


Thrun Law Firm Webinar: Comprehensive Title IX Training




(US, 1998)

Schools may be liable for money damages for **employee-to-student** sexual harassment if a school official who has authority to institute corrective action: Has actual notice of the employee's misconduct; and

- Is deliberately indifferent to the employee's
- misconduct, i.e. school made "an official decision...not to remedy the violation"

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(US, 1999)

Schools may be liable for money damages for **student-to-student** sexual harassment if:

- School official who has authority to institute corrective action has actual notice of the misconduct and is deliberately indifferent to the misconduct;
- School has substantial control over both the harasser and "context" where the harassment occurs; and
- Harasser's conduct is "so severe, pervasive, and objectively offensive" that it "effectively denies equal access to an institution's resources or opportunities."

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OCR 2001 Guidance

Unwelcome conduct determined by a reasonable person to be so severe, pervasive, **or** persistent, and to **interfere with or limit** a student's ability to participate in or benefit from school services, activities, or opportunities.

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Overview of 2020 Regulations



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Terminology in 2020 Regulations

Alleged Victim	→	Complainant
Alleged Perpetrator/ Alleged Harasser	→	Respondent
Complaint, Investigation, and Resolution	→	Grievance Process
Educational Institution	→	Recipient
Interim Measures	→	Supportive Measures

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Key Changes

- **All** staff have reporting obligation
- "Single investigator" model eliminated
- Grievance process includes many specific required steps
- Respondent presumed not responsible until responsibility determination is made
- Additional policy, training, documentation, and record retention requirements
- Due process emphasized

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Key Title IX Roles

1. **Title IX Coordinator:** oversees school's Title IX compliance and is a school employee
 2. **Investigator:** Conducts investigation and issues investigation report
 3. **Decision-Maker:** Makes determination of responsibility
 4. **Appeals Officer:** Hears appeals
 5. **Informal Resolution Facilitator ("IRF"):** assists parties in reaching informal resolution, if applicable
- Investigator, IRF, Decision-Maker, and Appeals Officer must be different persons and appropriately trained
 - Title IX Coordinator may also serve as investigator or IRF

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Impartiality is Key

- Persons serving in key roles must not have a conflict of interest or bias for or against:
 - Complainants and respondents generally, or
 - An individual complainant or respondent
- Prejudgment of the facts must be avoided

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Constitutional Concerns

Regulations emphasize protecting parties' constitutional rights:

- 1st Amendment (Freedom of Speech)
 - Exercising right doesn't constitute retaliation
 - Attempts to suppress free speech by school are not appropriate – No gag orders
- 14th Amendment (Equal Protection)

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Due Process Concerns

- 5th Amendment (Due Process)
- Title IX can't be interpreted in a manner that denies any person due process
- Respondent presumed not responsible until determination made
- Grievance process must be "adequate, fair, and reliable" and "consistent with constitutional due process guarantees and conceptions of fundamental fairness"
- Due process is "critical part" of Title IX grievance process

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What is sexual harassment?

Conduct **on the basis** of sex that satisfies one or more of the following:

- Employee *quid pro quo*;
- Sexual assault, dating violence, domestic violence, stalking (definitions from Violence Against Women Act); and
- Hostile environment (new stricter definition)

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Quid Pro Quo

- Recipient's **employee** conditioning an aid, service, or benefit of the recipient on an individual's participation in unwelcome sexual conduct.
- Only applicable to **employee** Respondents; not applicable to Respondent volunteer, student, etc.

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Sexual Violence Definitions

- “Sexual assault”: an offense classified as a forcible or nonforcible sex offense under the uniform crime reporting system of the Federal Bureau of Investigation.
- “Dating violence”: violence committed by a person who is or has been in a romantic or intimate relationship with the Complainant. The existence of such a relationship is based on a consideration of the length of the relationship, the type of relationship, and the frequency of interaction between the persons involved in the relationship.

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Sexual Violence – cont’d

- “Domestic violence”: felony or misdemeanor crimes of violence committed by a current or former spouse or intimate partner of the Complainant, person with whom the Complainant shares a child, person who is cohabitating with or has cohabitated with the Complainant as a spouse or intimate partner, person similarly situated to a spouse of the Complainant under the domestic or family violence laws of Michigan; or any other person against an adult or youth Complainant who is protected from that person’s acts under the domestic or family violence laws of Michigan.
- “Stalking”: engaging in a course of conduct directed at a specific person that would cause a reasonable person to (1) fear for the person’s safety or the safety of others; or (2) suffer substantial emotional distress.

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Consent

- Term not defined in regulations
- District must define term in its policy
- How does your policy define consent?
 - Consider absence or negation of consent, and capacity to consent
- Persons in key Title IX roles must know how to apply your consent definition consistently, impartially, and in accordance with policy

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Staff/Student Conduct

- Sexual conduct between a District employee and a student is **always** prohibited
- Consent is irrelevant
- Criminal charges may result

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Hostile Environment

“Unwelcome conduct determined by a reasonable person to be so severe, pervasive, **and** objectively offensive that it **effectively denies** a person’s **equal access** to the recipient’s education program or activity.”

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Hostile Environment

Unwelcome conduct determined by a reasonable person to be:

Old Definition

Severe, pervasive, **or persistent**, and **to interfere with or limit** a student’s **ability to participate** in or benefit from school services, activities, or opportunities.

New Definition

To be so severe, pervasive, **and objectively offensive** that it **effectively denies** a person’s **equal access** to the recipient’s education program or activity.

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Denial of Equal Access

- Reactions to sexual harassment vary and should be assessed from perspective of a reasonable person in Complainant's position
- Denial may include skipping class to avoid harasser, grade decline, difficulty concentrating in class
- No concrete injury required
- Complainant need not drop out of school, fail a class, have a panic attack, or otherwise reach "breaking point"

OCR, Question and Answers Regarding the Department's Final Title IX Rule, September 4, 2020

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"Education Program or Activity"

"Includes locations, events or circumstances over which the recipient exercised substantial control over both the respondent and the context in which the harassment occurs..."

34 CFR 106.44(a)

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Scope of Education Program or Activity

Consider:

- Location of conduct?
- Relationship to school or school activity?
- Involvement of student, employee, volunteer, contractor?
- Policy/handbook language?
- If no jurisdiction under Title IX, may have jurisdiction to address alleged misconduct under another policy, rule, or law

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Off Campus Sexual Harassment

- Case-by-case analysis
- Investigate if school doesn't know where misconduct occurred
- Not during school activity? Consider effects of off-campus conduct at school!
- Consider applicable codes of conduct and Revised School Code provisions

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OCR Guidance on Off Campus Conduct

- School must make a fact-specific determination
 - Consider "whether the [school] funded, promoted, or sponsored the event or circumstance where the alleged harassment occurred"
 - OCR Examples: Two students in a private hotel room as part of school-sponsored activity (field trip or athletic event) and teacher visiting student's home "ostensibly to give the student a book but in reality to instigate sexual activity with the student"
- No single factor is determinative

"Questions and Answers on the Title IX Regulations on Sexual Harassment," U.S. Department of Education Office for Civil Rights, July 2021.

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Deliberate Indifference

Take complaints seriously. Schools and school officials must not be **deliberately indifferent** to sexual harassment.

Old Definition

The school must take immediate action to eliminate the sexual harassment or sexual violence, prevent its recurrence, and address its effects.

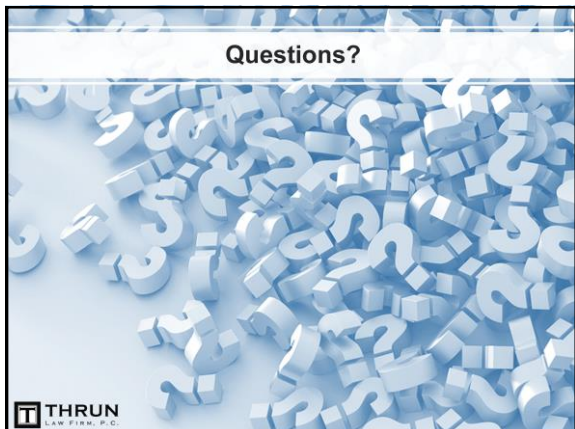
New Definition

Failure to respond reasonably in light of known circumstances.

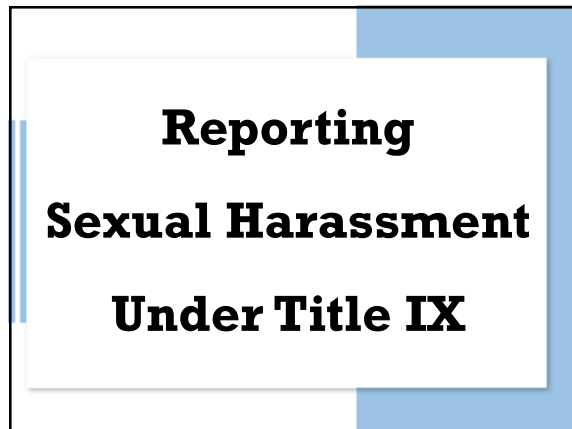
Must respond in **reasonably prompt** time frame.

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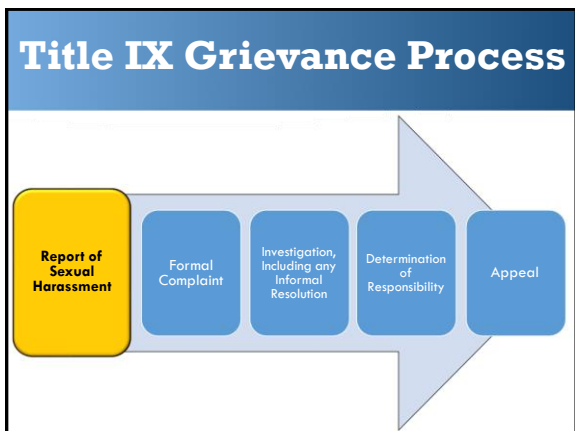
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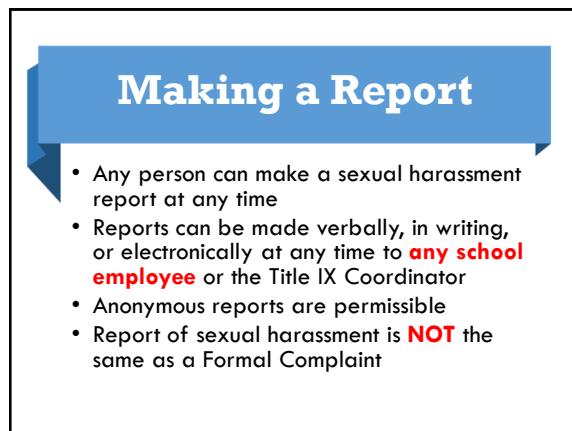
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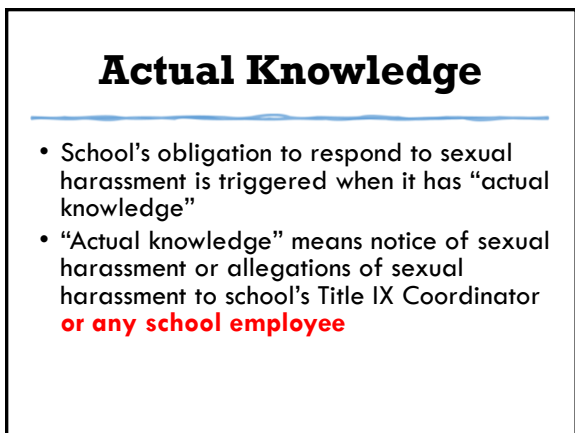
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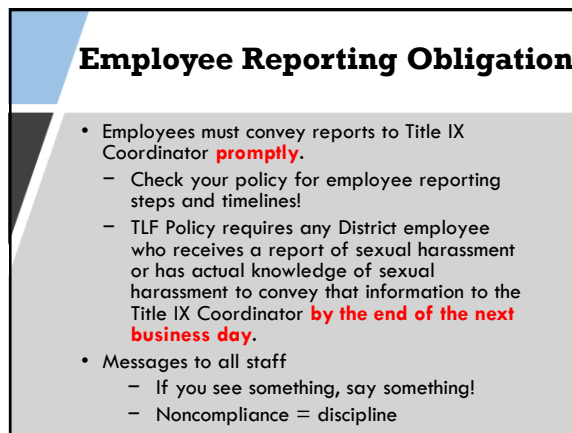
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Responding to Report

- Title IX Coordinator must, upon receipt of report:
 - Contact Complainant (alleged victim) to discuss “supportive measures”
 - Inform Complainant of “supportive measures” available
 - Explain process for filing Formal Complaint
- Failure to do the above = deliberate indifference

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Supportive Measures

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Supportive Measures

- Must be non-disciplinary, non-punitive, and individualized
- Offered as appropriate, as reasonably available, and without fee or charge to parties
- Available before, during, and after Formal Complaint is filed, or when no Formal Complaint is filed
- Designed to restore or preserve equal access to education program or activity without “unreasonably” burdening other party

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Examples

- Counseling
- Work/class schedule changes
- Extensions of deadlines
- Increased supervision or escorts
- Mutual no-contact order
- **But**, school may not impose discipline or other actions that are not supportive measures against Respondent before completing the grievance process

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Offering Supportive Measures

- No “one size fits all”
- Must be offered whether Complainant files Formal Complaint or not
- Document whether supportive measures were offered and which were taken, and retain documentation
- Modify, as necessary, to avoid deliberate indifference
- Keep confidential to extent possible except as may be required by law
- Coordinated by Title IX Coordinator

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TLF Supportive Measures Form

 This form must be completed by the Title IX Coordinator.
Documentation of Supportive Measures

1. Supportive measures offered to Complainant (include description and date):

2. Supportive measures offered to Respondent (include description and date):


3. Supportive measures requested by other party:

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Respondent Removal



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General Rule

Disciplinary sanctions may **NOT** be imposed against respondents before grievance process concludes except:

- Employee Respondents may be placed on nondisciplinary administrative leave pending completion of grievance process
- Student Respondents may be removed from school programs or activities on emergency basis only

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Student Emergency Removal

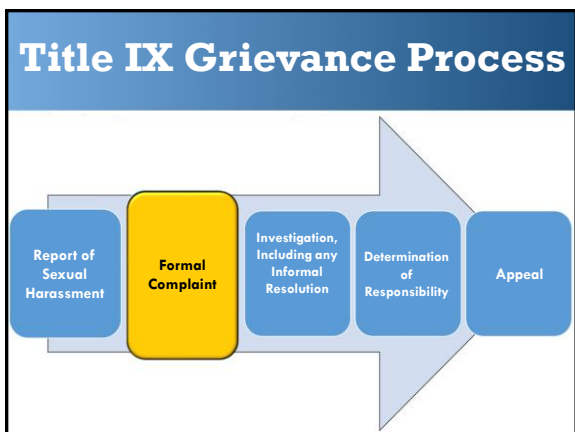
- Before removing student, school officials must:
 - Conduct individualized safety and risk analysis;
 - Determine that an immediate threat to **physical** health or safety of students or staff justifies removal; and
 - Provide removed student notice and opportunity to challenge removal immediately after being removed
- Consider IDEA and Section 504 requirements governing disciplinary removals of students with disabilities

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How to Conduct a Grievance Process



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Formal Complaint

A document filed and signed by a complainant or signed by Title IX Coordinator alleging sexual harassment against a Respondent and requesting that District investigate the sexual harassment allegation.

34 CFR §106.30

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Complainant's Status

- Complainant must be participating in or attempting to participate in school's education program or activity at the time the Complainant files a Formal Complaint
- But, nothing in the regulations prohibits a Title IX Coordinator from signing a Formal Complaint when the Complainant is not currently participating or attempting to participate in the school's programs

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Coordinator Signing Complaint

Key Question:

Is it clearly unreasonable in light of the known circumstances for the Title IX Coordinator to sign or not sign a Formal Complaint?



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TLF Formal Complaint Form

TITLE IX SEXUAL HARASSMENT FORMAL COMPLAINT FORM

This form is being submitted by:
 Complainant Title IX Coordinator

Complainant Name: _____
 Address: _____
 Phone: _____ Email: _____

If the Complainant is a student:
 School Building Attending: _____ Grade: _____ Birthdate: _____
 If the Complainant is an employee:
 Job Title: _____ Building: _____
 Reporter's Name (if different than Complainant): _____
 Relationship to Complainant: _____
 Reporter Address: _____
 Reporter Phone: _____ Reporter Email: _____

1. Describe the alleged violation of the District's Title IX Sexual Harassment Policy that you are requesting the District investigate. Please be specific. Describe the specific incident(s) and identify the individuals and relevant witnesses involved. Describe or attach any evidence you believe is relevant. Attach additional pages if needed.



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Notice to Parties

Upon receipt of Formal Complaint, provide written notice to the parties (if known) that includes:

- Notice of grievance process, including any informal resolution process
- Notice of allegations
 - Must be detailed!
 - Include dates, locations, names, and other specifics alleged in complaint
- Statement that Respondent is presumed not responsible and that a determination of responsibility is made at conclusion of grievance process

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Notice to Parties (cont d)

- Right to have advisor of their choice, including an attorney
- Right to inspect and review evidence
- Notice of any code of conduct provision that prohibits knowingly making false statements or submitting false information

If, during the investigation, it is determined that additional allegations will be investigated, notice of additional allegations must be sent to the parties

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Consolidation of Complaints

If there are multiple Formal Complaints arising out of the same facts and circumstances, for example several complaints alleging similar behavior by one Respondent, the Formal Complaints may be consolidated to streamline the grievance process.

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Bifurcation of the Investigation

- New regulations only apply to Title IX sexual harassment
- If a report or Formal Complaint includes allegations implicating other harassment/discrimination policies, you can bifurcate the investigation
- BUT Title IX sexual harassment must be investigated pursuant to the new regulations

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Formal Complaint Dismissal

Mandatory

Must be dismissed if allegations, if proven:

- Would not constitute sexual harassment under new definition;
- Did not occur in recipient's (school) program or activity; or
- Did not occur against a person in the U.S.

Permissive

May be dismissed if:

- Complainant requests withdrawal;
- Respondent's enrollment or employment ends; or
- Specific circumstances prevent the school from gathering evidence sufficient to reach a determination (e.g., Complainant not cooperating with investigation, many years between alleged misconduct and complaint filing)

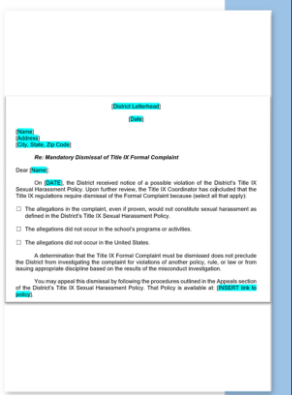
REMEMBER: Even if complaint is dismissed under Title IX, school may address complaint under another policy or code of conduct provision in some circumstances.

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Dismissal Notice

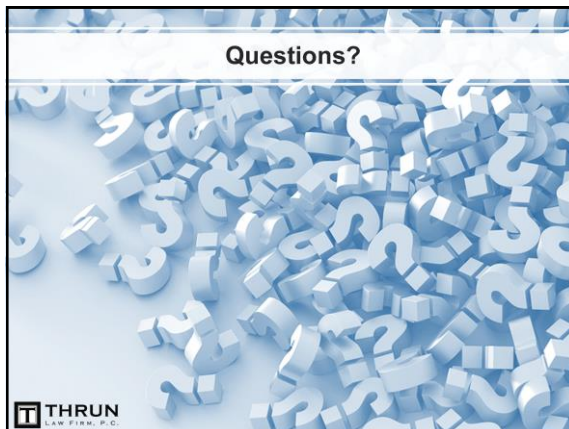
Prompt, simultaneous written notice to both parties that includes:

- Reasons for mandatory or discretionary dismissal, and
- Right to appeal



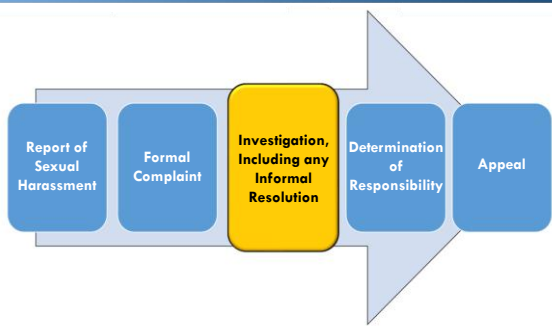
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Questions?



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Title IX Grievance Process



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Informal Resolution Process



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What is Informal Resolution?

- After Formal Complaint is filed but before determination of responsibility is made, school may offer parties the opportunity to informally resolve the complaint without a full investigation
- May encompass a broad range of conflict resolution strategies, including arbitration, mediation, or restorative justice - direct interaction between the parties is not required
- Not available for Formal Complaints alleging an employee sexually harassed a student

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School's Discretion

- School is not required to offer informal resolution
- If offered, school has discretion to determine what process will be used
- Consider:
 - What conduct has been alleged?
 - What resolution is sought?

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Voluntary Process

- Neither party should be pressured to participate
- Schools cannot require parties to participate or otherwise waive their right to an investigation and adjudication of the Formal Complaint
- Parties may withdraw from the informal resolution process and resume the investigation at any time before resolution is reached

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Notice and Consent Required

Title IX Coordinator or Investigator must:

- Provide both parties written notice of their informal resolution rights; and
- Obtain written, voluntary consent from both parties to enter into the informal resolution process.

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Informal Resolution Notice

The written notice must include:

- Allegations being investigated;
- Informal resolution requirements, including when informal resolution would preclude resuming a formal complaint arising from same allegations;
- Right to withdraw from informal resolution and resume the grievance process; and
- 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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How to Conduct a Title IX Investigation



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General Considerations

- School has burden of proof and burden to “gather evidence sufficient to reach a determination of responsibility”
- Parties must be treated equally
- Standard of evidence must be same for all complaints (employee and student)
- Reasonably prompt timeline
- Respondent presumed not responsible
- Consult your policy for specific procedures!

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Initial Steps

- If students are involved – contact parents/guardians
- Consider Mandatory Reporting Requirement and report to law enforcement
- Don't promise confidentiality!
- Secure evidence
 - Physical
 - Documentary
 - Electronic & Video

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CAUTION: Photos and Videos of Students

- If allegation involves sexting or other photos or videos of students that could possibly be considered child pornography,
CALL LAW ENFORCEMENT
- Do not view, save, copy, disseminate, handle or maintain photos and videos of students that could be considered child pornography
- Legal exposure for employee & school

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Law Enforcement Involvement

- Does *not* relieve school of Title IX obligation to investigate
- Do *not* use police involvement as excuse not to investigate
- Do *not* wait for criminal conclusion
- Can **briefly** delay Title IX investigation for concurrent criminal investigation

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OCR: Law Enforcement

“Police investigations may be useful for fact-gathering; but because the standards for criminal investigations are different, police investigations or reports are not determinative of whether sexual harassment or violence violates Title IX. Conduct may constitute unlawful sexual harassment under Title IX even if the police do not have sufficient evidence of a criminal violation.”

LaPorte Comm Sch Corp (OCR, 2015)

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Delays and Time Extensions

- Temporary delays for “good cause” are permitted with written notice to parties
- “Good cause” examples:
 - Complexity of investigation
 - Concurrent law enforcement investigation with time-dependent release of evidence
 - Absence of parties or witnesses
 - Need to provide accommodations for party or witness with a disability
- **Delay for administrative convenience is not “good cause”**

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Advisors

- Parties may be accompanied by an advisor of their choice in any meeting or grievance process proceeding
- Advisors can be parents, staff members, attorneys, friends, or other persons -- the party is in the best position to decide who serves in this role
- School may not restrict who serves as advisor

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Investigation Tips

- Create investigation plan based on what you know from Formal Complaint
- Interview Complainant first to gather more information about the allegations
- Use information from Formal Complaint and Complainant's interview to determine who to interview next and what evidence to secure
- Conduct site visits, if applicable
- Usually interview Respondent last

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Notice of Interviews

- Must provide date/time/location, participants, and purpose of all hearings (if any), investigative interviews, and meetings, to party whose participation is invited or expected, *in writing*
- Notice must be given a sufficient time in advance so that a party may prepare for interview

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Establish Ground Rules

- May set ground rules for interviews so long as rules apply equally to both parties
- Examples:
 - Be honest and forthright
 - Abusive, disruptive behavior or language will not be tolerated
 - Advisor may not interrupt the interview but will be given an opportunity to provide additional information at end of interview
- Cannot restrict parties from discussing allegations or gathering/presenting relevant evidence

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Interview Tips

- Establish rapport
- Inform party or witness, if possible, that interview summary with their name will be provided to parties
- Ask simple, straightforward questions
- Ask who else may have useful information and whether there is anything you didn't ask that interviewee thinks you should know
- Re-interview parties or witnesses if needed
- For Respondent:
 - Explain allegations, as appropriate
 - Ask awareness of applicable policies, rules, codes of conduct
- Be cognizant of bias or conflicts of interest!

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Do's and Don'ts

- ✓ **DO:** Give parties equal opportunity to present witnesses, evidence
- ✗ **DON'T:** Use questions or evidence that constitute, or seek disclosure of, legally-privileged information
- ✗ **DON'T:** access, consider, disclose, or otherwise use a party's medical records, including mental health records without voluntary, written consent to do so

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