



Title IX Training Wilson County Schools

Grace Pennerat and Rebecca Williams

© 2022 Poyner Spruill, LLP

Overview

Title IX Purpose and Definitions

School District Obligations

The Players: Title IX Personnel

Title IX Reporting & Grievance Process

Title IX Process: Informal Resolution

Title IX Process: Investigation Procedures

Title IX Process: Written Report

Title IX Process: Determination of Responsibility

Impartiality, Bias, and Conflict of Interest

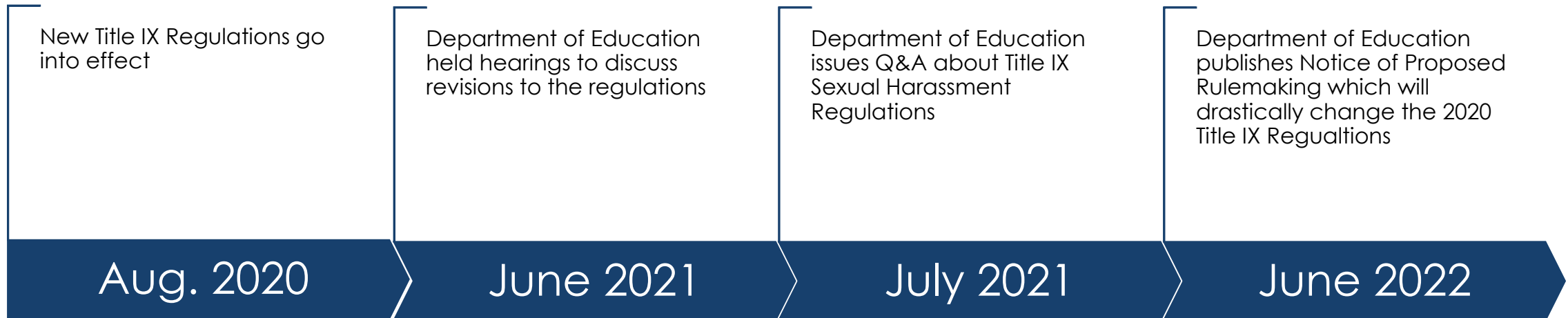
Relevance and Evidence

Case Studies



Title IX Purpose & Definitions

Recent Title IX Developments



What has changed with Title IX?

Sexual Harassment

- The final regulations make several changes intended to narrow the definition of “sexual harassment.”
- 3 types of prohibited sex-based conduct
 1. Quid Pro Quo
 2. Unwelcome Conduct
 3. Clery Act and Violence Against Women Act (“VAWA”) Components



A Review of the Types of Sex Discrimination

Quid Pro Quo

Occurs when:

- A school employee
- Conditions access to educational benefits
- On unwelcome sexual conduct

Note: This provision only applies to employee conduct

A Review of the Types of Sex Discrimination

Unwelcome Conduct

- Unwelcome conduct
- Determined by a reasonable person
- To be so severe **AND** pervasive **AND** objectively offensive that it **effectively denies** a person equal access to an education program or activity

Note: Severe conduct that constitutes sexual assault, dating violence, domestic violence, or stalking covered by the third prong of the definition of sexual harassment.




Unwelcome Conduct

- Conduct must be “unwelcome”
- Unwelcome conduct can take many forms
- However, the conduct still must meet the other two prongs of this definition: (1) severe, pervasive, and objectively offensive and (2) serves to deny access

Unwelcome Conduct

Severe, Pervasive, and Objectively Offensive

- Conduct must be severe, pervasive, and objectively offensive
- Determined based on a *“reasonable person”* standard



Denies Equal Access to the Education Program or Activity

- Does not require the complainant to have lost *all* access to the educational program/activity, but only *equal* access
- Includes a student withdrawing from a class, quitting an extracurricular activity, experiencing falling grades
- May involve development of mental or physical health complications

What is an "educational program or activity?"

The district's program or activity includes:

- Locations, events, or circumstances over which the recipient exercises substantial control over both the respondent and the context in which the sexual harassment occurs
- Behavior must take place in the United States

A Review of the Types of Sex Discrimination

Clery Act and VAWA Components

The following offenses, as defined in Clery and VAWA, are now specifically included as forms of sexual harassment:

- Sexual Assault 20 U.S.C. 1092(f)(6)(A)(v)
- Dating Violence 34 U.S.C. 12291(a)(10)
- Domestic Violence 34 U.S.C. 12291(a)(8)
- Stalking 34 U.S.C. 12291(a)(30)

A Review of the Types of Sex Discrimination

Sexual Assault, Dating Violence, Domestic Violence, Stalking

- Conduct covered by this prong of the sexual harassment definition need not be established as unwanted or as severe, pervasive and objectively offensive.
- Conduct need not be demonstrated to have denied the complainant's equal access to the educational program.

Sexual Assault

An offense classified as a forcible or nonforcible sex offense under the uniform crime reporting system of the Federal Bureau of Investigation. Includes:

- Sodomy, sexual assault with an object, fondling which occurs without consent or where the individual is incapable of consent due to age or mental or physical incapacity.
- Rape, defined as carnal knowledge of an individual without consent or where the person is incapable of consent due to physical or mental incapacity.

Dating Violence

Violence committed by a person:

- who is or has been in a social relationship of a romantic or intimate nature with the victim; and
- 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 USC § 12291(a)(10)

Domestic Violence

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 USC § 12291(a)(8)

Stalking

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 USC § 12291(a)(30)

Complainant

Complainant: A person who is alleged to be the victim of conduct that could constitute sexual harassment

NOT a third party who reports alleged sexual harassment perpetrated against someone else

NOT the Title IX Coordinator, even if the TIXC "signs" a formal complaint



Title

Respondent

Respondent: A person who has been reported to be a perpetrator of conduct that could constitute sexual harassment

When must schools respond to sexual harassment allegations?

School must respond when it has “actual knowledge” of sexual harassment that occurred/is occurring “in the school's education program or activity” in a manner that is not deliberately indifferent

- A recipient is only deliberately indifferent if its response to sexual harassment is unreasonable in light of known circumstances.
- “Actual knowledge” means a mandated reporter has notice of “sexual harassment or allegations of sexual harassment.”
- Old rule required a school to respond when it “knows or should have known” about the sexual harassment.
- A school with “actual knowledge” of sexual harassment in a school program or activity must respond promptly and in a manner that is not deliberately indifferent.

Note: In the K-12 context, all employees are mandated reporters.

**“Actual knowledge”
of sexual harassment
“in the school’s
education program or
activity.”**

- Reports of sexual harassment may be made by anyone, not just the alleged victim or a mandated reporter.
 - Reports can be made by phone, mail, email, letter, or by any means that result in the Title IX Coordinator receiving the report.
 - Reports can be made at any time, including non-business hours.
- “Program or activity” 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.”



School District Obligations

District Obligations

- Update policies to comply with new Title IX requirements
- Follow notice and posting requirements for antidiscrimination, Title IX policies, and training materials
- Train all employees involved in the Title IX process. This includes:
 - Title IX Coordinators
 - Investigators
 - Decision-makers
 - Individuals who facilitate the informal resolution process
 - Individual who handle appeals



District Training Obligations

- Training should include:
 - The definition of sexual harassment
 - The scope of the district's education program or activities
 - How to conduct an investigation
 - The grievance process, including hearings, appeals, and informal resolution processes, as applicable
 - How to serve impartially and avoid prejudgment of facts at issue, conflicts of interest, and bias
 - Issues of relevance of evidence



The Players

Title IX Personnel

Title	Responsibilities	Who?
Title IX Coordinator	<ul style="list-style-type: none">• Oversee and coordinate all Title IX responsibilities for the district• Oversee the district's response to Title IX reports and complaints• Implement supportive measures and remedies• Identify and address any pattern or systemic problem revealed by reports and complaints• Evaluate an alleged victim's confidentiality request, if one is made• File a formal complaint on behalf of a student/employee, if necessary	Must be Employee May Not Serve as Decision-Maker

Title	Responsibilities	Who?
Investigator	Conduct a Fair, Objective and Impartial Investigation Differentiate b/w Related & Relevant Evidence & Privilege	Staff or External May Not Serve as Decision-Maker
Decision Makers	Evaluate Evidence, Make & Write Decision, “Rule” on Relevancy during Cross Examination	Staff or External Cannot Serve in Any Other Capacity
Advisor(s)	Question Opposing Party & Witnesses	None required; Party provided, Staff, or External
Informal Resolution Facilitator	Informal Resolution Processes	Staff or External



Title IX Reporting & Grievance Process

Title IX Process: Initiation

- Begins with the initial report of sexual misconduct made to the Title IX Coordinator
- Both complainants and respondents should be treated equitably in a predictable process
 - The respondent is presumed to be not responsible for the alleged conduct and does not have to prove innocence.
 - No disciplinary sanctions will be imposed before the grievance process is completed.

IX

Title IX

Title IX Process: Initiation

- Upon received a report of sexual harassment, the Title IX Coordinator must promptly contact the complainant to discuss:
 - The availability of supportive measures with or without filing a formal complaint;
 - Supportive measures must be offered even if a complainant does not wish to initiate or participate in a grievance process
 - Discuss the complainant's wishes with respect to supportive measures; and
 - Explain the process for filing a formal complaint.





Supportive Measures

The Title IX Coordinator should discuss with the parties the availability of supportive measures and whether they wish to utilize any such measures. Supportive measures can include:

- Counseling
- Classwork modifications/extensions of deadlines
- Classroom changes
- Seating changes
- Mutual restriction on contact between the parties

Title IX Process: Initiation

The Title IX Coordinator should generally respect the wishes of the complainant with respect to filing a formal complaint. However, in certain instances where a complainant is not willing or able to do so, the Title IX Coordinator may sign a complaint against a respondent to ensure the district is not deliberately indifferent.

Some examples of when a Title IX Coordinator may sign a complaint include:

- The district has actual knowledge of a pattern of alleged sexual harassment by a perpetrator in a position of authority
- The district wishes to investigate allegations in order to determine whether it has probable cause of employee sexual misconduct
- A Title IX Coordinator receives multiple reports of sexual harassment against the same respondent.

Title IX Process: Initiation

Exercise of Rights by Parents or Guardians

- Parent(s) and guardian(s) have the legal right to act on behalf of a complainant, respondent, party, or other individual
- Including, but not limited to, filing a formal complaint.



Title IX Process: Notice of Allegations

The Title IX Coordinator must provide a written description to both parties in advance about the allegations of sexual harassment, including date, location, identities of parties (if known), and the alleged misconduct that constitutes sexual harassment.

The notice will include:

- A statement that the respondent is presumed not responsible for the conduct alleged and that a determination regarding responsibility will be made at the end of the grievance process;
- A description of the grievance process (including the possibility of informal resolution), standard of evidence, summary of possible sanctions, each party's right to select an advisor, each party's right to inspect and review evidence, appeal rights, and supportive measures;
- Sufficient details known at the time and with sufficient time (at least 10 days) to allow the parties to prepare a response before any initial interview;
- Information regarding any code of conduct policies that prohibit knowingly making false statements or submitting false information during the grievance process.



Title IX Process: Informal Resolution

Title IX Process: Informal Resolution

- If a formal complaint has been filed, an informal resolution process (e.g., mediation) may be used only if all parties agree to participate in an informal resolution process that does not involve a full investigation and adjudication.
- The Title IX Coordinator will appoint a facilitator who is free from conflicts of interest or bias and who has received special training for the role.
- Any party may decline or terminate an informal resolution process at any time prior to agreeing to a resolution, without penalty.

Note: The informal resolution process may not be used to resolve allegations that an employee sexually harassed a student.



Title IX Process: Dismissing a Formal Complaint

The Title IX Coordinator must decide if Title IX applies to the reported allegations. The complaint **must** be dismissed if the alleged conduct:

- Would not constitute sexual harassment even if proved;
- Did not occur in the school district's education program or activity; or
- Did not occur against a person in the United States.

The dismissal of the complaint does not preclude the district from taking disciplinary action under other district policies.

Title IX Process: Dismissing a Formal Complaint

The Title IX Coordinator **MAY** dismiss a complaint if:

- Complainant wants to withdraw complaint or any allegation therein
- Respondent is no longer enrolled or employed
- Specific circumstances prevent school from gathering evidence sufficient to reach a determination

The dismissal of the complaint does not preclude the district from taking disciplinary action under other district policies.

Emergency Removals

Students

- An accused student can be removed from the education program or activity on an emergency basis.
- School must conduct an individualized safety and risk analysis and determine that there is:
- An immediate threat to the physical health or safety of any student or other individual arising from the allegations of sexual harassment; and
- This immediate threat justifies removal from the education program/activity.
- The accused student must be provided with notice and an opportunity to challenge the decision “immediately” following the removal.

Employees

The final regulations do not limit an institution’s ability to place an employee on administrative leave during the pendency of a complaint. Whether such leave is paid or unpaid is at the institution’s discretion.

Note: These provisions do not in any way modify rights under IDEA (e.g., “change in placement”), §504, or the Americans with Disabilities Act.



Title IX Process: Investigation Procedures

Title IX Process: Investigation Procedures



The investigator should gather information by interviewing both parties and other witnesses and by collecting additional evidence.



The investigator should gather all evidence, inculpatory and exculpatory, directly related to the allegations.



The investigator should provide written notice in advance to parties who will be interviewed or requested to attend a meeting with sufficient time for the parties to prepare to participate.

This written notice will include date, time, location, participants, and purpose of the interview or meeting.



Title IX Process: Investigation Procedures

If the parties decline an informal resolution process, reported sexual misconduct of any kind will be adequately, reliably, and thoroughly investigated, regardless of whether the incident is the subject of a separate criminal investigation.

- The filing of a criminal complaint will ***not*** replace or hinder the district's investigation of a sexual misconduct violation.

The Title IX Coordinator will appoint an investigator (who may be the Title IX Coordinator himself or herself) who will thoroughly search for facts and evidence relevant to the claims made in the initial report or complaint.

- The investigator must be properly trained and free from conflicts of interest or bias.
- Throughout the course of an investigation, both parties should have an equal opportunity to discuss the allegations or gather evidence and to present the relevant evidence that they gather.

Title IX Process: Investigation Procedures

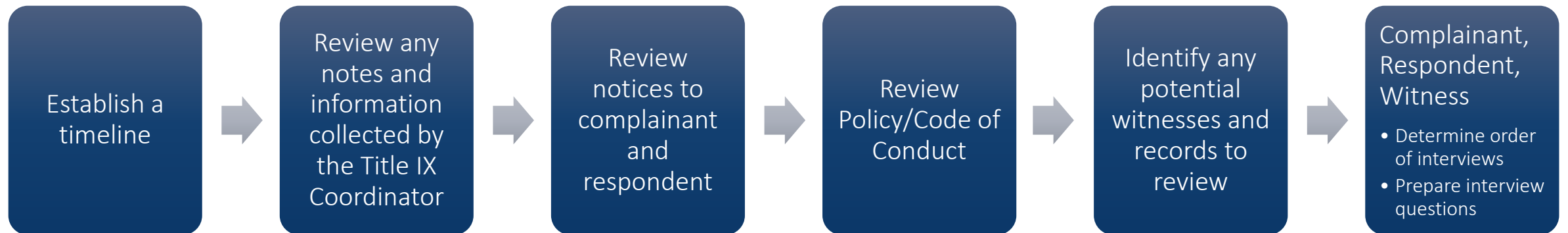
At the conclusion of the investigation, the parties will be allowed 10 days to inspect and review copies of any evidence directly related to the allegations.

- Information directly related to the allegation may not be redacted regardless of whether it is sensitive, confidential, or prejudicial.

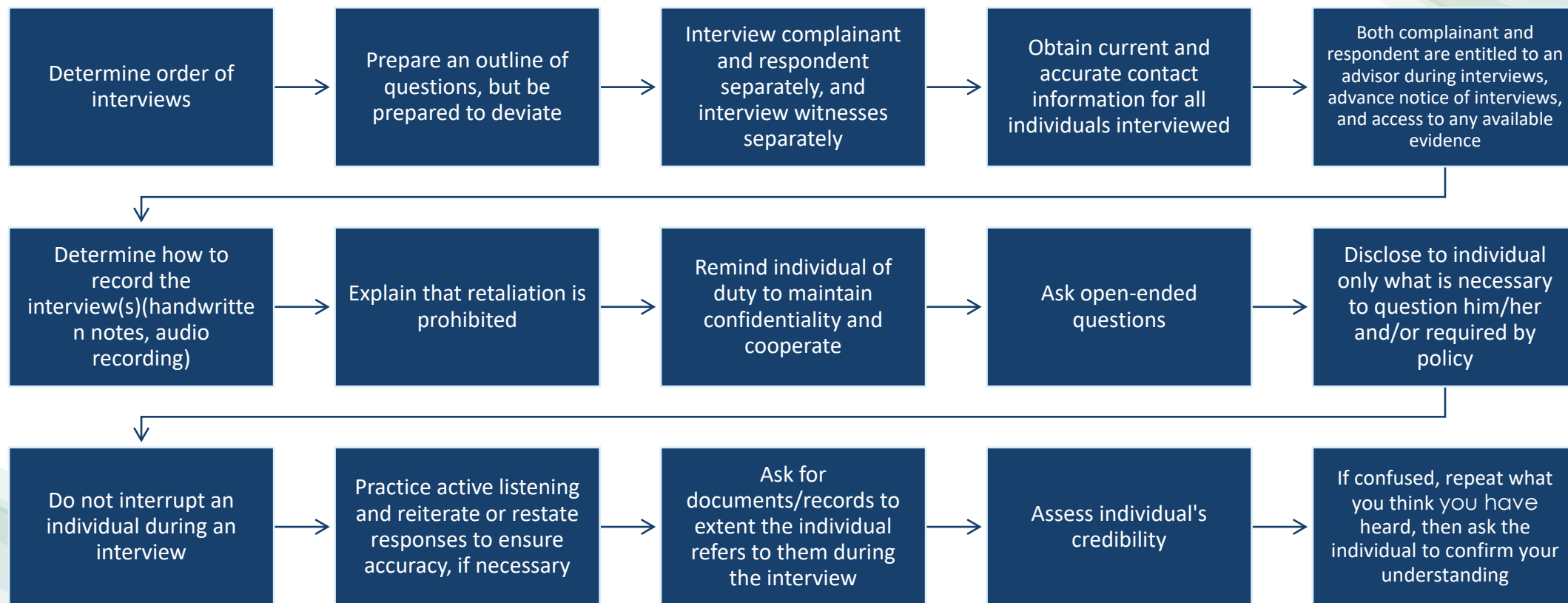
The parties may submit a written response to the investigator. The investigator must consider the written response prior to completing the final report.



Conducting the Investigation



Conducting Investigatory Interviews



Conducting Investigatory Interviews

Employee Interviews

- Duty to cooperate
- Garrity Warning
 - You are required to cooperate with our investigation and answer our questions without waiving any Fifth Amendment privilege against self-incrimination that might apply. If there is any investigation conducted by law enforcement into this situation, the information obtained from this interview could not be used against you by such authorities

Student Interviews

- No duty to cooperate
- Subject to Board Policy
- Parental Notification?



Collecting Evidence: Types of Evidence

Photographs and videos

Roster and seating charts

Schedules

Attendance records

Student records

Personnel records

Desk contents

Documents and other records,
including electronic records

Written reports

Project files

Court documents

Computer history logs

Emails, social media posts,
text messages

Letters or written messages

Collecting Evidence

Important Considerations

- Chain of Custody
- Search and Seizure
 - Fourth Amendment
 - Board Policy



TITLE IX



Title IX Process: Written Report

Title IX Process: Written Report

At the conclusion of the investigation, the investigator must prepare a written investigative report that fairly summarizes all directly related and relevant evidence, including inculpatory and exculpatory evidence.



The Title IX Process: Written Report

Drafting the investigative report:

- Fairly summarize all relevant evidence
- Provide contact for evidence
- Analyze the evidence and, if necessary, weigh credibility of witnesses
- Address any need for confidentiality with regard to complainants, witnesses, etc. Within the report. It may be advisable to use pseudonyms and a key be maintained in a separate document
- Apply the appropriate evidence standard
 - Preponderance of the Evidence: Review the evidence to determine whether it is more likely than not that the alleged conduct occurred
 - Clear and Convincing Evidence: Review the evidence to determine whether it is highly and substantially more probably to be true than not that the alleged conduct occurred

Title IX Process: Written Report

Contents of the Written Report

- Date
- Recipients
- Allegations
- Timeline and chronology of the investigation
- Relevant policies, procedures, ordinances, handbook provisions, etc.
- Review of evidence
- Findings of fact
- Conclusions
- Recommendations



The Title IX Process: Written Report

The investigator will simultaneously provide both parties with a written copy of the investigative report, and they will have at least 10 days before a hearing* or other type of determination regarding responsibility.

The report can be provided electronically or in hard copy but must be presented to both sides simultaneously.



The Title IX Process: Written Report

With or without a hearing, after the investigative report has been sent to the parties, the decision-maker(s) must afford each party the opportunity to submit written, relevant questions that a party wants asked of any party or witness, provide each party with the answers, and allow for additional, limited follow-up questions from each party.



**Title IX Process:
Determination of
Responsibility**

Title IX Process: Determination Regarding Responsibility

The independent, trained, decision-maker(s), *who cannot be the same person(s) as the Title IX Coordinator or the investigator(s)*, must issue a written determination regarding responsibility.

To reach this determination, the recipient must apply the standard of evidence set forth in board policy. The standard of evidence will be either:

- Preponderance of the Evidence; or
- Clear and Convincing Evidence.



Title IX Process: Standard of Evidence

- Preponderance of Evidence
 - Requires that the evidence be “more likely than not” to prove the matter at hand.
 - In other words, evidence only needs to be greater than a 50% likelihood of being true under the preponderance of evidence standard.
- Clear and Convincing Evidence
 - Means that the evidence being presented must be “highly” and substantially more probable to be true rather than untrue.
 - Higher standard than preponderance of the evidence standard.

Title IX Process: Written Determination Regarding Responsibility

- The written determination must be provided to both parties simultaneously and must include:
 - Identification of the allegations potentially constituting sexual harassment;
 - A description of the procedural steps taken from the receipt of the formal complaint through the determination, including any notifications to the parties, interviews with parties and witnesses, site visits, methods used to gather other evidence, and hearings held;
 - Findings of fact supporting the determination;
 - Conclusions regarding the application of the district's code of conduct to the facts;
 - A statement of, and rationale for, the result as to each allegation, including:
 - a determination regarding responsibility,
 - any disciplinary sanctions the recipient imposes on the respondent, and
 - whether remedies designed to restore or preserve equal access to the recipient's education program or activity will be provided by the recipient to the complainant.
 - The district's procedures and permissible bases for the complainant and respondent to appeal.

Sanctions

If the Sanction Involves a Long-Term Suspension

- North Carolina law still applies!
- NC Gen. Stat. 115C-390.7 requires that:
 - the student's parent be given written notice of the recommendation for long-term suspension and
 - the student be given the opportunity for a formal hearing

If the Sanction Involves an Expulsion

- North Carolina law still applies!
- NC Gen. Stat. 390.11 requires that:
 - the local board conduct a hearing to determine whether the student's continued presence in school constitutes a clear threat to the safety of other students or school staff

Note: The Title IX Coordinator is responsible for effective implementation of any remedies/sanctions

- **Students:** Disciplinary Consequences assigned in accordance with Student Code of Conduct
- **Employees:** Discipline, up to and including dismissal
- **Others:** Leave school property, Referred to law enforcement, Termination of contracts/agreements



Title IX Process: Appeals

Title IX Process: Appeals

A district must offer both parties an appeal from a determination regarding responsibility, and from a recipient's dismissal of a formal complaint or any allegations therein, on the following bases:

- 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 complainants or respondents generally or the individual complainant or respondent that affected the outcome of the matter.

Note: A recipient may offer an appeal equally to both parties on additional bases.

Title IX Process: Appeals

For all appeals, the district must:

- Notify the other party in writing when an appeal is filed and implement appeal procedures equally for both parties;
- Ensure that the decision-maker(s) for the appeal is not the same person as the decision-maker(s) that reached the determination regarding responsibility or dismissal, the investigator(s), or the Title IX Coordinator;
- Give both parties a reasonable, equal opportunity to submit a written statement in support of, or challenging, the outcome;
- Issue a written decision describing the result of the appeal and the rationale for the result; and
- Provide the written decision simultaneously to both parties.



Recordkeeping

A district must maintain for a period of seven years records of—

- Each sexual harassment investigation including any determination regarding responsibility and any audio or audiovisual recording or transcript that has been any disciplinary sanctions imposed on the respondent, and any remedies provided to the complainant designed to restore or preserve equal access to the recipient's education program or activity;
- Any appeal and the result therefrom;
- Any informal resolution and the result therefrom; and
- All materials used to train Title IX Coordinators, investigators, decisionmakers, and any person who facilitates an informal resolution process.*

**A district must make these training materials publicly available on its website*



Impartiality, Bias, & Conflict of Interest

Impartiality, Bias, & Conflict of Interest

Title IX Coordinators, investigators, decisionmakers, and persons who facilitate informal resolutions are prohibited from having conflicts of interest or bias against complainants or respondents generally, or against an individual complainant or respondent.

Impartiality

- Objective evaluation of all relevant evidence – inculpatory and exculpatory
- Credibility determination may not be based on a person's status as a complainant, respondent, or witness
- Complainants and respondents must be treated equitably
- Respondent is presumed not responsible for alleged conduct until a determination of responsibility is made at the conclusion of the grievance process
- Uniform application of the selected evidentiary standard
 - Preponderance of the Evidence
 - Clear and Convincing Evidence



Bias

"No complainant reporting Title IX sexual harassment or respondent defending against allegations of sexual harassment should be ignored or be met with prejudice"

- Prejudgment: *Complainant began crying while making a report of sexual harassment. You conclude that because the complainant is crying while describing the conduct at issue, the Complainant is telling the truth and the Respondent must be responsible.*
- Recipients are required to be impartial and "**free from bias**"
 - Explicit/Conscious Bias
 - Implicit Bias: Attitudes of stereotypes that affect our understanding, actions, and decisions in an unconscious manner



Bias

Appearance of Bias vs. Actual Bias

- How do you assess bias?
- "Whether bias exists requires examination of the particular facts of a situation and the Department encourages recipients to apply and objective (whether a reasonable person would believe bias exists), common sense approach to evaluating whether a particular person serving in a Title IX role is biased." (Preamble, 227)
- Department cautions against applying generalizations that might "unreasonably conclude" that bias exists"
 - Assumption that all "self-professed feminists" or "self-described survivors" are "against men"
 - Assumption that "a male is incapable of being sensitive to women"
 - Assumption that prior work as a defense attorney or victim advocate renders a person biased for/against complainants or respondents



Bias

Examples of Bias

- When talking with Title IX Complainants, the Title IX coordinator begins each initial meeting by asking who the Respondent is and what “he” did to the Complainant (assuming the Respondent is a male)
- A Title IX Decision-maker finds a Respondent in a case more credible than a Complainant because the Respondent speaks "perfect English" while the Complainant, who only knows English as a second language, does not

Conflict of Interest

Actual

Direct conflict between one's official duties and responsibilities, and a competing personal interest or obligation

Example: The Title IX Decision-maker's daughter is the Respondent in a sexual assault case

Perceived

A situation where it could reasonably be perceived that a competing interest could improperly influence the performance of one's official duties and responsibilities

Example: The Title IX investigator previously had a relationship with the family member of the Respondent

Potential

Where a personal interest or obligation could conflict with one's official duties and responsibilities in the future

Example: The Title IX Coordinator and Complainant's father co-chair a faculty committee and socialize outside of work on occasion

Impartiality, Bias, & Conflicts of Interest



Title IX

- Questions to consider:
 - Is a paid staff member biased in favor of the District (Institutional Bias)?
 - What is the relationship between and among the parties?
 - Have the adjudicative and administrative roles been confused?
- Keys:
 - Consider all evidence and testimony
 - Keep an open mind
 - Practice active listening

Impartiality, Bias, & Conflict of Interest

Avoiding Conflicts of Interest

- Adhere to investigation policies and procedures
- Avoid pre-determined conclusions
- Conscious awareness of personal biases

Avoiding Bias

- Consider the relationship between and among the investigator, decision-maker(s), and the parties, if any
 - Coach/Player, Teacher/Student
 - Prior Involvement in Title IX Complaints
- If either part has a history of conflict with the district, consider a third-party investigator



Sex Stereotypes

- Sex Stereotyping occurs when someone has a preconceived idea about how someone should be, act, or behave on the basis of that person's sex
- Examples of sex stereotyping:
 - Women have regret about sex and lie about sexual assault
 - Men are sexually aggressive or likely to perpetrate sexual assault
 - Men cannot be sexually assaulted
 - Women complainant about sexual harassment are just jumping on the #MeToo bandwagon

Impartiality, Bias, & Conflict of Interest

Hypothetical

Sarah is an investigator who conducts Title IX investigations. Sarah frequently makes comments to her colleagues that women who dress provocatively are "asking for it" and shouldn't be surprised when they're catcalled, stared at, and the like. A female student makes a report of sexual harassment against a classmate of hers for making sexually inappropriate comments to her and groping her behind. During Sarah's investigation into the incident, the female student describes that she was wearing a high-waisted skirt and crop top when the incident occurred.

In terms of prejudice on the facts, would you be concerned about Sarah's impartiality?

Issues of Relevancy of Questions & Evidence



Issues of Relevancy of Questions & Evidence

The Rules of Evidence do not apply
and cannot apply

"The final regulations do not allow a recipient to impose rules of evidence that result in the exclusion of relevant evidence; the decision-maker must consider relevant evidence and must not consider irrelevant evidence"
(Preamble, 311)

Relevant Evidence is evidence that is probative of a material fact concerning the allegations

Evidence that is not relevant:

- 1) Information protected by a legally recognized privilege;
- 2) Evidence about a complaint's prior sexual history;
- 3) Medical, psychological, and other treatment records (without written consent)

Relevancy Determinations: Legally Privileged Information

Not relevant absent written consent

During the investigation of a formal complaint, a recipient:

- "Cannot access, consider, disclose, or otherwise use a party's records that are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional...made and maintained in connection with the provision of treatment to that party unless the recipient obtains that party's voluntary, written consent" Section 106.45(b)(5)(i)
- A recipient's grievance process must not require, allow, rely upon, or otherwise use questions or evidence that constitute, or seek disclosure of, information protected under a legally recognized privilege



Relevancy Determinations: Prior Sexual History or Conduct

Evidence about a complainant's prior sexual history or prior sexual conduct are not relevant unless offered to provide that:

- Someone other than the respondent committed the conduct alleged by the complainant; or
- The questions and evidence concern specific incidents of the complainant's prior sexual behavior with respect to the respondent are offered to prove consent

Case Studies

Case Study 1

A female student needs three letters of recommendation to apply to college, including one from a current teacher. She really likes her math teacher and has done well in his class. One day after class she asks the male teacher to write her a letter of recommendation. He tells her that he would be happy to write a letter of recommendation for her if she sends him nude photos of herself. The student reports this behavior to the assistant principal.

- Is this behavior a Title IX violation? If so, what type of violation?
- What are the assistant principal's responsibilities?
- Can the informal resolution process be used to resolve this issue?

Case Study 2

The men's and women's swim teams practice at the same time and the same public swimming pool after school. The coach assigns the swimmers to lanes based on how fast each swimmer is. A female swimmer, who performed very well at the last meet, is assigned to the lane with the fastest male swimmers. At the end of practice, one of the male swimmers pins the female swimmer against the wall at the end of the lane and gropes her. Another teammate witnesses it, and he tells the assistant coach, who is an instructional assistant.

- Is this behavior a Title IX violation? If so, what type of violation?
- What are the instructional assistant's responsibilities?
- What supportive measures can be offered to the Complainant?
- Can the male swimmer be removed or suspended from the team?

Case Study 3

Sarah Billingsley is a parent to Eddie and a volunteer in Mr. Haskell's first grade classroom. The long-term substitute teacher for the second-grade classroom, Mrs. Cleaver, notices that Ms. Billingsley appears to be very uncomfortable every time Mr. Haskell is near. When Mrs. Cleaver asks her if anything is wrong, Ms. Billingsley confesses that Mr. Haskell sends her text messages containing sexually inappropriate images several times a week. When Ms. Billingsley told Mr. Haskell not to send those types of messages, Mr. Haskell threatened that Eddie would not pass the first grade if Ms. Billingsley told anyone.

Mrs. Cleaver encouraged Ms. Billingsley to make a report of Mr. Haskell's conduct to the district's Title IX Coordinator, but Ms. Billingsley was afraid that Mr. Haskell would ensure Eddie fails the first grade.

- Is this behavior a Title IX violation? If so, what type of violation?
- What are Mrs. Cleaver's responsibilities?
- If a Title IX formal complaint is filed and an investigation begun, what evidence should the investigator obtain? Whom should the investigator interview?

Case Study 4

The female principal and male assistant principal ("AP") get into a disagreement during a staff meeting about certain aspects of the school's re-opening plans. The female principal becomes very frustrated with the male AP, and the male AP tells her to "calm down," asks if she is "on her period," and exclaims that she must be "PMSing" in front of all staff in attendance. The female principal's face turns bright red and her eyes well up with tears. She ends the meeting early and informs her staff she will reschedule. The next day, during a school district-wide administrator meeting at central office, the male AP approaches the female principal and hands her a bottle of Midol and pronounces that this may help with her PMS. The female principal becomes very upset and rushes out of the meeting room.

- Is this behavior a Title IX violation? If so, what type of violation?

Case Study 5

The male baseball coach asks a first-year female social studies teacher out on a date. The teacher, while flattered, turns him down. However, the baseball coach does not take "no" for an answer. He asks her out three more times and each time she says "no." The female teacher begins to find love notes from the baseball coach on her car, and flowers are being delivered to her classroom. The teacher notices that the baseball coach is frequently walking by her classroom during the day and following her out to her car at the end of the school day. Uncomfortable, she asks a guidance counselor to walk her to her car each evening and refuses to remain in her classroom alone. When the fellow teacher asks why, the female social studies teacher explains that the male baseball coach will not leave her alone.

- Is this behavior a Title IX violation? If so, what type of violation?
- What are the guidance counselor's responsibilities?
- What supportive measures can be offered to the complainant? To the respondent?

Questions