



Northern
California ReLiEF

Title IX Training Series

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Excess Fund

NCR's Upcoming Title IX Training



~~Title IX Coordinator Training~~

~~July 12, 2023~~

~~8:30-12:00PM PDT Zoom Training~~

Title IX Investigator Training

July 19, 2023

8:30-12:00PM PDT Zoom Training

Title IX Decision-maker Training

July 26, 2023

8:30-11:30AM PDT Zoom Training

<https://ww2.keenan.com/ncr-titleix-training-series>

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Any comments made by participants will not be shared.



Title IX Investigator Training

K12 School Districts
2023-2024

NCR Training

Disclaimer

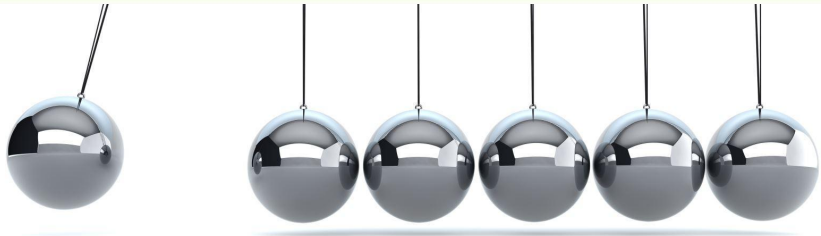


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Title IX Law and Regulation

Title IX Guidance



- Federal Law
- Regulations
- Other sources of mandatory and recommended guidance
 - State law
 - Case law
 - Advocacy
 - Best Practices

Title IX

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

- Title IX of the Education Amendments of 1972

Enforced by the Office for Civil Rights (OCR)



Title IX Law & Regulation Timeline



2011

OCR issues Dear Colleague Letter changing how campuses handle Title IX

2017

Department of Ed withdraws guidance and issues Q&As and starts NPRM process

2022

Guidance and new NPRM process announced

2014

OCR issues additional guidance in response to outcry from schools

2020

New regulations issued and effective August 2020 amidst COVID

Title IX Regulatory Guidance



- Regulations 2001
- Dear Colleague Letters
 - 2011 Dear Colleague Letter: Sexual Violence, Background, Summary and Fast Facts
 - 2014 Questions and Answers on Title IX and Sexual Violence
 - 2015 Dear Colleague Letter on Title IX Coordinators
 - 2016 Dear Colleague Letter on Transgender Students
 - 2017 Questions and Answers on Sexual Misconduct
- Regulations 2020
 - March 8, 2022 - Executive Order on Advancing Equality for Lesbian, Gay, Bisexual, Transgender, Queer, and Intersex Individuals
- New regulations will be released in October 2023

Title IX Regulatory Guidance - Report to OCR



- Following a report of sexual harassment to the Office for Civil Rights (OCR)
- OCR initiates an investigation
- OCR may seek an informal resolution
- Negotiated agreement is set forth in a resolution agreement
- OCR may impose fines and penalties against a school if resolution not reached



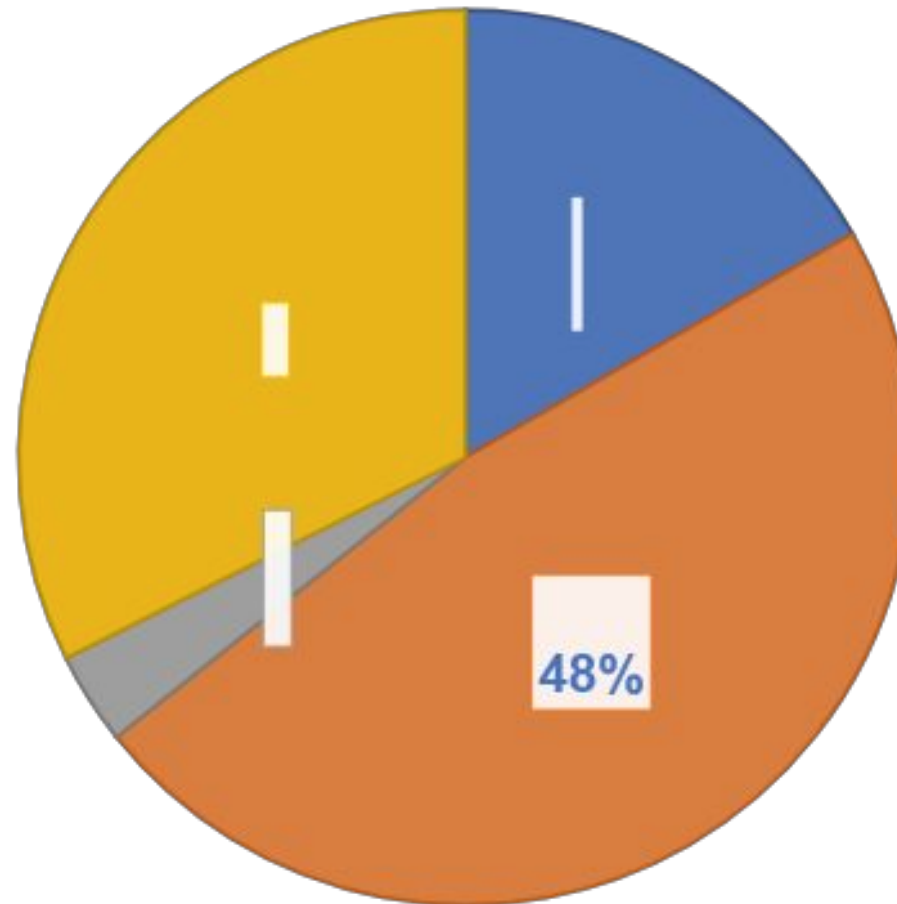
- Title IX protects against student sexual harassment set forth in Supreme Court decisions
 - Gebser v. Lago Vista Independent School District (1998)
 - Davis v. Monroe County Board of Education (1999)
- Litigation has clarified some of OCR's guidance and in some instances, overturned guidance
 - Examples include use of hearings, cross examination, and exclusion of evidence
- State law addressing specific, and, in some instances, controversial topics related to Title IX enforcement
 - Hearings
 - Transgender rights



OCR 2022 Report

Total Reports:
18,804

PERCENTAGE of Complaints





- Consider campus needs and culture
- Legal obligations
- Advocacy groups
- Adopting practices
 - Trauma informed practices
 - Incorporate school culture
 - Reflect needs of your campus





Title IX Obligations for K12 School Districts

Title IX Covers



Title IX protects BOTH students and employees of K12 Schools

Sex discrimination

Sexual Harassment

Athletics

Sexual Assault

Pregnant Students

Recruitment/Admissions Programs



Legal Obligation

Educational institutions must respond in a manner that is not **deliberately indifferent** when it has actual knowledge of sexual harassment occurring in the institution's education program or activity against a person in the United States.

Actual Knowledge of Sexual Harassment



- When sexual harassment or allegations of sexual harassment come to the attention of **ANY EMPLOYEE** of a K-12 district:
 - All employees **MUST** report to the **TITLE IX COORDINATOR**
- Failure to report could lead to an inadequate response
 - Proof of deliberate indifference
 - Legal responsibility for sexual harassment



For Title IX to apply, the behavior must occur in the school’s “education program or activity,” further defined as:

locations, events, or circumstances over which the school exercised substantial control over both the respondent and the context in which the sexual harassment occurs, and also includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution.

Off-campus activities covered if one (1) of three (3) requirements are met:

1. the off-campus incident occurs as part of the school’s operations;
2. the school exercised substantial control over the respondent and the context of alleged sexual harassment that occurred; or
3. the incident of sexual harassment occurs at an off-campus building owned or controlled by a student organization officially recognized by a college



- A licensed mental health professional at the school can maintain confidentiality.
- All other employees are required to report the matter to the Title IX Coordinator.
- In instances of potential sexual harassment, investigators (and other employees) cannot offer to keep the matter confidential.
- A Title IX investigation is completely transparent to both parties:
 - Parties get to know the names of all the people involved, including witnesses.
 - Parties get access to all of the information gathered during the investigation.
 - Parties get the opportunity to request additional investigation and to challenge the investigator prior to the final decision.

Title IX Enforcement and Federal Constitutional Protections



Under Title IX, schools may not restrict the rights afforded under:

- First Amendment (Free Speech)
- Fifth Amendment (Protection against Self-Incrimination)
- Fourteenth Amendment (Due Process)

Title IX Prohibits Retaliation



- Prohibition against retaliation for any participant in the Title IX reporting & investigation process

- Requires some level of school action

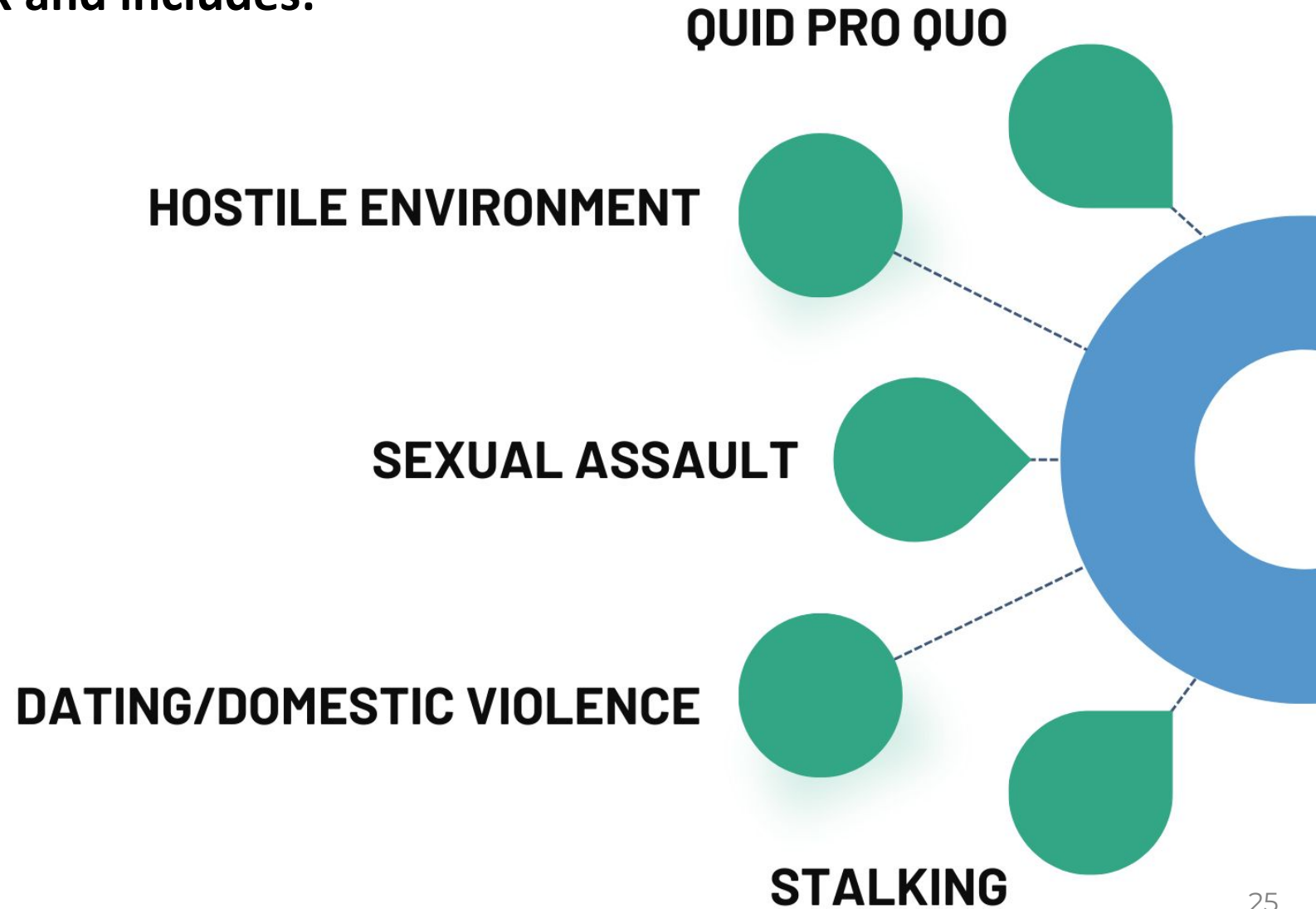


Title IX Sexual Harassment Definitions

Title IX (TIX) Definition of Sexual Harassment



Defined conduct on the basis of sex and includes:





Defines conduct “on the basis of sex” and includes:

- Quid pro quo - An employee of the school conditioning the provision of an aid, benefit, or service of the recipient on an individual’s participation in unwelcome sexual conduct;
- Hostile environment - 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 school’s education program or activity;



The definition includes:

- **Sexual Assault** means any sexual act directed against a Complainant without consent. Sexual Assault includes fondling, incest, rape, sexual assault with an object, sodomy, and statutory rape.
- **Dating violence** means violence committed by a person— (A) who is or has been in a social relationship of a romantic or intimate nature with the victim; and (B) where the existence of such a relationship shall be determined based on a consideration of the following factors: (i) the length of the relationship. (ii) the type of relationship. (iii) the frequency of interaction between the persons involved in the relationship.



- **Domestic violence** includes felony or misdemeanor crimes committed by a current or former spouse or intimate partner of the victim
 - It includes the use or attempted use of physical abuse or sexual abuse, or a pattern of any other coercive behavior committed to gain or maintain power and control over a victim, including verbal, psychological, economic, or technological abuse that may or may not constitute criminal behavior,
 - By a person who— (A) is a current or former spouse or intimate partner of the victim; (B) is cohabitating, or has cohabitated, with the victim as a spouse or intimate partner; (C) shares a child in common with the victim; or (D) commits acts against a youth or adult victim who is protected from those acts under the family or domestic violence laws of the jurisdiction.



- **Stalking** means engaging in a course of conduct directed at a specific person that would cause a reasonable person to—
 - fear for his or her safety or the safety of others; or
 - suffer substantial emotional distress.

State Laws Prohibiting Sexual Harassment



- Aside from obligations under Title IX, K12 schools must also enforce state laws prohibiting sexual harassment
- Definitions of sexual harassment may be different
- In most instances, an incident will be analyzed under both Title IX and state law



Title IX Grievance Process



Parties

- Complainant – alleged victim/survivor
- Respondent – responds to the allegation(s)

Other Participants

- Fact Witnesses
- Expert Witnesses

Administration of Claims

- Title IX Coordinator
- **Title IX Investigator**
- Title IX Decision-maker
- Title IX Appeal Officer
- Title IX Advisor
- Title IX Informal Resolution Officer

Overview of Title IX Grievance Process (TIXGP)



- Respond promptly in a manner that is not deliberately indifferent
- Due process and fundamentally fair procedures to adjudicate the allegations
- Upon notification, supportive measures offered
 - Emergency removal
- Offer of formal process (upon signing of Formal Complaint)
 - Complainant files or Title IX Coordinator may file
- Both parties receive notice of the allegations
- Both parties participate in investigation and can inspect information gathered
- Separate decision-maker(s)
- Completed in a prompt time-frame
- Retaliation prohibited - define the retaliation complaint process



Title IX Investigator Role and Responsibilities

Investigator Responsibility



- Serve objectively, impartially, without bias
 - Conflicts
 - Stereotypes
- Gather all information related to a claim
- Analyze
 - Relevancy
 - Authenticity
 - Credibility
- Connect to parties and witnesses
- Assist in maintaining legitimacy of the process
- Policy should define the INVESTIGATOR role

Impartiality



- Be neutral – neither pro-Complainant nor pro-Respondent
- Consider the evidence as presented
- Confront and understand bias and not allow it to impact decision
- Maintain open mind as to the potential conclusions

Conflicts of Interest



- Relationship to parties or witnesses
- Professional conflicts
- Personal conflicts
- Actual and perceived

Stereotypes



- “A fixed, over generalized belief about a particular group or class of people.”
(Cardwell, 1996)
- Stereotypes around sexual assault
- Stereotypes around sexual harassment
- Complainant and Respondent



- Conscious/Explicit
 - Discriminatory intent
 - Stated preferences
- Unconscious/Implicit
 - For the most part, most people are unaware of these drivers
 - Developed over a period time and can influence many factors in hearing
 - Short cuts developed by the brain and often play a role in:
 - Immediate response to conflict
 - Often mimics fear responses

Displaying Bias



Presumptions

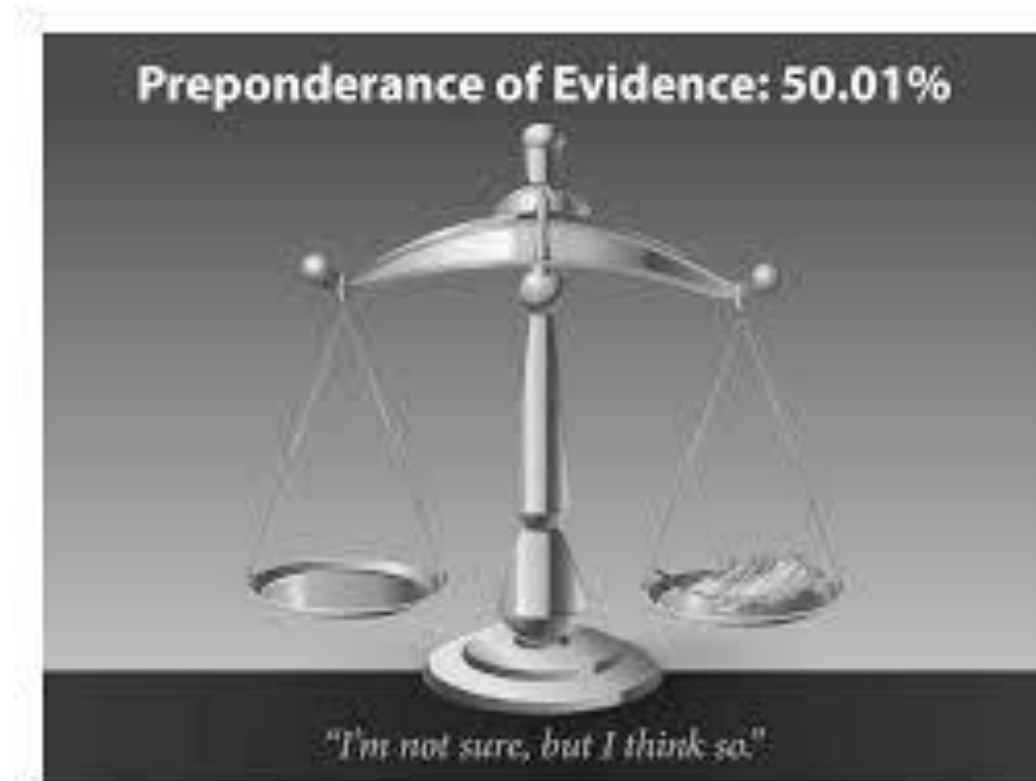


- Not responsible until proven to be responsible
- Stereotypes and bias

Burden of Proof



- Preponderance of the evidence
- Clear and convincing





Conducting Investigations

Basics

Information Gathering



- Types of information
- Background
- Request information from parties
- Proactively seek information
- Requests and refusals
- Information sharing



- Formal complaint
- Notice to both parties
- Supportive measures
- Timelines
- Parties (and parents) understand the process
- Other complaints?
 - Criminal matters
 - Similar complaints – consolidation
- Concurrent or parallel investigations
- Record-keeping requirements
- **Documentation at every step!!**

Preliminary Information Gathering



- Documents shared with the parties
- Other records



What Is Next?

Organizing the Investigation

Gathering Documents and Other Evidence



- Emails, texts, photos
- Legal implications
- Support or contradict testimony
- Character evidence

Conducting Interviews



- Introduction
- Questioning – time, space, and effect of silence
- Open-ended versus leading questions
- Direct versus indirect evidence
- Sensory recollection
- Note-taking versus audio/video-recording
- Advisors' role
- Investigator should maintain control during the interview
 - Decorum
 - Responses
 - Concluding the interviews
 - “Anything else”



- Parties must be advised that they can have an advisor present for the entire investigation process including the interview.
- Parties select an “advisor of choice.”
- Advisor may be but need not be an attorney.
- Advisor provides advice and counsel to the party during the process.
- Advisor has a more active role in cross-examination if a hearing takes place.
 - K12s are not required to hold hearings.

Weighing and Challenging Evidence



- Authentication
- Relevance
- Credibility



- RELEVANCE – Applying to the matter in question; affording something to the purpose (Black’s Law Dictionary)
- NOT permitted:
 - Sexual history of Complainant (see Rape Shield exception)
 - Privileged communications
 - Medical documentation
- Not repetitive



- In Title IX investigations, the decision-maker has ultimate responsibility for credibility determinations and may explore credibility issues with parties after your investigation report is complete
- However, in the course of an investigation, investigators are gathering important information that may impact credibility determinations, including:
 - Corroboration
 - Feasibility
 - Motivation for truthfulness/untruthfulness
 - Consistency
 - Reviewed/coached testimony

Impact of Trauma



- Many Title IX causes of action involve trauma
- Investigators and decision-makers must understand the impact of trauma on:
 - Reaction to trauma
 - Ability to capture memories
 - Recollection of memories
- Expectations around trauma victim



- Interview Tips
- Interview Notes Form



Writing the Report

Investigation Report



- Convey relevant information about the allegations to the parties and their advisors
- The Department of Education takes no position on the elements required in the report beyond what is required by final regulations
- The investigative report must fairly summarize relevant evidence

Final Outcome Letter Requirements



Decision-maker must issue a written determination regarding responsibility that has to include

- Findings of fact
- Conclusions as to all allegations
- Rationale for reaching the decision
- Sanctions, if the respondent is found responsible for policy violations, must be included in the written determination

Organizing the Report



- Covering required categories
- Providing the relevant information
- Including applicable policy provisions
- Staying within the parameters of the investigation report (as set forth in policy)

- 20-20 Hindsight



Review Investigation Outline

Title IX Investigator Report and Information Sharing



Before investigation report issued, all evidence shared

Opportunity to question and provide feedback

Draft investigation report issued and shared

Opportunity to question and provide feedback on
investigation report

Final investigation report issued

TIX Investigator: Sharing of Investigation Information TIMING



- Both parties are given the FULL investigation file to review
- Documents shared or document inspection
 - 10 days for parties to respond to the information
- Investigator prepares a draft investigation report and shares it with both parties
 - 10 days for the parties to respond to the investigation report
- Investigator prepares final investigation report and shares it with both parties and the decision-maker



- Decision-maker provides the parties with the opportunity to send questions or comments
 - 10 days to respond
- Decision-maker must determine:
 - Policy violation
 - Discipline (if found in-violation of policy)
- Decision-maker issues an outcome letter to the parties
- In K-12, discipline decisions against students with disabilities may require a manifestation determination
 - A **Manifestation Determination** is a process, required by the Individuals With Disabilities Education Act (IDEA 2004), which is conducted when considering the exclusion of a student with a disability that constitutes a change of placement

Allegation of Sexual Harassment – Title IX and State Law Analysis



- **Sexual Harassment under Title IX includes sexual assault (sexual battery, fondling, etc.)**
- Sexual Battery is defined as:
Any person who touches an intimate part of another person while that person is unlawfully restrained by the accused or an accomplice, and if the touching is against the will of the person touched and is for the purpose of sexual arousal, sexual gratification, or sexual abuse, is guilty of sexual battery. *See, California Penal Code § 243.4(a).*

Hostile environment sexual harassment

- Prohibited sexual harassment includes, but is not limited to, unwelcome sexual advances, unwanted requests for sexual favors, or other unwanted verbal, visual, or physical conduct of a sexual nature made against another person of the same or opposite sex in the educational setting, under any of the following conditions:
...
 3. The conduct has the purpose or effect of having a negative impact on the student's academic performance or of creating an intimidating, hostile, or offensive educational environment.



Other Considerations

Appeal and Informal Resolution



Procedural Review

Procedural irregularity in the Title IX grievance process that materially affected the outcome.

New Information

Newly discovered evidence that was not reasonably available at the time of the determination of responsibility or dismissal that could materially affect the outcome.

Conflict of Interest or Bias

Due to a bias or conflict of interest by the Title IX Coordinator, investigator, or decision-maker that materially affected the outcome.



- **Trained facilitators**
- Offered after formal complaint is filed
- Process must be detailed in writing
- Described to both parties
- Parties agree in writing
- Either party may end informal resolution before a formal agreement is accepted
- **Never** available when complainant is student and respondent is employee



Title IX Changes on Horizon

Notice of Proposed Rulemaking from Office
for Civil Rights (OCR)

NCR Training from 6/14/23, recording and
slides are available



Final Points

1. Your certificate of completion will be sent to you this week, along with all the other resources shared during the program.
2. Keep and post a copy of slides from the training on your website.
3. Reach out with any follow-up questions:
office@titleixconsult.com

Upcoming Title IX Events from Title IX Consult, LLC



- **Title IX Thursdays –**
 - Thursday, August 3, 2023 12:30-1p Pacific
- **K12 Title IX Coordinator**
 - Friday August 11, 2023 830a-12p Pacific
- **K12 Title IX Investigator**
 - Friday August 18, 2023 830a-12p Pacific
- **K12 Title IX Decision-Maker and Appeal Officer**
 - Friday August 25, 2023 830a-12p Pacific



Thank You!

www.titleixconsult.com

**Sign-up for our newsletter
or ALL Title IX Thursdays!**