondent to appeal.

APPEALS:

- See 34 CFR 106.45(b)(8)
- Appeal must be offered to either party for any determination of responsibility OR from any dismissal of a formal complaint (or any allegations therein).
- May only appeal on grounds of procedural irregularity, new evidence, or conflict of interest/bias.
- Grounds for appeal (see above) must be something that could have affected the outcome of the matter. Inconsequential or insignificant will not suffice.

RE: Appeals – the School MUST...



NOTIFY THE OTHER PARTY IN WRITING WHEN AN APPEAL IS FILED AND IMPLEMENT APPEAL PROCEDURES EQUALLY FOR BOTH PARTIES;



ENSURE THAT THE DECISION-MAKER(S) FOR THE APPEAL IS NOT THE SAME PERSON AS THE DECISION-MAKER(S) THAT REACHED THE DETERMINATION REGARDING RESPONSIBILITY OR DISMISSAL, THE INVESTIGATOR(S), OR THE TITLE IX COORDINATOR;



ENSURE THAT THE DECISION-MAKER(S) FOR THE APPEAL COMPLIES WITH THE STANDARDS SET FORTH IN PARAGRAPH (B)(1)(III) (CONFLICT, BIAS, TRAINING, ETC.)



GIVE BOTH PARTIES A REASONABLE, EQUAL OPPORTUNITY TO SUBMIT A WRITTEN STATEMENT IN SUPPORT OF, OR CHALLENGING, THE OUTCOME;



ISSUE A WRITTEN DECISION DESCRIBING THE RESULT OF THE APPEAL AND THE RATIONALE FOR THE RESULT; AND



PROVIDE THE WRITTEN DECISION SIMULTANEOUSLY TO BOTH PARTIES.

Emergency Removal:

A school may remove a respondent from an education program or activity on an emergency basis if the school:

01

Undertakes an individualized safety and risk analysis (threat assessment);

02

Determines an immediate threat to the physical health or safety of any student or other individual arising from the allegations justifies removal; and

03


Provides the respondent with notice and an opportunity to challenge

04


This provision may not be construed to modify any rights under the Individuals with Disabilities Education Act,

Informal Resolutions:

Prior to reaching a determination, School may have an informal resolution process (such as mediation) to try and resolve issue.



Notice must be provided to the parties (along with the allegations), and parties have the knowledge that they can withdraw at any time and continue with the grievance process.



Must obtain the parties' voluntary, written consent.



May not offer or facilitate an informal resolution process to resolve allegations that an employee sexually harassed a student.

Obligations for Record Keeping

Schools must maintain records related to any investigation for seven (7) years, including

records of:

- Any actions taken in response to a report of sexual harassment;
- Any actions taken in response to a formal complaint of sexual harassment;
- Any supportive measures provided;
- Each sexual harassment investigation;
- Any determination regarding responsibility;
- Any audio or audiovisual recording or transcript;
- Any disciplinary sanctions imposed on the respondent;
- Any remedies provided to the complainant;
- Any appeal and written appeal decision; and
- All materials used to train school-based Title IX Coordinators, investigators, decision-makers, and appeals decision-makers.


Retaliation

No school or other person may intimidate, threaten, coerce, or discriminate against any individual for the purposes of interfering with any right or privilege secured by Title IX, or because the individual has made a report or complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing

Complaints alleging retaliation should be sent to the District Title IX Coordinator

Process must be conflict and bias free...

A conflict of interest is defined as a conflict between the private interests and the official or professional responsibilities of a person in a position of trust. It could also encompass the conflict between competing duties.



Explicit bias refers to attitudes and beliefs we have about a person or a group on a conscious level.



Implicit bias refers to the attitudes or stereotypes that affect our understanding, actions, and decisions in an unconscious manner.