

A hand holding a silver compass with a black face and white markings. The compass is held in the palm of a hand, with the thumb and index finger gripping the top. The background is a soft, out-of-focus blue and grey gradient.

TITLE IX: THE WAY FORWARD

 **DILIGENCE, LLC**
Know. More.



Laura Goecke Burns ~ W. Thomas Stratton, Jr.

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PART 106 CHANGES

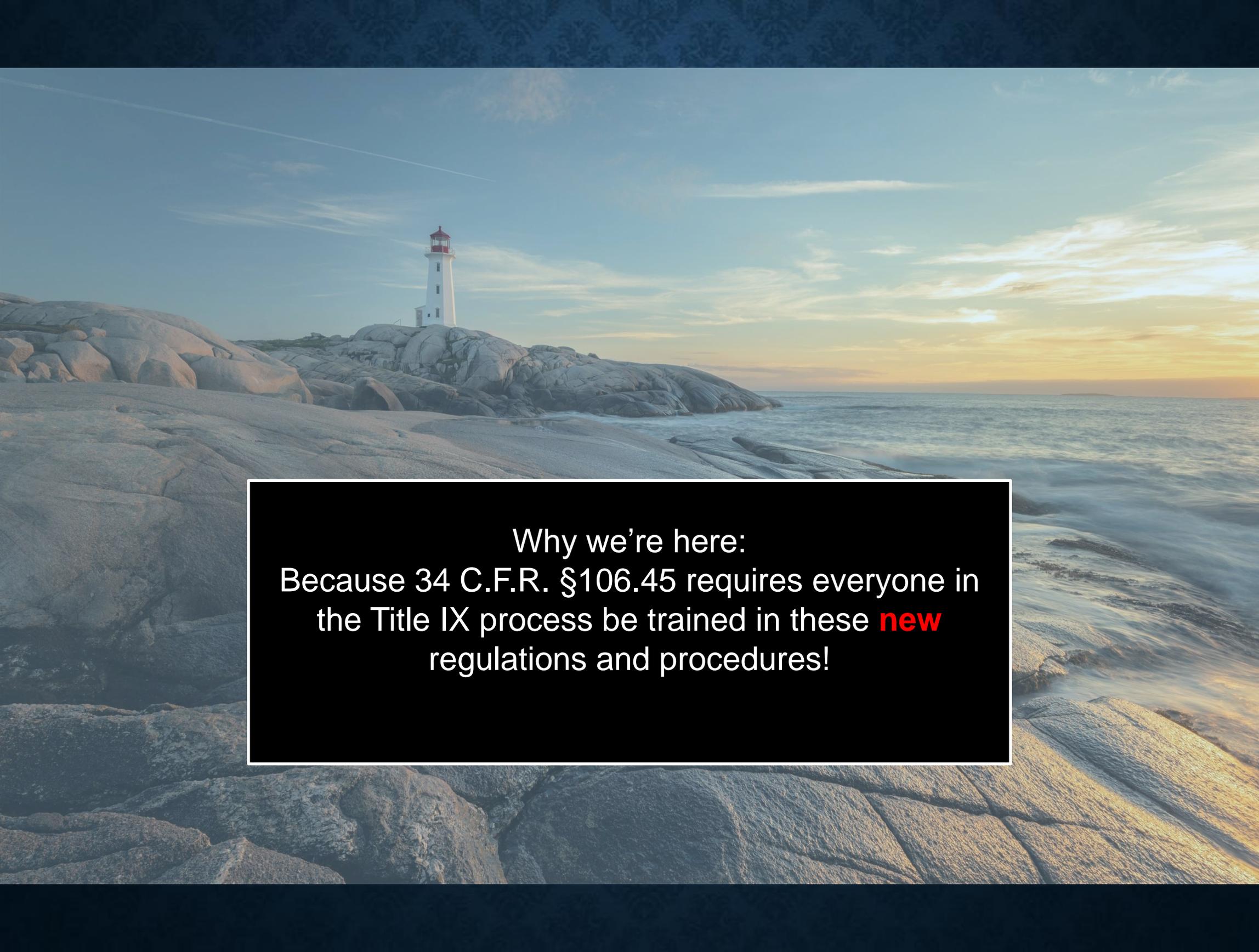
Nondiscrimination on the basis of sex in education

▶ Cite as 34 C.F.R. 106

Sexual harassment, including sexual assault, is unlawful sex discrimination, effective **08.14.20**.

34 C.F.R. §106.45 requires everyone is trained on new regulations and procedures





Why we're here:
Because 34 C.F.R. §106.45 requires everyone in
the Title IX process be trained in these **new**
regulations and procedures!

UNDERSTAND

All of the following requirements are grafted onto your existing substantive and procedural rules and regulations.

Every school may have a different process, but **every process must comply** with the following requirements.

For the first time, the Title IX regulations recognize that sexual harassment, including sexual assault, is **unlawful sex discrimination**.

Title IX is not a prohibition on sexual misconduct or sexual crimes *per se*.



The goal: **Provide individuals with effective protections against discrimination**

TITLE IX IS DIRECTED
AT SCHOOLS, NOT
STUDENTS, FACULTY
OR EMPLOYEES.

Title IX does not punish people who commit sexual harassment... it penalizes schools that respond to sexual harassment in a way that amounts to subjecting students to sex discrimination.

34 C.F.R. §106.6

Compliance with new regs is not obviated or alleviated by the FERPA statute, 20 U.S.C. 1232g, or FERPA regulations, 34 CFR part 99.

For instance: A parent or guardian may act on behalf of a “Complainant,” “Respondent,” “Party,” or other person covered by the new regs, including but not limited to filing a formal complaint.

34 C.F.R. §106.8

You must notify applicants for admission and employment, of the name/title, office address, electronic mail address, and telephone number of the **Title IX Coordinator**

34 C.F.R. §106.8

You must notify APPLICANTS that your school does not discriminate on the basis of sex and that you are required by Title IX not to discriminate in such a manner.

34 C.F.R. §106.8

Any person may report sex discrimination/harassment (whether or not the person reporting is the victim), in person, by mail, by telephone, or by e-mail, using the Title IX Coordinator's contact info - or by any other means that results in the Title IX Coordinator receiving the person's verbal or written report.

34 C.F.R. §106.8

You must adopt/publish grievance procedures that provide for the [prompt and equitable](#) resolution of student and employee complaints alleging sex discrimination/harassment



NEW DEFINITIONS

Take note

ACTUAL KNOWLEDGE

Means notice of sexual harassment or allegations of sexual harassment to your Title IX Coordinator or any official of your school who has authority to institute corrective measures on behalf of your school



34 C.F.R. §106.30

COMPLAINANT

Means a person who is alleged to be the **victim** of sexual harassment or violence



34 C.F.R. §106.30

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 you investigate the allegation of sexual harassment



34 C.F.R. §106.30

SEXUAL HARASSMENT

Means conduct on the basis of sex that satisfies one or more of the following:

- (1) An employee who conditions the provision of an aid, benefit, or service 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 your education program or activity; or



34 C.F.R. §106.30

(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).

VAWA – Clery Act

RESPONDENT

Means an individual who has been reported to be the perpetrator of conduct that could constitute **sexual harassment**



34 C.F.R. §106.30



Your Response to Sexual Harassment

34 CFR §106.44

When you have **actual knowledge** of sexual-harassment, **you must respond promptly** in a manner that is not deliberately indifferent

You must treat Complainants and Respondents equitably by offering supportive measures to both

Must follow grievance process of compliance with section 106.45 before the imposition of any disciplinary sanctions

YOUR RESPONSE TO SEXUAL HARASSMENT

34 C.F.R. §106.44

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 the process for filing a formal complaint to the Complainant

34 C.F.R. §106.44

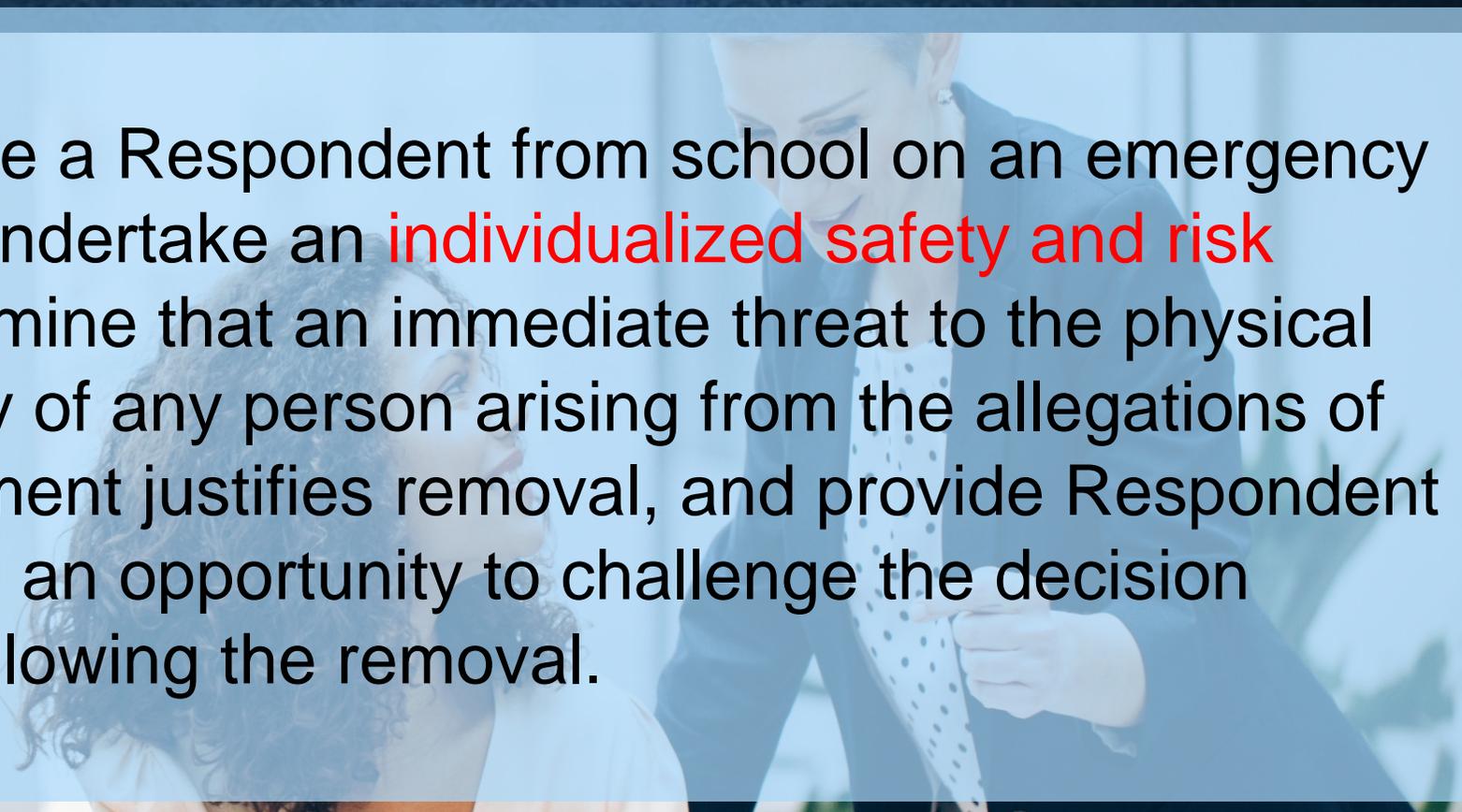
If Complainant files a Formal Complaint, you must follow a grievance process that complies with §106.45.

Emergency Removals

34 C.F.R.
§106.44

Talk to your
GC – ASAP

You can remove a Respondent from school on an emergency basis...If you undertake an **individualized safety and risk analysis**, determine that an immediate threat to the physical health or safety of any person arising from the allegations of sexual harassment justifies removal, and provide Respondent with notice and an opportunity to challenge the decision **immediately** following the removal.

A woman in a blue blazer is leaning over and talking to a woman with curly hair. The background is a blurred office setting.

RESPONDING TO FORMAL COMPLAINTS OF SEXUAL HARASSMENT

34 C.F.R. §106.45

Be aware: Your treatment of a Complainant or a Respondent in response to a formal complaint of sexual harassment may constitute discrimination on the basis of sex under Title IX.

YOUR GRIEVANCE PROCESS MUST

Treat Complainants and Respondents equitably by providing remedies to a Complainant when a determination of responsibility for sexual harassment has been made against Respondent

And by following a grievance process that complies with new regs before the imposition of any disciplinary sanctions



34 C.F.R. §106.45

GRIEVANCE PROCESS

Must be concluded in a
“Reasonably Prompt Time
Frame” (No more “60 days!”)

Good cause for delays may
include **considerations** such as
the absence of a party, a party’s
advisor, or a witness; concurrent
law enforcement activity; or the
need for language assistance or
accommodation of disabilities



34 C.F.R. §106.45

34 C.F.R. §106.45

Requires an objective evaluation of all relevant evidence – including both **inculpatory** and **exculpatory** evidence – and provide that credibility determinations may not be based on a person's status as a Complainant, Respondent, or witness

34 C.F.R. §106.45

Requires that the Title IX Coordinator, investigator, decision-maker, or any person designated to facilitate an informal resolution process, **not have a conflict of interest or bias for or against Complainants or Respondents or current parties**

34 C.F.R. §106.45

Requires that ALL persons involved in the Title IX process affirmatively avoid prejudgment of the facts at issue, conflicts of interest, and bias

34 C.F.R. §106.45

Investigators must not rely on sex stereotypes and must promote impartial investigations and adjudications of formal complaints of sexual harassment

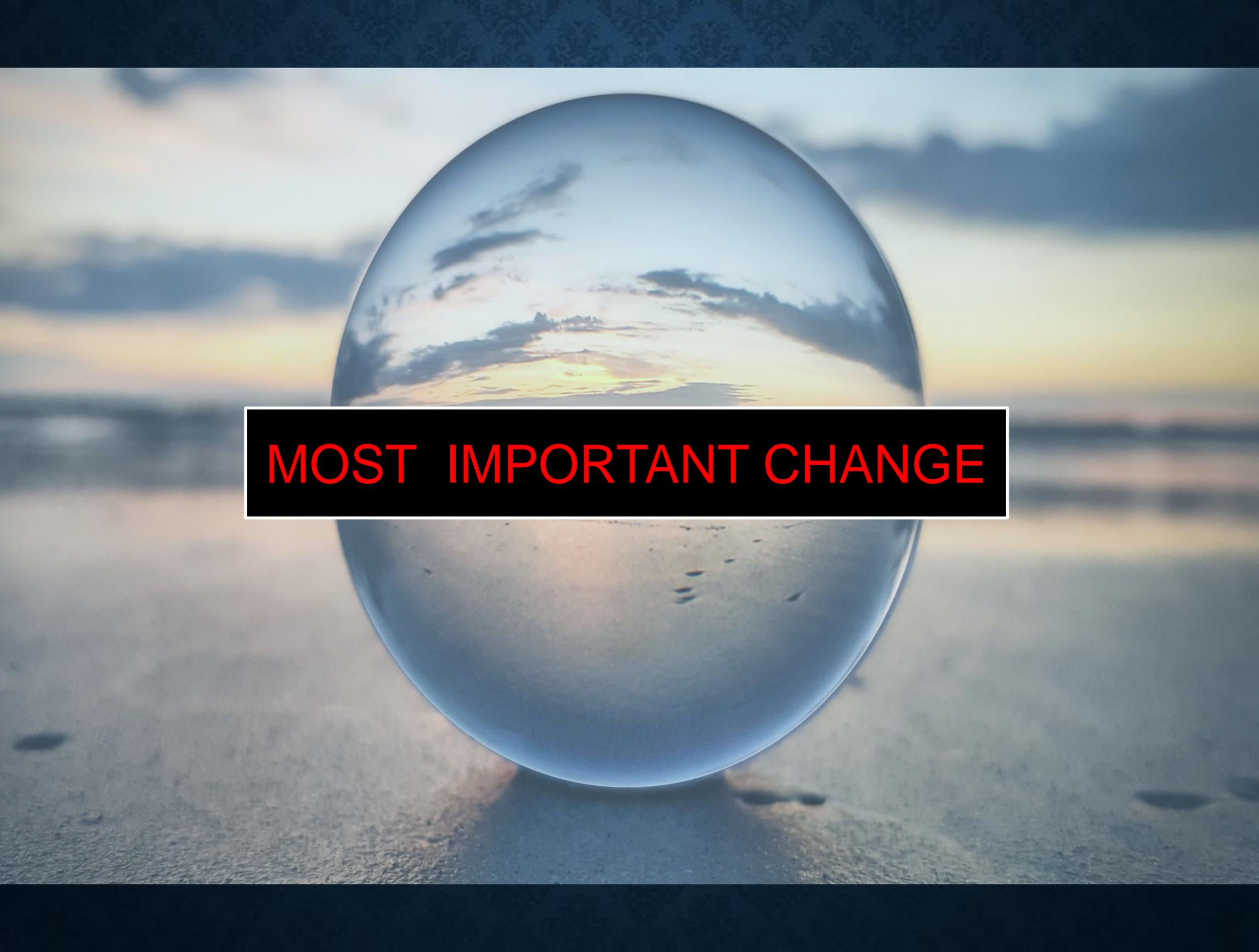
All parties in the process must presume that the Respondent is NOT responsible for the alleged conduct until a determination regarding responsibility is made at the conclusion of the grievance process

34 C.F.R. §106.45

Investigators must understand issues of relevance to create an investigative report that fairly summarizes relevant evidence

34 C.F.R. §106.45

Investigators must be trained to seek and develop both **inculpatory** and **exculpatory** evidence

A glass sphere sits on a sandy beach, reflecting the sunset over the ocean. The reflection shows a bright sun low on the horizon, with clouds catching the light. The background is a blurred view of the actual sunset over the sea.

MOST IMPORTANT CHANGE

34 C.F.R. §106.45

Decision-makers MUST be impartial; **must be trained** on issues of relevance; on admissibility of evidence, including when questions and evidence about the Complainant's sexual predisposition or prior sexual behavior are irrelevant

34 C.F.R. §106.45

Decision-makers must **presume** that the Respondent is NOT responsible for the alleged conduct until a determination regarding responsibility is made at the conclusion of the grievance process

34 C.F.R. §106.45

Decision-makers **must be trained** to 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.

34 C.F.R. §106.45

You must determine and publish what standard of proof will be used to determine responsibility: “**preponderance of the evidence standard**” or the “clear and convincing evidence standard”

Must apply the same standard of evidence for formal/informal complaints against employees, including faculty, and apply the same standard of evidence to all formal complaints of sexual harassment

34 C.F.R. §106.45

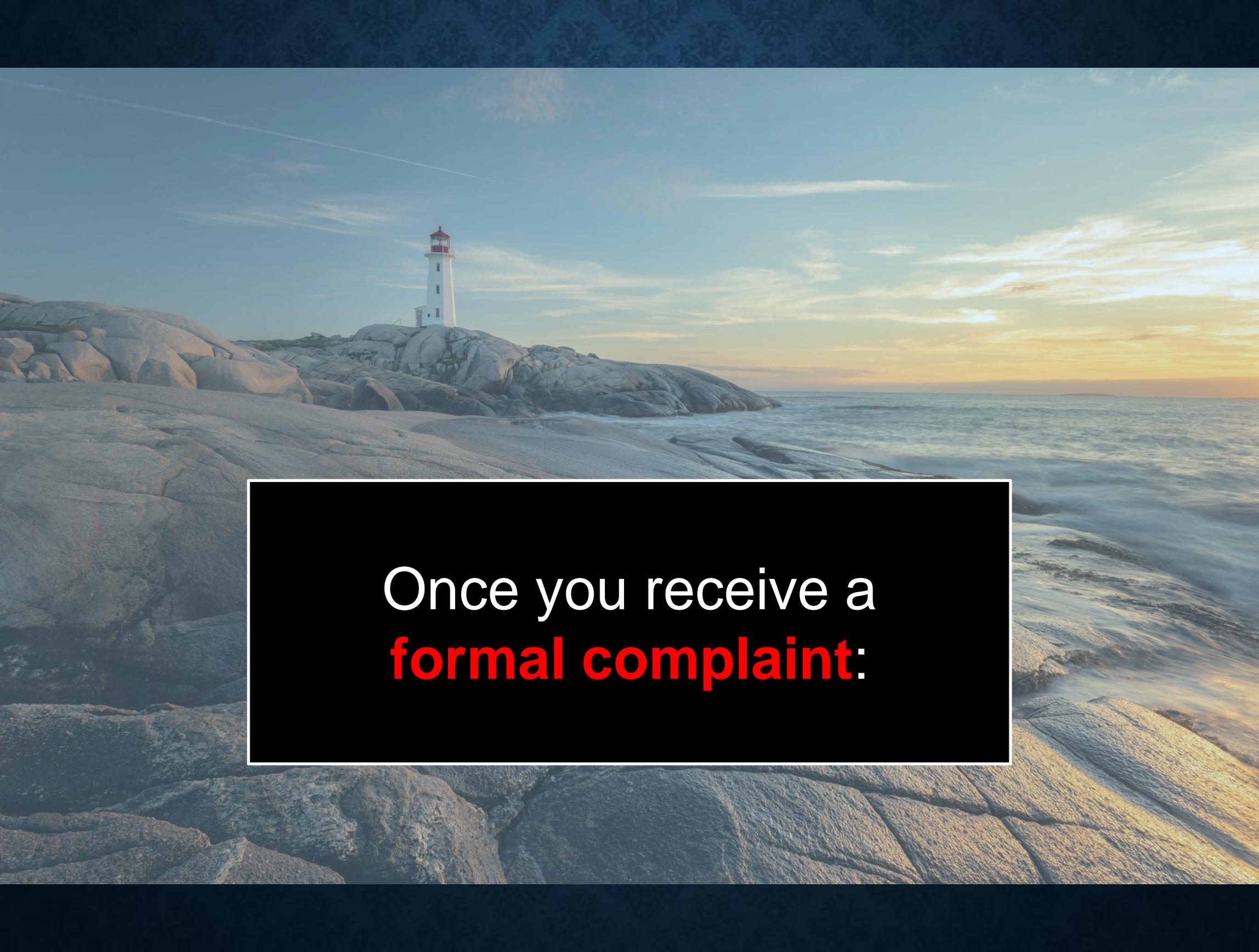
You must publish the range of possible disciplinary sanctions and remedies or list the possible disciplinary sanctions and remedies that you may implement following any determination of responsibility

34 C.F.R. §106.45

You **must publish** procedures and permissible bases for Complainant and Respondent to appeal

A crystal ball sits on a sandy beach, reflecting a vibrant sunset over the ocean. The sky is filled with soft, colorful clouds in shades of orange, yellow, and blue. The reflection in the crystal ball is sharp and clear, mirroring the scene outside. The background is a blurred view of the beach and the ocean under a similar sky.

LET'S TAKE A BREAK



Once you receive a
formal complaint:

YOU MUST PROVIDE THE WRITTEN NOTICE TO THE PARTIES WHICH CONTAINS:

Description of your grievance process including any informal resolution process

The allegations of behavior that potentially constitute sexual harassment.

Sufficient details known at the time

Sufficient time to prepare a response before any initial interview

A statement that the Respondent is presumed not responsible for the alleged conduct and that a determination regarding responsibility is made only at the conclusion of the grievance process

WRITTEN NOTICE ALSO CONTAINS

34 C.F.R. §106.45

The parties may have an advisor of their choice

Right to inspect and review evidence

Any provision in the school code of conduct that prohibits lying during the grievance process

34 C.F.R. §106.45

If the investigation reveals that the conduct alleged in the formal complaint would not constitute sexual harassment OR did not occur in the school's education program or activity OR did not occur against a person in the United States, then you ***must dismiss the formal complaint***

ALSO MAY DISMISS THE FORMAL COMPLAINT IF

The Complainant notifies the Title IX Coordinator in writing that the Complainant would like to withdraw the formal complaint or,

If the Respondent is no longer enrolled in or employed by you

WHAT ABOUT NEW ALLEGATIONS NOT LISTED IN THE ORIGINAL NOTICE?

You must provide **notice of the additional allegations** to the parties whose identities are known.

A scenic photograph of a white lighthouse with a red lantern room, perched on a rocky island. The sky is a mix of blue and orange, suggesting a sunset or sunrise. The foreground is dominated by large, flat, grey rocks. The ocean is visible in the distance, with gentle waves. A thin white line, possibly a power line, stretches across the upper left portion of the sky.

The Investigator

THE INVESTIGATOR MUST

Ensure that the burden of proof and the burden of gathering evidence rests on you and not on the parties!

You 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

Unless you obtain that party's voluntary, **written consent** to do so for the grievance process



34 C.F.R. §106.45

THE INVESTIGATOR MUST

34 C.F.R. §106.45

Give parties equal opportunity to present witnesses, including fact and expert witnesses, and other **inculpatory** and **exculpatory** evidence

SET TIMELINES & BENCHMARKS FOR:

- Interviewing parties
- Interviewing witnesses
- Compiling statements
- Verifying statements
- Gathering/obtaining documentation
- Testing medical evidence
- Research
- Drafting the report

INITIAL CONTACT WITH COMPLAINANT

Confidentiality important, but **not**
guaranteed

Identify the team and explain its mission

Explain the investigatory process; the
steps to be taken; timing

Complainant is entitled to be fully
involved and informed regarding the
process



COMPLAINANT INTERVIEW

Create a comfortable, safe, and blame-free environment.

Complainant comfortable, **unpressured** and at own pace.

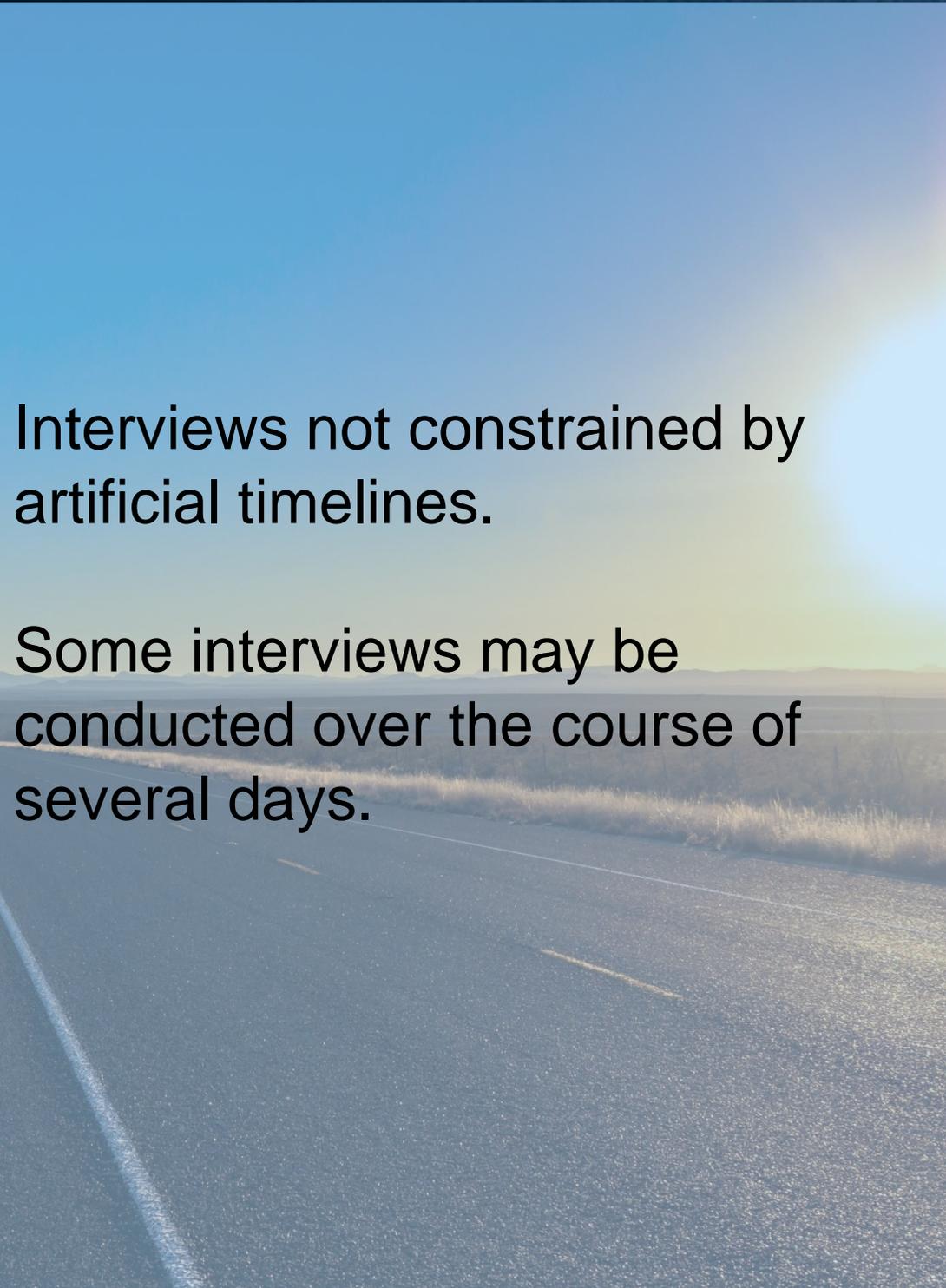
COMPLAINANT INTERVIEW

Suggest Complainant use a handwritten journal book or word-processed document to note things as events are remembered.

Allow for sleep cycles to assist Complainant to remember key events, places and persons involved.

Understand **dynamic memory process**.

RESPONDENT INTERVIEW



Interviews not constrained by artificial timelines.

Some interviews may be conducted over the course of several days.

Interviews are strategically timed and planned

Open-ended questions when appropriate

Build trust; avoid leading, argumentative, or **accusatory** questions

NO STEREOTYPING

Investigative techniques and approaches that apply **sex stereotypes** or generalizations may **violate Title IX** and should be avoided so that the investigation proceeds objectively and impartially

THROUGHOUT THE PROCESS

The parties have equal opportunities to have others present (the advisor of their choice) during any grievance proceeding, or you 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

NOTICE FOR ALL HEARINGS

You must provide written notice of the date, time, location, participants, and purpose of all hearings, or other meetings, to all parties, with sufficient time for **each** party to prepare to participate

A photograph of a young green plant with two leaves growing out of a mound of dark soil. The plant is centered in the image, and the soil is a dark, rich brown color. The background is a soft, out-of-focus green.

34 C.F.R. §106.45

INVESTIGATOR MUST

34 C.F.R. §106.45

Provide **both parties an equal opportunity to inspect and review** any evidence obtained as part of the investigation directly related to a formal complaint, including inculpatory or exculpatory evidence from any source, so that each party can meaningfully respond to the evidence prior to conclusion of the investigation. (This includes evidence that you don't intend to offer at the hearing.)

Parties must be given least **10 days to submit a written response** to the evidence, which the investigator will consider prior to completion of the investigative report.

INVESTIGATOR MUST ENSURE THESE STEPS ARE TAKEN:

Report must fairly summarize **relevant** evidence

At least 10 days before the hearing, must send each party (and the party's advisor) a copy of the investigative report for review and written response

IMPARTIALITY IS KEY

The report must also summarize the relevant **exculpatory evidence**, thus underscoring the need for impartiality.

“Formal” means a live, evidentiary hearing with a presiding decision maker; presentation of testimony and evidence; cross-examination of witnesses, results in a written decision

“Informal” means something like mediation

You can't require waiver of the right to an investigation and adjudication of formal complaints of sexual harassment.

A photograph of two women in an office setting. One woman is standing and leaning over, looking at the other woman who is sitting. They appear to be in a professional conversation. The image is overlaid with a light blue tint.

“Formal” vs “Informal” Resolutions

“INFORMAL” RESOLUTION

At any time before final determination, you may facilitate an informal resolution process, such as mediation, that does not involve a full investigation and adjudication, provided that you provide to the parties a written notice disclosing: the allegations, 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)

Any party has the right to withdraw from the informal resolution process and resume the formal grievance process at any time

You must obtain the parties' voluntary, written consent to an informal resolution process

NO INFORMAL RESOLUTION

IF:

Complaint contains allegations that
an **employee sexually harassed a
student**



THE HEARING

AT THE HEARING

34 C.F.R. §106.45

You must provide for a live hearing.

The Decision-Maker must permit each party's advisor to **ask the other party and any witnesses all relevant questions** and follow-up questions, including those challenging credibility.

AT THE HEARING

34 C.F.R. §106.45

Cross-examination at the live hearing must be conducted directly, orally, and in real time **by the party's advisor** of choice and never by a party personally. Questions must elicit relevant information.

If **either party asks**, you must provide for the live hearing to occur with the parties located in separate rooms with technology enabling the Decision-Maker(s) and parties to simultaneously see and hear the party or the witness answering questions.

You must create an audio or audiovisual recording, or transcript, of any live hearing and make it available to the parties for inspection and review

MUST RECORD

34 C.F.R. §106.45

You must keep records of investigation/hearing for 7 years.



Parties may have
their own
advisors.

A WORD ABOUT REPRESENTATION

You must provide a **FREE** advisor of your choice, to conduct cross-examination on behalf of that party
(Hint: **call** the law school!)

DECISION-MAKER

34 C.F.R. §106.45

The decision-maker cannot be the same person as the Title IX Coordinator or **the investigator**

SUCCESS STARTS WITH THE DECISION MAKER

Rules on the admissibility of evidence

Understands the meaning of legal **relevance**

Considers **inculpatory** as well as **exculpatory**
evidence

Applies the **rape shield law** and the exception
thereto

SUCCESS STARTS WITH THE DECISION MAKER

Applies a **presumption of innocence**

Oversees cross-examination

Controls the hearing - particularly in the presence of experienced, **aggressive Respondent's counsel**

Applies either the “preponderance” or the “clear and convincing” standards of proof.

MOST IMPORTANTLY

The Decision Maker makes highly-detailed, written *findings of fact* based upon testimony and evidence adduced during the hearing.

DECISION MAKER

AFTER THE HEARING ISSUES A WRITTEN
DECISION REGARDING RESPONSIBILITY

34 C.F.R. §106.45

THE WRITTEN DECISION

34 C.F.R. §106.45

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 DECISION

34 C.F.R. §106.45

Findings of fact supporting the determination

Conclusions regarding the application of your code of conduct to the facts

A statement of, and rationale for, the result as to each allegation, including a determination regarding responsibility, any disciplinary sanctions you impose on the Respondent, and whether remedies designed to restore or preserve equal access to your education program or activity will be provided by you to the Complainant

THE WRITTEN DECISION

34 C.F.R. §106.45

Your procedures and permissible bases for the Complainant and Respondent to appeal.

You must provide the written determination to the parties simultaneously.

The determination regarding responsibility becomes final either on the date that you provide the parties with the written determination of the result of the appeal, if an appeal is filed, or if an appeal is not filed, the date on which an appeal would no longer be considered timely



Appeals 34 C.F.R. §106.45

YOU MUST OFFER BOTH PARTIES AN APPEAL FROM A DETERMINATION REGARDING RESPONSIBILITY AND FROM YOUR DISMISSAL OF A FORMAL COMPLAINT OR ANY ALLEGATIONS THEREIN, ON THE FOLLOWING BASES:

Procedural irregularity that affected the outcome of the matter

The Title IX Coordinator, investigator(s), or decision-maker(s) conflict of interest or bias for or against any party

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;

You may offer an appeal equally to both parties on additional bases.

MORE ABOUT APPEALS

Notify the other party in writing when an appeal is filed and implement appeal procedures equally for both parties

Give both parties a reasonable, equal opportunity to submit a written statement in support of, or challenging, the outcome

Ensure that the decision-maker(s) for the appeal is not the same person as the decision-maker or the investigator(s), or the Title IX Coordinator

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

Ensure that the decision-maker for the appeal complies with 34 C.F.R. §106.45

Provide the written decision simultaneously to both parties.

AVOIDING LAWSUITS

Courts will review university student conduct hearings (much as they analyze the administrative decisions of any other agency) on the “**abuse of discretion**” standard.

AVOIDING LAWSUITS

Courts give **great deference** to the actions your university takes, if your decisions are supported by professionally-drafted, superbly-detailed findings of fact with citations to the evidentiary record.

If you can establish that your student conduct decisions were based on “**substantial evidence**” obtained during the hearing, courts unlikely to find your results were “**arbitrary or capricious**” or violative of Title IX.

ANTI-RETALIATION

34 C.F.R. §106.71

Neither you nor any other person may **intimidate**, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by Title IX or this part, 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.

HOWEVER....

34 C.F.R. §106.71

Charging an individual with a code of conduct violation for making a materially false statement in bad faith in the course of a grievance proceeding under this part does not constitute retaliation provided, however, that a determination regarding responsibility, alone, is not sufficient to conclude that any party made a materially false statement in bad faith.

QUESTIONS?



DILIGENCE, LLC

Know. More.

843.338.4097

