

Thrun Law Firm Webinar: Title IX Investigator Training

Title IX Investigator Training



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Caution

These slides reflect general legal standards for the related presentation and are not intended as legal advice for specific situations.

Future legal developments may affect these topics.

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Training Certification

This training is NOT intended to satisfy the training requirements for Title IX Coordinators, Investigators, Decision-Makers, and Appeals Officers.

Review of these slides without the synchronous training may not satisfy training requirements.

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New Definition of Sexual Harassment

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

- Employee quid pro quo;
- Sexual assault, dating violence, domestic violence, stalking (definitions from Violence Against Women Act); and
- Hostile Environment (new stricter definition)

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Hostile Environment

- “Unwelcome conduct determined by a reasonable person to be so severe, pervasive, **and** objectively offensive that it **effectively denies** a person's equal access to the recipient's education program or activity.”
- “Education program” is any location, event, or circumstance over which the recipient exhibits substantial control over both the Respondent and the context in which the harassment occurred.

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Denial of Equal Access

- Reactions to sexual harassment may vary
- Assess from perspective of reasonable person in complainant's position
- Denial may include skipping class to avoid harasser, grade decline, difficulty concentrating in class
- No concrete injury required
- Do not have to show that complainant dropped out of school, failed a class, had a panic attack, or otherwise reached “breaking point”

OCR, Question and Answers Regarding the Department's Final Title IX Rule, September 4, 2020

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Possible Examples of Verbal Harassment

- Unwelcome comments, including derogatory, sexually suggestive, or vulgar language
- Sexual innuendos
- Unwelcome advances or repeated requests for dates
- Threats based on a person's sex

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Possible Examples of Visual Harassment

- Subjecting another to images, text, or cartoons that are:
 - Sexually suggestive
 - Obscene
 - Pornographic
- Use of obscene gestures
- Leering at an individual

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Possible Examples of Physical Harassment

- Unwanted kissing, touching, patting, hugging, pinching, or unwanted physical contact
- Stalking or sex-based assault or battery
- Impeding a person's movements

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Title IX Roadmap

1. Report of sexual harassment
2. Formal Complaint
 - Written, signed by Complainant or Title IX Coordinator
3. Investigation or Informal Resolution
 - Respondent presumed not responsible
 - Both parties are sent evidence for review/response
4. Determination of Responsibility
 - Final investigation report given to Decision-Maker and both parties
 - Decision-Maker makes determination
 - Cannot issue discipline or sanctions until DoR
5. Appeal

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Making a Report

Who can make a report?

- Anyone can – verbal, written, electronic
- Report ≠ Formal Complaint

How?

- Reports can be made to any employee or sent to Title IX Coordinator
- Mail, telephone, or email, or by any means that results in the Title IX Coordinator receiving the person's report
- Employees should convey report to Title IX Coordinator

When can a report be made?

- Anytime!

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Responding to Report

Title IX Coordinator must, upon receipt of report:

- Contact Complainant to discuss "supportive measures"
- Inform Complainant of "supportive measures" available whether Formal Complaint filed or not
- Explain process for filing Formal Complaint

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Bifurcating the Investigation

- New regulations *only* apply to Title IX sexual harassment
- If a report or Formal Complaint includes allegations implicating other harassment/discrimination policies, consider bifurcating the investigation
- BUT Title IX sexual harassment must be investigated pursuant to the new regulations

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Supportive Measures

- Available before, during, and after investigation, **and** if no Formal Complaint filed
- Must be:
 - Non-disciplinary
 - Non-punitive
 - Individualized
 - Designed to restore or preserve equal access to education program or activity without “unreasonably” burdening the other party

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Supportive Measures

- Examples: Counseling, work/class schedule changes, increased monitoring
- Does *not* include anything that completely removes Respondent from an activity except under *very limited* circumstances
 - Removal is considered punitive, except:
 - For students: emergency removal permitted
 - For staff: administrative leave permitted
- Document whether supportive measures were offered and which were taken
- Keep confidential to extent possible while still complying with Title IX requirements

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Formal Complaint

- A document filed and signed by a Complainant or signed by the Title IX Coordinator;
- Alleging sexual harassment by a Respondent; and
- Requesting that the District investigate the sexual harassment allegation

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Formal Complaint: Notice

Written notice to parties that includes:

- Grievance procedures
- Allegation details
- Parties' right to inspect and review relevant evidence
- Notice that parties may have advisor of their choice
- Statement that Respondent is presumed not responsible; determination of responsibility provided at conclusion of grievance process

Notice must be supplemented if new allegations arise during investigation

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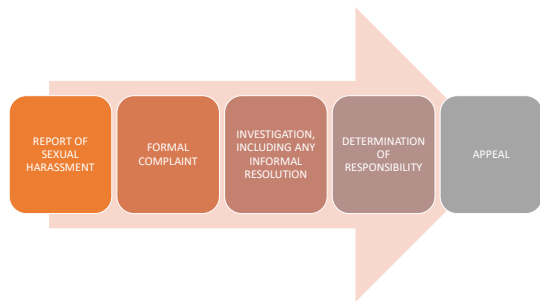
Advisors

- Parties may be accompanied by an advisor of their choice in any meeting or grievance process proceeding
- Advisors can be parents, staff members, attorneys, friends, or other persons -- the party is in the best position to decide who serves in this role
- School may not restrict who serves as advisor

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Title IX Grievance Process



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Starting the Investigation

- Involve parents
- Consider Mandatory Reporting Requirement & report to law enforcement
- Don't discourage criminal complaint
- Secure evidence
 - Physical
 - Documentary
 - Electronic & Video
- Identify disputed facts and follow up
- Review police records if available
- If necessary, place employee on paid administrative leave

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Investigation Tips

- Interview Complainant to gather all information
- Use that information to determine who to interview next
- Conduct site visits, if applicable

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Full & Fair Investigation

- Suspend judgment until investigation is complete
- Do not investigate *to prove* what is alleged to have happened but rather to discern *what happened*
- Interview all with knowledge
- Make credibility determinations

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Title IX Considerations

- School has burden of proof and burden to “gather evidence sufficient to reach a determination of responsibility”
- Standard of evidence must be same for all complaints (employee and student)
 - Preponderance of evidence recommended
- Reasonably prompt timeframes
- Consult policy for specific procedures

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CPS Reporting

- School administrator/counselor/teacher
- **Reasonable cause to suspect** abuse/neglect
 - Immediately: oral report
 - 72 hours after oral report: written report
- School employee shall
 - Notify “person in charge” of finding
 - Make written report available
 - **Not** be dismissed or penalized for making report or cooperating in an investigation

MCL 722.623(1)(a)

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Creating an Investigation Plan

- Who will you interview?
 - Complainant & all witnesses s/he identifies
 - Respondent & all witnesses s/he identifies
 - Others who may have knowledge (Consider where/when)
 - Teacher on hall monitoring duty or lunch duty at same time as incident? Food Service Staff?
 - Bus Driver? Coach? Assistant or Volunteer Coaches?
 - People may be added to/removed from list as investigation proceeds
- Is there tangible evidence to preserve and review?

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Preserve Tangible Evidence

- Surveillance video
- School records: personnel files, student disciplinary records
- Text messages, emails, voicemails
- Screenshots of social media (Instagram, SnapChat, TikTok)

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New Jersey v T.L.O., 469 US 325 (1985)

- **Reasonable** suspicion, not probable cause, is needed for school officials to search students
- Was the search
 - Justified at inception?
 - Reasonable in scope?

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Search Justified at Inception

The presence of “**reasonable** grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school.”

T.L.O., 469 US at 342

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Reasonable in Scope

A school search “will be permissible in its scope when the measures adopted are **reasonably related** to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction.”

T.L.O., 469 US at 342

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Locker Searches

- No privacy expectation
- Principal may search locker (but not items in locker)
 - Without reason
 - Without notice
- Law enforcement may assist
- Policy required
 - Copies to student, parent, MDE
 - Put notice in student handbook

MCL 380.1306

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Digital Evidence Considerations

- Review acceptable use policy
- Cut access to email and school computers/servers
- Stop automatic delete function
- Collect school electronic devices
- Consider access to personal electronic data

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Internet Privacy Protection Act

- PA 478 of 2012
- Effective Dec. 28, 2012
- Applies to employers, including school districts, ISDs, PSAs
- Violation is criminal misdemeanor, subject to fine up to \$1,000
- Civil action permitted for damages, attorney fees, costs

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Personal Internet Account

- Prohibits employers from requesting passwords from employees/applicants for social networking sites
- Prohibits schools from asking students for access to, allow observation of, or disclose information to access "personal internet account"
- Does *not* apply to devices paid for, in whole or part, by school and used for educational purposes



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CAUTION:

Photos and Videos of Students

- If allegation involves sexting or other photos or videos of students that could possibly be considered child pornography,
CALL LAW ENFORCEMENT
- Do not view, save, copy, disseminate, handle or maintain photos and videos of students that could be considered child pornography
- Legal exposure for employee & school

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Video Disclosure to Police

If an education record, disclosure **only** if:

- Prior written consent from parent
- Application of consent exception
 - Health or safety emergency
 - Court order or subpoena

20 USC 1232g; FPCO FAQ (April 19, 2018)

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Craft Your Investigation Plan

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Conducting Interviews

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Notice of Interviews

- Must notify parties **in writing** of date/time/location, participants, and purpose of all hearings (if any), **investigative interviews**, and meetings,
- Notice must be given **a sufficient time in advance** so that a party may prepare for interview
- Cannot provide notice and conduct interview on same day

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Interview Considerations

- Interview witnesses while memories are still fresh!
- **Before interview**
 - Outline questions to be asked
 - Use same central questions for each witness
- **During interview**
 - Present directive to be honest and forthright
 - Take notes, which may be discoverable

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Direct vs Leading Questions

- Use “stepped” direct questions if possible
 - Where were you on Monday morning?
 - Who was with you?
 - What were you doing?
- Leading questions suggest the answer and minimize interaction, may be useful with some students, be careful not to put words in their mouth!
 - What color was the shirt? (direct)
 - Was the shirt blue? (leading)

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Practice Tips

- Advise interviewee ahead of time to distinguish between what they saw/heard firsthand and what they were told happened by someone else
- Don't interrupt answers
- Don't try to fill the silence, let the pauses breathe
- Listen to the answers and ask follow up questions! Don't let your outline drive you away from relevant information

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Using Evidence in Interviews

- Lay foundation before substantive questions
 - You mentioned that X sent you a message that made you uncomfortable, how was that sent?
 - Do you recall when you saw it?
 - Is this that message?
(Present screenshot of message)
- Then question:
 - How did that message make you feel?
 - What about those words stood out to you?

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Always Ask

- Awareness (as applicable) of
 - Code of Conduct
 - Board policy
 - Prior directives
- At end of interview, ask:
 - Is there anything you think I need to know that I didn't ask you?
 - Is there anyone else you think I should talk to?
- Possible Directive: no retaliation, no contact

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If Respondent is Employee

- Follow Board policy and CBA
- Union representation
- Another administrator
- Direct employee to provide truthful responses

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NLRB v Weingarten 420 US 251 (1975)

- Employee has right to union representation at investigatory interview which might reasonably result in disciplinary action
- MERC has same standard
- Violation is an unfair labor practice of “interference” with union activity

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“Weingarten” Right

- Employee must request
- Employer not required to bargain or interact with union representative
- Employer, not union, controls interview
- Violation may invalidate investigation and allow for employee's reinstatement

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When to Interview the Respondent?

- **At the beginning of the investigation**
 - Helps to set the scope
 - But will likely require a second interview
- **At the end of the investigation**
 - Have more information about what occurred
 - More complete interview
 - Easier to wrap-up

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During the Interview

- Don't base Complainant credibility assessment solely on whether Complainant was emotional/upset when describing allegations
- Caution advisor, attorney, or parent, if necessary, that questions are for the interviewee, not them
- For student interviews, allow parent to weigh in if they choose, *after* all student questions are completed
- Allow breaks, if necessary, but do not break between question and answer

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Recording

- Neither required, nor prohibited
- Consider “chilling” effect
- If interviewee records, so should you
- Michigan law only requires consent of one party to the conversation

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Interview Tips Summary

- Establish guidelines with advisor, interviewee, and anyone else present (i.e., parent/guardian, union representative)
- Explain allegations, if applicable
- Be direct - ask simple, straightforward questions
- Ask awareness of applicable policies, rules, codes of conduct
- Ask who else may have useful information, anything you didn't ask that they think you should know
- Re-interview Complainant, Respondent or witnesses if needed
- Be cognizant of implicit bias or conflicts of interest!

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Investigator Obligations

- Must give parties equal opportunity to present witnesses, inculpatory/exculpatory evidence
- Cannot restrict parties from discussing allegations or gathering/presenting relevant evidence
- Must provide date/time/location, participants, and purpose of all hearings (if any), investigative interviews, and meetings, to party whose participation is invited or expected, in writing
 - Notice must be given a sufficient time in advance so that a party may prepare for interview

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Remember

The District:

- Has the burden of proof and the burden to gather evidence sufficient to reach a DoR
- Cannot, generally, use questions or evidence that constitute, or seek disclosure of, legally-privileged information
- Cannot access, consider, disclose, or otherwise use a party's medical records, including mental health records, unless the District obtains that party's voluntary, written consent to do so

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Notice of Additional Allegations

- If investigation reveals additional allegations not in original notice to parties and investigator decides to investigate those allegations, must provide notice of additional allegations to both parties
- Additional notice must:
 - Identify date notice of the additional allegations given to the parties, and
 - Describe additional allegations
- If additional allegations will not be investigated, investigator must state basis for decision not to investigate in investigation report

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Evidence Review Timeline

- **At least 10 calendar days before** investigation report is finalized: Parties/advisors must be sent copy of all evidence to inspect and review
- **10 day** timeline allows for parties to consider evidence, prepare arguments about relevancy and whether evidence has been omitted, and consider how the party intends to respond to the evidence
- Parties may submit written response to Investigator during **10 day** period

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What Evidence Must Be Provided?

- **ANY** evidence, including:
 - Evidence upon which the District does not intend to rely in reaching a determination regarding responsibility; and
 - Inculpatory or exculpatory evidence obtained from any source.
- Consider reminder to parties that redisclosure of evidence outside of Title IX Grievance Process is prohibited

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Confidentiality of Evidence

“Recipients may require parties and advisors to refrain from disseminating the evidence (for instance, by requiring parties and advisors to sign a non-disclosure agreement that permits review and use of the evidence only for purposes of the Title IX grievance process), thus providing recipients with discretion as to how to provide evidence to the parties that directly relates to the allegations raised in the formal complaint.”

85 Fed Reg 30297-30298 (May 19, 2020)

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Writing an Investigation Report

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General Tips

- Ensure report is clear, concise, and complete
- Report is more than copying and pasting witness statements
- Assume report may be released by either party
- Use quotes, dates, times, and locations when possible

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Parties' Information

- Name of Party
- Name of advisor (if any)
- If student: age, grade level, and building
- If employee: job title and building

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Investigator's Information

- Investigator name and title
- Training verification
- Statement that investigator does not have conflict of interest or bias against either party, generally or individually, that affected the investigation

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Nature of Allegations

- Describe each allegation, including date, time, place, and nature of the incident(s)
- Additional allegations?
 - If not in original notice and investigator decides to investigate, identify date notice of additional allegations was given and describe the additional allegations
 - If additional allegations won't be investigated, state basis for decision

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Relevant Chronology

- Date of Formal Complaint
- Date notice letters sent
- Date Complainant(s) and Respondent(s) were notified of interviews
- Dates interviews conducted
- Date evidence submitted to parties/advisors for review
- Date each party's response was due and whether response received
- Date investigation report submitted to Decision-Maker

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Fact Finding Activities

- Summarize Complainant's and Respondent's interviews, noting date and who attended
- Identify any other contacts with Complainant, Respondent, or their advisors, noting date, contact method, purpose
- Summarize all other witness interviews, noting date and who attended
- Identify and describe any relevant evidence, including who submitted it or how obtained

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Other Fact-Finding Activities

- Describe any other fact-finding that occurred as part of the investigation (e.g., site visits, record review, or hearing)
- Describe any findings of fact made during the investigation (e.g., statements relied upon, credibility determinations)
- ***The investigator does not make a determination of responsibility.***

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Findings of Fact

Investigator may:

- Make specific findings of fact for review by the Decision-Maker
- Make credibility determinations

But, may **NOT** make the determination of responsibility

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Assessing Evidence

- Commentary: No definition of relevancy, use ordinary meaning of the word
- Relevant evidence: evidence that makes a fact more or less likely than it would be without the evidence
 - Does this piece of evidence impact the facts? If so, it's probably relevant!
 - Low bar to meet
- BUT relevancy does not determine weight, credibility, or persuasiveness
- Weigh evidence based on credibility and other circumstances

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Assessing Witness Credibility

- Monitor consistency
- Consider corroboration either from other witnesses or physical evidence
- Consider whether there is a motivation to lie
- Previously consenting does not imply future consent

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Writing About Evidence

- Remember, testimony IS evidence!
- Consider summarizing relevant information from interviews rather than copying and pasting Q&A
- Consider grouping similar witnesses together (e.g., student-athletes, coaches, eyewitnesses)
- Use quotes from interviews or detailed descriptions of tangible evidence

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Investigation Report Summary

- Investigator must objectively evaluate evidence
- Report must fairly summarize relevant evidence
- Consider your audience!
 - Parties get to review it
 - Decision-Maker uses it
 - Report can be FOIA'd or released by parties

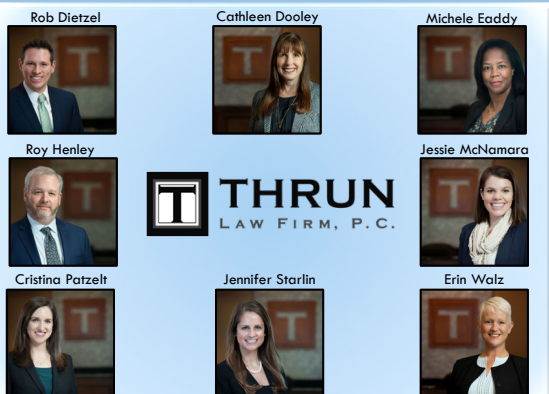
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Transmittal of Final Report

- Investigator, Coordinator, or Decisionmaker must send (electronic or hard copy) investigation report to the parties and any advisors for review and response
- Report also should be sent to:
 - Title IX Coordinator
 - Decision-Maker
- Receipt of the report by the parties starts the Decision-Maker's timelines
- Parties must have 10 calendar days to review report

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