TITLE IX INVESTIGATOR TRAINING

TITLE IX REGULATIONS
34 CFR PART 106
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Title IX Basics

- Federal law prohibits discrimination on the basis of sex in any educational program or activity receiving federal financial assistance
- Includes both students and employees and prohibits discrimination in admissions, employment, athletics, treatment of pregnant and parenting students and **prohibits sexual harassment**
- Compliance with Title IX is enforced by the Department of Education Office of Civil Rights (OCR)
- Other federal laws and/or state laws may overlap with Title IX requirements

Title IX Basics: History

1972	1975	1997	2011–2017	2017	2018–2019	2020
Title IX Adopted by legislative action	Implementing Regulations addressed sex discrimination, but not sexual harassment	Department began issuing guidance addressing sexual harassment	Significant ED guidance released on issue of sexual harassment and sexual violence	Withdrawn Guidance: 2011 DCL 2014 Q&A 2017 Q&A	Negotiated Rulemaking & Proposed Rule	Newly Revised Title IX Rules Effective 8/14/20

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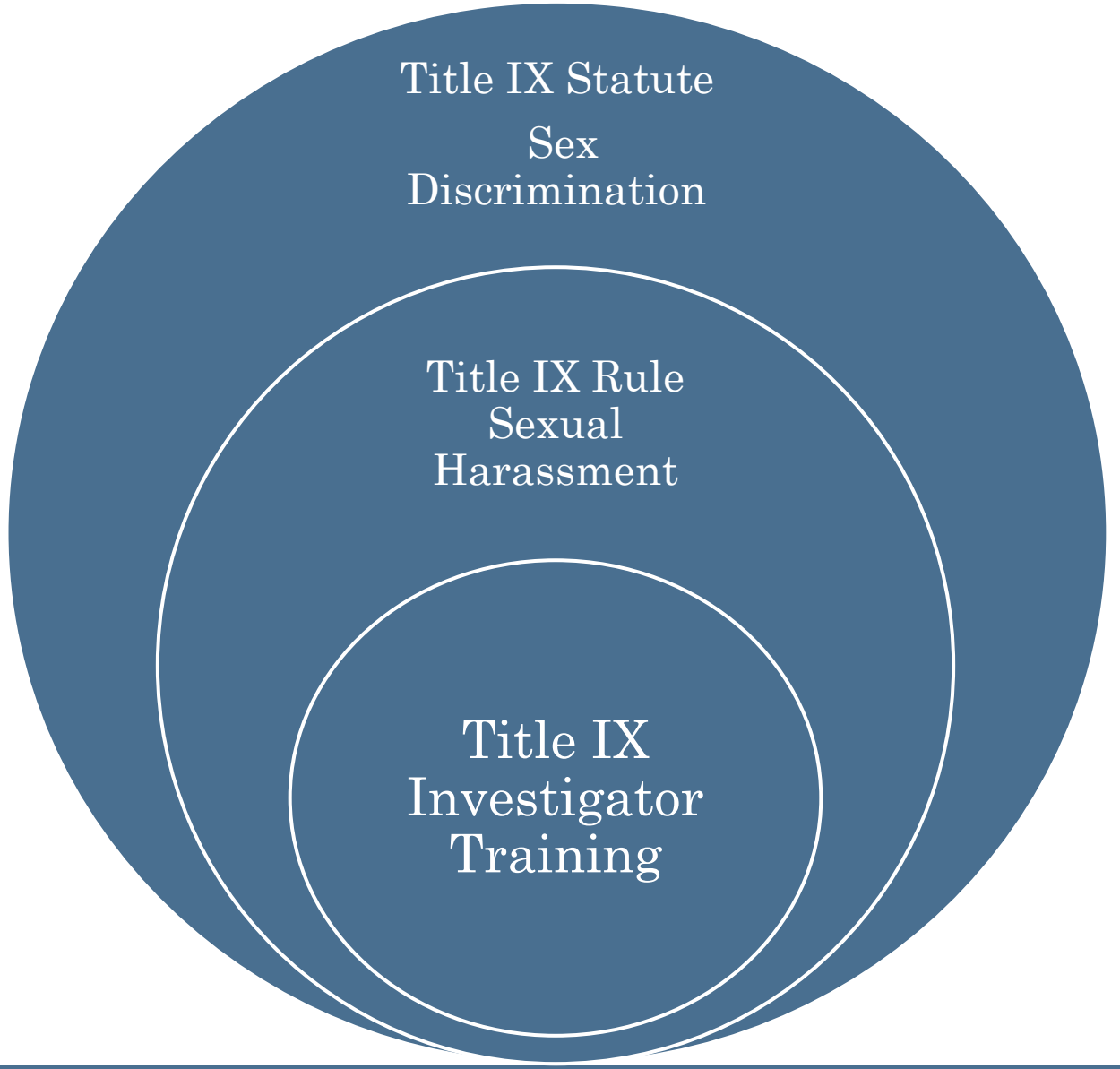
Title IX Basics: Title IX Personnel

TITLE	RESPONSIBILITIES	TRAINING	STATUS
Title IX Coordinator (multiple &/or deputies)	Coordinate, Intake Reports & Complaints, T9 analysis, Initiate Formal Complaint, Implement Supportive Measures	Sexual Harassment, Investigation & Grievance Procedure, Hearings, Appeals & Informal Resolution (as applicable); Impartiality, Relevance, Privilege	Must be Employee May Not Serve as Decision-Maker
Investigator	Conduct Fair, Objective and Impartial Investigation, Differentiate b/w Related & Relevant Evidence & Privilege	Sexual Harassment; How to Conduct an Investigation, Impartiality, Relevance, Privilege, Report-Writing	Staff or External May Not Serve as Decision-Maker
Decision Makers	Evaluate Evidence, Make & Write Decision, "Rule" on Relevancy during Cross-Examination	Sexual Harassment, Hearing Process, Technology, Evidence/Relevancy	Staff or External Cannot Serve in Any Other Capacity
Advisor(s)	Question Opposing Party & Witnesses	None required	Party provided Staff or External
Informal Resolution Facilitator	Informal Resolution Processes	Informal Resolution Processes	Staff or External

Title IX Basics: Investigator Training

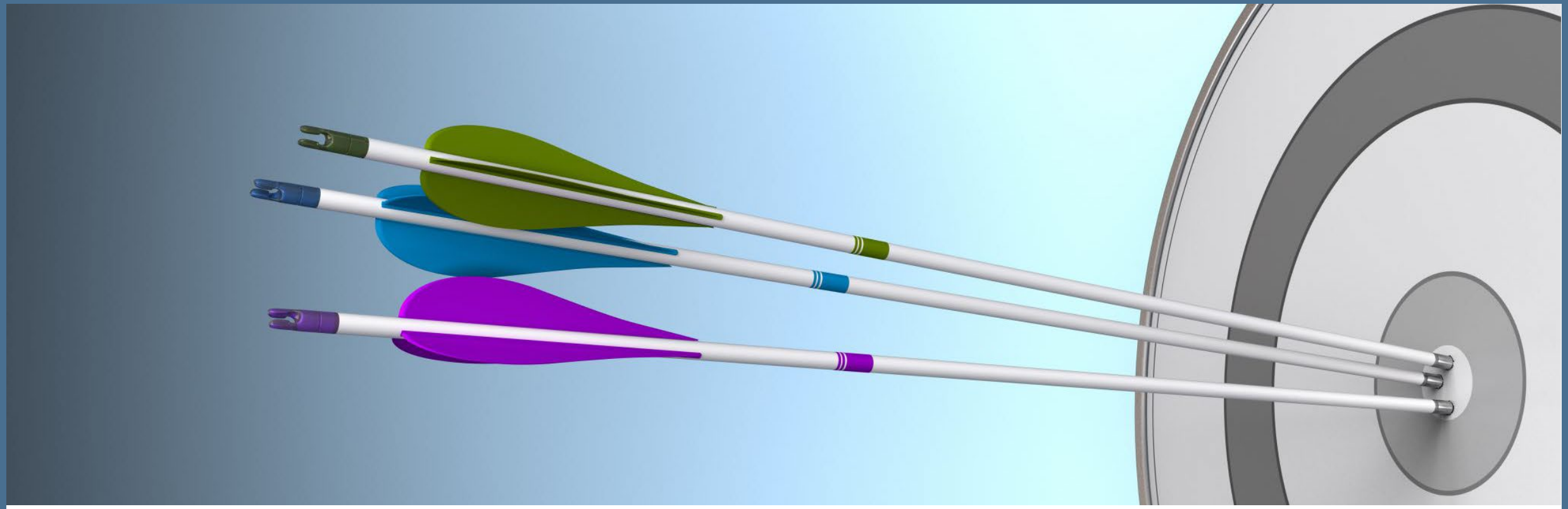


Title IX Investigator Training: What We Will Cover

- On Title IX's definition of "sexual harassment"
- On the scope of the school's education program or activity
- On how to serve impartially, including by avoiding prejudgment of the facts at issue
- On how to avoid conflicts of interest and bias
- On how to conduct an investigation
- Evidence: Relevancy, Privilege, Exclusions

Procedural Protections

CITATION	SUMMARY
106.45(a)	School's treatment of parties may constitute discrimination
106.45(b)(1)(i)-(x)	**Grievance Process Requirements**
106.45(b)(2)	**Written Notice of Allegations to Both Parties**
106.45(b)(3)-(b)(4)	**Formal Complaints Must be Investigated, Dismissals, Consolidation**
106.45(b)(5)(i)-(vii)	**Investigation Requirements**
106.45(b)(6)	Cross Examination Conducted by Advisor
106.45(b)(7)	Independent/Neutral Decision-maker, Standard of Evidence Same, Written Determination
106.45(b)(8)	Appeals: Procedural Irregularities, New Evidence, Bias or Conflict of Interest
106.45(b)(9)	Informal Resolution: Voluntary, Written Consent. Not Allowed for Employee Respondent
106.45(b)(10)	Record Keeping, Publication of Training Material



DEFINITION OF SEXUAL HARASSMENT

JURISDICTION & SCOPE OF TITLE IX RULE

Definition of Sexual Harassment: 3-Prongs

Quid Pro Quo	***Employee*** **Conditions Something of Value for Sexual Favor**
Davis Standard	**So Severe, Pervasive and Objectively Offensive**
Clery/VAWA Crimes	**Sexual Assault, Stalking, Dating & Domestic Violence**

Sexual Harassment: Quid Pro Quo

- Applies solely to an employee respondent
- Involves an abuse of authority by an employee
- Doesn't require a showing of severity, pervasiveness or offensiveness
- Need not be explicit, could be implied
- Not subject to informal resolution option

Sexual Harassment: Severe, Pervasive, Offensive (*Davis)*

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

- directed at verbal or expressive conduct
- evaluated under the "reasonable person standard" taking into consideration the characteristics of the alleged victim

Sexual Harassment: Clery/VAWA Crimes

- "sexual assault" as defined in 20 U.S.C. 1092(f)(6)(A)(v),
- "dating violence" as defined in 34 U.S.C. 12291(a)(10),
- "domestic violence" as defined in 34 U.S.C. 12291)a)(8),or
- "stalking" as defined in 34 U.S.C. 12291(a)(30).

Dating Violence

- 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 shall be determined based on a consideration of the following factors:
    - the length of the relationship.
    - the type of relationship.
    - the frequency of interaction between the persons involved in the relationship.

Domestic Violence

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 grant monies, 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.

Stalking

- stalking means engaging in a course of conduct directed at a specific person that would cause a reasonable person to—
  - fear for his or her safety or the safety of others; or
  - suffer substantial emotional distress.

Educational Program or Activity

- Locations, events, or circumstances where the school exercises substantial control over both:
  - the Respondent
  - the context in which the alleged sexual harassment or discrimination occurs
  - includes any building owned or controlled by the school or by a student organization that is officially recognized by the school
  - must occur in the U.S.

Dismissals

- Mandatory
  - Doesn't meet definition or jurisdictional requirements
- Discretionary
  - Complainant wants to withdraw complaint Complainant notifies the Coordinator in writing that they would like to withdraw the complaint, or any allegation therein
  - Respondent is no longer enrolled or employed
  - Specific circumstances prevent school from gathering evidence sufficient to reach a determination
- Apply to individual allegations or to an entire complaint
- Parties must receive written notification and reasons for any dismissal; mandatory dismissals are appealable

FORMAL GRIEVANCE PROCESS

Grievance Process Basic Requirements

- **Treat parties equitably**
- **Require objective evaluation of all relevant evidence**
- **Train Title IX personnel & post all training on web-site**
- **Include a presumption that respondent is not responsible**
- **Include reasonably prompt time frames**
- **Describe the range of, or list, possible disciplinary sanctions and remedies**
- **State standard of evidence: preponderance or clear and convincing**
- **Include process and bases for appeals**
- **Exclude privileged evidence**

Investigators

Rule prohibits “single-investigator model”

Coordinator *may* serve as investigator as long as can do so conflict and bias-free * *note the Department cautions on this*

May have more than one investigator on a case

Investigators Must:

Objectively evaluate 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*

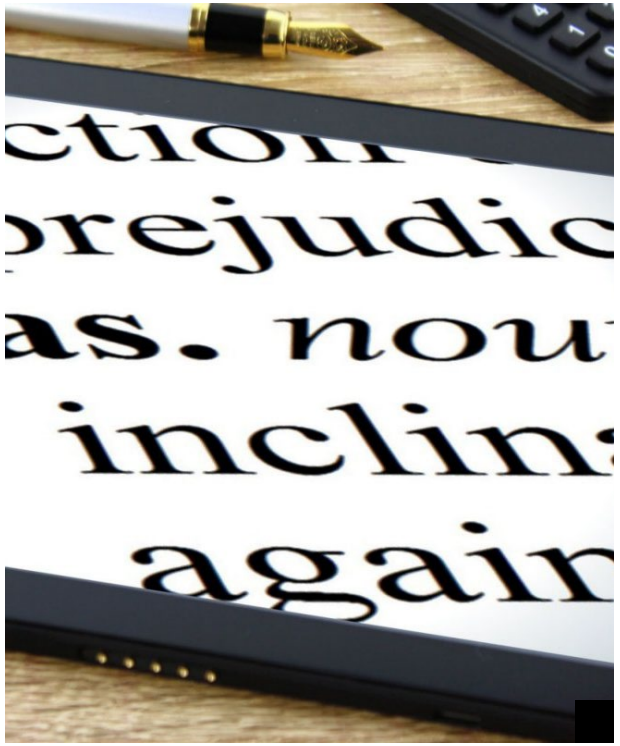
Not have a conflict of interest or bias *for or against complainants or respondents generally or an individual complainant or respondent*

Receive training *on the definition of sexual harassment, the scope of the recipient's education program or activity,*

How to Serve Impartially & Objectively

Require on objective evaluation of all relevant evidence-including both inculpatory and exculpatory evidence-and that provides credibility determinations may not be based on a person's status as a complainant, respondent or witness

Conflicts of Interest and Bias



- Schools must have process to ensure no conflict/bias
- May provide a process for parties to assert claims of conflict/bias during the investigation
- Consider including a provision in your policy that allows students to raise concerns about an investigator, or any Title IX personnel during the grievance process,
- Conflict & bias of Title IX personnel is a basis for appeal

REASONABLY PROMPT TIMEFRAME

Reasonably Prompt Timeframes

- Administrative Delay
  - *School's inefficiency not good cause*
- Availability of Parties & Witnesses
- Law Enforcement Activity
- Accommodations for Disabilities
- Language Assistance

Reasonably Prompt Timeframes

Concurrent Law Enforcement Activity

- distinct, separate and independent processes
- obligated to respond to T9 allegations irrespective of criminal matter
- law enforcement investigation could justify a delay or extension
- delay cannot be protracted or open-ended

Availability of Parties & Witnesses

- must try to accommodate individuals' schedules to allow their meaningful participation
- parties may participate remotely
- a party or witness cannot indefinitely delay the grievance process by refusing to cooperate
- the process can proceed even in the absence of a party or witness
- must keep nonparticipating party informed

THE INVESTIGATION

Investigation: Rights of the Parties

- Opportunity to Present Evidence & Witnesses
- Cannot Restrict Parties Right to Discuss Case
- Right to an Advisor
- Notice & Opportunity to Prepare
- Right to Review All Related-to Evidence
- Right to Review Investigation Report
- Burden on School Not on Parties

Right to Discuss the Allegations & Gather Evidence

- ✓ Schools must not restrict the ability of the parties to discuss the allegations or gather evidence (no gag orders)

- ✓ Parties have the right to discuss the allegations with anyone they choose with limited exceptions:
  - ✓ no-contact directive
  - ✓ retaliatory manner

Right to an Advisor

Parties must have the same ability to select an advisor of choice, who may be, but need not be an attorney

- ✓ Parties can choose anyone to be their advisor
  - ✓ friend, parent, classmate, attorney
- ✓ Role of advisors
  - ✓ provide support, accompany party to meetings/interviews
  - ✓ adversarial with respect to their role in the hearing and in conducting cross examination
- ✓ School may limit to advisor's role with respect to their participation
- ✓ Any rules around the role of advisors must apply equally to both parties
- ✓ If a party does not have an advisor, the school must provide one at no cost to the party for the limited purpose of conducting cross exam during the hearing
- ✓ Advisor does not have to match the qualifications of the other party's, so if the other party has an attorney, the school is not obligated to provide an attorney

Written Notice

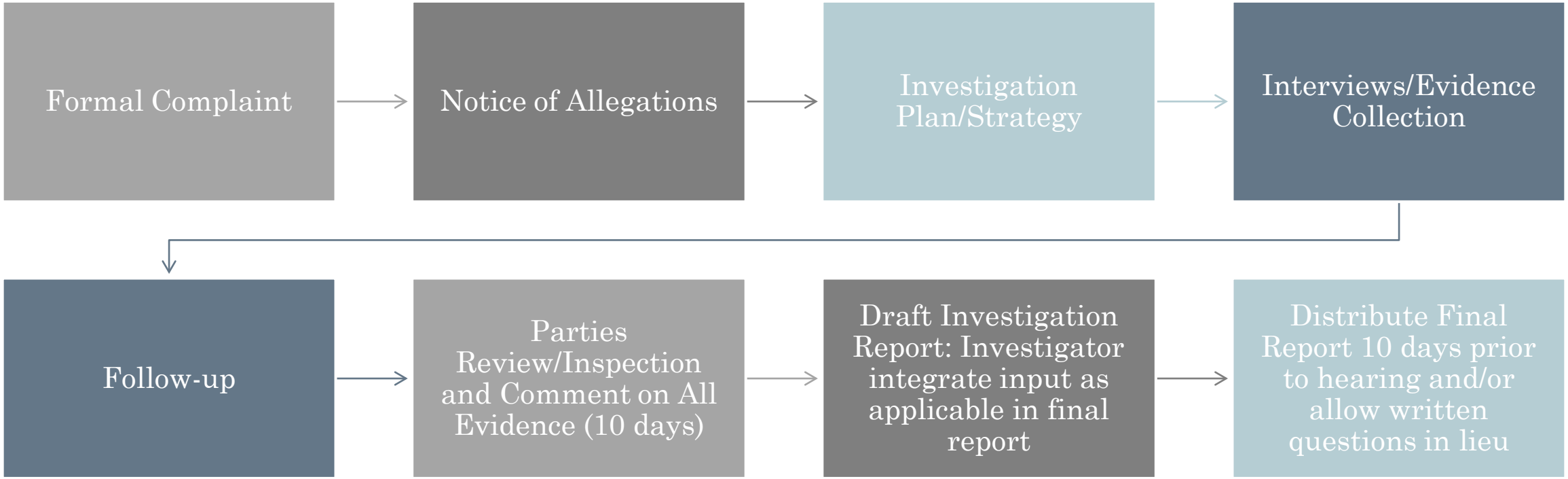
Provide, to a party whose participation is invited or expected, written notice of the date, time, location, participants, and purpose of all hearings, investigative interviews, or other meetings, with sufficient time for the party to prepare to participate;

Burden of Proof

**The burden of gathering evidence and the burden of proof must remain on schools not the parties*

- Both parties have the right to provide evidence and witnesses, but it is not their responsibility
- It is the school's job to conduct the investigation, track down and gather all of the evidence possibly and interview witnesses…
- The school is neutral during this process, they are not focusing on gathering evidence to prove respondent "guilty" or to prove respondent is not responsible; they are not "building a case"
- The goal is a truth-seeking mission; gather everything so that a neutral decision maker can reach an accurate determination based on the facts

Steps in the Investigation Process



Notice of Allegations (NOA)

Notice of allegations—(i) Upon receipt of a formal complaint, a recipient must provide the following written notice to the parties who are known:

(A)Notice of the recipient's grievance process that complies with this section, including any informal resolution process.

(A)Notice of the allegations of sexual harassment potentially constituting sexual harassment as defined in § 106.30, including sufficient details known at the time and with sufficient time to prepare a response before any initial interview.

Notice of Allegations (NOA)

1. Identities of the parties involved in the incident, if known,
2. Conduct allegedly constituting sexual harassment
3. Date and location of the alleged incident, if known.
4. Statement that the respondent is presumed not responsible for the alleged conduct and that a determination regarding responsibility is made at the conclusion of the grievance process.
5. Right to an advisor of their choice, who may be, but is not required to be, an attorney
6. Right to inspect and review evidence
7. Any provision in the recipient's code of conduct that prohibits knowingly making false statements or knowingly submitting false information during the grievance process.

Investigation Plan

Determine the scope of the investigation,

Establish a preliminary timeline of events Identify important testimony and evidence

Develop an initial witness list

Determine order in which to interview the accused and witnesses

INTERVIEWING PARTIES & WITNESSES

Interviews

- Interviews should be conducted in a private location with no interruptions; try to make the interviewee feel comfortable
- Explain what, if any, information might be shared with others
- Provide a brief explanation of the institution's investigatory process
- May have more than one investigator on a case
- Explain the institution's prohibition on retaliation

Dos and Don'ts of Interviewing

Don't: Use overly "legalistic" or formal language

Do: Balance empathy with objectivity; establish rapport while maintaining professionalism

Dos and Don'ts of Interviewing

Don't: Avoid difficult or embarrassing questions because they are uncomfortable

Do: Use tact and sensitivity, but can't skip important details

Dos and Don'ts of Interviewing

Don't: Ask leading questions based on what you think probably happened

Do: Allow the details and facts to come out first, then follow-up with additional clarifying questions as you learn more

Dos and Don'ts of Interviewing

Don't: Make promises you can't keep, or set unrealistic expectations

Do: Be clear about the process including the limits on "confidentiality"

Dos and Don'ts of Interviewing

Don't: Interrupt, ask "blaming" or biased questions, or fill in the gaps with your own assumptions

Do: Ask open ended questions and Allow Interviewee to provide their story in their own words…allow space to let them speak

Dos and Don'ts of Interviewing

Don't: Treat the interview like an interrogation or inquisition

Do: Ensure you remain objective and keep your role in context, this is an administrative process, not a law enforcement investigation.

EVIDENCE

Evidence

- School Carries the Burden of Evidence
- Only Relevant Evidence May be Considered
- Investigator Must Collect All Evidence Related-to Allegations
- Privileged Evidence, Medical Records, etc. is Not Admissible Without Consent
- No Other Restrictions on Evidence (legal rules don't apply)
- Parties Have the Right to Inspect the Evidence
- Statements of Party of Witness that Does Not Submit to X-Exam May Not be Relied Upon by Decision-Maker (hearing optional in K-12)
- Decision-Maker Evaluates Credibility
- School May Develop Guidelines as Long as Don't Contravene Rules

Relevancy

Relevance: evidence pertinent to proving whether facts material the allegation are more or less likely to be true and that do not relate to complainant's sexual predisposition of prior sexual acts (with two exceptions).

Related-to vs. Relevant

Related-to

Investigator must collect all evidence that is related to the allegations whether or not relevant (excluding evidence subject to privilege, medical records)

Relevant

Relevant evidence is all evidence related to, except that which is protected under the rape shield provisions (and not otherwise privileged, medical records)

Relevancy, Rape Shield Protections & Exceptions

- Questions and evidence about the complainant's sexual predisposition are NEVER RELEVANT; questions about prior sexual behavior are NOT RELEVANT, ***unless***:
  - offered to prove
    1. "Mistaken Identity"
    - that someone other than the respondent committed the conduct alleged by the complainant, or
    2. Consent
    - concern specific incidents of the complainant's prior sexual behavior with respect to the respondent and are offered to prove consent.
      - State law considerations re: minors and consent

Privileged Evidence Inadmissible

Not require, allow, rely upon, or otherwise use questions or evidence that constitute, or seek disclosure of, information protected under a legally recognized privilege, unless the person holding such privilege has waived the privilege in writing.

- ✓ Patient-doctor
- ✓ attorney-client
- ✓ spousal privilege

Other Inadmissible Evidence

Statements of non-cooperating party or witness: the statements of a party or witness that does not submit to cross examination may not be considered by the decision-maker in rendering a decision

Opportunity to Review Evidence & Investigative Report

Prior to completion of investigative report, school must send to parties and their advisors, all evidence gathered that is directly related to the allegations, inculpatory & exculpatory, and provide at least 10 days to review and respond in writing

Final investigation report must fairly summarize relevant evidence and be provided to party and the party's advisor at least 10 days prior to a hearing with an opportunity to review and respond in writing

Submission of Written Questions

- Live hearing is fully within discretion of school and is not required for K-12
- State law may require a live hearing for certain disciplinary matters, so state requirements could overlap necessitating a hearing under state requirements
- Schools must afford parties the option to submit written questions in lieu of live testimony
- Parents & legal guardians have the right to act on behalf of minor children
- Written questions, responses and limited follow-up may occur concurrently during the 10-day period parties are entitled to review the investigative report
- Hearing officer will rule on relevancy of written questions;

Right to Inspect Evidence

Schools must send the parties *and their advisors:*

- ✓ **ALL** evidence directly related to the allegations
  will include relevant **and irrelevant evidence <u>including that which would otherwise be excluded under the rape shield protections</u>*
- ✓ includes evidence the school will <u>not</u> use/rely in making a decision
- ✓ includes inculpatory or exculpatory evidence whether obtained from a party or other source
- ✓ electronic format or a hard copy, otherwise, method and format of delivery up to school
- ✓ parties must have *at least 10 days* to submit a written response
  *consider when determining reasonable timeframes
- ✓ the investigator <u>will</u> consider parties input prior to completion of the investigative report
- ✓ evidence *must be made available at hearing*

- ✓ *Note that both evidence and report MUST be sent to advisor, this is the default. If parties wish to opt out, they can, request that the request be provided in writing*

Right to Review Evidence & Investigation Report

EVIDENCE

Before Report Finalized

ALL evidence "related-to"

Send to Both to Party & Advisor

Electronic or Hard Copy

10-day Review

Must Consider Input

INVESTIGATION REPORT

After Report Finalized

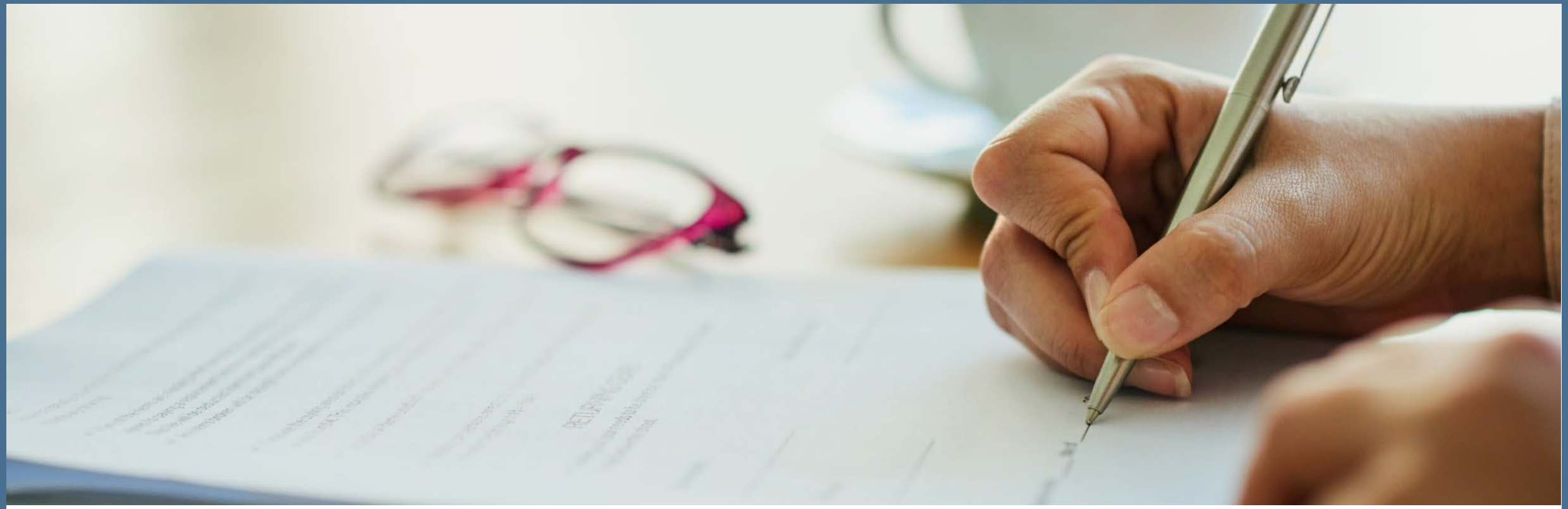
Relevant Evidence Only

Send to Both to Party & Advisor

Electronic or Hard Copy

10-day Review

Discretion to Make Changes



INVESTIGATIVE REPORT

Investigative Report

Must fairly summarize the relevant evidence

- Have discretion to determine what format or what other elements to include if any
- Decision-maker must independently reach conclusions
- Additional information useful from a practical perspective, i.e. providing sufficient background info/context to understand the evidence, to satisfy record-keeping requirements and document process was thorough, fair, etc.

Resources

Department of Education Office for Civil Rights ("OCR")Web-page:
https://www2.ed.gov/about/offices/list/ocr/index.html

OCR Title IX Videos:
https://www.youtube.com/watch?v=TdfT5R8ibm4&feature=youtu.be

Summary of new regulations:
https://www2.ed.gov/about/offices/list/ocr/docs/titleix-summary.pdf

OCR Blog:
https://www2.ed.gov/about/offices/list/ocr/blog/index.html

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