

# TITLE IX TRAINING

## *PART II*

*presented by*  
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# Reporting Sexual Harassment: Who, How and When?



## Reporting Sexual Harassment: Who?

- **Who?** Any person may report sex discrimination:
  - the harassed student or employee (complainant)
  - the complainant’s parent
  - a 3<sup>rd</sup> party

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## Reporting Sexual Harassment: How?

- **How?** Reports can be made many ways:
  - In person
  - By mail, telephone or email using the contact information to the Title IX Coordinator
  - By any means that results in the Title IX Coordinator receiving the person’s report (e.g., all employees must be trained to notify the Title IX Coordinator of reports they have received or actual knowledge they have attained)

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## Reporting Sexual Harassment: When?

- **When?** Reports can be made at any time:
  - through use of the telephone number, email address or mail to the Title IX Coordinator
  - School districts must ensure individuals have the capability to make complaints at any time

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## Response to Report of Sexual Harassment

- One of the most unique procedural differences imposed by the new regulations is that school districts must engage in a bifurcated response when they receive a report of sexual harassment:
  - Initial response after actual knowledge of a “report”
  - Response after the filing of a “formal complaint”

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## Initial Response to Report of Sexual Harassment

- When a school district receives report of sexual harassment, the Title IX Coordinator must make contact with both the complainant and the respondent. School district must treat complainants and respondents “equitably.”  
34 C.F.R. §106.44(a), .30(a)
- The Title IX Coordinator must promptly do the following – even if a formal complaint is not filed:

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## Initial Response to Report of Sexual Harassment

### **For the complainant:**

- Offer “supportive measures.”
- Explain supportive measures are available even without the filing of a formal complaint.
- Consider the complainant’s wishes with respect to supportive measures.
- Explain the process for filing a formal complaint.

### **For the respondent:**

- Offer supportive measures.
- Follow the Title IX grievance process before disciplining or sanctioning respondent (subject to “emergency removal” provisions discussed below)

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# Initial Response to Report of Sexual Harassment: Supportive Measures



## What Are “Supportive Measures”?

34 C.F.R. §106.30(a)

- Non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, and without fee or charge to the complainant or respondent before or after the filing of a formal complaint or where no formal complaint has been filed.
- Supportive measures are designed to restore or preserve equal access to the school district’s education program or activity without unreasonably burdening the other party, including measures designed to protect the safety of all parties or the recipient’s educational environment or deter sexual harassment.



## What Are “Supportive Measures”?

- Supportive measures may include the following:
  - Counseling
  - Extensions of deadlines or other course-related adjustments
  - Modifications of work or class schedules
  - Campus escort services
  - Mutual restrictions on contact between the parties
  - Changes in work or housing locations
  - Leaves of absence
  - Increased security and monitoring of certain areas of the campus
  - Other similar measures

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## What Are “Supportive Measures”?

- School district must maintain as confidential any supportive measures provided to the complainant or respondent “to the extent that maintaining such confidentiality would not impair the ability of the school district to provide the supportive measures.”
- Title IX Coordinator is responsible for coordinating the effective implementation of supportive measures.
- Title IX Coordinator should document:
  - that supportive measures were offered
  - if supportive measures were not given, why that result or response is not “clearly unreasonable in light of the known circumstances”
  - if supportive measures requested by the complainant were not granted, indicate why the refusal was not “clearly unreasonable in light of the known circumstances”

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# Title IX Investigation: Report Through Appeal



## Begins With a Report of Sexual Harassment

- Review who can make a report
- Review who can receive a report
- PSBA Reporting Form



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**September 2020**

## Report Form

**DISCRIMINATION/SEXUAL HARASSMENT/BULLYING/  
HAZING/DATING VIOLENCE/RETALIATION  
REPORT FORM**

The Board declares it to be the policy of this district to provide a safe, positive learning and working environment that is free from bullying, hazing, dating violence, sexual harassment and other discrimination, and retaliation. If you have experienced, or if you have knowledge of, any such actions, we encourage you to complete this form. The Title IX Coordinator will be happy to support you by answering any questions about the report form, reviewing the report form for completion and assisting as necessary with completion of the report. The Title IX Coordinator's contact information is:

Position: \_\_\_\_\_

Address: \_\_\_\_\_

Email: \_\_\_\_\_

Phone Number: \_\_\_\_\_

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### Retaliation Prohibited

The district, its employees and others are prohibited from intimidating, threatening, coercing, or discriminating against you for filing this report. Please contact the Title IX Coordinator immediately if you believe retaliation has occurred.

### Confidentiality

Confidentiality of all parties, witnesses, the allegations and the filing of a report shall be handled in accordance with applicable law, regulations, Board policy, procedures, and the district's legal and investigative obligations. The school will take all reasonable steps to investigate and respond to the report, consistent with a request for confidentiality as long as doing so does not preclude the school from responding effectively to the report. If you have any questions regarding how the information contained in this report may be used, please discuss them with the Title IX Coordinator prior to filing the report. Once this report is filed, the district has an obligation to investigate the information provided.

*Note: For purposes of Title IX sexual harassment, this Report Form serves initially as an informal report, not a formal complaint of Sexual Harassment under Title IX.*

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**I. Information About the Person Making This Report:**

Name: \_\_\_\_\_

Address: \_\_\_\_\_

Phone Number: \_\_\_\_\_

School Building: \_\_\_\_\_

I am a:

Student  Parent/Guardian  Employee  Volunteer  Visitor

Other \_\_\_\_\_ (please explain relationship to the district)


If you are not the victim of the reported conduct, please identify the alleged victim:

Name: \_\_\_\_\_

The alleged victim is:  Your Child  Another Student  A District Employee

Other: \_\_\_\_\_ (please explain relationship to the alleged victim)

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**II. Information About the Person(s) You Believe is/are Responsible for the Bullying, Hazing, Harassing or Other Discrimination You are Reporting**

What is/are the name(s) of the individual(s) you believe is/are responsible for the conduct you are reporting?

Name(s): \_\_\_\_\_


**The reported individual(s) is/are:**

Student(s)  Employee(s)

Other \_\_\_\_\_ (please explain relationship to the district)

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**III. Description of the Conduct You are Reporting**

In your own words, please do your best to describe the conduct you are reporting as clearly as possible. Please attach additional pages if necessary:

When did the reported conduct occur? (Please provide the specific date(s) and time(s) if possible):

Where did the reported conduct take place?

Please provide the name(s) of any person(s) who was/were present, even if for only part of the time.

Please provide the name(s) of any other person(s) that may have knowledge or related information surrounding the reported conduct.

Have you reported this conduct to any other individual prior to giving this report?

Yes       No

If yes, who did you tell about it?

If you are the victim of the reported conduct, how has this affected you?

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I affirm that the information reported above is true to the best of my knowledge, information and belief.

\_\_\_\_\_  
Signature of Person Making the Report

\_\_\_\_\_  
Date

\_\_\_\_\_  
Received By

\_\_\_\_\_  
Date

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**FOR OFFICIAL USE ONLY**

*This section is to be completed by the Title IX Coordinator based on reviewing the report with the complainant or other individual making the report.*

*The purpose of this form is to assist the Title IX Coordinator in gathering information necessary to properly assess the circumstances surrounding the reported conduct to determine if the allegations fall under the definition of Title IX sexual harassment or if the matter merits review and action under the Code of Student Conduct and/or other Board policies. The Title IX Coordinator shall gather as much information as possible in cases of incomplete or anonymous reports (including those that may be received through the Safe2Say Something program) to assess the report.*

*Upon receipt of the report, The Title IX Coordinator shall promptly contact the complainant regarding the report to gather additional information as necessary, and to discuss the availability of supportive measures as described in Policy 103 and Attachment 3. The Title IX Coordinator shall consider the complainant's wishes with respect to supportive measures.*

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**I. Reporter Information:**

Name: \_\_\_\_\_

Address: \_\_\_\_\_

Phone Number: \_\_\_\_\_

School Building: \_\_\_\_\_

Reporter is a:

Student     Parent/Guardian     Employee     Volunteer     Visitor

Other \_\_\_\_\_ (please explain relationship to the district)

If the reporter is not the victim of the reported conduct, please identify the alleged victim:

Name: \_\_\_\_\_

The alleged victim is:  Reporter's Child     Another Student     Another Employee

Other: \_\_\_\_\_ (please explain relationship to the alleged victim)

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**II. Respondent Information**

Please state the name(s) of the individual(s) believed to have conducted the reported violation:

Name(s):

**The reported respondent(s) is/are:**


Student(s)       Employee(s)

Other \_\_\_\_\_ (please explain relationship to the district)

**III. Level of Report:**

Informal       Formal (see additional information below on Title IX formal complaints)

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**IV. Type of Report:**


Title IX Sexual Harassment     Discrimination     Retaliation     Bullying

Hazing                       Dating Violence                       Other \_\_\_\_\_

**Nature of the Report (check all that apply):**

<input type="checkbox"/> Race	<input type="checkbox"/> Age
<input type="checkbox"/> Color	<input type="checkbox"/> Creed
<input type="checkbox"/> Religion	<input type="checkbox"/> Sex
<input type="checkbox"/> Sexual Orientation	<input type="checkbox"/> Sexual Harassment (Title IX)
<input type="checkbox"/> National Origin	<input type="checkbox"/> Ancestry
<input type="checkbox"/> Marital Status	<input type="checkbox"/> Pregnancy
<input type="checkbox"/> Handicap/Disability	<input type="checkbox"/> Bullying
<input type="checkbox"/> Hazing	<input type="checkbox"/> Dating Violence

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**V. Reported Conduct**

Describe the reported conduct below, including specific actions, dates, times, locations and any other details necessary to properly assess the reported incident(s).

How often did the conduct occur?

Is it being repeated?     Yes     No

No  
Do the circumstances involve a student identified as a student with a disability under the Individuals with Disabilities Education Act or Section 504 of the Rehabilitation Act?

No.

Yes, please identify the student with a disability and contact the Director of Special Education.

Date Director of Special Education was contacted:

How has the conduct affected the alleged victim's ability to fully participate in the school's academic, programs, activities or school employment?

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What is the alleged victim's relationship with the alleged respondent?

Insert names, descriptions, and/or contact information of individuals believed to have observed the conduct or who otherwise may have knowledge of the conduct and/or related circumstances.

Additional observations or evidence including pictures, texts, emails, video or other information submitted to the Title IX Coordinator.

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**VI. Safety Concerns**

Are there safety concerns that may require Emergency Removal of or Administrative Leave for a respondent? (This requires an individualized safety and risk analysis as to whether there is an immediate threat to the physical health or safety of a student or other individual.)

- No.
- Yes, please describe:

**VII. Other Reports**

Has the conduct been reported to the police or any other agency?

- No
- Yes      Date reported: \_\_\_\_\_ Agency: \_\_\_\_\_

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**VIII. Identification of Policies Implicated by Reported Conduct**

Check all that apply:

- Policy 103. Discrimination/Title IX Sexual Harassment Affecting Students
- Policy 104. Discrimination/Title IX Sexual Harassment Affecting Staff
- Policy 247. Hazing
- Policy 249. Bullying
- Policy 252. Dating Violence
- Other

To meet the definition of Title IX sexual harassment, the conduct must have taken place during a district education program or activity involving a person in the United States. An **education program or activity** includes the locations, events or circumstances over which the district exercises substantial control over both the respondent and the context in which the sexual harassment occurs. Title IX applies to all of a district's education programs or activities, whether such programs or activities occur on-campus or off-campus.

Did the incident occur during a during a school program or activity involving a person in the United States?

- Yes
- No

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To meet the definition of Title IX sexual harassment, the conduct needs to satisfy one or more of the following (please check all that apply):

- A district employee conditioning the provision of an aid, benefit, or district service on an individual's participation in unwelcome sexual conduct, commonly referred to as quid pro quo sexual harassment.
- Unwelcome conduct determined by a reasonable person to be so severe, pervasive and objectively offensive that it effectively denies a person equal access to a district education program or activity.
- Sexual assault, dating violence, domestic violence or stalking.

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**Dating violence** means violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the victim and where the existence of such a relationship is determined by the following factors:

- Length of relationship.
- Type of relationship.
- Frequency of interaction between the persons involved in the relationship.

**Domestic violence** includes felony or misdemeanor crimes of violence committed by a current or former spouse or intimate partner of the victim, by a person with whom the victim shares a child in common, by a person who is cohabitating with or has cohabitated with the victim as a spouse or intimate partner, by a person similarly situated to a spouse of the victim under the domestic or family violence laws of the jurisdiction receiving federal funding, or by any other person against an adult or youth victim who is protected from that person's acts under the domestic or family violence laws of the jurisdiction.

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**Sexual assault** means a sexual offense under a state or federal law that is classified as a forcible or nonforcible sex offense under the uniform crime reporting system of the Federal Bureau of Investigation.

**Stalking** means stalking on the basis of sex, for example when the stalker desires to date a victim. Stalking means to engage in a course of conduct directed at a specific person that would cause a reasonable person to either:

1. Fear for their safety or the safety of others.
2. Suffer substantial emotional distress.

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**IX. Recommended Course of Action**

After consultation with the complainant and consideration of the reported information, the Title IX Coordinator directs the report to proceed under the provisions of (check all that apply):

- No further action at this time. Reason:
- Policy 247. Hazing
- Policy 249. Bullying
- Policy 252. Dating Violence
- Other
- Policy 103 Discrimination/Title IX Sexual Harassment Affecting Students: Attachment 2 Discrimination Complaint Procedures
- Policy 104 Discrimination/Title IX Sexual Harassment Affecting Staff: Attachment 2 Discrimination Complaint Procedures
- Policy 103. Discrimination/Title IX Sexual Harassment Affecting Students: Attachment 3 Title IX Sexual Harassment Procedures and Grievance Process for Formal Complaints
- Policy 104. Discrimination/Title IX Sexual Harassment Affecting Staff: Attachment 3 Title IX Sexual Harassment Procedures and Grievance Process for Formal Complaints

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**X. Title IX Information to Complainant**

What supportive measures were discussed with the complainant, and what were the complainant's wishes with respect to supportive measures?

Upon designating a course of action under Title IX sexual harassment, the Title IX Coordinator will  comply:

1. Explain to the complainant the process for filing a formal complaint.

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2. Inform the complainant of the continued availability of supportive measures with or without the filing of a formal complaint.

3. The Title IX Coordinator shall contact a student complainant's parents/guardians and provide them with information regarding the report and Title IX sexual harassment procedures and grievance process for formal complaints.

If the complainant/reporter, school staff or others with professional knowledge relating to the complainant's health and well-being indicate that notifying the parents/guardians could cause serious harm to the health or well-being of the complainant or other person(s), the Title IX Coordinator will determine, in consultation with such individuals and upon advice of legal counsel, whether to withhold or delay notification of the report from the complainant's parents/guardians.

4. Determine what supportive measures may be offered to the respondent.
5. Determine whether the complainant wishes this report to be treated as a formal complaint.

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**XI. Title IX Coordinator Signature**

I recommend the above course of action based on my consultation with the complainant and the information available at this time.

Title IX Coordinator: \_\_\_\_\_

Date: \_\_\_\_\_

**XII. Title IX Formal Complaint Action**

The Title IX Coordinator shall have the complainant check the appropriate box and sign and date below to indicate whether or not the complainant wishes to have this form serve as a formal complaint pursuant to Title IX.


I would like my report to be treated as a formal complaint pursuant to Title IX.

Yes                       No

Complainant's Signature: \_\_\_\_\_

Date: \_\_\_\_\_

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If the complainant does not wish this report to be treated as a formal complaint pursuant to Title IX, the Title IX Coordinator must assess whether actions limited to supportive measures are a sufficient response to alleged behavior, or whether a formal complaint process is necessary to investigate and address the situation adequately. If the facts as contained in this Report, if presumed as true, could meet the definition of Title IX sexual harassment, the Title IX Coordinator must proceed with the filing of a formal complaint. The Title IX Coordinator may consult with the school solicitor and other district officials in making this decision.


As Title IX Coordinator, I have determined that, notwithstanding the complainant's preference, it is necessary to proceed with the Grievance Process for Formal Complaints for the following reasons:

Therefore, I am signing this form for the purpose of serving as the formal complaint initiating that process:

Title IX Coordinator's Signature: \_\_\_\_\_

Date: \_\_\_\_\_

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## Stage One: Pre-Formal Complaint

- Title IX Coordinator receives and reviews report
- Contact made promptly with Complainant, if known, and/or Parent/legal guardian, if known, to discuss:
  - Confidentiality
  - Supportive Measures (with or without a formal complaint)
  - Explain the formal complaint process, including the grievance procedure
  - This is not an investigatory interview

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- Documenting all steps is key
  - Providing written summary of information discussed with Complainant
  - Internal notes reflecting dates and times of contact and decisions on supportive measures and confidentiality
  - This is a key component of Title IX Coordinator's role
- Decision on Formal Complaint
  - If Complainant wishes to move forward with a formal complaint, then that Complaint goes to the Title IX Coordinator.
  - Title IX Coordinator must conduct the jurisdictional analysis to determine if the grievance process will begin.

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## Informal Resolution

- A school **may**, but is not required to, offer the parties an “**informal resolution**” to resolve a complaint when:
  - A formal complaint has been filed;
  - The school determines that an informal resolution would be appropriate under the circumstances; and
  - Both parties provide fully informed written consent for informal resolution.

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## Informal Resolution

- A school may **not** :
  - Initiate or offer informal resolution of a Title IX sexual harassment report prior to the issuance of a formal complaint.
  - Require either the complainant or the respondent to waive the right to an investigation or adjudication of a formal complaint or to participate in an informal resolution process.
  - Offer or facilitate informal resolution to resolve allegations that an employee sexually harassed a student.

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## Informal Resolution Process

- At any time after a formal complaint is issued, but before a determination is reached, a school may facilitate an informal resolution process, such as mediation, by:
  - Providing written notice to the parties disclosing:
    - The allegations involved;
    - The requirements of the informal resolution process, including the circumstances under which it would preclude a party from resuming a formal complaint; and
    - The consequences of participating in the informal resolution process, including the records that will be maintained or could be shared.
  - Obtaining the parties' voluntary, written consent.

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## Stage Two: Grievance Process

The Grievance Process is the procedure used to investigate and make a final determination relating to the formal complaint. It is essential that the process be fair to complainants, but providing an efficient method to address claims of sexual harassment, and to respondents, by providing a fair process in which they are presumed not responsible until a final determination is made.

### **Requirements of grievance process:**

- Treat complainants and respondents equitably
- Require an objective evaluation of all relevant evidence – this includes inculpatory and exculpatory evidence

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- Require that credibility determinations may not be based on a person's status as complainant, respondent, or witness.
  - Making credibility determinations involves
  - Unbiased observation of witness's demeanor
  - Considering of internal and external inconsistencies
  - Witness's opportunity to observe and provide the information they are giving
  - Witness's bias or motive.
- Require that no one filling a required role (Coordinator, Investigator, Decision-Maker, Facilitator) have any conflict of interest.

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- Require that all individuals filling the relevant roles have training
- Include a presumption that the respondent is not responsible for the alleged conduct until a determination regarding responsibility is made at the conclusion of the process
- Establish reasonably prompt time frames for the conclusion of the process
- Describe the range of possible disciplinary actions

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- Establish the standard of evidence to be used.
  - “Clear and Convincing Evidence”
  - “concluding that a fact is highly probable to be true”

**OR**

- “Preponderance of the Evidence”
  - “a fact is more likely true than not”
- 
- We are recommending the use of a “preponderance of the evidence” standard, which is the standard generally used in other school based decision making processes (e.g. expulsion hearings).

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- Identify and describe the procedures that will be followed including investigation, decision making process and appeals – include the permissible bases for an appeal
- Describe the range of supportive measures available to complainants and respondents
- Not permit the use of questions or evidence that constitute or seek disclosure of information protected by a legally recognized privilege, unless the person holding that privilege has waived it.

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## **Stage Two: Notice to Parties and Title IX Coordinator's Continuing Role**

**Upon the filing of a formal complaint, the Title IX Coordinator must give all parties written notice, which must include**

- Notice of the grievance process – We will be providing a form written notice.
- Identity of the parties, if known
- The conduct that allegedly constitutes sexual harassment
- The date and location of the incident, if known
- A statement that the respondent is presumed not responsible for the alleged conduct and that determination of responsibility is made at the conclusion of the grievance process

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- The parties' right to have any advisor of their choosing, who may be, but is not required to be, an attorney
- The parties may inspect and review evidence gathered
- Inform the parties of any provision of the schools code/policies that prohibit knowingly making false statements or knowingly submitting false information during the grievance process.

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- In addition to the written notice, the Title IX Coordinator should promptly notify Respondent and Respondent's Parents of the filing of the Complaint and;
  - Discuss availability of supportive measures
  - Discuss Grievance Process
  - Discuss any no contact orders
  - This meeting is not in lieu of the formal written notice and is not an investigatory interview.

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The Title IX Coordinator will then turn the investigation over to the Title IX Investigator, however, the Title IX Coordinator stays involved in the process:

- Regular contact with Complainant and Respondent regarding the status of the process and supportive measures
- Transmitting the investigative report, responses to that report, the determination and any appeal decisions to the parties
- Staying available to the parties for questions
- Ultimately implementing any remedies designed to restore or preserve the complainant's equal access to education programming and activities.
- Preserve all materials related to the investigation, determination and appeal for a minimum of 7 years.

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## Stage Two: Investigation

**Once the Title IX Coordinator issues the notice of complaint, the Title IX Investigator begins the investigation**

### **The Investigation**

- The burden to gather evidence and of proof rests on the school, not on either party
  - The school is not simply an arbiter of the issue, it must actively investigate and develop a record of all relevant evidence upon which a decision can then be made. This is different than traditional investigations.
- Title IX Investigator must provide equal opportunity for parties to present/identify witnesses
  - Follow up on all identified witnesses who may have relevant evidence

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- Must allow the parties to have an advisor of their choosing present at any interviews or meetings
- Must provide advance written notice of any meetings or interviews so that the party has sufficient time to prepare.
- Medical Records
- Privileged Information

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## Investigation Techniques

- Open ended questioning (“What happened?” vs. “Isn’t it true that \_\_\_\_\_ happened?”)
- Asking follow-up questions to seek to get a complete understanding of the relevant facts and information.
- Questions designed to uncover other evidence (“Who else saw that?”, “Has anyone else discussed this incident with you?” etc.)
- Take detailed and objective notes. Avoid extraneous commentary.
- Pursuing all inquiries that may lead to relevant information, but avoiding questions that will necessarily invite the introduction of irrelevant or inadmissible evidence.

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## Potential Dismissal of Complaint

- During the Investigation, events can develop that require dismissal of the Complaint:
  - A determination that the alleged conduct would not meet Title IX’s jurisdictional requirements:
    - Events occurred outside of United States
    - Conduct did not involve educational program or activity
    - Conduct as alleged does not rise to Title IX’s definition of sexual harassment.

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- The Investigation can also lead to developments that allow, but do not require, dismissal:
  - The Complainant withdraws, in writing, his or her Formal Complaint
  - The Respondent is no longer enrolled in or employed by the District
  - Specific circumstances prevent the recipient from gathering evidence sufficient to reach a determination

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## The Transmission of Evidence

The Title IX Investigator must provide both parties an equal opportunity to inspect and review any evidence obtained as part of the investigation that is related (not necessarily relevant) to the allegations raised in the formal complaint

- This includes evidence that the investigator does not intend to rely upon.
- This includes both inculpatory and exculpatory evidence.
- The parties must be given at least 10 days to review and provide a written response to this evidence prior to the completion of the investigative report.
- The Title IX Investigator must consider the parties' responses prior to finalizing the investigative report.

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## Stage Two: The Investigative Report

The culmination of the investigator's work is the creation of an investigative report. That report must include a fair summary of all relevant evidence.

**We also recommend that the report:**

- Provide detailed summaries of all relevant interviews
- Provide detailed summaries of all relevant documentary or other tangible evidence
- For any credibility determinations made by the investigator, an explanation of the basis of such determination that cannot be related to the witnesses status as a complainant, respondent or witness.

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- We will be providing a form Investigative Report that can be used.
- The investigative report is then sent to the parties a minimum of 10 days before any decision will be made for their review and written response.

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## **Stage Three: Determination Regarding Responsibility**

- Once the investigative report is complete, it is provided to each party for their review and any written response they wish to make. It is also provided to the Initial Decision Maker, who must also have available to him or her all evidence that was subject to the parties inspection and review.

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- The Initial Decision Maker then must:
  - Provide the parties with a reasonable period of time to submit written, relevant questions that they would like to have asked of any party or witness.
  - Provide all parties with the responses to any such questions, and the opportunity for the parties to submit limited, follow-up questions.
  - If the Initial Decision Maker decides to exclude a proposed question as not relevant or otherwise inadmissible, he or she must explain to the party proposing the question that decision.

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Once the written questioning is complete, the Initial Decision Maker then makes a determination regarding responsibility through a written determination that must be simultaneously provided to the parties and must include:

- An identification of the allegations potentially constituting sexual harassment
- A detailed description of the procedural steps followed from receipt of the formal complaint through determination, this includes
  - All notifications of the parties
  - All interviews that were conducted
  - Any site visits that occurred
  - And a description of the methods used to gather evidence

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- Findings of fact supporting the determination
- Conclusions regarding the application of the school's code of conduct to the facts
- A statement of, and rationale for, the results as to each allegations, including determination of responsibility, disciplinary sanctions imposed, and whether remedies designed to restore or preserve equal access to the education program will be provided to the complainant
- The procedures for an appeal.
- We will be providing a form Determination.

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## Stage Four: Appeal

Either party must be permitted the opportunity to appeal a Determination on at least the following bases:

- A procedural irregularity that affected the outcome of the matter
- New evidence that was not reasonably available at the time of the determination regarding responsibility or dismissal, and that could affect the outcome of the matter.
- That the Title IX Coordinator, Investigator, or Initial Decision-Maker 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.

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### **The appeal process must include the following:**

- Notifying the other party, in writing, when an appeal is filed
- Ensure that the appeal decision maker is not the same person as the Title IX Coordinator, Investigator, or Initial Decision-Maker.
- Give both parties a reasonable and equal opportunity to submit a written statement in support of, or challenging, the outcome
- Issue a written decision, simultaneously to both parties, describing the result of the appeal and the rationale for the result.
- We will be providing a form appellate decision.

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## Impartiality and Conflicts of Interest

Impartiality is deeply embedded in the United States System of Justice – the Sixth Amendment to the US Constitution provides a criminal defendant the right to “an impartial jury.”

### Key Elements of Impartiality

- Preventing Sympathy, prejudice, fear or public opinion to influence a decision.
- Reviewing all of the evidence before reaching a decision
- Giving due regard to the positions of all parties and considering those positions when arriving at a decision.

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Conflicts of Interest arise when one could obtain a personal or unrelated benefit from actions or decisions made in an official or neutral capacity.

- Tobacco studies of the 1980s
- Pete Rose

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**September 2020**

Avoiding Conflicts of Interest, or the appearance of them, is critical in Title IX investigations. The following issues should be considered when determining individuals who are appointed to the relevant roles:

- Does the person have any relationship with either party (e.g. current or former teacher, coach, advisor).
- Does the person have any relationship with either party's family.
- Does the individual have any history related to the alleged conduct (e.g. former victim or respondent, involvement in any aspect of the facts related to the allegations)
- Has any party or other individual raised a concern regarding conflict of interest.

The evaluation of conflict of interest must be on-going and regularly reviewed as the investigation proceeds.

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# Relevance



## Relevance

**“(1) Basic requirements for grievance process. A recipient's grievance process must—**

**... (ii) Require an objective evaluation of all relevant evidence—including both inculpatory and exculpatory evidence—and provide that credibility determinations may not be based on a person's status as a complainant, respondent, or witness;” § 106.45 Grievance process for formal complaints of sexual harassment., 34 C.F.R. § 106.45(b)(1)(ii)**

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**“The final regulations do not define relevance, and the ordinary meaning of the word should be understood and applied.” p.811, n. 1018**

- **Federal Rule of Evidence 401:**
  - Evidence is relevant if:
    - (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and
    - (b) the fact is of consequence in determining the action.
- **Merriam-Webster’s Dictionary defines “relevant” as**
  - **1a: having significant and demonstrable bearing on the matter at hand**
  - **b: affording evidence tending to prove or disprove the matter at issue or under discussion**

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### Only Exceptions:

- Rape Shield
- Evidence protected by a legally recognized privilege, unless the person holding the privilege has waived the privilege

### Decision maker must explain why something is deemed irrelevant

- “The decision-maker(s) must explain to the party proposing the questions any decision to exclude a question as not relevant.” § 106.45 Grievance process for formal complaints of sexual harassment., 34 C.F.R. § 106.45(b)(6)(ii).
- Relevance determination can provide a basis for appeal

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## Rape Shield

**“With or without a 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 [1] to prove that someone other than the respondent committed the conduct alleged by the complainant, or [2] 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.”**  
**34 C.F.R. § 106.45(b)(6)(ii).**

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## Rape Shield

### **Complainant's "sexual predisposition"**

- **Never relevant**

### **Complainant's "prior sexual behavior"**

- **ONLY Relevant if**
  - 1. offered to prove that someone besides the respondent committed the alleged sexual harassment**
  - 2. evidence of prior sexual behavior between complainant and respondent if offered to prove consent**

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## Application to Complainants

### **The Rape Shield language only applies to Complainants, not Respondents.**

- Evidence of a Respondent's sexual predisposition or prior sexual behavior is admissible if relevant.

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## Consent

**Regulations and guidance do not provide a definition for “consent” but state that a District can select a definition of “consent”**

- “Affirmative consent” vs. “implied consent”
  - Recipient can use their state’s definition of consent. Pennsylvania does not have a clear definition of consent.

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## Example: Pennsylvania

**Pennsylvania does not specifically define “consent” but uses the following definitions in criminal statutes:**

[A] person commits a felony of the first degree when the person engages in sexual intercourse with a complainant:

- (1) By forcible compulsion;
- (2) By threat of forcible compulsion that would prevent resistance by a person of reasonable resolution;
- (3) Who is unconscious or where the person knows that the complainant is unaware that the sexual intercourse is occurring;

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(4) Where the person has substantially impaired the complainant's power to appraise or control his or her conduct by administering or employing, without the knowledge of the complainant, drugs, intoxicants or other means for the purpose of preventing resistance; or

(5) Who suffers from a mental disability which renders the complainant incapable of consent. 18 Pa.C.S.A. § 3121.

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- “Forcible compulsion” is defined as “compulsion by use of physical, intellectual, moral, emotional or psychological force, either express or implied. The term includes, but is not limited to, compulsion resulting in another person's death, whether the death occurred before, during or after sexual intercourse.” 18 Pa.C.S.A. § 3101.
- Further, resistance is not required. The alleged victim need not resist the actor in prosecutions under this chapter: Provided, however, that nothing in this section shall be construed to prohibit a defendant from introducing evidence that the alleged victim consented to the conduct in question. 18 Pa.C.S.A. § 3107
- <https://apps.rainn.org/policy/policy-crime-definitions-export.cfm?state=pennsylvania&group=9>

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## Example: Canada

**Canada uses the following definition of “consent”:**

“Subsection 273.1(1) defines consent as the voluntary agreement of the complainant to engage in the sexual activity in question. Conduct short of a voluntary agreement to engage in sexual activity does not constitute consent as a matter of law.”

“[S]pecific situations where there is no consent in law; no consent is obtained:

- where the agreement is expressed by the words or conduct of a person other than the complainant
- where the complainant is incapable of consenting to the activity

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- where the accused induces the complainant to engage in the activity by abusing a position of trust, power or authority
- where the complainant expresses, by words or conduct, a lack of agreement to engage in the activity, or
- where the complainant, having consented to engage in sexual activity, expresses, by words or conduct, a lack of agreement to continue to engage in the activity.”

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## Example: Model Penal Code

**The Model Penal Code as approved by the American Law Institute provides the following definition for “consent”:**

(3) “Consent”

(a) “Consent” means a person’s behavior, including words and conduct— both action and inaction—that communicates the person’s willingness to engage in a specific act of sexual penetration or sexual contact.

...

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(c) Consent may be express, or it may be inferred from a person’s behavior. Neither verbal nor physical resistance is required to establish the absence of consent; the person’s behavior must be assessed in the context of all the circumstances to determine whether the person has consented.

(d) Consent may be revoked any time before or during the act of sexual penetration or sexual contact, by behavior communicating that the person is no longer willing. A clear verbal refusal—such as “No,” “Stop,” or “Don’t”—suffices to establish the lack of consent. A clear verbal refusal also suffices to withdraw previously communicated willingness in the absence of subsequent behavior that communicates willingness before the sexual act occurs.

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## Thank You!

*Be sure to use the separate link for PART III tomorrow.*

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