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TITLE IX OVERVIEW AND INVESTIGATION TRAINING FOR ADMINISTRATORS

Independent School District No. 286, Brooklyn Center Public Schools

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I. INTRODUCTION

In 2020, the Office for Civil Rights ("OCR") at the U.S. Department of Education announced new Title IX requirements governing sexual harassment complaints and investigations. The Title IX legal landscape has experienced significant changes since 2020, and new regulations temporarily went into effect in 2024. However, considering a recent court decision in January 2025 vacating the 2024 Title IX regulations, the OCR recently clarified in a *Dear Colleague* letter that it will enforce Title IX under the provisions of the 2020 Title IX Rule. This training focuses on the requirements of the 2020 Title IX regulations.

NOTE: These materials and the corresponding presentation are meant to inform you of interesting and important legal developments. While current as of the date of presentation, the information that is provided may be superseded by court decisions, legislative amendments, rule changes, and opinions issued by bodies interpreting the area of law. We cannot render legal advice without an awareness and analysis of the facts of a particular situation. If you have questions about the application of concepts addressed in this outline or discussed in the presentation, you should consult with your legal counsel.
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II. LAWS PROHIBITING SEX DISCRIMINATION

There are different laws with different definitions of sexual harassment that apply in the school setting. The best approach is to first address sexual harassment allegations through the Title IX process. If conduct does not meet the Title IX definition of sexual harassment, it may still need to be addressed to avoid liability under the Minnesota Human Rights Act or Title VII.

A. Title IX

1. Title IX is a federal law that prohibits discrimination on the basis of sex by any education program or activity receiving federal funding. 20 U.S.C. § 1681(a).

2. Title IX applies to *students and employees* in "any academic, extracurricular, research, occupational training, or other education program or activity." 34 C.F.R. § 106.31(a).

3. For Title IX, discrimination includes providing services in a different manner.

4. Definition of sexual harassment for Title IX is explained in more detail below.

B. Minnesota Human Rights Act ("MHRA")

1. The MHRA prohibits discrimination based on certain characteristics, including sex and sexual orientation. Minn. Stat. § 363A.03, subd. 44 (including gender identity within the definition of sexual orientation); Minn. Stat. § 363A.08; Minn. Stat. § 363A.13.

2. In the context of educational institutions, the MHRA specifically prohibits discrimination "in any manner in the full utilization of or benefit from any educational institution, or the services rendered thereby." Minn. Stat. § 363A.13, subd. 1.

3. To "discriminate" under the MHRA means to "segregate or separate." Minn. Stat. § 363A.03, subd. 13.

4. The MHRA also creates liability for individual employees who aid and abet violations of the MHRA. Minn. Stat. § 363A.14.

C. **Title VII**

1. Title VII protects *employees* from discrimination on the basis of sex.

2. It is unlawful for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's … sex…" 42 U.S.C. § 2000e-2(a) (1).

3. Title IX applies to students and employees in an educational institution, so when an employee files a complaint, districts should be aware that the Title VII and Title IX standards for sexual harassment are not the same.

   a) For Title VII, sexual harassment is defined as:

   Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when:

   (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment,

   (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or

   (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

   29 C.F.R. § 1604.11

III. SEXUAL HARASSMENT DEFINED UNDER TITLE IX

A. **What is sexual harassment?** Sexual harassment is conduct on the basis of sex that includes one or more of the following:

1. An employee conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct (also called *quid pro quo* harassment);

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 a school's education program or activity;

3. ''Sexual assault'' as defined in 20 U.S.C. 1092(f)(6)(A)(v), ''dating violence'' as defined in 34 U.S.C. 12291(a)(10), ''domestic violence'' as defined in 34 U.S.C. 12291(a)(8), or ''stalking'' as defined in 34 U.S.C. 12291(a)(30). These are definitions from the "Clery Act" and "Violence Against Women Act" ("VAWA").

   a) 20 U.S.C. 1092(f)(6)(A)(v) defines "sexual assault" as "an offense classified as a forcible or nonforcible sex offense under the uniform crime reporting system ("UCRS") of the Federal Bureau of Investigation."

      (1) The FBI UCRS defines "Sex Offenses – Forcible" as "[a]ny sexual act directed against another person, forcibly and/or against that person's will; or not forcibly or against the person's will where the victim is incapable of giving consent." This definition includes forcible rape, forcible sodomy, sexual assault with an object, and forcible fondling.

      (2) The FBI UCRS defines "Sex Offenses – Non-forcible unlawful, non-forcible sexual intercourse" as "Incest – Non-forcible sexual intercourse between persons who are related to each other within the degrees wherein marriage is prohibited by law" and "Statutory Rape – Non-forcible sexual intercourse with a person who is under the statutory age of consent."

   b) 34 U.S.C. 12291(a)(10) defines "dating violence" as "violence committed by a person…"

      (1) who is or has been in a social relationship of a romantic or intimate nature with the victim; and

      (2) where the existence of such a relationship shall be determined based on a consideration of the following factors:

         (a) The length of the relationship,

(b) The type of relationship,

(c) The frequency of interaction between the persons involved in the relationship.

c) 34 U.S.C. 12291(a)(8) defines "domestic violence as including "felony or misdemeanor crimes of violence committed…"

(1) by a current or former spouse or intimate partner of the victim,

(2) a person with whom the victim shares a child in common,

(3) by a person who is cohabitating with or has cohabitated with the victim as a spouse or intimate partner

(4) 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

(5) 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.

d) 34 U.S.C. 12291(a)(30) defines "stalking" as engaging in a course of conduct directed at a specific person that would cause a reasonable person to—

(1) fear for his or her safety or the safety of others; or

(2) suffer substantial emotional distress.

B. **What does it mean to "effectively deny" equal access to education?**

1. DOE guidance states the following may be examples of a student who has been effectively denied equal access to an education:

a) skipping class to avoid a harasser;

b) decline in grade point average related to harassment;

c) difficulty concentrating in class as a result of harassment;

d) emotional reactions that occur at home, such as crying or bed-wetting as a result of harassment; or

e) quitting a sports team due to harassment, but continuing to participate normally in other school activities.

2. A complainant does not need to have suffered educational loss prior to making a complaint.

3. A complainant does not need to demonstrate that all access to education has been denied; it could be one component such as extreme discomfort attending a specific class or participating in an extracurricular activity.

4. In general, school districts should not screen out complaints of sexual harassment because the complainant "was not traumatized enough." U.S. Dep't of Ed. *Questions and Answers on the Title IX Regulations on Sexual Harassment*, (July, 2021) at Answer 8.

C. **What about consent?**

1. The regulations expressly decline to adopt a definition of consent and give schools the ability to choose one most appropriate to their circumstances.

2. The MSBA model policy does not include a definition of consent.

D. **Which school programs or activities are covered by Title IX?**

1. An "education program or activity" includes "locations, events, or circumstances over which the recipient exercised substantial control over both the [subject of a complaint] and the context in which the sexual harassment occurs…" 34 C.F.R. § 106.44(a).

2. Note that this definition is broad enough to encompass sexual harassment occurring over an online platform.

3. One of the only exclusions is conduct that takes place outside of the United States. 34 C.F.R. § 106.8(d).

E. **What documents are required?**

1. Nondiscrimination Policy

a) The 2020 regulations do not include any detailed requirements for what must be included in a nondiscrimination policy, other than stating that one must exist.

b) Schools should review existing policy language to ensure there is no confusion about who serves as the Title IX Coordinator (**see District Policy 522).**

c) Notice of Policy

(1) The regulations require that notice of the non-discrimination policy must be provided to: "applicants for admission and employment, students, parents or legal guardians of elementary and secondary school students, employees, and all unions or professional organizations holding collective bargaining or professional agreements with the [district.]" 34 C.F.R. § 106.8(a) and § 106.8(b).

(2) Notice of the policy must also identify the Title IX Coordinator and include their office address, email address, and telephone number.

(3) Notice of the policy and contact information for the Title IX Coordinator must also be "prominently displayed" on a school district's website, and be included in each handbook or catalog made available to "applicants for admission and employment, students, parents or legal guardians of elementary and secondary school students, employees, and all unions or professional organizations holding collective bargaining or professional agreements with the [district.]"

2. Grievance Procedure

a) A grievance procedure may be part of the nondiscrimination policy or may be a separate document. It must "provide for the prompt and

equitable resolution of student and employee complaints alleging any action prohibited by [Title IX]." 34 C.F.R. § 106.8(c).

b) The grievance procedure only applies to claims of sexual harassment or retaliation in connection with a report of sexual harassment.

c) The regulations contain many detailed requirements for the grievance procedure. These requirements are discussed in this outline. The following are overarching requirements:

(1) Complainants and respondents must be treated equally.

(2) All relevant evidence must be objectively evaluated and credibility determinations must not be solely based on a person's status as a complainant, respondent, or witness.

(3) Individuals involved in the Title IX grievance process must be trained and must not demonstrate bias.

(4) The respondent is presumed not responsible for the alleged conduct until a determination of responsibility is made after the grievance process.

(5) There must be reasonably prompt time frames for conclusion of the grievance process.

(6) The range of potential disciplinary sanctions must be outlined.

(7) The standard of evidence used must be identified. Options are "preponderance of the evidence" or "clear and convincing evidence." These options are discussed below. ***See*** **Policy 522 (adopting preponderance of the evidence standard).**

(8) Appeal procedures and bases for appeal must be outlined.

(9) Range of supportive measures available to complainants *and* respondents must be described.

(10) The procedures 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, unless the person holding the privilege has waived the privilege.

IV. INITIAL HANDLING OF ALLEGATIONS AND FORMAL COMPLAINTS

A. Reporting Sex Discrimination or Sexual Harassment.

1. Any person may report sex discrimination or sexual harassment to the Title IX Coordinator, regardless of whether the reporter is the alleged victim.

2. A report may be made in person, by mail, by telephone, by e-mail, using the Title IX Coordinator's other designated contact information, or by any other means that results in the Title IX Coordinator receiving the person's verbal or written report.

3. A report may be made at any time, including non-business hours. 34 C.F.R. § 106.8(a).

4. A parent of a dependent child may also file a formal complaint on behalf of their child. 34 C.F.R. § 106.6(h).

B. Notice of Sexual Harassment Allegations

1. A district's obligations under Title IX are triggered once the district has "actual knowledge" of alleged sexual harassment.

2. An elementary or secondary school is deemed to have *actual knowledge* of alleged sexual harassment if ***any employee*** has notice of the allegation. 34 C.F.R. § 106.30(a). This standard is intended to be consistent with mandatory reporting requirements for school staff.

3. Although not specifically required by the 2020 Title IX regulations, an employee who has notice of sexual harassment should promptly notify the Title IX Coordinator to ensure the matter is properly addressed. This will require that staff are notified of and understand their obligation to pass all knowledge of or reports they receive of sexual harassment to the Title IX Coordinator.

C. **Responding to Allegations of Sexual Harassment**

1. At a minimum, the school must respond promptly and in a manner that is not "deliberately indifferent."

2. A school is "deliberately indifferent" *only* if the school's response is "clearly unreasonable in light of the known circumstances." 34 C.F.R. § 160.44(a).

D. **Formal Complaints**

1. A "formal complaint" is a document filed by an individual who is the victim of alleged sexual harassment (called the "complainant" under the Title IX regulations) or signed by the Title IX Coordinator alleging sexual harassment against a respondent and requesting that a school investigate the allegation of sexual harassment. 34 C.F.R. § 160.30(a).

2. At the time the formal complaint is filed, a "complainant" must be participating in or attempting to participate in the school's education program or activity.

3. If the Title IX Coordinator signs a complaint, the Title IX Coordinator is not considered a "complainant" or party to the matter. The Title IX Coordinator is the only school official under the regulations with authority to initiate a formal complaint.

4. Once a formal complaint is filed, a school must follow the grievance process outlined below. 34 C.F.R. § 160.44(b). This is an important concept because it means that a school does not have to conduct a Title IX investigation if a "formal complaint" is not filed, but the school still must respond to the reported misconduct in a manner that is not "deliberately indifferent."

E. **Title IX Coordinator Complaints**

1. The Title IX Coordinator may file a formal complaint over the objection of a complainant if it is "reasonable" to do so.

2. This issue is not directly addressed in the text of the 2020 regulations, but OCR's commentary on the 2020 regulations states that a Title IX Coordinator must consider the complainant's wishes and must only initiate

a formal complaint against a complainant's wishes if doing so is "not clearly unreasonable in light of the known circumstances."

F. **Responding to Complaints that are not Formal Complaints**

1. A district is required to respond to any complaint, even if it is not a "formal complaint."

2. The "deliberate indifference" standard outlined above applies regardless of whether a formal complaint is filed. 34 C.F.R. § 106.44(b).

3. When a school has actual knowledge of potential sexual harassment, the Title IX Coordinator must promptly contact the suspected victim, who is referred to as the "complainant" in the regulations, to discuss the availability of supportive measures, consider the complainant's wishes regarding supportive measures, inform the complainant of the availability of supportive measures regardless of whether a formal complaint is filed, and discuss the process for filing a formal complaint. 34 C.F.R. § 160.44(a).

G. **Supportive Measures**

1. "Supportive measures" are non-disciplinary, non-punitive individualized services offered as appropriate and reasonably available to the complainant or the respondent. They must be offered at no cost.

2. Supportive measures may be offered before or after a formal complaint is filed or in situations where no formal complaint is filed.

3. Supportive measures are designed to deter sexual harassment and to restore or preserve equal access to an education program or activity by *both parties* without reasonably burdening the other party, which includes protecting the safety of all parties and the educational environment.

4. Examples of supportive measures include counseling, extensions of deadlines or other course-related adjustments, modifications of work or class schedules, campus escort services, mutual restrictions on contact between the parties, increased security and monitoring of certain areas of the campus, and other similar measures.

5. Supportive measures offered to a party must be kept confidential to the extent doing so does not impair the ability of a school to provide the supportive measures. 34 C.F.R. § 160.30.

6. The Title IX Coordinator is responsible for coordinating the implementation of supportive measures.

H. **Notice to Parties**

1. When a formal complaint is filed, a school must provide the following written notice to the known parties:

   a) Notice of the grievance process, including any informal resolution process;

   b) Notice of the allegations potentially constituting sexual harassment, including sufficient details known at the time and with sufficient time to prepare a response before any initial interview. Sufficient details include the identities of the parties involved in the incident, if known, the conduct allegedly constituting sexual harassment, and the date and the location of the alleged harassment, if known. The notice must also include:

      (1) A statement that the respondent is presumed not responsible for the alleged conduct;

      (2) A statement that the parties may have an advisor of their choice, who may be, but is not required to be, an attorney;

      (3) A statement that the parties may inspect and review evidence;

      (4) Notice of any provision in the school's code of conduct that prohibits knowingly making false statements or knowingly submitting false information during the grievance process.

2. If, in the course of an investigation, the school decides to investigate allegations about the complainant or respondent that are not included in the initial notice, notice of the additional allegations must be provided to the parties whose identities are known.

V. CONDUCTING AN INVESTIGATION

A. Obligation to investigate or dismiss.

1. An investigation is required when a formal complaint is made.

2. A formal complaint **must** be dismissed if: (1) the conduct alleged in the formal complaint would not constitute sexual harassment, as defined above, even if proved, or (2) did not occur against a person in the United States.

3. The dismissal of the complaint for Title IX purposes does not prevent a school from taking action under another provision of the code of conduct for students, the MHRA, or Title VII for employees.

4. There are circumstances identified in **District Policy 522** where a complaint **may** be dismissed (complainant notification in writing to the Title IX Coordinator that they would like to withdraw; the respondent is no longer enrolled at or employed by the school; specific circumstances prevent the District from gathering evidence sufficient to reach a determination)

B. Investigation Process

1. Exactly how an investigation will be conducted is subject to each district's grievance process. The Title IX regulations require the following elements:

   a) School districts bear the burden of proof and are responsible for gathering evidence.

   b) A school district cannot access, consider, disclose, or otherwise use a party's records from a physician, psychiatrist, psychologist, or similar professional that are made and maintained in connection to the treatment of that party, unless the party (or a parent) provides voluntary, written consent.

   c) Both parties must have an opportunity to present fact and expert witnesses, as well as other evidence.

   d) Parties cannot be prohibited from discussing the allegations with others.

e) The school district must provide the parties with the same opportunities to have others present during any grievance proceeding, including the opportunity to be accompanied by an advisor of their choice, who may be an attorney, and not limit the party's choice or presence of advisor (a school may establish restrictions regarding the extent to which the advisor may participate in the proceedings, as long as the restrictions apply equally to both parties).

f) The school district must provide reasonable advance written notice of the date, time, location, participants, and purpose for any meetings, including hearings or investigative interviews, to any invited or expected participant.

g) Both parties must be allowed to review all evidence.

h) The investigator must prepare an investigation report that fairly summarizes relevant evidence and provide a copy of the investigation report to each party and the party's advisor, if any, at least ten days before a determination of responsibility is made by the decision-maker.

i) Prior to completing the investigative report, the investigator must send all evidence to the parties or their advisors, if any, and provide the parties ten days to submit a written response.

C. **Data Privacy.** The regulations state that schools cannot use the Family Educational Rights and Privacy Act ("FERPA") as a reason for not complying with these regulations. 34 C.F.R. § 106.6(e).

VI. MAKING A DECISION

A. Decision-maker's role

1. A "decision-maker" must make a determination regarding responsibility.

2. The "decision-maker" may not be the Title IX Coordinator or the investigator(s). 34 C.F.R. § 106.45(b)(7).

3. The regulations specify required training for a "decision-maker," which is discussed below, but do not otherwise define who must serve as a "decision-maker."

B. **Opportunity to submit written questions**

1. After the investigation report is provided to the parties, the decision-maker must allow for each party to submit written questions to any party or witness. The decision-maker determines whether the questions are relevant and, if so, the decision-maker must send the questions to the party or witness, allow time for a written response, and provide the written response to the party who submitted the question. 34 C.F.R. § 106.45(b)(6)(ii).

2. The decision-maker must also allow "limited follow-up" questions from each party.

C. **Informal Resolution**

Options for informal resolution are outlined in Section XII.

D. **Written decision required.**

1. A decision must be in writing and must contain the following elements:

a) Identification of the allegations potentially constituting sexual harassment;

b) 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;

c) Findings of fact supporting the determination;

d) Conclusions regarding the application of the recipient's code of conduct to the facts;

e) 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; and

f) The recipient's procedures and permissible bases for the complainant and respondent to appeal. 34 C.F.R. § 106.45(b)(7).

VII. APPEALS

A. **Any party may appeal.** Any party may appeal from a determination regarding responsibility or a dismissal of a formal complaint. 34 C.F.R. § 106.45(b)(8).

B. **Grounds for Appeal.** An appeal may be based on any of the following:

1. Procedural irregularity that affected the outcome of the matter;

2. New evidence that was not reasonably available at the time the determination regarding responsibility or a dismissal was made and that could affect the outcome of the matter; and

3. The Title IX Coordinator, investigator(s), or decision-makers(s) had a conflict of interest or bias for or against complaints or respondents generally or the individual complainant or respondent that affected the outcome of the matter.

C. **Procedure after receiving notice of appeal.**

1. After receiving the notice of appeal, the decision-maker for the appeal must notify the other party of the appeal.

2. Both parties must have an opportunity to submit a written statement in support of, or challenging the outcome.

3. The decision-maker on appeal must issue a written decision describing the result of the appeal and the rationale for the result.

4. The written decision on the appeal must be provided simultaneously to both parties.

D. **Decision-maker on Appeal.** The person who presides over an appeal must not be the initial "decision-maker," the Title IX Coordinator, or the investigator(s). 34 C.F.R. § 106.48(b)(8). It could be the school board, but schools that have the school board preside over an appeal would need to ensure that board members

receive the training required for "decision-makers." The required training is discussed below.

VIII. REMOVALS PENDING COMPLETION OF GRIEVANCE PROCESS

A. **Students**

1. The regulations do not prevent a school from removing a student from an education program or activity on an emergency basis, as long as the school does an individualized safety and risk analysis, determines that an immediate threat to the physical health or safety of any student or other individual arising from the allegations of sexual harassment justifies removal, and provides the respondent with notice and an opportunity to challenge the decision immediately following the removal.

2. Any such removal would be subject to any rights the student may have under the Individuals with Disabilities Education Act, Section 504, the ADA, or Minnesota's Pupil Fair Dismissal Act.

B. **Employees**

1. An employee can be placed on a paid suspension during an investigation, subject to any requirements in an applicable collective bargaining agreement. *See* 34 C.F.R. § 106.44(d).

2. Because the suspension would be paid, it would generally not be considered disciplinary.

IX. TRAINING REQUIREMENTS

A. **Title IX Personnel and Training.** Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process must be trained on:

1. The definition of sexual harassment under Title IX;

2. The scope of the district's educational programs and activities;

3. How to conduct an investigation and grievance process, including hearings, appeals, and informal resolution processes;

4. How to serve impartially, including by avoiding prejudgment of facts at issue, conflicts of interest, and bias;

5. How to determine whether questions and evidence are relevant;

6. When questions and evidence about a complainant's sexual predisposition or prior sexual behavior are relevant; and

7. How to prepare an investigative report that fairly summarizes relevant evidence. 34 C.F.R. § 106.45(b)(1)(iii).

B. **Posting Materials.** Districts are required to post the training materials used to train their Title IX Coordinator, investigators, decision-makers, and individuals authorized to facilitate informal resolution on the district website. 34 C.F.R. § 106.45(b)(10)(i)(D). These materials must also be maintained by the district for seven years.

C. **Training for All Employees.** Because a student report of sexual harassment to *any* staff member is considered notice to the district, districts should ensure that all staff are aware of the definition of sexual harassment and that they must report any allegations to the Title IX Coordinator immediately. The commentary to the 2020 regulations states that part of the basis for imputing knowledge based on a report to any staff member is that employees have obligations to report child maltreatment under state laws. While this is true, it is important for employees to know that there are some instances that would meet the Title IX definition of sexual harassment, but would not necessarily constitute maltreatment under Minnesota law. For example, peer-to-peer sexual harassment would not require a maltreatment report in most circumstances, but would need to be investigated pursuant to Title IX.

X. ADDITIONAL REQUIREMENTS

A. **Prohibition on retaliation.**

1. Districts and individuals are prohibited from intimidating, threatening, coercing, or discriminating against anyone for the purpose of interfering with a right or privilege provided by Title IX or because a person made a complaint or participated in an investigation. 34 C.F.R. § 106.71(a).

2. Complaints about retaliation should be investigated pursuant to the grievance process.

B. **Recordkeeping.** For every incident of alleged sexual harassment that requires a response, the district must maintain records of the complaint, any discipline or other consequences, and any remedies or supportive measures offered to the complainant for seven years. 34 C.F.R. § 106.45(b)(10)(ii).

C. **Record Retention.** Records of any investigation must be maintained for seven years. 34 C.F.R. § 106.45(b)(10)(i). These include records of every investigation, appeal, and informal resolution.

XI. INVESTIGATION TRAINING

A. **Preliminary Steps.**

1. **Consultation with Title IX Coordinator.** For each of these steps, the Investigator should consult with the Title IX Coordinator to determine whether the Title IX Coordinator has already taken that step and, if not, who will be responsible for it.

2. **Review the Complaint.** Determine that the alleged conduct, if true, would meet the definition of sexual harassment (or retaliation for reporting sexual harassment).

   a) If the allegations would not support a finding of sexual harassment or retaliation if proven to be true, the formal complaint must be dismissed, but could be investigated outside of the Title IX process if it violates other school rules or policies.

   b) If the allegations (if proven) would support a finding of sexual harassment or retaliation, then there must be an investigation or voluntary resolution.

   c) If the allegations could potentially constitute criminal conduct and/or maltreatment of a minor, contact law enforcement or MDE, or ensure that the person receiving the complaint already did so. Note that mandatory reporting is an *individual* obligation.

3. **Preliminary Plan.** Identify people who should be interviewed, including the complainant, respondent, and any witnesses. Identify whether there are any documents mentioned in the complaint that would be useful to review

before interviewing witnesses and, if possible, make arrangements to obtain those documents.

4. **Notice.** Ensure the pre-investigation notice has been provided to the known parties, which will typically include any complainants and respondents.

5. **Placing Respondent on Leave.** Determine whether the respondent should be placed on leave and, if so, notify the respondent in accordance with applicable laws or contract language.

6. **Supportive Measures.** Determine whether any supportive measures need to be put in place for the complainant or the respondent. The Title IX Coordinator is responsible for coordinating supportive measures.

B. **Conducting the Investigation.**

1. **Interview the Complainant.**

a) Prior to interviewing the complainant, provide written notice to the complainant of the date, time, location, participants, and purpose of the interview. This must be done with "sufficient time for the party to prepare to participate."

b) Provide a Tennessen warning before the interview begins.

c) Remember the complainant has the right to have a representative of his or her choice present for the interview. The investigator may limit the participation of a party's representative, but must impose equal limits on the representatives for the complainant and respondent.

d) Explain the next steps after interviewing the complainant, and the time frames for completion of those steps.

2. **Interview the Fact Witnesses.**

a) **Students**

(1) Decide in advance whether parents will be permitted or invited to attend the interview of their children. Factors such

as the age of the students and the subject matter of the investigation should be considered.

(2) School officials are not required to permit parents to attend for fact witnesses. In contrast, for a complainant and respondent, Title IX allows to have a representative of their choice, who could be a parent, attend all interviews/ hearings as part of the investigation.

b) **Staff**

Staff being interviewed as fact witnesses are not entitled to have a representative attend with them.

3. **Interview the respondent.** (Provide written notice of time/date/place).

a) **Opening remarks.**

(1) At the start of the interview, introduce yourself and define your role in the investigation process as an impartial investigator.

(2) Give the respondent a Tennessen warning.

(3) Lay out the ground rules for the interview. Explain that you will not interrupt when the respondent is speaking, and he/she is not to interrupt when you are speaking. Explain the limits for the respondent's representative, which must be consistent with any limits that were placed on the complainant's representative.

(4) Explain that allegations have been made against the alleged offender; explain the evidence that the investigator has in support of the allegations; and tell the alleged offender that this is his/her opportunity to tell his/her side of the story.

b) **Follow-up Questions.** Be prepared to ask appropriate follow-up questions in order to obtain the alleged offender's response to each allegation. Consider the tips discussed above in this outline, as well as those set forth below.

(1) Do not tap dance around delicate topics. Ask the questions directly. This ensures respondents have a full opportunity to respond to the allegations.

(2) If the respondent admits to some comments or actions, ask what his or her intent was.

(3) If the respondent denies the allegations, ask if anyone would have a reason to fabricate the allegations.

(4) Ask for the names of people the respondent thinks have firsthand knowledge of the alleged conduct or the fact that it did not occur. Ask what information each person would have in order to ensure that they are not simply "character witnesses."

c) **Closing Remarks.** Prepare a written outline of your closing remarks.

(1) Ask for any other information that may be helpful, or if there is any other information the alleged offender would like to provide. Ask the alleged offender if he or she feels like the investigator has provided a full and fair opportunity to respond to the allegations. If the alleged offender says no, ask what else he or she would like to add to what has already been said.

(2) Direct the alleged offender to refrain from engaging in retaliation or taking any action which could give the appearance of attempting to influence the testimony of a witness in the investigation.

4. **Drafting an Investigation Report**

a) **Opportunity to review all evidence.** Prior to completion of the investigation report, the investigator *must* provide an opportunity for the complainant and respondent to inspect and review any evidence that is directly related to the allegations. They must be allowed ten days to submit a written response to the investigator.

b) **Drafting the report**

(1) The purpose of an investigation report is to document the actions you have taken and summarize the evidence you received. In other words, the investigator should follow a math teacher's advice and show the investigator's work.

(2) Title IX requires that both parties be provided an opportunity to present inculpatory and exculpatory evidence. Unless evidence is irrelevant (explained in more detail below), the investigator should summarize the evidence in the report.

(3) The investigation report should describe the behavior that occurred, rather than relying on conclusory statements.

(4) An investigator may include "recommended" findings of facts and conclusions, but the decision-maker will reach the final conclusion.

(5) A good investigation report will include the following elements:

(a) Summary of the allegations;

(b) Summary of the documents reviewed and witnesses interviewed;

(c) Findings of fact as to what occurred with respect to each allegation.

c) **Opportunity to review report.** After completion of the investigation report, it must be provided to the complainant, respondent, and decision-maker. If there will be a live hearing, the report must be provided at least ten days prior to the hearing. If there is no live hearing, it must be provided at least ten days before a determination of responsibility by the decision-maker.

C. **Making the Decision**

1. **Written Exchange of Questions.** If a live hearing is not provided, the parties must be allowed to submit written questions to any witness.

a) After the decision-maker receives the investigation report, the decision-maker must allow the complainant and respondent to

submit written, relevant questions to the other party and/or any witness.

b) If the decision-maker determines that a question submitted by a party is not relevant, the decision-maker must explain the decision to exclude the question to the party that asked it.

c) Parties and witnesses submit written answers to the questions to the decision-maker, who then provides the answers to both parties.

d) Parties may ask "limited" follow-up questions in writing, with written answers provided to the decision-maker and produced to the parties.

e) The regulations do not impose requirements for how much time must be allowed for the submission of written questions. Schools have the ability to determine how much time should be allowed. One option is to allow the decision-maker to address the amount of time on a case-by-case basis depending on the complexity of an investigation.

2. **Written Determination of Responsibility.** The decision-maker must prepare a written determination that includes the following elements:

a) Identification of the allegations potentially constituting sexual harassment;

b) 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;

c) Findings of fact supporting the determination;

d) Conclusions regarding the application of the district's policies or codes of conduct to the facts;

e) A statement of, and rationale for, the result as to each allegation, including a determination regarding responsibility, any disciplinary sanctions, and whether remedies designed to restore or preserve equal access to the district's education program will be provided to the complainant; and

f) The district's procedures and permissible bases for the complainant and respondent to appeal.

3. **Provide the Decision to the Parties Simultaneously.** This starts the time period for any appeal. The regulations do not require a specific appeal period. This is another area where schools have discretion to determine how much time should be allowed.

D. **Appeals.** *See* Section VII.

XII. CONDUCTING AN INFORMAL RESOLUTION PROCESS

A. Schools may offer an informal resolution process for Title IX complaints, except in situations involving allegations that an employee sexually harassed a student. School districts have wide discretion to offer informal resolution.

B. Parties cannot be required to participate in an informal resolution process. In addition, a school must not offer an informal resolution process unless a "formal complaint" is filed.

C. At any time during the grievance process after a formal complaint is filed, a school may facilitate an informal resolution process that does not involve a full investigation or decision regarding responsibility, as long as the parties receive written notice of the following:

1. The allegations;

2. The requirements of the informal resolution process including the circumstances under which it precludes the parties from resuming a formal complaint arising from the same allegations;

3. That at any time prior to agreeing to a resolution, any party has the right to withdraw from the informal resolution process and resume the grievance process with respect to the formal complaint; and

4. Any consequences resulting from participating in the informal resolution process, including the records that will be maintained or could be shared.

D. The school must obtain the parties' voluntary, written consent to the informal resolution process before proceeding with informal resolution.

E. The Title IX regulations do not outline specific options for an informal resolution process. A mediation where both parties agree on a resolution or another type of

restorative justice process are appropriate options. The written commentary to the 2020 regulations provides: "Informal resolution may encompass a broad range of conflict resolution strategies, including, but not limited to, arbitration, mediation, or restorative justice." 85 FR 30401.

F. As noted above, the parties should be advised of any available informal resolution processes when they are provided notice of a formal complaint.

XIII. EVALUATING EVIDENCE

A. General Relevance Standard

1. To exclude evidence or decline to provide a written question to another party or witness, an investigator or decision-maker must determine that the evidence is not relevant or that the proposed question is not designed to gather relevant evidence.

2. The Title IX regulations do not adopt any specific legal definition of relevance, but Federal Rule of Evidence 401 is useful. That rule says evidence is relevant if:

   a) it has any tendency to make a fact more or less probable than it would be without the evidence; and

   b) the fact is of consequence in determining the action.

B. Questions and Evidence Regarding Prior Sexual Behavior

1. Questions and evidence about the complainant's prior sexual behavior will *rarely* be relevant.

2. They can only be admitted if offered to prove someone other than the respondent committed the alleged conduct, or if they relate to prior conduct between the complainant and respondent and are used to prove consent. (Note that consent is likely not relevant if there is an allegation of sexual contact between an employee and student.)

C. Burden of Proof

1. The burden of proof is always on the school district. This means it is the district's duty to gather evidence in support of any finding of responsibility.

2. Respondents are entitled to a presumption that they are not responsible. This means if the district does not find evidence of any specific fact required

for a finding of responsibility, the decision-maker cannot conclude the respondent was responsible.

3. If a respondent refuses to answer questions asked by the complainant, the decision-maker cannot take the respondent's failure to answer into account in making the decision.

D. Standard of Evidence

Districts must designate a standard of evidence in their grievance procedures. We recommend "preponderance of the evidence," which means that it is more likely than not that something occurred. If you think in terms of percentages, anytime it is over 50% likely that the conclusion is true would meet the preponderance standard.

XIV. IMPARTIALITY

A. Bias

1. All persons participating in the Title IX process on behalf of the district should take care not to let bias affect their participation in the process. A district representative should not serve as an investigator or decision-maker if there are any potential issues regarding bias.

2. Individuals involved in Title IX investigations should also be aware of implicit bias. Implicit bias can cause attitudes and stereotypes to unconsciously affect decisions people make. The Harvard Implicit Association Test (https://implicit.harvard.edu/implicit/takeatest.html) is a great individual resource for individuals to start exploring their own perceptions.

3. The Title IX regulations specifically state that credibility determinations cannot be based on a person's status as a complainant, respondent, or witness. This means that it is inappropriate for someone to let someone's mere status as an alleged "victim" or "perpetrator" influence how that person's credibility is measured.

4. **Credibility Determinations.** Although it is not binding on Title IX Investigators, the EEOC has provided guidance on factors to consider in determining whether a witness is credible in a workplace investigation. Many of those factors are relevant regardless of the topic of the investigation. They include:

a) ***Inherent Plausibility:*** Is the testimony believable on its face? Does it make sense?

b) ***Demeanor:*** Did the person seem to be telling the truth or lying?

c) ***Motive to falsify:*** Did the person have a reason to lie?

d) ***Corroboration:*** Is there witness testimony (such as testimony by eye-witnesses, people who saw the person soon after the alleged incidents, or people who discussed the incidents with him or her at around the time that they occurred) or physical evidence (such as written documentation) that corroborates the party's testimony?

e) ***Past record:*** Did the respondent have a history of similar behavior in the past?

f) ***None of the above factors are determinative as to credibility.*** For example, the fact that there are no eye-witnesses to the alleged conduct by no means necessarily defeats the complainant's credibility, since sexual harassment often occurs behind closed doors. Furthermore, the fact that the respondent engaged in similar behavior in the past does not necessarily mean that he or she did so again.

EEOC Enforcement Guidance: Vicarious Liability for Unlawful Harassment by Supervisors; June 18, 1999.

B. **Conflicts of Interest**

1. Individuals should not participate in a grievance process as an investigator or decision-maker if they have a conflict of interest that would affect their judgment in the outcome. The regulations do not specifically define conflicts of interest.

2. **Relationships.** Of course, individuals should not participate in a grievance process that includes a family member, but there may be other types of relationships that could affect an investigator or decision-maker's ability to effectively evaluate the claims.

a) For example, if the investigator and complainant have a close working relationship and will need to continue to work closely together, that could (consciously or unconsciously) affect the

investigator's decision in order to preserve a good working environment.

b) However, merely having a prior interaction with that person is not a disqualifying conflict of interest, so long as those interactions were in a work/educational context. Thus, a principal would not have a conflict of interest in investigating a student, even if the principal had other interactions with a student. And an HR Director who met an employee once when they interviewed for the position would not have a conflict of interest with that person.

C. **Avoid Prejudging Facts**

1. The Title IX regulations specifically state that a respondent is to be presumed innocent.

2. Investigators and decision-makers should not reach their conclusions until they have received all of the evidence and heard from all of the witnesses.

3. Investigators and decision-makers should base their findings on facts obtained during the investigation process, not on generalizations or reputations of the people involved.