

Title IX Role Training

Presented by
Melissa D. Allen
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Agenda

- Title IX Roles
- Definitions
- Grievance Procedure
 - Notifications
 - Investigation
 - Determination of Responsibility
 - Appeals
- Record Keeping



Title IX Roles

- Title IX Coordinator
- Investigator
- Decision Maker
- Informal Resolution Facilitator
- Appeal Decision Maker



Required Training for All Roles

- Definition of sexual harassment in 34 CFR 106.30;
- Scope of the recipient's education program or activity;
- How to conduct an investigation and grievance process, including hearings, appeals, and informal resolution, as applicable; AND
- How to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias.



Title IX Coordinator

- Must be an employee of the recipient.
 - May have more than one: students and staff.
- Cannot be the same person as:
 - Decision Maker
 - Appeal Decision Maker
- Responsible for:
 - The independent implementation of the Title IX grievance process.
 - Coordinating the effective implementation of supportive measures.
 - Effective implementation of any remedies.
- May sign a Complaint on behalf of a complainant; does not make the Title IX Coordinator a party.



Investigator

- Cannot be the same person as:
 - Decision Maker
 - Appeal Decision Maker
- Additional required training:
 - Issues of relevance
 - How to complete an investigative report that summarizes relevant evidence, as stated in 34 CFR 106.45(b)(5)(viii)



Decision Maker

- Cannot be the same person as:
 - Title IX Coordinator
 - Investigator
 - Appeal Decision Maker
- Additional required training:
 - Any technology to be used at a live hearing
 - Issues of relevance of questions and evidence
 - Includes determining the relevance of questions about the complainant's sexual predisposition or prior sexual behavior.



Appeal Decision Maker

- Cannot be the same person as:
 - The Title IX Coordinator
 - Investigator
 - Decision Maker
- Consider appointing the superintendent.



Informal Resolution Facilitator

- Essentially a mediator, attempting to resolve the case prior to a determination of responsibility.
- No prohibitions as to who may serve this role.
 - If there is have sufficient staff, consider assigning this to one person.



General Principles



What Title IX Does Not Do

- It does not alter any other obligation under other federal authorities to discriminate.
 - Executive Order 11246, Title VII of the Civil Rights Act, the Equal Pay Act, or any other Act of Congress or Federal regulation.
- It does not allow any state or local law or requirement that would limit the eligibility of any applicant or student, on the basis of sex, to practice any occupation or profession.
- It does not allow any rules or regulations of private organizations in any education program or activity operated by a recipient that receives federal financial assistance to limit the eligibility of any applicant or student, on the basis of sex, to participate.



What Title IX Does Not Do

- Does not allow any state or local law to preempt Title IX.
 - California Department of Education's website was updated on February 11, 2025, but still states that Title IX protects transgender and non-conforming students, citing the language in the preamble of the original 1972 Title IX that discrimination or harassment based on sex is prohibited.
 - California now has an Office of Civil Rights under the Government of Operations agency, not CDE.



Must Act Without a Conflict of Interest or Bias

- Guiding principle of the grievance procedure is to act without conflict of interest or bias.
- Conflict of Interest: Occurs when a person has a personal interest that conflicts with the interests of the investigation.
 - Either the complainant, respondent, or witness is related to the investigator or decision maker.
- Bias: Allowing a personal feeling or past dealing to affect your judgment.
 - Strong belief that girls do not make up allegations of being sexually assaulted; they should always be believed.



How to Avoid a Conflict of Interest

- Don't allow past behaviors by a party or feelings towards a party to affect your judgment.
- Focus on the evidence, not your feelings about any party or issue.
- Avoid showing that you agree or disagree with either party or that you're on their side or not on their side.
 - "Yes, I agree." "I understand what you are going through."
 - "In my opinion this is not sexual harassment, you're overreacting." "She's overreacting."
- Don't allow the wishes of others (administration) to affect your judgment, focus on the evidence.



Title IX and Student Discipline

- Title IX Regulations require the Recipient to follow the grievance process before implementing any discipline or other actions that were not supportive measures against a Respondent.
- Employees: Can be placed on paid administrative leave pending investigation and potential discipline.
- Student: Likely cannot comply with Title IX and Education Code requirements/timeline for discipline.
 - Suspension is supposed to be issued at the time the district determines that the student violated the Education Code.
 - Expulsion hearing must be held within 30 school days of determining that the student committed the conduct.
 - If the student was on campus and did not have any discipline or put anyone in danger, it is difficult to argue that the student should be expelled, "Due to the nature of the act, the presence of the pupil causes a continuing danger to the physical safety of the pupil or others." Education Code §§ 48915(b)(2) & 48915(e)(2)



Hypotheticals

- Your son's friend is the respondent.
- Your daughter's boyfriend is at your house at least once a week for dinner and they have dated for one year.
- You were previously investigated based on a complaint of harassment filed by the respondent's parents.
- You have previously disciplined the female respondent for fighting.
- A female reports that she was sexually assaulted by a male and you believe that no female would make up a sexual assault.



Definitions



Definitions: Parties

- Complainant: Individual who is alleged to be the victim of sexual harassment or discrimination.
- Respondent: Individual who has been reported to be the perpetrator of the sexual harassment or discrimination.
- Recipient: Local Education Agency that receives federal funding either directly or through another recipient.
- Elementary or secondary school: Includes a preschool or private elementary or secondary school.



Definitions: Education Program or Activity

- Locations, events, or circumstances over which the recipient exercises control over both the respondent and the context in which the sexual harassment occurs.
 - Includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution.



Factors to Assist in Determining if It Is in the Education Program

Office for Civil Rights 2025 Online or Digital Sexual Harassment under the 2020 Title IX Regulations Resource provides examples of what might be covered:

- Locations, events, or circumstances in which the school exercised substantial control over both the alleged harasser and the context in which the sexual harassment occurs – including conduct that occurs off-campus under certain circumstances;
- Occurs in a building owned or controlled by a student organization that is officially recognized by a college;
- Occurs in a school-related, off-campus setting such as field trips, online classes, and athletic programs;
- Takes place via school-sponsored electronic devices, computers, and internet networks; or
- Takes place on digital platforms operated by, or used in the operations of, the school, including AI technologies.



Definitions: Actual Knowledge

- The recipient is deemed to have actual knowledge when notice of sexual harassment or allegations is made to the recipient's:
 - Title IX Coordinator;
 - Any official of the recipient who has authority to institute corrective measures on behalf of the recipient; OR
 - Any employee of an elementary or secondary school.
 - Exception: The employee is the respondent.
- Students are required to be online: online harassment, stalking, human trafficking, etc.



Definitions: Consent

- Does not require any particular definition of consent; each recipient must adopt a definition.
- Affirmative Consent found in Education Code section 67386(a)(1):
 - “Means affirmative, conscious, and voluntary agreement to engage in sexual activity. It is the responsibility of each person involved in the sexual activity to ensure that the person has the affirmative consent of the other or others to engage in the sexual activity. Lack of protest or resistance does not mean consent, nor does silence mean consent. Affirmative consent must be ongoing throughout a sexual activity and can be revoked at any time. The existence of a dating relationship between the persons involved, or the fact of past sexual relations between them, should never by itself be assumed to be an indicator of consent.”
- Consent can be given by words or actions, as long as those words or actions create clear permission regarding willingness to engage in the sexual activity.

Definitions: Formal Complaint

- Document alleging sexual harassment against a respondent and requesting an investigation either:
 - Filed by the complainant; OR
 - Must have a physical or digital signature, or otherwise indicate the complainant is the person filing the formal complaint.
 - Signed by the Title IX Coordinator;
 - Does not make the person a party to the investigation.
- May be filed with the Title IX Coordinator:
 - In person
 - By mail
 - By electronic mail
 - Any additional method designated by the recipient

34 CFR 106.30



Definitions:

- Findings:
 - Responsible: Respondent violated Title IX; guilty
 - Not responsible: Respondent did not violate Title IX; not guilty
- Evidence:
 - Inculpatory Evidence: Tends to prove the respondent is responsible
 - Exculpatory Evidence: Tends to prove the respondent is not responsible



Definitions: Supportive Measures

- Non-disciplinary, non-punitive individualized services offered to both the complainant and the respondent.
- Purpose: They are designed to “restore and preserve equal access to the recipient’s education program or activity” and deter sexual harassment.



Definitions: Sexual Harassment

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

1. Quid pro quo: 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.



Definitions: Sexual Harassment

2. Unwelcome sexual 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
- Regulations do not define what is reasonable.
 - Does not require complete exclusion from education, but rather a denial of "equal" access. May include skipping class, declining grades, difficulty concentrating in class, etc.

34 CFR 106.30



Definitions: Sexual Harassment

3. Specific Offenses:
- 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)
 - Dating and Domestic Violence Defined by VAWA: Former spouse, spouse, former cohabitant, cohabitant, someone with whom you have a child with, and someone with whom you have or previously have had a dating or engagement relationship.
 - Includes same-sex relationships
 - Stalking as defined in 34 U.S.C. 12291(a)(30)

34 CFR 106.30



Definitions: Retaliation

Retaliation includes:

- A recipient or other person intimidating, threatening, coercing, or discriminating against any individual for the purpose of interfering with any right or privilege pursuant to Title IX.
- Acts that violate a code of conduct that do not involve sex discrimination or harassment but arise out of the same facts or circumstances as a report or complaint for the purposes of interfering with any right or privilege guaranteed by Title IX.
- Making a report or formal complaint of sexual harassment for the purpose of interfering with any right or privilege secured by Title IX.

34 CFR 106.71(a)



Definitions: Retaliation

- The recipient breaking confidentiality as required by Title IX Regulations could be found to be retaliation.
- What is not retaliation:
 - Exercise of First Amendment rights.
 - Charging a code of conduct violation for making a materially false statement in bad faith in the course of a Title IX grievance procedure.
 - Qualification: That a determination regarding responsibility alone, is not sufficient to find that a false statement was made in bad faith.

34 CFR 106.71(a) & (b)



Hypotheticals

- Sam and Cindy recently broke up after a two-month relationship. Cindy reports every time she goes to her locker, he is waiting for her and he also waits after school for her at her car. He constantly tries to talk to her and get information from her friends regarding what she is doing. He started sending text messages that became threatening and recently threatened to post nude photos of her to social media.
- Female student reports that a male student who helps in the office told her that he had figured out how to change school records. He told her that if she brought him a picture of her in a bikini or naked, he would change her tardies so her parents would not find out.



Hypotheticals

- A female general education student reports that a male student with Down Syndrome is constantly hugging her and sometimes kisses her cheek. She has tried to nicely tell him to stop and has tried avoiding going through the hallway that he is in, but he still finds her at lunchtime to hug her.
 - Female student told her teacher last month.
- Custodian observes two students whom he knows are dating in an argument. He witnesses one slapped the other in the face. He did not report.
- First-grade female student states a boy “was showing me bad stuff on his phone”.



Confidentiality



The recipient must keep confidential:

- The identity of any individual who has made a report or complaint of sex discrimination or sexual harassment
- Any Complainant
- Any individual who has been reported to be the perpetrator of sex discrimination or sexual harassment
- Any respondent
- Any witness

34 CFR 106.71(a)



Exceptions to Confidentiality:

- FERPA
- As required by law
 - Mandated reporting
- Carry out the purpose of Title IX, including:
 - Conducting the investigation
 - Conducting any hearing
 - Any judicial proceeding



Step One: Notification of Policy



Step One: Required Content of Notification

- Contact information of the Title IX Coordinator:
 - Name or Title
 - Office Address
 - Electronic Mail Address
 - Telephone number
 - Considerations:
 - Just use the title so that you do not have to change board policy when the person changes
 - Maintain confidentiality
- The recipient “does not discriminate on the basis of sex in the education program or activity that it operates, and that it is required by Title IX and this part not to discriminate in such a manner.”
 - This requirement extends to admission and employment.

34 CFR 106.8



Step One: Required Content of Notification

- Title IX inquiries can be made to:
 - Recipient's Title IX Coordinator
 - U.S. Department of Education's Assistant Secretary
 - Both
- Grievance procedures and processes, including:
 - How to report or file a complaint of sex discrimination;
 - How to report or file a formal complaint of sexual harassment;
 - How the recipient will respond (the procedure)
 - Compliance can be satisfied by providing a copy of Board regulation; 4119.12 for employees and 5145.71 for students.

34 CFR 106.8(b) and (c)



Step One: Who Must be Notified of Policy?

- Students
- Applicants for admission and employment
- Parents or legal guardians of elementary and secondary school students
- Employees
- All unions or professional organizations holding collective bargaining or professional agreements with the recipient

34 CFR 106.8(a)



Step One: Where Does the Policy Have to be Posted?

- Website:
 - Must “prominently display”
 - Contact information of the Title IX Coordinator
 - Non-discrimination policy
 - Also required on the website:
 - The complete grievance procedure
 - Training materials
 - Be aware of potential copyright issues
- Campus:
 - Must prominently display the Title IX Coordinator’s contact information
 - Non-discrimination policy
- Handbook or catalog made available

34 CFR 106.8(a)



Step Two: Knowledge of Sexual Harassment or Discrimination



Step Two: Deemed to Have Knowledge if:

- Receive a report for a person;
- Receive a signed formal complaint; OR
- Any employee has knowledge
 - Exception: Employee is the respondent

File a mandated report if required.



Step Two: Who May Report?

- Any person whether or not that person is the victim of the conduct can make a report to the Title IX Coordinator.
 - Reporting is different than filing a complaint
- How does a person file a report:
 - In person
 - Mail
 - Telephone
 - Electronic mail
 - Other means that results in Title IX Coordinator being informed
 - Any other method designated by the recipient



Step Three: Jurisdiction



Jurisdiction

Must occur:

- In the recipient's educational program or activity
- Within the United States

Harassment can occur:

- In person
- Online
- Email
- Texts or messages
- Apps
- District technology
- Unwelcome conduct on social media platforms
- Non-consensual texting, sharing, or sharing of intimate photos, real or AI
- Stalking using technology



Step Four: Title IX Coordinator Receives Report



Step Four: Response to Report

- If the Title IX Coordinator has actual knowledge of sexual harassment, the Coordinator must “promptly” contact the potential complainant to offer supportive measures and inform the potential complainant of the process for filing a formal Title IX Complaint.
 - Written follow-up if the Coordinator meets in person.
- Title IX Coordinator must determine whether or not to file a complaint on behalf of the complainant.
 - Consider:
 - Did it involve sexual assault?
 - Is the potential respondent an employee?
- **Mandated reporting is a separate requirement** and must be completed whether or not there is a Title IX Complaint or investigation.



Step Four: Response to Report

- Must respond in a way that is “not deliberately indifferent.”
 - Standard for review: Was the response to sexual harassment “clearly unreasonable in light of the known circumstances?”
- Must treat complainants and respondents equitably by offering supportive measures.
 - The Regulations do not specify when supportive measures should be offered to the respondent.
 - Recommend offering supportive measures if a formal complaint is filed.
 - 34 CFR 106.30 defines supportive measures and requires confidentiality of supportive measures offered to the complainant or respondent.
 - 34 CFR 106.44 requires the recipient to “treat complainants and respondents equitably by offering supportive measures....to a complainant.”



Step Four: Supportive Measures

- Requirements to offer:
 - Must be offered to the complainant regardless of whether or not a complaint is filed; regulations are silent as to the respondent.
 - Services must be provided free of charge.
 - Must not unreasonably burden the other party.
 - Must keep supportive measures confidential to the extent possible.
- Examples of supportive measures:
 - 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, changes in work or housing locations, leaves of absence, increased security and monitoring of certain areas of the campus, and other similar measures.
- Be aware of potential special education issues: Does it change a student's services and/or placement?



Step Five: Response to Formal Complaint



Step Five: Response to Formal Complaint

- Must respond in accordance with the district's written Title IX Complaint grievance procedures.
 - Must investigate a formal complaint, unless the district may dismiss it pursuant to the Regulations or the district's policy.

File a mandated report if required.



Step Five: Determine if you Should Dismiss Complaint

Must dismiss the complaint if:

- Conduct did not occur in the United States;
- Would not constitute sexual harassment even if proven; OR
- Conduct did not occur in the recipient's education program or activity.

May dismiss if:

- A complainant notifies the Title IX Coordinator in writing that the complainant would like to withdraw the complaint;
- The Respondent is no longer employed or enrolled by the recipient; OR
- Specific circumstances prevent the recipient from gathering sufficient evidence to make a determination.

Step Five: Dismissal of Complaint

Exercise caution in dismissing a complaint:

- Let a bad staff member or student go to the next school with no record
- Student may not fully explain all events in the complaint
- If against a teacher, potential liability; no longer a statute of limitations.

If the complaint is dismissed, must:

- Provide simultaneous written notification to both parties of the dismissal, including:
 - Reason for dismissal.
 - Right to appeal the dismissal of the formal complaint.

File a mandated report if required.



Step Six: Written Notification to Complainant and Respondent



Step Six: Written Notification

Once a formal complaint is filed, must provide written notice of the following to both the complainant and the respondent:

- Recipient's grievance process;
 - Including any informal resolution process.
- Allegations of sexual harassment;
- Must provide sufficient details of the allegations:
 - Identities of the parties involved;
 - The conduct allegedly constituting sexual harassment;
AND
 - Date and location of the alleged incident.

34 CFR 106.45(b)(2)



Step Six: Written Notification (Con't.)

- A statement that the respondent is presumed not responsible;
- Decision of responsibility will be made at the conclusion of the grievance process;
- That parties may have an advisor of their choice;
 - The advisor may be an attorney, but the recipient does not provide/fund the advisor;
- Have the right to inspect and review evidence; AND
- Inform the parties of any provision in the recipient's code of conduct that prohibits knowingly making false statements or knowingly submitting false evidence.
- While not required by the regulations, consider informing parties of the name of each person in each role so that the party may raise concerns about any conflict of interest or bias.

34 CFR 106.45(b)(2)



Step Seven: Informal Resolution



Step Seven: Informal Resolution

- Requirements:
 - Formal complaint must be filed;
 - Must not have reached a determination; AND
 - Must obtain the voluntary, written consent of both parties to participate.
- Prohibited:
 - Forcing a party to participate.
 - Requiring participation as a condition of employment, enrollment, or any other waiver of an investigation.
 - Offering informal resolution if the allegations are that an employee sexually harassed a student.

34 CFR 106.45(b)(9)



Step Seven: Informal Resolution Written Notification

- Must provide written notification to both parties:
 - The allegations;
 - Requirements of the informal resolution session:
 - Circumstances under which parties are prohibited from resuming a formal complaint.
 - Parties have the right to withdraw from informal resolution at any time and resume the grievance procedure.
- Any consequences resulting from participating in the informal resolution session, including records that will be maintained and possibly shared.
- While not required, recommend reducing any agreement to writing and having it signed by the parties.

34 CFR 106.45(b)(9)



Step Seven: Conducting Informal Resolution

- Parties can agree to informal resolution at any time prior to a determination of responsibility.
 - Do both parties agree on how to proceed?
- Understand the alleged conduct
- What resolution is sought?
 - What would make the victim feel safe? Stay away order?
 - Avoid making the complainant move, as this can be revictimizing
 - Does the complainant just want the respondent to understand the issue?
 - Think about restorative justice: Engagement, accountability and restoration.
- If it involves SPED, does anyone from the IEP team need to be involved?
- Not required by Title IX, but it is good practice to write the resolution out and have both parties sign.



Step Eight: Removal of Student or Staff



Step Eight: Emergency Removal of Student

May remove a respondent on an emergency basis, if:

- Perform an individualized safety and risk analysis;
 - No particular analysis is required, but make sure that it is standardized.
- Based on that analysis, determine that there is an immediate threat to the “physical health or safety” of any student or other individual; AND
- Provide the respondent with notice and opportunity to “immediately” challenge the removal.
- Does not override IDEA or 504

34 CFR 106.44(c)



Step Eight: Employee Removals

- Employees: Regulations do not preclude placing employees on leave.
 - May be placed on paid administrative leave.
 - Must still follow all applicable employee laws, collective bargaining agreements, and board policies or regulations.
- Employees maintain any rights under 504 or ADA



Detour: Employee Considerations

- Not allowed to restrict the ability of either party to discuss the allegations under investigation or to gather and present relevant evidence. Cannot issue a “Gag Order.”

(34 CFR 106.45(b)(5)(iii))

 - National Labor Relations Board has ruled that an employer has a right to order employees to abide by confidentiality rules during an open investigation.

(Apogee Retail LLC d/b/a Unique Thrift Store, 368 NLRB No. 144 (2019)).
 - Rule only applies to Title IX investigations
 - Recommendation: Request, not order, that the employee abide by confidentiality.
 - In order to keep this process fair and not taint other witnesses, our expectation is that you not disclose information about your interview or information that you provided during the interview to others.



Detour: Employee Considerations

- Under labor laws, employees have the right to confidentiality during an investigation
 - Should advise that the district will keep information confidential to the extent possible
 - Never promise that you will not disclose information given during investigation
- Determinations in labor investigations can be by preponderance of the evidence.
- District can be liable for a defective investigation:
 - An employer who fails to follow its own complaint policy/procedures and uses a potentially biased investigator and fails to interview witnesses for potentially exculpatory information evidences pretext for purposes of claims of discrimination in violation of public policy, FEHA.

(Nazir v. United Airlines, Inc. (2009))



Step Nine: Investigation Notification



Step Nine: Investigation Notification

- Title IX Coordinator provides the complaint to the Title IX Investigator.
- Investigator must provide written notice to each party and witness of the date, time, location, participants, and purpose of:
 - All hearings.
 - Investigative interviews.
 - Meetings.
- Written notice must be given with sufficient time for the party to prepare to participate.



Step Ten: Investigation



Step Ten: General Principles of Investigation

- The burden of gathering evidence sufficient to reach a determination of responsibility is on the recipient.
- Provide the parties with an equal opportunity to present evidence:
 - Fact and expert witnesses.
 - Inculpatory Evidence: Tends to prove a party is responsible.
 - Exculpatory Evidence: Tends to prove a party is not responsible.
- Investigation by law enforcement does not nullify the obligation to complete a Title IX investigation; the recipient must still complete the investigation.
 - Consider how you want to work with law enforcement.
 - Do not depend on whether or not charges were filed in making your determination of responsibility as law enforcement uses a different standard.



Step Ten: General Principles of Investigation

- Cannot restrict the ability of either party to discuss the allegations under investigation or to gather and present relevant evidence.
 - Cannot issue a “gag order.”
- For employees: Must assure that you send the correct PAL letter that does not include the normal directive to not speak to others about the investigation.
- Does not provide the ability to harass a person.
 - Retaliation applies.



Detour: Consolidation

- What if you develop evidence of a new victim, respondent or act during the investigation?
- May consolidate the new case with the current case.
- May consolidate additional allegations about the complainant or respondent that are not included in the original notification:
 - Did the allegations of sexual harassment arise out of the same facts or circumstances?
 - May be more than one respondent, more than one complainant, or one party against the other.
 - Must provide written notice to both parties of the new allegations consistent with requirements for written notification of the original allegations.

File a mandated report if required.

34 CFR 106.45(b)(2) & (b)(4)



Step Ten: Inadmissible Evidence

- A party's records that are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional and are made in connection with the provision of treatment to the party.
 - Exception: The party voluntarily consents in writing.
 - If student cannot consent, then the parent may consent.

34 CFR 106.45(b)(5)(i)



Step Ten: Determining Relevant Evidence

- The final Title IX rule does not define relevance.
- Does not adopt the Federal Rules of Evidence for hearings.
 - May not adopt rules that contravene those evidentiary requirements prescribed in 34 C.F.R. § 106.45.
 - For example, the Preamble to Title IX states that a recipient “may not adopt a rule excluding relevant evidence whose probative value is substantially outweighed by the danger of unfair prejudice; although such a rule is part of the Federal Rules of Evidence.”
 - Similarly, it also states that a recipient may not adopt rules excluding relevant evidence, such as lie detector results and rape kits.
- There are three types of evidence that are deemed irrelevant by the Rule:
 - A party’s treatment records without consent;
 - Information protected by a legally recognized privilege; AND
 - Complainant’s prior sexual history.

(Preamble to Title IX, pp. 980-82)



Step Ten: Determining Relevant Evidence

- Some types of evidence that are generally excluded from a criminal trial cannot be excluded from a Title IX investigation: unfairly prejudicial evidence, evidence concerning bad acts, or evidence that constitutes character evidence.
- Decision maker has discretion in considering evidence: Title IX “does not prescribe rules governing how admissible, relevant evidence must be evaluated for weight or credibility by a recipient’s decision maker, and recipients thus have discretion to adopt and apply rules in that regard, so long as such rules do not conflict with section 106.45 and apply equally to both parties.”
 - You may decide the weight or credibility to give to any particular evidence as long as that rule is applied equally to both sides
 - Each side must be given the opportunity to argue the weight and credibility that the decision maker should give to each piece of evidence

(Preamble to the Title IX Rule, at pp. 980-82)



Step Ten: How do I Determine Relevant Evidence?

- Was the person offering the evidence credible?
- How is the evidence relevant to the issues?
 - Does it go to a party's credibility?
 - Did that person have any motive for coming forward?
 - Does it tend to prove or disprove a material fact?
- How many levels of hearsay?
 - Hearsay: A statement, reported by another person (not the declarant), offered to prove the truth of the matter asserted
 - Example: Jane testifies, "Mary told me that John slapped her."
- Does it tend to show that the respondent has committed similar acts in the past?



Hypotheticals

- Mallory files a Title IX Complaint alleging that Mr. Smith is sexually harassing her by making comments about her figure, repeatedly stating he wishes she was 18, and "maybe after you go to college." Mr. Smith denies the allegations, arguing that she is lying. He presents evidence that she had lied about 5 months ago regarding homework she claimed to have turned in.
- Mr. Smith presents evidence that one month prior, Mallory had falsely reported that a male student had been stalking her by following her around and sending threatening messages. The videos on campus and the male student's cell phone proved she was lying.
- Mallory presents an extremely credible student as a witness that confirms she heard everything Mallory alleges Mr. Smith said.



Step Ten: The Investigation

- Statements of complainant, respondent, and witnesses
 - Whether or not to record the interview
 - *May NOT secretly record*
 - Decide the order of interviews
 - Use words that the witness uses
 - Is what the person reporting appropriate for the person's age or ability?
- Review prior discipline and reports of incidents
 - Be mindful of any privacy concerns – only look where you are allowed to look
- Surveillance cameras at the location
- Social media of those involved
- Notes/letters/photos of those involved. Most likely electronic, such as a cell phone, iPad, computer, etc. Be sure to consider search & seizure rules.



Step Ten: The Investigation (Con't.)

- Photographs:
 - Area of occurrence
 - *Those involved*: Damage to clothing, injuries, etc.
 - Only photograph what you have consent to photograph
- Schedules and attendance of those involved, including witnesses
- Any evidence going to the credibility of any witness
 - *Motive to lie*: Did the teacher recently give the student a bad grade? Did the student respondent recently break up with the student complainant?
 - Has the person been dishonest in the past?
- If it involves a student, contact the parents – anything relevant going on at home?
 - Consider any confidentiality issues prior to contacting parents.

Step Ten: Search and Seizure

- The Fourth Amendment protects an individual's reasonable expectations of privacy against unreasonable government intrusions.
- As a school district, the standard to search a student is reasonable suspicion.
 - Reasonable suspicion: Specific and articulable basis for suspecting that a student has violated or is violating the law or a school rule and that a search will reveal evidence of that violation.
 - A mere hunch is not sufficient.
 - “[T]he requirement of reasonable suspicion is not a requirement of absolute certainty: ‘sufficient probability, not certainty, is the touchstone of reasonableness under the Fourth Amendment.’”

New Jersey v. TLO (1985) 469 U.S. 325, 346.



Step Ten: Search and Seizure

- The legality of a search of a student depends on the reasonableness of it. This requires a twofold inquiry:
 - Was the search justified at **inception**?
 - Under ordinary circumstances, a search of a student by a teacher or other school official will be “justified at its inception” when there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school.
 - Was the search **permissible in scope**?
- A search will be permissible in its scope when the measures adopted are reasonably related to the objectives of the search and are not excessively intrusive in light of the age and sex of the student and the nature of the infraction.



Step Ten: Search and Seizure

- Consent: “Consent searches are part of the standard investigatory techniques of law enforcement agencies’ and are ‘a constitutionally permissible and wholly legitimate aspect of effective police activity.”
- Caveats: Must be informed and voluntary.
 - Submission to Authority: Consent is not voluntary if the student is acquiescing to a show of authority.
 - Examples: A student’s consent to search after it was expressed or implied that the search would be conducted with or without the student’s consent is involuntary.
 - “You don’t have anything in your pockets you don’t want me to see, do you?” (shakes head no)
 - Followed by: “Then you wouldn’t mind me looking, would you?”
 - Will invalidate consent.



Step Ten: Search and Seizure

Cal. Ed. Code § 49050:

No school employee shall conduct a search that involves:

(a) Conducting a body cavity search of a pupil manually or with an instrument.

(b) Removing or arranging any or all of the clothing of a pupil to permit a visual inspection of the underclothing, breast, buttocks, or genitalia of the pupil.

BP 5145.12:

- Must have at least two district staff members present to search a student.
- Must notify parent/guardian of the student as soon as possible after the search.



Step Ten: Interviews

- If the matter involves potential criminal conduct, you do not have to advise a student of *Miranda* rights (Fifth Amendment right to remain silent). *Miranda* only applies if a peace officer is conducting a custodial interrogation designed to elicit an incriminating statement.
- Know who the complainant, respondent and witnesses are
 - Rapport building
 - Do not be immediately confrontational
- Ages/grade level
- Understand the person's mental capabilities – determine if the person is in special education.
- Is the investigator bilingual or is an interpreter needed?
- Recognize that the act might appear minimal to you as the investigator, but that it was extremely traumatic to the complainant.



Step Ten: Interviews

- Ask open-ended questions.
 - Can ask direct questions to clarify.
- Avoid promises, oral agreements, and coercion.
- Use the words that the person you are interviewing uses
 - May need to clarify that you are speaking of the same body parts when allegations involve touching.
- At the end, ask if there is anything else the person wants you or the district to know and let the person know that they can contact you with any additional information they might have.



Step Ten: Trauma Informed Care

- *Trauma*: An event, or series of events, that overwhelms the central nervous system.
 - Trauma occurs when one's ability to defend, protect or say no is overwhelmed.
 - Trauma is what occurs when your solution (active response to threat) does not work.
 - Empoweringeducation.org
- It is about considering/treating the whole person, not just the immediate incident.
 - Ask "What happened to you?" Do not ask, "What's wrong with you?" "What's wrong?"
- Key concepts to speaking with a person using trauma informed care: Safety, Trustworthiness, Choice, Collaboration, and Empowerment.
- Office for Victims of Crime, Training and Technological Assistance Center

Step Ten: Employees Rights During Interview

- *Weingarten Rights*: If it reasonably appears that the employee could be subject to discipline, the employee has the right to have a union representative present.
 - Representative cannot be intrusive or unduly adversarial.
- An employee that is a mere witness to events and is not suspected of being culpable do not typically have a *Weingarten* right unless required by personnel rules, a collective bargaining agreement or past practice.
- *Spielbauer Warning*: If the employee invokes their Fifth Amendment right to remain silent, he or she can be ordered to answer questions. The statements may not be used in a criminal proceeding, but may be used in a disciplinary proceeding. Must give a *Spielbauer* warning:
 - You do not have a right to refuse to answer these questions. Should you refuse, you may be guilty of insubordination, an offense that can and will lead to discipline up to and including termination. Any information you provide to us, however, will not be used against you in any criminal proceeding.

Step Ten: Law Enforcement

- Do you have a District Policy?
- Generally, advise that the district cooperate with law enforcement to the extent legally permissible.
- Law Enforcement Investigation:
 - Pretext call
 - Multiple interviews of the victim
 - Interview of the suspect
 - Will *Miranda* apply?
 - Investigative techniques
- Must complete the District's Title IX investigation, even if law enforcement completes one.
 - Do not rely on the outcome, the investigations use a different standard.



Step Ten: Exclusion of Prior Sexual History

- Evidence of a complainant's sexual history is generally not relevant and should be excluded
 - Examples:
 - She had sex with Sam, therefore, she had consensual sex with John.
 - Evidence regarding a reputation for being promiscuous.
- Evidence can be considered if it is directly relevant to an issue
 - Examples:
 - Complainant previously consented to an act with respondent, therefore, he/she consented during the current incident (state of mind).
 - The evidence will explain an injury the complainant has or other evidence.
- Title IX specifies the only two conditions under which sexual history may be asked:
 - Someone other than the respondent committed the act.
 - Specific incidents between the respondent and complainant to prove consent.

34 CFR 106.45(b)(6)(ii)



Step Ten: Credibility Determinations

- As the investigator, you do not determine whether the respondent is responsible or not, but can offer opinions on credibility.
- May not make a credibility determination on the basis of a person's status as a complainant, respondent, or witness.



Step Eleven: Draft and Final Report



Step Eleven: Report

- Report must “fairly summarize relevant evidence.”
 - Inculpatory and exculpatory
 - All witness statements
 - Description of any physical evidence, videos, photos, etc.
- Cite to any applicable policies and/or codes of conduct that are considered.
- Must be sent to each party and the party’s advisor, if any.
- Should be a confidential document, but assume it will be released to the public or used in future lawsuit.

34 CFR 106.45(b)(5)(vii)



Step Eleven: Provide Draft Copy & Inspection of Evidence

- Both parties must be provided with an equal opportunity to inspect and review any evidence obtained during the investigation that is directly related to the allegations.
 - Must include evidence that you do not intend to rely on in reaching a determination of responsibility.
 - Must include inculpatory and exculpatory evidence.
- Purpose: Allow each party to meaningfully respond to the evidence prior to the conclusion of the investigation.
- Must provide the draft report and evidence to each party and allow ten days for review and written response.
 - Regulations require “electronic format or hard copy” of evidence be provided to parties.

34 CFR 106.45(b)(5)(vi)



Step Eleven: Provide Final Report

- After receipt of written responses from both parties or after the time allowed for response passes:
 - Add any additional information provided by either party to the report.
 - Finalize the report.
- Must provide a copy of the final report to both parties at least ten days prior to a hearing or other determination.
 - Decision maker must allow at least ten days before starting the process.
- Can be provided in electronic format or hard copy.
- May need to have it translated.
- Should be a confidential document, but assume it will be released to the public or used in future lawsuit.

34 CFR 106.45(b)(5)(vii)

Step Twelve: Decision Maker Notifications

Step Twelve: Decision Maker Notifications

- Upon receipt of the investigation report, the Decision Maker must:
 - Provide each party with an opportunity to submit written relevant questions that a party wants asked of the other party or of a witness;
 - Provide a date by which to submit the questions.
 - Provide answers to each party; AND
 - Allow for limited follow-up questions.
- Not relevant:
 - Complainant's prior sexual predisposition or prior sexual behavior.
 - Exceptions, offered to prove:
 - Someone other than the respondent committed the alleged conduct; OR
 - Concerns specific incidents of sexual behavior regarding the respondent in order to prove consent.
 - Decision Maker must explain to the party proposing the question the reason for excluding the question.

34 CFR 106.45(b)(6)(ii)



Step Thirteen: Determination of Responsibility



Step Thirteen: Determination of Responsibility

- Standard: Preponderance of the evidence
 - More likely than not.
 - Must use the same standard for all investigations
- Must issue a written determination of responsibility.

34 CFR 106.45(b)(7)(i)



Step Thirteen: Determination of Responsibility

The written report must include:

- Identification of the allegations as defined in 106.30.
- Description of the procedural steps taken from the receipt of the formal complaint through the determination. Must include:
 - Notifications to the parties
 - Interviews with the parties and witnesses
 - Site visits
 - Methods used to gather other evidence
 - Hearings held if applicable

34 CFR 106.45(b)(7)(ii)



Step Thirteen: Determination of Responsibility

Report requirements continued:

- Findings of fact supporting the determination;
- Conclusions regarding the application of the recipient's code of conduct to the facts;
- Statement and **rationale** for the result as to each allegation, including:
 - Determination of responsibility;
 - Any disciplinary sanctions; 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.

34 CFR 106.45(b)(7)(ii)



Step Thirteen: Determination of Responsibility

Report requirements continued:

- Procedures and bases for the complainant and respondent to appeal.
- Assume the report may be released to the public or at least used in future lawsuits.
- Remedies: Must state 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."

34 CFR 106.45(b)(7)(ii)



Step Thirteen: Determination of Responsibility

- Must provide the written report simultaneously to both parties
- Decision becomes final on:
 - Date provide an appeal
 - Date appeal, if not filed

34 CFR 106.45(b)(7)(ii)



Step Fourteen: Remedies



Step Fourteen: Remedies

- May be implemented following a determination of responsibility.
- Must be described in the grievance procedure.
- Must be designed to restore or preserve equal access to the recipient's education program or activity.
- May include:
 - What was previously provided as supportive measures.
 - May now be disciplinary in nature and may burden the respondent.
- Students:
- Discipline prior to a determination of responsibility is prohibited by Title IX.
- If the district waits to this point, it will not be in compliance with Education Code discipline requirements.

34 CFR 106.45(b)(7)(ii)



Detour: Special Education Considerations

- Should work closely with special education staff (IEP team) to assure compliance with Title IX and IDEA/504.
 - May have to attend IEP or manifestation meetings.
 - Note: The 2024 Regulations required this; under the current regulations, it is now just a potential violation of IDEA, not Title IX.
- A special education student can seek monetary damages for failure to protect the student from harassment or assault.
- Do the actions trigger child find?
 - Do the actions indicate that an FBA, BIP, or other assessment is needed?
- Accessibility issues with regard to the grievance procedure.
 - Will the special education student and parent be able to access the evidence and attend any interview, hearing, propose questions, etc.?
 - Advocates and other members of the IEP team may want to access the records for the IEP meeting, but the records may involve other students who may be entitled to confidentiality.



Detour: Special Education Considerations

- Supportive Measures: Likely will need to be addressed in the IEP.
 - Change of placement, change in schedule, counseling, etc.
 - Do supportive measures trigger IDEA or 504?
- Emergency Removal: If a disabled student is the accused, a manifestation determination will be required if the emergency removal is more than 10 days.
 - It will always be more than 10 days because the process takes 20 plus days to complete, excluding an appeal.
 - The only exception would be the “serious bodily injury” exception that would allow a removal of up to 45 days.
- Can you use the misconduct data to support a change in placement?



Step Fifteen: Appeals



Step Fifteen: Appeals

- Must offer both parties an appeal from a dismissal or determination of responsibility on the following bases:
 - Procedural irregularity that affected the outcome of the matter;
 - New evidence that was not reasonably available at the time of the determination of responsibility or dismissal and could have affected the outcome; AND
 - The Title IX Coordinator, Investigator, or Decision Maker had a conflict of interest.
- Recipient may offer additional bases for appeals as long as they are offered equally to both parties.

34 CFR 106.45(b)(8)



Step Fifteen: Appeal Procedure

Appeal Decision Maker Must:

- Provide written notification that the other party has filed an appeal.
 - Must inform the parties that they have an opportunity to submit a written statement in support of, or challenging, the outcome.
 - Include a reasonable date by which the response must be submitted by; this date may be specified in written policy.
- Issue a written decision. Must include:
 - Result; AND
 - Rationale for the result.
- Provide the written decision simultaneously to both parties.

34 CFR 106.45(b)(8)



Step Sixteen: Record Retention



Step Sixteen: Record Retention

Must maintain records for seven years:

- Each investigation, including:
 - Determination of responsibility;
 - Any audio or audiovisual recording or transcript;
 - Discipline sanctions imposed on respondent;AND
- Remedies provided to the complainant.
- Any appeal and result.
- Any informal resolution and result.

34 CFR 106.45(b)(10)



Step Sixteen: Record Retention

Must maintain records for seven years (cont'd):

- Record of any action, including supportive measures, taken in response to a report or formal complaint.
- Reasons for not providing supportive measures and why that was not “clearly unreasonable” in light of the known circumstances.
- Measures taken to restore or preserve equal access to the recipient’s education program.
- Reasons that the response was not deliberately indifferent.
- All materials used to train all members of the Title IX Team.
- Must put training materials on the recipient’s website.

34 CFR 106.45(b)(10)



Potential Consequences of Not Following Title IX

Investigations or lawsuits:

- April 4, 2025: U.S. Department of Education announced that it would be forming a “Title IX Special Investigations Team” (“SIT”) with the U.S. Department of Justice to “ensure timely, consistent resolutions to protect students and especially female athletes, from the pernicious effects of gender ideology in school programs and activities.”
 - Secretary of Education: It has taken “months, even years” to complete a Title IX investigation and that the Department will move much quicker under this initiative.
 - Attorney General: This will allow the Department of Education to collaborate with attorneys to “take a comprehensive action when women’s sports or spaces are threatened and use the full power of the law to remedy any violation of women’s civil rights.”



Potential Consequences of Not Following Title IX

- Recipient with actual knowledge of sexual harassment must respond promptly in a manner that is not deliberately indifferent, whether or not a formal complaint is filed.
- Reviewed by the Assistant Secretary
 - Was the response clearly unreasonable in light of the known circumstances?
- In reviewing, whether or not the recipient acted with deliberate indifference, the Assistant Secretary will not make that determination solely because the Assistant Secretary would have reached a different determination based on independent weighing of the evidence.
- The Assistant Secretary will not be limited only by reasons written in the records as to certain bases or measures; the recipient may provide additional explanations for additional steps taken.



FERPA

- The records created in the Title IX grievance hearing are likely “student records” of the perpetrator and victim.
- Title IX specifies that a school cannot hide behind FERPA to avoid Title IX obligations.
- Parent Inspection of Records: Should not allow a parent to inspect records until completion of the entire grievance process.
- Hearing to Challenge Student Records: Should only allow the parent, the person responsible for creating the record, and the Superintendent at the hearing. Should not allow the parent to turn the hearing into a Title IX hearing to retry the Title IX complaint.
 - The Title IX process allows for a written response to be part of the record, but the school could allow the parties to file another written response.
- Law Enforcement Records: If law enforcement was involved in the investigation, those reports are not “student records” pursuant to FERPA.



Hypotheticals

- A fourth grade student reports that her teacher hugs her every day when she gets to school and when she leaves. He does not hug any other student. She has missed several days due to being ill and her grades are falling.
 - She has told the playground aide that she does not want to go to class because her teacher keeps making her feel “weird” by hugging her



Hypotheticals

- Over a weekend, John posts several inappropriate photographs with sexually explicit comments of Jane on social media. Jane sees the posts and is very upset and humiliated.
- Other boys add sexually explicit comments to the photos.
- Several of the boys make comments to Jane about the photographs during the week at school.
- Jane refuses to come to school and leaves the campus when her parents drop her off.



Thank You For Your Attention

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