

HUSCH BLACKWELL

# Title IX Training for Employees

## Module 2

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# Presenter



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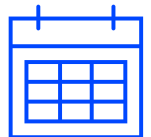
# Agenda

The Title IX Regulations

Reporting

Sex Discrimination and Sex-Based Harassment

Pregnancy

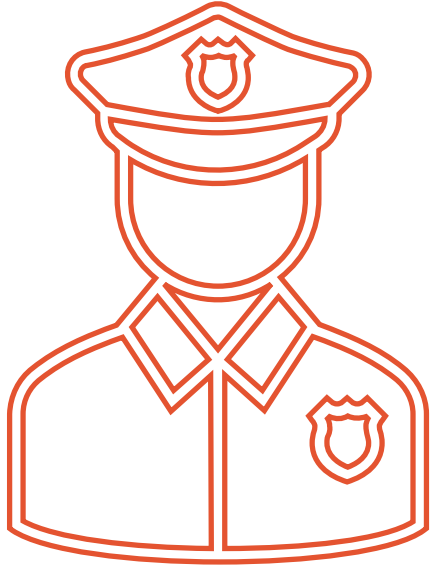


# Quiz

- You will be quizzed at the end of the next Module (not this one)
- The polls throughout this presentation are intended to track your understanding of the material we discuss

# The Title IX Regulations

# How is Title IX implemented?



- U.S. Department of Education regulations
- Private lawsuits and related court decisions

# How does the Department enforce Title IX regulations?



- Largely a complaint-initiated investigation and resolution process led by Office for Civil Rights (OCR)
- OCR has authority to force compliance through various tools including resolution agreements or initiation of proceedings to revoke financial aid eligibility (last resort)

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# Where are the Title IX regulations?

- 34 C.F.R. (“Code of Federal Regulations”) Part 106
- Contains dozens of different Title IX regulations, including those that govern appointment of a Title IX Coordinator, publication of district policies, and requirements pertaining to grievance procedures
- August 2020 regulation amended multiple elements of Part 106 and added new ones



# What is the “new” Title IX regulation?

- Effective August 1, 2024, a series of revisions to Part 106 that address several issues, including:
  - The scope of sex discrimination and sex-based harassment covered by Title IX
  - The procedures and requirements for addressing complaints of sex discrimination and sex-based harassment
  - Specific content on accommodating pregnancy and pregnancy related conditions

# What portions of the new regulation have garnered the most attention?

- Definition of “sex” to include gender identity and sexual orientation
- Roll-back of some “due process” requirements from August 2020 regulations



# When did the new regulation take effect?

- August 1, 2024
- Those portions of the regulation that govern response to specific instances of sex discrimination and sex-based harassment apply only to incidents that allegedly occurred on or after August 1, 2024
- Earlier incidents are governed by regulations that were in place at the time the misconduct allegedly occurred

# Reporting

# Which employees must report to the Title IX Coordinator?

- **Reminder:** *All school employees* who are not Confidential Employees must promptly report potential Sex Discrimination to the Title IX Coordinator

# Neola's Reporting Language

- All Board employees except Confidential Employees must provide the Title IX Coordinator with notification of conduct that reasonably may constitute sex discrimination under Title IX

Who can make a report?

Anyone.

# What triggers the reporting obligation?

- Information about conduct that reasonably may constitute sex discrimination or sex-based harassment
- Observing potential Sex Discrimination
- Or learning about potential Sex Discrimination through another means





What should you do when you learn of potential Sex Discrimination or Sex-Based Harassment?

Report it promptly to the Title IX  
Coordinator

# What should you include in your report?

- Board employees must share the following with the Title IX Coordinator:
  - All **known** details about the alleged sex discrimination, including:
    - The name of the alleged respondent;
    - The person who experienced the alleged sex discrimination;
    - Other persons involved in the alleged sex discrimination; and
    - Any other relevant facts (date, time, location, etc.)

# How should you report to the Title IX Coordinator?

- Your District's Title IX policy will include contact information for the Title IX Coordinator
- You can notify the Title IX Coordinator by:
  - Email
  - In writing
  - Verbally
- Best practice: put your report in writing

# How should you report to the Title IX Coordinator? (cont.)

- In your report, include as many details as you are aware of
- It's okay if you do not know all the details
- Even partial reports where the party's identity is unknown are appropriate
- Report everything that you *do* know to the Title IX Coordinator

# What happens if I don't make a report?

***Failure to provide such notification may result in discipline, up to and including suspension or termination of employment***

# Are there any employees that do not have to report?

- Yes, only board-designated confidential employees
  - Very rarely are employees considered confidential

# Neola's Recommendations Re: Confidential Employees

- Neola does not recommend that the Board include the definition of or designate “confidential employees” based on:
  1. the confusion that may result from designating a confidential employee(s) – in particular, Board-designated confidential employees will have different responsibilities as compared to ALL other Board employees when it comes to the actions they must take if a person notifies them of alleged sex discrimination;
  2. they require additional training concerning the responsibilities mentioned in the preceding paragraph, which are different from the responsibilities required of ALL other Board employees; and
  3. students or persons who are acting on their behalf may “lose” the “confidentiality” they are seeking if they communicate their concerns about alleged sex discrimination to a person who is not actually a confidential employee – it is safer for students, and those acting on their behalf, to operate on the assumption that if they tell a Board employee about alleged sex discrimination that the Board employee will report it to the Title IX Coordinator.

# Do confidential employees have information-sharing obligations?

- A confidential employee must:
  - Notify a person of the employee's confidential status, and
  - How to contact the Title IX Coordinator and make a complaint, and
  - That the Title IX Coordinator may be able to offer supportive measures as well as initiate informal resolution or grievance procedures



# Reminder: Child Abuse & Neglect Reporting

- State law typically governs the mandatory reporting of child sexual abuse. Usually in such states, sexual assaults of minors need to be immediately reported to state or local officials, irrespective of what the victim and/or their parents want to do.
- If you receive information about potential sexual assault of a minor, follow your school's child abuse & neglect reporting policy

# Neola's Child/Student Abuse or Neglect Policies

## **Po8462 – Student Abuse and Neglect**

- “Each professional staff member employed by this District and all other persons employed by this District who are mandatory reporters under the law who has reasonable cause to suspect child abuse or neglect shall be responsible for reporting immediately every case, whether ascertained or suspected, of abuse or neglect resulting in physical or mental injury to a student by other than accidental means.”

## **Ag8462 – Child Abuse or Neglect (Michigan)**

- “In compliance with Board of Education policy and State statute, professional staff members are required to report to the proper legal authorities any sign of child abuse or neglect. The child may suffer from physical abuse and neglect, sexual abuse, and/or emotional maltreatment. Basically, physical abuse is the nonaccidental, physical injury of a child; physical neglect is the failure to provide proper parental care, support medical attention, and education for a child; sexual abuse is any indecent sexual activity in the family; and emotional maltreatment is failure to provide warmth, attention, supervision, and/or normal living experiences for a child.”

## **Ag8462 – Mandatory Reporting of Child Abuse or Neglect and Threats of Violence (Wisconsin)**


- “Staff members are required to make a report to the proper legal authorities if, in the course of performance of a staff member's responsibilities, they have (a) any reasonable cause to suspect that a child has been abused or neglected; (b) reason to believe that a child has been threatened with abuse or neglect and that abuse or neglect of the child will occur; and (c) good faith belief, based on a threat made by an individual regarding violence in or targeted at a school, that there is a serious and imminent threat to the health or safety of a student, school employee, or the public.”

# Sex Discrimination and Sex-Based Harassment

# What are supportive measures?


- Individualized measures
- Offered as appropriate
- As reasonably available
- Without unreasonably burdening a party
- Not for punitive or disciplinary reasons
- Without fee or charge
- To restore or preserve access
- Or provide support during the grievance process or informal resolution

# What are examples of supportive measures?

 Counseling

 Academic accommodations

 Security escorts

 Leave of absence

 Increased security or monitoring

 Modified work schedules

 Mutual no-contact order if implicated by facts

# Example

**Student reports that Fellow Student sexually harassed Student by repeatedly propositioning Fellow Student until Student's brother intervened. Student would like to receive counseling, but does not wish to file a complaint. Student does not believe Fellow Student poses a physical threat.**



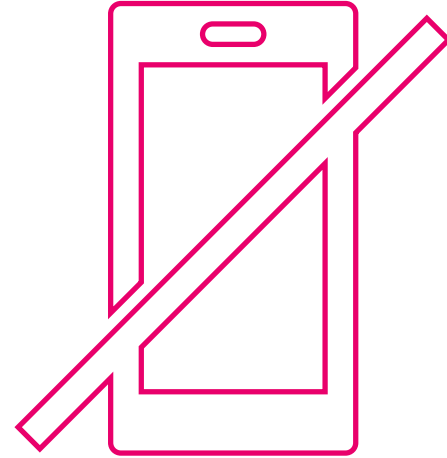
# Example

**One student reports another student committed sexual assault three years ago when they were freshmen. The reporting student has received strong academic marks since then. The reporting student requests a refund of all private counseling charges for the last three years.**



# When is a no contact order appropriate as a supportive measure?

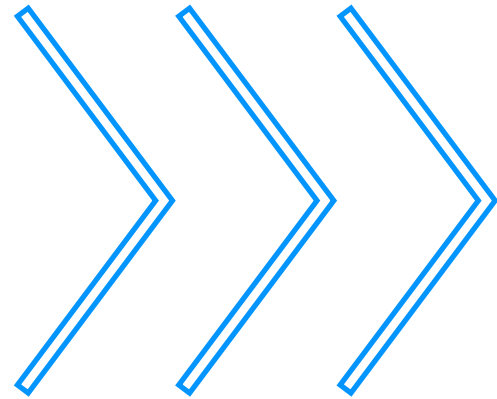
- When reasonably available
- When not an unreasonable burden
- When necessary to restore access or preserve safety
- Never for disciplinary or punitive reasons





# When are supportive measures offered?

- For the alleged victim, promptly after receiving a report
- For the alleged perpetrator, when grievance procedures or informal resolution are initiated



# Example

**A male student, Rick, is uncomfortable being friends with gay men. When James, a self-identified gay male student, invites Rick to join conversations or attend social events with James and others, Rick politely declines. Rick does not direct any unwelcome conduct towards James.**



# What is retaliation?

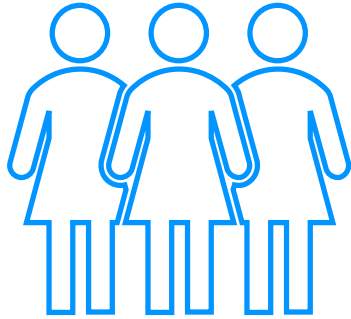
Neither the Board nor any other person may intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by Title IX or this policy, or because the individual made a report or complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing under this policy. Intimidation, threats, coercion, or discrimination, including initiating a disciplinary process against a person for a code of conduct violation that does not involve sex discrimination but arises out of the same facts and circumstances as a complaint or information reported about possible sex discrimination, for the purpose of interfering with the exercise of any right or privilege secured by Title IX constitutes retaliation. Peer retaliation is also prohibited. Retaliation against a person for making a complaint or participating in an investigation is a serious violation of this policy that can result in the imposition of disciplinary sanctions/consequences and/or other appropriate remedies.

# Does retaliation require intent?



- “[F]or the purpose of interfering with any right or privilege secured by Title IX . . . .”
- Requires a subjective state of mind of the respondent

# Can peers engage in retaliation?



- “A [district] must prohibit retaliation, including peer retaliation . . . .”
- Complaints of peer retaliation may be appropriate for consolidation with an underlying report of sex discrimination or sex-based harassment

# Is it retaliation to punish someone for lying during a Title IX proceeding?

- A district may punish a person for making false statements in a Title IX proceeding
- Provided there is evidence of falsity apart from the outcome of the Title IX proceeding itself

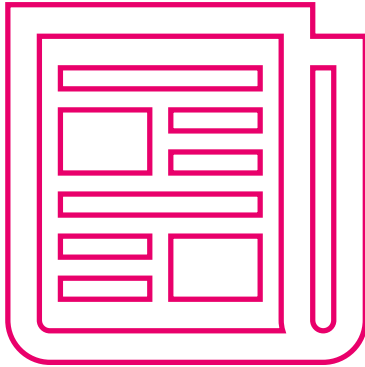


# Is it retaliation if a respondent files a counter-complaint?

- Only if the counter-complaint is made in bad faith for the purpose of interfering with the complainant's exercise of Title IX rights



# Examples of Prohibited Retaliation



- An employee makes a Title IX complaint and is then demoted
- A student refuses to participate in a Title IX investigation and is then removed from their extracurricular activities
- A teacher is fired after participating as a witness in a Title IX investigation and revealing negative information about a Principal



# Can employees be compelled to serve as witnesses?

“Nothing in this definition [of retaliation] . . . precludes a [district] from requiring an employee or other person authorized by a [district] to provide aid, benefit, or service . . . to participate as a witness in, or otherwise assist with, an investigation, proceeding, or hearing under this part.”

## New Title IX Regulation

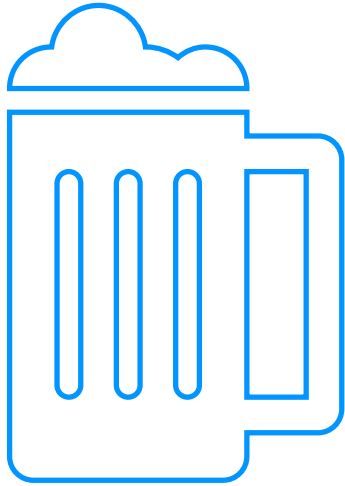
# Consent

- An important distinction with Title IX cases is whether a party consented to the sexual activity
- Whether someone was incapacitated can play into whether a party consented

# How should we think about consent?

- Consent in fact
  - Determined by whether the relevant facts establish conduct that amounts to agreement to engage in sexual activity – as agreement is defined by the district
- Ability to consent
  - Determined by whether a person has capacity to consent or whether they have lost such capacity

# How do we know if a person is incapacitated due to alcohol or drugs?



- Loss of ability to make a reasoned decision and communicate it
- Loss of appreciation of the nature and fact of sexual activity
- Loss of appreciation of the “who, what, when, where, and how”

# What facts may be relevant to determining incapacity due to alcohol or drugs?

- Ability to speak coherently
- Ability to track conversation
- Ability to appreciate and weigh risks and benefits
- Ability to walk or stand
- Ability to engage in behaviors requiring presence of mind
- Time period of consumption
- Nature of alcohol or drugs
- Amount of alcohol or drugs
- Size of the person consuming
- Others?

# Pregnancy

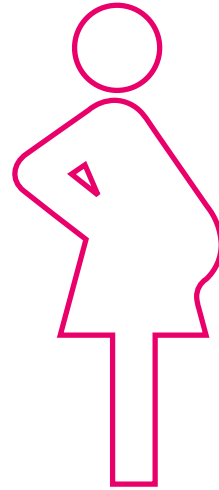
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# What does the new regulation say about pregnancy?

- Discrimination and harassment based on pregnancy and related conditions is “sex” discrimination and sex-based harassment
- Districts have a duty to provide certain accommodations to persons with pregnancy and related conditions



# What are pregnancy and related conditions?

- Pregnancy
- Childbirth
- Termination of pregnancy
- Lactation
- Medical conditions related to pregnancy, childbirth, termination of pregnancy, or lactation
- Recovery from pregnancy, childbirth, termination of pregnancy, lactation, or related medical conditions



# Example

A pregnant student experiences pre-term labor that must be controlled with medication and bedrest. The student then gives birth by caesarean section. Four weeks after giving birth, the student is diagnosed with postpartum depression.

*These are examples of pregnancy and pregnancy related conditions.*



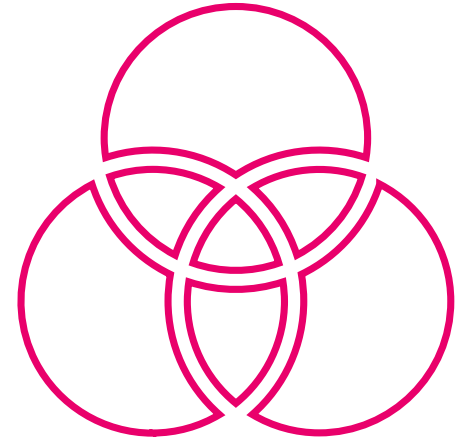
# Example

**A pregnant student gives birth without complication, fully recovers after six weeks, and returns to school. The student is breastfeeding and is also having challenges finding a babysitter to watch her child while the student attends class.**



# What do we do if pregnancy presents a health concern with a particular program or course?

- For purposes of assessing eligibility, pregnancy must be treated the same as other temporary medical conditions
- It is not discrimination for a pregnant student to voluntarily participate in a “separate portion” of a program if it is comparable



# May a district require a pregnant student to provide a doctor's certification?

- Only when certified level of physical ability or health is necessary
- Such certification is required of all students participating in the class
- Information obtained is not used for discriminatory purpose

# Example

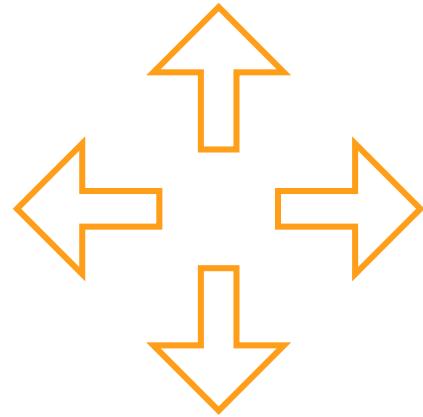
**A school operates a military studies program that includes a course that involves physical activity similar to that which one would experience in basic training. All students are required to provide a pre-clearance letter from a physician.**

***The school may require a pregnant student to provide a pre-clearance letter.***



# What reasonable accommodations are pregnant students allowed?

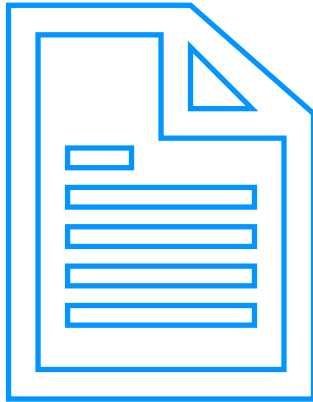
- Reasonable modifications
- Based on individualized needs
- Determined after consultation with the student
- Fundamental alteration is not required



# What are some common examples of reasonable accommodations?

- Breaks during class to express breast milk or breast feed
- Breaks to attend to pregnancy related needs, including eating, drinking, or using the restroom
- Intermittent absences to attend appointments
- Access to online or homebound education
- Changes in schedule or course sequences
- Extensions of time and rescheduling
- Counseling

# Can we require documentation before granting an accommodation?



- Documentation must not be requested unless it is necessary and reasonable to determine modifications
- Some accommodation needs related to pregnancy are obvious or inherent and need not be documented



# Examples

**A pregnant student is no longer able to fit into the standard desk used in a particular classroom.**

**A pregnant student needs to take more frequent bathroom breaks.**

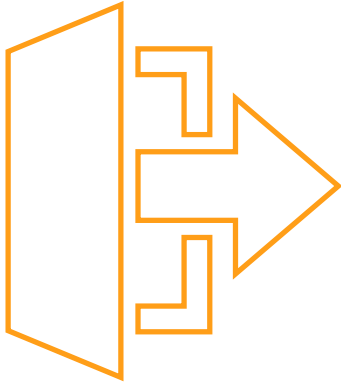
**A student who recently gave birth has lactation needs.**



# Practical Point

**Providing accommodations to pregnant students is similar, although not identical, to providing accommodations to students with disabilities.**

# What about voluntary leaves?



- Must allow a pregnant student to take a voluntary leave for at least the period of time medically necessary
- When returning, student must be reinstated to academic status, and as practicable, to the extracurricular status before leave

# Must a school provide lactation space?

- Must provide access to lactation space, other than a bathroom, that is clean and private
- Space must be available both for expressing breast milk or for breastfeeding, as needed

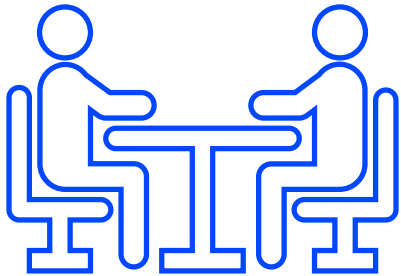


# Are there reporting obligations for the needs of pregnant students?

- When student informs employee of student's pregnancy or related condition
- Employee must promptly provide student with Title IX Coordinator's contact information and inform student of Title IX Coordinator's ability to prevent sex discrimination and ensure equal access



# Who is responsible for ensuring accommodations?



- The Title IX Coordinator must “coordinate these actions”
- Title IX Coordinator must ensure that student is provided notification of protections against discrimination and various pregnancy related rights

# Takeaways

- Employees are required to report potential sex discrimination or sex-based harassment
  - This includes information you witness, hear of second-hand, or learn about in some other way
- Report as many details as you know to the Title IX Coordinator, but it's okay if you do not have all of the information – report what you know
- Failure to report can lead to disciplinary action
- Be mindful of your state law obligations to mandatory report child abuse or neglect
- If a student informs you that they are pregnant or have a related condition, you must give them the Title IX Coordinator's contact information



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