

Thrun Law Firm Title IX Refresher

**Title IX & FERPA:
A Legal Refresher**

 **THRUN**
LAW FIRM, P.C.

**Rob Dietzel
August 31, 2023**

 **BERRIEN SPRINGS PUBLIC SCHOOLS**
TOGETHER, INSPIRING STUDENTS TO THINK, LEARN,
ACHIEVE AND CARE IN A GLOBAL COMMUNITY

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Caution

These slides reflect general legal standards for the related presentation and are not intended as legal advice for specific situations.

Future legal developments may affect these topics.

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Disclaimer

- This training is a legal overview for awareness of relevant legal requirements
- This training is not sufficient to satisfy the training requirements for Title IX Coordinators, Investigators, Decision Makers, Appeals Officers, or Facilitators

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*"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 . . ."*

20 USC 1681

Title IX

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Scope of 2020 Regulations

- Went into effect August 14, 2020
- Do not apply to sexual harassment that allegedly occurred before effective date
- Address sexual harassment as subset of sex-based discrimination
- Apply to staff-to-staff, staff-to-student, student-to-staff, and student-to-student sexual harassment occurring **against persons in the U.S.**

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Broad Application

- Academics
- All Extracurricular activities, including athletics
- All school programs and activities, on school transportation, and in school-sponsored programs

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Fluid Situation

- Changes to regulations effective 8/14/20
- OCR Q&A issued 9/4/20
- OCR issued 2 Q&As on 1/15/21
 - Biden administration
 - Executive Orders
- DOJ Memo
- OCR Q&A issued 7/20/21

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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 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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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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VAWA

"Sexual assault": an offense classified as a forcible or nonforcible sex offense under FBI uniform crime reporting system. Includes rape, sodomy, sexual assault w/ object, or fondling directed against another person, w/o victim consent, including instances where victim is incapable of giving consent; and unlawful sexual intercourse.

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VAWA Also Includes

- Dating violence
- Domestic violence
- Stalking

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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 employee and 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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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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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.

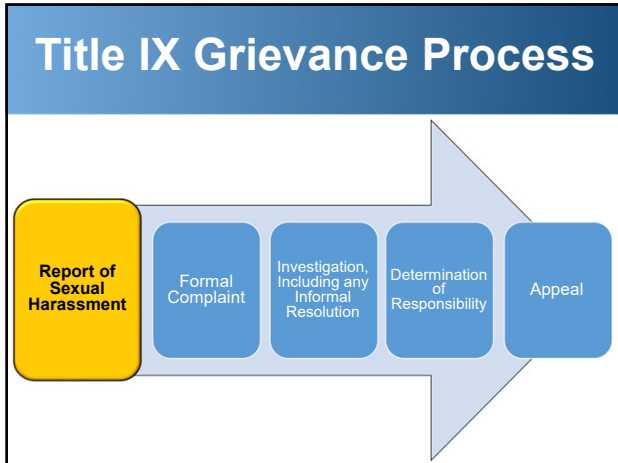
Must respond in **reasonably prompt** time frame.

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Reporting Sexual Harassment Under Title IX

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Making a Report

- Any person can make a sexual harassment report at any time
- Reports can be made verbally, in writing, or electronically at any time to **any school employee** or the Title IX Coordinator
- Anonymous reports are permissible
- Report of sexual harassment is **NOT** the same as a Formal Complaint

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Actual Knowledge

- School's obligation to respond to sexual harassment is triggered when it has "actual knowledge"
- "Actual knowledge" means notice of sexual harassment or allegations of sexual harassment to school's Title IX Coordinator **or any school employee**

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Employee Reporting Obligation

Employees must convey reports to Title IX Coordinator **promptly**.

- Check your policy for employee reporting steps and timelines!
- If you see something, say something!
- Noncompliance = misconduct

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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
- Consider Mandatory Reporting Requirement and report to law enforcement

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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 sanctions 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**
- 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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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**

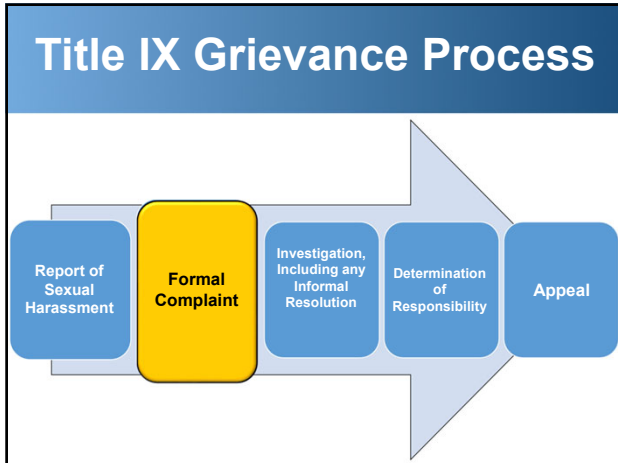
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Student Emergency Removal

- 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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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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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, additional allegations will be consolidated into current investigation, notice of additional allegations must be sent to the parties

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Formal Complaint Dismissal

<p>Mandatory</p> <p>Must be dismissed if allegations, if proven:</p> <ul style="list-style-type: none"> • 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. 	<p>Permissive</p> <p>May be dismissed if:</p> <ul style="list-style-type: none"> • 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)
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REMEMBER: Even if complaint is dismissed under Title IX, school may address complaint under another policy or code of conduct provision in some circumstances.

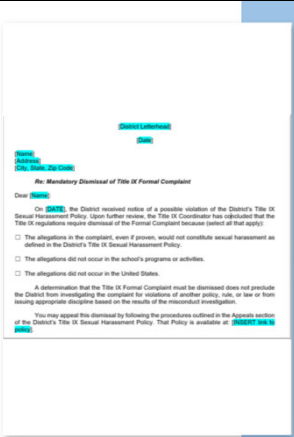
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Dismissal Notice

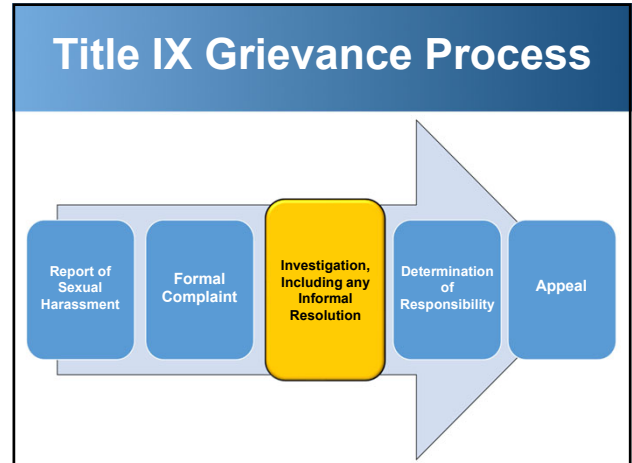
Prompt, simultaneous written notice to both parties that includes:

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




The sample document shows a 'Mandatory Dismissal of Title IX Formal Complaint' with fields for 'School', 'District', and 'Title IX Coordinator'. It includes a 'Dear [Name]' salutation and a paragraph stating that the District received notice of a possible violation and has conducted an investigation. It lists reasons for dismissal: 'The allegations in the complaint, even if proven, would not constitute sexual harassment as defined in the District's Title IX Sexual Harassment Policy', 'The allegations did not occur in the school's programs or activities', and 'The allegations did not occur in the United States'. It concludes with a statement that the determination to dismiss does not preclude the District from investigating the complaint for violations of another policy, rule, or law.

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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 complaint without investigation
- Can encompass broad range of conflict resolution, including arbitration, mediation, or restorative justice - direct interaction between 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 Title IX Investigation

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Initial Steps

- Communicate with parents/guardians if students are involved and with advisor/attorney, if one exists
- Remember mandatory reporting obligations for new allegations
- Remember Respondent presumed not responsible
- **Don't promise confidentiality!**
- Secure evidence
 - Physical
 - Documentary
 - Electronic & Video

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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)
- Timeline: Regulations require Grievance Process completed w/in a reasonably prompt time

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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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Notice of Interviews

- Must notify parties **in writing** of date/time/location, participants, and purpose of all hearings (if any), **investigative interviews**, and meetings,
- Notice must be given **a sufficient time in advance** so that a party may prepare for interview
- Cannot provide notice and conduct interview on same day

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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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Notice of Additional Allegations

- If investigation reveals additional allegations not in original notice to parties and investigator decides to investigate those allegations, must provide notice of additional allegations to both parties
- Additional notice must:
 - Identify date notice of the additional allegations given to the parties, and
 - Describe additional allegations
- If additional allegations will not be investigated, investigator must state basis for decision not to investigate in investigation report

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Evidence Review

- Before the investigation report is completed, the investigator must send (in electronic or hard copy) the parties and their advisors all evidence obtained in the investigation so that they can respond to the evidence before the investigator finalizes the report
- Parties must be given **at least 10 calendar days** to submit a written response to the evidence
- Investigator must consider any responses received before completing the report

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What Evidence?

- **ALL** evidence submitted to parties, including:
 - Evidence upon which the District does not intend to rely in reaching a determination regarding responsibility; and
 - Inculpatory or exculpatory evidence obtained from any source.
- Consider reminder to parties that redisclosure of evidence outside of Title IX grievance process is prohibited

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Findings of Fact

Investigator may:

- Make specific findings of fact for review by the Decision-Maker
- Make credibility determinations

But, may **NOT** make the determination of responsibility

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Final Tips

- Report must fairly summarize relevant evidence
- Use witness quotes, specific dates, times, and locations in the report when possible
- Check for correct spelling of names
- Cite applicable Board policies, code of conduct provisions, RSC Sections, but no conclusions whether those were violated
- Ensure report is clear, concise, and complete
- Assume either party may release report

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Transmittal of Final Report

- Investigator, Coordinator, or Decisionmaker must send (electronic or hard copy) investigation report to the parties and any advisors for review and response
- Report also should be sent to:
 - Title IX Coordinator
 - Decision-Maker
- Receipt of the report by the parties starts the Decision-Maker's timelines
- Parties must have 10 calendar days to review report

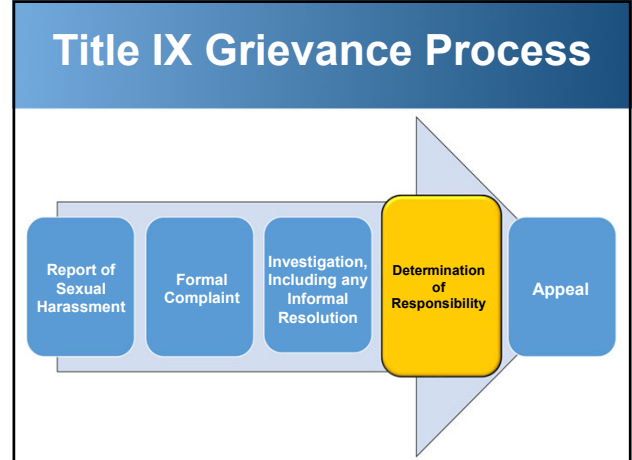
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Determination of Responsibility



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Decision-Maker's Role

- Has independent obligation to:
 - Evaluate relevance of available evidence including evidence summarized in investigation report, and
 - Consider all relevant evidence
- Make determination of responsibility

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Right to Submit Questions

After the parties receive the investigation report but before the Decision-Maker makes the responsibility determination, the Decision-Maker must:

- Allow each party **the opportunity** to submit written, relevant questions for any party or witness to answer;
- Provide each party the answers to the questions; and
- Allow for limited follow-up questions from each party
- Explain to party submitting question basis for excluding any questions

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Complainant's Sexual History

Questions and evidence about Complainant's sexual predisposition or prior sexual behavior **are not relevant** unless:

- Offered to prove that someone other than the Respondent committed the alleged misconduct; or
- 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

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Determination of Responsibility

Must be in writing and address:

- Allegations
- Procedural steps taken
- Findings of fact
- Student code of conduct or Board policy implications
- Conclusion for each allegation and rationale
- Disciplinary sanctions imposed and whether remedies provided
- Appeal rights

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Disciplinary Sanctions

- Determination of Responsibility letter must include any disciplinary action taken against Respondent
- Sanctions should be consistent with applicable codes of conduct, policies, law
- If Board approval is required for discipline Determination of Responsibility should include recommendations

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What Constitutes a Change of Placement?

- Removals for more than 10 consecutive days in single school year
- Removals for more than 10 cumulative days in school year and a pattern of removal
- Placement in an IAES for weapons, drugs, serious bodily injury, or dangerousness

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Procedural Requirements for Change of Placement

- Provide **educational services**
- Provide **FBA or behavioral intervention services**, as appropriate, to prevent behavior recurrence
- Conduct a **manifestation determination**
- Provide **notice of removal** and **procedural safeguards** immediately

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MDR Team

"... the LEA, the parent, and relevant members of the child's IEP Team (as determined by the parent and the LEA)...."

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MDR Team Reviews

"... all relevant information in the student's file, including the child's IEP, any teacher observations, and any relevant information provided by the parents to determine...."

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Manifestation Questions

- Was conduct caused by, or did it have a direct and substantial relationship to, disability?
- Was conduct a direct result of school's failure to implement IEP?
- If answer is yes to either question, conduct is a manifestation

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What Is the “Conduct in Question”?

- Look at the *facts*
 - Administrative write-ups
 - Witness statements
 - Video
 - Police report
- Review all incidents triggering recommended discipline
- What about persistent disobedience?

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What Is the Student’s “Disability”?

- Look first to the IEP
- *But* be prepared to consider other impairments or disabilities raised by parents, which may be “*other relevant information*”

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Focus on Specific Child

- What is the disability?
 - For EI, which type?
 - Refer back to MET assurances
- What other impairments?
- Prior behaviors
- Antecedents
- Ask: how does this child’s disability typically manifest itself?
- Ask: is this behavior consistent or inconsistent? Why?

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Consider Full Picture

“The review of relevant information is intended to present a picture of the whole child and not a specific focus on category of eligibility.”

MDE Guidance, June 2020

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Failure to Implement IEP?

Two-fold question

- Were IEP programs and services fully implemented?
- If not, did failure to implement the IEP as written directly result in the behavior in question?

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MDE Guidance

- “Robust discussion” of “individual circumstances”
- Avoid predetermination
- Decisions made at meeting
- Consensus; no voting
- Keep detailed documentation

MDE Guidance, June 2020

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When Manifestation

- IEP team must conduct FBA/implement BIP or review/modify BIP
- Student must be returned to current placement, unless
 - IAES for up to 45 school days **RARE** (drugs/weapons/serious bodily injury)
 - School/parent agree to CIP
 - ALJ or court orders otherwise
- School must take immediate steps to remedy any IEP implementation deficiencies

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When Not Manifestation

- May apply relevant disciplinary procedures for nondisabled students
- **IEP team** determines services needed during removal to allow student to:
 - participate in gen ed curriculum (although in different setting)
 - progress on IEP goals
- FBA or behavior services must be provided as needed to prevent behavior recurrence

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Apply Gen. Ed. Discipline

“School personnel may apply the relevant disciplinary procedures to children with disabilities in the same manner and for the same duration as the procedures would be applied to children without disabilities.”

OSERS Guidance, July 2022

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Educational Services



- Provide to enable student to continue to participate in general education curriculum, although in another setting, and progress on IEP goals
- **Setting and services determined by student's IEP team**

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“Individualized” Services

- Not “one size fits all”
- Services determined by
 - length of removal,
 - extent of past removals,
 - student’s needs, and
 - IEP goals
- Homebound rule does NOT apply

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Title IX Remedies

- Determination of responsibility must include whether Complainant will receive remedial measures
- Title IX Coordinator should directly communicate with Complainant about specifics
- Remedies should be designed to restore and preserve equal access to the District’s education program or activity

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Remedy Examples

- Provide escort to ensure that the Complainant and Respondent can safely work or attend classes and school activities
- Offer parties school-based counseling
- Provide parties with academic support
- Rearrange course or work schedules to minimize contact between Complainant and Respondent
- Move Complainant's or Respondent's locker or work space
- Issue "no contact" directive between Complainant and Respondent

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Remember!

- Supportive measures are available to more than just Complainant
- Also consider systemic remedies, such as training
- For students with disabilities, convene IEP or Section 504 meetings as necessary

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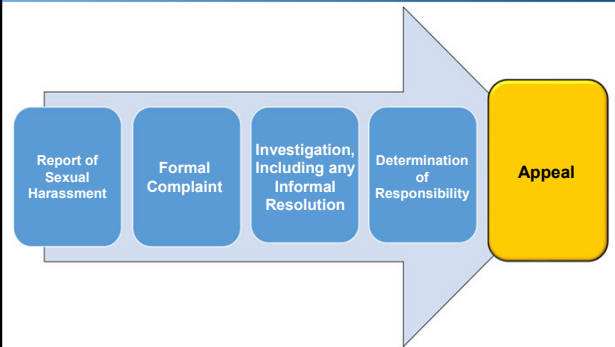
Final Reminders

Determination of responsibility should:

- Provide evidence-based rationales
- Be clear and precise
- Be nearly identical for both Complainant and Respondent
- Sent to parties simultaneously
- Title IX Coordinator is responsible for effective implementation of any remedies

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Title IX Grievance Process



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Appeal Bases

1. Procedural irregularity that affected the outcome;
2. New evidence that was not reasonably available at the time of the determination and could affect the outcome;
3. Title IX Coordinator, Investigator, or Decision-Maker had a conflict of interest that affected the outcome

Schools can create additional bases for appeal—check your policy!

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Appeal Process

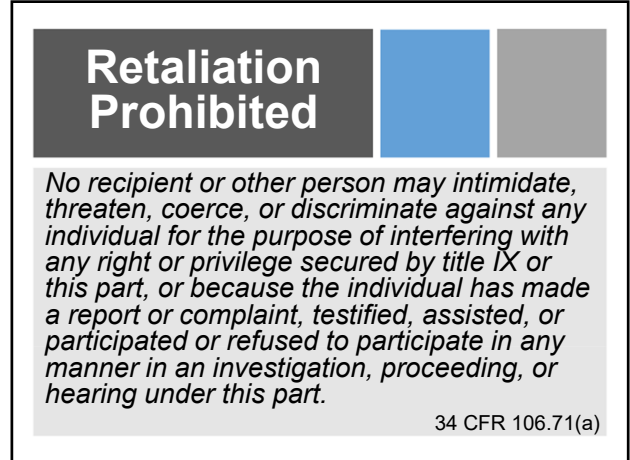
- Determination of responsibility or dismissal includes parties' appeal rights
- Party submits appeal to Appeals Officer or Title IX Coordinator as applicable
- Appeals Officer provides written notice to both parties that appeal filed
- Parties may submit written statement to Appeals Officer in support of, or challenging, determination
- Appeals Officer issues written decision to parties simultaneously

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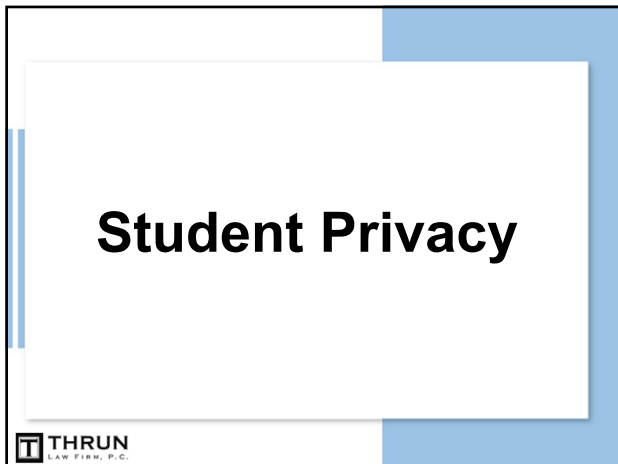
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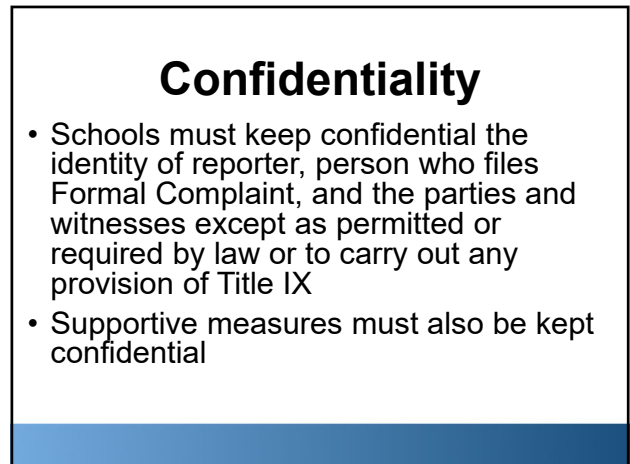
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