Pepple & Waggoner, Ltd.
ATTORNEYS AT LAW

250 East 5th Street, Suite 1565
Cincinnati, OH 45202
t: 513-562-1264 | f: 513-562-1505
www.pepple-waggoner.com

SANDUSKY CITY SCHOOL DISTRICT
TRAINING SESSION

Sandusky, Ohio
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"Title IX Training: Sexual Harassment Grievance Procedures"

Presented by:
Daniel L. Lautar, Esq.
dlautar@pepple-waggoner.com

I. Introduction

A. Title IX is a federal civil rights law passed as part of the Education Amendments of 1972. It applies to any institution that received federal financial assistance from the U.S. Department of Education.

B. The Office for Civil Rights ("OCR") is part of the U.S. Department of Education and is responsible for enforcing laws requiring nondiscrimination by institutions receiving federal funding.

C. In a press release regarding the new Title IX regulations, Assistant Secretary Kenneth L. Marcus of OCR stated:

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> The new Title IX regulation is a game-changer. It establishes that schools and colleges must take sexual harassment seriously, while also ensuring a fair process for everyone involved. It marks the end of the false dichotomy of either protecting survivors, while ignoring due process, or protecting the accused, while disregarding sexual misconduct. There is no reason why educators cannot protect all of their students – and under this regulation there will be no excuses for failing to do so. In a string of recent major OCR Title IX cases, and in a large number of investigations over the last few years, we have shown that we will hold institutions accountable under federal civil rights laws. This regulation provides important new tools that will strengthen our ability to do so.

D. The new regulations also change the definition of sexual harassment. The new definition, commonly referred to as the "Davis standard," is based on a 1999 Supreme Court decision and defines sexual harassment as actions that are "so severe, pervasive, ***and*** objectively offensive that it effectively denies a person equal access to the school's education program or activity."

E. Sexual harassment previously had been defined as conduct that is "severe, pervasive, ***or*** objectively offensive."

F. The significant procedural changes and protections in the new regulations, as well as the new definition of sexual harassment, provide greater protection to respondents.

II. Sexual Harassment Defined

Sexual harassment is defined as conduct on the basis of sex that satisfies one or more of the following:

A. An employee conditioning the provision of an aid, benefit, or service of the school district on an individual's participation in unwelcome sexual conduct;

B. 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 education program or activity; or

C. "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). 34 C.F.R. 106.30(a).

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1. The term "sexual assault" means an offense classified as a forcible or nonforcible sex offense under the uniform crime reporting system of the Federal Bureau of Investigation. 20 U.S.C. 1092(f)(6)(A)(v).

2. The term "dating violence" means violence committed by a person –

   a. Who is or has been in a social relationship of a romantic or intimate nature with the victim; and

   b. Where the existence of such a relationship shall be determined based on a consideration of the following factors:

      (1) The length of the relationship.

      (2) The type of relationship.

      (3) The frequency of interaction between the persons involved in the relationship. 34 U.S.C. 12291(a)(10).

3. The term "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. 34 U.S.C. 12291(a)(8).

4. The term "stalking" means engaging in a course of conduct directed at a specific person that would cause a reasonable person to –

   a. Fear for his or her safety or the safety of others; or

   b. Suffer substantial emotional distress 34 U.S.C. 12291(a)(30).

III. Scope of the Educational Program or Activity

A. Per 34 C.F.R. 106.45(b)(1)(iii), school districts must ensure that Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process, receive training on the scope of the education program or activity.

B. Goal: Accurately identify situations that require a response under Title IX.

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C. Title IX, at 20 U.S.C. 1681(a), provides: "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[.]"

D. Under 20 U.S.C. 1687 and 34 C.F.R. 106.2(h), "program or activity" means the operations of:

1. a. A department, agency, special purpose district, or other instrumentality of a State or local government; or

   b. The entity of a State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government;

2. a. A college, university, or other postsecondary institution, or a public system of higher education; or

   b. A local educational agency (as defined in 20 U.S.C. 8801), system of vocational education, or other school system;

3. a. An entire corporation, partnership, other private organization, or an entire sole proprietorship:

      (1) If assistance is extended to such corporation, partnership, private organization, or sole proprietorship as a whole; or

      (2) Which is principally engaged in the business of providing education, health care, housing, social services, or parks and recreation; or

   b. The entire plant or other comparable, geographically separate facility to which Federal financial assistance is extended, in the case of any other corporation, partnership, private organization, or sole proprietorship; or

4. Any other entity that is established by two or more of the entities described above; any part of which is extended Federal financial assistance.

E. Includes circumstances wherein the district exercises substantial control over both the harasser and the context of the harassment. There is no bright-line geographic test, and off-campus sexual misconduct is not categorically excluded from Title IX protection under the final regulations.

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F. Includes "any building owned or controlled by a student organization that is officially recognized by a postsecondary institution."

G. Extends to sexual harassment incidents that occur off campus, if any of three conditions are met:

1. If the off-campus incident occurs as part of the district's "operations";

2. If the district exercised substantial control over the respondent and the context of alleged sexual harassment that occurred off campus; or

3. If a sexual harassment incident occurs at an off-campus building owned or controlled by a student organization officially recognized by a postsecondary institution.

H. Consider whether the district funded, promoted, or sponsored the event or circumstance where the alleged harassment occurred. However, no single factor is determinative to conclude whether a district exercised substantial control over the respondent and the context in which the harassment occurred, or whether an incident occurred as part of "all of the operations of" a school, college, or university.

I. In situations involving some allegations of conduct that occurred in an education program or activity, and some allegations of conduct that did not, the district must investigate the allegations of conduct that occurred in the district's education program or activity. However, nothing in the final regulations precludes the district from choosing to also address allegations of conduct outside the district's education program or activity.

J. Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274 (1998).

Involved teacher-on-student harassment that consisted of both in-class sexual comments directed at the plaintiff, as well as a sexual relationship that began when the respondent-teacher visited the plaintiff's home ostensibly to give her a book. The U.S. Supreme Court in Gebser emphasized that a school district needs to be aware of discrimination (in the form of sexual harassment) "in its programs" and emphasized that a teacher's sexual abuse of a student "undermines the basic purposes of the educational system" thereby implicitly recognizing that a teacher's sexual harassment of a student is likely to constitute sexual harassment "in the program" of the school even if the harassment occurs off campus.

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K. Davis Next Friend LaShonda D. v. Monroe Cty. Bd. of Educ., 526 U.S. 629 (1999).

In Davis, the U.S. Supreme Court acknowledged that Title IX protects students from "discrimination" and from being "excluded from participation in" or "denied the benefits of" any education program or activity receiving Federal financial assistance. The Davis Court characterized sexual harassment as a form of sex discrimination under Title IX, and reasoned that whether a board of education is liable for sexual harassment thus turns on whether the board can be said to have "subjected" students to sex discrimination in the form of sexual harassment. The Davis Court further reasoned, "Moreover, because the harassment must occur 'under' 'the operations of' a funding recipient, *see* 20 U.S.C. § 1681(a); § 1687 (defining 'program or activity'), the harassment must take place in a context subject to the school district's control. . . These factors combine to limit a recipient's damages liability to circumstances wherein the recipient exercises substantial control over both the harasser and the context in which the known harassment occurs."

Sexual harassment by a teacher as opposed to harassment by a fellow student may affect whether the sexual harassment occurred "under any education program or activity." In the context of student-on-student harassment, damages are available only where "the behavior is so severe, pervasive, and objectively offensive that it denies its victims the equal access to education that Title IX is designed to protect."

L. King v. Board of Control of Eastern Michigan University, 221 F.Supp.2d 783 (E.D. Mich. 2002).

The court applied Title IX to a claim of sexual harassment occurring overseas during a study abroad program. The Federal district court reasoned that study abroad programs are educational operations of the university that "are explicitly covered by Title IX and which necessarily require students to leave U.S. territory in order to pursue their education." The court emphasized that Title IX's scope extends to "any education program or activity" of a recipient, which presumably would include the recipient's study abroad programs.

However, while study abroad programs may constitute education programs or activities of the district, the U.S. Department of Education ("DOE") agreed with the rationale applied by a Federal district court in Phillips v. St. George's University, No. 07-CV-1555, 2007 WL 3407728 (E.D.N.Y. Nov. 15, 2007), that regardless of whether a study abroad program is part of a recipient's education program or activity, Title IX does not have extraterritorial application. Title IX only applies to persons located in the United States, even when that person is participating in a recipient's education program or activity outside the United States.

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M. For postsecondary institutions or elementary and secondary schools, the statutory and regulatory definitions of "program or activity" encompass "all of the operations of" such recipients, and such "operations" may include computer and internet networks, digital platforms, and computer hardware or software owned or operated by, or used in the operations of, the school.

For example, a student using a personal device to perpetrate online sexual harassment during class time may constitute a circumstance over which the recipient exercises substantial control.

IV. The Grievance Procedure

A. Must adopt and publish grievance procedures that provide for the prompt and equitable resolution of student and employee complaints alleging sex discrimination/harassment. Must provide notice of the grievance procedures and grievance process, including how to report or file a complaint of sex discrimination, how to report or file a formal complaint of sexual harassment, and how the school district will respond.

B. All grievance process provisions, rules, or practices must apply equally to both parties.

C. Must treat complainants and respondents equitably by providing remedies to a complainant where a determination of responsibility for sexual harassment has been made against the respondent, and by following the grievance process before the imposition of any disciplinary sanctions or other actions that are not supportive measures against a respondent.

D. Remedies must be designed to restore or preserve equal access to the educational program or activity. Such remedies may include "supportive measures." However, remedies need not be non-disciplinary or non-punitive and need not avoid burdening the respondent.

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

F. Title IX Coordinator, investigator, decision-maker, or any person designated to facilitate an informal resolution process, cannot have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent.

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G. There must be 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.

H. The school district must adhere to reasonably prompt time frames for the conclusion of the grievance process, including reasonably prompt time frames for filing and resolving appeals and informal resolution processes if the school district offers informal resolution processes, and a process that allows for the temporary delay of the grievance process or the limited extension of time frames for good cause with written notice to the complainant and the respondent of the delay or extension and the reasons for the action.

I. Must describe the range of possible disciplinary sanctions and remedies or list the possible disciplinary sanctions and remedies that the school district may implement following any determination of responsibility.

J. State whether the standard of evidence to be used to determine responsibility is the "preponderance of the evidence" standard or the "clear and convincing evidence" standard. The same standard of evidence must be used for formal complaints against students as for formal complaints against employees, including faculty, and must be applied to all formal complaints of sexual harassment.

1. Clear and Convincing Evidence: Evidence that will produce in the factfinder's mind a firm belief or conviction as to the facts sought to be established. Fitzpatrick v. Palmer, 926 N.E.2d 651, 656, 186 Ohio App.3d 80, 87, 2009 -Ohio- 6008, ¶ 23 (Ohio App. 4 Dist., 2009). This is a higher degree of proof than the "preponderance of the evidence" standard.

2. Preponderance of the Evidence: Evidence which is of a greater weight or more convincing than the evidence which is offered in opposition to it. In re A.F., 103 N.E.3d 1260, 1274, 2018-Ohio-310, ¶ 53 (Ohio App. 2 Dist., 2018).

V. Conducting an Investigation

A. Notice of complaint.

Upon receipt of a formal complaint, a school district must provide the following written notice to the parties who are known:

1. Notice of the school district's grievance process, including any informal resolution process;

2. Notice of the allegations of sexual harassment, including sufficient details known at the time and with sufficient time to prepare a response before

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any initial interview. Sufficient details include the identities of the parties involved in the incident, if known, the conduct allegedly constituting sexual harassment, and the date and location of the alleged incident, if known;

3. A 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;

4. Notice that the parties may have an advisor of their choice, who may be an attorney, and may inspect and review evidence; and

5. Notice of any provision in the school district's code of conduct that prohibits knowingly making false statements or knowingly submitting false information during the grievance process. 34 C.F.R. 106.45(b)(2).

B. Supportive measures.

1. Supportive measures are non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, and without fee or charge to the complainant or the respondent before or after the filing of a formal complaint or where no formal complaint has been filed. 34 C.F.R. 106.30(a).

2. The Title IX Coordinator is responsible for coordinating the effective implementation of supportive measures. 34 C.F.R. 106.30(a).

3. Supportive measures are designed to restore or preserve equal access to the education program or activity without unreasonably burdening the other party, including measures designed to protect the safety of all parties or the educational environment, or deter sexual harassment. 34 C.F.R. 106.30(a).

4. Supportive measures may include:

a. Counseling;
b. Extensions of deadlines or other course-related adjustments;
c. Modifications of work or class schedules;
d. Campus escort services;
e. Mutual restrictions on contact between the parties;
f. Changes in work locations;
g. Leaves of absence;
h. Increased security and monitoring of certain areas of campus.

34 C.F.R. 106.30(a).

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5. The Title IX Coordinator must promptly contact the complainant to discuss the availability of supportive measures, consider the complainant's wishes with respect to supportive measures, inform the complainant of the availability of supportive measures with or without the filing of a formal complaint, and explain to the complainant the process for filing a formal complaint. 34 C.F.R. 106.44(a).

   The final regulations increase the obligations on school districts to respond promptly and supportively to every complainant when the school district receives notice that the complainant has allegedly been victimized by sexual harassment (without requiring any proof or evidence supporting the allegations) irrespective of the existence of a grievance process, promote respect for a complainant's autonomy over whether or not to file a formal complaint that initiates a grievance process, and protect complainants from retaliation for refusing to participate in a grievance process.

6. The 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. 34 C.F.R. 106.30(a).

C. Investigation requirements.

When investigating a formal complaint, and throughout the grievance process, a school district must:

1. Ensure that the burden of proof and the burden of gathering evidence sufficient to reach a determination regarding responsibility rest on the school district and not on the parties. 34 C.F.R. 106.45(b)(5)(i).

   a. It is the school district's burden to impartially gather evidence and present it so the decision-maker can determine whether the school district (not either party) has shown that the weight of the evidence reaches or falls short of the standard of evidence the school district selected for making determinations.

   b. When considering the issue of consent for sexual assault purposes, the burden of proof and the burden of collecting evidence sufficient to reach a determination regarding responsibility rest on the school district. The school district may not shift the burden on the respondent to prove consent, or on the complainant to prove the absence of consent.

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2. Provide an equal opportunity for the parties to present witnesses, including fact and expert witnesses, and other inculpatory and exculpatory evidence. 34 C.F.R. 106.45(b)(5)(ii).

    a. The identities of complainants, respondents, and witnesses must be kept confidential, except as permitted by FERPA, required by law, or to the extent necessary to carry out the Title IX grievance process.

    b. Credibility determinations may not be based on a person's status as complainant, respondent, or witness.

3. Cannot restrict the ability of either party to discuss the allegations under investigation or to gather and present relevant evidence. 34 C.F.R. 106.45(b)(5)(iii).

    a. The school district should not, under the guise of confidentiality concerns, impose prior restraints on students' and employees' ability to discuss (i.e., speak or write about) the allegations under investigation, for example with a parent, friend, or other source of emotional support, or with an advocacy organization.

    b. The school district should not impose prior restraints on a party's ability to criticize the school district's handling of the investigation or approach to Title IX generally.

    c. School districts are permitted to restrict the discussion of information that does not consist of the "allegations under investigation," such as evidence related to the allegations that has been collected and exchanged between the parties and their advisors during the investigation, or the investigative report summarizing the relevant evidence sent to the parties and their advisors.

    d. These two requirements may overlap, such as where a party's ability to "discuss the allegations under investigation" is necessary so the party can "gather and present evidence," for example to seek advice from an advocacy organization or seek access to a building to inspect the location of an alleged incident.

    e. Regarding elementary and secondary schools, the DOE has clarified that principals are not forbidden from warning students not to speak "maliciously" since malicious discussions intended to interfere with another party's Title IX rights would constitute prohibited retaliation.

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4. Provide the parties with the same opportunities to have others present during any grievance proceeding, including the opportunity to be accompanied to any related meeting or proceeding by the advisor of their choice, who may be, but is not required to be, an attorney, and not limit the choice or presence of advisor for either the complainant or respondent in any meeting or grievance proceeding. However, the school district may establish restrictions regarding the extent to which the advisor may participate in the proceedings as long as the restrictions apply equally to both parties. 34 C.F.R. 106.45(b)(5)(iv).

   a. The DOE recognizes the high stakes for all parties involved in sexual misconduct proceedings under Title IX and that the outcomes of these cases can carry potentially life-altering consequences, and thus believes every party should have the right to seek advice and assistance from an advisor of the party's choice.

   b. Providing parties the right to select an advisor of choice does not align with the constitutional right of criminal defendants to be provided with effective representation. The more rigorous constitutional protection provided to criminal defendants is not necessary or appropriate in the context of administrative proceedings held by an educational institution rather than by a criminal court.

   c. School districts may require advisors to use the evidence received for inspection and review, as well as the investigative report, only for purposes of the grievance process and require them not to further disseminate or disclose these materials. Additionally, the final regulations do not prohibit a recipient from using a non-disclosure agreement that complies with the final regulations and other applicable laws.

   d. While nothing in the final regulations discourages parties from speaking for themselves during the proceedings, the DOE believes it is important that each party have the right to receive advice and assistance navigating the grievance process.

   e. School districts are permitted to place restrictions on advisors, such as requiring parties personally to answer questions posed by an investigator during an interview, or personally to make any opening or closing statements at a live hearing if a hearing is held, so long as such rules apply equally to both parties.

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f. The final regulations ensure that a party's advisor of choice must be included in the party's receipt of, for instance, evidence subject to party inspection and review, and the investigative report, so that a party's advisor of choice is fully informed throughout the investigation in order to advise and assist the party.

5. 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. 34 C.F.R. 106.45(b)(5)(v).

a. The DOE believes that written notice of investigative interviews, meetings, and hearings, with time to prepare, permits both parties meaningfully to advance their respective interests during the grievance process, which helps ensure that relevant evidence is gathered and considered in investigating and adjudicating allegations of sexual harassment.

b. Because the stakes are high for both parties in a grievance process, both parties should receive notice with sufficient time to prepare before participating in interviews, meetings, or hearings associated with the grievance process, and written notice is better calculated to effectively ensure that parties are apprised of the date, time, and nature of interviews, meetings, and hearings than relying solely on notice in the form of oral communications.

c. For example, if a party receives written notice of the date of an interview, and needs to request rescheduling of the date or time of the interview due to a conflict with the party's class schedule, the school district and parties benefit from having had the originally-scheduled notice confirmed in writing so that any rescheduled date or time is measured accurately against the original schedule.

d. Nothing in the final regulations precludes a school district from also conveying notice via in-person, telephonic, or other means of conveying the notice, in addition to sending written notice.

e. The DOE declined to impose a rule requiring advisors be copied on all correspondence between the school district and the parties in order to preserve the school district's discretion to limit the participation of party advisors, and to preserve a party's right to decide whether or not, for what purposes, and at what times, the party wishes for an advisor of choice to participate with the party. Nothing in the final regulations precludes the school district from adopting a practice of copying party advisors on all notices, so

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long as the school district ensures that such a practice applies equally with respect to both parties.

6. 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 school district does not intend to rely in reaching a determination regarding responsibility, and inculpatory or exculpatory evidence, whether obtained from a party or other source, so that each party can meaningfully respond to the evidence prior to conclusion of the investigation. 34 C.F.R. 106.45(b)(5)(vi).

   a. The DOE believes that the right to inspect all evidence directly related to the allegations is an important procedural right for both parties, in order for a respondent to present a defense and for a complainant to present reasons why the respondent should be found responsible.

   b. This approach balances the recipient's obligation to impartially gather and objectively evaluate all relevant evidence, including inculpatory and exculpatory evidence, with the parties' equal right to participate in furthering each party's own interests by identifying evidence overlooked by the investigator and evidence the investigator erroneously deemed relevant or irrelevant and making arguments to the decision-maker regarding the relevance of evidence and the weight or credibility of relevant evidence.

   c. The DOE notes that "directly related" in §106.45(b)(5)(vi) aligns with requirements in FERPA, 20 U.S.C. 1232g(a)(4)(A)(i). The DOE also acknowledges that "directly related" may sometimes encompass a broader universe of evidence than evidence that is "relevant."

   d. The DOE believes it is important that at the phase of the investigation where the parties have the opportunity to review and respond to evidence, the universe of that exchanged evidence should include all evidence (inculpatory and exculpatory) that relates to the allegations under investigation, without the investigator having screened out evidence related to the allegations that the investigator does not believe is relevant.

   e. The parties should have the opportunity to argue that evidence directly related to the allegations is in fact relevant (and not otherwise barred from use under §106.45), and parties will not have a robust opportunity to do this if evidence related to the allegations is withheld from the parties by the investigator.

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(1) For example, an investigator may discover during the investigation that evidence exists in the form of communications between a party and a third party (such as the party's friend or roommate) wherein the party characterizes the incident under investigation. If the investigator decides that such evidence is irrelevant (perhaps from a belief that communications before or after an incident do not make the facts of the incident itself more or less likely to be true), the other party should be entitled to know of the existence of that evidence so as to argue about whether it is relevant.

(2) The investigator would then consider the parties' viewpoints about whether such evidence (directly related to the allegations) is also relevant, and on that basis decide whether to summarize that evidence in the investigative report.

(3) A party who believes the investigator reached the wrong conclusion about the relevance of the evidence may argue again to the decision-maker (i.e., as part of the party's response to the investigative report, and/or at a live hearing) about whether the evidence is actually relevant, but the parties would not have that opportunity if the evidence had been screened out by the investigator (that is, deemed irrelevant) without the parties having inspected and reviewed it as part of the exchange of evidence.

7. Prior to completion of the investigative report, the school district 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, and 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. All such evidence must be subject to the parties' inspection and review and be available at any hearing. 34 C.F.R. 106.45(b)(5)(vi).

a. School districts are neither required nor prohibited from using a file sharing platform that restricts parties and advisors from downloading or copying the evidence.

b. School districts may require parties and advisors to refrain from disseminating the evidence (for instance, by requiring parties and advisors to sign a non-disclosure agreement that permits review and use of the evidence only for purposes of the Title IX grievance process), thus providing school districts with discretion as to how

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to provide evidence to the parties that directly relates to the allegations raised in the formal complaint.

c. With regard to the sharing of confidential information, a school district may permit or require the investigator to redact information that is not directly related to the allegations (or that is otherwise barred from use under §106.45, such as information protected by a legally recognized privilege, or a party's treatment records if the party has not given written consent) contained within documents or other evidence that are directly related to the allegations, before sending the evidence to the parties for inspection and review.

d. Redacting "confidential" information is not the same as redacting information that is not "directly related to the allegations" because information that is confidential, sensitive, or private may still be "directly related to the allegations" and thus subject to review by both parties.

e. School districts may choose whether the 10 days should be business days or calendar days (or may use a different calculation of "days" that works with the recipient's administrative operations, such as "school days"). Although the school district is required to provide at least 10 days for inspection and review, the school district may give the parties more than 10 days to respond, bearing in mind that the school district must conclude the grievance process within the reasonably prompt time frames to which the school district must commit under §106.45(b)(1)(v).

f. If a party has exercised the party's right to select an advisor of the party's choice, it is for the purpose of receiving that advisor's assistance during the grievance process. A party's 10-day window to review and respond to the evidence should not be narrowed by placing the burden on the party to receive the evidence from the school district and then send the evidence to the party's advisor. However, nothing in the final regulations precludes a party from requesting that the school district not send the evidence subject to inspection and review to the party's advisor. Similarly, the final regulations do not preclude the school district from asking the parties to confirm whether or not the party has an advisor prior to sending the evidence.

g. Parties have the opportunity to provide additional information or context in their written response after reviewing the evidence. A school district may require all parties to submit any evidence that they would like the investigator to consider prior to when the parties' time to inspect and review evidence begins. Alternatively,

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a school district may choose to allow both parties to provide additional evidence in response to their inspection and review of the evidence, and also an opportunity to respond to the other party's additional evidence.

h. Similarly, a school district has discretion to choose whether to provide a copy of each party's written response to the other party to ensure a fair and transparent process and to allow the parties to adequately prepare for any hearing that is required or provided under the grievance process.

8. Create an investigative report that fairly summarizes relevant evidence, and at least 10 days prior to any hearing, send same to each party and the party's advisor for their review and written response. 34 C.F.R. 106.45(b)(5)(vii).

D. Summary of general investigation procedure.

1. The investigator must send written notice to both parties of the allegations set forth in the complaint upon receipt of a formal complaint.

2. The investigator should interview the complainant and obtain a witness statement. The complainant may have an advisor of his or her choice present during the interview.

3. The investigator should interview the respondent and obtain a witness statement. The respondent may have an advisor of his or her choice present during the interview.

4. The investigator should provide both parties the opportunity to identify witnesses and submit evidence.

5. The investigator should interview any witnesses identified by the parties and obtain witness statements. The investigator should ask each witness to identify any other potential witnesses and provide the investigator with copies of relevant evidence.

6. The investigator should continue to interview identified witnesses, obtain witness statements, and collect copies of relevant evidence until the investigator has determined that, to the extent reasonably possible, the relevant witnesses have been interviewed and the relevant evidence has been collected.

7. Send the evidence to the complainant and respondent, and their advisors, for their inspection and review. Provide the complainant and respondent at least 10 days to submit a written response.

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8. Consider all relevant evidence, including any responses from the complainant and respondent, before completing the investigation report.

9. Create an investigation report that fairly summarizes the relevant evidence. Provide the complainant and the respondent, as well as their advisors, with copies of the investigation report at least 10 days prior to any hearing.

VI. Creating an Investigative Report

A. The final regulations do not prescribe the contents of the investigative report, other than specifying its core purpose of fairly summarizing relevant evidence. 34 C.F.R. 106.45(b)(5)(vii).

1. The investigative report should contain relevant evidence, including exculpatory and inculpatory evidence. The school district must evaluate relevant evidence, including inculpatory and exculpatory evidence.

2. The DOE does not wish to prohibit the investigator from including recommended findings or conclusions in the investigative report. However, the decision-maker is under an independent obligation to objectively evaluate relevant evidence, and thus cannot simply defer to recommendations made by the investigator in the investigative report.

3. The DOE notes that the decision-maker must prepare a written determination regarding responsibility that must contain certain specific elements (for instance, a description of procedural steps taken during the investigation) and so a school district may wish to instruct the investigator to include such matters in the investigative report, but the final regulations do not prescribe the contents of the investigative report other than specifying its core purpose of summarizing relevant evidence

B. A district may require all parties to submit any evidence that they would like the investigator to consider prior to the finalization of the investigative report, thereby allowing each party to respond to the evidence in the investigative report.

C. The investigator must determine what is relevant after the parties have reviewed the evidence.

D. A copy of the investigative report must be sent electronically or by hard copy to each party and the party's advisor, if any.

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E. School districts enjoy discretion with respect to whether and how to amend and supplement the investigative report, as long as any such rules and practices apply equally to both parties.

F. Districts may provide both parties with an opportunity to respond to any additional evidence the other party proposes after reviewing the investigative report. If a district allows parties to provide additional evidence in response to the investigative report, any such additional evidence will not qualify as new evidence that was reasonably available at the time the determination regarding responsibility was made for purposes of an appeal. Similarly, a district has discretion to choose whether to provide a copy of each party's written response to the other party as an additional measure to allow the parties to prepare for the hearing (or to be heard prior to the determination regarding responsibility being made, if no hearing is required or provided).

G. School districts must maintain, for a period of seven years, records of each sexual harassment investigation.

VII. The Hearing

A. Elementary and secondary schools are **NOT** required to use hearings (live or otherwise) to adjudicate formal complaints under Title IX.

B. If an elementary and secondary school chooses to hold a hearing (live or otherwise), such school has significant discretion as to how to conduct such a hearing.

C. Basic structure of the hearing:

1. Investigator submits investigative reports to both parties. Parties then have 10 days to submit a response to the investigative report.

2. Each party has the opportunity to submit written questions to be asked of other parties and witnesses, including limited follow-up questions. The opportunity for each party to submit written questions to other parties and witnesses must take place after the parties are sent the investigative report, and before the determination regarding responsibility is reached. The written submission of questions procedure may overlap with the 10-day period for responding to the investigative report, so that the written questions procedure need not extend the time frame of the grievance process.

3. The decision-maker objectively evaluates the answers to such questions, and any other relevant evidence gathered and presented during the investigation;

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4. The decision-maker reaches a determination regarding responsibility which is reduced to writing and issued to the parties concurrently. 34 C.F.R. 106.45(b)(7)(ii) states that the decision-maker "must issue a written determination regarding responsibility," but does not require that written determination to be issued at the hearing. The time frame for when the decision-maker will issue the written determination must be "reasonably prompt."

D. Cannot 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.

E. Cannot compel witness participation in a grievance process. 34 C.F.R. 106.71(a) protects every individual from retaliation for participating or refusing to participate in a Title IX proceeding.

F. 34 C.F.R. 106.45(b)(6)(i) requires the creation of an audio or audiovisual recording, or transcript, of any live hearing, which must be made available to the parties for inspection and review.

G. Hearings under §106.45(b)(6) are not "public" hearings.

H. Good cause may exist to temporarily delay the Title IX grievance process to coordinate or cooperate with a concurrent law enforcement investigation.

I. The regulations do not limit the legal rights of parents or guardians to act on behalf of a party during a hearing.

VIII. Technology to be Used at Live Hearing

A. To protect traumatized complainants from facing the respondent in person, cross-examination in live hearings must never involve parties personally questioning each other, and at a party's request, the live hearing must occur with the parties in separate rooms with technology enabling participants to see and hear each other. 34 C.F.R. 106.45(b)(6)(i).

B. Any technology used must permit the parties to both see and hear each other. Consequently, a telephone hearing (without video) would be insufficient.

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C. Under 34 C.F.R. 106.71, a school conducting a live hearing must "keep confidential the identity of any individual who has made a report or complaint of sex discrimination, including any individual who has made a report or filed a formal complaint of sexual harassment, any complainant, any individual who has been reported to be the perpetrator of sex discrimination, any respondent, and any witness" in a Title IX grievance process except as permitted by FERPA, required by law, or as necessary to conduct the hearing or proceeding. Therefore, schools must ensure that technology used to comply with this provision does not result in "live streaming" a party in a manner that exposes the testimony to persons outside those participating in the hearing.

D. 34 C.F.R. 106.45(b)(6)(i) requires that the creation of an audio or audiovisual recording, or transcript, of any live hearing held, and the recording or transcript must be made available to the parties for inspection and review.

E. There are no technology grants under the Title IX regulations. However, commonly available equipment which could likely be used includes: webcams, laptops, or cell phones, paired with free or relatively inexpensive software solutions. There are more than a dozen free video web conferencing platforms that could be used to ensure that decision-maker(s) and parties could simultaneously see and hear the party or witness who is answering questions. The requirements for creating audio or audiovisual recordings or a transcript of hearings can be met at very low or no cost using commonly available voice memo apps or software or tape recorders.

F. Technology problems interrupting a virtual hearing may constitute good cause to postpone a hearing.

IX. Issues of Relevance

A. School districts that do not conduct live hearings must afford each party the opportunity to submit written, relevant questions that a party wants asked of any party or witness, and must provide each party with the answers, and allow for additional, limited follow-up questions from each party. 34 C.F.R. 106.45(b)(6)(ii).

B. 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 to prove that someone other than the respondent committed the conduct alleged by the complainant, or 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. The decision-maker(s) must explain to the party proposing the questions any decision to exclude a question as not relevant. 34 C.F.R. 106.45(b)(6)(i) and (ii).

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1. Non-treatment records and information, such as a party's financial or sexual history, must be directly related to the allegations at issue in order to be reviewed by the other party, and all evidence summarized in the investigative report must be "relevant" such that evidence about a complainant's sexual predisposition would never be included in the investigative report and evidence about a complainant's prior sexual behavior would only be included if it meets one of the two narrow exceptions.

2. According to the DOE, the scope of when sexual behavior between the complainant and respondent might be relevant to the presence of consent regarding the particular allegations at issue depends in part on a recipient's definition of consent. Not all definitions of consent, for example, require a verbal expression of consent; some definitions of consent inquire whether, based on circumstances, the respondent reasonably understood that consent was present (or absent), thus potentially making relevant evidence of past sexual interactions between the complainant and the respondent.

C. The school district cannot access, consider, disclose, or otherwise use a party's records that are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in the professional's or paraprofessional's capacity, or assisting in that capacity, and which are made and maintained in connection with the provision of treatment to the party, unless the school district obtains that party's voluntary, written consent. 34 C.F.R. 106.45(b)(5)(i).

1. If the party is not an "eligible student," as defined in 34 C.F.R. 99.3, then the school district must obtain the voluntary, written consent of a "parent," as defined in 34 C.F.R. 99.3.1176.

2. Accordingly, a school district will not access, consider, disclose, or otherwise use some of the most sensitive documents about a party without the party's (or the parent of the party's) voluntary, written consent, regardless of whether the school district already has possession of such treatment records, even if the records are relevant.

D. The school district may not 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. 34 C.F.R. 106.45(b)(1)(x).

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X. Final Determination

A. The decision-maker must issue a written decision which sets forth the decision-maker's determination of responsibility or non-responsibility. 34 C.F.R. 106.45(b)(7).

B. The DOE describes six items that must be included in the written determination:

1. Identification of the allegations potentially constituting sexual harassment.

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. The written determination should also describe the process undertaken to inspect and review the evidence and disseminate the investigative report, including the adherence to mandated procedural timelines.

3. Findings of fact supporting the determination. Notably, the decisionmaker's written determination does not need to include "all" evidence presented at the hearing, or deal with facts not supporting the determination. Rather, it requires an analysis of what findings of fact support the determination of responsibility or non-responsibility;

4. Conclusions regarding the application of the school district's code of conduct to the facts, such that the written determination "matches up" with the language of the code of conduct itself.

5. A statement of, and rationale for, the result as to each allegation, including a determination regarding responsibility, any disciplinary sanctions the school district imposes on the respondent, and whether remedies designed to restore or preserve equal access to the school district's education program or activity will be provided by the school district to the complainant.

a. Remedies that do not impact the respondent should not be disclosed in the written determination; rather, the determination should simply indicate that "remedies will be provided to the complainant."

b. The complainant should be informed of the sanctions imposed on the respondent because knowledge of the sanctions may impact the complainant's equal access to the school district's education program and activity.

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6. The school district's procedures and permissible bases for the complainant and respondent to appeal.

C. The decision-maker must provide simultaneous notification of the outcome to the parties. §106.45(b)(7)(iii). While the regulations do not prescribe a method of delivering the written determination, a best practice is to send the determination electronically to the parties' district e-mail accounts; this ensures the "simultaneous" delivery and receipt of the determination and generates metadata affirming compliance with this requirement.

D. The Title IX Coordinator is responsible for effective implementation of any remedies set forth in the written determination. §106.45(b)(7)(iv).

XI. Appeals

A. Must offer both parties an appeal from a determination regarding responsibility, and from the dismissal of a formal complaint or any allegations therein, on the following bases:

1. Procedural irregularity that affected the outcome of the matter;

2. New evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter;

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

4. Any other basis offered equally to both parties.

B. As to all appeals, the school district 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. Give both parties a reasonable, equal opportunity to submit a written statement in support of, or challenging the outcome;

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4. Issue a written decision describing the result of the appeal and the rationale for the result; and

5. Provide the written decision simultaneously to both parties.

C. 34 C.F.R. 106.45(b)(1)(v) requires schools to conclude the appeal process under designated, reasonably prompt time frames

XII. Informal Resolution Process

A. Nothing in the final regulations requires schools to offer an informal resolution process. Schools remain free to craft or not craft an informal resolution process that serves their unique educational needs.

B. Informal resolution cannot be offered unless a formal complaint is filed. However, an informal resolution can be obtained at any time prior to reaching a final determination.

C. School districts must provide to the parties a written notice disclosing:

1. The allegations;

2. 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; and

3. Any consequences resulting from participating in the informal resolution process, including the records that will be maintained or could be shared.

D. Informal resolution may encompass a broad range of conflict resolution strategies, including, but not limited to, arbitration, mediation, or restorative justice.

E. Districts are prohibited from requiring the parties to participate in an informal resolution process. Districts must obtain the parties' voluntary, written consent to the informal resolution process. Districts are also explicitly prohibited from requiring students or employees to waive their right to a formal grievance process as a condition of enrollment or employment or enjoyment of any other right.

F. Cannot offer or facilitate an informal resolution process to resolve allegations that an employee sexually harassed a student.

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G. Whether informal resolution facilitators may serve as witnesses in subsequent formal grievance processes is the district's option. If permitted, the district must disclose this possibility in the written notice disclosing any consequences resulting from participating in the informal resolution process, including the records that will be maintained or could be shared.

H. Must have reasonably prompt time frames for conducting the informal resolution process.

I. Individuals facilitating informal resolution must be free from conflicts of interest, bias, and trained to serve impartially.

J. Must not intimidate, threaten, or coerce any person for the purpose of interfering with a person's rights under Title IX, including the right to voluntarily decide whether or not to participate in informal resolution.

XIII. Dismissal of Complaints

A. Mandatory dismissal.

1. The final regulations clarify that dismissal is mandatory where the allegations, if true, would not meet the Title IX jurisdictional conditions:

   a. The actions complained of do not meet the definition of "sexual harassment";

   b. The actions complained of were not against a person in the United States;

   c. The actions complained of did not occur in the school district's education program or activity.

2. Dismissing a Title IX complaint does not preclude action under another provision of a school district's code of conduct. School districts retain the flexibility to employ supportive measures in response to allegations of conduct that does not fall under Title IX's purview, as well as to investigate such conduct under the recipient's own code of conduct at the recipient's discretion.

B. Discretionary dismissal.

Under 34 C.F.R. 106.45(b)(3)(ii), school districts may dismiss Title IX complaints in three (3) specific circumstances:

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1. A complainant notifies the Title IX Coordinator in writing that the complainant would like to withdraw the formal complaint or any allegations therein;

2. The respondent is no longer enrolled or employed by the school district; and/or

3. Specific circumstances prevent the school district from gathering evidence sufficient to reach a determination as to the allegations contained in the formal complaint.

   Example: A complainant refuses to participate in the grievance process (but also has not decided to send written notice stating that the complainant wishes to withdraw the formal complaint), or where the respondent is not under the authority of the school district (for instance because the respondent is a non-student, non-employee individual who came onto campus and allegedly sexually harassed a complaint), and the school district has no way to gather evidence sufficient to make a determination.

C. Notice of dismissal.

34 C.F.R. 106.45(b)(3)(iii) requires school districts to send the parties written notice of any dismissal decision, and the reason(s) therefore.

D. Appeal of dismissal.

Pursuant to 34 C.F.R. 106.45(b)(8), school districts must give both parties equal rights to appeal a dismissal decision.

XIV. Serving Impartially

A. Avoid prejudgment of the facts at issue. 34 C.F.R. 106.45(b)(1)(iii). Do not prejudge the facts at issue and objectively evaluate inculpatory and exculpatory evidence before reaching determinations regarding responsibility.

B. The Title IX Coordinator, investigator, decision-maker(s), or any person designated to facilitate an informal resolution process, cannot have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent. 34 C.F.R. 106.45(b)(1)(iii).

1. A school district, irrespective of size, may use existing employees to fulfill the role of Title IX Coordinator, investigator, and decision-maker(s), as long as these employees do not have a conflict of interest or bias and receive the requisite training.

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2. The DOE gives school districts discretion to decide how best to implement the prohibition on conflicts of interest and bias, including whether a school district wishes to provide a process for parties to assert claims of conflict of interest or bias during the investigation.

3. A Title IX Coordinator, investigator, or decision-maker(s) may have a role in the emergency removal process as long as such a role does not result in a conflict of interest with respect to the grievance process.

XV. Conclusion

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