

Fairfield Public Schools Title IX Training

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Goals of Today's Presentation?

- Identify and explore what types of conduct constitute sexual harassment under Title IX as it currently exists and other state and federal laws.
- Learn about the new Title IX regulations for addressing sexual harassment in schools.
- Understand what conduct falls under the Title IX regulations and what does not.
- Learn how the new regulations interact with existing state and federal laws.
- Learn how to recognize and avoid prejudgment of the facts, conflicts of interest and bias.
- Learn about the Role of the Title IX Coordinator, Investigator and Decision-Maker in the Title IX Grievance Process.

Some Statistics

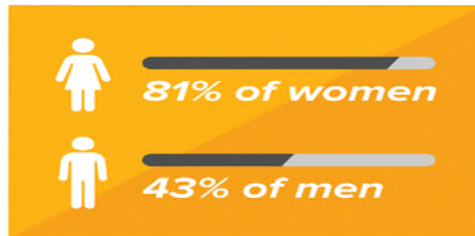
Learn more on our [Questions and Answers](#) page.



One in five women in the United States experienced completed or attempted rape during their lifetime. [SOURCE](#)



Nearly a quarter (24.8%) of men in the U.S. experienced some form of contact sexual violence in their lifetime. [SOURCE](#)



Nationwide, 81% of women and 43% of men reported experiencing some form of sexual harassment and/or assault in their lifetime. [SOURCE](#)



One in three female victims of completed or attempted rape experienced it for the first time between the ages of 11 and 17. [SOURCE](#)



About one in four male victims of completed or attempted rape first experienced it between the ages of 11 and 17. [SOURCE](#)



It is estimated that 734,630 people were raped (including threatened, attempted, or completed rape) in the U.S. in 2018. [SOURCE](#)

[Sexual Assault Statistics | National Sexual Violence Resource Center \(NSVRC\)](#)

BACKGROUND

Title IX of the Education Amendments of 1972 (20 U.S.C. §§ 1681 *et seq*)

“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, 20 U.S.C. §§ 1681 *et seq.* [“Title IX”].

Who is Protected by Title IX?

- Students
- Staff
- U.S. citizens and non-U.S. citizens
- Men and Women
- Pregnant students
- According to the U.S. Department of Education, transgender students, students based on their sexual orientation and students based on the gender expression or identity
- Does not matter if the alleged harasser is the same or different sex than the alleged victim

Title IX Anti-Harassment Regulations

- In May 2020, the Office of Civil Rights published new regulations regarding sexual harassment under Title IX
- These regulations went into effect on August 14, 2020
- They appear to be designed for colleges and are often a poor fit for K-12 schools
- They require sweeping changes to numerous things including:
 - The definition of sexual harassment under Title IX,
 - How schools must address sexual harassment under Title IX,
 - How/When complaints under Title IX must be investigated, and
 - Many other aspects of addressing sexual harassment in schools

New Proposed Regulations

- On June 23, 2022, the U.S. Department of Education's Office of Civil Rights issued proposed regulations.
- They have gone through the notice and comment period.
- The latest statement from the Department of Education is that the new final regulations will be released in October 2023.
- That means that schools need to continue to follow the current regulations until the effective date of the new regulations.

Definition of Sexual Harassment Under the Title IX Regulations

- Conduct on the basis of sex that satisfies one of the following:
 - An employee of the district conditioning the provision of an aid, benefit, or service on the individual's participation in unwelcome sexual conduct;
 - 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 district's education program or activity; or
 - sexual assault, dating violence, domestic violence or stalking.

If conduct does not fall into one of these categories, it is not prohibited by Title IX.

Definition of Sexual Harassment Under the Title IX Regulations

- Per the Regulations, Title IX only applies to conduct that occurs in a program or activity over which the district exerts substantial control over both the respondent and the context.
 - Thus, Title IX no longer covers off-campus conduct even if it has an on-campus effect
- Does not apply if the conduct occurred against a person outside the U.S.
 - For example, they would not apply during a field trip outside of the United States

NOTE – just because OCR will not treat conduct as a Title IX violation, it does not mean the conduct does not violate some other section of the school's policies and/or state or other federal law

Quid Pro Quo Sexual Harassment

- Unwelcome sexual advances, requests for sexual favors, other verbal or written conduct of a sexual nature
- By a school employee
- When submission to or rejection of such conduct is made either explicitly or implicitly a term or condition of the receipt of some benefit such as a grade, a part in a school play, field time on a sports team

- A hostile environment is created when the sexual harassment is so:
- Severe
- Pervasive **AND**
- Objectively offense

That it effectively denies a person equal access to the district's education program or activity

Could be the academic program, or
Extracurricular activities.

- There is an increasing problem in schools with misunderstanding between things that may create discomfort or offend someone versus the higher standard of creating a hostile environment.
- Not everything that is offensive to a student/employee creates a hostile environment.
- This is especially important to note in the high school where students are often encouraged to address topics in some classes that may be sensitive and their opinions may make other students uncomfortable.

- Things to look at:
 - How frequently did the conduct occur
 - Was the conduct physically threatening
 - Was the conduct humiliating
 - The age and relationship between the alleged harasser and victim
 - What was the effect on the alleged victim's emotional state
 - Did it unreasonably interfere with an individual's ability to engage in a school activity
 - Did it unreasonably interfere with a student's educational performance or an employee's work performance
 - Was the conduct directed at more than one person
 - Was the conduct protected First Amendment speech

- Based on the Violence Against Women Act
 - Adopts the definitions effectively importing the act into the K-12 realm
- sexual assault - an offense classified as a forcible or nonforcible sex offense under the uniform crime reporting system of the Federal Bureau of Investigation as set forth in 20 USC §1092(f)(6)(A)(v).
- Includes:
 - Rape
 - Fondling
 - Incest
 - Statutory rape

- Dating Violence – means violence committed by a person
 - (a) who has been in a social relationship of a romantic or intimate nature with the victim, and
 - (b) where the existence of such relationship shall be determined based on consideration of the following factors (i) the length of the relationship, (ii) the type of relationship, and (iii) the frequency of interaction between the persons involved in the relationship as set forth in 34 U.S.C. §12291(a)(10).

May include things such as sexual or physical abuse or the threat of such abuse.

- Stalking - means engaging in a course of conduct directed at a specific person that would cause a reasonable person to
 - (a) fear for his or her safety or the safety of others, or
 - (b) suffer substantial emotional distress
- 34 U.S.C. §12291(a)(30)

Generally includes – two or more acts, including, but not limited to, acts in which the stalker directly, indirectly or through a third party follows, monitors, observes, surveils, threatens or communicates to or about a person, or interferes with a person's property

Does It Fall Under Title IX?

- Did the conduct occur in a program or activity over which the district exerts substantial control over **both** the respondent and the situation?
- Is there an allegation that an employee conditioned the provision of an aid, benefit or service on the individual's participation in unwanted sexual conduct?
- Is there an allegation of conduct on the basis of sex that was so **severe, pervasive AND objectively offensive** that it effectively denied the person equal access to the district's education programs or activities?
- Is there an allegation of sexual assault, dating violence, domestic violence or stalking?

Does It Fall Under Title IX?

If the answer to **ANY** of the questions on the prior slide is **YES**

STOP

Title IX applies and **all of the due process requirements under Title IX must be followed.**

If the answer to **ALL** of the questions on the prior slide is **NO**

Title IX does not apply and you can process the complaint under other applicable policies such as your non-Title IX discrimination/harassment policies, the anti-bullying policy, etc.

- The Title IX Coordinator makes the initial determination as to whether the complaint falls within the confines of Title IX
- The complaint **MUST** be dismissed at the outset if:
 - The conduct as alleged did not occur in the institution's education programs or activities;
 - The conduct did not occur against a person in the United States; and/or
 - The conduct would not constitute sexual harassment as defined even if proved.

- The Title IX Coordinator may dismiss the formal complaint (or any of the allegations therein) if at anytime during the investigation (or hearing):
 - A complainant notifies the Title IX Coordinator in writing that the complainant would like to withdraw the formal complaint or any allegations therein;
 - The respondent is no longer enrolled or employed by the institution; or
 - Specific circumstances prevent the institution from gathering evidence sufficient to reach a determination as to the formal complaint or allegations therein.

- Upon dismissal, the institution must promptly send written notice of the dismissal and reasons simultaneously to the parties.

Title IX Applies – Now What?

Two Separate Situations

- The district has knowledge of sexual harassment but there has not been a request for a formal investigation
 - The district must take steps to eliminate sexual harassment and provide support to the victim whenever it has actual knowledge of sexual harassment
 - The district cannot issue discipline to the alleged harasser under Title IX
 - Other statutes such as bullying might apply that would allow discipline

- A formal complaint of sexual harassment is filed under Title IX
 - The district may discipline the alleged harasser if the alleged harasser is determined to be responsible for sexual harassment after the completion of the grievance process

- **Title IX Coordinator**
 - Employee who will coordinate the district's efforts to comply with its responsibilities under Title IX
- **Investigator**
 - If possible, should not be the Title IX Coordinator
- **Decision-maker**
 - Must not be the Title IX Coordinator or the Investigator
- **Appeal Decision-maker**
 - Must not be the Title IX Coordinator, Investigator or Decision-maker

- Complainant – the alleged victim
- Respondent – the alleged harasser
- Responsible Party – someone found responsible for sexual harassment at the end of the formal grievance process

- Who may report sexual harassment? – anyone
 - Does NOT need to be the individual who is being harassed
 - Report may be made anonymously
- How can sexual harassment be reported?
 - In person
 - By telephone
 - By mail
 - By electronic mail
 - By any other reasonable means
- There should be multiple people to whom a report can be made
 - All employees should know to bring to the Title IX Coordinator any report of sexual harassment

VARIOUS ROLES IN THE TITLE IX PROCESS

- Ensure that the Title IX Coordinator is aware of the situation
- Ensure that the Title IX Coordinator schedules a meeting with the family to discuss the situation
- The administrator should NOT commence their own investigation
- The administrator CANNOT file a complaint under Title IX on behalf of someone else
- Consider whether other laws/policies apply
- Consider whether a report to DCF or the police needs to be made

Upon learning of potential sexual harassment, the Title IX Coordinator **MUST** do the following (whether or not a Title IX complaint has been filed):

1. Contact the complainant (and parents/guardian)
2. Discuss the following with the complainant (and parents/guardian)
 - What occurred
 - What supportive measures are available
 - Explain the formal complaint process
 - Make sure the complainant knows that supportive measures will be available whether or not a formal complaint is filed
- At this stage, confidentiality should be maintained as much as possible except where it is necessary to inform other staff in order to implement supportive measures

- The **Title IX Coordinator** should document the conversation
- They **must** document at a minimum:
 - Measures taken to restore or preserve equal access to the district’s education program or activity
 - The documentation should be sufficient to show that the response was not deliberately indifferent
 - **Document all supportive measures offered**
 - Document which, if any, were accepted
 - Document any supportive measures that were offered and rejected by the complainant
 - If supportive measures are not provided, must document why they were not provided
- It is recommended that you document:
 - That the Title IX process was explained to the family
 - That the Title IX policies and procedure were provided to the family

- Non-disciplinary, non-punitive individualized services offered 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.
 - Such measures are designed to restore or preserve equal access to the education program or activity without unreasonably burdening the other party,
 - Includes measures designed to protect the safety of all parties or the district's educational environment or to deter sexual harassment.

No “One Size Fits All” Approach

- Supportive measures should be individualized based on the situation.
- Always a good idea to ask the student/family if there is any specific supportive measure they want.
- They should be memorialized in a supportive measures plan and shared with relevant staff.

Potential Supportive Measures

- Change in class schedule,
- Additional time to make up missed assignments due to the alleged harassment,
- Ability to retake assignments/tests that were impacted by the harassment,
- Ability to withdraw from elective classes without penalty,
- Separating the parties as much as possible during the school day,
- Providing support by the guidance counselor, social worker or other mental/emotional health support,
- Increased monitoring, supervision, security.

- Supportive measures are available to both the complainant and the respondent,
- Should be designed to allow the party equal access to their education,
- Supportive measures cannot be punitive.
 - For example, with some exceptions, you cannot remove the respondent from the school setting during the investigation

- Scenario 1: George comes to you and says that in his English class, Sarah keeps making inappropriate sexual comments to him. He does not want to file a formal complaint. He just wants the conduct to stop. You transfer him to another English class.
- Was the response appropriate – yes/no

- Scenario 2: Susie tells you she feels uncomfortable going into the school's cafeteria because one of the employees is always staring at her chest. You rearrange the employee's schedule so the worker is in the kitchen instead of the student area when Susie is eating lunch.
- Was the response appropriate – yes/no
- What other supportive measures might be provided to Susie?

Consider whether any other laws are applicable

- Is there an allegation of abuse or neglect?
 - a DCF report must be made
- Does a report need to be made to the police?
- Are the allegations such that a bullying report must be made?
 - Investigations may need to be conducted simultaneously
- Are there allegations of harassment based on any other protected category in addition to sex?
 - Investigations may need to be conducted simultaneously
- Are any other school policies implicated?

- What is a formal complaint?

- Signed by complainant (or the complainant's parent if the complainant is a student) or the Title IX Coordinator
- Alleges sexual harassment
- Requests investigation

As the regulations currently exist, if no formal complaint is filed by the complainant, or in the case of a minor the complainant's parents, then no investigation can take place unless the Title IX Coordinator signs a formal complaint.

A complaint filed by anyone else is NOT a formal complaint as defined under Title IX and cannot be used as a basis of discipline for a Title IX violation.

The Grievance Process – An Overview

- Some underlying principles for sexual harassment investigations
 - **Equitable**
 - Due process
 - The complainants and respondents should be treated equally
 - **Impartial**
 - The people in all of the roles should not have bias towards or against complainants/respondents, men/women
 - Should not be biased against the individual complainant or respondent
 - **Thorough**
 - Should collect as much relevant information and evidence as possible
 - **Prompt**
 - Although there is no definitive answer, generally the process should be completed within 60-90 days unless there are extenuating circumstances

- Standard of evidence to be used should be pre-defined in policy and consistent for investigations into staff and students
 - District chooses: “***preponderance of the evidence***” or “***clear and convincing evidence***”
- Generally, school districts choose to use the preponderance of the evidence standard

- If the complainant wants to file a formal complaint, the process should be explained in detail:
 - Ensure that a formal written complaint is signed (preferably by the student and the parent);
 - Ensure the student/parent is aware that one of the consequences of filing a formal complaint is that the complaint and the evidence will be shared with the respondent.
- There should be a standardized form for the complaint that can be given to the complainant.
- The Title IX Coordinator can assist the complainant with the complaint but, if possible, the complaint should be in the complainant's words and be written by the complainant or the complainant's parent.

- At a minimum, a formal complaint must contain the following:
 1. The name of the complainant,
 2. The date of the complaint,
 3. The date of the alleged harassment,
 4. The name or names of the harasser(s), if known,
 5. Identification of the location where the harassment occurred, and
 6. A detailed statement of the circumstances constituting the alleged harassment.

First steps once a formal complaint is filed

- The Title IX Coordinator must provide each party with the following:
 - Notice of the allegations, including:
 - Identity of parties
 - Conduct alleged to be sexual harassment
 - Date and location of incident
 - Provide:
 - A copy of the grievance process including any informal resolution processes available,
 - A statement that the respondent is presumed not responsible and that the determination of responsibility will not be made until the end of the process,
 - The ability for each party to have advisor (including an attorney) at all stages, and
 - The section of the code of conduct that prohibits providing false statements and information during the grievance process

- **The Title IX Coordinator** should make an individualized risk assessment upon receipt of a formal complaint;
- Determine whether there is an immediate threat to the physical health or safety of any student or other individual arising from the allegations of sexual harassment that would justify removal of the respondent from the school setting;
- Determine if a report should be made to DCF;
- Determine if a report should be made to the police.

- Any decision to suspend or expel a student would need to follow state law and board policy
 - Do not forget about special education laws regarding exclusions from school
- Any decision to remove an employee would need to follow state law, board policy and the provisions of any applicable collective bargaining agreement
- To the extent removal cannot be accomplished, other safety measures should be put into place during the pendency of the grievance process

- If not already done:
 - Determine if any supportive measures will be put in place
 - Discuss the same with the complainant and the complainant’s parent
 - Document any supportive measures that were offered (even if rejected by the student/parent)
 - Document any supportive measures agreed to
- Even if a support plan was put in place prior to the filing of the complaint, it is a good idea to revisit the support plan following the filing of a formal complaint to determine that nothing has changed

- If the investigator is not the Title IX Coordinator, the Title IX Coordinator would provide all information in his/her possession regarding the complaint to the assigned investigator
- The Title IX Coordinator should remain in contact with the complainant and the complainant's parents/guardians to ensure the supportive measures put in place during the investigation are appropriate and do not need to be changed

THE FORMAL INVESTIGATION

Avoiding Bias, Conflict of Interest, and Prejudgment of Facts

- Investigators and Decision-makers (as well as Title IX Coordinators, informal resolution facilitators, and appeals officers) must:
 - Be free from **conflict of interest**,
 - Be free from **bias**, and
 - Be trained to serve impartially and **without prejudging facts**.

- The regulations make clear that at each stage, the school employee must not be biased.
 - Bias may be as to categories
 - e.g. a belief that because evidence shows that female students are often subjected to sexual harassment, that it is more likely that the female student is telling the truth
 - Bias as to the specific individual
 - The more you know about the complainant and/or the respondent, the more you are likely to believe that they behaved in keeping with how you perceive them
 - e.g. – the respondent is an honor student so he could not have engaged in the alleged acts
 - The complainant has a reputation for going out with a lot of different boys at school so she is not believable
 - Pressure from outside
 - Is the respondent the star of the school play that is about to open?
 - Is the respondent the star of the school's football team?

- Bias can be
 - Conscious or unconscious
 - Positive or negative
 - Based on societal norms or your own cultural perspective

- Things that are **not** automatic conflicts of interest
 - Just because you know the student/employee does not mean there is a conflict of interest
 - Just because you have disciplined the student/employee in the past does not equate to a conflict of interest

- Conflicts of interest
 - Wearing too many hats in the process
 - Title IX Coordinators who are also acting as Investigators must take care not to let the roles bleed into one another
 - A relationship with one of the parties that goes beyond the school setting
 - Friendship with students' parents
 - Coaching a student on a sports team

Avoiding Prejudgment of Facts

- Keep an open mind.
- Each case is unique and different.

“Dangerous Words” to Avoid

- Just ignore it.
- It's just a joke.
- This is just part of growing up.
- If we disciplined every student that said a bad word, we would never be able to get any teaching done.
- It's just a prank.
- Nobody else has ever complained about it.
- Boys will be boys OR girls will be girls.

- Role of Investigator:
 - Gather and organize relevant evidence directly related to the allegations (both inculpatory and exculpatory).
 - District must ensure that “all relevant questions and evidence are admitted and considered (though varying weight or credibility may of course be given to particular evidence by the decision-maker).”
- Must provide equal opportunities to parties throughout investigation:
 - Must provide an equal opportunity for the parties to present witnesses (including fact and expert witnesses) and other inculpatory and exculpatory evidence.
- Discussing Allegations:
 - Cannot restrict the ability of either party to discuss the allegations under investigation or to gather and present relevant evidence.
- Burden of proof and burden of gathering evidence is not on the complainant or the respondent.

1. Review all relevant school policies and procedures as well as any relevant state and federal statutes. Ensure that you follow all policies and procedures throughout the investigation.
 - a. Make sure you review the district's sexual harassment policies and procedures before starting the investigation.
2. Review the written complaint.
3. Make an investigation plan.

1. Review any relevant portions of the student/staff files of the complainant and the respondent.
2. Interview the complainant and any other alleged victims.
 - a. Things to ask include, but are not limited to:
 - i. What occurred?
 - ii. How did the alleged harassment affect you or your school experience?
 - iii. Are there any other students, teachers or staff who may have relevant information?
 - iv. Do you have any notes, emails, text messages, WhatsApp messages, SnapChats, or any other relevant physical evidence?

3. Interview witnesses identified by the complainant, as necessary.

- a. Some suggested questions to ask:
 - a. What did you observe/see/hear?
 - b. Relationship with the parties?
 - c. What, if anything, did the complainant tell you about the incident?
 - d. Describe the respondent's behavior toward the complainant.
 - e. Are you aware of the respondent doing anything similar in the past?
 - f. Do you know of anyone else who may have relevant information?

Typical Order of Investigation

4. Interview of any other witnesses identified.
5. Interview the respondent.
6. Interview any witnesses identified by the respondent.
7. Review notes.
8. Follow up on any inconsistencies.

- Must provide the complainant and the respondent with the same opportunities to have others present during any grievance proceeding, including the opportunity to be accompanied to any interview or related meeting or proceeding by the advisor of their choice.
- Who can be an advisor?
 - Advisor may be an attorney but need not be.
- Cannot limit the choice or presence of advisor for either party in any meeting or grievance proceeding.
- May establish restrictions regarding extent to which advisor may participate in the proceedings, as long as applies *equally* to both parties.

- District must **objectively** evaluate all **relevant evidence** (both inculpatory and exculpatory).
 - Recipient must ensure that “all relevant questions and evidence are admitted and considered (though varying weight or credibility may of course be given to particular evidence by the decisionmaker).”
- What is relevant?
 - Includes evidence that is “probative of any material fact concerning the allegations.”
 - Includes “evidence pertinent to proving whether facts material to the allegations under investigation are more or less likely to be true (i.e., on what is relevant)”.
- The Rules of Evidence do NOT apply.

- Medical treatment records:
 - Cannot access, consider, disclose, or otherwise use a party’s records that are made or maintained by a physician, psychiatrist, psychologist, or other professional, and which are made/maintained in connection with the provision of treatment of the party, unless obtain voluntary written consent.
- Legally privileged information:
 - A recipient’s grievance process cannot require, allow, rely upon, or otherwise use evidence or questions that constitute, or seek disclosure of, information protected under a legally recognized privilege, unless the person holding such privilege has waived the privilege.
- Complainant’s sexual behavior (Rape Shield Protections):
 - Evidence about the complainant’s prior sexual history must be excluded unless such evidence/questions:
 - Are offered to prove that someone other than the respondent committed the conduct, or
 - If the evidence/questions concern specific incidents of the complainant’s prior sexual behavior with respect to the Respondent and are offered to provide consent.
 - Note: Rape shield protections do **not** apply to respondents.
 - “[E]vidence of a pattern of inappropriate behavior by an alleged harasser must be judged for relevance as any other evidence must be.”

- Provide written notice to individuals who you intend to interview (including the complainant, the respondent, and witnesses) which must contain the following information:
 - Date,
 - Time,
 - Location,
 - Participants, and
 - Purpose of interview.
- Must provide sufficient time for the individual to prepare to participate.

- Carefully prepare a list of questions in advance for each interview.
- Be prepared to revise questions as you learn more from the party or witness during the interview.
- Select a neutral, comfortable setting for the interview(s).

- Introduce yourself and explain your role.
- Develop a rapport.
- Explain why they are being interviewed.
- Explain retaliation policy.
- Ask if they have any questions.

- In general, ask **open-ended** (vs. close-ended) questions.
 - i.e. who, what, how, etc.
- Ask questions **one at a time**.
- Avoid multiple choice questions.
- Avoid jumping from one line of questioning to another.
- Avoid suggesting the answer in your question.
- Avoid questions that are not relevant.

Interview Basics – Active Listening

- Remain attentive and carefully listen to everything being said.
- Watch for non-verbal behaviors.
- Avoid unnecessary writing.
- Avoid whispering between investigators unless absolutely necessary.
- Never accuse an interviewee or participate in heated arguments.

- Don't guide the interview unless necessary, allow the complainant to narrate without interruption.
- Use trauma-informed interview techniques.
- Speak carefully and accurately.
 - Avoid words that imply consent.
 - Do not victim blame.

- Ask if the party or witness has any questions.
- Request copies of evidence potentially available.
- Discuss confidentiality:
 - Note: **Cannot** prohibit a party from discussing allegations.
- Explain next steps.

- Document interview.
- Update witness list and evidence list.
- Write down follow-up questions for others.
- Consider whether additional allegations were raised that must be brought to Title IX Coordinator.

- Investigator may need to gather evidence other than statements from parties and witnesses.
- Some evidence may be identified by the parties or witnesses, and the investigator may identify other evidence.
 - Follow up with individuals regarding evidence mentioned in interviews.
- Examples of possible evidence:
 - Copies of text messages and voicemail messages
 - Copies of phone bills
 - Posts on social media
 - Medical records (only allowed with signed permission)
 - Police reports
 - Photographs, video recordings, video surveillance
 - Diaries/journals

Parties' Opportunity to Review Evidence and Respond

- Prior to completion of investigative report, must provide the complainant and the respondent (and advisors) equal opportunity to inspect and review any evidence that is directly related to the allegations.
 - Electronic or paper copy.
 - Includes evidence upon which district does not intend to rely in reaching a determination regarding responsibility.
 - Includes inculpatory and exculpatory evidence, from all sources.
- Parties must have at least 10 days to submit a written response.
- The Investigator must consider the written responses prior to completion of investigative report.

- Prior to writing report, consider:
 - Has all evidence been examined?
 - Have all leads been exhausted?

- Investigative report must fairly summarize all relevant evidence.
 - Summarize the facts.
 - Both undisputed and disputed.
 - Do not make any determinations.

- Information to include in investigative report:
 - Introductory information:
 - Identify those involved (the complainant, the respondent, witnesses, investigator)
 - Date filed
 - Name of person and office that received allegations
 - Background:
 - History of relationship between parties
 - Other details surrounding allegations
 - List specific allegations.
 - Description of alleged policy violations.
 - Include definition of prohibited conduct from policy
 - Witnesses interviewed (and those not interviewed)
 - Procedures followed (and any abnormalities)
 - Explanation of how report is organized (chronologically, by allegation, etc.).
 - Statement regarding relevant evidence:
 - Ex: “All relevant information gathered during the course of the investigation has been included in this report.”

- Appendices to report may include:
 - Summaries/transcripts of interviews
 - Documents/physical evidence
 - Timeline of incident
 - Timeline of investigation
 - Witness list/flowchart
 - Diagrams

Opportunity to Review/Respond to Investigative Report

- Must send the complainant and the respondent (and any advisors) the investigative report, at least 10 days prior to the Decision-maker making a determination regarding responsibility.
 - Electronic or hardcopy.
- The complainant and the respondent must have opportunity to review and respond to the investigation prior to the Decision-maker issuing a decision.

- Parties (including the complainant, the respondent, and witnesses) have the right to elect not to participate in the investigation, a recipient cannot retaliate against them.

- 20 U.S.C. §1232g(b) prohibits the release of a student's education records, or personally identifiable information contained therein, other than directory information unless one of the exceptions applies or there is signed permission.
 - There is no exception in the rule to allow the release of confidential education records of a student who has filed a sexual harassment complaint against another student or school employee.
 - There is no exception to the rule to allow release of confidential discipline records for a student who is found to be responsible for sexual harassment in a K-12 school.
 - FERPA exception that allows release of the name of a perpetrator of a sexual offense and the discipline does NOT apply in the K-12 setting. See 20 U.S.C. sec. 1232g(b)(6).

The Investigation and FERPA

- Be aware of the requirements of FERPA to keep student information confidential.
- Be aware of the confidentiality provisions of the IDEA for any student who has a disability.
- To the extent possible, the Investigator should avoid reviewing confidential student information during the investigation unless it is directly related to the complaint.
 - Ex. it is doubtful that the complainant's grades would be relevant to an investigation.
- Confidential student information should be redacted from anything shared with the other side unless there is written permission to share the information.

Title IX Regulations and Conflicts - FERPA

- The U.S. Department of Education in *New York et al v. DeVos* attempted to reconcile this by claiming:
 - “The Rule allows a recipient to redact personally identifiable information from education records if that information does not directly relate to a formal complaint’s allegations and acknowledges that such redactions may even be required under FERPA.”
- QUERY – what if the information is confidential student information protected by FERPA, but would also directly relate to a formal complaint allegation?

Title IX Regulations and Conflicts – IDEA

- Similar to FERPA, evidence that may be reviewed by the Investigator and/or Decision-maker could include special education records of either the complainant or the respondent.
 - The mandate to release all evidence reviewed during the investigation to the parties would appear to violate the IDEA’s confidentiality mandates.
- The requirement that a single decision-maker decides discipline could result in violation of the IDEA’s required procedures prior to making a disciplinary change in placement.

- The Formal Complaint,
 - Keep each investigation file for at least 7 years,
 - Including the disciplinary sanctions, if any, and
 - Including remedies and any supportive measures provided.
- Records of any appeals and the results of the appeal,
- Record of any informal resolution and the results therefrom,
- All materials used to train Title IX Coordinators, Investigators, Decision-makers, and any person who facilitates an informal resolution process,
- Records of any actions, including any supportive measures, taken in response to a report or formal complaint of sexual harassment.

- The district can always offer an informal resolution process for issues between students or between employees
 - Before doing so, the district must provide the parties with a written notice disclosing:
 - The allegations,
 - The requirements of the informal process including circumstances under which it would preclude a party from resuming the formal complaint process from the same allegations,
 - Any party has the right to withdraw from the informal resolution process at any time, and
 - Any consequences from engaging in the informal resolution process including whether records from it will be maintained and/or shared in the formal complaint process.
- Informal resolution process is NOT available for complaints that an employee harassed a student

- In K-12 school, an in-person hearing is NOT required prior to determining whether the respondent is responsible for sexual harassment
- The decision-maker still must:
 - Give each party the opportunity to submit relevant questions that the party wants asked for any party or witness,
 - Provide each party with the answers to those questions, and
 - Allow for follow-up questions

Note that the burden of proof and the burden of gathering evidence sufficient to reach a determination regarding responsibility rests on the district, not the parties

The Decision Making Process

- The decision-maker must be a different person than the investigator and the Title XI Coordinator
- The decision-maker has two roles
 - Determine responsibility
 - Issue discipline
- In certain circumstances there may be a different decision maker for each step

- In K-12 school, an in-person hearing is NOT required prior to determining whether the respondent is responsible for sexual harassment
- The decision-maker still must:
 - Give each party the opportunity to submit relevant questions that the party wants asked for any party or witness,
 - Provide each party with the answers to those questions, and
 - Allow for follow up questions

Note that the burden of proof and the burden of gathering evidence sufficient to reach a determination regarding responsibility rests on the district, not the parties

- The Written Decision on Responsibility
- This is a formal written decision that must at a minimum:
 - Identify the allegations,
 - Describe the procedural steps taken to investigate,
 - Make findings of fact,
 - Make conclusions regarding the application of the code of conduct to the facts,
 - Contain a statement of rationale for the result as to each allegation,
 - Identify any disciplinary sanctions to be imposed,
 - Identify whether remedies will be provided to the complainant, and
 - Inform the parties of the appeal procedures.

The decision must be provided to both parties simultaneously
Again – Beware of FERPA

The Appeal Process

- Is available to both parties,
- Must be decided by a different decision-maker,
- Only bases for appeal:
 - Procedural irregularity that affected the outcome of the matter;
 - 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; and
 - The Title IX Coordinator, Investigator(s) or Decision-maker(s) had a conflict of interest or bias for or against the complainants or the respondents generally or the individual complainant or respondent that affected the outcome of the matter.

- The other party must be notified in writing if an appeal is filed
- Both parties must be given a reasonable, equal opportunity to submit a written statement in support of, or challenging the decision,
- The decision-maker must issue a written decision describing results of the appeal and the rationale for the result,
- The decision must be given to each party simultaneously.

- The regulations prohibit any recipient (i.e., school district) or “other person” from
 - Intimidating,
 - Threatening,
 - Coercing, or
 - Discriminating against any individual

for the purpose of interfering with any right or privilege secured by Title IX.

Protected Activity Under Title IX

- Reporting sexual discrimination including harassment,
 - On your own behalf or on behalf of someone else
- Filing a discrimination complaint,
- Assisting someone in reporting discrimination or filing a complaint,
- Participating in any matter in an investigation into sexual harassment,
 - e.g., protects witnesses
- Protesting any form of sexual discrimination.
 - Although we are discussing harassment today, this would include protesting alleged lack of equality in athletic teams, etc.

Retaliation Defined Under Title IX Regulations

- The regulations prohibit retaliation not just for engaging in a protected activity but:

Because an individual has “refused to participate in any manner in an investigation, proceeding, or hearing under this part.”

Retaliation according to the regulations includes:

“charges against an individual for code of conduct violations that do not involve sex discrimination or sexual harassment, but arise out of the same facts or circumstances as a report or complaint of sex discrimination, or a report or formal complaint of sexual harassment, for the purposes of interfering with any right or privilege secured by Title IX or this part ...”

- For Students:
 - Discipline for engaging in protected conduct
 - Reduction in grades
 - Removal from a sports team
 - Refusal to allow play time on the sports field
 - Writing a poor recommendation for college
 - Harassment in class or on a team
 - Denial of an honor

- For employees:
 - Demotion
 - Termination
 - Other discipline
 - Giving a poor job reference
 - Giving unequal work assignments

- Establishing retaliation requires proving the intent to retaliate
- This is rarely proven by direct evidence
- Is generally based on circumstantial evidence
- What must be proven
 - Did the complainant (i.e., the person alleging retaliation) engage in protected activity
 - Was the complainant subjected to an adverse action?
 - Does the evidence suggest a connection between the protected activity and the adverse action?

- Is there something that would rebut a finding of retaliation
 - Is there an explanation for the adverse action that is legitimate on its face?
- If so, is there evidence that the reason given is really a pretext to retaliate against the individual for the protected conduct?
 - Things to look at:
 - Did the alleged retaliator know about the protected activity
 - The time between the protected activity and the adverse action
 - Any evidence that would suggest the alleged retaliator really took the action because of the protected activity
 - Does the explanation make sense
 - Were others in a similar situation who did not engage in protected activity treated better
 - Did others engage in similar protected activity without adverse action

- As with any other investigation, complete confidentiality cannot be guaranteed and should not be promised.
- Confidentiality, however, should be maintained as much as possible.
- The regulations require the district to maintain the confidentiality of identity of an individual who reports or complains of sex discrimination or harassment, including filing a formal complaint of sexual harassment, as well as the identity of the complainant, respondent and witnesses, *except as required to carry out the purposes of the Title IX regulations.*

- The U.S. Department of Education, Office of Civil Rights published proposed changes to the regulations on June 23, 2022 – the 50th anniversary of Title IX
- Final Regulations are now expected in October 2023
- The current regulations remain in effect and must be followed by school districts until new regulations are formally adopted
- Will completely overhaul – yet again, how Title IX Complaints are processed by school districts

Questions???



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Thank you for joining us!

Please visit our website at:

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