NEW TITLE IX REGULATIONS AND YOUR RESPONSIBILITY

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TITLE IX BACKGROUND



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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).

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TITLE IX BACKGROUND

- **Q: Whom does Title IX protect?**
- **A: Any person participating in an educational program in the United States that receives federal financial assistance.**
  - Students.
  - Staff.
  - Applicants for admission.
  - Visitors and community members.



TITLE IX BACKGROUND

- **Staff are participants in educational programs and activities, so Title IX protects them, too. (As do other employment-specific non-discrimination laws.)**
  - Recruitment, posting of positions, pre-employment inquiries, hiring.
  - Compensation.
  - Decisions on the basis of marital or parental status.
  - Sexual harassment and sexual violence.



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TITLE IX BACKGROUND

- **Q: What does Title IX protect against?**
- **A: Exclusion from participation in, or denial of benefits of, any educational program or activity on the basis of sex, which includes sexuality and gender identity.**
  - Admissions.
  - Classes and curricular activities.
  - Extracurricular activities (including athletics).
  - Discipline.
  - Sexual harassment.
  - Sexual violence.

TITLE IX BACKGROUND

- **For example, Title IX prohibits the following:**
  - Excluding participants from certain schools or classes on the basis of sex (with limited exceptions).
  - Denying participants an equal opportunity to participate in athletics and other extracurricular activities on the basis of sex, or disproportionately allocating resources for athletics or extracurricular activities on the basis of sex.
  - Failing to respond to allegations of sexual harassment or violence, or failing to protect participants from sexual harassment or violence or its effects.



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TITLE IX BACKGROUND

- **Q: To what institutions does Title IX apply?**
- **A: Any institution receiving federal financial assistance from the United States Department of Education.**
  - K-12 public schools.
  - Other public educational institutions (e.g., career centers, educational service centers).
  - Postsecondary institutions.
  - Community schools.
  - Some private schools.
  - Libraries.
  - Museums.

TITLE IX BACKGROUND

- **Q: How is Title IX enforced?**
- **A: In part, through regulatory oversight.**
  - United States Department of Education's Office for Civil Rights ("OCR") oversees Title IX compliance. OCR also enforces other federal civil rights laws that apply to schools.
  - OCR issues regulations regarding Title IX. See 34 C.F.R. Part 106.
  - OCR has the power to receive complaints alleging violations of Title IX, investigate complaints, issue remedial measures and sanctions, and even take away a school's federal funding for violations of Title IX (although this has never happened).



TITLE IX BACKGROUND

- **Q: How is Title IX enforced?**
- **A: In part, through private lawsuits and awards of money damages.**
  - *Gebser v. Lago Vista Independent School District* (1998): A school district is liable for failing to respond to a teacher's sexual harassment of a student if a school official who had authority to institute corrective measures on the district's behalf had **actual notice** of, and was **deliberately indifferent** to the teacher's misconduct.
  - *Davis v. Monroe County Board of Education* (1999): A school district is liable for failing to respond to a student's sexual harassment of another student if the district was **deliberately indifferent** to known acts of harassment in its programs or activities, and the harassment was **so severe, pervasive, and objectively offensive** that it effectively barred the victim's access to an educational opportunity or benefit.



RECOGNIZING SEXUAL HARASSMENT OR SEXUAL DISCRIMINATION IN EDUCATION

DEFINING SEXUAL HARASSMENT

Conduct on the basis of sex that satisfies one or more of the following:

1. An employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct (i.e., quid pro quo sexual 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 the recipient's education program or activity;*

OR

3. "Sexual assault," "dating violence," "domestic violence," or "stalking," as defined by the Clery Act.



EXAMPLES OF SEXUAL HARASSMENT OR BOUNDARY VIOLATIONS: STAFF

- Being overly "touchy" with students; lap sitting, hugging.
- Talking about sexual topics that are not related to curriculum.
- Being alone with a student behind closed doors without a legitimate educational purpose.
- Going to a student's home for non-educational purposes; inviting students to the staff member's home without proper chaperones.
- Using e-mail, text, or social media to discuss personal matters with students.



EXAMPLES OF SEXUAL HARASSMENT OR BOUNDARY VIOLATIONS: STAFF

- Telling a student "secrets" and having "secrets" with a student.
- Talking to a student about problems normally discussed with adults (e.g., marital issues).
- Favoring certain students by inviting them to come to the classroom at non-class times; getting a student out of class to visit with the staff member.
- Telling sexual jokes to students; engaging in sexual innuendo.
- Invading a student's privacy (e.g., bathroom, locker-room, asking questions about bra size, sexual experiences, etc.).



EXAMPLES OF SEXUAL HARASSMENT OR BOUNDARY VIOLATIONS: STUDENTS

- Starting rumors about a student's sexual behavior.
- Grabbing a classmate or "accidentally" touching them.
- Bullying (in person or on social media) based on sex.
- Fake social media accounts about a person; exchanging pictures.
- Sexual jokes; engaging in sexual innuendo.
- Relationship harassment – stalking; physical or emotional abuse.



DEFINING SEXUAL DISCRIMINATION IN EDUCATION

"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."

EXAMPLES OF SEXUAL DISCRIMINATION IN EDUCATION

- Sex Stereotypes
- Athletics
- Sex-Based Discrimination
- Discipline
- Dress Codes
- Behavior Shaming
- Stalking
- Social Media

WHAT ARE MY OBLIGATIONS UNDER TITLE IX?



REPORT WHEN YOU HAVE KNOWLEDGE

- The new regulations require a school district to respond to potential sexual harassment when the district has ACTUAL KNOWLEDGE of the sexual harassment or allegations of sexual harassment.
- A district has ACTUAL KNOWLEDGE when there has been NOTICE to ANY EMPLOYEE of an elementary or secondary school.
- Report to the Title IX Coordinator.



DUTY TO REPORT SUSPECTED ABUSE OR NEGLECT

DUTY TO REPORT SUSPECTED ABUSE OR NEGLECT

- In addition to the obligation to report discrimination or harassment, school employees also have a duty to report suspected abuse or neglect.
- School employees are MANDATORY REPORTERS.
- Failure to report can impact:
  - Your license
  - Your livelihood
  - Your finances
  - Your freedom

WHEN IS THERE A MANDATORY DUTY TO REPORT?

- When a mandated reporter is:
  - acting in an official or professional capacity, and
  - knows, or has reasonable cause to suspect based on facts that would cause a reasonable person in a similar position to suspect,
  - that a child under eighteen years of age, or a person under twenty-one years of age with a developmental disability or physical impairment,
  - has suffered or faces a threat of suffering any physical or mental wound, injury, disability, or condition of a nature that reasonably indicates abuse or neglect of the child.
- Must report IMMEDIATELY.



WHEN MUST THE SCHOOL EMPLOYEE REPORT ABUSE? TO WHOM?

- Must IMMEDIATELY REPORT.
- Report must be made to the public children services agency or a municipal or county peace officer in the county in which the child resides or in which the abuse or neglect is occurring or has occurred.

WHAT SHOULD BE REPORTED?

- Factual information about the situation.
- If you are not sure, say so.
- Check Board Policy on documenting the report.
- Keep your own records about who you spoke to, when and what you shared.
- If you are reporting a school employee, also report to an administrator.

WHAT HAPPENS WHEN A SCHOOL EMPLOYEE MAKES A REPORT?

- Law enforcement and/or the appropriate public children's services agency will investigate and make recommendations regarding potential prosecution.

ARE REPORTS CONFIDENTIAL?

- Reports are confidential.
- The public children's services agency must not provide any information to the accused person that identifies the person who made the report, statements of witnesses, or police or other investigative reports.
- But remember Board Policy may require you to share with the school district that you made a report.

WHAT ARE THE CONSEQUENCES FOR FAILING TO REPORT?

- **Criminal:** Failure of a school employee to make the report is a fourth degree misdemeanor punishable by up to 30-days in jail and/or a $150 fine. Penalty is raised to a first degree misdemeanor if the child is under the offender's direct care, or a subordinate's care, when the child suffers the abuse or neglect.
- **Compensatory and exemplary damages:** A person who fails to report is liable to the child who would have been the subject of the report that was not made.
- **Employment:** Courts have recognized the failure to report suspected child abuse when required is good and just cause for termination from employment.
- **Licensure:** Failing to report known or suspected child abuse may be conduct unbecoming the education profession under the Licensure Code of Professional Conduct for Educators.



EDUCATOR SEXUAL MISCONDUCT IS PREVENTABLE.

- An estimated 10% of K-12 students are susceptible to school employee sexual misconduct while the child is in the employee's care in a school setting.
- Many times, after a well-publicized case, educators or parents will reveal they had suspicions.
- Reporting misconduct of a sexual nature to the district may prevent a child from being abused.
- Reporting known or suspected child abuse may prevent a child from being further abused.



THANK YOU!



NEW TITLE IX REGULATIONS – TRAINING SESSIONS

TITLE IX INVESTIGATOR TRAINING

JULY 23, 2020

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PRESENTATION FORMAT

- Questions
  - Raise your hand for relevant questions during training.
  - You can email questions to either attorney during the presentation and we will address those questions during our break or at the end.
    - Jessica@scottscrivenlaw.com
    - Julia@scottscrivenlaw.com
  - You can use the chat function for questions. Julia will be monitoring.
- Please keep your video on as much as possible so we can see your smiling faces.
- Please mute on your end unless you are asking or responding to a question.
- We will be sending certificates of completion after every training.

YOUR TITLE IX TOOLBOX

- Training materials from this session are available at the following link:

https://scottscrivenlaw-my.sharepoint.com/:f:/p/julia/EtvtqEtQr95IrJh3w4110DEBLNL0ddBIsJnZvAdVuyg-PQ?e=fjJ8we

- The folder also contains other useful resources we will reference during the training.

AGENDA

- 9:00 – 9:30 Overview of New Regulations and Definitions Relevant to Investigators
- 9:30 – 10:30 Investigating a Title IX Complaint – Providing Notice and Gathering Evidence
- 10:30 BREAK
- 10:45 – 11:15 Drafting an Unbiased Report and Allowing Party Input
- 11:15 – 11:45 Investigating a Title IX Athletics Complaint
- 11:45 – 12:00 Q & A

YOUR TRAINING OBLIGATIONS UNDER THE NEW TITLE IX REGULATIONS

TRAINING REQUIREMENTS

- Title IX Coordinators, Investigators, Decision-makers, and any person who facilitates an informal resolution process must receive training on:
  - the definition of sexual harassment in the regulations,
  - the scope of the recipient's education program or activity,
  - how to conduct an investigation and grievance process including hearings, appeals, and informal resolution processes, **as applicable**, and
  - how to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias.

INVESTIGATOR-SPECIFIC TRAINING REQUIREMENT

- Districts must ensure that investigators receive training on issues of relevance to create an investigative report that fairly summarizes relevant evidence, as set forth in the regulations.

TRAINING REQUIREMENTS

- Any materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process, must not rely on sex stereotypes and must promote impartial investigations and adjudications of formal complaints of sexual harassment.
- All materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution must be made available on the school's website, if it has one.
- Training materials must be kept for 7 years.

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BACKGROUND ON TITLE IX REGULATIONS

Sep. 2017

U.S. Department of Education, Office for Civil Rights (OCR) issues a Dear Colleague Letter and Q&A; rescinds Obama-era guidance.

Nov. 2018

Notice of Proposed Rulemaking seeking comments on changes to the Title IX regulations.

6 May 2020

OCR released the highly anticipated final rule.

14 Aug. 2020

August 14, 2020

- Final rule becomes effective.

2021

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  - Visitors and community members.

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- **Q: What does Title IX protect against?**
- **A: Exclusion from participation in, or denial of benefits of, any educational program or activity on the basis of sex.**
  - Admissions and Employment.
  - Classes and curricular activities.
  - Extracurricular activities (including athletics).
  - Discipline.
  - Social media.
  - Pregnant and Parenting Students
  - Retaliation
  - Treatment of Transgender Students
  - Sex-based harassment and discrimination

NEW TITLE IX TERMS AND DEFINITIONS

NEW TITLE IX LINGO (TERMS)

Recipients. School districts are now referred to as "recipients."

Complainant. A person alleged to be the victim of conduct that could constitute sexual harassment.

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

Supportive Measures. These are your "interim measures."

Determination of Responsibility. This is your report/decision.

NEW TITLE IX LINGO (DEFINITIONS)

Actual Knowledge

- Notice of sexual harassment or allegations of sexual harassment **to any employee.**

Obligation to Respond

- A school with **actual knowledge** of sexual harassment in a program or activity against a person in the U.S. must respond promptly and in a manner that is **not deliberately indifferent.**

NEW TITLE IX LINGO (DEFINITIONS)

Sexual Harassment: Conduct on the basis of sex that satisfies one or more of the following:

- An employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct (i.e., *quid pro quo* sexual harassment);
- 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 recipient's education program or activity; OR
- "Sexual assault," "dating violence," "domestic violence," or "stalking," as defined by the Clery Act.

THE TITLE IX COORDINATOR'S ROLE

- **<u>Title IX Coordinator(s)</u>**
  - Must promptly contact Complainant, discuss available supportive measures (with or without a formal complaint), and explain process for filing a formal complaint.
  - Responsible for effective implementation of any remedies.
  - New documentation requirements:
    - Measures taken to restore or preserve equal access to the program or activity;
    - The basis for the conclusion that the District's response was not deliberately indifferent.

THE SCOPE OF YOUR ROLE AS INVESTIGATOR

FIVE SIGNIFICANT CHANGES TO INVESTIGATIONS

- Mandatory separation between the investigation function and decision-making.
- Respondent is not just "innocent until proven guilty," but must be presumed not responsible for the conduct throughout the entire investigation process.
- Parties are entitled to view all of the evidence in the case, even if it is not relevant.
- Parties are entitled to review the investigator's draft report and make comments or criticisms before the report is finalized.
- Confidentiality of party and witness names is over.

DUTY TO AVOID BIAS AND CONFLICTS OF INTEREST

- Your focus is the integrity of the process. Never an outcome.
- Recognize and understand what your biases are so that you can put them aside.
- Cultural competency – understand your microaggressions or unconscious biases.
- Check ego at the door.

HOW MANY HATS CAN AN INVESTIGATOR WEAR?



Investigator

Person designated to investigate, gather evidence and compile an investigation report.

Investigator may also be the Title IX Coordinator.



Decisionmaker

Person who issues a written determination regarding responsibility.

Cannot be the same person as the Title IX Coordinator or the Investigator.



Appeals Designee

Must offer both respondent and complainant an opportunity to appeal.

Cannot be the same person as the Title IX Coordinator, Investigator, or the Decisionmaker.

MORE ON THE SEPARATION BETWEEN INVESTIGATOR AND DECISION-MAKER

- The Preamble to the Regulations says that an investigation report can reach a conclusion or recommendation. However, this is not recommended.
- In response to questions, the DOE has clarified that an investigator can testify to their opinions at a hearing and that decision-makers can have discussions with the investigator about their opinions.
- No matter how much sharing occurs between Investigator and Decision-Maker, it is the Decision-Maker's job to issue an independent and objective decision.

CONFIDENTIALITY

Recipients **cannot restrict either party's ability to discuss the allegations or gather and present evidence.**

Recipients **must keep confidential the identity of a person who complains or reports sexual harassment, including parties and witnesses, except as permitted by law or to carry out the purpose of these regulations.**

Will **these** responsibilities be frustrated in practice**?**

INVESTIGATION #1: STUDENT COMPLAINANT AND RESPONDENT

Katie is a Junior on the school's dance team and has dated two different football players this year. She had sex with both of them and now that she has broken up with them, they've told the entire team about the details of everything they've done. The boys have shared intimate texts and sexting between the two of them and now the whole school knows. Katie has been called a "slut" and a "whore" by various classmates, but especially by Nick, her most recent boyfriend. Twice she has been in the hallway at school at her locker and had her butt grabbed by someone, and she doesn't know who it was. She files a formal complaint naming Nick as the Respondent and delivers it to the Title IX Coordinator.

INVESTIGATION #2:
STUDENT COMPLAINANT/STAFF RESPONDENT

Emma is a Sophomore student who has struggled academically. Her math teacher suggested she start meeting with him after school for private tutoring/review, at no cost. Her parents are aware. Emma meets with her teacher for two months in his classroom with the door shut, and then during a tutoring meeting the teacher leans in towards her, puts his hand on her stomach, and kisses her. She was stunned, didn't say anything, and went home and told her parents. The following day the parents call the school counselor and tell her what happened. They do not want to see the teacher ever again and they do not want to participate in an investigation because it will be too traumatic for Emma.

YOUR ROLE AS INVESTIGATOR: STEP ONE – PROVIDING THE NOTICE OF INVESTIGATION AND ALLEGATIONS

Written Notice
Start of Investigation of Formal Complaint

- ✓ Notice of the grievance process, including any informal resolution process;
- ✓ Notice of the allegations, including sufficient detail (i.e., names of known parties, the conduct alleged to be sexual harassment, and the date and location of the conduct, if known) to allow the respondent to prepare a response before an initial interview;
- ✓ A statement that the respondent is presumed not responsible for the conduct and that responsibility will be determined at the conclusion of the grievance process;
- ✓ Notice of the parties' right to have an advisor (who may be, but is not required to be, an attorney) and to inspect and review evidence; and
- ✓ Notice of any provision in the code of conduct that prohibits knowingly making false statements or providing false information in the grievance process.

PARTIES TO THE INVESTIGATION

- May consolidate formal complaints against more than one respondent, by more than one complainant against one or more respondents, or by one party against another party, where the allegations arise out of the same facts or circumstances. 106.45(b)(4).
- If new allegations emerge that will be part of the investigation, you must provide a revised written notice identifying the new allegations.

MANAGING AN ADVISOR'S INVOLVEMENT

- Both parties have an equal opportunity to have others present during any grievance proceeding, including the opportunity to be accompanied by an advisor who may be, but is not required to be, an attorney.
- Employees will typically have a union representative and/or an attorney represent them.
- Students may bring a parent or advisor.
- Make sure to have a pre-interview discussion with representatives/advisors about the limitations of what they can do/say in the interview.
- You 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.

REVIEW OF TEMPLATES:
NOTICE OF ALLEGATIONS AND INVESTIGATION
DESIGNATION OF ADVISOR FORM
CONSENT TO INFORMAL PROCESS

NOTE: THE INFORMAL PROCESS IS NEVER AVAILABLE WHEN AN EMPLOYEE IS THE RESPONDENT

YOUR ROLE AS INVESTIGATOR: STEP TWO – GATHERING EVIDENCE

GATHERING EVIDENCE – COMPLYING WITH THE REGULATIONS

- Burden of proof rests on the Recipient at all times.
- Provide an equal opportunity for the parties to present witnesses, including fact and expert witnesses, and other inculpatory and exculpatory evidence.
- Cannot restrict the parties from discussing the allegations under investigation or from gathering and presenting relevant evidence.
- Must provide to any party whose participation is invited or expected, written notice of the date, time, location, participants, and purpose of all hearings, investigative interviews, or other meetings, with sufficient time for the party to prepare to participate.

GATHERING EVIDENCE – BEGIN WITH AN ORGANIZED FILE

- Binders are great. Set up an automatic protocol for each investigation. A binder with pre-determined tabs and a Table of Contents that you can fill in as you go.
- Tabs: Notice of Allegations, Advisor Forms, Complainant Interview, Respondent Interview, Witness Interviews, Text Messages and Social Media, Evidence from Complainant, Evidence from Respondent, Draft Report, Final Report, Correspondence with Complainant and/or Advisor, Correspondence with Respondent and/or Advisor, Notes, etc.
- Start a Timeline and a Witness List to use throughout your investigation.
- Remember that all of your evidence must be provided to the parties eventually, and so keep original copies of things clean.

GATHERING EVIDENCE – HOW TO BEGIN

- What records should you be looking and/or asking for?
- Who do you interview first?
- What witnesses have the Complainant and Respondent asked you to interview?

INTERVIEW CONSIDERATIONS

- Identify potential witnesses.
- Determine what questioning is appropriate based on the following factors:
  - Age of the student(s);
  - Nature of the offense;
    - Involve students?
    - Staff?
    - Sexual background of Complainant?
  - Video or other evidence available;
  - Trustworthiness/credibility of witnesses; and
- Balance thoroughness and disruptiveness.

TAKING STATEMENTS

- Begin interview process as soon as possible.
- Never promise confidentiality, but explain the safety precautions the District will take (e.g., no disclosure of personally identifiable information in public records).
- Consider the role of the parents: Notification? Representation?
- Get their story in their own words, first in general, then more specifically.
- Follow up to get specific facts, not generalities.
- Don't forget "anything else?"

INTERVIEWING CHILDREN

- Do not avoid interviewing students.
- Determine if you will have a parent present (Board Policy typically does not require this for school interviews.)
- Consider who will interview child (male, female, known/trusted adult)
- Consider if Children Services should interview first (consider age of child, subject matter of interview, etc.)

INTERVIEWING CHILDREN

- Interview Structure:
  - Introductory--set general ground rules regarding discussion.
    - Agreement to tell the truth.
    - Reminder they should not guess.
    - Correct you if you are wrong.
  - Rapport-Building--talk about things other than the target incident.
  - Free-Recall—ask open-ended questions.
- Open-ended questions provide higher quality information.
  - Ex: "Where were the other students?" v. "Were the other students in the hallway?"
- Young students – look for the core of the story to be true; minor inconsistencies are common and do not speak to the larger credibility of the narrative.

SPECIAL WITNESS CONSIDERATIONS: DIFFICULT WITNESSES

- What if a student witness refuses to testify?
- Do not allow witnesses or parties to provide ambiguous answers, or to not fully answer your question.

SPECIAL WITNESS CONSIDERATIONS: DIFFICULT WITNESSES

- What if a Respondent-Employee refuses to testify?
- You can force testimony under *Kalkines v. United States*, 473 F.2d 1391, 1393 (Fed. Cir. 1973).
- Failure to cooperate may result in disciplinary action, including dismissal.
- Note: testimony provided in the above scenario may not be used for a criminal prosecution.

SPECIAL WITNESS CONSIDERATIONS: CONDUCTING A TRAUMA-INFORMED INTERVIEW

Trauma-informed investigating and interviewing include the following key components:

1) understanding the impact of trauma on a neurological, physical, and emotional level;
2) promoting safety and support;
3) knowing positive ways to respond that avoid re-traumatization; and
4) providing choice with a goal of empowerment.

SPECIAL WITNESS CONSIDERATIONS: CONDUCTING A TRAUMA-INFORMED INVESTIGATION

- Making the interview more comfortable and build rapport– having a box of tissues in the room; letting them choose their drink; maybe a white noise machine if it is in a busy space; letting them choose their seat/side of the table. Never "rank" the trauma (e.g., "you're lucky you don't remember" or ranking based on whether you were drugged or not drugged, or whether it was someone you know or a stranger, etc.)
- Avoid Asking "why" questions. "Why did you…" It sounds too judgmental.
  - Why assumes that there was another option that they didn't choose.
  - Instead, can ask "how did it happen that…?"

SHORT BREAK



YOUR ROLE AS INVESTIGATOR: STEP THREE – TURNING EVIDENCE INTO A DRAFT REPORT

Written Investigation Report

- ✓ Fairly summarize relevant evidence.
- ✓ Evaluates all relevant evidence objectively, including both inculpatory and exculpatory evidence.
- ✓ Make credibility determinations that are not based on a person's status as a Complainant, Respondent, or Witness.
- ✓ "Show your work" for all of the above in order to have a complete report.

FAIRLY SUMMARIZING RELEVANT EVIDENCE

Do…

- Be specific.
- Memorialize witnesses interviewed, records reviewed/created.
- Document the District's efforts. (e.g., if a witness would not cooperate/be interviewed).
- Come to a factual conclusion about what happened and make credibility determinations.
- Come up with an action plan – Safety Plan, Professional Development, etc. and document it.

Don't...

- Be too general.
- Use legal definitions or terms.
- Refer to conversations with legal counsel.
- Refer to conversations with insurers.
- Make conclusions to make someone happy. This is our one chance to get it right.
- Be afraid to take action if there is misconduct that just doesn't fall into the definitions investigated.

FAIRLY SUMMARIZING RELEVANT EVIDENCE

DON'T	DO
"He has the party classroom."	"Mr. Jones stays after school every day for at least 1.5 hours and allows students to come to his classroom to listen to music and socialize with the classroom door shut."
"She swore."	"Mrs. Smith told Sam that if he didn't meet her before school for sex that he was a pussy."
"He stalked her every day."	"Michael left his last period class every day last week in order to be at Melinda's class when it ended. He then followed her to her locker and out to her car."
"The coach used sexual innuendo as jokes."	"The coach made the comment that No. 6 and No. 9 were standing right next to each other and laughed at the combination of '69.'"

TURNING EVIDENCE INTO A REPORT – ASSESSING CREDIBILITY

- Credibility is the process of weighing the accuracy and veracity of evidence.
- Evaluate the source, content, and plausibility of testimony in light of other evidence.
- Assessment of credibility does not include making conclusions about whether a witness or evidence is credible, or judging the comparative credibility of evidence or witnesses. It stops just short of that, pointing to discrepancies without deciding them.

EVALUATING INFORMATION: EVALUATING CONFLICTING EVIDENCE

- You are the finder of fact;
- Common sense and credibility determinations;
- Consider the witnesses' opportunity to observe what happened versus hearsay;
- Consider whether testimony matches up with hard evidence such as texts, photographs, videos, social media, etc.; and
- Demeanor of witnesses. What do they have to lose/gain?

TURNING EVIDENCE INTO A REPORT: AVOIDING BIAS

- Distinguish undisputed evidence from contested evidence.
- Let the evidence lead to a conclusion – do not interpret the evidence with a goal to reach a particular conclusion.
- Avoid having a "hunch" from the beginning or judging based upon appearance or the "type" of girl/boy.
- Avoid "first impression bias."
- There will be gaps in evidence – if you cannot fill those gaps, do not use your assumptions or speculation.

SHORT BREAK



YOUR ROLE AS INVESTIGATOR: STEP FOUR – PROVIDING THE PARTIES WITH EVIDENCE

OBLIGATION TO PROVIDE EVIDENCE

- Must provide both parties an equal opportunity to inspect and review any evidence obtained as a part of the investigation that is **directly related to the allegations raised in a formal complaint**, including the evidence upon which the recipient does not intend to rely in reaching a determination.
- Must do this at this time so that each party can "meaningfully respond to the evidence prior to the conclusion of the investigation."
- You must provide the evidence in an electronic format or hard copy and give the parties at least 10 days to submit a written response. If a written response is provided, consider it in completing your final report.

YOUR ROLE AS INVESTIGATOR: STEP FIVE – DRAFTING YOUR FINAL REPORT AND PROVIDING IT TO THE DECISION-MAKER

REVIEWING THE FINAL REPORT TEMPLATE



YOUR ROLE AS INVESTIGATOR:
STEP SIX – PREPARE TO BE A WITNESS AT A HEARING

INVESTIGATOR TESTIMONY AT A HEARING

- Yes, you may be called as a witness at a hearing by the Decisionmaker, Complainant, or Respondent!
- Testimony should be factual. It is OK to have a copy of your report and your evidence to review.

INVESTIGATOR TESTIMONY AT A HEARING

- You should not be required to testify regarding evidence that you may have learned that was not directly related to the complaint.
- Allow time before responding for objections to be ruled upon.
- Decisionmaker should not solicit your opinion on responsibility at the hearing.

Q & A



CONDUCTING AN ATHLETICS INVESTIGATION UNDER TITLE IX

TITLE IX AND ATHLETICS

- Title IX requires school districts to:
  - 1) offer boys and girls substantially equal participation opportunities to play sports (measured by the "student interests and abilities test");
  - 2) provide boys and girls equal treatment in their athletic programs (measured by the "benefits and opportunities test"); and
  - 3) give boys and girls their fair share of athletic financial assistance.

TITLE IX AND ATHLETICS

- Title IX compliance is assessed through a total program comparison. In other words, the entire boys' program is compared to the entire girls' program, not just one boys' team to the girls' team in the same sport. The broad comparative provision was intended to emphasize that Title IX does not require the creation of mirror image programs. Title IX also provides that legitimate and justifiable discrepancies for nongender related differences in sports could be taken into account (i.e., the differing costs of equipment or event management expenditures). Title IX specifically provides that "[u]nequal aggregate expenditures…will not constitute noncompliance with this section, but the Assistant Secretary may consider the failure to provide necessary funds for teams for one sex in assessing equality of opportunity for members of each sex."

DOCUMENTS YOU ARE LIKELY TO REVIEW

- Board policies and administrative guidelines.
- Athletic Handbooks.
- Athletic Code of Conduct.
- Individual team rules and discipline policy.
- Funding by the District and Outside Groups (such as Booster Programs) for each sport.
- Data on the number of total boys and girls at the District; Data on the total number of boys and girls participating in each District sport.

ATHLETICS PARTICIPATION: THE STUDENT INTERESTS AND ABILITIES TEST

A school district is compliant under Title IX's requirement to provide equal participation opportunities for both boys and girls if it meets any one of the following three prongs:

- 1. Participation opportunities for boys and girls are provided in numbers substantially proportionate to their respective enrollments; or
- 2. Where the members of one sex have been, and are, underrepresented among athletes, the District must show a history and continuing practice of program expansion, which is demonstrably responsive to the developing interests and abilities of the members of that sex; or
- 3. Where the members of one sex are underrepresented among athletes, and the District cannot show a history and continuing practice of program expansion, the District must demonstrate that the interests and abilities of the members of that sex have been fully and effectively accommodated by the present program.

SCHOOL YEAR	SCHOOL DISTRICT
SCHOOL ENROLLMENT*	2,000
BOYS ENROLLED #	1,100
GIRLS ENROLLED #	900
% ENROLLMENT BOYS	51.7%
% ENROLLMENT GIRLS	48.3%
TOTAL # OF ATHLETES	1500
BOY ATHLETES #	815
GIRL ATHLETES #	675
% OF ATHLETES (BOYS)	54%
% OF ATHLETES (GIRLS)	46%
VARIANCE (BOYS)	2.3%
VARIANCE (GIRLS)	-2.3%

*Numbers slightly changed for anonymity of District.

In accordance with guidance from the U.S. Department of Education's Office for Civil Rights (OCR), any athlete who participates in more than one sport is counted as a participant in each sport in which he or she participates. This results in multi-sport athletes being counted more than once for athletic participation purposes.

BENEFITS AND OPPORTUNITIES

In determining equal treatment compliance under Title IX, OCR Regulations articulate the specific "benefits and opportunities" that should be considered. They are the following:

1. The provision of equipment and supplies;
2. Scheduling of games and practice time;
3. Travel and per diem allowance; (N/A)
4. Opportunity to receive coaching and academic tutoring;
5. Assignment and compensation of coaches and tutors; (N/A)
6. Provision of locker rooms, practice and competitive facilities;
7. Provision of medical and training facilities and services;
8. Provision of housing and dining facilities and services; (N/A)
9. Publicity.

FINANCIAL ASSISTANCE

- Must consider District financing and all money provided by outside sources, including Booster programs.
- OCR's guidance explains:
  - "The District has a responsibility under Title IX to ensure that boys' and girls' programs are provided with equivalent benefits, treatment, services or opportunities regardless of their source. When determining equivalency, benefits, services or opportunities attained through the use of private funds, such funds are considered in combination with all benefits, services or opportunities. This interpretation is consistent with the OCR 'Title IX Athletics Investigator's Manual,' pertinent Federal court decisions, and the legislative history of Title IX and the Civil Rights Restoration Act of 1987.

Q & A



THANK YOU!



NEW TITLE IX REGULATIONS – TRAINING SESSIONS

TITLE IX DECISION MAKING & DRAFTING REPORTS

OCTOBER 2, 2020

Elizabeth A. Braverman, Esq.
ATIXA Certified
PreK-12 Title IX Administrator

GROUND RULES

- Questions
  - You can email me questions during the presentation or put questions in the comment box, and I will make sure to address those questions during our break or at the end.
    - elizabeth@scottscrivenlaw.com
  - We will take breaks for questions at various points throughout the presentation.
- Please keep your video on so we can see your smiling faces.
- Please mute on your end unless you are asking or responding to a question.
- We will be sending certificates of completion after every training.

YOUR TITLE IX TOOLBOX

- Training materials from this session are available at the following link:

https://scottscrivenlaw-my.sharepoint.com/:f:/p/julia/EgCbgI2SOuBOhRE-npBwzKwBJpGAsvY6OTcPUkeu_rjSXA?e=StYaWI

- The folder also contains other useful resources we will reference during the training.

AGENDA

- 9:00 – 9:30 Determining the Decision Making Process and Finding a Decision Maker
- 9:30 – 10:00 The Decision Making Process
- 10:00 – 10:30 Making a Determination of Responsibility and Drafting the Written Report
- 10:30 BREAK
- 10:45 – 11:00 Q & A
- 11:00 – 11:20 Making a Determination of Responsibility and Drafting the Written Report, Cont.
- 11:20 – 11:45 Appeals and Finalizing the Complaint Process
- 11:45 – 12:00 Q & A

LET'S REVIEW….

TITLE IX BACKGROUND

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).

NEW TITLE IX LINGO (TERMS)

Recipients. School districts are now referred to as "recipients."

Complainant. A person alleged to be the victim of conduct that could constitute sexual harassment.

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

Supportive Measures. These are your "interim measures."

Determination of Responsibility. This is your report/decision.

THE TITLE IX COORDINATOR'S ROLE

- **<u>Title IX Coordinator(s)</u>**
  - Must promptly contact Complainant, discuss available supportive measures (with or without a formal complaint), and explain process for filing a formal complaint.
  - Responsible for effective implementation of any remedies.
  - New documentation requirements:
    - Measures taken to restore or preserve equal access to the program or activity;
    - The basis for the conclusion that the District's response was not deliberately indifferent.

WHAT IS THE DETERMINATION WE WILL BE MAKING?

- Whether the respondent has engaged in **"sexual harassment"** in violation of Title IX and its regulations.
  1. A district employee conditioning the provision of an aid, benefit, or service on the 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 recipient's education program or activity; or
  3. "Sexual assault" as defined the Clery Act, or "dating violence," "domestic violence," or "stalking" as defined in the Violence Against Women Act (VAWA).

HERE'S WHAT HAS HAPPENED SO FAR:

- The district has received a formal complaint of sexual harassment.
- The district has provided supportive measures to the Complainant.
- The Title IX Coordinator has determined the complaint will not be dismissed and the district should proceed with a formal investigation.
- The Title IX Coordinator has provided both parties notice of the alleged violation(s) and investigation.
- The investigator has investigated the allegations by conducting interviews with the Complainant, the Respondent, and any witnesses, and has reviewed all available evidence.
- The investigator has sent both parties and their advisors the relevant evidence and given them 10 days to submit a response.
- The investigator has considered the parties' responses, created an investigative report, and sent a copy of the investigative report to both parties and their advisors.

SO NOW WHAT?

NEXT STEP: DETERMINING THE DECISION MAKING PROCESS AND APPOINTING A DECISION MAKER

HOW WILL THE DISTRICT MAKE A DETERMINATION REGARDING RESPONSIBILITY?

- What procedure will the district use? Two options:
  - Adopt a hearing procedure.
  - Reach a decision through a written decision making process.

HEARINGS

- Required for postsecondary institutions, which include vocational schools.
- K-12 school districts may choose to include hearings in their grievance processes but are not required to.
- If the grievance process includes a live hearing, the following is required:
  - The parties' advisors are permitted to ask live questions of the other party(ies) and witnesses.
  - Questioning must be conducted directly, orally, and in real time. At the same geographic location or connected by technology, at the option of the Career Center.
  - If the hearing is conducted with all parties at the same geographic location, upon request, the Career Center must facilitate questioning with the parties located in separate rooms and connected by technology.
  - The decision maker must determine whether each question is relevant before allowing the other party or witness to answer it.
  - If a party does not have an advisor present, the district must provide one for free.
  - In determining responsibility, the decision maker may only rely on statements by parties or witnesses who agree to be questioned.
  - The District must create a recording or transcript of the hearing.

WRITTEN DECISION MAKING PROCESS

- If the district opts not to include hearings in the grievance process:
  - No interaction between the parties or live questioning is required.
  - The district need not appoint a hearing officer.
  - Districts must:
    - Appoint a Decision Maker.
    - Afford each party an opportunity to submit written, relevant questions to the other party or witnesses.
    - Exclude questions that are not relevant and explain the reason for the exclusion to the asking party.
    - Provide each party with the answers to their questions.
    - Allow for additional, limited follow-up questions from each party.

WHO SHOULD THE DECISION MAKER BE?

- The Decision Maker must not be:
  - Biased.
  - Conflicted.
  - The Title IX Coordinator, the investigator, or the person who will hear the appeal (if there is one).
- The Decision Maker must be:
  - Appropriately trained.
  - Capable of timely reviewing the investigative report and making a determination of responsibility.

WHO MUST THE DECISION MAKER ***NOT*** BE?

- The decision maker must not be **biased**.
  - Black's Law Dictionary: Bias is a mental inclination or tendency; prejudice; predilection.
  - May not be biased for or against complainants or respondents generally.
  - May not be biased for or against the individual complainants or respondents involved in the formal complaint.

WHO MUST THE DECISION MAKER ***NOT*** BE?

- The decision maker must not be **conflicted**.
  - Black's Law Dictionary: "Conflict of interest" means a real or seeming incompatibility between one's private interests and one's public duties.
  - May not have a conflict of interest in favor of or against complainants or respondents generally.
  - May not have a conflict of interest in favor of or against the individual complainants or respondents involved in the formal complaint.

WHO MUST THE DECISION MAKER ***NOT*** BE?

- The decision maker must not be the Title IX Coordinator, the investigator of the complaint, or the person who will hear the appeal.

WHO ***MUST*** THE DECISION MAKER BE?

- The decision maker must be appropriately trained on:
  - The Title IX regulations' definition of sexual harassment.
  - The scope of the district's education program.
  - How to conduct an investigation and grievance process, including hearings, appeals, and informal resolution processes, as applicable. If live hearings are used, the decision maker must receive training in any technology to be used.
  - How to serve impartially, including by prejudgment of the facts at issue.
  - Conflicts of interest.
  - Bias.
  - Relevance of questions and evidence, including regarding the relevance of a complainant's sexual predisposition or prior sexual behavior.
  - Training materials must not rely on sex stereotypes and must promote impartial investigations and adjudications of formal complaints of sexual harassment.

WHO ***SHOULD*** THE DECISION MAKER BE?

- The decision maker should be capable of timely reviewing the investigative report and making a determination of responsibility.
- A District administrator who has the power to discipline the Respondent.

WHO WILL THE DECISION MAKER BE?

- Think through who this person (or persons) will be in your district.
  - Superintendent?
  - Other administrator?
  - Outside party?

- A district would like to use the Superintendent as its Title IX decision maker. A few weeks ago, the Superintendent Tweeted on her personal Twitter account: "To survivors everywhere, we believe you."
- What if a few years ago, the Superintendent commented on a Facebook post about Harvey Weinstein, "#metoo," but she never provided more information or made another post or public comment about sexual harassment?

HYPOTHETICAL:

Finding the right decision maker.

- What if the person the district would like to use as the decision maker is the next-door neighbor of the Complainant and his parents?
  - What if the decision maker just moved into the house and hasn't met the Complainant or his parents yet?
  - What if the decision maker does not know the family well, but waives hello or goodbye whenever he sees his neighbors?
  - What if the decision maker and the Complainant's family have each lived in their houses for over 10 years and sometimes have dinner at each other's houses?
  - What if the decision maker and the Complainant's family have a long-running dispute over re-paving their shared driveway?

HYPOTHETICAL:

Finding the right decision maker.

- The district would like to use the Superintendent as its decision maker in all Title IX formal complaints. A few weeks before the Superintendent received the final investigative report, the Superintendent made a decision to expel the Respondent from school for drinking alcohol on school grounds.
- What if the Respondent and his parents successfully appealed the suspension?

HYPOTHETICAL:

Finding the right decision maker.

INFORMAL RESOLUTION

- Districts may not offer an informal resolution process unless a formal complaint is filed.
- Districts may not require as a condition of enrollment or continuing enrollment, or employment or continuing employment, or enjoyment of any other right, waiver of the right to an investigation and adjudication of formal complaints of sexual harassment.
- Districts may not require the parties to participate in an informal resolution process.
- However, at any time prior to reaching a determination regarding responsibility the district may facilitate an informal resolution process, such as mediation, that does not involve a full investigation and adjudication, provided that the recipient provides written notice disclosing certain items (next slide).
- Prior to informal resolution, the district must obtain the parties' voluntary, written consent to the informal resolution process.
- Districts cannot offer or facilitate an informal resolution process to resolve allegations that an employee sexually harassed a student.

Written Notice Prior to Informal Resolution

Notice to the parties must include:

- ✓ the allegations,
- ✓ 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, provided, however, 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
- ✓ any consequences resulting from participating in the informal resolution process, including the records that will be maintained or could be shared.

THE DECISION MAKING PROCESS



SO, WHERE WERE WE?

- The investigator has considered the parties' responses, created an investigative report, and sent a copy of this investigative report to both parties and their advisors.
- The district has appointed a qualified and appropriate decision maker to reach a determination of responsibility.

DECISION MAKING PROCESS

- Before reaching a decision, the decision maker must:
  - Afford each party the opportunity to submit written, relevant questions that the party wants to ask of any party or witness.
  - Determine whether the question the party wants to ask is relevant and exclude any question that is not.
  - Provide each party with the answers to their questions.
  - Allow for additional, limited follow-up questions from each party.

DECISION MAKING PROCESS – ALLOWING QUESTIONING

- What if a party or witness refuses to answer a question?
  - For Career Centers conducting hearings: "If a party or witness does not submit to cross-examination at the **live hearing**, the decision maker(s) must not rely on any statement of that party or witness in reaching a determination regarding responsibility; provided, however, that the decision maker cannot draw an inference about the determination regarding responsibility based solely on a party's or witness's absence from the live hearing or refusal to answer cross-examination or other questions."
  - This requirement is specific to live hearings but proceed with caution in relying too heavily evidence provided by a party or witness who refuses to answer questions and thus may be considered to not have submitted to cross-examination.

DECISION MAKING PROCESS – ALLOWING QUESTIONING

- The decision maker may only allow **relevant** questions.
- What is a relevant question?
  - "Relevance" is not generally defined in the regulations.
  - Under the Federal Rules of Evidence, evidence is relevant if:
    - It has any tendency to make a fact more or less probable than it would be without the evidence; and
    - The fact is of consequence in determining the action.

Katie is a Junior on the school's dance team and has dated two different football players this year. She had sex with both of them and now that she has broken up with them, they've told the entire team about the details of everything they've done. They've shared intimate texts and sexting between the two of them and now the whole school knows. Katie has been called a "slut" and a "whore" by various classmates, but especially by Nick, her most recent boyfriend. Twice she has been in the hallway at school at her locker and had her butt grabbed by someone, and she doesn't know who it was. She files a formal complaint and delivers it to the Title IX Coordinator.

- **Respondent to Complainant:** Have you quit the dance team since the conduct you alleged began?
- ***Is this a relevant question?***

HYPOTHETICAL:

Determining relevance.

DECISION MAKING PROCESS – ALLOWING QUESTIONING

- What is a relevant question?
  - Questions and evidence about the Complainant's sexual predisposition or prior sexual behavior are not relevant.
  - Unless:
    - Offered to prove that someone other than the Respondent committed the conduct alleged by the Complaint; or
    - Concern specific incidents of the Complainant's prior sexual behavior with respect to the Respondent and are offered to prove consent.

Katie is a Junior on the school's dance team and has dated two different football players this year. She had sex with both of them and now that she has broken up with them, they've told the entire team about the details of everything they've done. They've shared intimate texts and sexting between the two of them and now the whole school knows. Katie has been called a "slut" and a "whore" by various classmates, but especially by Nick, her most recent boyfriend. Twice she has been in the hallway at school at her locker and had her butt grabbed by someone, and she doesn't know who it was. She files a formal complaint and delivers it to the Title IX Coordinator.

- **Respondent to Complainant:** How many people have you had sex with?
- **Complainant to Respondent:** How many people have you had sex with?
- ***Are these relevant questions?***

HYPOTHETICAL:

Determining relevance.

Billy is a Sophomore student who has struggled academically. His math teacher suggested he start meeting with her after school for private tutoring/review, at no cost. His parents are aware. Billy meets with his teacher for two months in her classroom with the door shut, and then during a tutoring meeting the teacher leans in towards him, puts her hand on his stomach, and kisses him. He was stunned, didn't say anything, and went home and told his parents. The following day the parents call the school counselor and tell her what happened. They do not want to see the teacher ever again and they do not want to participate in an investigation because it will be too traumatic for Billy.

- Respondent to Complainant: Did your first kiss happen after you put your hand on a girl's stomach and then kissed her?
- Respondent to Complainant: Were you given a detention last year for plagiarizing a paper then lying about it?

HYPOTHETICAL:

Determining relevance.

DECISION MAKING PROCESS – ALLOWING QUESTIONING

- What is an allowable question?
  - "The grievance process may not require, allow, rely upon, or otherwise use questions or evidence that constitute or seek disclosure of, information protected under a legally protected privilege, unless the person holding the privilege has waived it."
  - Legal Privilege (See Ohio Revised Code section 2317.02).
    - Confidential communications between attorneys and clients.
    - Confidential communications between doctors and patients.
    - Confidential communications between counselors or therapists and clients.
    - Confidential communications between religious clerics and parishioners.

MAKING A DETERMINATION OF RESPONSIBILITY AND DRAFTING THE WRITTEN REPORT



INVESTIGATIVE REPORT VS. DETERMINATION OF RESPONSIBILITY

Investigative Report

- The investigator should be a **fact finder**.
  - Gather the facts.
  - Provide sufficient details to provide context and information on the importance of specific evidence.
  - Explain what questions were asked, what evidence was reviewed, and why the investigator made the choices to ask those questions and review that evidence.
  - Explain what evidence the investigator believes is most important and why. Explain what evidence the investigator believes is unimportant and why.
  - Explain why the investigator thinks certain evidence or statements are more or less credible.

Determination of Responsibility

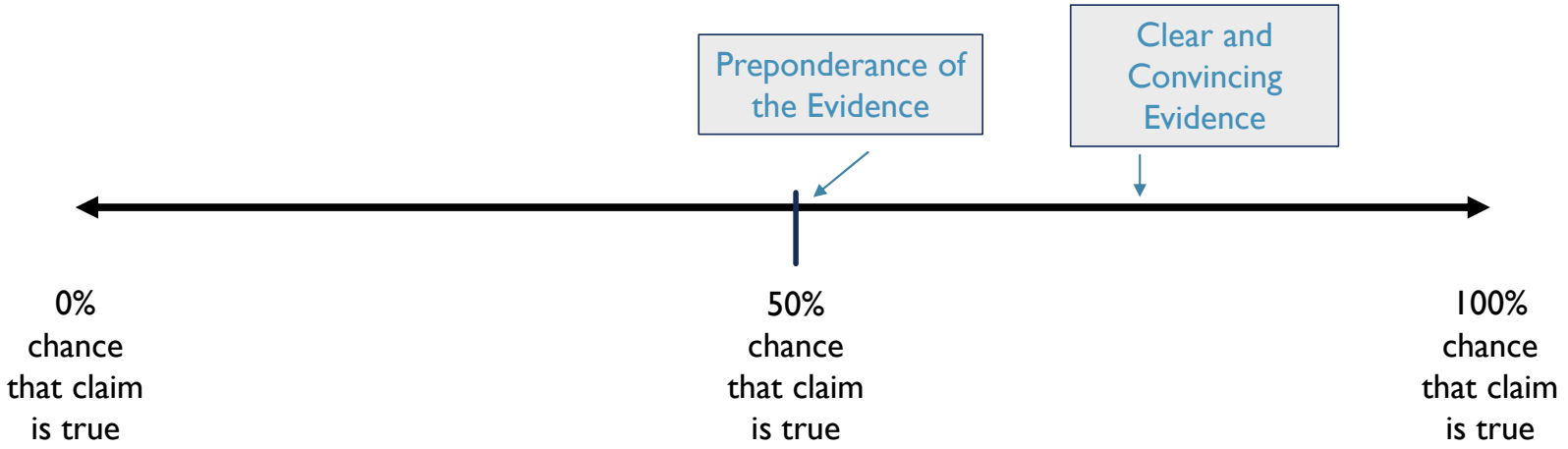
- The decision maker should be a **decision maker**.
  - Make credibility determinations, including whether parties and witnesses were telling the truth.
  - Make determinations about what happened and when.
  - Make determinations about the relative importance of facts and evidence.
  - ***Make a determination regarding whether the Respondent sexually harassed the Complainant that is supported by the facts, as presented by the investigative report and reviewed by the decision maker.***
  - ***Make a determination about whether the Respondent violated any other District rules.***
  - ***Make determinations regarding appropriate sanctions and remedies.***

MAKE A DETERMINATION REGARDING RESPONSIBILITY

- Apply the standard of evidence your district has chosen to use:
  - Preponderance of the Evidence.
  - Clear and Convincing Evidence.
- The same standard of evidence must be used for all formal complaints of sexual harassment against students and employees.

WHICH STANDARD OF EVIDENCE SHOULD YOUR DISTRICT USE?

- "Preponderance of the Evidence" means there is greater than 50% chance that the claim is true.
- "Clear and Convincing Evidence" means the claim is highly and substantially more likely to be true than untrue.



WHICH STANDARD OF EVIDENCE SHOULD YOUR DISTRICT USE?

- Aim for consistency across other policies and practices:
  - Other discrimination harassment policies (race, religion, national origin, disability, etc.).
  - Employee discipline and termination.
  - Student discipline.
  - Preponderance of the evidence has been the required standard of proof for Title IX and other discrimination claims for many years. It remains the standard of proof for other claims of discrimination.
- Think about deliberate indifference.

WHAT RULES APPLY TO THE DECISION MAKER'S CONSIDERATION OF THE EVIDENCE?

- Objectively evaluate all relevant evidence, both inculpatory and exculpatory.
  - "Inculpatory evidence" is evidence that shows, or tends to show, a person's involvement in an act, or evidence that can establish responsibility.
  - "Exculpatory evidence" is evidence that tends to excuse, justify, or absolve the alleged fault or responsibility as a Respondent.
- Make credibility determinations that are not based on a person's status as a complainant, respondent, or witness.
- Continue to presume that the Respondent is not responsible for the alleged conduct until a **final** determination regarding responsibility is made.
- Remember that the burden of proof and the burden of gathering evidence sufficient to reach a determination regarding responsibility rests on the **District**, not the Complainant or Respondent.

BREAK



WHAT IS SEXUAL HARASSMENT?

- Determine whether the respondent has engaged in **"sexual harassment"** in violation of Title IX and its regulations.
  1. A district employee conditioning the provision of an aid, benefit, or service on the 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 recipient's education program or activity; or
  3. "Sexual assault" as defined the Clery Act, or "dating violence," "domestic violence," or "stalking" as defined in the Violence Against Women Act (VAWA).

WHAT IS SEXUAL HARASSMENT?

1. A district employee **conditioning** the provision of an aid, benefit, or service on the individual's participation in **unwelcome** sexual conduct.
   - *Quid pro quo* harassment.
   - Whether *quid pro quo* harassment exists may be implied from the circumstances; the exchange need not be explicit.
   - *Quid pro quo* harassment need not be severe, pervasive, and objectively offensive. Even a single instance is "inherently offensive and serious enough to jeopardize equal educational access," even when only verbal conduct is at issue.

WHAT IS SEXUAL HARASSMENT?

- What is "**unwelcome conduct**"? Subjective standard.
  - OCR: "The Complainant's subjective statement that the Complainant found the conduct to be unwelcome suffices to meet this 'unwelcome' element."
  - Does not require an explicit statement to the Respondent that the conduct is unwelcome.
  - A sexual relationship between an employee and a student will constitute unwelcome sexual conduct regardless of whether the student nominally consented or welcomed the sexual activity.

WHAT IS SEXUAL HARASSMENT?

- What does it mean to **condition** something on participation in sexual conduct?
  - K-12 students are generally expected to submit to the instructions and directions of teachers, such that if a teacher makes a student feel uncomfortable through sex-based or other sexual conduct (e.g., back rubs or touching students' shoulders or thighs), it is likely that the students will interpret that conduct as implying that the student must submit to the conduct in order to maintain the educational benefits (e.g., not getting in trouble or continuing to please the teacher and earn good grades).
  - In situations where an employee did not intend to commit quid pro quo harassment (e.g., where the teacher did not realize that what the teacher believed were friendly back rubs had sexual overtones and made students feel uncomfortable), the District may take the specific factual circumstances into account in deciding what remedies are appropriate for the complainants and what disciplinary sanctions are appropriate for the respondent.

WHAT IS SEXUAL 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 the recipient's education program or activity.
   - Unwelcome conduct.
   - Severe **and** pervasive **and** objectively offensive.
   - Effectively denies equal access to the education program or activity.

WHAT IS SEXUAL HARASSMENT?

3. "Sexual assault" as defined the Clery Act, or "dating violence," "domestic violence," or "stalking" as defined in the Violence Against Women Act (VAWA).
   - "Sexual Assault" means "any sexual act directed against another person, without the consent of the victim including instances when the victim is incapable of consent" or "unlawful, nonforcible sexual intercourse." "Sexual act" includes forcible rape, forcible sodomy, sexual assault with an object, forcible fondling (the touching of private body parts of another person for the purpose of sexual gratification), incest, or statutory rape.
   - "Dating Violence" means violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the victim; and where the existence of such a relationship is determined based on a consideration of the length of the relationship, the type of the relationship, and the frequency of interaction between the persons involved in a relationship.
   - "Domestic Violence" includes felony or misdemeanor crimes of violence committed by a current or former spouse or intimate partner of the victim, by a person with whom the victim shares a child in common, by a person who is cohabitating with or has cohabitated with the victim as a spouse or intimate partner, by a person similarly situated to a spouse of the victim under applicable domestic or family violence laws, or by any other person against an adult or youth victim who is protected by applicable domestic violence laws.
   - "Stalking" means engaging in a course of conduct directed at a specific person that would cause a reasonable person to fear for his or her safety or the safety of others, or suffer substantial emotional distress.

Katie is a Junior on the school's dance team and has dated two different football players this year. She had sex with both of them and now that she has broken up with them, they've told the entire team about the details of everything they've done. They've shared intimate texts and sexting between the two of them and now the whole school knows. Katie has been called a "slut" and a "whore" by various classmates, but especially by Nick, her most recent boyfriend. Twice she has been in the hallway at school at her locker and had her butt grabbed by someone, and she doesn't know who it was. She files a formal complaint and delivers it to the Title IX Coordinator.

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 recipient's education program or activity?

HYPOTHETICAL:

Sexual Harassment Determinations

Billy is a Sophomore student who has struggled academically. His math teacher suggested he start meeting with her after school for private tutoring/review, at no cost. His parents are aware. Billy meets with his teacher for two months in her classroom with the door shut, and then during a tutoring meeting the teacher leans in towards him, puts her hand on his stomach, and kisses him. He was stunned, didn't say anything, and went home and told his parents. The following day the parents call the school counselor and tell her what happened. They do not want to see the teacher ever again and they do not want to participate in an investigation because it will be too traumatic for Billy.

A district employee conditioning the provision of an aid, benefit, or service on the individual's participation in unwelcome sexual conduct?

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 recipient's education program or activity?

"Sexual assault" as defined the Clery Act, or "dating violence," "domestic violence," or "stalking" as defined in the Violence Against Women Act (VAWA).

HYPOTHETICAL:

Sexual Harassment Determinations

Written Determination of Responsibility

The Written Determination of Responsibility Must Include:

- Allegations potentially constituting sexual harassment;
- Description of procedural steps taken from the receipt of the formal complaint through the determination, including any notifications to the parties, interviews with parties and witnesses, site visits, methods used to gather other evidence, and hearings held;
- **Findings of fact supporting the determination;**
- **Conclusions regarding the application of the district's code of conduct to the facts;**
- **A statement of, and rationale for, the result as to each allegation, including a determination regarding responsibility, disciplinary sanctions for the Respondent, and remedies designed to restore or preserve equal access to the district's education program or activity to be provided to the Complainant.**
- Procedures and permissible bases for the Complainant and the Respondent to appeal.

PROVIDING THE WRITTEN DETERMINATION TO THE PARTIES

- The District must provide the written determination simultaneously to the parties.
  - Must actually give the written determination to the parties, either electronically or physically.
  - Cannot just show them the report, as was often the practice in the past.
- The written determination becomes final on either:
  - The date that the District provides the parties with the written determination of the result of an appeal, if an appeal is filed; or
  - If an appeal is not filed, the date on which an appeal would no longer be considered timely.

CONFIDENTIALITY: TITLE IX AND FERPA

- "The obligation to comply with this part is not obviated or alleviated by the FERPA statute, 20 U.S.C. 1232g, or FERPA regulations, 34 CFR part 99."
- The Title IX regulations require districts to disclose certain personally identifiable information and records of students. Districts cannot condition this disclosure on consent.
  - The district must provide relevant evidence to both parties and their advisors.
  - The district must provide both parties a copy of the investigative report.
  - The district must provide both parties a copy of the determination of responsibility.

CONFIDENTIALITY: TITLE IX AND TITLE IX

- The District must keep confidential the identity of any individual who has made a report or complaint of sex discrimination, including any individual who has made a report or filed a formal complaint of sexual harassment, any complainant, any individual who has been reported to be the perpetrator of sex discrimination, any respondent, and any witness.
- **Except** as required to carry out the purposes of the Title IX regulations, including the conduct of any investigation, hearing, or judicial proceeding arising under those regulations.

DECISION MAKING BEFORE AND AFTER AUGUST 14, 2020

Before

- One person typically served as the investigator and decision maker.
- Evidence relevant to the determination was usually not shared with either party.
- Witnesses statements usually were not shared with either party.
- No rules specifically limited the evidence that could be relied on.
- The detailed final reports often were not shared with either party.
- The decision maker had discretion over how to write the final report of the investigation.

After

- The decision maker and the investigator cannot be the same person.
- Evidence relevant to the determination must be shared with both parties.
- Witness statements relevant to the determination must be shared with both parties.
- Evidence must meet the definition of "relevance" in the regulations to be considered.
- The detailed final reports must be simultaneously shared with both parties.
- The decision maker must follow a strict template in writing the determination of responsibility.

APPEALS

BASIS FOR APPEALS

- Districts must offer all parties an appeal from a determination regarding responsibility, and from a district's dismissal of a formal complaint or any allegations in a formal complaint, on the following bases:
  - A procedural irregularity that affected the outcome of the matter;
  - New evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter; and
  - The Title IX Coordinator, Investigator(s), or Decision Maker(s) had a conflict of interest or bias for or against complainants or respondents generally or the individual Complainant or Respondent that affected the outcome of the matter.
  - Any other bases, as long as offered equally to both parties.

PROCEDURES FOR APPEALS – NOTICE OF APPEAL

- Include appeal procedures, including deadlines, in your district's grievance process.
  - Whom should parties notify of their appeal? (Title IX Coordinator?)
  - What will the deadline be to notify the district of the appeal?
    - The deadline can be fairly quick, e.g., between 3 and 5 days.
    - The grievance process can allow for limited, equitable extension of time for good cause.
  - How should the party notify the appropriate person of the appeal (e.g., in writing, at a particular email address, via mail).
  - What information must be included in the notice of the appeal?
- Restate the appeal procedures outlined in the grievance process in each written determination of responsibility, and also refer the parties to the grievance process.

Written Notification of Appeal

- When an appeal is received, notify the other party(ies) in writing of the appeal, and implement appeal procedures equally for both parties.
- Give both parties a reasonable, equal opportunity to submit a written statement in support of, or challenging, the determination of responsibility.
  - The grievance procedure should specify the deadline for submitting this statement. (Like the notice of appeal, this timeline can be fairly quick.)
  - The grievance procedure should specify any other requirements for this statement.

WHO SHOULD THE APPEALS DECISION MAKER BE?

- The Appeals Decision Maker must not be:
  - Biased.
  - Conflicted.
  - The Title IX Coordinator, the Investigator, or the Decision Maker.
- The Appeals Decision Maker must be:
  - Appropriately trained.
  - Capable of timely reviewing the Determination of Responsibility and deciding the issue on appeal.
  - Able to impose discipline on the Respondent.

WHO SHOULD THE APPEAL DECISION MAKER BE?

- Think through who this person (or persons) will be in your district. Keep in mind that this person will be reviewing the actions of the Title IX Coordinator, Investigator, and Decision Maker.
  - Administrator?
  - Superintendent?
  - Board President?
  - Board Designee?
  - Outside party?

DECIDING THE APPEAL

- The Appeal is not a Re-Do, but a Review.
  - Confine the review of the Determination of Responsibility to the specific issue raised in the Appeal and the statements the parties submitted in the Appeal.
  - The Appeals Decision Maker should not substitute his/her judgment for that of the Decision Maker, especially regarding factual determinations.
  - If no additional investigation is needed, the Appeals Decision Maker should identify the error and correct it, explaining how that changes the Determination of Responsibility, sanctions, and/or remedies.
  - If additional investigation is needed, the Appeals Decision Maker should "remand" the Complaint to the Decision Maker, with instructions on how to correct the error and appropriately revise the Determination of Responsibility.

Appeal Decision

- Identify the basis/bases for appeal.
- Describe the **relevant** procedural steps taken from the receipt of the formal complaint to the issuance of the Determination of Responsibility.
- Describe the **relevant** findings of fact and **relevant** conclusions in the Determination of Responsibility.
- Include a statement of, and rationale for, the result as to each basis for appeal.
- Describe the result of the appeal.

THE WRITTEN APPEAL DECISION

- What are possible results of the appeal?
  - The Determination of Responsibility is "affirmed."
  - The Determination of Responsibility is completely or partially "reversed," and the Appeals Decision Maker comes to a different conclusion.
  - The complaint is "remanded" to the Investigator for limited further investigation in accordance with specific instructions from the Appeal Decision.

PROCEDURES FOR APPEALS – NOTIFYING PARTIES OF THE RESULT

- Issue a written appeal decision describing the result of the appeal and the rationale for the result.
- Simultaneously provide the written appeal decision to both parties.

Billy is a Sophomore student who has struggled academically. His math teacher suggested he start meeting with her after school for private tutoring/review, at no cost. His parents are aware. Billy meets with his teacher for two months in her classroom with the door shut, and then during a tutoring meeting the teacher leans in towards him, puts her hand on his stomach, and kisses him. He was stunned, didn't say anything, and went home and told his parents. The following day the parents call the school counselor and tell her what happened. They do not want to see the teacher ever again and they do not want to participate in an investigation because it will be too traumatic for Billy.

The Decision Maker determined that the Respondent sexually harassed Billy, under the first two prongs of the sexual harassment definition. After receiving a copy of the Determination of Responsibility, the Respondent appeals, alleging the Investigator, who is the Respondent's building principal, is biased against her because the principal has made numerous comments in past school assemblies that people who complain about sexual harassment should be believed, and that false complaints of sexual harassment are "very rare."

HYPOTHETICAL:

Appeals

A WORD ON "REASONABLY PROMPT TIME FRAMES"



REASONABLY PROMPT TIME FRAMES

- Before we even reached the Decision Making and Appeals process:
  - The Respondent must be provided sufficient time to prepare a response to the Complaint before any initial interview;
  - The Complaint is investigated (provided it is not delayed for good cause), and all parties are provided sufficient advance notice of interviews to allow them to prepare to participate;
  - All relevant evidence is sent to both parties, who are given 10 days to respond;
  - The Investigator creates the Investigative Report, which is sent to both parties and their advisors at least 10 days before any decision is made on the basis of that report;
- Then…
  - The Decision Maker allows each party to submit questions, reviews those questions, provides the answers to the other party, provides the other party's answer to the asking party, and allows for limited follow-up questions;
  - The Decision Maker issues a Determination of Responsibility;
  - The parties have the opportunity to appeal;
  - If there is an appeal, the other party is notified of the appeal and given the opportunity to submit a statement before the appeal is determined and provided to both parties.

REASONABLY PROMPT TIME FRAMES

- This is all to say…
  - To the best of your abilities, stick to the time frames in your district's grievance processes and keep this process moving.
  - There may be situations in which the time frame must be extended for "good cause." Make sure you know what the "good cause" is if that happens.
  - Title IX Coordinators should make an effort to keep in touch with parties during this process to make sure they understand what is going on, what the next steps will be, and that the Complaint process is moving forward (even though it might not seem that way).

SANCTIONS

SANCTIONS



- The district may not impose any disciplinary sanctions or other actions that are not supportive measures against a Respondent until the grievance process has concluded.
- The Determination of Responsibility becomes final either on the date the appeal is resolved or the date the appeal is no longer timely.
- The sanctions must be among those listed or described in the grievance process as within the range of possible disciplinary sanctions and remedies.
- The Title IX Coordinator is responsible for effectively implementing any sanctions and/or remedies.

REMEDIES



REMEDIES

- The Determination of Responsibility must include a statement of whether remedies designed to restore or preserve equal access to the district's education program or activity will be provided by the district to the Complainant.
- Remedies may be the same as supportive measures, but after the Determination of Responsibility becomes final, need not be non-disciplinary or non-punitive, and need not avoid burdening the Respondent.

QUESTIONS?