



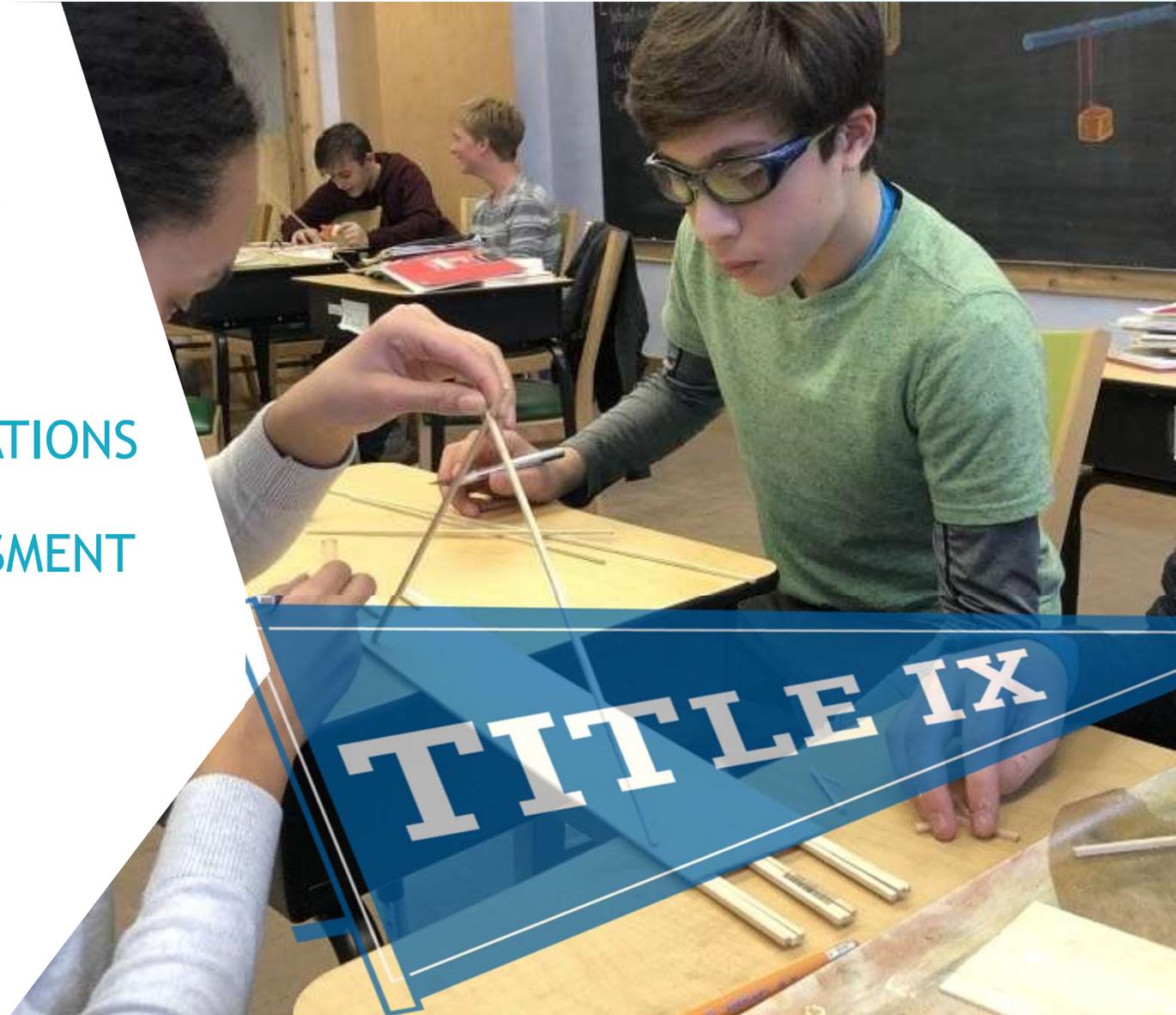
Urban Prairie
Waldorf School

NEW TITLE IX REGULATIONS RE: SEXUAL MISCONDUCT/HARASSMENT

Presented by:

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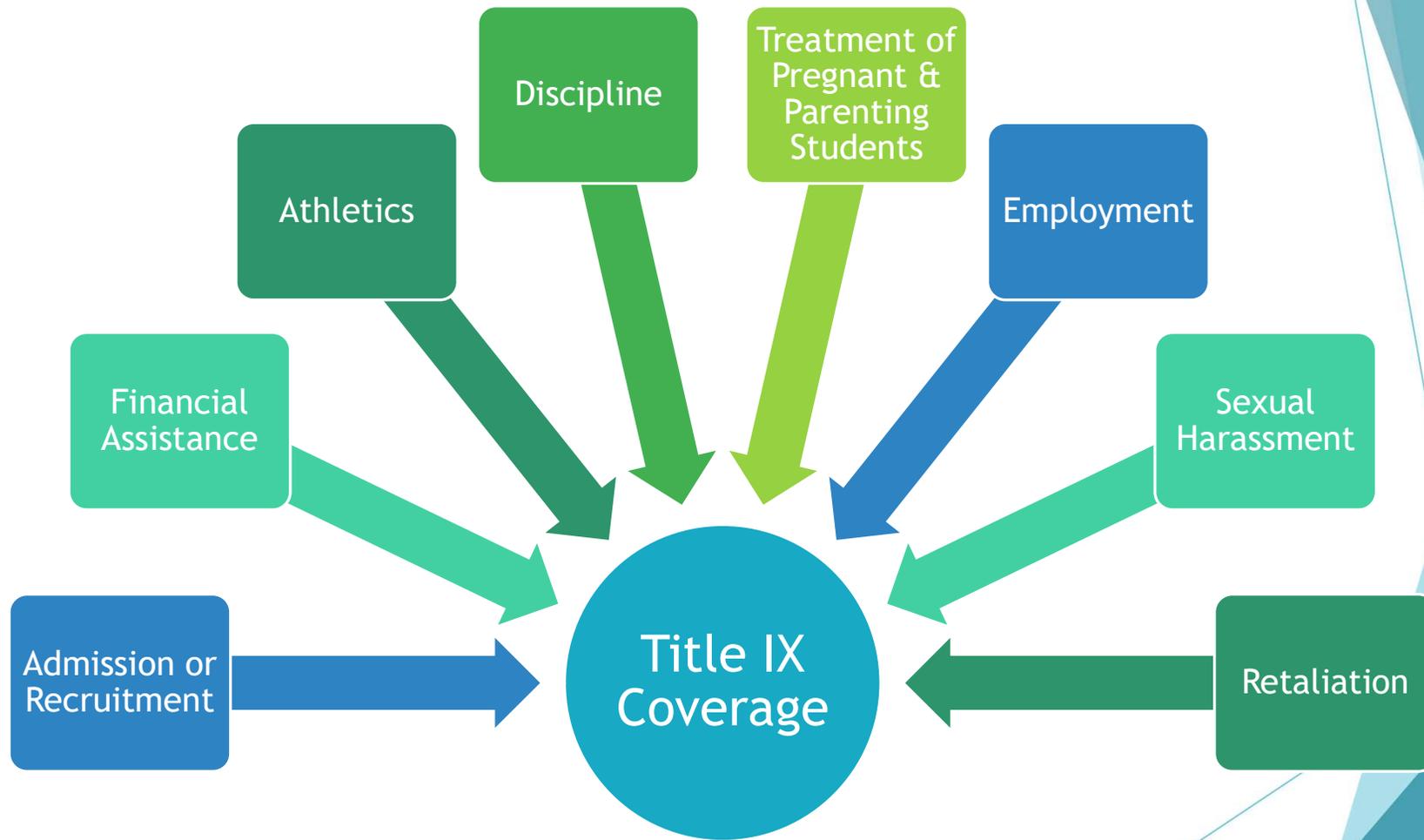
- ✓ Title IX Background/Coverage
- ✓ New Definitions
- ✓ Title IX/Title VII/IHRA
- ✓ Grievance Procedures
- ✓ Investigation and Notices
- ✓ Appeals
- ✓ Record keeping
- ✓ Training
- ✓ Informal Resolution

Topics to Discuss

Title IX Statute

Title IX Statute (20 U.S.C. §§ 1681-1688)

- "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."



Applies To Employees & Students

Questions to OCR - open@ed.gov



Do the new Title IX regulations apply to employees in the 7th Circuit, with the Circuit having ruled that an employee's Title IX claim is preempted by Title VII?



The split among Federal courts relates to whether an implied private right of action exists for damages under Title IX for redressing employment discrimination by employers. These Federal cases focus on whether Congress intended for Title VII to provide the exclusive judicial remedy for claims of employment discrimination. Courts have not precluded the Department from administratively enforcing Title IX with respect to employees.

Title IX External Complaints

An individual may assert a Title IX claim against a recipient by:

Lawsuit: Suing the school in court and seeking monetary damages or injunctive or declaratory relief

AND/OR

OCR Complaint: Filing an administrative complaint, a grievance with U.S. Dept. of Ed. Office for Civil Rights (or other applicable federal agency).

Major Changes

- ▶ Definition of Sexual Harassment/Jurisdiction
- ▶ Grievance Procedures
- ▶ Notice to Parties/Due Process
- ▶ Formal Investigation and Hearings
- ▶ Substantial Documentation Requirements
- ▶ Significant Training Requirements

Response To Sexual Harassment - §106.44

If a school has actual knowledge of sexual harassment in an education program or activity of the recipient against a person in the United States, must respond promptly in a manner that is not deliberately indifferent.

- Must treat all parties equitably by offering supportive measures to complainants, and by following a grievance process that complies with §106.45 before any discipline.
- <https://www2.ed.gov/about/offices/list/ocr/docs/titleix-regs-unofficial.pdf>

Actual
Knowledge -
§106.30(a)

NOTICE

Actual knowledge means notice of sexual harassment or allegations of sexual harassment to a recipient's Title IX Coordinator or any official of the recipient who has authority to institute corrective measures on behalf of the recipient, or to any employee of an elementary and secondary school.

Actual Knowledge

- ▶ *Gebser v. Lago Vista Indep. School*, 524 U.S. 274 (1998)
- ▶ Adult-on-student sexual harassment
- ▶ Three-part standard:
 1. An official of the educational institution must have had “actual notice” of harassment;
 2. The official must have authority to “institute corrective measures” to resolve the harassment problem; AND
 3. The official must have “failed to adequately respond” to the harassment and, in failing to respond, must have acted with “deliberate indifference.”

New Sexual Harassment Definition -§106.30(a)

Sexual harassment means conduct on the basis of sex that satisfies one or more of the following:

(1) An employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct;

(2) 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; or

(3) "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).

Severe, Pervasive, And Objectively Offensive/Deliberate Indifferent

Davis v. Monroe County Bd. of Ed., 526 U.S. 629 (1999)

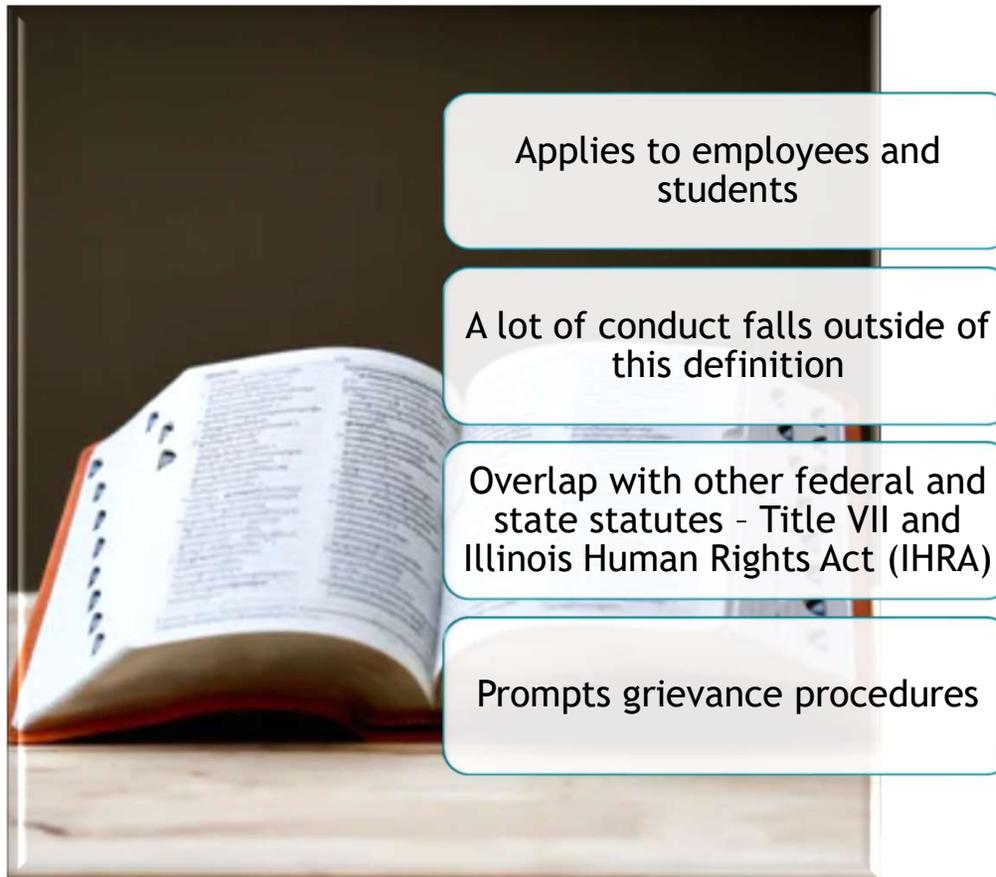
- Student-on-student sexual harassment.
- The institution must have “actual notice” of the harassment; and the institution must have responded to the harassment with “deliberate indifference.”
- Harassment must be “severe, pervasive, and objectively offensive.”
- Deliberate indifference constitutes a response that is “clearly unreasonable in light of the known circumstances.”

Education Program Or Activity - §106.44(a)

- ▶ Education program or activity: locations, events, or circumstances over which the recipient exercised substantial control over both the respondent and the context in which the sexual harassment occurs.



Significance Of The New Definitions



Applies to employees and students

A lot of conduct falls outside of this definition

Overlap with other federal and state statutes - Title VII and Illinois Human Rights Act (IHRA)

Prompts grievance procedures

Title IX, Title VII, And IHRA

1. Quid Pro Quo

2. Hostile Environment

- ▶ Title IX: 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
- ▶ Title VII: Unwelcome conduct by a reasonable person to be so severe **or** pervasive, and objectively and subjectively offensive that it altered the conditions of employment
- ▶ IHRA: any unwelcome conduct of a sexual nature when such conduct has the purpose or effect of substantially interfering with an individual's work performance or creating an intimidating, hostile or offensive working environment. 775 ILCS 5/2-101(E)

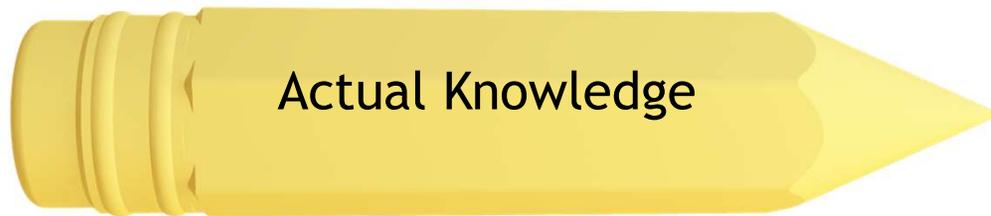
Title IX, Title VII, And IHRA (cont...)



▶ Response obligations:

- ▶ Title IX: Deliberately indifferent - Only if its response to sexual harassment is clearly unreasonable in light of the known circumstances.
- ▶ Title VII: A coworker's **sexual harassment** of an employee gives rise to employer liability **under Title VII** when an employer is "negligent either in discovering or remedying the **harassment.**"
- ▶ IHRA: An employer shall be responsible for sexual harassment of the employer's employees by nonemployees or nonmanagerial and nonsupervisory employees only if the employer becomes aware of the conduct and fails to take reasonable corrective measures. 775 ILCS 5/2-102(D)
- ▶ <https://www2.illinois.gov/dhr/Training/Pages/State-of-Illinois-Sexual-Harassment-Prevention-Training-Model.aspx>

What will prompt the new grievance procedures?



Formal Complaint -§106.30

Filed by the Complainant or Title IX Coordinator requesting an investigation

At the time of filing, a complainant must be participating in or attempting to participate in the education program or activity.

Where the Title IX Coordinator signs a formal complaint, the Title IX Coordinator is not a complainant or otherwise a party

Must Dismiss A Formal Complaint - §106.45

1

- Conduct does not fall under the new definition of sexual harassment

2

- Did not occur in education program or activity: locations, events, or circumstances over which the recipient exercised substantial control over both the respondent and the context in which the sexual harassment occurs

3

- Did not occur against a person in the United States

May Dismiss A Formal Complaint - §106.45(b)(3)(iii)

Complainant informs the Title IX Coordinator that they would like to withdraw the complaint

Respondent is no longer enrolled or employed, or

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



§106.45 - Grievance Process For Formal Complaints Of Sexual Harassment

§106.45(b)(1): Basic Requirements - 10 paragraphs, with subparagraphs of requirements.

Notice of allegations:

“Sufficient details” means: identities of the parties involved in the incident, the conduct allegedly constituting sexual harassment under §160.30, and the date and location of the alleged incident.

Notice must include: (1) “presumed not responsible” statement, (2) right to an advisor, (3) reference to code of conduct that prohibits knowingly making false statements.

New evidence, new notice.

Promptly - §106.45(b)(1)(v)

- ▶ Include reasonably prompt time frames for conclusion of the grievance process.
 - ❖ time frames for filing and resolving appeals and informal resolution processes
- ▶ Delay is permissible if extension is for good cause and notice is provided.
- ▶ Good cause may include:
 - ❖ considerations such as the absence of a party, a party's advisor, or a witness;
 - ❖ concurrent law enforcement activity; or
 - ❖ the need for language assistance or accommodation of disabilities. §106.45(b)(1)(v).



Investigation Of A Formal Complaint - §106.45(b)(5)

1

- Burden remains on the school to gather the evidence

2

- Equal opportunity for the party to present witnesses, fact and expert witnesses

3

- No restriction on either party to discuss the allegations

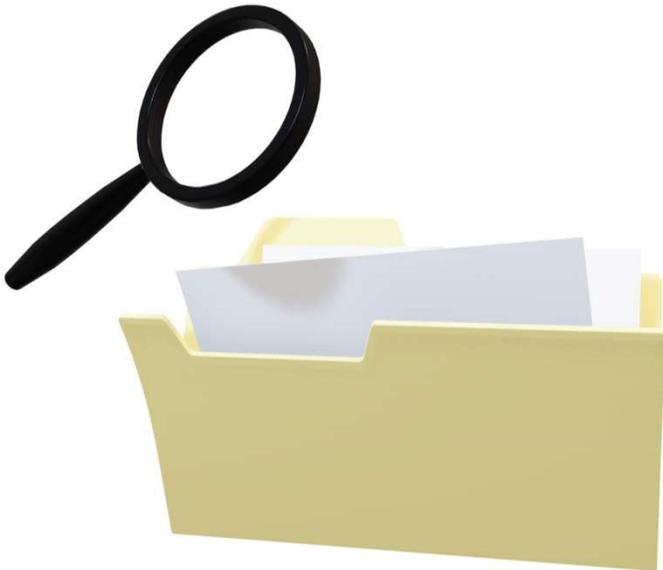
4

- Able to have an advisor (which could be an attorney) at any “meeting” or “proceeding”

5

- Provide to a party written notice of the date, time, location, participants, purpose of all hearings, investigative interviews, or other meetings, with sufficient time for the party to prepare to participate

Investigation Of A Formal Complaint - §106.45(b)(5) (cont...)



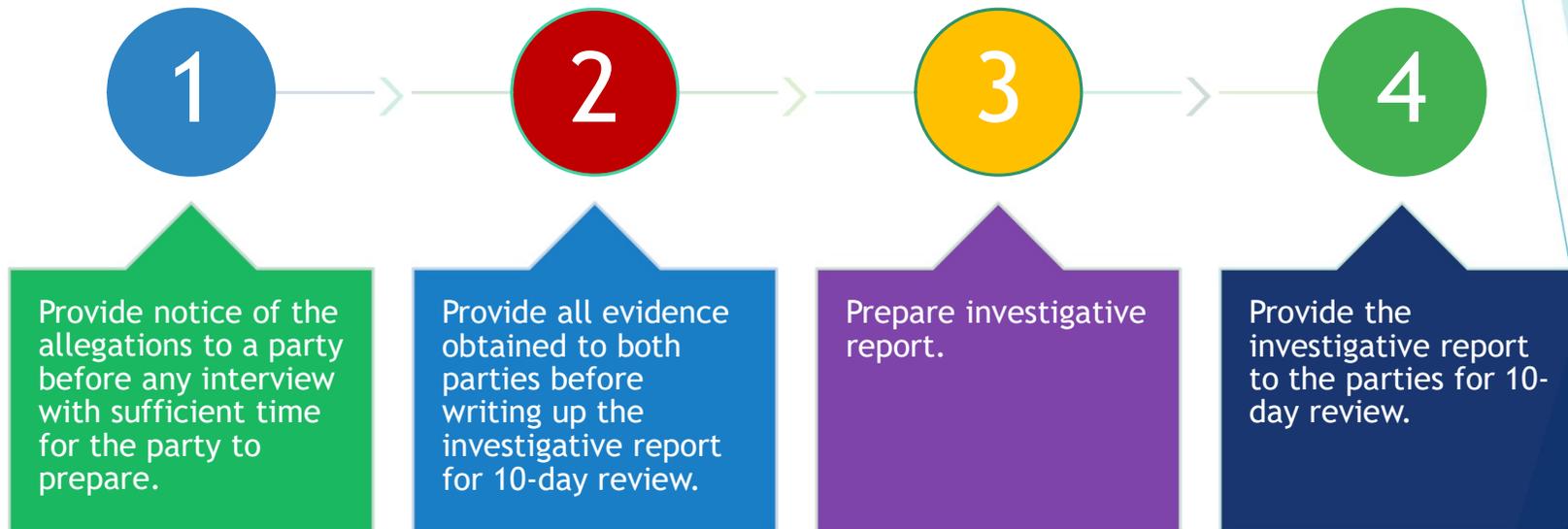
- ▶ Provide both parties an equal opportunity to inspect and review any evidence obtained as part of the investigation that is directly related to the allegations raised in a formal complaint
 - ❖ including the evidence upon which the recipient does not intend to rely in reaching a determination regarding responsibility
- ▶ Prior to completion of the investigative report, the recipient must send to each party and the party's advisor, if any, the evidence subject to inspection and review in an electronic format or a hard copy
 - ▶ the parties must have at least 10 days to submit a written response, which the investigator will consider prior to completion of the investigative report

Investigation Of A Formal Complaint - §106.45(b)(5) (cont...)

Complete the investigative report that fairly summarizes relevant evidence, and at least 10 days prior to a hearing (if a hearing is required under this section or otherwise provided)

Send to each party and the party's advisor, if any, the investigative report for their review and written response

Summary Of Investigation Slides



Live Hearing

K-12***

With or without a hearing, after the recipient has sent the investigative report to the parties and before reaching a determination regarding responsibility, the decision-maker(s) must afford each party the opportunity to submit written, relevant questions that a party wants asked of any party or witness, provide each party with the answers, and allow for additional, limited follow-up questions from each party.

Decision-Maker

- ▶ The decision-maker(s), **who cannot be the same person(s) as the Title IX Coordinator or the investigator(s)**, must issue a written determination regarding responsibility.
- ▶ The written determination must include—
 1. Identification of the allegations potentially constituting sexual harassment as defined in §106.30;
 2. A description of the procedural steps taken from the receipt of the formal complaint through the determination, including any notifications to the parties, interviews with parties and witnesses, site visits, methods used to gather other evidence, and hearings held;
 3. Findings of fact supporting the determination;
 4. Conclusions regarding the application of the recipient's code of conduct to the facts;
 5. A statement of, and rationale for, the result as to each allegation, including a determination regarding responsibility, any disciplinary sanctions the recipient imposes on the respondent, and whether remedies designed to restore or preserve equal access to the recipient's education program or activity will be provided by the recipient to the complainant; and
 6. The recipient's procedures and permissible bases for the complainant and respondent to appeal.



Appeals - Basis For Appeal

Procedural irregularity;

New evidence that was not previously available;

The Title IX Coordinator, investigator(s), or decision-maker(s) had a conflict of interest; or

The Title IX Coordinator, investigator(s), or decision-maker(s) had a bias for or against complainants or respondents - generally or individually.

Appeals (cont...)

As to all appeals, the recipient must:

- 1 Notify the other party in writing when an appeal is filed and implement appeal procedures equally for both parties;
- 2 Ensure that the decision-maker(s) for the appeal is not the same person as the decision-maker(s) that reached the determination regarding responsibility or dismissal, the investigator(s), or the Title IX Coordinator;
- 3 Ensure that the decision-maker(s) for the appeal has been trained pursuant to the new regulations;
- 4 Give both parties a reasonable, equal opportunity to submit a written statement in support of, or challenging, the outcome;
- 5 Issue a written decision describing the result of the appeal and the rationale for the result; and
- 6 Provide the written decision simultaneously to both parties.

Conflicts Of Interest

Title IX Coordinator

Investigator

Decision-Maker

Appeals

Record Keeping

Must maintain everything that demonstrates compliance for 7 years.

1. Complaint;
2. Investigative report;
3. Hearing transcripts;
4. Any decisions on responsibility;
5. Documents relating to supportive measures;
6. Documents relating to informal resolution;
7. Discipline records;
8. Appeal records; and
9. Trainings.



Record Keeping (cont...)



- ▶ “In each instance, the recipient must document the basis for its conclusion that its response was not deliberately indifferent, and document that it has taken measures designed to restore or preserve equal access to the recipient’s education program or activity.” §106.45(b)(10)(ii)
- ▶ “If a recipient does not provide a complainant with supportive measures, then the recipient must document the reasons why such a response was not clearly unreasonable in light of the known circumstances.” §106.45(b)(10)(ii)

- ▶ A recipient must ensure that Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process, receive training on:
 - the definition of sexual harassment in §106.30;
 - the scope of the recipient's education program or activity;
 - how to conduct an investigation and grievance process, including hearings, appeals, and informal resolution processes, as applicable; and
 - how to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias.
- ▶ A recipient must ensure that decision-makers receive training on any technology to be used at a live hearing and on issues of relevance of questions and evidence, including when questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant, as set forth in paragraph (b)(6) of this section.
- ▶ A recipient also must ensure that investigators receive training on issues of relevance to create an investigative report that fairly summarizes relevant evidence, as set forth in paragraph (b)(5)(vii) of this section.
- ▶ Any materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process, must not rely on sex stereotypes and must promote impartial investigations and adjudications of formal complaints of sexual harassment.



Training

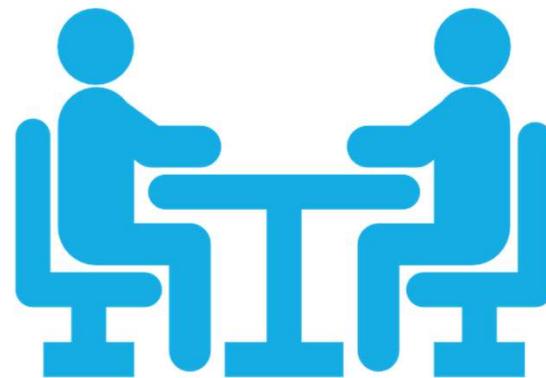
Informal Resolution



- ▶ Parties cannot be required to participate in an informal resolution process
- ▶ Cannot apply to employee-to-student situation
- ▶ A process may not be offered unless a formal complaint is filed
- ▶ Informal resolution can be facilitated at any time prior to reaching a determination regarding responsibility that does not involve a full investigation and adjudication, so long as....

Informal Resolution (cont...)

- ▶ Parties are provided a written notice disclosing:
 - the allegations of the complaint;
 - the requirements of the informal resolution process, including the circumstances under which it precludes the parties from resuming a formal complaint arising from the same allegations provided, however, that at any time prior to agreeing to a resolution, any party has the right to withdraw from the informal resolution process and resume the grievance process with respect to the formal complaint;
 - any consequences resulting from participating in the informal resolution process, including the records that will be maintained or could be shared.
- ▶ Parties have provided voluntary, written consent to the informal resolution process





Checklists/Templates

- ▶ Templates
 - Initial Notice of Complaint to Parties
 - Notice letter if there is a delay
 - Notice letter pre-investigative report
 - Notice letter post-investigative report
 - Investigation report
 - Decision-maker's report
 - Notice letter re: decision
 - Appeal report
- ▶ Checklists
 - Opening a Complaint file
 - Closing a Complaint file
 - Checklists to ensure procedures are complete



QUESTIONS