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Title IX: Responding to Discrimination on the Basis of Sex in K-12 School Systems

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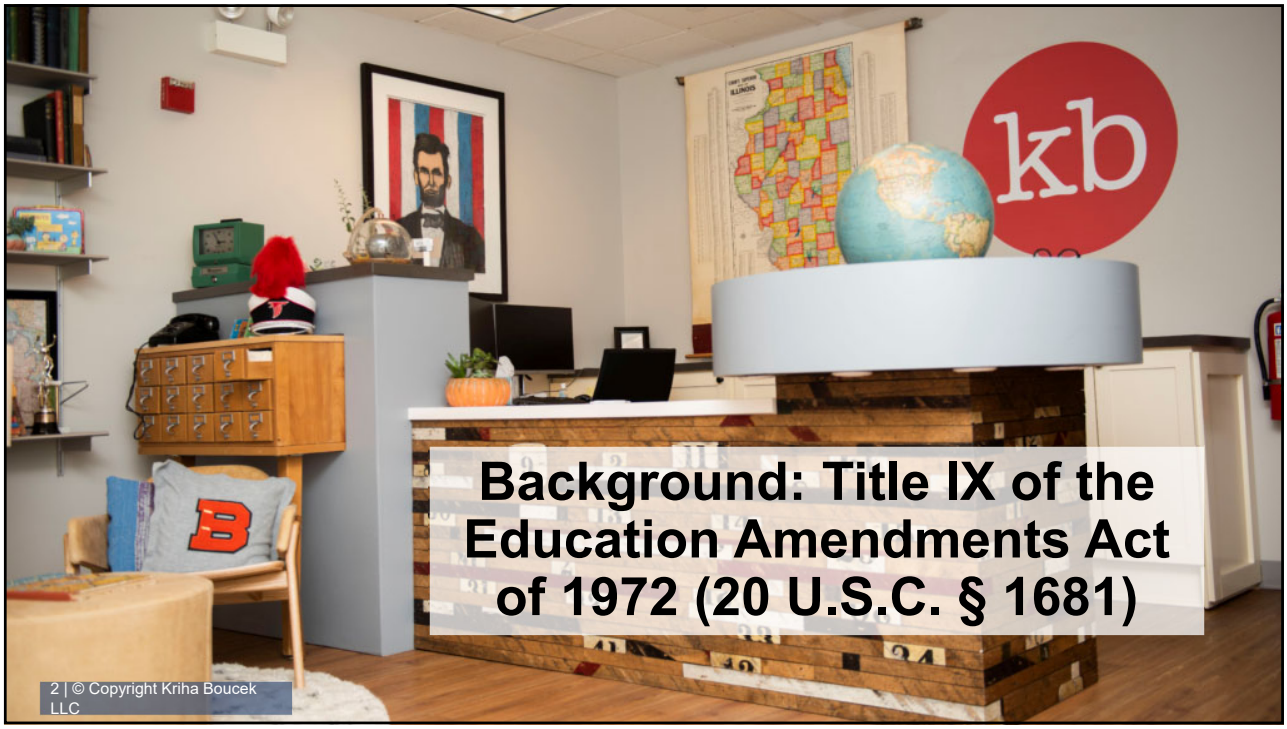

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Brief History

- **1972** : Title IX passed and signed into law
- **1975** : DOE issued first Regulations to implement Title IX (34 CFR Part 106 et seq.)
  - Addressed equal opportunities for men and women in hiring, admissions, athletics, etc.
  - Did not specifically address sexual harassment as a form of sex discrimination
- **1997, 2001, 2011, 2014, 2015, 2017** : DOE's Office for Civil Rights issued policy guidance documents to address sexual misconduct as a form of sex discrimination
- **Mid-2017** : DOE started drafting proposed Regulations
- **Nov. 29, 2018** : DOE published "Notice of Proposed Rulemaking"
- **2019** : DOE held committee hearings, listening sessions about proposed regulations
- **May 6, 2020** : DOE issued Final Regulations (& 2000+ pages explaining them...)
- **Aug. 14, 2020*** : Final Regulations *must be fully implemented*
  - **In early June, 17 states (including IL)+ D.C. filed a lawsuit against DeVos and the DOE seeking to block implementation of the final regulations; in May, the ACLU joined with other organizations to file their own lawsuit to block the final rules*

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"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."
- 20 U.S.C. § 1681(a)

Sexual misconduct constitutes sex-based discrimination.

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Illinois Sex Equity Rules

"**Equal Access**" = the availability of opportunity without discrimination on the basis of sex, going beyond simple admission to a course or activity to include full and unrestricted participation in educational and experiential processes.

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Sex Equity Policy

"It is the policy of the State of Illinois and the State Board of Education that ***no person shall be subjected to discrimination on the basis of sex in any program or activity supported by school district funds***."

- Rules largely aimed at ensuring **equal access** to opportunities and **equal treatment**
  - Compare to new Title IX Regulations aimed at addressing *Sexual Harassment*
- Requires schools to have written policies on sex equity and a grievance procedure for investigating complaints of alleged discrimination on the basis of sex
  - "Uniform Grievance Procedure" + "Non-discrimination" + "Harassment" policies all in place to meet this requirement
- Supplement to Title IX obligations
  - Title IX is the floor/baseline of what a school must do
  - Sex Equity Rules elevate and clarify expectations

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Applying The Sex Equity Rules

- **Sports / Extra-Curricular Activities**:
  - Required to offer ***equal opportunities*** to participate in athletic programs / activities
    - Different rules for contact v. non-contact activities
  - "The nature and extent of the athletics programs offered by a system shall accommodate the interests and abilities of both sexes to a comparable degree"
    - Factors looked at here =
      - Selection of sports offered; scheduling of games and practices, ratios of coaches to athletes; quality of coaching and officiating; supplies and equipment; budget
- **Facilities:**
  - Okay to have single-sex locker rooms, bathrooms, shower facilities
    - Transgender Student Rights – Equal access to ALL students to choose the restroom, locker room, shower facility they prefer
- **Classes**:
  - All courses open to all students; advertised to attract all students
    - Can segregate students for portions of a class or class sessions when discussing human sexuality content
    - PE → can be segregated for purpose of participating in contact sports
  - History, roles, and contributions if both sexes should be discussed in curriculum

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Comparing Key Definitions

(Because they differ from the new Title IX Regs …)

Illinois Rules:

"***Educational System***" = any local public education agency in its entirety, including elementary, secondary and unit districts, area vocational education centers, and special education cooperatives.

"***Program***" = a series of courses or set of activities leading toward identified educational or experiential student outcomes.

"***Sexual Harassment***" = unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature.

Title IX Regulations:

"Education Program or Activity" = includes locations, events, or circumstances in the United States over which the District exercised substantial control over both the Respondent and the context in which the sexual harassment occurred.

- Extends off-campus where the District has "substantial control" over a Respondent and the context of where the alleged incident occurred

"*Title IX Sexual Harassment*" = Conduct on the basis of sex that satisfies one or more of the following: (1) A District employee 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 the District's education program or activity; or; (3) *Sexual assault, dating violence*, *domestic violence*, or *stalking*

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WHO are the parties involved?

- **Complainant:** an individual who is alleged to be the victim of conduct that could constitute sexual harassment
- **Respondent:** an individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment

- **Title IX Coordinator:** schools must designate a Title IX Coordinator to coordinate all the school's efforts to comply with the Title IX Regulations
- **Investigator:** individual(s) who investigate(s) allegations sexual harassment made in a formal complaint and create(s) investigative report; may be Title IX Coordinator, but not in all circumstances *(more on this later)*
- **Decision-maker:** individual(s) who make(s) a determination of responsibility based on investigative report, evidence, statements, and any hearings as to alleged sexual harassment made in a formal complaint; *cannot* be the same person(s) as the Title IX Coordinator or Investigator *(more on this later)*
- **Appeals Decision-maker:** individual(s) who review(s) the appeal of any determination of responsibility; *cannot* be the same person(s) as the Title IX Coordinator, Investigator, or original Decision-maker *(more on this later)*

34 CFR §§ 106.8, 106.30(a), 106.46(b)(5)-(8)

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WHAT does Title IX Cover?

- **"Sexual harassment":** covers three classifications of sex-based discriminatory conduct:
  1. ***Quid pro quo***: employee offers some kind of aid/benefit/service in exchange for unwelcome sexual conduct
  2. Any incident of ***sexual assault***, ***dating violence***, ***domestic violence***, or ***stalking***, as defined in the Clery Act / Violence Against Women Act
  3. Unwelcome conduct that is:
     - *Based on sex;*
     - ***So severe* AND *pervasive* AND *objectively offensive;***
     - That it effectively DENIES a person *equal access* to educational program or activity.

34 CFR § 106.30(a)

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34 CFR § 106.30(a)

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WHAT does Title IX Cover?

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  2. Any incident of ***sexual assault***, ***dating violence***, ***domestic violence***, or ***stalking***, as defined in the Clery Act / the Violence Against Women Act
     - **Sexual Assault** means "an offence classified as a forcible or nonforcible sex offense under the uniform crime reporting system of the Federal Bureau of Investigation" 20 U.S.C. 1092(f)(6)(A)(v) [Clery Act]
     - **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. 34 U.S.C. 12291(a)(10) [VAWA]

34 CFR § 106.30(a)

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  1. --
  2. Any incident of ***sexual assault***, ***dating violence***, ***domestic violence***, or ***stalking***, as defined in the Clery Act / the Violence Against Women Act
     - **Domestic violence** includes "felony or misdemeanor crimes of violence committed by a current or former spouse or intimate partner of the victim, by a person with whom the victim shares a child in common, by a person who is cohabitating with or has cohabitated with the victim as a spouse or intimate partner, by a person similarly situated to a spouse of the victim under the domestic or family violence laws of the jurisdiction receiving grant monies, or by any other person against an adult or youth victim who is protected from that person's acts under the domestic or family violence laws of the jurisdiction." 34 U.S.C. 12291(a)(8) [VAWA]

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WHAT does Title IX Cover?

- **"Sexual harassment":** covers three classifications of sex-based discriminatory conduct:
  1. --
  2. Any incident of ***sexual assault***, ***dating violence***, ***domestic violence***, or ***stalking***, as defined in the Clery Act / the Violence Against Women Act
     - **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) [VAWA]

34 CFR § 106.30(a)

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WHAT does Title IX Cover?

- **"Sexual harassment":** covers three classifications of sex-based discriminatory conduct:
  1. --
  2. --
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     - *Based on sex;*
     - ***So severe* AND *pervasive* AND *objectively offensive*;**
     - That it effectively DENIES a person *equal access* to educational program or activity.

"*Davis* standard"

QUESTIONS?

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Example Scenarios:

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Example 1:

A fifth grader tells her teacher that a student in her class is trying to touch her chest and her private areas, and saying things to her like "I want to get in bed with you" and "I want to feel your boobs." The student says the classmate also put a door stop in his pants and tried to rub up against her in the hallway. This kind of behavior occurred nearly every day over several months. The student tells her teacher this is why her grades have dropped, that she is always nervous and anxious in school now. The girl's mother also met several times with the principal to discuss the behavior.

Does this behavior, as described, meet the definition of sexual harassment under the Title IX regulations? If so, which prong does it fit, and why?

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Example 2:

A male student in seventh grade is the target of bullying by football players. On multiple occasions, the players pushed the student against a locker, ridicule him, threaten him, and say things like he "would be better off dead" or that he "should commit suicide." Given what is said to the student, teachers suspect that he is the target of bullying because he is perceived as "not masculine enough" and not presenting himself in the same way as other male students at the school. On one occasion, the student was bullied in a classroom, and when he asked to leave the classroom to go to the guidance counselor's office, his teacher told him that he "needed to stop being a baby."

Does this behavior, as described, meet the definition of sexual harassment under the Title IX regulations? If so, which prong does it fit, and why?

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Example 3:

A female high school student is the only female student on the school's wrestling team. Over the course of about three years that the student was on the wrestling team, the (male) coach made the following comments:

- **When the female student was wrestling with a male student, the coach said to him, "How does it feel knowing that's probably one of the only women you'll ever have on top of you?" Another time, while the same two students were wrestling, the coach said to the male student, "she'll be the only girl you'll touch."**
- **To the female student directly, the coach said, "You'll have to be a 'boy' on the team," at least twice. He also said that she would have to have "strap-ons" [referring to prosthetic penises] at least four times.**
- **The coach asked the student if she was having her menstrual cycle during a wrestling match, because he could see her "pad" through her singlet, and then laughed about it with another coach.**

Does this behavior, as described, meet the definition of sexual harassment under the Title IX regulations? If so, which prong does it fit, and why?

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WHEN does Title IX Apply?

- **"Actual notice":** Title IX applies when *certain individuals* have notice—either informally through verbal or written report, or via a formal written complaint by a Complainant—of sexual harassment or allegations of sexual harassment. These individuals include:
  - Title IX Coordinator; or
  - Any school official with authority to institute corrective measures on school's behalf; or
    - *"The mere ability or obligation to report sexual harassment or to inform a student about how to report sexual harassment, or having been trained to do so, does not qualify an individual as one who has authority to institute corrective measures"*
  - Any employee of elementary/secondary school *(K-12 ONLY)*.
- **IF a Formal Complaint is filed, there are additional temporal restrictions:**
  - At the time of filing, Complainant MUST be participating in or attempting to participate in the school's education program or activity

34 CFR § 106.30(a)

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Discussion: Is there "actual notice" under the following scenarios:

- A parent calls the school principal to talk about an incident on the playground where a first grader pulled down her kindergarten-age daughter's pants and tried to touch her private area.

- A cafeteria worker often sees a group of eighth grade boys pushing around another boy wearing earrings and other jewelry, calling him "gay" and "fag." The worker isn't exactly sure what is going on, but she definitely hears those terms.

- A bus driver, on his daily route, nearly every day sees the same seventh grade girl get on at the third stop, and then two stops later, another seventh grade boy gets on and sits next to her. The first several times, she would get out of her seat and move away, but he would follow her or block her in to the seat. He appeared to be saying things that made her appear upset, but the driver couldn't hear what they were. After a few weeks, she stopped trying to move but would stare out the window and pull her sweatshirt up over most of her face when he sat down.

- *Same as above, but the bus driver asks the girl if the boy is making her uncomfortable, and she says that every day, he says he wants to "hold her down and do what he wants with her," which makes her scared.*

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Discussion: Is there "actual notice" under the following scenarios:

- An undergraduate student, who is on summer break but plans to return to school in the fall, writes an email to the university's Title IX Coordinator to say that the previous spring, her roommate's boyfriend came in to her dorm room, drunk, and sexually assaulted her.

- The Dean of Students receives an anonymous letter alleging that a professor (who is named in the letter) has propositioned several male students in a biology class that if they agree to go out to dinner with her, she will grant them extra credit.

- A graduate student TA, during group office hours for his students, overhears a few of the undergraduate students talking about something that happened at a party the previous weekend. They said one of their friends was sexually assaulted at a party that occurred at a fraternity house. The graduate student does not know the names of any of the people involved.

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WHERE does Title IX Apply?

- **"Educational Programs or Activities":** includes—
  - **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
  - Any building owned or controlled by a student organization that is officially recognized by a postsecondary institution.

- **"Against a person in the United States":**
  - Sexual harassment that occurs abroad does not fall within the purview of Title IX and its implementing Regulations.
  - BUT schools can choose to respond to sexual misconduct that occurs abroad via alternative means in Student/Employee Codes of Conduct.

34 CFR §§ 106.30(a), 106.44(a)

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Examples of "Educational Programs & Activities"

- In the hallway between classes?
- On the school bus?
- At the convenience store across the street from school, where students work an after-school job?
- At an "away" volleyball tournament held at another district's school?
- On a field trip to a museum?
- At a student's house?
- A student's Instagram page?
- The marching band trip, on a cruise ship to the Caribbean?

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Examples of "Educational Programs & Activities"

- The campus recreation center?
- In the dining hall?
- At a student's internship at a consulting firm in town?
- In the backyard of the house where members of the college's Ultimate Frisbee team (a recognized student organization) live?
- An elementary school where students volunteer as tutors in the afternoon?
- At the annual homecoming bonfire, which is well-known, but not officially school sanctioned?
- The Facebook page for an undergraduate residence hall, monitored by residence life staff?

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HOW Do Schools Fulfill Their Title IX Obligations?

General Response: A school with actual knowledge of sexual harassment in an education program or activity against a person in the United States must respond *promptly* and in a manner that is *not deliberately indifferent.*

- **"Deliberately indifferent"**: clearly unreasonable in light of known circumstances
- **Must treat complainants and respondents equitably**
- Must offer **supportive measures** to an alleged victim
- Must not impose disciplinary measures against Respondent until full grievance process carried out *(more on this later)*

Maintaining other Legal Obligations: While responding to Title IX allegations, schools should not compromise other rights including:

- **First Amendment**: e.g., freedom of speech
- **Fifth/Fourteenth Amendments:** due process rights
- **FERPA requirements**
- **Title VII obligations**
- **Parents' rights** to act on behalf of minor child
- **State laws and regulations**
  - *BUT* if State law conflicts with federal law, then federal law preempts State law

34 CFR §§ 106.6(d)-(h), 106.44(a)

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HOW Do Schools Fulfill Their Title IX Obligations?

Supportive Measures: *non-disciplinary*, *non-punitive* individualized services* offered free of charge as appropriate and reasonably available, in order to restore equal access. Title IX Coordinator helps get these resources. Examples:

- Counseling
- Extension of deadlines
- Modification of work/class schedules
- Campus escort services
- Mutual restrictions on contact*
- Changes in housing/work locations
- Leaves of absence
- Increased security

*Must NOT *unreasonably burden* the other party; remain confidential

When a Formal Complaint is filed, then school must respond by following grievance procedures that conform to the Regulations' requirements

Questions??

34 CFR §§ 106.30(a), 106.44(b)

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Title IX Formal Complaints & Grievance Procedures

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Basic Response Requirements

- Equitable treatment for all parties
- Objective evaluation of *all* relevant evidence, both inculpatory and exculpatory
- No conflicts of interest/bias of Title IX Coordinator, Investigator(s), Decision-maker(s)
- Presumption of innocence until proven guilty
- Training for Title IX Coordinator, Investigator(s), Decision-maker(s) on the Regulations and impartiality
- Same standard of evidence for students and employees
- Reasonably prompt timelines for procedures
- Clear descriptions of grievance & appeals procedures, range of disciplinary sanctions & remedies
- Supportive measures available to Complainants and Respondents at any point
- Can't require production of legally privileged evidence

34 CFR § 106.46(b)(1)(i)-(x)

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Impartiality

- We all have biases, whether conscious or unconscious
  - https://implicit.harvard.edu/implicit/
  - https://trustandjustice.org/resources/intervention/implicit-bias
- Resist the urge to categorize
- Reflect critically on your own identity and experience
- Recognize when your identity and experience may affect your judgment
- Hold yourself accountable

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Impartiality

- An impartial party puts aside one's preconceived beliefs or the urge to judge
- Listen equally to all sides and focus on understanding the viewpoints of all involved
  - X Listening impartially to others takes **time**
  - X Listening impartially requires **awareness** of one's own biases
  - X Listening impartially means **asking questions that open up dialogue**, rather than close it down
- Strategies like summarizing what you have heard and reflecting back can help you avoid your biases and ensure you are correctly understanding the person you're questioning
- Acknowledge where differences between accounts/perspectives exist; rather than seek to smooth over differences, seek more details
- Take care that your words, tone of voice, and body language are neutral

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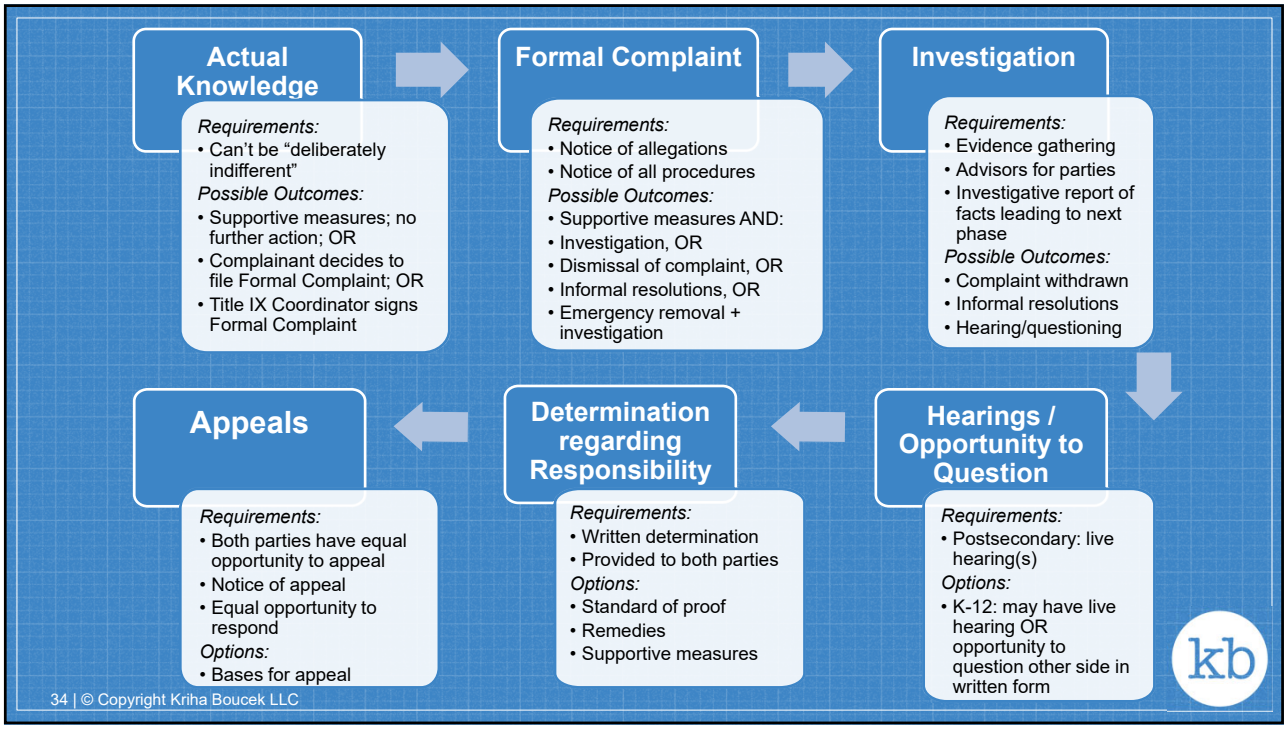

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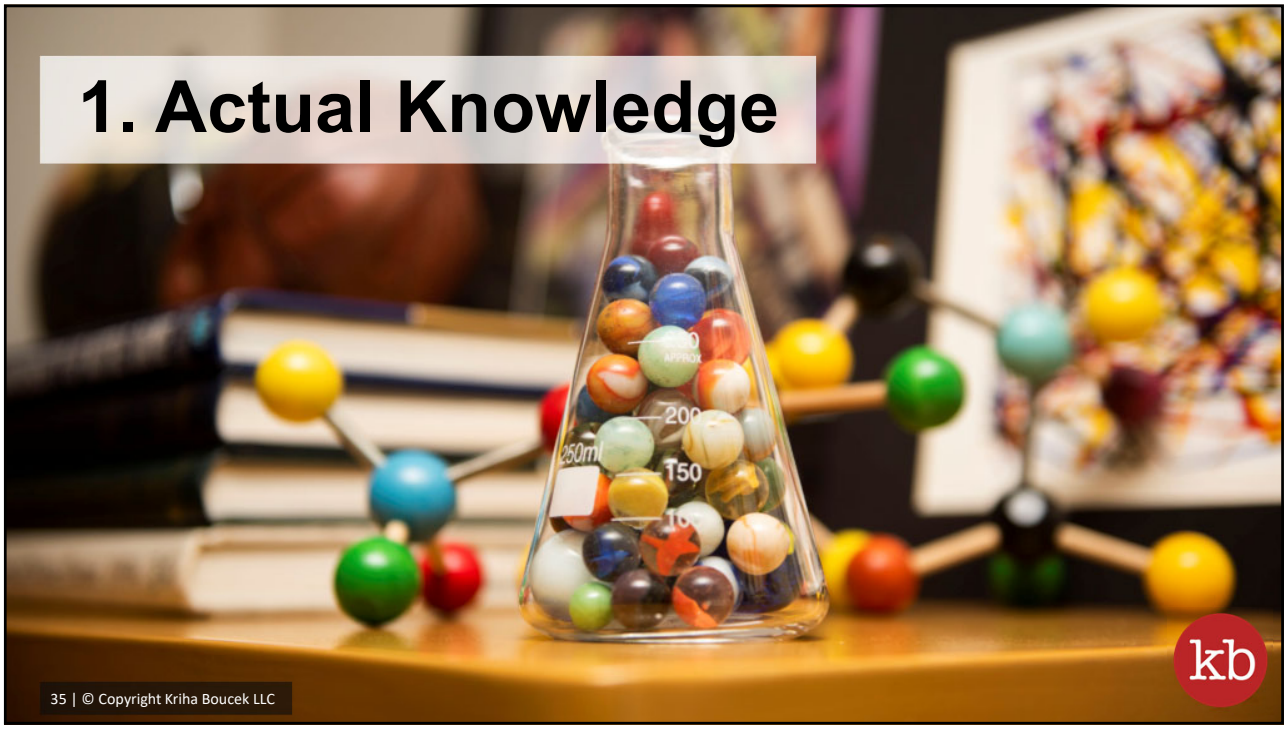

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1. Actual Knowledge

- Triggered by notice of allegations of sexual harassment via
  - Informal verbal or written notice to relevant individual *[see "actual knowledge" standard]*, OR
  - Formal Complaint filed by Complainant/signed by Title IX Coordinator *[Go directly to Phase 2]*
- Informal notice triggers several possible responses, all of which require that school not be "deliberately indifferent" *[see "deliberately indifferent" standard]:*

Informal verbal or written notice	Supportive measures for alleged victim	No further action taken.
Informal verbal or written notice	Supportive measures for alleged victim	Alleged victim **files Formal Complaint**
Informal verbal or written notice	Supportive measures for alleged victim	Alleged victim declines to file Formal Complaint; Title IX Coordinator instead **signs Formal Complaint**

34 CFR §§ 106.30(a), 106.44(a)

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1. Actual Knowledge

When the Title IX Coordinator "Signs" a Formal Complaint Instead of Complainant

- When would it be necessary?
  - If Complainant is not willing or eligible (e.g., has graduated) or identified to sign
  - But potential safety risk continues for other students/employees
- What specific circumstances might justify the Title IX Coordinator signing a formal complaint?
  - The school has actual knowledge of a pattern of alleged sexual harassment by a perpetrator in a position of authority
  - The school wishes to investigate allegations in order to determine whether it has probable cause of employee sexual misconduct that affect school's ESSA obligations
  - A Title IX Coordinator receives multiple reports of sexual harassment against the same respondent
- Factors to consider
  - Pattern of alleged conduct, involvement of violence/weapons
  - Seriousness of alleged harassment, age of student harassed, prior reports
  - CANNOT use the "credibility" of report as a factor in deciding to sign formal complaint

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Breakout Discussion #1

A bus driver, on his daily route, nearly every day sees the same seventh grade girl get on at the third stop, and then two stops later, another seventh grade boy gets on and sits next to her. The first several times, she would get out of her seat and move away, but he would follow her or block her in to the seat. He appeared to be saying things that made her appear upset, but the driver couldn't hear what they were. After a few weeks, she stopped trying to move but would stare out the window and pull her sweatshirt up over most of her face when he sat down. The bus driver asks the girl if the boy is making her uncomfortable, and she says that every day, he says he wants to "hold her down and do what he wants with her," which makes her scared. *After his route ends, the bus driver calls the school principal to tell her about this incident, and the principal relays the information to the Title IX Coordinator.*

You are the Title IX Coordinator. What are your next steps, when you hear this report?

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2. Formal Complaint

Requirements of Formal Complaint:

- A document (electronic or physical)
- Alleging sexual harassment, and
- Requesting an investigation
- EITHER:
  - Filed by a Complainant and signed by this individual [may not be anonymous]

  OR
  - Signed by Title IX Coordinator. *(see next slide)*

Procedure for filing a Formal Complaint must be included in the school's Title IX policies that are "prominently displayed" on website and/or in Student and Employee Handbooks, along with Title IX Coordinator's contact information. Form may be provided via web portal.

34 CFR §§ 106.30(a), 106.8(b)-(c)

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2. Formal Complaint

- Formal Complaint triggers several possible responses:

1	Formal Complaint of allegations falling **outside** Title IX purview	School must dismiss complaint.	Supportive measures / no further action.
2	Formal Complaint of allegations falling **within** Title IX purview	Notice to all parties of allegations	Grievance procedures; begin **investigation**
3	Formal Complaint of allegations falling **within** Title IX purview	Notice to all parties of allegations	Parties mutually agree to **informal resolution**
4	Formal Complaint of allegations falling **within** Title IX purview	Notice to all parties of allegations	Emergency removal or administrative leave for Respondent

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2. Formal Complaint

Potential Outcome #1: Dismissal

- If alleged conduct, even if proved 100% true, would not meet the definition of sexual harassment OR does not fit temporal or geographic scope of Title IX, then conduct falls outside of Title IX's purview and school **must dismiss** the complaint.
  - School can still choose to address in other ways, such as through Code of Conduct.
- School ***may choose*** to dismiss a complaint with allegations that fall within Title IX's purview, *IF:*
  - Complainant wants to withdraw Formal Complaint, or
  - Respondent leaves, or
  - School cannot gather sufficient evidence to reach a formal conclusion.
- Title IX Coordinator must provide written notice of dismissal and reasons to all involved parties
  - Complainant can choose to appeal dismissal.
- **School <u>can</u> continue to provide supportive measures to Complainant.**

34 CFR §§ 106.46(b)(3); 106(b)(8)

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2. Formal Complaint

Potential Outcome #2: Investigation Triggered Under Grievance Procedures

- If alleged conduct in Formal Complaint falls within Title IX purview, Title IX Coordinator must provide **written notice to all parties** who are known:
  - Notice of grievance process, including optional informal resolution process
  - Notice of the allegations of sexual harassment, including sufficient details for Respondent to prepare a response:
    - Identities of all involved parties, if known
    - Description of alleged conduct that meets Title IX definition of sexual harassment
    - Date/location of incident, if known
    - Statement that the Respondent is presumed innocent
  - Inform parties of their right to an advisor of their choice
  - Inform parties of their right to inspect/review ALL evidence
  - Inform parties of any provision in school's Code of Conduct that prohibits knowingly making false statements or submitting false information
- **EITHER** Investigation proceeds, **OR** parties agree to Informal Resolutions

34 CFR § 106.46(b)(2)

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2. Formal Complaint

Potential Outcome #3: Parties Opt for Informal Resolution

- Title IX Coordinator must first receive Formal Complaint and follow notice procedures to all parties, discussed on previous slide
- Requirements for Informal Resolution option:
  - CANNOT be compelled; parties must mutually agree
  - May be facilitated at any time before determination regarding responsibility reached under grievance procedures
  - Parties must provide written consent to informal resolution process
  - Before conclusion of informal resolution process, either party has the right to withdraw and return to grievance procedure; any information revealed during informal resolution process may be shared in the context of a renewed grievance procedure
- School CANNOT use informal resolution for allegations of an employee's sexual harassment of a student

34 CFR § 106.46(b)(9)

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2. Formal Complaint

Potential Outcome #3: Parties Opt for Informal Resolution

- Options for Informal Resolution
  - Restorative Justice
  - Mediation
  - Arbitration
  - Others. . . No specific format required
  - **Ensure that, before offering any informal resolution, those who will conduct it are extensively trained in effective techniques
- Informal Resolutions may reach agreements between the parties, facilitated by the school, that include measures similar to supportive measures for the Complainant, BUT they could also include disciplinary/punitive measures for the Respondent
- Regulations allow for flexibility of Informal Resolution approach

34 CFR § 106.46(b)(9)

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2. Formal Complaint

Potential Outcome #4: Emergency Removal and/or Administrative Leave, Pending Outcome of Investigation & Grievance Procedures

- Title IX Coordinator must first receive Formal Complaint and follow notice procedures to all parties, discussed on previous slide
- Emergency Removal only possible in very specific circumstances: School must undertake an *individualized safety and risk analysis* and determine:
  - An **immediate** threat
  - To the **physical** health and safety of any student or other individual
  - Arising from the allegations of sexual harassment.
- If school undertakes emergency removal, must provide Respondent with notice and an opportunity to challenge the removal immediately after removal occurs. [*Consider IDEA, ADA, 504 implications for special education students*]
- Administrative Leave: school may place an employee on administrative leave pending the outcome of a grievance process. [*Consider obligations to your union employees.*]

34 CFR § 106.44(c)-(d)

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3. Investigation

- Burden on school, not parties, to gather evidence
- Cannot request evidence that would be legally privileged; parties can opt to waive this privilege
- Equal opportunity for parties to present witnesses
  - Fact
  - Expert
- Cannot restrict ability of either party to discuss allegations or to gather evidence
- Parties have equal opportunity to select advisors of their choice (may be attorney)
- Must provide notice to all parties of all hearings, interviews, and meetings to allow time to prepare
- Equal opportunity for parties to inspect/review any and all evidence so each party can meaningfully respond
  - Must send all evidence to parties before final report created
  - Must allow at least 10 days to respond

34 CFR § 106.46(b)(5)

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Trauma-Informed Response for Investigations

1. Understand the impact of trauma on a neurobiological, physical, and emotional level

2. Promote safety and support

3. Know positive ways to respond that avoid re-traumatization

4. Provide choice with a goal of empowerment

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3. Investigation

How To Conduct Investigation

- Plan investigation scope and timeline (must be prompt)
- Identify and interview all involved parties
  - Interview the Complainant and the Respondent (separately) about what happened; additional interviews may be needed as evidence is uncovered
  - Ask open-ended questions about the incident(s) in the complaint
    - Pre-script standardized, open-ended questions, screened for neutral language
    - Allow time for follow-up questions, for more details
    - Do not use judgmental or projecting language in questions
    - Asking about how certain events made the interviewee feel is okay
    - Asking sensory questions may also help memory recall
  - Ask each person for the names of potential witnesses for additional interviews
  - Understand the trauma-informed approach to interviewing

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3. Investigation

How To Conduct Investigation

- Gather any other relevant documentation available, such as documents, files, audio and video recordings, security camera footage, entry/exit logs, text messages, emails, social media posts, physical evidence, police reports, diary entries, etc.
  - ✗ You cannot request privileged information, such as medical records, educational records, or correspondence between a party and their lawyer—but a person may voluntarily offer this information
  - ✗ Think about what kinds of evidence could potentially corroborate the statements made in the interviews, and ask for if from interviewees
  - ✗ If a search is necessary, remember it must comply with 4th Amendment rights
- Once compiled, send all evidence to Complainant and Respondent (and their advisors) with plenty of time--at least 10 days--to meaningfully respond
- Do not judge credibility of any parties or their statements, but document details that do/do not align with other parties' accounts and other evidence

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Tips for handling witnesses

- Introduce yourself and explain your purpose
- Do not promise confidentiality, you cannot guarantee it
- Allow witnesses to fully answer questions before you speak again
- Do not put words in the witnesses mouth
- Ask open ended questions first and then ask leading questions to confirm your understanding of the facts
- Don't be afraid to ask uncomfortable questions
- End the interview by letting them know the following:
  - When you expect to be done with the investigation
  - What your steps are after the investigation
  - Whether they will be informed of the outcome of the investigation
  - Whether you may need to interview them a 2nd time

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Additional considerations for witnesses

- Should you tape record interviews, use a stenographer, or use a note taker?
- Where should you maintain the records of your interview?
- If witnesses are students, should you involve their parents?
- For witnesses that are not subject to discipline, should you allow union representatives to be present?
- Should an employee who is the respondent be placed on leave for the term of the investigation?
- Is there a potential crime involved that requires notifying the police or DCFS?

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Corey's Law and Student Interviews

- Corey's Law, 105 ILCS 5/22-85, was passed as the result of a student suicide after the student was interview by a school resource officer and threatened with criminal charges
- The law requires notice to parents before a student is interviewed by law enforcement, an SRO, or school security personnel
- Must make reasonable efforts to allow parents to be present for interview

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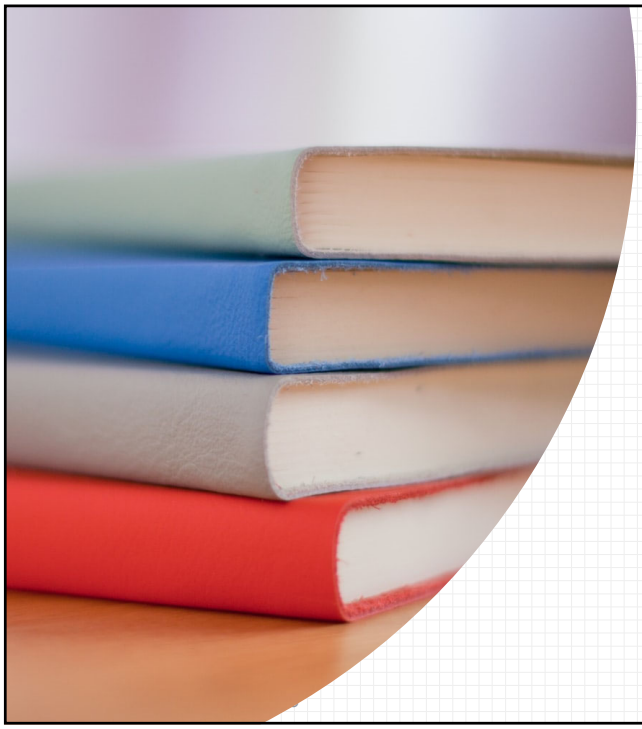

Interviewing the Complainant

- If the Complainant is a minor who is claiming they were sexually assaulted, school districts must wait to conduct an interview until the police and DCFS determine their involvement and for a forensic interview to take place by the Child Advocacy Center

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Interviewing the Respondent

- Union members are entitled to Union representatives if the investigation could result in discipline
- Ask about their knowledge of the complaint
- Ask about their relationship with the complainant
- Ask open ended questions and get as much detail as possible
- Ask if they know of witnesses that can corroborate their side of the story

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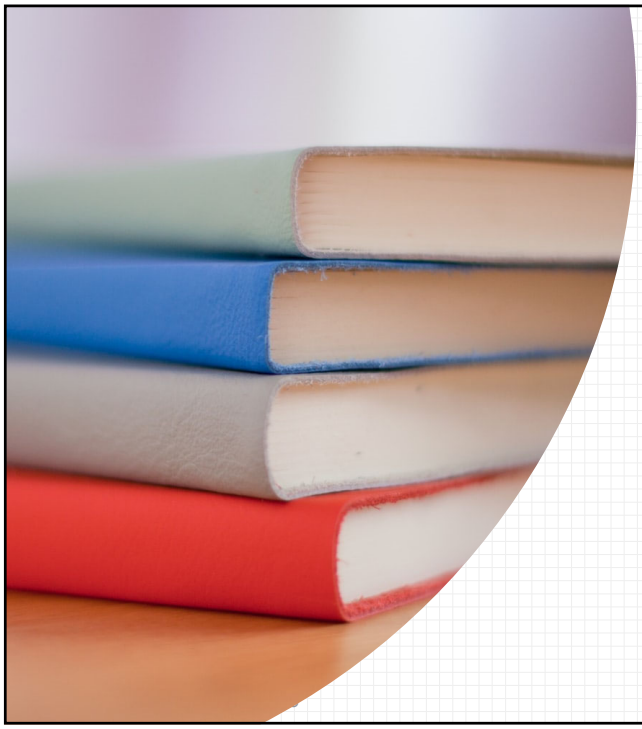

Atwell Notice/Garrity Warning

Public employees do not have the right to remain silent. You can compel them to talk to you about the information contained in the complaint, even if the complaint involves criminal activity. However, you must give them a warning that explains that the information they share with you cannot be used against them to prosecute them.

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Collection of Records

- Ask all witnesses if they have or know of any documents regarding the incident
- Identify whether there could be any video footage of the incident and secure it immediately
- Determine whether or not you need to gather email and discuss the request with the technology department

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Collection of Other Artifacts

- You have the right to search and seize items that are stored in workplace related areas (desk, file cabinets, classroom closets, district technology) as long as the employee does not have a reasonable expectation of privacy in those areas
- Personal belongings that are out in the open can be viewed, but not searched
- Contact Human Resources and/or your school attorney before you search the personal belongings of a school employee

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Avoid Investigation Pitfalls

- Don't assume anything – the truthfulness of witnesses, the veracity of the complaint, the guilt of the alleged respondent – until you have evidence
- Don't promise confidentiality because you cannot guarantee it
- Don't demonize the alleged victim or protect the alleged perpetrator
- Stay neutral and, if you can't stay neutral, you shouldn't be investigating
- Ensure proper documentation of the investigation

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3. Investigation

Investigator(s) must create a final *investigative report* that fairly summarizes all the relevant evidence, without making a determination of responsibility.

It is not the investigator's job to determine credibility of parties, witnesses, or evidence. It is the investigator's job to gather the relevant evidence, and turn this over to the decision-maker to weigh credibility during next phase.

- Create categories of facts that parties agree on, and facts that are in dispute, without inserting your own judgment of what is true or false
- Must send full report to each party at least 10 days before any hearing
- Must send full report to the Decision-maker in advance of any hearing / opportunity for parties to question each other

At any time, Complainant has right to withdraw the Complaint.

At any time, parties can mutually agree to Informal Resolutions, as applicable.

34 CFR § 106.46(b)(5)

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Breakout Discussion

You are the Title IX Coordinator for a K-12 school district. You receive a formal complaint signed by a parent on behalf of his 16-year-old son, who is a member of the high school varsity diving team. The parent's complaint alleges that Coach Smith, who coaches both the girls' and boys' diving teams—as well as teaches world geography and is part of the teacher's union—has been texting photos of his genitalia to members of the boys' diving team, including to his son. Though the parent acknowledges that the phone number from which the texts originate is not the same as the cell phone on record for Coach Smith, the parent says that his son and his teammates feel like it couldn't be anyone else, because it has happened to three of them, the coach has the cell phone numbers for all the team members, and the boys think the coach looks at them "weird" when in the locker room.

In small groups, create an investigation plan. What are your first steps? In what order will you arrange your investigation? Who will you notify and when? Who will you interview and when? What kinds of evidence will you look for?

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4. Hearing / Opportunity to Question

K-12

- Live hearing permitted, but not required
- If no live hearing, then must provide opportunity to question other party

College/University

- Live hearing required

34 CFR § 106.46(b)(6)

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4. Hearing / Opportunity to Question

Questions and Their Relevance

- Parties may only be asked *relevant* questions
  - Does it tend to make a fact more or less probable than without that information?
  - Is it likely to prove or disprove a fact or an allegation?
- Same standard for live hearing and for written opportunity to question
- Decision-maker must determine relevance of questions *as they are asked*, and *before* they are answered

34 CFR § 106.46(b)(6)(i)

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4. Hearing / Opportunity to Question

Questions and Their Relevance

- Parties may only be asked *relevant* questions
  - *Legally privileged information cannot be used*
  - *No party's treatment records can be used without voluntary written consent*
  - *Questions about complainant's "prior sexual behavior or predisposition" are NOT relevant and must be excluded, UNLESS offered either 1) to prove someone else committed the alleged conduct, or 2) to prove consent, because it has to do with sexual behavior between complainant and respondent**
    - *Prior consent to past sexual conduct does not imply future consent
- Decision-maker must determine relevance of questions *as they are asked*, and *before* they are answered

34 CFR § 106.46(b)(6)(i)

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4a. Live Hearing

- Presided over by Decision-maker [individual or group]
- Must be **direct**, **oral**, **live** questioning of parties and witnesses, including cross-examination
  - May be facilitated by technology, as long as simultaneous
  - Parties may not directly ask questions; only **advisors** for parties
  - **Advisors** for parties must be able to ask opposing party and witnesses all relevant questions
  - If a party does not have an **advisor**, school must appoint one
- If a party/witness will not submit to cross-examination, then Decision-maker ***cannot use any*** statements or evidence from that person in making decision
- Hearing must be recorded (audio or film or transcript), and made available to all parties for inspection and review after hearing

34 CFR § 106.46(b)(6)(i)

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4a. Live Hearing

Advisors Required—but Who?

- The Complainant and Respondent must both have an advisor
- Each has a right to select any advisor of their choice; *may* be an attorney (at their own expense) but does not have to be an attorney
- If a party does not have an advisor, **school must appoint one.**
- Advisor not required to do more than relay represented party's question to the other party/witnesses
- Advisors not required to be trained in any way
- Potential options?
  - Student affairs professionals trained on Title IX
  - Academic affairs professionals trained on Title IX
  - Human Resources representatives (as applicable)
- Recommend against appointing:
  - Someone with special access to Title IX investigation records
  - Attorneys from the school's Office of Legal Counsel
  - Instructors/faculty members

34 CFR § 106.46(b)(6)(i)

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4a. Live Hearing

Technology

- Upon request of any party, must permit cross-examination to occur with the parties located in separate rooms with technology facilitating the ability of all participants to see and hear the person answering questions
  - **Testifying party must be seen and heard by all in real time, but testifying party does not have to be able to see all other parties
  - *(i.e., if the Complainant is testifying, Complainant must have video/audio on, but Respondent does not have to be seen by Complainant)*
- Hearings must still be recorded, or have a transcript of all testimony created, including when technology is used
- Ensure all staff have been trained on the technology in use
- Ensure technology used does expose the testimony to anyone outside those participating in the hearing

34 CFR § 106.46(b)(6)(i)

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4b. Opportunity to Question

For K-12 schools only, and only if there is no live hearing, then must provide an opportunity for each side to ask each other written questions:

- After investigative report sent to each party, each party must have the opportunity to submit written, relevant questions that it wants from any other involved party or witness
- School must facilitate written back-and-forth:
  - Must provide the answers to all the questions requested
  - Must allow for additional, limited follow-up questions from each party
- Same rules about relevance as in previous slide

34 CFR § 106.46(b)(6)(ii)

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Decision-maker reviews investigative report, all evidence, all statements/answers from parties and witnesses during any live hearings or opportunity to question.

Decision-maker weighs the credibility of all relevant evidence and statements.

Next phase: Determination regarding Responsibility. . .

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5. Determination Regarding Responsibility

- Decision-maker applies the school's chosen standard of evidence for Title IX investigations of sexual harassment:
  - **Option 1**: "preponderance of the evidence" standard
  - **Option 2**: "clear and convincing" standard
  - School must choose one of these standards for ALL sexual harassment investigations—those involving just students, just employees, and both students and employees.

[Decision point: which standard will your school apply?]

34 CFR § 106.46(b)(1)(vii)

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5. Determination Regarding Responsibility

- Decision-maker issues written determination regarding responsibility that includes:
  - Identification of allegations of sexual harassment that meet Title IX definition
  - Description of all procedural steps
  - Findings of fact supporting the determination
  - Conclusions regarding application of school's Code of Conduct to the facts
  - Statement of, and rationale for, result as to *each* allegation and determination regarding responsibility
  - Any disciplinary sanctions imposed on Respondent
  - Any other remedies and supportive measures designed to restore/preserve equal access for Complainant
  - **Procedures and permissible bases for appeal**
- School must provide written determination to parties simultaneously
- Title IX Coordinator implements remedies / coordinates disciplinary sanctions

34 CFR § 106.46(b)(7)

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6. Appeals

- Parties can appeal:
  - The determination of responsibility, OR
  - School's decision to dismiss complaint
- Bases for appeal:
  - Procedural irregularity that *affected the outcome*
  - New evidence not reasonably available previously that *could affect outcome*
  - That Title IX Coordinator OR Investigator(s) OR Decision-maker(s) had a bias or conflict of interest that *affected the outcome*
    - Generally, either for or against complainants or respondents, OR
    - Specifically, either for or against an involved party
  - Another basis for appeal allowed by the school, as long as it's equally available to either party

34 CFR § 106.46(b)(8)

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6. Appeals

- School must do following for an appeal:
  - Notify the other party in writing when an appeal is filed and on what basis
  - Implement appeals procedure equitably
  - Find new Appeals Decision-maker who
    - Has not been involved in the grievance process thus far, and
    - Has been trained and is neutral/impartial
  - Give both parties a reasonable, equal opportunity to submit a written statement about the outcome
  - Issue a written decision describing the result and rationale of the appeal
  - Provide decision simultaneously to all parties

34 CFR § 106.46(b)(8)

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Recordkeeping

The Title IX Coordinator must keep records for 7 years of:

- Formal Complaints, including
  - Supportive measures
  - Basis for school's conclusion that its response was not deliberately indifferent
  - Documentation of measures designed to restore or preserve equal access
  - If no supportive measures provided, documentation reasons *why* response was not deliberately indifferent [i.e., clearly unreasonable in light of known circumstances]
- Investigations
- Recordings/transcripts of hearings
- Determinations regarding responsibility
- Disciplinary sanctions for Respondent, remedies provided Complainant
- Appeals
- Informal Resolutions

34 CFR § 106.46(b)(10)

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Training

All training materials used to train

- Title IX Coordinator
- Investigator(s)
- Decision-maker(s)
- Appeals Decision-maker(s)

Training must include:

- Regulations
- How to use technology
- How to avoid prejudgment
- How to serve impartially
- How to determine issues of relevance of questions or evidence

Training materials must be kept for seven years AND **posted publicly to school's website for public review and scrutiny.**

34 CFR § 106.46(b)(10)(i)(D)

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Retaliation

Retaliation is prohibited against anyone involved in a Title IX complaint, investigation, or grievance procedure.

"The exercise of rights protected under the First Amendment does not constitute retaliation prohibited"

School can charge someone with a Code of Conduct violation for making a "materially false statement in bad faith" during grievance proceeding.

34 CFR § 106.71

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School Board Policy Integration

Consider Policy Revisions to Align with Title IX Regulations to:

- Section 2:260 – Uniform Grievance Procedure
- Section 7:10 – Equal Educational Opportunities
- Section 7:20 – Harassment of Students Prohibited

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Next Steps for Schools:

1. Decide who will fulfill the various roles
2. Update policies and procedures in accordance with the Regulations
   - Who needs to be involved?
   - Approval by the Board? Committee? Unions?
3. Train staff
4. Communicate information to all stakeholders
   - Update website, handbooks, etc.
5. For any questions that arise, consult experts or counsel

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Dissemination Activity

- Using the hypothetical provided, draft a plan for investigating a Title IX complaint, including the questions you will ask, how you will handle an appeal, and the preparation for the outcome of the investigation

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