# TITLE IX COMPLIANCE-INVESTIGATOR, DECISION MAKER, AND OTHER TITLE IX TEAM MEMBERS

San Mateo County Attorney's Office

Gina J. Beltramo, Lead Deputy County Attorney

Lisa Y. Cho, Deputy County Attorney

Lauren F. Carroll, Deputy County Attorney

#### AGENDA

- 1. Grievance Procedures
- 2. Supportive Measures
- 3. Investigation
- 4. Review of Evidence
- 5. Determination of Responsibility
- 6. Appeal
- 7. Informal Resolution Process
- 8. Dismissal

#### AN LEA'S OBLIGATION TO RESPOND (§106.44)

Knowledge of conduct that reasonably may constitute sex discrimination
 Must respond promptly and effectively

"without unreasonable delay"

WHO IS YOUR TITLE IX TEAM? Title IX Coordinator

Investigator

Decision maker

Informal resolution facilitator

Appeal decision-maker

#### THE TITLE IX COORDINATOR

1. May delegate duties as appropriate

2. Oversees the implementation of the Title IX Process

3. Is responsible for all record keeping obligations

4. Monitors the offering of and implementation of supportive measures

5. Notifies the parties of the complaint and the grievance process

6. Determines whether to initiate a grievance process

\*\*7. Oversees that appropriate, prompt and effective steps are taken to ensure sex discrimination does not continue or recur

INVESTIGATOR - gathers all evidence

considers all relevant evidence and determines responsibility

Decision Maker may now be the same person as the Investigator or Coordinator

INFORMAL
RESOLUTION
FACILITATORfacilitates informal
resolution process

#### BIAS & CONFLICT

No member of the Title IX team may have a conflict of interest or bias.

No one has a "side"

No one has an interest in the outcome, other than to stop, prevent and remedy any sex discrimination

Sex stereotypes may not be relied upon

Impartiality is essential

## NON-DISCLOSU RE OF PERSONALLY IDENTIFIABLE INFORMATION

### Personally identifiable information (PII) is information that would tend to reveal the identity of an individual

#### An LEA may not disclose PII obtained in the course of complying with Title IX regulations, except:

1. With prior consent

2. When disclosed to parent, guardian, legal representative

3. To carry out the regulations

4. As required by Federal or State law

WHAT
STARTS THE
TITLE IX
PROCESS?
A.K.A. THE
GRIEVANCE
PROCEDURES

- Grievance procedures are for all complaints of sex discrimination
- There is no longer a requirement for a "formal complaint" to be filed
  - A report of facts that could reasonably be determined to be sex discrimination is enough to trigger the Title IX process
- A complaint may be verbal or written
- Complaint must be objectively understood as a request for the LEA to investigate and make a determination about the alleged discrimination
- A parent/guardian/authorized legal representative may initiate a complaint on behalf of their student.
- In cases of sex discrimination, complaints can be made by any student, employee, or any person involved in or attempting to participate in the recipient's programs or activities.
  - This does not extend to complaints of sex-based harassment

#### EMERGENCY SITUATIONS

Cross reference: Student Sexual Abuse Response Guidelines for San Mateo County Schools and Law Enforcement

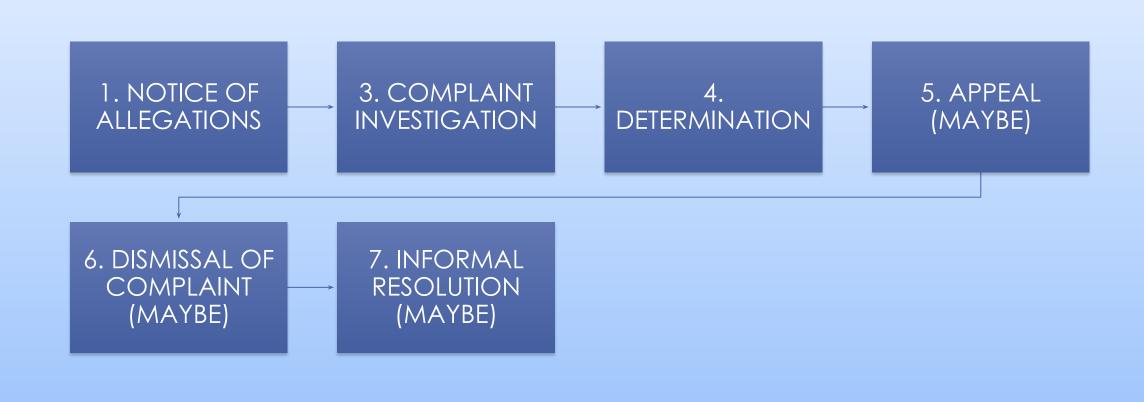
- Step 1: Immediately address urgent health and safety concerns. When warranted, call 911, request immediate assistance, and interrupt presently occurring inappropriate behavior. When in doubt, call 911 so law enforcement does initial interview of both complainant and respondent.
- Step 2: If complainant's statement is unclear, staff may ask open-ended questions for clarification only. (ex: what happened?) Avoid leading questions which suggest an answer, like "Did he touch you?," "He didn't touch you, right?" or try to draw out frequency and times frames. Do not attempt to make credibility determinations at this initial stage. Do not remove or arrange complainant's clothing to view underwear or private body parts. Complainant should likely be interviewed by Keller Center by trained forensic interviewer.
- Step 3: Also important—don't tip off any known friends or family of the respondent who may alert respondent.

#### EMERGENCY SITUATIONS

Cross reference: San Mateo County Student Threat Assessment Team (Level One Protocol)

If there is imminent danger to others, call law enforcement and district office. Follow the Big Five immediate response guidelines as appropriate. If necessary, take appropriate precautions, such as school-wide security measures, detaining students of concern, or restricting access to coats, backpacks, etc.

### STEPS OF THE GRIEVANCE PROCEDURES UNDER \$106.45



## MANDATED APPROACH TO GRIEVANCE PROCEDURES

- Treat complainants and respondents equitably;
- No bias or conflict of interest
- Include a presumption that the respondent is not responsible for the alleged sex discrimination
- Establish reasonably prompt timeframes for the major stages of the grievance procedures, e.g., evaluation of jurisdiction and initiation of complaint, investigation, determination, appeal
- Take reasonable steps to protect the privacy of the parties and witnesses during the grievance procedures
- Objective evaluation of all evidence that is relevant and not otherwise impermissible

#### SUMMARY OF PARTIES' RIGHTS

- Receive a Notice of Allegations, with all required information
- Have the opportunity to gather and present evidence and witnesses.
- Review all relevant evidence or receive an accurate summary of it.
- If a student, have a parent or guardian with them during all meetings and interviews
- Have the option to choose not to participate in the Title IX Grievance Process.
- Receive a written notification of the outcome, including the reasoning behind the decision.
- Be informed of and have access to appropriate supportive measures.



SUPPORTIVE
MEASURES –
THE OLD, THE NEW
AND THE
YOU-SAID-WHAT??

SUPPORTIVE
MEASURES WHAT HASN'T
CHANGED?
(§106.44)

Must not unreasonably burden either party

Designed to protect the safety of the parties or educational environment, or program

Designed to provide support during grievance procedures or informal resolution process

Not punitive or disciplinary

Information about supportive measures is to remain confidential, to the greatest extent possible

#### SUPPORTIVE MEASURES - EXAMPLES (§106.44)

- Counseling;
- Extensions of deadlines and other course-related adjustments;
- Campus escort services;
- Increased security and monitoring of certain areas of the campus;
- Restrictions on contact applied to one or more parties;
- Leaves of absence;
- Changes in class, work, or extracurricular or any other activity, regardless of whether there is or is not a comparable alternative; and
- Training and education programs related to sex-based harassment.

SUPPORTIVE MESAURES-WHAT HAS CHANGED? Supportive measures are to be offered to the potential complainant as soon as the LEA is aware of complaint of discrimination.

Supportive measures are to be offered to the respondent, if appropriate, once a complaint is made.

Should circumstances change materially, LEA must provide party an opportunity to seek additional modification or termination of supportive measure SUPPORTIVE
MEASURES YOU SAID
WHAT??
(§106.44)

\*NEW\* - either party must be given opportunity to challenge the supportive measures offered, denied, modified or terminated

- must be decided by impartial employee
- impartial employee is someone who has authority to modify or reverse the decision
- modification or reversal based on definition of supportive measure (see page 499 of Unofficial)

SUPPORTIVE
MEASURES AND
STUDENTS
WITH
DISABILITIES
(§106.44)



If either party is a SWD, Coordinator must consult with one or more IEP team members.



If the student has a 504 Plan, Coordinator must consult with one or more 504 Plan team members 1. Information
About
Conduct

2. Supportive Measures

3. Complaint Made

Next Step?

#### NOTICE OF THE ALLEGATIONS

Once the grievance procedures are initiated, notice must be provided to all parties. Notice is to include:

- 1. The grievance procedures
- 2. **Sufficient information** about the allegation to allow the parties to respond. This includes:
  - a. the identities of the parties involved in the incident(s),
  - b. the conduct alleged to constitute sex discrimination under Title IX,
  - c. the date(s) and location(s) of the alleged incident(s), to the extent that information is available to the LEA
- 3. A statement that retaliation is prohibited; and
- 4. A statement that the parties are entitled to access the relevant and not otherwise impermissible evidence or an accurate description of this evidence.

#### CONSOLIDATION OF COMPLAINTS

Complaints of sex discrimination against more than one respondent, or by more than one complainant against one or more respondents, or by one party against another party, may be consolidated when the allegations of sex discrimination arise out of the same facts or circumstances.

1. Information
About
Conduct

2. Supportive Measures

3. Complaint Made

4. Notice Provided

Next Step?

## INVESTIGATION OF THE COMPLAINT



#### INVESTIGATION OF THE COMPLAINT



MUST BE ADEQUATE, RELIABLE, AND IMPARTIAL



1. Burden on the LEA to gather the evidence



2. Parties must have an equal opportunity to present fact witnesses and other inculpatory and exculpatory evidence that is relevant and permissible



3. LEA must review all evidence gathered through the investigation and determine what is relevant, and what is impermissible regardless of relevancy



#### Initial steps of the Investigation:

**Scope**: Define the scope of the investigation

**Who:** Determine who the potential witnesses are

**What:** Consider the alleged conduct and the definition of sex discrimination

**Deadlines**: Outline any deadlines prescribed by district grievance policy.

**Plan**: Crete a list of witnesses, determine the preferred order of interviews.

Outline what other evidence may be available and relevant

Anticipate obstacles or challenges in the investigation

Identify if there are parents, advisors or outside counsel that are involved

**Confirm** if there's need to coordinate with law enforcement

#### Investigation of the Complaint

#### Collecting and maintaining evidence

Is there a need to secure evidence, such as a computer hard drive of electronic communications?

- Exercise extreme caution before accessing electronic devices without consent of the authorized possessor
- Work with IT to determine if there is a way to gather electronic evidence, if appropriate



#### INVESTIGATION OF THE COMPLAINT

#### **Interviews**



Interviews should be conducted in person unless that is impracticable or would cause undue delay.



Explain your neutral role and provide a description of the process.



Conduct each interview separately.



Ask open-ended questions and don't be afraid of pauses in the conversation.



Use "who, what, where, why and how" questions and keep the chronology of the events in mind.



Remember, the goal is to collect information, not disseminate it

## INVESTIGATION OF THE COMPLAINT

#### Interviews typically proceed in the following order:

- (1) Complainant;
- (2) Witnesses;
- $\square$  (3) Respondent
- (4) Other witnesses identified
- (5) Re-interview complainant, if necessary; and
- (6) Re-interview respondent, if necessary.
- Investigators may deviate from the above order when there is a good reason to do so, although the complainant should be interviewed first if at all possible.
- Generally, it is preferable to interview the respondent last, so the investigator can confront them with all known facts, and have a full understanding of the scope of the allegations. But sometimes it may make sense to interview the respondent before interviewing some or all witnesses, as the respondent may provide information that makes further interviews unnecessary. The respondent may admit to the allegations, for example.

#### INVESTIGATION OF THE COMPLAINT

**Interviews -** What to tell witnesses

Share as little information as possible when setting up the interview.

"I have been assigned to investigate a complaint filed by an employee. You are not the subject of the investigation. I need to meet with you because I believe you may have relevant information. I cannot discuss the specifics of the allegations with you, but will be happy to answer any questions you have regarding the process of the investigation. Please do not discuss this matter with anyone."

#### INVESTIGATION OF THE COMPLAINT

#### **Interviews -** What to Ask and How

- Two goals to keep in mind: gathering information and providing the accused a fair opportunity to respond. Do not use an accusatory tone as no findings will have been made at this point. While the complainant's story may have sounded compelling, the respondent may have information to share that will call into question the complainant's credibility.
- It is useful to explore motives with interviewees. For example, if an interviewee denies a certain allegation to which another person attests, consider asking the interviewee why they believe the other person would fabricate the allegation.
- Ask the interviewee whether they have kept a log or notes or have any emails concerning the allegations.
- Consider asking the complainant what they would like to see happen as a result of the complaint.

#### INVESTIGATION OF THE COMPLAINT

#### **Interviews -** What to Ask and How

- Try to use the funnel approach start with broad, open-ended questions and then focus on more detailed questions
- Do not suggest answers
- Let the witness describe the situation in their own words
- Ask for relevant documents
- Ask whether other people may have relevant information. If the list is long, the investigator should ask the complainant what specific information each person would have concerning the allegations
- Is there anything else I should know?

## INVESTIGATION OF THE COMPLAINT



#### **Interviews -** What to Avoid:

- Accusatory or argumentative questions or tone (often in the form of leading)
- Confusing questions
- Blaming questions
- Compound questions
- Evaluative responses

#### INVESTIGATION OF THE COMPLAINT

When sharing information, it's important to strike a balance between transparency, privacy, strategic considerations, and the rights of all involved parties.

Witnesses might have little to no awareness of the details of the complaint.

Witnesses may not be familiar with the individuals involved or other witnesses.

Some level of information sharing is unavoidable.

At the end of the investigation, both parties will have access to all relevant evidence that is permissible to share.

1. Information
About
Conduct

2. Supportive Measures

3. Complaint Made

4. Notice Provided

5. Investigation

Next Step?

## REVIEW OF THE EVIDENCE

The Decision Maker is to objectively evaluate and consider all relevant and permissible evidence including both inculpatory and exculpatory evidence.

REVIEW OF
THE
EVIDENCE RELEVANCY

Relevant evidence is that which is related to the allegation(s) of sex discrimination

Relevant evidence has a tendency to make a fact that is of consequence to the determination more or less likely to be true

## REVIEW OF THE EVIDENCE -INCULPATORY &

EXCULPATORY



Inculpatory - shows, or tends to show, a person's involvement in an act, or evidence that can establish guilt.



Exculpatory - tends to exonerate or show no fault.

## REVIEW OF THE EVIDENCE -

## ASSESSING CREDIBILITY

It is the Investigator's and Decision Maker's obligation to make credibility determinations based on all the information. Certain factors should be applied in making such determinations:

- Inherent Plausibility. Is the testimony believable on its face?
- Demeanor. Did the person seem to be telling the truth or lying (and why)?
- Motive to Falsify. Did the person have a reason to lie?
- Corroboration. Is there witness testimony or physical evidence that corroborates the party's testimony?
- □ Past Record. Does the respondent have a history of similar behavior in the past?
- Credibility determinations must not be based on person's status as complainant, respondent or witness

# REVIEW OF THE EVIDENCE-

## IMPERMISSIBLE EVIDENCE

#### **Impermissible Evidence** is that which is;

- Protected under a Federal or State privilege
- records that are made or maintained by a physician, psychologist, or other medical treater
- interests or prior sexual conduct, unless evidence about the complainant's prior sexual conduct is offered to prove that someone other than the respondent committed the alleged conduct or is evidence about specific incidents of the complainant's prior sexual conduct with the respondent that is offered to prove consent to the alleged sex-based harassment.

# REVIEW OF THE EVIDENCE - PREPARING FOR PROVISION TO PARTIES

It is recommended that the Title IX Coordinator, LEA legal counsel, or both, review the evidence before it is provided to the parties.

- Are there gaps? Assumptions? Typographical errors?
- Are names and other identifiers used appropriately?
- Is there information that is privileged?
- Not a chance to rewrite
- Investigator may want to clarify points, add information to fill in any gaps, remove language that is unnecessary

The evidence may be in the form of an investigative report (summary of the evidence) or all evidence in original form.

## EVIDENCE – PARTIES' REVIEW OF THE EVIDENCE

- Both parties must be given an equal opportunity to access either the relevant, permissible evidence or an accurate description of this evidence.
  - This is a new option. The recipient may provide a descriptive summary of the evidence. However, if either party requests to see the actual evidence, both parties must be provided access to it.
- Unlike the 2020 regulations, there is no mandated timeline.
- Your LEA will have to consider inserting a timeline into its process
- Both parties must be given a reasonable opportunity to respond to the evidence or description of the evidence.
  - No standard for "reasonable"



#### EVIDENCE

#### **Unauthorized Disclosure of Information**

Reasonable steps must be taken prevent and address a party's unauthorized disclosure of information and evidence obtained solely through the grievance procedures. 1. Information
About
Conduct

2. Supportive Measures

3. Complaint Made

4. Notice Provided

5. Investigation 6. Review of Evidence

Next Steps?

## DETERMINATION OF RESPONSIBILITY

## DETERMINATION OF RESPONSIBILITY

- Preponderance of the evidence standard
- Evaluation of all relevant, permissible evidence
- If Decision Maker is not persuaded by the evidence to the preponderance of the evidence standard, they must not determine that sex discrimination occurred
  - Regardless of the quantity of the evidence

## DETERMINATION OF RESPONSIBILITY

#### **Standard of Proof**

The standard of proof need to be met to make the determination that sex discrimination occurred is **preponderance of the evidence**.

Preponderance of evidence means more likely than not the conduct occurred (i.e., more than 50% certainty, when compared to opposing evidence)

# DETERMINATION OF RESPONSIBILITY

## Questioning the parties and witnesses to evaluate credibility

- The **Decision Maker** must be provided an opportunity to question parties and witnesses to adequately assess a credibility, to the extent credibility is both in dispute and relevant
  - This is a change from the 2020 Regulations, which provided for the Decision Maker to question witnesses or the parties <u>only at the request</u> of a party.
- The process in which a Decision maker is enabled to question witnesses is not described by the regulations. Therefore, it is up to each LEA to provide for this process as it determines appropriate.

## DETERMINATION OF RESPONSIBILITY





LEA must notify the parties in writing of the determination.



Notification is to include the rationale for the determination, and the procedures and permissible bases for an appeal.

## AFTER DETERMINATION OF RESPONSIBILITY

#### Title IX Coordinator must:

1. Coordinate provision and implementation of remedies

2. Coordinate the imposition of any disciplinary sanctions on a respondent

3. Take other appropriate prompt and effective steps to ensure that sex discrimination does not continue or recur

No party or witness may be disciplined for making a false statement based solely on the LEA's determination whether sex discrimination occurred.

## APPEAL OF DETERMINATION

Recipient must offer parties an appeal process that is the same as it offers in all other comparable proceedings, if any, including proceedings relating to other discrimination complaints.

1. Information About Conduct

2. Supportive Measures

3. Complaint Made

4. Notice Provided

5. Investigation

6. Review of Evidence

Determination of Responsibility

Possible Intervening Actions?

## YES!



INFORMAL RESOLUTION



EMERGENCY REMOVAL



DISMISSAL OF COMPLAINT

What is Informal Resolution?

An alternative approach to resolving Title IX complaints without undergoing a full investigation or formal hearing.

Designed to achieve a mutually satisfactory outcome for both parties

- The parties may elect to participate in an informal resolution process at any time until final determination.
  - At LEA's discretion
  - □ Not available for complaints involving employee harassment of K-12 students.
  - Circumstances to decline: Potential future risk of harm to others.
- Remember- a formal complaint is not required under the 2024 Regulations. Therefore, informal resolution may be offered at any time the LEA determines it may be appropriate.

#### **Benefits of Informal Resolution**

- Timely Resolution: Often faster than the formal grievance process, reducing stress and anxiety for all involved.
- Less Adversarial: Encourages cooperation and understanding, fostering a more positive resolution environment.
- More Privacy: Involves fewer participants, helping to protect the privacy of those involved.
- ☐ **Flexibility**: Allows for customized solutions tailored to the specific needs and desires of the parties.
- Potential Drawbacks:
  - □ Not Binding: If the parties fail to agree, the formal grievance process may still need to proceed.
  - Power Imbalances: Care must be taken to ensure that one party is not coerced or pressured into an agreement.

- Voluntary Participation: Participation must be entirely voluntary, with the option for either party to withdraw at any stage without penalty.
- Neutral Facilitator: A trained facilitator guides the process, ensuring a fair and unbiased approach to resolving the dispute.
- Informed Consent:
  - ☐ Clear Explanation: Both parties must fully understand the process, their rights, and the possible outcomes.
  - Written Agreement: Informed consent must be documented in writing before proceeding.

## INFORMAL RESOLUTION PROCESS

#### **Notice Requirements**

Must provide parties with notice explaining:

- 1. The allegations.
- 2. Requirements of the informal resolution process.
- 3. Right to withdraw from the process and initiate grievance procedures before reaching resolution.
- 4. Binding nature of resolution on grievance procedures.
- 5. Potential terms and conditions of a resolution agreement.
- 6. How information may be used if grievance procedures resume.

## INFORMAL RESOLUTION FACILITATOR

#### Role of the Facilitator

#### Neutrality and Impartiality:

- ☐ The facilitator must remain neutral, ensuring that neither party is favored.
- They should facilitate discussions in a way that encourages open communication and voluntary decision-making.

#### Guidance and Support:

- Help both parties understand their rights, the process, and the potential outcomes.
- Ensure that supportive measures are in place to protect both parties during the resolution process.

#### Confidentiality Assurance:

The facilitator must maintain the confidentiality of the discussions, except where disclosure is required by law or school policy.

#### INFORMAL RESOLUTION FACILITATOR

#### Initiation:

- Written consent is obtained from both parties before starting the process.
- Parties should be informed they can withdraw at any time and return to the formal grievance process.
- The facilitator engages with both parties separately or together to explore potential solutions.
- Discussion is guided by the principles of fairness, respect, and a focus on finding a mutually acceptable outcome.

#### **Resolution Agreement:**

- If an agreement is reached, it is documented, signed by both parties, and becomes binding.
- The agreement may include terms such as behavioral changes, no-contact agreements, or other restorative actions.

#### **Outcome Documentation:**

- The final agreement, or documentation of an unsuccessful resolution, is recorded and stored by the school/district.
- If the process does not resolve the issue, the case may revert to the formal grievance process.

#### INFORMAL RESOLUTION FACILITATOR

#### **Potential Outcomes of Informal Resolution**

- Restorative Actions:
  - Apologies, restitution, or educational programs aimed at addressing the harm and preventing future issues.
- Behavioral Agreements:
  - Agreements regarding future conduct, such as commitments to specific behaviors or participation in counseling.
- No-Contact Orders:
  - Use Voluntary agreements to avoid contact, ensuring a safe and supportive environment for both parties.
- Mediation Agreements:
  - Outcomes may include facilitated mediation sessions, where both parties work together to resolve misunderstandings or conflicts.
- ☐ Resolution Without Admission of Fault:
  - Agreements may be reached without either party admitting fault, focusing on future behavior and mutual respect.

#### BEST PRACTICES FOR A FACILITATOR



#### **Clear Communication:**

Provide detailed explanations of the process, rights, and potential outcomes to all parties.

Ensure that both parties understand the voluntary nature of the process and their ability to withdraw at any time.



## Creating a Supportive Environment:

Foster an environment where students and staff feel safe and supported in reporting concerns and participating in resolution processes.

Promote a culture of respect, understanding, and accountability throughout the school community.

## BEST PRACTICES FOR A FACILITATOR



## Documentation and Record-Keeping:

Keep detailed records of the informal resolution process, including consent forms, agreements reached, and any follow-up actions.

Ensure compliance with Title IX record-keeping requirements.



#### Safety and Equity:

Always ensure that the safety and well-being of all parties are prioritized throughout the process.

Monitor for power imbalances and take steps to mitigate them if they arise.

## EMERGENCY REMOVALS

Title IX Regulations do not preclude removal of a party from the education program or activity, on an emergency basis. LEA is to:

- undertake individualized safety and risk analysis
- determine imminent and serious threat to health or safety exists
- the threat justifies the removal
- provide removed party with notice and opportunity to challenge the decision immediately following the removal.

# DISMISSAL OF COMPLAINT

#### **Potential Reasons for Dismissal**

A complaint may be dismissed if:

- 1. The LEA cannot identify the respondent after taking reasonable steps.
- 2. If the respondent is not involved in the education program or is not an employee.
- 3. The complainant withdraws any or all allegations, and the Title IX Coordinator decides not to initiate the complaint.
- 4. The alleged conduct, even if proven, would not constitute sex discrimination under Title IX or this part.

#### DISMISSAL OF COMPLAINT

#### **Steps After Dismissal**

- 1. Prompt Notification:
  - Complainant (and respondent if respondent informed of allegations) must be promptly informed of the dismissal and the basis for it.
  - □ Notification is simultaneous if in writing. If verbal, complainant informed first.
- 2. Notification of Appeal Rights
- 3. Offer supportive measures as appropriate
- 4. Title IX Coordinator to take other appropriate prompt and effective steps to ensure that sex discrimination does not continue or recur

#### APPEAL OF DISMISSAL

If a party appeals a dismissal, the LEA must:

- Notify the other party of the appeal;
- Implement appeal procedures equally for the parties;
- Assign new, uninvolved, trained decision maker
- Provide the parties a reasonable and equal opportunity to make a statement in support of, or challenging, the outcome; and
- Notify the parties of the result of the appeal and the rationale for the result.



## Questions?

