

Stephanie Jones

stephanie@krihaboucek.com

@EdLawSteph1



kriha boucek

Title IX Final Regulations: Training for Implementation

AAC# 3752
June 2021



krihaboucek.com



@krihabouceklaw

Oakbrook Terrace Office

2 Trans Am Plaza Dr., Suite
450
Oakbrook Terrace, IL 60181

Southern Illinois Office

3 Club Centre Court Suite D
Edwardsville, IL 62025

Who's here?



Fist-to-Five



**Fist =
Clueless!**



**1 = Heard
the words**



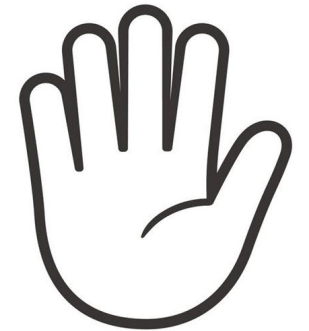
**2 = Vague
idea**



**3 = Sorta
get it**

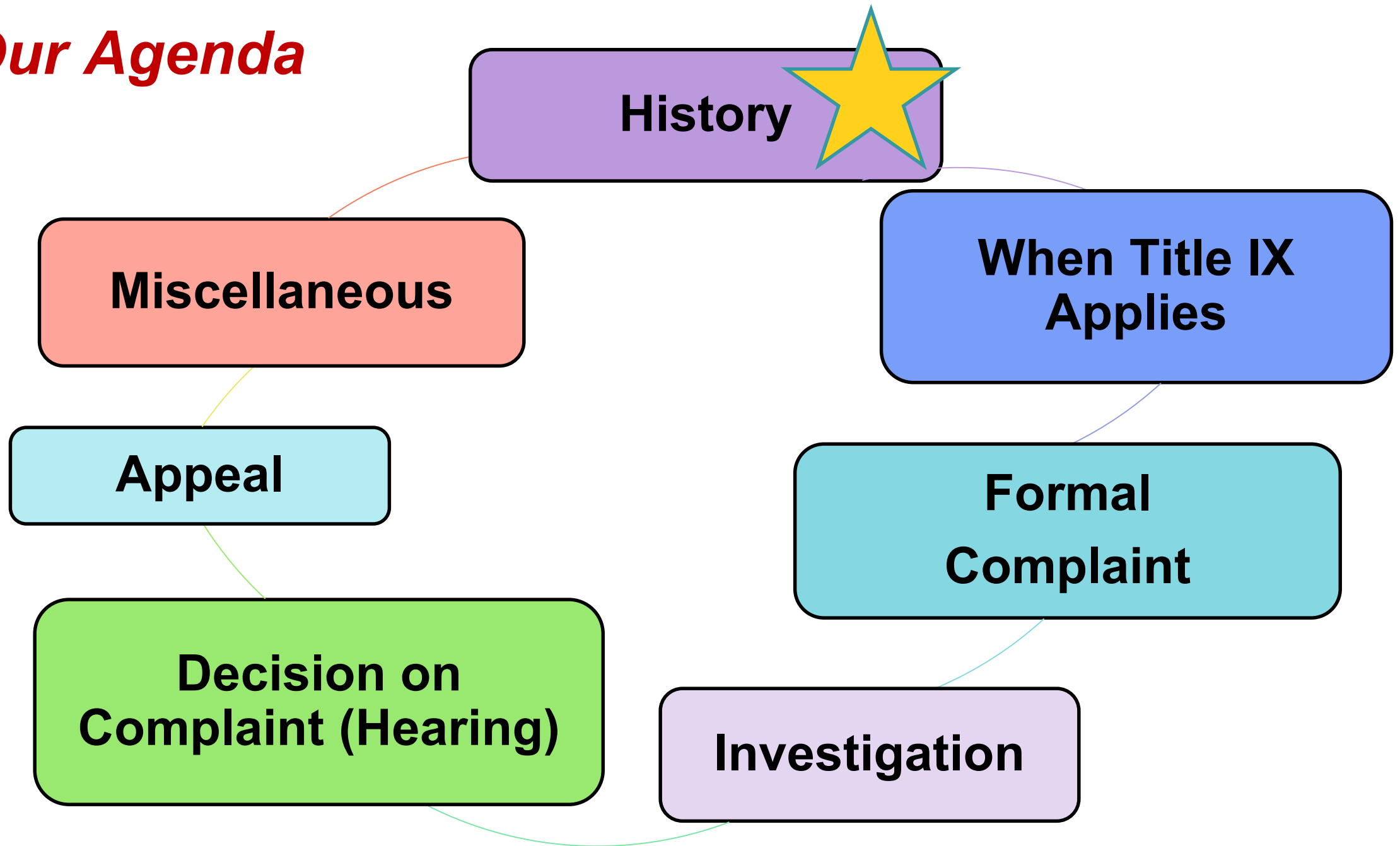


**4 = Pretty
good**



5 = Pro!

Our Agenda



“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)

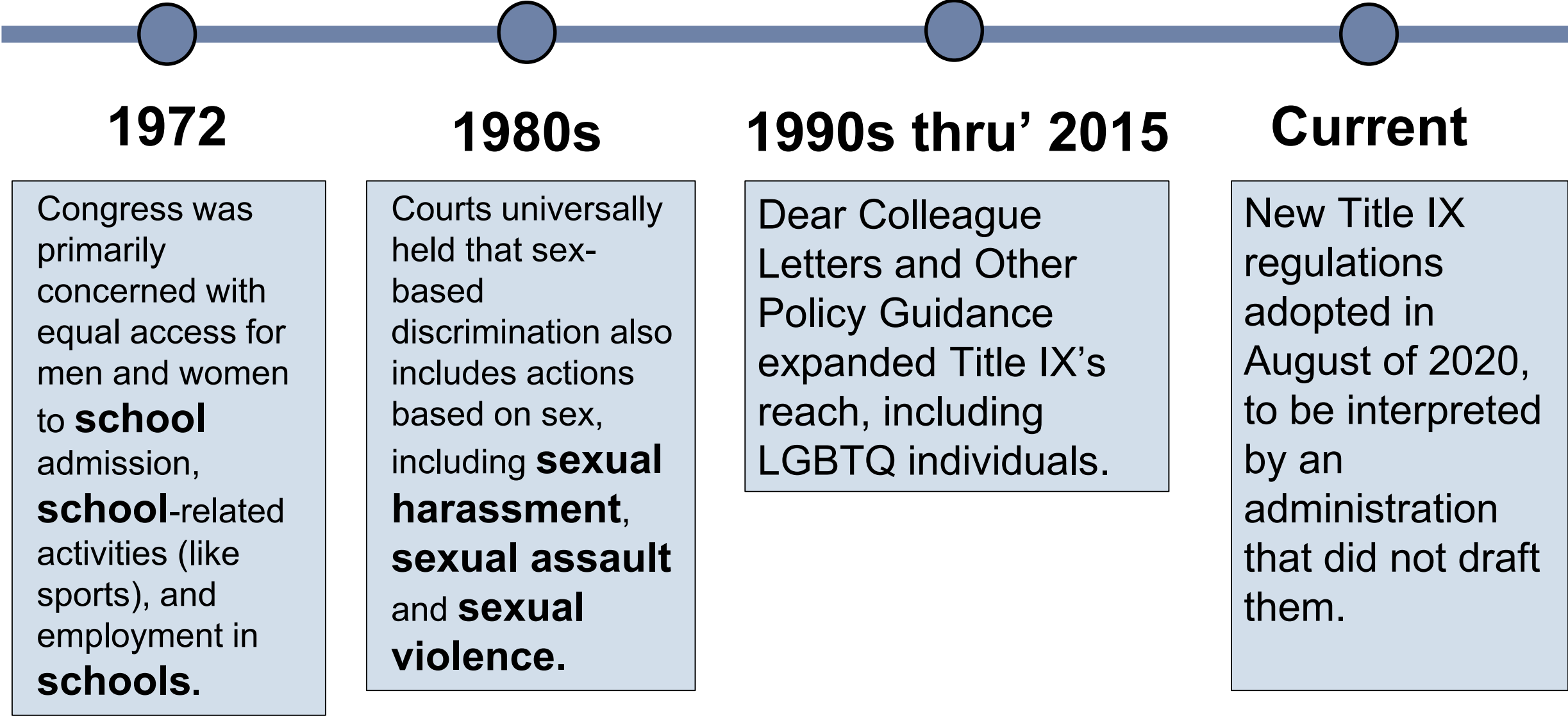


Title IX of the Education Amendments Act of 1972

20 U.S.C. §1681

**Signed on
June 23, 1972**

1972 → 2021



1972

Congress was primarily concerned with equal access for men and women to **school** admission, **school**-related activities (like sports), and employment in **schools**.

1980s

Courts universally held that sex-based discrimination also includes actions based on sex, including **sexual harassment**, **sexual assault** and **sexual violence**.

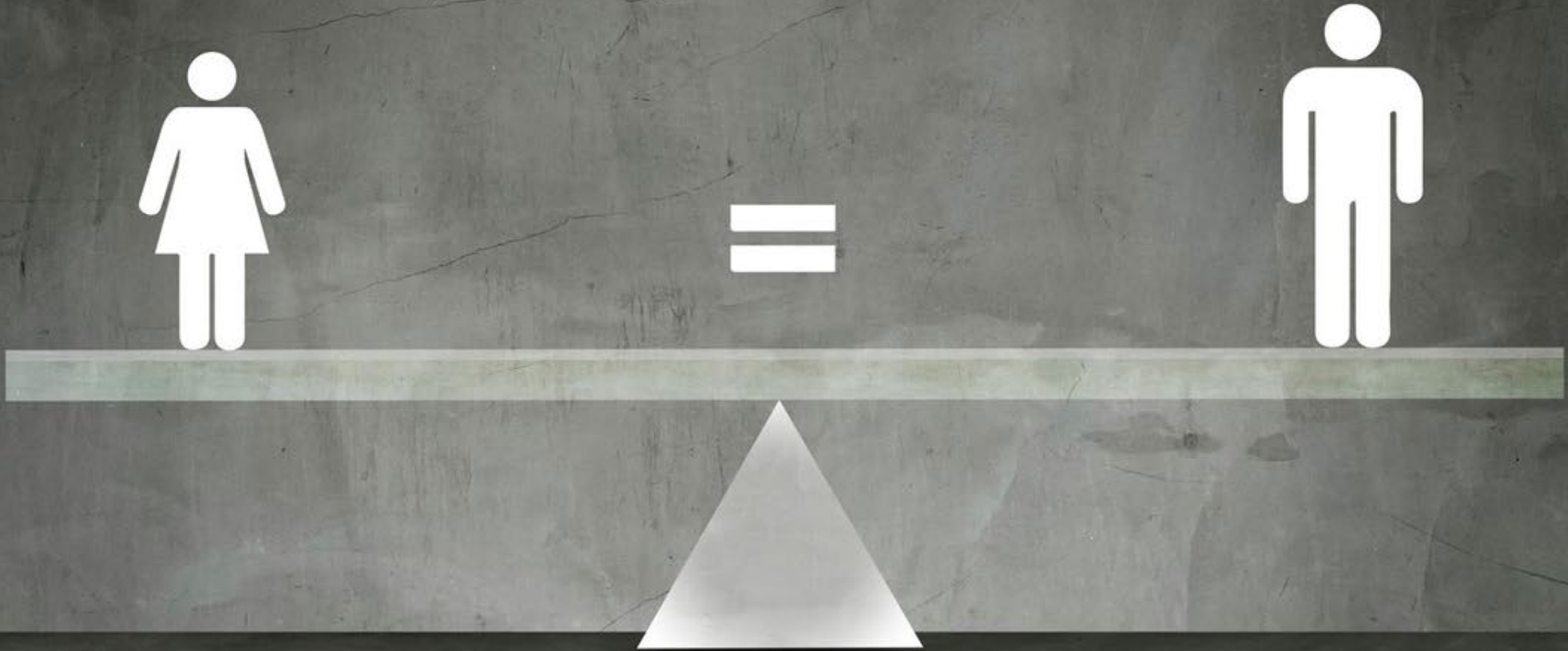
1990s thru' 2015

Dear Colleague Letters and Other Policy Guidance expanded Title IX's reach, including LGBTQ individuals.

Current

New Title IX regulations adopted in August of 2020, to be interpreted by an administration that did not draft them.

Original Focus: Sex Equity



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

Applying the Sex Equity Rules

Sports



Classes



Facilities



Scope of Title IX Under the New Regulations



Who are the parties involved?

complainant

respondent

Title IX
coordinator

investigator

decision-maker

appeals
decision-maker



Handout - Details:
Who are the Parties
Involved?

What is Title IX Misconduct Based on Sex?

1. **Quid pro quo** offer based on sex:

- employee (not student) offers some kind of aid-benefit-service in exchange for unwelcome sexual conduct

2. **Violence** based on sex:

- sexual assault, dating violence, domestic violence and/or stalking, as defined in the *Clery Act* and the *Violence Against Women Act (VAWA)*

3. **Sexual harassment**:

- Unwelcome sexual conduct (or conduct based on sex)
- So severe AND pervasive AND objectively offensive
- That it effectively denies a person equal access to educational programs or activities

Title IX vs. Illinois Sexual Harassment

Illinois: "***Sexual Harassment***" is defined as unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature.

Title IX: "***Title IX Sexual Harassment***" is defined as 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

Davis v. Monroe County Board of Education

526 U.S. 629 (1999)



FACTS:

A fifth grader told her teacher that a student in her class is trying to touch her chest and her private areas and said things to her like “I want to get in bed with you” and “I want to feel your boobs.” The student said 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 told 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. Nothing was done by the school district to stop the behavior.

Davis v. Monroe County Board of Education

526 U.S. 629 (1999)



DECISION:

School Districts that are deliberately indifferent to peer on peer sexual harassment may be held liable for money damages for their deliberate indifference.

To avoid deliberate indifference, School Districts must respond in a way that is not clearly unreasonable in light of the known circumstances.

The Court is specific that this does not require School Districts to discipline every student accused of sexual harassment.



Small Group “Breakout” Time

Moeck v. Pleasant Valley Sch. Dist., 179 F.Supp.3d 442



Does this behavior, as described, meet the definition of sexual harassment under the Title IX regulations? Why/not?

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.

Location of the Misconduct



- “Actual notice”
- On or off campus
- School exercises substantial control
- School district may provide supportive measures

*Handout - Details:
Location of the
Misconduct*



Title IX = IN the United States

Temporal scope of Title IX

Complainant's Enrollment



Examples

- At a high school football game?
- During class or in the hallways?
- On the bus?
- On a field trip to the Zoo?
- At a student's job at the convenience store across the street from school?
- At a student's home?
- On a student's Instagram page?
- On a Spanish Immersion Trip in Mexico?

HOW Do Schools Fulfill Their Title IX Obligations?

General Response

Maintaining other
Legal Obligations

34 CFR §§ 106.6(d)-(h), 106.44(a)

*Handout -
Details:*
How do schools
fulfill their Title
IX obligation?

Supportive Measures: What are they?



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



34 CFR §§ 106.30(a), 106.44(b)

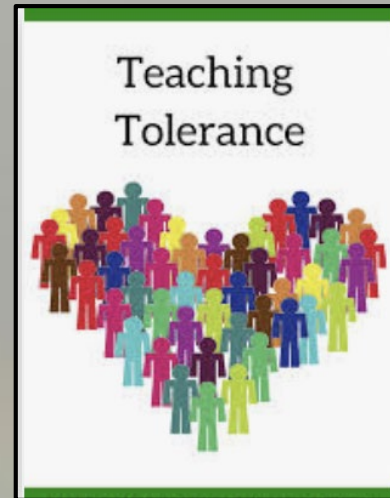
Impartiality



<https://trustandjustice.org/resources/intervention/implicit-bias>



<https://implicit.harvard.edu/implicit/>



www.facinghistory.org



Impartiality

Listen.

Really listen.



6-Step Title IX Process



Actual Knowledge

Requirements:

- Can't be "deliberately indifferent"

Possible Outcomes:

- Supportive measures; no further action; OR
- Complainant decides to file Formal Complaint; OR
- Title IX Coordinator signs Formal Complaint

Formal Complaint

Requirements:

- Notice of allegations
- Notice of all procedures

Possible Outcomes:

- Supportive measures AND:
- Investigation, OR
- Dismissal of complaint, OR
- Informal resolutions, OR
- Emergency removal + investigation

Investigation

Requirements:

- Evidence gathering
- Advisors for parties
- Investigative report of facts leading to next phase

Possible Outcomes:

- Complaint withdrawn
- Informal resolutions
- Hearing/questioning

Handout -
Details:
6-Step
Title IX
Process

Appeals

Requirements:

- Both parties have equal opportunity to appeal
- Notice of appeal
- Equal opportunity to respond

Options:

- Basis for appeal

Determination regarding Responsibility

Requirements:

- Written determination
- Provided to both parties

Options:

- Standard of proof
- Remedies
- Supportive measures

Hearings / Opportunity to Question

Requirements:

- Postsecondary: live hearing(s)

Options:

- K-12: may have live hearing OR opportunity to question other side in written form

1

Actual Knowledge

Actual
Knowledge
is Required

Any
employee



2

Formal Complaint

Formal Title IX Complaint



Formal Title IX Complaint

- In writing and signed by the Complainant (parents) or the Title IX coordinator (not anonymous)
- Alleges a violation of Title IX
- Requests investigation



The Title IX Coordinator can dismiss any complaint that does not meet this standard.

Formal Complaint
Signed by
Title IX Coordinator



3

Informal
Resolution or
Investigation

Informal Resolution is (Sometimes) an Option





Investigations: An Overview

*Handout -
Details:
Investigation:
An Overview*

New Legislation re Forensic Interviews by the Child Advocacy Center (CAC)

55 ILCS 80/4.5 new

Effective January 1, 2020

Sec. 4.5. Forensic interviews; electronic recordings.

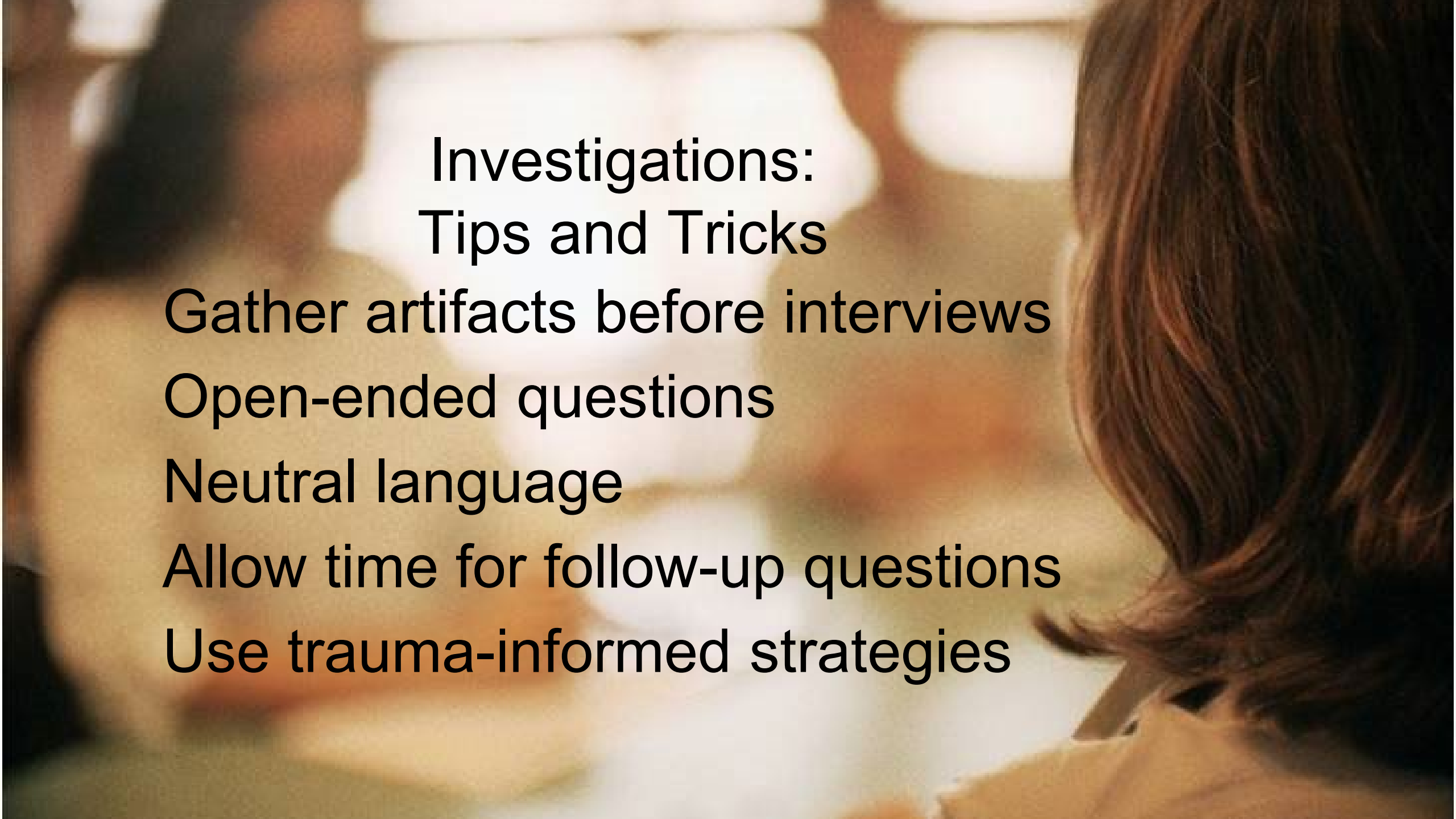
(a) Parental consent is no longer required for a forensic interview to be electronically recorded by the CAC. Failure to record does not render a forensic interview inadmissible.

(b) The recording of a forensic interview may be provided to school districts in relation to an administrative hearing (teacher dismissal, student expulsion, etc.) to limit re-traumatization of the child victim.



Corey's Law and Student Interviews

- Corey's 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 during the interview if held on school grounds
- 105 ILCS 5/22-85

The background of the slide is a blurred photograph of a group of people. On the right side, the back of a person's head with long, dark, wavy hair is visible. The rest of the image is out of focus, showing indistinct shapes and colors of other people in a group setting.

Investigations: Tips and Tricks

Gather artifacts before interviews

Open-ended questions

Neutral language

Allow time for follow-up questions

Use trauma-informed strategies

Investigations — Unique to Title IX



- Once compiled, **send all evidence to complainant** and respondent (and their advisors) with plenty of time (at least 10 days) to meaningfully respond
- **Consider** the Parties' responses when drafting the investigative report
- **Refrain at this step from determining the credibility** of the parties or their statements, but document details that *do* and/or *do not* align with other parties' accounts and other relevant evidence



Small Group “Breakout” Time

Additional Considerations for Witnesses

- A. Should you record the interview?
- B. Should you have the witness sign a statement?
- C. For student witnesses, should parents be involved?
- D. For staff witnesses, should union representatives be involved?
- E. Should the employee be placed on leave during an investigation?
- F. Should you involve law enforcement or DCFS?

Investigation: The Written Report

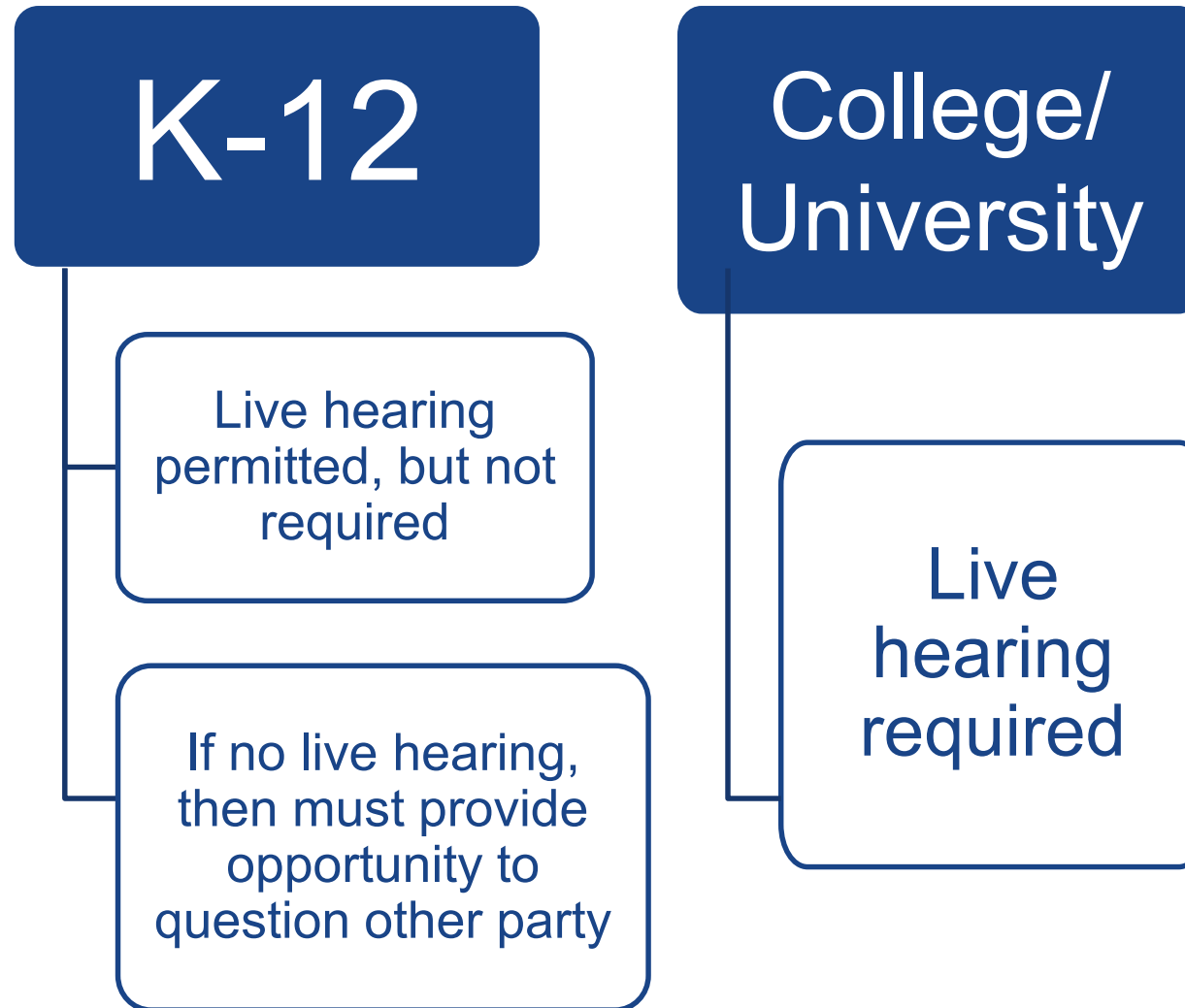
*Handout -
Details:
The Written
Report*



4

Hearing or
Opportunity to
Question

Hearing / Opportunity to Question





Formal Hearing

- Questions by advisors only (appoint an advisor if a party does not have one)
- Exclude evidence if a witness refuses cross examination
- Use technology for witnesses at the District's discretion

Opportunity to Question

**ONLY
relevant
questions**

**K-12
“funneling”**

*Handout -
Details:
Opportunity to
Question*

5

Decision Making:
Determination
regarding
Responsibility

Standard of Review

The decision-maker applies the school district's chosen standard of evidence for Title IX investigations:

- **Option 1:** “preponderance of the evidence” standard
- **Option 2:** “clear and convincing” standard

Each school district must choose one of these standards for ALL sexual harassment investigations (those involving just students, just employees, and both students and employees)

Decision Maker

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

weighs the credibility of all relevant evidence and statements.

Next phase:
Determination regarding Responsibility.

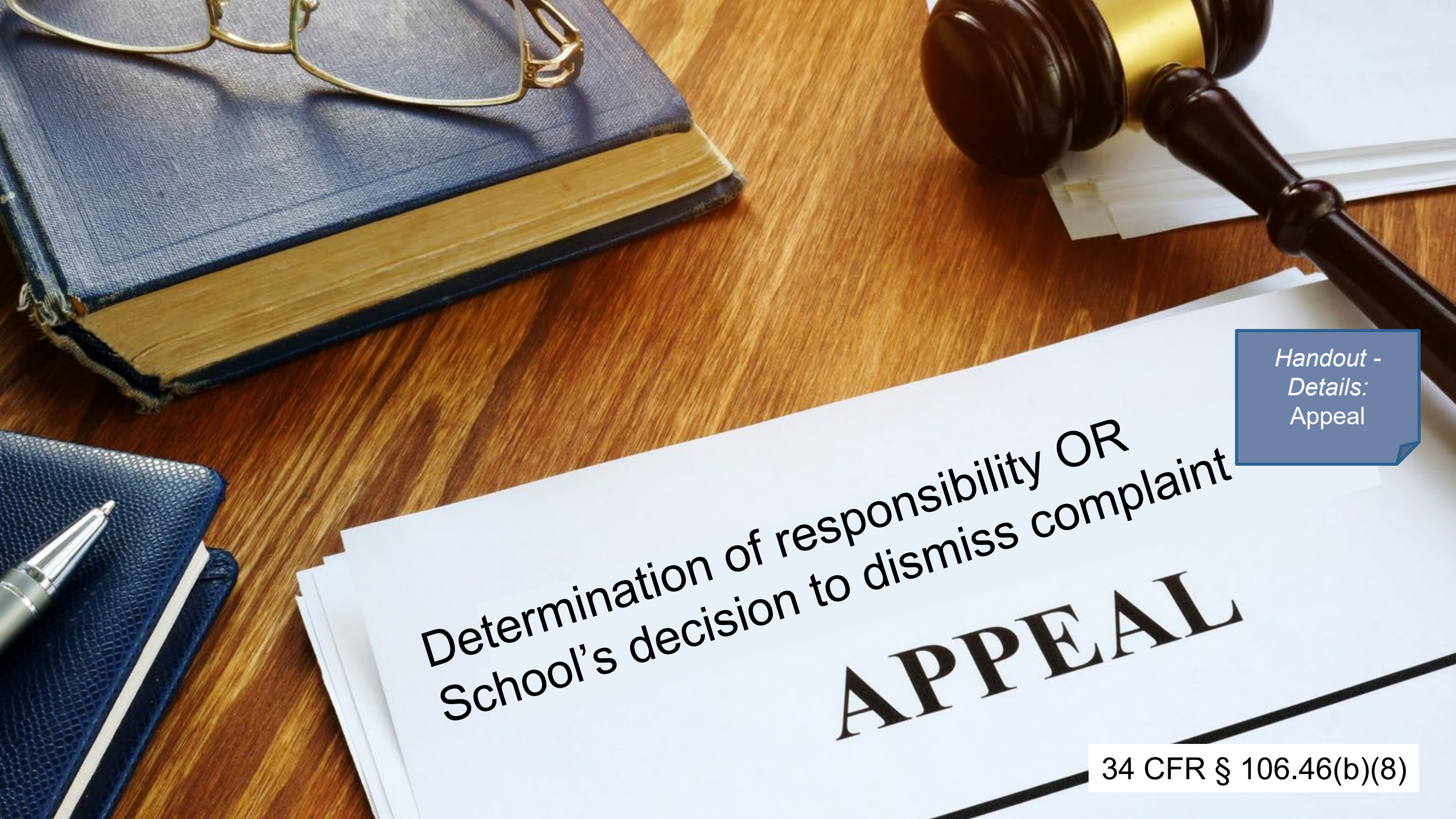


The Written Decision

- The decision-maker issues a 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 disciplinary code to the facts
 - Rationale for the decision regarding *each* allegation and determination regarding responsibility
 - Any disciplinary sanctions imposed upon a party
 - Any other remedies and supportive measures recommended or warranted
 - Procedures and permissible basis for appeal
- School must provide written determination to parties simultaneously
- Title IX Coordinator implements remedies / coordinates disciplinary consequences

6

Appeals



Determination of responsibility OR
School's decision to dismiss complaint

APPEAL

*Handout -
Details:
Appeal*

34 CFR § 106.46(b)(8)

Schools 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
- The appeals decision-maker must not have been involved in the Title IX complaint process thus far
- The appeal decision-maker must be trained and is neutral/impartial
- Give both parties a reasonable, equal opportunity to submit a written statement about the outcome of the investigation phase
- Issue a written decision describing the result (final decision) and rationale
- Provide decision simultaneously to all parties



Other Matters



Recordkeeping

The Title IX Coordinator must keep written records for 7 years of all the following.

- Title IX complaints, including:
 - Supportive measures provided
 - If no supportive measures provided, document why not warranted
 - Basis for school's conclusion that its response was not deliberately indifferent
 - Documentation of measures designed to restore or preserve equal access for the complainant
- Investigation reports and records
- Recordings/transcripts of hearings (if any)
- Written determinations regarding responsibility
- Disciplinary consequences (if any)
- Appeals
- Informal Resolutions

34 CFR § 106.46(b)(10)



Small Group “Breakout” Time

Training & Training Materials

Training must include:

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

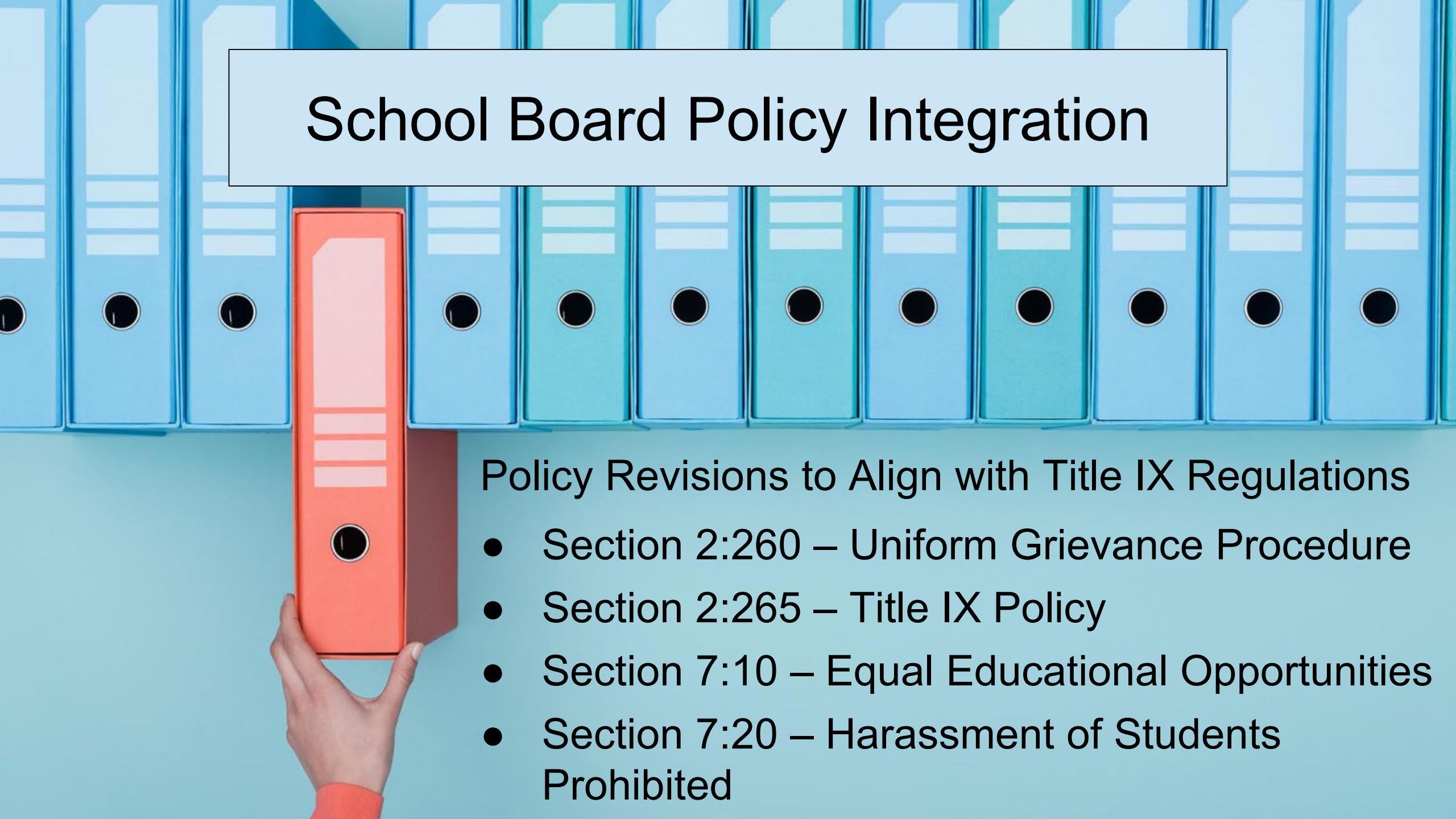
All training materials used to train:

- Title IX coordinator
- Investigator(s)
- Decision-maker(s)
- Appeals decision-maker(s)

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

Retaliation is
Prohibited





School Board Policy Integration

Policy Revisions to Align with Title IX Regulations

- Section 2:260 – Uniform Grievance Procedure
- Section 2:265 – Title IX Policy
- Section 7:10 – Equal Educational Opportunities
- Section 7:20 – Harassment of Students Prohibited



CHAT:
**Based on what
you learned today,
what is your “call-
to-action”?**

Stephanie Jones

stephanie@krihaboucek.com

@EdLawSteph1

Sara Boucek

sara@krihaboucek.com

@sboucek



kriha boucek

Thank you!



krihaboucek.com



@krihabouceklaw

Oakbrook Terrace Office

2 Trans Am Plaza Dr., Suite
450

Oakbrook Terrace, IL 60181

Southern Illinois Office

3 Club Centre Court Suite D
Edwardsville, IL 62025