

Plotting the Course: Investigation Preparation

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I. How must a school respond to allegations of sexual harassment?^{1,2}

1. Schools must “respond promptly in a manner that is not deliberately indifferent.”
2. The Title IX Coordinator or designee must promptly contact the complainant to discuss the availability of supportive measures, regardless of whether a formal complaint is filed, and to explain the process for filing a formal complaint.
3. In addition, if a formal complaint is filed, either by the complainant or the Title IX Coordinator, a school must:
 - a. Offer supportive measures to the respondent, and
 - b. Follow the Title IX grievance process specified by the 2020 amendments.
4. In addition to setting out these requirements, the Title IX regulations provide that a school is deliberately indifferent “only if its response to sexual harassment is clearly unreasonable in light of the known circumstances.”

II. Pre-investigation matters

1. Investigators must be impartial, unbiased, and free of conflict.
 - a. Conflict of Interest check: you will know the names of the Complainant and Respondent based on the Notice of Investigation.
2. Trauma-informed interviewing:
 - a. A school may use trauma-informed approaches to respond to a formal complaint of sexual harassment. The preamble clarifies that the 2020 amendments do not preclude a school “from applying trauma-informed techniques, practices, or approaches,” but notes that the use of such approaches must be consistent with the requirements of 34 C.F.R. § 106.45, particularly 34 C.F.R. § 106.45(b)(1)(iii).³
3. Presumption of non-responsibility:
 - a. The 2020 amendments require a school to include in its Title IX grievance process “a presumption that the respondent is not responsible for the alleged conduct until a determination regarding responsibility is made at the conclusion of the grievance process.”⁴
 - b. “The presumption does not imply that the alleged harassment did not occur,” or that the respondent is truthful, or a complainant is untruthful.⁵ Instead, the preamble says that the

¹ 34 C.F.R. § 106.44(a).

² <https://www2.ed.gov/about/offices/list/ocr/docs/202107-qa-titleix.pdf>

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⁴ 34 C.F.R. § 106.45(b)(1)(iv).

⁵ 85 Fed. Reg. at 30,259.

- presumption is designed to ensure that investigators and decision-makers serve impartially and do not prejudge that the respondent is responsible for the alleged harassment.
- c. Schools that have relied on this presumption to decline services to a complainant or to make assumptions about a complainant's credibility have done so in error.
4. Key Questions of the Title IX Grievance Process
 - a. What is the alleged conduct?
 - b. Does the evidence support a finding that it occurred (preponderance of the evidence or clear and convincing evidence – your policy will define standard)
 - c. If it occurred, was the conduct a policy violation?
 - d. You will ask the parties and identify information and evidence that answers these questions.
 5. Understand parties' rights and responsibilities in the process.
 - a. Neither party is required to participate in the investigation.
 - b. Parties have the right to an advisor during interviews.
 - c. Parties have the right to provide their account of the alleged misconduct and have that account be on the record.

III. Investigation

1. Receive formal complaint (process should be outlined in school policy)
2. Assess for conflict & notify Title IX Coordinator immediately in case of conflict.
3. Jurisdiction determination
4. Prompt notice to both parties of allegations
 - a. Provide updated notice if additional allegations come out during investigation.
5. Assess for supportive measures.
 - a. The school must contact the complainant to discuss the availability of, and to offer, supportive measures, regardless of whether a formal complaint is filed. A school must also consider the complainant's wishes with respect to supportive measures.⁶
 - b. Supportive measures “are designed to restore or preserve equal access to the [school's] education program or activity,” “protect the safety of all parties or the [school's] educational environment, or deter sexual harassment,” do not “unreasonably burden [] the other party.”⁷
 - c. Can include removal from campus or administrative leave.⁸
6. Investigation plan: Create a template with timelines for your entire team to start from.

⁶ 34 C.F.R. § 106.44(a).

⁷ 34 C.F.R § 106.30(a).

⁸ 34 C.F.R. §§ 106.44(c)-(d).

- a. Witness List & Order of Interviews for all Witnesses and Parties
 - b. Evidence List
 - c. Investigation Timeline
 - i. Per law/regulations, there is no set timeline – but timeline must be:⁹
 1. Defined in policy
 2. Reasonably prompt
 - ii. Best practices:
 1. Official TIX policy statement about overall timeline
 2. Internal policy or procedures outlining detailed timelines
 3. Emails to parties regularly with updates
 4. Notify parties immediately in case of delay beyond original timeline & include reason for delay
7. Teams of two or more investigators:
 - a. Communicate with your co-investigator & delegate tasks.
8. Brainstorm interview questions based on policy violations.
 - a. Do not be shy about asking personal and intimate questions. Details are important!
 - b. If you feel like the interviewee may perceive the question as harsh or biased, it may be helpful to explain WHY you are asking a specific question.
9. Interview parties and witnesses.
 - a. General order of interviews: Complainant → Respondent → Witnesses
 - b. Interview anyone named (or who you discover in your investigation) who may have relevant information.
 - c. Ask all questions requested by parties unless clearly not relevant. Relevance should be defined in your policy.
 - d. Know your policy – this will guide what facts you need to gather.
10. Prepare the report.

IV. Important tips:

1. Be Flexible!
 - a. You will likely have to modify/update your investigation plan and timeline as the investigation goes on – communicate with parties so their expectations are realistic.
2. Understand the time commitment.
3. You must be impartial, unbiased, and free of conflict, but there is no requirement of “neutrality.”
 - a. You can and should be empathetic to both parties and provide resources, support information, flexibility, etc.
 - b. You cannot favor one party over the other.

⁹ 34 C.F.R. § 106.45(b)(1)(v).

- c. If a party feels heard and respected by you, there is a higher chance of satisfaction with the process even if they disagree with the outcome.
4. Investigations are stressful and require you to listen carefully to, process, and rehash over and over very difficult and painful facts about rape, sexual abuse, harassment, stalking, and/or relationship violence.
 - a. Self-care is crucial!
 - b. Community care is also crucial.