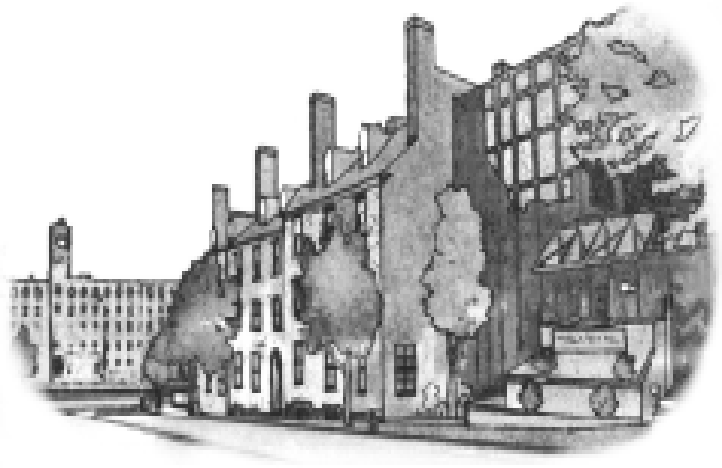
The Role of the Investigator and Decision-Maker in the Title IX Complaint Process

Presented to the Pinkerton Academy Administrators

October 13, 2020



Wadleigh, Starr & Peters, P.L.L.C.
Serving New Hampshire since 1899

By: Dean B. Eggert, Esquire
Alison M. Minutelli, Esquire
Robin D. Melone, Esquire
WADLEIGH, STARR & PETERS, P.L.L.C.
95 Market Street
Manchester, New Hampshire 03101
Telephone: 603/669-4140
Facsimile: 603/669-6018
E-Mail: deggert@wadleighlaw.com
aminutelli@wadleighlaw.com
rmelone@wadleighlaw.com
Website: www.wadleighlaw.com

Table of Contents

About the Authors

Dean B. Eggert, Esquire (JD., UCLA; B.A., Wheaton College) is a partner in the firm of Wadleigh, Starr & Peters, P.L.L.C. Mr. Eggert is a jury trial attorney. Over the past 35 years he has had extensive experience representing school districts in general matters, as well as special education matters at the administrative and appellate levels. He has spoken and lectured extensively on a wide range of legal issues in the field of education law.

Alison M. Minutelli, Esquire (JD., University of New Hampshire School of Law; B.A. Brandeis University) is a partner in the firm of Wadleigh, Starr & Peters, P.L.L.C. For the past 15 years, Ms. Minutelli has practiced in the field of school law, and has experience representing school districts in general matters, as well as special education matters at the administrative and appellate levels. She has also written numerous articles and presented on a wide range of legal issues in the field of education law.

Robin D. Melone, Esquire (JD., Suffolk University Law School; B.A. Mount Holyoke College) is a partner in the firm of Wadleigh, Starr & Peters, P.L.L.C. Robin has been a criminal defense attorney for 15 years. She added Title IX work to her practice five years ago and has significant experience handling Title IX cases in schools, colleges and universities in New Hampshire and Massachusetts. Robin is now a trained civil rights investigator conducting Title IX investigations and helping educational institutions design and provide a fair and equitable process.

A Word of Caution

No two cases are exactly alike. This material is designed to provide educators with an understanding of the roles of the investigator, decision-maker and appellate decision-makers with regard to Title IX Complaints. This material does not include every aspect of the law. You are strongly encouraged to seek a legal opinion from your legal counsel regarding any specific case.

I. Overview

The purpose of this material is to provide educators who will be serving as Title IX Investigators, Decision-makers and appellate decision-makers, with an understanding of their role in the Title IX grievance process, the Title IX investigation, decision-making and appellate requirements, how to conduct investigations, draft investigation reports, make determinations regarding Title IX Complaints, hear Title IX appeals and the Title IX grievance procedures. This material does not include every aspect of the law. You are strongly encouraged to seek a legal opinion from your legal counsel regarding any specific case.

II. Title IX, 20 USC 1681(a)

Title IX states:

> No person . . . shall, on the basis of sex, be excluded from participation in, be denied the benefit of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.

20 USC 1681(a).

The United States Supreme Court has held that Title IX may be enforced through a private right of action, and that plaintiffs may obtain damages for violations of Title IX. Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60, 76 (1992) (damages); Cannon v. Univ. of Chicago, 441 U.S. 677, 717 (1979) (private right of action). The Court has also held that plaintiffs alleging unconstitutional gender discrimination in schools may bring suit under 42 U.S.C. § 1983, based on the Equal Protection Clause of the Constitution. Fitzgerald v. Barnstable Sch. Comm., 555 U.S. 246 (2009).

In addition, Title IX discrimination may occur when there is a "significant gender-based statistical disparity," such as "practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified." Franchi v. New Hampton Sch., 656 F.Supp. 2d 252, 261 (D.N.H. 2009) (citations omitted) (noting that an allegation that a private school "regularly discharges students with eating disorders, resulting in the dismissal of more girls than boys since girls are the ones who usually suffer from them" may be sufficient to state a claim for discrimination under Title IX).

III. The New Title IX Regulations

In May 2020, the United States Department of Education ("Department" or "Department of Education") released its new Final Regulations under Title IX. The amended regulations took effect on August 14, 2020. The full text of the regulations and comments are available online at: https://www.govinfo.gov/content/pkg/FR-2020-05-19/pdf/2020-10512.pdf.

A. Definitions

The amended regulations contain a number of new definitions, including the following.

1. "Sexual Harassment"

The definition of "sexual harassment" has been narrowed slightly to the following:

> Conduct on the basis of sex that satisfies **one or more** of the following:
>
> (1) An employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct;
>
> (2) Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity;
>
> **[or]**
>
> (3) "Sexual assault" as defined in 20 U.S.C. 1092(f)(6)(A)(v), "dating violence" as defined in 34 U.S.C. 12291(a)(10), "domestic violence" as defined in 34 U.S.C. 12291(a)(8), or "stalking" as defined in 34 U.S.C. 12291(a)(30).

34 CFR § 106.30.

Conduct that may constitute sexual harassment includes, but is not limited to:

- Quid pro quo harassment - requesting that a student engage in a sexual activity in exchange for an improved grade, or that a staff member do such in exchange for a promotion;
- Sexting;
- Spreading rumors about a student/staff member, pertaining to sexual activity, such that the student/staff member who is the subject of the rumor avoids attending school/work; and
- Inappropriate and unwelcome touching.

2. "Actual Knowledge"

Actual Knowledge is defined by the new regulations in 34 C.F.R. § 106.30 as:

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

(Emphasis added). The regulations also make clear that the "actual knowledge" standard is not met when the only official with actual knowledge of the alleged sexual harassment is the respondent. 34 C.F.R. § 106.30(a) (definition of "actual knowledge").

Finally, actual knowledge does not necessarily trigger the obligation to investigate, but it does trigger the obligation to provide supportive measures.

3. "Deliberate Indifference"

The phrase "deliberate indifference" is now no longer analyzed coextensively with actual knowledge, but rather can be found in the regulations' General Response to Sexual Harassment, 34 C.F.R. § 106.44 (a):

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

The new regulations state that a district is deliberately indifferent "only if its response to sexual harassment is **clearly unreasonable in light of the known circumstances**." 34 C.F.R. § 106.44(a) (emphasis added). Under the deliberate indifference standard, upon receiving a report of sexual harassment, at a minimum, Pinkerton has an obligation to offer supportive measures to the complainant and to follow its grievance process prior to imposing any disciplinary sanctions or other actions that are not supportive measures against a respondent.

4. "Supportive Measures"

The amended regulations define "supportive measures" as "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. The regulations go on to state that:

> "Such measures are designed to restore or preserve equal access to the recipient's education program or activity without unreasonably burdening the other party, including measures designed to protect the safety of all parties or the recipient's educational environment, or deter sexual harassment."

34 C.F.R. § 106.30.

Supportive measures may include, but are not limited to the following:

- counseling,
- extensions of deadlines or other course-related adjustments,
- modifications of work or class schedules,
- campus escort services,
- mutual restrictions on contact between the parties,
- changes in work or housing locations,
- leaves of absence,
- increased security and monitoring of certain areas of the campus, and
- other similar measures.

Id.

The duty to provide supportive measures is triggered upon actual knowledge of a sexual harassment or allegations of sexual harassment, and occurs regardless of whether there is a need to implement an emergency removal. See 34 C.F.R. § 106.44(a) and (c).

The new regulations also require that the recipient maintain as confidential any supportive measures provided to the complainant or respondent. 34 C.F.R. § 106.30.

The comments to the new regulations elaborate that the supportive measures must be tailored to the complainant/respondents' unique circumstances, and the Department of Education explained that its main focus is to ensure that schools take action to restore and preserve a complainant's equal educational access, while also leaving discretion to schools to make disciplinary decisions only when respondents are found responsible. Further, supportive measures cannot be punitive, such as prohibiting participation in athletics or other student organizations.

5. "Formal Complaint"

It is the filing of a formal complaint that triggers Pinkerton's duty to investigate a Title IX Complaint.

34 C.F.R. § 106.30(a) defines "Formal complaint" as:

> "A document filed by a complainant or signed by the Title IX Coordinator alleging sexual harassment against a respondent and requesting that the recipient investigate the allegation of sexual harassment.
>
> - At the time of filing a formal complaint, a complainant must be participating in or attempting to participate in the education program or activity of the recipient with which the formal complaint is filed.

- A formal complaint may be filed with the Title IX Coordinator in person, by mail, or by electronic mail, by using the contact information required to be listed for the Title IX Coordinator under § 106.8(a), and by any additional method designated by the recipient."

In cases where a complainant declines to file a formal complaint and indicates that they do not wish to file a formal complaint, Pinkerton is still obliged to offer supportive measures to the complainant. See e.g. 34 C.F.R. § 106.44(a).

Pinkerton must investigate allegations in a formal complaint, however, the regulations include provisions pertaining to mandatory dismissal and permissive dismissal of formal complaints. 34 C.F.R. § 106.45(b)(3).

A formal complaint must be dismissed if the allegations would not constitute sexual harassment, even if true, did not occur in Pinkerton's education program or activity, or did not occur against a person in the United States. Id. However, such dismissal does not preclude Pinkerton from taking action against the respondent based on another provision of its code of conduct. Id.

Pinkerton may dismiss the formal complaint, or any allegations contained in the complaint, if the complainant notifies the Title IX Coordinator in writing that the complainant would like to withdraw the complaint for any allegations therein, the respondent is no longer enrolled or employed by the recipient, or specific circumstances prevent the recipient from gathering evidence sufficient to reach a determination as to the formal complaint or allegations therein. Id.

Pinkerton must provide prompt written notice of the dismissal and any reasons therefore, simultaneously to both parties. Id.

6. "Education Program or Activity"

Schools are responsible for Title IX enforcement within an "education program or activity." An "education program or activity" is broadly defined to include locations, events, or circumstances over which the institution exercises substantial control. 34 C.F.R. § 106.44(a). However, the amended regulations clarify that Title IX applies only to conduct that occurs in the United States, not to any incident that occurs on foreign soil, including during a school-sponsored study abroad program or other activity. See 34 C.F.R. § 106.8(d).

7. "Complainant and Respondent"

The "complainant" is the "individual who is alleged to be the victim of conduct that could constitute sexual harassment." The "respondent" is the "individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment." 34 C.F.R. 106.30.

IV. Conducting an Effective Title IX Investigation

The new regulations set forth concrete procedural requirements regarding a recipient's response to formal complaints in 34 C.F.R. § 106.45, and establish a clear grievance process, including the process for investigating complaints. The Title IX Grievance Process commences upon the filing of a formal complaint of sexual harassment. 34 C.F.R. § 106.45(b).

The investigator's role in the Title IX process is that of a fact finder. All individuals involved in the Title IX grievance process (Title IX Coordinator, Investigators, Decision-makers and appellate decision-makers) must be free from conflicts of interest or bias. 34 C.F.R. § 106.45(b).

The term "bias" is defined as "a mental inclination of tendency; prejudice; predilection"; "actual bias" as "genuine prejudice that a judge, juror, witness or other person has against some person or relevant subject"; "implied bias" as "Bias, as of a juror, that the law conclusively presumes because of kinship or some other incurably close relationship; prejudice that is inferred from the experiences or relationships of a judge, juror, witness, or other person." See Black's Law Dictionary (11th Ed., 2019).

The term "conflict of interest" means "a real or seeming incompatibility between one's private interests and one's public or fiduciary duties." See Black's Law Dictionary (11th Ed., 2019).

If an investigator (or the Title IX Coordinator or any other individual involved in decision-making, informal resolution or appeals processes) has or appears to have a conflict of interest, or bias, then best practice is to select a different individual to serve in that role.

A. Minimum Requirements for Title IX Investigations

The amended regulations outline the minimum requirements for Title IX investigations:

- The parties (complainant and respondent) must have an equal opportunity to present witnesses, including both fact and expert witnesses and other witnesses. Schools cannot restrict the parties' ability to discuss the allegations or gather and present evidence.
- The parties must be allowed to have an advisor of their choosing present at any meeting or grievance proceeding.
    - Schools are still permitted to establish restrictions regarding the extent to which the advisor may participate in the proceedings, so long as the restrictions apply equally to both parties.

- The school must provide written notice to the parties in advance of any meeting or interview conducted as part of the investigation or adjudication in which they are expected or invited to participate.
- Schools cannot access or rely upon any treatment records maintained by a healthcare provider, including the school's student health center, unless the party provides consent.
- Both parties must have an equal opportunity to inspect and review evidence obtained as part of the investigation that is directly related to the allegations raised in a formal complaint, including evidence which Pinkerton does not intend to rely in reaching a determination regarding responsibility and inculpatory or exculpatory evidence, so that each party can meaningfully respond to the evidence prior to the conclusion of the investigation.

34 C.F.R. § 106.45(b)(5).

B. Initial Considerations

1. Do you Need an Outside Investigator?

The first step in any investigation is to determine who is going to conduct the investigation. In some cases, however, it is appropriate to involve legal counsel or to hire outside investigators.

For example, certain allegations may give rise to a conflict of interest, or a perceived conflict of interest, for which it will be necessary to utilize an alternate investigator or to hire an outside investigator. Outside investigators also bring an element of objectivity to an investigation. This can eliminate claims of potential bias which may be leveraged against an employee investigator. If the matter ultimately reaches litigation, an independent investigator can add significant credibility to the school's case, as he or she is usually free from any asserted interest in the outcome of the matter. If a matter is very likely to result in litigation, then it is wise to hire an independent investigator from the beginning, so as to avoid having to duplicate the initial efforts of an inside investigator and to avoid the appearance of bias at trial.

Broad complaints, such as to time, the number of parties involved, the scope of the factual allegations, and/or the legal risks presented to the school, may require an outside investigator. In addition, when a complaint is based on allegations of sexual assault, you should expect that law enforcement will be running a parallel investigation that could result in criminal prosecution. It may also be appropriate to have an investigator who is trained in trauma-informed interview techniques conduct the investigation to ensure the well-being of the parties and to bolster the integrity of the investigation.

2. Do the allegations trigger other reporting duties?

The receipt of a complaint may trigger a reporting duty on the part of the administration. Therefore, it is vital that the administrator know whether or not the law requires that they report the complaint, and to whom the complaint must be reported. By diligently adhering to these reporting obligations the administrator can reduce liability and fulfill their statutory obligations to protect students.

When the investigation is complete (either due to the appeals period expiring or after any appeal has been resolved), administrators should assess whether any additional reporting duties have been triggered.

a. Reporting to Law Enforcement.

Any complaint alleging a crime should be reported to law enforcement. Administrators have a civic duty to report alleged crimes by their students and employees.

In addition, administrators may have a statutory duty to report crimes which occur within the "Safe School Zone," in accord with the "Safe School Zones" Act (RSA 193-D:1 et seq.).

b. Reporting Complaints of Abuse and Neglect.

School officials are under a statutory obligation to report suspected abuse and neglect. RSA 169-C:29. The primary body to whom this reporting obligation runs is the New Hampshire Department of Health and Human Services, Division for Children, Youth and Families. When a complaint is made of potential abuse by an educator, the complaint, if credible, triggers a reason to suspect abuse and a concomitant reporting requirement to the NH Department of Education.

c. Reporting to the Risk Manager/Liability Insurer.

Certain reports may give rise to potential liability on the part of Pinkerton. A lack of timely notice to your liability carrier can compromise coverage. You should assume that the liability carrier will request any documentation you create as to the complaint.

d. Reporting to the State Department of Education.

Educators having reason to suspect that another educator has abused or neglected a student have a duty under NH Regulation Ed 510.05 to report that suspected educator to:

- ❒ Their immediate supervisor, superintendent, or both;
- ❒ The Bureau of Credentialing, Department of Education; and

❒ The Department of Health and Human Services.

Ed 510.05(e).

In addition, any credential holder must "report any suspected violation of the code of conduct following school, school district, or SAU reporting procedures." See Ed 510.05(a), available at: http://www.gencourt.state.nh.us/rules/state_agencies/ed500.html; see also Ed 510.05(c).

C. Notice to the Complainant, Respondent and Other Parties

Once a complainant files a formal complaint of sexual harassment, the school/Title IX Coordinator must provide written notice to the complainant and the complainant's parent/guardian, and to the respondent (if known) and the respondent's parent/guardian, as well as to any other known parties. The notice must include the following:

- Notice of the school's grievance process, including any informal resolution process, AND
- Notice of the allegations of sexual harassment, "including sufficient details known at the time and with sufficient time to prepare a response before 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.
- 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.
- Notice to the parties that they may have an advisor of their choice and of any provision in the recipient'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). If, during the course of an investigation, the scope of the investigation is expanded to include allegations that were not included in the above notice, Pinkerton must provide notice of the additional allegations. Id.

If the alleged conduct may also violate other Pinkerton policies, the parties should also be put on notice of any other applicable policies.

The new regulations require that the respondent be presumed not responsible until the conclusion of the grievance process. 34 C.F.R. § 106.45(b)(1)(iv). This presumption is intended to reflect principles of due process and uphold the requirement

that investigators and decision-makers serve impartially without prejudging the facts at issue.

D. Scope and Conduct of the Investigation

The scope of the investigation will vary from case to case, depending on the nature of the complaint. In all cases, however, it will be necessary to interview and take statements from the complaining party and any witnesses. Nearly all investigations will involve document review, including Pinkerton policies, witness statements given prior to the formal investigation and personnel files of any employees under investigation.

It is important to document all steps of the investigation process, including attempts to contact the complainant, respondent and any witnesses. The investigator's goal is to conduct a thorough and fair investigation.

1. Conducting Interviews

The investigator should keep a separate, confidential file for each complaint. Notes of all interviews and discussions should be kept. Where appropriate, written statements should be obtained from the complaining party, from the respondent, and, if applicable, from witnesses. The investigator's notes should include: who was interviewed, when, where the interview occurred, who was present, what was said, and what documents were reviewed.

Interviews should be conducted in a neutral setting, and all parties should be provided with the opportunity to provide the investigator with evidence and suggest potential witnesses.

The investigator should provide the individual being interviewed with written notice of the date, time, location, and identification of parties who will be present during the interview.

Both parties must have an equal opportunity to present witnesses and submit evidence to the investigator.

When conducting interviews, it will be important to begin with open-ended questions, such that questions are being phrased in a manner that is not leading.

a. Garrity Warnings

If an employee is being questioned about matters pertaining to his or her own alleged misconduct, the investigator should consider whether a Garrity warning is required prior to conducting the interview. A Garrity warning is provided to inform the employee that, in accordance with the United States Supreme Court's decision in Garrity v. New Jersey, 385 U.S. 493 (1967), any information or evidence which is gained while an employee is under threat of discharge from government employment is

compelled, and therefore cannot be used against the employee in criminal proceedings. However, such information can be used against the employee in administrative proceedings relating to the employment. The Federal Court of Appeals for the First Circuit has interpreted Garrity as applying only in circumstances where the public employee faces automatic dismissal for refusing to cooperate with the investigation. See United States v. Indorato, 628 F.2d 711 (1st Cir. 1980, *cert. denied*, 449 U.S. 1016 (1980)). The New Hampshire Supreme Court has followed the Indorato decision and ruled that the Garrity protections are triggered only when failure to cooperate subjects the employee to automatic dismissal from public employment. State v. Litvin, 147 N.H. 606 (2002).

If a Garrity warning is required, the employee should be presented with a written document explaining the nature of the requested interview, the employee's right against self-incrimination in criminal proceedings, and the intended use of the interview by the employer. The document should also explain the requirement and importance of cooperating in the interview and answering questions related to the employment and warn of any potential discipline, including dismissal, if applicable, for failing to cooperate. It is strongly recommended that an investigator seek the assistance of counsel in presenting a Garrity warning document to an employee under investigation.

2. Pre-decision access to evidence

Before concluding the investigation and prior to completing the investigative report, the investigator must provide the parties and their advisors, if any, with an equal opportunity to inspect and review any evidence obtained during the investigation that "is directly related to the allegations raised in a formal complaint," even if the investigator will not rely on that evidence in reaching a determination. All inculpatory and exculpatory evidence must be included. 34 C.F.R. § 106.45(b)(5)(vi).

Relevant evidence is defined as "evidence tending to prove or disprove a matter in issue." Black's Law Dictionary (11th Ed. 2019). Relevant evidence will be directly related to the allegations in the complaint, and therefore, must be disclosed to the parties and the evidence should be described in the investigative report.

Evidence that is directly related to the complaint, but does not tend to prove or disprove the allegations, must also be provided to the complainant and respondent as part of their review process.

The parties have 10 days to review the evidence and submit a written response to the investigator. Evidence about the Complainant's sexual predisposition or prior sexual behavior are not relevant to the investigation, unless the evidence is offered to prove that someone other than the Respondent committed the alleged acts, or if offered to prove consent on the part of the Complainant.

a. State Law Considerations

Our State law may place some limitations an investigator's ability to obtain information from social media accounts. Among other things, the statute prohibits schools from "requiring or requesting a student or prospective student to access a personal social media account in the presence of any employee of the district in a manner that enables the employee to observe the contents of the personal social media account." RSA 189:70, I.

The term "social media account" is defined as "an account, service, or profile on a social networking website that is used by a current or prospective student primarily for personal communications. This definition shall not apply to an account opened or provided by [a district] and intended to be used solely on behalf of the [district]." RSA 189:70, IV(b); see also RSA 189:70, III (The statute does not apply to personal social media accounts that are created or provided by the educational institution if the student has been provided advance notice that the account may be monitored at any time by district employees).

The statute permits the adoption of a policy that permits: "Conducting an investigation, without requiring or requesting access to a personal social media account through username, password, or other means of authentication, for the purpose of ensuring compliance with applicable law or educational institution's policies against student misconduct based on the receipt of specific information about activity associated with a student's social media account. In the case of a minor, the educational institution may request the student's parent or guardian to provide specific data from the student's social media account." RSA 189:70, II.

3. The Investigation Report

At the conclusion of the investigation, the investigator must create an investigative report that fairly summarizes relevant evidence. The investigative report must be provided to the parties and the decision-maker in a secure electronic format or a hard copy, and the parties must be given at least 10 days prior to the determination of final responsibility to provide supplementary, limited follow-up questions and answers to those questions. 34 C.F.R. § 106.45(b)(5)(vii).

The report should include the following information:

- The identification of the parties;
- A description of the allegations;
- Identification of the individuals who participated in the investigation;
- A description of the steps taken by the investigator, including dates of initial notification to the parties, interviews with witnesses, individuals who attended the interview(s);

- A description of the evidence that proves/disproves the allegations in the complaint;

- Whether there is any documentary or physical proof of the allegation;

- An assessment as to the credibility of the individuals who participated in the investigation;

- Any consistencies/inconsistencies in testimony;

- The objectiveness (lack of bias) of the witnesses;

- Whether there is any motive for any person to falsify a story or lie;

- Any relevant information provided by the parties following their review of the relevant evidence;

- Any other information that will assist the decision-maker in making a determination as to whether the allegations are founded or unfounded.

As a general rule, investigation reports should include the following sections:

- Introduction
    - This section should summarize the allegations in the complaint and identify the Complainant and Respondent
- Procedural History
    - Describe the contacts with the Complainant, Respondent and witnesses, including dates of initial contact, dates of interview(s), and identification of individuals who attended the interviews;
- Standard of Review
    - Identification and brief description of the Title IX policy and the preponderance of the evidence standard of review
    - Identify any other policies that may apply to the allegations
- Summary of the Evidence
    - Summaries of the interviews with the parties and witnesses and any documents or evidence reviewed as part of the investigation
- Findings of Fact
    - This section should include a detailed summary of the findings of fact and an explanation as to how the investigator reached those findings, including an assessment of the credibility of individuals interviewed.

V. The Role of the Decision-Maker

The decision-maker must be an individual other than the investigator and Title IX Coordinator, and should not have had any prior involvement with the investigation. The

decision-maker must also be free from bias and conflicts of interest, and should recuse him/herself, if any such conflict or bias exists.

The decision-maker is tasked with reviewing the investigative report and making an objective determination as to whether the allegations are founded or unfounded.

After the parties and decision-maker have received the final investigative report, and at least 10 days prior to the determination regarding responsibility, the decision-maker must provide "each party with the opportunity to submit written, relevant questions that a party wants asked of any party or witness, provide each party with the answers, and allow for additional, limited follow-up questions from each party." 34 C.F.R. § 106.45(b)(5)(vii) and (6)(ii). "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 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)(ii).

This process provides both parties with the opportunity to pose written questions regarding the investigation report. The decision-maker facilitates the question and answer process, with questions being provided to the decision-maker for subsequent submission to the other party or witnesses. The decision-maker may exclude questions that are not relevant, but must explain the rationale for the exclusion.

The parties and witnesses must be afforded an opportunity to submit a written response to the questions, and the decision-maker may allow for additional, limited follow-up questions.

The decision-maker then must consider all of the evidence gathered during the question-and-answer period, as well as the investigator's report, before the issuance of a written determination.

A. Standard of Proof

Pinkerton has selected the "Preponderance of the evidence" standard of proof. This standard requires the decision-maker to consider the greater weight of the evidence. This is the burden of proof in most civil trials, in which the jury is instructed to find for the party that, on the whole, has the stronger evidence, however slight the edge may be, commonly in the context of a finding of "more likely than not."[1]

The decision-maker is tasked with reviewing all of the evidence and determining whether, on the basis of such evidence, it is more likely than not that the allegations are

[1] PREPONDERANCE OF THE EVIDENCE, Black's Law Dictionary (11th ed. 2019).

true. If the decision-maker finds that the allegations are founded, he/she may impose disciplinary sanctions on the Respondent.

B. Written determination

The new regulations also dictate the contents of the decision-maker's final written determination regarding responsibility. A written determination must include:

- The date of the determination;
- Identification of the allegations potentially constituting sexual harassment;
- A description of the procedural steps taken from the receipt of the formal complaint through the determination, including notification to the parties, interviews with parties and witnesses, site visits, and methods used to gather other evidence;
- Findings of fact supporting the determination;
- Conclusions regarding the application of the school's code of conduct to the facts;
- A statement of the result as to each allegation, including a rationale for each result. This must also include:
    - A determination regarding responsibility;
    - Any disciplinary sanctions to be imposed on the respondent;
    - Whether remedies designed to restore or preserve equal access to Pinkerton's education program or activity will be provided by Pinkerton to the complainant; and
    - Pinkerton's procedures and permissible bases for either party to appeal.

34 C.F.R. § 106.45(b)(7); see also 34 C.F.R. § 106.6(e) ("The obligation to comply with [the Title IX regulations] is not obviated or alleviated by the FERPA statute . . . or FERPA regulations").

This written determination must be provided to the parties simultaneously, and the Title IX Coordinator is responsible for effective implementation of any remedies (34 C.F.R. § 106.45(b)(7)(iv)). The written determination should also be provided to the Title IX Coordinator and Headmaster.

The written decision becomes final after the conclusion of any appeals process, or the expiration of the appeals period contained in Pinkerton's Title IX policy. See 34 C.F.R. § 106.45(b)(7)(iii).

VI. Right to Appeal

The issuance of the written determination, including dismissal of a formal complaint or any allegations therein, triggers the right to appeal. 34 C.F.R. § 106.45(b)(8).

Pursuant to Pinkerton's Title IX policy, parties have 10 days from the receipt of the decision to file an appeal. Upon receipt of an appeal, the Title IX Coordinator must provide the other party with written notice that an appeal has been filed. Both parties must have a reasonable, equal opportunity, to submit a written statement in support of, or challenging, the underlying outcome.

34 C.F.R. § 106.45(b)(8)(i) provides three limited bases for appeals by either party:

- Procedural irregularity that affected the outcome;
- New evidence that was not reasonably available when the determination of responsibility or dismissal was made that could affect the outcome; and
- The Title IX Coordinator, investigator, or decision-maker had a conflict of interest or bias that affected the outcome.

Pinkerton has not adopted any additional grounds for appeal. If the request for appeal does not meet the above criteria, the parties should be notified that the appeal has been denied and the rationale for the dismissal.

The appellate decision-maker must be an individual other than the Title IX-Coordinator, investigator, or initial decision-maker. The appellate decision-maker should review the underlying decision with deference and should not substitute his/her judgment for that of the decision-maker.

The appellate decision-maker is tasked with reviewing the investigative report, the decision-maker's final report, and any information submitted by the parties during the appeal process, and determining whether the initial decision was supported by a preponderance of the evidence.

The appellate decision-maker must issue a written decision, which must be simultaneously provided to both parties at the conclusion of the appeals process. The written decision should specify the basis for the appeal and the decision as to the appeal, with specific findings to support the decision. The decision on appeal is final.

If the underlying decision was upheld, any disciplinary sanctions imposed by the decision-maker take effect after the conclusion of the appeals process.

VII. Additional Considerations

A. Informal Resolution

Schools are permitted to offer informal resolution once a formal complaint has been filed. Schools maintain general discretion as to when informal resolution may be offered; however, a school is prohibited from offering or facilitating an informal resolution process where the allegations in the formal complaint allege that an employee sexually harassed a student. 34 C.F.R. § 106.45(b)(9).

Prior to proceeding with an informal resolution process, both parties must give voluntary, informed, written consent. Either party may withdraw from the informal resolution process and resume the grievance process with respect to the formal complaint at any point. Id.

Allegations involving violence or physical harm may not be appropriate for informal resolution. If the informal resolution process is successful, it will likely result in a written agreement between the Complainant, Respondent and Pinkerton, and may include additional supportive measures for both parties, overseen and enforced by Pinkerton.

B. Prohibition Against Retaliation

The new regulations expressly prohibit retaliation against any individual for exercising his/her right under Title IX, including participating in or refusing to participate in the filing of a complaint, the investigation, or any proceeding. 34 C.F.R. § 106.71 (emphasis added).

Examples of conduct that may constitute retaliation include, but are not limited to:

- Cutting a student athlete from a team or preventing a student from participating in an extra-curricular activity, after the student files a complaint alleging a violation of Title IX;
- Penalizing a student or staff member who declines to participate as a witness in a Title IX investigation;
- Penalizing a student or staff member who participates as a witness in a Title IX investigation.