



TITLE IX MANDATED TRAINING (20 U.S.C. §§ 1681–1688; 34 C.F.R. part 106)

FACILITATORS OF INFORMAL RESOLUTIONS (Module 3, Part 2)

TITLE IX – THE LAW

A. Title IX Law (20 U.S.C. §§ 1681–1688)

No person in the U.S. 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.

B. Title IX Regulations ([34 C.F.R. part 106](#)). The following are the key sections of the regulations relating to sexual harassment that have been newly created or amended effective on August 14, 2020:

- [Section 106.8](#): Addressing the designation of a Title IX Coordinator, the adoption of a grievance procedure and grievance process, and notice/dissemination of policies
- [Section 106.30](#): Important new definitions added by the Final Rule
- [Section 106.44](#): Addressing the requirements for districts to respond to each report or complaint of sexual harassment of which the district has actual knowledge
- [Section 106.45](#): Requiring districts to establish and administer a grievance process for formal complaints of sexual harassment; also addressing training and recordkeeping requirements
- [Section 106.71](#): Non-retaliation and confidentiality requirements.

C. Enforced by Office for Civil Rights (OCR), U.S. Department of Education

FORMAL COMPLAINT AND GRIEVANCE PROCESS

- A. **“Formal complaint”** means a document filed by a complainant or signed by the Title IX Coordinator alleging sexual harassment against a respondent and requesting that the district investigate the allegation of sexual harassment. (Note: A parent or guardian who is acting on behalf of a child complainant may also file a formal complaint.)
1. A **“complainant”** means an individual who is alleged to be the victim of conduct that could constitute sexual harassment.
 2. The **“respondent”** is the alleged perpetrator of the conduct.

- B. In response to a **formal complaint** of sexual harassment under Title IX, a recipient must follow a **grievance process** that complies with 34 C.F.R. §106.45. *See* 34 C.F.R. §106.44(b)(1).
- C. A district's response must treat complainants **equitably** by offering supportive measures to a complainant and by following a grievance process before imposition of disciplinary sanctions or other actions that are not supportive measures against a respondent. *See* 34 C.F.R. §106.44(a).
- D. In addition, any provisions, rules, or practices other than those required by the Title IX regulations that a school district adopts as part of its grievance process for handling formal complaints of sexual harassment must apply **equally to both parties**. *See* 34 C.F.R. §106.45(b).
- E. Within the grievance process, the regulations set forth "**basic requirements**" for the grievance process. *See* 34 C.F.R. §106.45(b)(1). Some of the basic requirements include that each local Title IX grievance process must:
1. Require an objective evaluation of all relevant evidence, including an expectation that all individuals involved in the grievance process on behalf of the district must **avoid prejudice of the facts and allegations**.
 2. Provide that credibility determinations may not be based on person's status as a complainant, respondent, or witness.
 3. 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.
 4. Require that any individual designated by a district as a Title IX Coordinator, investigator, decision-maker, **or any person designated to facilitate an informal resolution process** not have a conflict of interest or a bias for or against complainants or respondents generally or an individual complainant or respondent..
 5. Include a presumption that the respondent is **not responsible** for the alleged conduct until a determination of responsibility is made at the conclusion of the grievance process.
 6. 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**, and then apply the same standard of evidence to all formal complaints and to all allegations of Title IX sexual harassment.
 7. 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 its agents, and **not** on the parties.

- F. Within the grievance process, the regulations set forth requirements for an “**investigation of a formal complaint.**” *See* 34 C.F.R. §106.45(b)(5). Some of the requirements within the investigation include that the investigator will:
1. **Not** restrict the ability of **either** party to gather and present relevant evidence, or to discuss the allegations under investigation;
 2. Provide **equal** opportunity for the parties to present witnesses and other inculpatory and exculpatory evidence;
 3. Provide the parties with the **same** opportunities to have **others present** during any complaint 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. However, the 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;
 4. Provide to the **party** whose participation is invited or expected **written notice** of the date, time, location, participants, and purpose of investigative interviews, or other meetings, with sufficient time for the party to prepare to participate;
 5. 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 evidence upon which the district does not intend to rely in reaching a determination regarding responsibility, as well as inculpatory and 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;
- G. Within the grievance process, the regulations set forth a process for a “**determination regarding responsibility**” after an investigation has occurred involving a formal complaint of sexual harassment under Title IX. *See* 34 C.F.R. §106.45(b)(7).
- H. Within the grievance process, the regulations allow for an **informal resolution process** after a formal complaint is filed. *See* 34 C.F.R. §106.45(b)(9).
1. Specifically, it states that, at any time **prior to** reaching a determination regarding responsibility, the district **may facilitate an informal resolution process** that does **not** involve a full investigation and adjudication, if certain requirements are met.
 2. Based on the above, at any time, prior to a determination regarding responsibility, even after an investigation has begun, the parties may voluntarily agree to an informal resolution process.
 3. The district must be prepared to identify a facilitator who may be authorized to conduct an informal resolution if the local grievance process allows for such a process.

INFORMAL RESOLUTION PROCESS

- A. Informal Resolution Processes. If permitted under the local grievance process, the Title IX Coordinator and other relevant district officials may consider offering an “**informal resolution process**” when a formal complaint has been filed. P*
1. If permitted, informal resolution may be offered at any point **after a formal complaint has been filed** and **prior to reaching a determination of responsibility** under the full grievance process.
 2. The regulations state that, if permitted, a district **may not require** as a condition of enrollment or continuing enrollment, or employment or continuing employment, or enjoyment of any other right, **waiver** of the right to an investigation and adjudication of formal complaints of sexual harassment.
 3. District **cannot require** parties to go through any informal resolution process.
 4. Districts must also **not** intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by Title IX or the Title IX regulations, or because the individual has made a report or complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing under the regulations. This non-retaliation requirement also prohibits such conduct toward parties with respect to any decision to participate or refuse to participate in an informal resolution process.
 5. The regulations state that an informal resolution process **may never be used** if the formal complaint includes allegations that **an employee sexually harassed a student**. The portion of the district’s grievance process that addresses informal resolution, or other policy guidelines that the District adopts for the consistent implementation of the grievance process, may identify other situations where informal resolution may not be used, such as sexual assault cases.
- B. Facilitator of the Informal Resolution Process. Districts must carefully consider who will serve as a facilitator of the informal resolution process and what expectations will be placed on the facilitator.
1. The facilitator must have received training as required under the regulations.
 2. The facilitator must **not** have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent.

* NOTE: The large green **P** serves as a signal for Title IX coordinators and other school officials to take special care to review their **local policies and procedures** in connection with that particular issue and to identify an important area of local discretion.

3. Although not expressly prohibited by the Title IX regulations, there are sound reasons that, in nearly all formal complaint cases, a district would **not** want to assign the facilitator as either the investigator or decision-maker in the same case.
 4. Unless the district sets forth limitations on a facilitator serving as a witness, facilitators should be aware that they could be a witness in the formal grievance process. For example, if the informal resolution is not successful, in some instances, the investigator may wish to interview the facilitator to determine whether parties provided inconsistent statements at different times.
 5. The district must ensure that facilitators understand the structure of the intended informal resolution process and their role and scope of authority.
- C. Notice to the Parties. If such a process is utilized, the district must provide to the parties a **written notice** disclosing certain information.
1. The written notice must include the **allegations** in the formal complaint.
 2. The written notice must include the **requirements** of the informal resolution process.
 - c. The **requirements** of any informal resolution process may differ from case to case. In some local district policies, the informal resolution process may be very specifically defined. However, in other policies, the informal resolution process may not specify the requirements in order to give some flexibility to the district in any case.
 - b. The regulations specify that, at any time **prior to** agreeing to a resolution within the informal resolution process, any party has the **right to withdraw** from the informal resolution process and resume the grievance process with respect to the formal complaint. This information should be included in the notice.
 - c. This notice must also include the circumstances under which it **precludes the parties from resuming a formal complaint** arising from the same allegations. For example, the notice could state as follows: “After agreeing to a resolution, a party may not withdraw from the resolution in whole or in part in order to (1) insist on a full investigation and adjudication of the formal complaint, (2) challenge or appeal elements of the resolution, or (3) file a new formal complaint arising from the same allegations.”
 3. The written notice must also include any **consequences** resulting from participating in the informal resolution process.
 - a. Consequences may vary from case to case. One example of a consequence may be that, upon agreeing to a final resolution, the parties forfeit certain rights and procedures that would be available under a full investigation and written

determination of the formal complaint. Another example may be that a party who agrees to a final resolution generally may not, after agreement to the final resolution, challenge or dispute any sanctions or remedies that were included in the final resolution.

- b. This notice must also include the **records** that will be maintained or that could be shared. Such records may include the written notice itself and any final resolution.
4. Where the complainant or respondent is a minor or legally incompetent person, then the party's parent or guardian must receive the required notice.
- D. Written Consent of the Parties. If such a process is utilized, the district must also obtain the parties' **voluntary, written consent** to the informal resolution process.
1. Consent to informal resolution cannot be the product of coercion or undue influence.
 2. Each party should only agree to engage in the informal resolution process because the party believes such a process may further the party's own wishes and desires.
 3. The voluntary aspect of informal resolution likely means that the district should **not** consider or draw any positive or negative inferences from a party's willingness, or unwillingness, to participate in an informal resolution process, or from a party's decision to withdraw from an informal resolution process prior to reaching an agreement. Those decisions by a party would not be relevant to determining the facts or reaching an adjudication of a complaint.
- E. Types of Informal Resolution Processes. According to the regulations, an informal resolution process is any process, such as mediation, that does not involve a full investigation and adjudication of the complaint as delineated in the local grievance process.
1. Districts have discretion on whether to offer an informal process. Districts remain free to create (or not create) an informal resolution process that serves their unique educational needs.
 2. Informal resolution may encompass a broad range of conflict resolution strategies, including, but not limited to, mediation or restorative justice.
 3. Mediation may involve an admission to certain conduct by the respondent, a mutual acknowledgement of partial responsibility by both parties, or mutual acknowledgement that the parties agree on the conduct, but perceive the conduct in different ways. A mediation model may result in a mutually agreed upon resolution to the situation without the respondent admitting responsibility.

4. Restorative justice generally involves a respondent admitting wrongdoing and working to redress the harm caused. Any admission does not mean that the district has also reached that determination.
5. The Department of Education provided extensive commentary accompanying the 2020 Title IX regulations. Within its commentary, the Department stated that it believes that the option of informal resolution gives districts an avenue to educate and change behavior in a way that the adversarial formal grievance process might not. Benefits of such informal resolution process may include greater party control over outcomes (which may improve parties' sense of justice and increase compliance with outcomes) and yielding remedies and sanctions more customized to the needs of unique situations. *See Federal Register*, Vol. 85, No. 97 (May 19, 2020), page 30400.

F. Conducting the Informal Resolution Process.

1. The facilitator likely must treat complainants and respondents equitably. Consistent with the basic requirements of the grievance process, the facilitator must also likely presume that the respondent is not responsible for the alleged conduct. In addition, the facilitator must 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.
2. Consistent with the requirements of any investigation, the facilitator must also likely provide the parties with the same opportunities to have others present during any meeting, including by an advisor of their choice. In addition, the facilitator must likely provide a party whose participating is expected with written notice of the date, time, location, participants, and purpose of any meeting, with sufficient time for the party to prepare.
3. An informal resolution process must include reasonably prompt time frames for filing and resolving any process, which may include delays for good cause as appropriate.
4. An informal resolution process should identify how the parties will be meeting. The facilitator should carefully consider risks in allowing parties to be present in the same room together, which may raise issues with potential additional harassment.
5. The district should consider whether the facilitator will conduct any questioning or investigation into the matter. In some instances, there may be no dispute over the facts. As a result, the facilitator may just need to identify a specific resolution to the problem. In other instances, the parties may not agree to the specific facts. In those instances, the facilitator may need to consider whether the disputed facts need to be resolved. The facilitator may or may not be authorized to resolve disputed facts, but instead the facilitator may just be authorized to reach a resolution based on the disputed facts.

6. If the facilitator will conduct fact finding, then the facilitator may want to provide some notice the parties. Such notice may state that the parties are expected to provide truthful information during the informal resolution process and that statements that a party makes during the informal resolution process may become relevant evidence in connection with any subsequent investigation or adjudication of the complaint if the informal resolution process is not successful or does not fully resolve the complaint. The facilitator should be cautious about promising confidentiality in these matters.
 7. The facilitator should carefully consider both parties input on the facts and their desire on the specific outcome desired. The facilitator should also consider any interest that the district may have on any outcome and any resolution.
 8. The facilitator must consider any issue where new allegations arise during the informal resolution process, that may not be addressed or included in the pending complaint.
 9. Through an informal resolution process, a district may impose disciplinary sanctions against a respondent without conducting an investigation and without reaching a final written determination.
 10. The facilitator should reach a final written resolution that is signed by the parties and/or their parents and the district. The facilitator should be cautious about overstepping any authority in these instances. The final resolution may include (1) whether the parties take responsibility for the matter, (2) any disciplinary sanctions that may be imposed or recommended against the respondent, (3) any remedies that may be provided to the complainant, and (4) whether the parties reserve any rights on certain elements of the resolution. Once entered, the resolution will likely become binding according to its terms.
- G. Resuming an Investigation. If an informal resolution is attempted but is not successful, the district must complete a full investigation and adjudication of the formal complaint using the local grievance process.
- H. Recordkeeping.
1. School districts must maintain the following records for a period of seven years (e.g., measured from the conclusion of the proceedings and the implementation of any sanctions and/or remedies).
 2. In connection with each formal complaint of sexual harassment that is filed, a school district must maintain a record of:
 - a. Each sexual harassment investigation including any determination regarding responsibility, any disciplinary sanctions imposed on the respondent, and any remedies provided to the complainant designed to restore or preserve equal access to the district's education program or activity;

- b. Any audio or audiovisual recording or transcript from a hearing (Note: A district will have these records only if hearings are permitted under the local grievance process. Most school districts will not provide for hearings);
 - c. Any appeal and the result of an appeal; and
 - d. Any informal resolution and the result therefrom.
3. In connection with a school district response to any report or formal complaint of sexual harassment, the district must create and maintain a record of any actions, including any supportive measures, that the district takes in response to the report or complaint. In each instance:
- a. The district 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 school district's education program or activity.
 - b. If a district does not provide a complainant with supportive measures, then the district must document the reasons why such a response was not clearly unreasonable in light of the known circumstances.

NOTICE: These training materials, including the comments of all speakers who present the materials, do not constitute legal advice and should not be relied upon or used as legal advice. The materials will present information and commentary to facilitate a general understanding of the topics that are addressed but are not necessarily an exhaustive treatment of any legal or policy issues. If a school district requires legal advice regarding any topic, issue, situation or incident, the advice should be obtained from the school district's designated legal counsel.

TITLE IX MANDATED TRAINING
Appendix to Module 3

**APPENDIX A: SAMPLE NOTICE TO PARTIES OF
INFORMAL RESOLUTION PROCESS**

NOTE: The Title IX regulations require school districts to notify parties of certain information related to an informal resolution process. This sample presents one approach to documenting this notice, but any such notice will need to be specifically tailored to the situation and your local policy. The Title IX Coordinator will usually be the individual who provides such notice, which should be based on any input from the individual who is serving as facilitator of the process.

[DISTRICT LETTERHEAD]

[DATE]

[NAME]

[ADDRESS]

Re: Notice of Informal Resolution Process

Dear *[NAME]*:

As you are aware, a formal complaint alleging Title IX sexual harassment has been filed involving you. This letter is intended to notify you that the district offers parties an option to engage in an informal resolution process. When the option is offered, the District is required to provide notice to you about this informal resolution process.

First, the District is required to provide notice to you of the allegations in the formal complaint. The formal complaint alleges that *[INCLUDE DETAILS OF ALLEGATIONS HERE]*.

Second, the District is required to notify you of the requirements of the informal resolution process. The informal resolution process will include various requirements, including *[INCLUDE REQUIREMENTS OF THE PROCESS, e.g., that a facilitator will be appointed to serve as mediator to the process and will require both parties to be present in separate rooms at the District office to mediate the allegations]*. This notice must include the circumstances under which the District precludes the parties from resuming a formal complaint arising from the same allegations. In this respect, please note that the parties are precluded from resuming a formal complaint arising from the same allegations if *[INCLUDE CIRCUMSTANCES, e.g., if the parties reach a final agreement that resolves all matters involving the parties on the specific allegations]*.

Please note, however, that, at any time prior to agreeing to a resolution in this informal process, any party has the right to withdraw from the informal resolution process and resume the grievance process with respect to the formal complaint.

Third, the District is required to notify you of any consequences resulting from participating in the informal resolution process. In this respect, please note that the consequences include that ***[INCLUDE POSSIBLE CONSEQUENCES, e.g., a resolution that results in disciplinary sanctions against the respondent or that prohibits future investigation of the particular allegations]***. This notice must also inform you of the records that will be maintained or that could be shared. In this respect, please note that ***[INCLUDE DESCRIPTION OF RECORDS, e.g., records may include a resolution agreement between the parties that will not be shared, except as may be required by law.]***

Finally, the District is required to obtain the parties' voluntary written consent to the informal resolution process. Enclosed a voluntary written consent form for your consideration and approval.

If you are willing to participate in an attempt to reach an informal resolution of the pending formal complaint, please return the written consent to ***[IDENTIFY THE APPROPRIATE PERSON AND CONTACT INFORMATION, e.g., this would likely be the Title IX Coordinator.]*** by no later than ***[DATE]***. If you do not submit your written consent by the deadline, the District will treat the lack of consent as your rejection of the offer to attempt to reach a facilitated informal resolution of the matter.

Please feel free to contact me with any questions about this notice or about the informal resolution process.

Sincerely,

Title IX Coordinator
[NAME OF SCHOOL DISTRICT]

Enclosure: Voluntary Written Consent Form
[Identify Applicable District Policies]

APPENDIX B: SAMPLE VOLUNTARY WRITTEN CONSENT FOR INFORMAL RESOLUTION PROCESS

NOTE: The Title IX regulations require school districts to obtain voluntary written consent from both parties related to an informal resolution process. This sample presents one approach to documenting this voluntary written consent, but the contents of this consent form may vary and must be based on your local policy. The Title IX Coordinator will usually be the individual who obtains such consent.

[DISTRICT LETTERHEAD]

VOLUNTARY CONSENT FORM FOR INFORMAL RESOLUTION OF A FORMAL COMPLAINT OF TITLE IX SEXUAL HARASSMENT

This form is provided on behalf of _____, a party to a formal complaint for sexual harassment under Title IX. The District has provided me with the required notice dated _____, 20__.

By signing this form, the party, or, as appropriate, his or her parent/guardian, consents to the informal resolution process to resolve the formal complaint. (Note: A parent or guardian must sign for any party who is not eighteen years old at the time of this consent.)

I acknowledge and agree that my consent is based on my desire to engage in the informal resolution process and that my consent is not the result of any coercion or undue influence.

Signature of Party or Parent / Guardian

Date

*IMPORTANT: If you wish to consent to the informal resolution process,
return this form by no later than _____, 20__, to _____ at _____.*