

HUSCH BLACKWELL

Title IX K-12 Training for Title IX Team Members

Neola, Inc.
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Presenter



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Agenda (1 of 2)

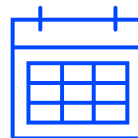
The Title IX Regulations and Implementation

Sex Discrimination and Sex-Based Harassment

Retaliation

The Title IX Coordinator and Title IX Team

Reporting



Agenda (2 of 2)

Supportive Measures

The Grievance Procedures

Appeals

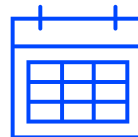
Informal Resolution

Pregnancy

Navigating Investigations

Managing Trauma, Conflicts of Interest, and Bias

Conduct that Allegedly Occurred Prior to August 1, 2024



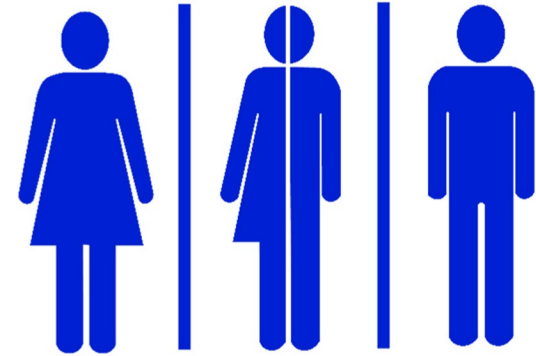
The Title IX Regulations and Implementation

Module 1

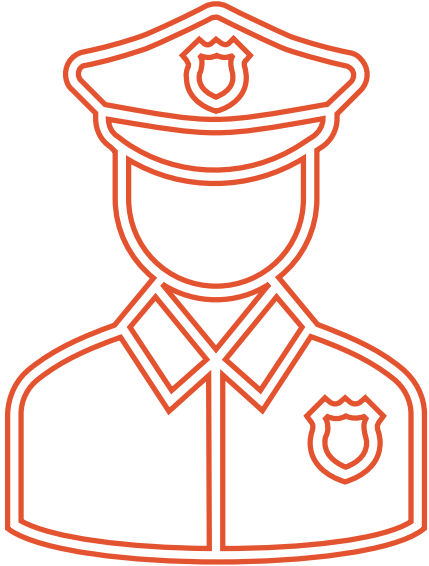
What is Title IX?

“[N]o 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



How is Title IX implemented?



- U.S. Department of Education regulations
- Private lawsuits and related court decisions

Where are the Title IX regulations?

- 34 C.F.R. (“Code of Federal Regulations”) Part 106
- Contains dozens of different Title IX regulations, including those that govern appointment of a Title IX Coordinator, publication of district policies, and requirements pertaining to grievance procedures
- August 2020 regulation amended multiple elements of Part 106 and added new ones

How does the Department enforce Title IX regulations?



- Largely a complaint-initiated investigation and resolution process led by the Office for Civil Rights (“OCR”)
- OCR has authority to force compliance through various tools including resolution agreements or initiation of proceedings to revoke financial aid eligibility (last resort)

What is the “new” Title IX regulation?

- Effective August 1, 2024, a series of revisions to Part 106 that address several issues, including:
 - The scope of sex discrimination and sex-based harassment covered by Title IX
 - The procedures and requirements for addressing complaints of sex discrimination and sex-based harassment
 - Specific content on accommodating pregnancy and pregnancy related conditions

What portions of the new regulation have garnered the most attention?

- Definition of “sex” to include gender identity and sexual orientation
- Roll-back of some “due process” requirements from August 2020 regulations



When does the new regulation take effect?

- August 1, 2024
- Those portions of the regulation that govern response to specific instances of sex discrimination and sex-based harassment apply only to incidents that allegedly occurred on or after August 1, 2024
- Earlier incidents are governed by regulations that were in place at the time the misconduct allegedly occurred

Example

On August 24, 2024, a student is sexually assaulted by a peer in a locker room at school. The incident is reported to the Title IX Coordinator the following day.

The new regulations govern the district's response to this report, including its investigation and determination.



Example

On August 24, 2024, a student reports that they were sexually assaulted by a peer in a locker room at school and that the assault occurred on May 2, 2024.

The August 2020 regulations govern the district's response to this report, including its investigation and determination.



Practical Point

Districts must keep an archive copy of their policies and procedures created in 2020 and apply relevant provisions of those policies and procedures to “transition” cases that are reported after August 1, 2024, but where the alleged incident of misconduct occurred before August 1, 2024.

Could the courts block the regulation before August 2024?

- Numerous lawsuits across the country filed by multiple states, interest groups, and private persons seeking to block all or part of the regulations



What is the programmatic scope of the new regulation?

- All sex discrimination and sex-based harassment occurring under a district's education program or activity in the United States



What is included in education program or activity?

- Any operation of the district, regardless of location
- Buildings owned or controlled by the district
- Conduct that is subject to the district's disciplinary authority
- The exercise of district power or authority by employees and agents regardless of location

What are examples of education programs and activities?

Student
Assignment

Hiring

Workplace

In-person classes

Online classes

Recreational
activities

Sports teams

Student clubs

Performances on
school grounds

Off-school
grounds trips or
experiences
organized by the
school district

Sponsored
organization
activities

Anything else
that happens
on school grounds

What about misconduct that happens abroad?



- Title IX only requires response to sex discrimination and sex-based harassment “in the United States”
- But districts must address a “sex-based hostile environment” in their programs and activities even when some contributory conduct occurred abroad

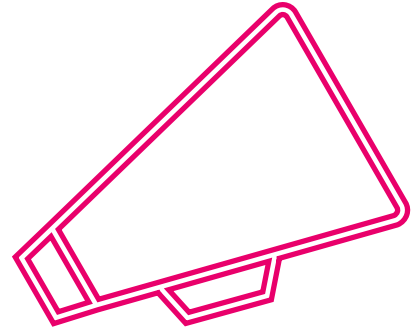
What does the new Title IX regulation apply to?

- Any school that receives federal funds and operates an education program
- The regulation has some differing requirements for K-12 districts and “post-secondary” institutions



Are there other limitations on the reach of the Title IX regulation?

- Regulation
 - Does not apply to the extent it conflicts with the First Amendment and other Constitutional rights
 - May be limited by the federal Religious Freedom Restoration Act
 - Does not regulate the selection of textbooks or curricular materials

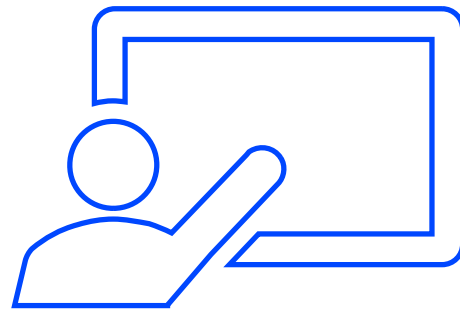


Practical Point

Since the Title IX regulation does not apply in any way that would violate Constitutional rights, some Title IX complaints must be dismissed and/or rejected at the outset, without subjecting the respondent to a burdensome process, where it is clear the conduct alleged is constitutionally protected activity.

Does the new regulation require training?

- All Title IX “team” members must be trained initially and annually on their respective roles and duties in the Title IX process
- All employees must be trained initially upon hiring and annually on prohibited conduct and mandatory reporting/information sharing requirements



When should initial training occur?

- For team members, preferably before August 1, 2024 and certainly before working on any specific Title IX matter post-August 1, 2024
- For all employees, as soon as practical after August 1, 2024, and certainly before widespread interaction with students
- For new employees thereafter, “promptly upon hiring”

Practical Point

For schools that operate on a traditional academic calendar, annual Title IX training should be part of the “back to school” training package in August or September (depending on the semester’s start date) and should be offered in a virtual or small group form thereafter as new employees are added throughout the academic year.

Neola's Policies, Administrative Guidelines, and Form

- Policy 2264 – Nondiscrimination on the Basis of Sex in Education Programs and Activities (New)
- Policy 2266 – Nondiscrimination on the Basis of Sex in Education Programs and Activities (Revised)
- Administrative Guideline 2264 – Nondiscrimination on the Basis of Sex in Education Programs and Activities (New)
- Administrative Guideline 2266 – Nondiscrimination on the Basis of Sex in Education Programs or Activities (Revised)
- Form 2264 F1 – Notice and Statement of Nondiscrimination (New)

Sex Discrimination and Sex-Based Harassment

Module 2

What misconduct does the Title IX regulation address?

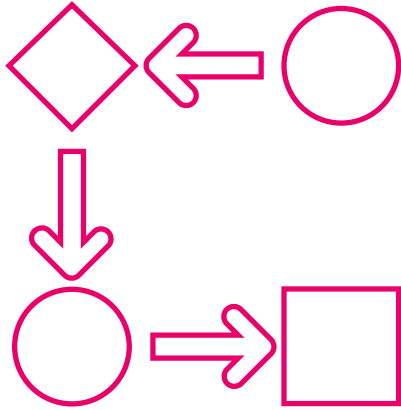
- Sex discrimination
 - Sex-based harassment



What does the Title IX regulation include in the concept of “sex”?

- Assigned sex at birth
- “Biological” sex
- Sex stereotypes
- Sex characteristics
- Pregnancy and pregnancy-related conditions
- Sexual orientation
- Gender identity

What is sex discrimination?



- Adverse treatment of a person on the basis of sex
- Limits or excludes the person from participating in the district's education program or activity or denies or limits the benefits thereof

Programmatic
Discrimination

Individualized
Discrimination

Sex-Based Harassment

What is programmatic discrimination?

- Where discrimination occurs in a systematic way due to a district policy or practice
- Programmatic discrimination adversely affects persons as a group or by category, rather than by individualized decision
- Programmatic discrimination is usually *not* attributed to an individual perpetrator (i.e., “respondent”)

Example

A school provides brand new facilities, luxury travel, unlimited food, new equipment and new uniforms for most men's sports teams. Women's teams have outdated facilities, ride in old vans, eat per-diem, use old equipment and old uniforms.

This may constitute programmatic discrimination under the new Title IX regulations.



Example

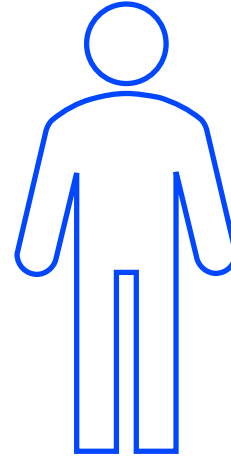
A school creates a special mentorship program that pairs female students with a female mentor who is a successful business executive. Only female students are allowed to participate. The program significantly improves the odds of a participant receiving a scholarship to college. In addition to the mentor relationship, the program includes special seminars held at the school, paid travel to a national summit, a small scholarship, and a plaque awarded to the participant at the program's conclusion.

This may constitute programmatic discrimination under the new Title IX regulations.



What is individualized discrimination?

- A particular decision is made, or particular action taken, that results in adverse treatment of a particular person that limits or excludes them from participation or denies or limits benefits
- Typically, individualized discrimination has an identifiable “respondent” who makes the discriminatory decision



Example

A supervisor has interviewed one male candidate and one female candidate for an open position. The supervisor prefers working with men because the supervisor believes women can be “catty” and “emotional.” The supervisor decides to hire the man, and not the woman, *because* of his stereotypical beliefs about women.

This is likely individualized discrimination under the new Title IX regulations.



Practical Point

Individualized discrimination involves adverse treatment that is taken *because of* or *based on* the target's sex. If a person is treated the same way as similarly situated individuals, *despite* sex, then there is no individualized discrimination, even if the treatment is adverse.

Example

A male student, Rick, is uncomfortable being friends with gay men. When James, a self-identified gay male student, invites Rick to join conversations or attend social events with James and others, Rick politely declines. Rick does not direct any unwelcome conduct towards James.



Questions for Discussion

Is Rick engaged in sex discrimination against James?

What if Rick were the president of an officially recognized student club and Rick refused to let James join the club because of Rick's discomfort being around gay men?



Practical Point

To be sex discrimination under Title IX, adverse treatment based on sex must be coupled with some exclusion from, limitation, or denial of participation in the benefits of a district's education programs or activities, which is defined broadly to include all the “operations” of a district.

Is different treatment or sex-separation ever permitted?

- If it results in no more than *de minimis* harm (i.e., it is not material)
- Or is otherwise explicitly permitted by the statute or regulations, like:
 - Sex-separated living facilities (higher education)
 - Sex-separated sports teams involving a contact sport or where selection is based on competitive skill
 - Social fraternities and sororities (higher education)
 - Father-son/mother-daughter activities

Is there specific guidance on competitive sports teams?

- The U.S. Department of Education is planning to issue separate regulations specifically addressing this subject
- Likely no earlier than 2025



What about separation based on gender identity?

- A policy or practice that prevents a person from participating consistent with the person's gender identity subjects a person to more than *de minimis* harm and is discriminatory
- Unless the separation is specifically permitted by Title IX or the regulation

What is sex-based harassment?



- Conduct that is sexual in nature or on the basis of sex
- And that constitutes:
 - Quid pro quo harassment
 - Hostile environment harassment
 - Certain specific offenses

What's the difference between sexual conduct and conduct that is on the basis of sex?

- “Sexual” means the conduct itself has a sexual nature
- “On the basis of sex” means the conduct is targeted at a person because of their sex

Example

Jean repeatedly leers at Calvin's genitals, makes crass sexual jokes to Calvin, and propositions Calvin to engage in sexual activity. Calvin is not receptive to any of this and has repeatedly told Jean to stop.

This is an example of sexual conduct.



Example

Calvin repeatedly tells jokes to Jean about how women are “stupid,” denigrates Jean’s own mental ability as a woman in front of others, and makes incessant, mocking comments to Jean about cooking, cleaning, and raising babies.

This is an example of conduct on the basis of sex.



Example

Frankie, a self-identified transgender male student, is repeatedly pushed, shoved, and subject to physical aggression by a group of other students in Frankie's class. The aggressors engage in their conduct *because* of their animus towards Frankie's transgender status.

This is conduct on the basis of sex.



What are the different categories of sex-based harassment?

Quid Pro Quo
Harassment

Hostile Environment
Harassment

Sexual Assault

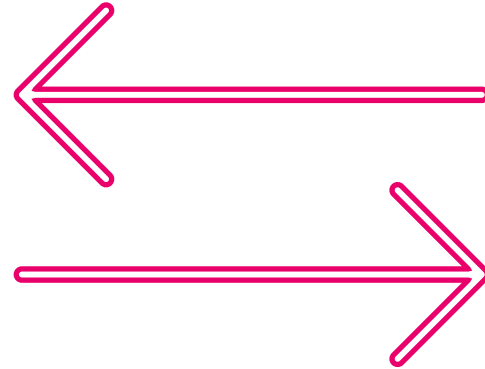
Domestic Violence

Dating Violence

Stalking

What is quid pro quo harassment?

An employee, agent, or other person authorized by the Board to provide an aid, benefit, or service under the District's education program or activity explicitly or impliedly conditioning the provision of such an aid, benefit, or service on a person's participation in unwelcome sexual conduct.



Example

A member of the school's coaching staff offers to secure a student's acceptance to a school sports team if the student agrees to perform sexual favors the student would otherwise not want to perform.



What is hostile environment harassment?



Unwelcome sex-based conduct that, based on the totality of the circumstances, is subjectively and objectively offensive and is so severe or pervasive that it limits or denies a person's ability to participate in or benefit from the District's education program or activity (i.e., creates a hostile environment).

What factors do we consider in determining a hostile environment?

- The degree to which the conduct affected the complainant's ability to access
- Type, frequency and duration of the conduct
- Parties' ages
- Parties' roles and other factors about each party
- Previous interactions
- Location of the conduct and context
- Other sex-based harassment at the district

Example

The AP Bio teacher repeatedly leers at a particular student's chest and genitals, lingers in hallway whenever the student is present, tells the student unsolicited details about the teacher's prior sexual conquests, and rubs the student's shoulders without permission. The student is increasingly affected by the unwelcome conduct and eventually withdraws from AP Bio to avoid the teacher's attention.



Questions for Discussion

What factors in this scenario weigh in favor of a finding of hostile environment harassment?

What else stood about this scenario to you that you want to learn more about?



Break Time

What is sexual assault?

An offense classified as a forcible or nonforcible sex offense under the uniform crime reporting system of the Federal Bureau of Investigation.



Rape

Statutory
Rape

Fondling

Incest

What is rape?

Penetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person, or by a sex-related object. This definition also includes any instance in which the victim is incapable of giving consent because of temporary or permanent mental or physical incapacity (including due to the influence of drugs or alcohol) or because of age. Physical resistance is not required on the part of the victim to demonstrate lack of consent.

Does the Title IX regulation define consent?

“The Assistant Secretary will not require a recipient to adopt a particular definition of consent, where that term is applicable with respect to sex-based harassment.”



New Title IX Regulation

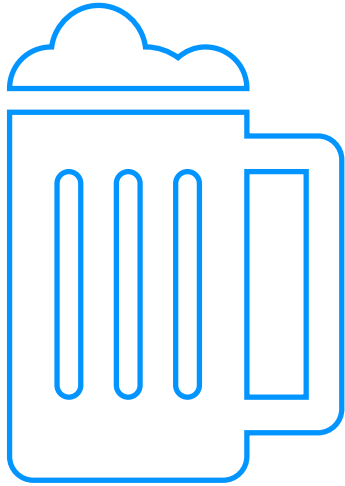
Neola's Definition of Consent

Refers to words or affirmative actions that a reasonable person in the perspective of the respondent would understand as agreement to engage in the sexual conduct at issue. A person who is incapacitated is not capable of giving consent. A person may be incapable of giving consent because of age or because of temporary or permanent mental or physical incapacity. Consent must be given voluntarily. It cannot be procured through physical violence, threats, blackmail, or other unreasonable pressure for sexual activity. Consent to some form of sexual activity cannot be automatically taken as consent to any other form of sexual activity. Previous relationships or prior consent do not imply consent to future sexual acts.

How should we think about consent?

- Consent in fact
 - Determined by whether the relevant facts establish conduct that amounts to agreement to engage in sexual activity – as agreement is defined by the district
- Ability to consent
 - Determined by whether a person has capacity to consent or whether they have lost such capacity

How do we know if a person is incapacitated due to alcohol or drugs?



- Loss of ability to make a reasoned decision and communicate it
- Loss of appreciation of the nature and fact of sexual activity
- Loss of appreciation of the “who, what, when, where, and how”

Neola's Definition of Incapacitated

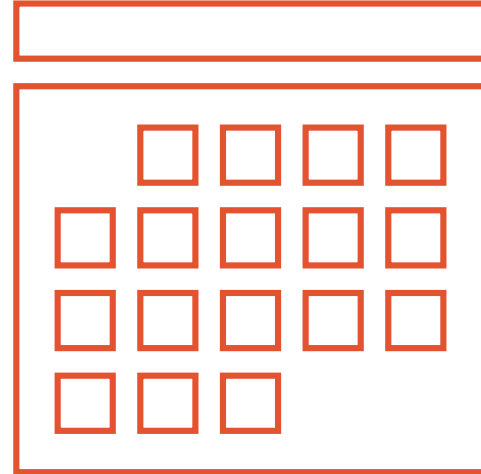
A state where an individual cannot make an informed and rational decision to consent to engage in sexual contact because the individual lacks conscious knowledge of the nature of the act (e.g., to understand the “who, what, where, when, why or how” of the sexual interaction) and/or is physically or mentally helpless. An individual is also considered incapacitated, and therefore unable to give consent, when asleep, unconscious, or otherwise unaware that sexual contact is occurring.

What facts may be relevant to determining incapacity due to alcohol or drugs?

- Ability to speak coherently
- Ability to track conversation
- Ability to appreciate and weigh risks and benefits
- Ability to walk or stand
- Ability to engage in behaviors requiring presence of mind
- Time period of consumption
- Nature of alcohol or drugs
- Amount of alcohol or drugs
- Size of the person consuming
- Others?

What is statutory rape?

Sexual intercourse with a person who is under the statutory age of consent.



Practical Point

State law typically governs the mandatory reporting of child sexual abuse. Usually in such states, sexual assaults of minors need to be immediately reported to state or local officials, irrespective of what the victim and/or their parents want to do.

What is fondling?

Touching of the private body parts of another person for the purpose of sexual gratification, without the consent of the victim, including instances where the victim is incapable of giving consent because of age or because of temporary or permanent mental incapacity.

What is domestic violence?

Felony or misdemeanor crimes committed by a person who:

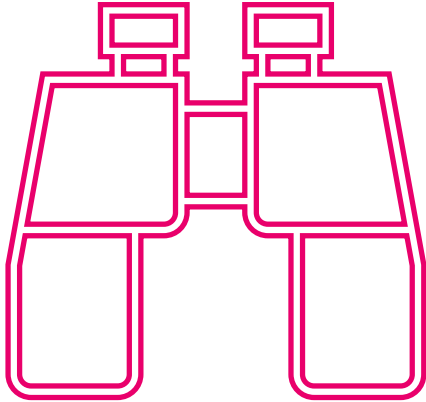
- Is a current or former spouse or intimate partner of the victim under the family or domestic violence laws of the jurisdiction of the recipient, or a person similarly situated to a spouse of the victim
- Is cohabitating, or has cohabitated, with the victim as a spouse or intimate partner
- Shares a child in common with the victim, or
- Commits acts against a youth or adult victim who is protected from those acts under the family or domestic violence laws of the jurisdiction

What is dating violence?

“Dating Violence” is 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 will be determined based on consideration of the following factors:
 - The length of the relationship
 - The type of relationship, and
 - The frequency of interaction between the persons involved in the relationship

What is stalking?



Engaging in a course of conduct directed at a specific person that would cause a reasonable person to:

- Fear for their safety or the safety of others, or
- Suffer substantial emotional distress

Scenario

Jasper and Kris are members of school's debate team and are partners for an upcoming competition at Big City School. The club is student-run and has no advisor. Students arrange and pay for their own travel to competitions. School covers only the entrance fee.

During one practice on school grounds with the whole team present, Jasper tells a raunchy sexual joke that Kris finds offensive. Once, while Jasper and Kris are practicing on their own at Kris' house, Jasper comments "If we didn't have to practice, I'd like to have sex with you right now."

The day before the competition, Jasper and Kris drive to Big City in Kris' car. Jasper and Kris each have their own hotel room that each independently paid for. Kris comes to Jasper's room for a final run-through. In the hotel room, Jasper repeatedly comments on Kris' appearance and eventually places their hand on Kris' groin area. Kris slaps Jasper and leaves the room.

The next morning, Jasper wakes up to find that Kris has left the hotel and returned to school. Without a partner, Jasper is forced to withdraw and take a ride-share back to school. Kris eventually files a Title IX complaint against Jasper.

Scenario Questions

- What potential forms of sex discrimination are implicated by Jasper's actions?
- Does school's Title IX policy apply to some or all of Jasper's actions? How would you analyze this, and what key facts would you consider?
- Are there facts that you would like to have, that are not present in the scenario, to determine whether the school's Title IX policy applies?



Retaliation

Module 3

What is retaliation?

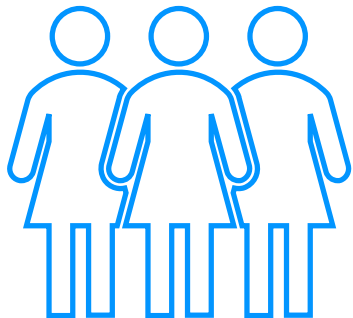
Neither the Board nor any other person may intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by Title IX or this policy, or because the individual made a report or complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing under this policy. Intimidation, threats, coercion, or discrimination, including initiating a disciplinary process against a person for a code of conduct violation that does not involve sex discrimination but arises out of the same facts and circumstances as a complaint or information reported about possible sex discrimination, for the purpose of interfering with the exercise of any right or privilege secured by Title IX constitutes retaliation. Peer retaliation is also prohibited. Retaliation against a person for making a complaint or participating in an investigation is a serious violation of this policy that can result in the imposition of disciplinary sanctions/consequences and/or other appropriate remedies.

Does retaliation require intent?



- “[F]or the purpose of interfering with any right or privilege secured by Title IX”
- Requires a subjective state of mind of the respondent

Can peers engage in retaliation?



- “A recipient must prohibit retaliation, including peer retaliation . . .”
- Complaints of peer retaliation may be appropriate for consolidation with an underlying report of sex discrimination or sex-based harassment

Is it retaliation to punish someone for lying during a Title IX proceeding?

- A district may punish a person for making false statements in a Title IX proceeding
- Provided there is evidence of falsity apart from the outcome of the Title IX proceeding itself



Is it retaliation if a respondent files a counter-complaint?

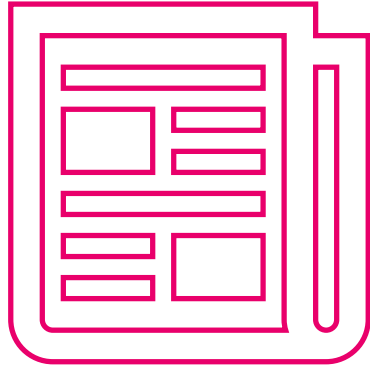
- Only if the counter-complaint is made in bad faith for the purpose of interfering with the complainant's exercise of Title IX rights



Practical Point

Districts should proceed cautiously and not presume a counter-complaint is retaliatory simply because it comes second. Doing so can create a “race to the Title IX Coordinator” scenario and risks systematic bias against respondents.

Is there any retaliation that is allowed?



- Some conduct that meets the technical definition of retaliation may be Constitutionally protected
- Freedom speech
- Freedom of association
- Freedom of religion

Can employees be compelled to serve as witnesses?

“Nothing in this definition [of retaliation] . . . precludes a recipient from requiring an employee or other person authorized by a recipient to provide aid, benefit, or service . . . to participate as a witness in, or otherwise assist with, an investigation, proceeding, or hearing under this part.”

New Title IX Regulation

The Title IX Coordinator and Title IX Team

Module 4

Who are your Title IX team members?

- Title IX Coordinator
- Deputy Title IX Coordinator
- Investigators
- Decision-makers
- Informal resolution facilitators
- Appellate officers
- Persons responsible for supportive measures

What are the team members' general qualifications?

- Appropriately trained in their duties and relevant policy
- Competent
- Free of conflicts of interest
- Free of bias and not relying on stereotypes



What is a conflict of interest?

- When an individual has a material connection to a dispute, or the parties involved, such that a reasonable person would question the individual's ability to be impartial
- May be based on prior or existing relationships, professional interest, financial interest, prior involvement, and/or nature of position



Examples of Conflicts

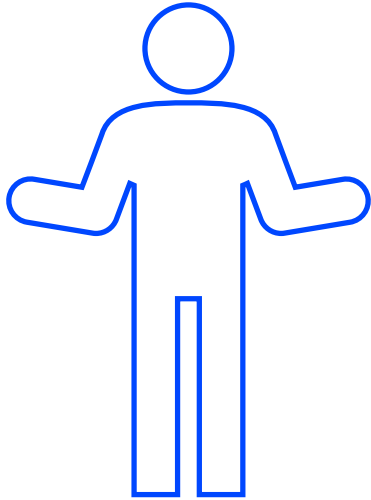
An investigator assigned to a case babysat for the complainant when the complainant was a child and is still close with the complainant's family.

A deputy title ix coordinator previously wrote a glowing letter of recommendation for the respondent.

An appeal officer in a case previously supervised the complainant and recommended her termination for performance reasons.



What is bias?



- A prejudice, predisposition, or inclination in favor of or against a thing or person
- Team members must be free of bias against complainants or respondents generally, or a specific complainant or respondent

Example of Bias

An investigator assigned to a sexual assault case also serves on the board of a local sexual assault advocacy organization. The organization recently announced a new campaign supporting sexual assault victims titled: “Believe them all.” As a board member, the investigator voted to approve the campaign. The investigator holds the personal belief that persons who report sexual assault should be believed unless objective evidence proves their allegations to be false.



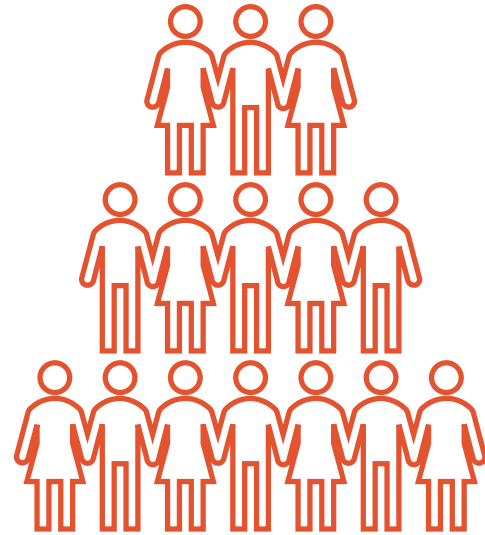
Example of Bias

An appeal officer (a teacher) previously had the complainant as a student. As a student, the complainant was frequently absent from the teacher's class, which prompted the teacher to send the student an email accusing the student of having a poor work ethic and threatening to fail the student. The email included the following: "I am singularly unimpressed with your performance. You are, without question, one of the laziest and least attentive students I have had in my career. I fear your future is bleak."



What are stereotypes?

A form of bias that operates as a preconceived, generalized, and sometimes inaccurate belief about a person based on their membership in a group or some other characteristic.



Examples of Impermissible Stereotypes

Members of sports teams always lie for each other.

Women who wear tight dresses and go to parties are looking to hook up.

Men are always the aggressors in a sexual encounter.

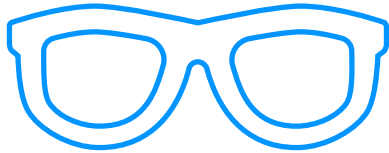
Transpeople are looking to draw attention to themselves.



What are some of the Title IX Coordinator's responsibilities?

- Coordinate overall Title IX compliance
- Answer questions about Title IX programs
- Coordinate training
- Receive reports and complaints
- Provide information about options and rights to complainants and others
- Coordinate supportive measures
- Provide information about grievance procedures and informal resolution
- Initiate relevant processes
- Screen for conflicts and bias
- Coordinate with disability services staff
- Evaluate efficacy of reporting and barriers to reporting
- Ensure retention of Title IX records

Can the Title IX Coordinator be an investigator?



- Yes, since no *per se* rule prohibits Title IX Coordinator from being an investigator
- Caution: Title IX Coordinator must be especially attentive to actual or perceived conflicts of interest

Can the Title IX Coordinator be a decision-maker?

- Yes, since no *per se* rule prohibits the Title IX Coordinator from being a decision-maker
- Caution:
 - Potential for conflicts of interest
 - Potential to undermine confidence in Title IX Coordinator's ability to effectively serve



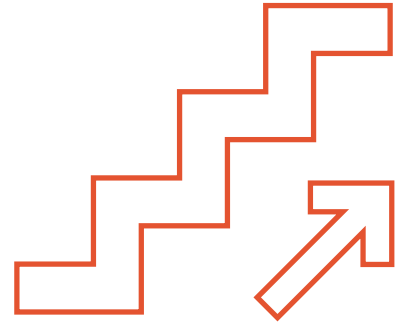
Who can serve as an informal resolution facilitator?



- Cannot be the investigator *in the same case*
- Cannot be the decision-maker *in the same case*

Who can serve as an appeal officer?

- Appeal officer should be a different person(s) than the person whose decision is appealed
- Not decision-maker
- Not determiner of dismissal
- Not decider of supportive measures



Who administers supportive measures?



- Title IX Coordinator must “coordinate” supportive measures
- Responsibility for determining supportive measures (or some types of them) can be delegated with appropriate oversight

Reporting

Module 5

What's the difference between a report and a complaint?

- A report is information about potential sex discrimination or sex-based harassment
- A complaint is an oral or written request to investigate and determine alleged sex discrimination or sex-based harassment

Who can make a report?

Anyone.

Which employees must report to the Title IX Coordinator?

- All school employees who are not Confidential Employees must promptly report potential Sex Discrimination to the Title IX Coordinator

Neola's Reporting Language

- All Board employees except Confidential Employees must provide the Title IX Coordinator with notification of conduct that reasonably may constitute sex discrimination under Title IX
- Board employees must share the following with the Title IX Coordinator:
 - All known details about the alleged sex discrimination, including:
 - The name of the alleged respondent;
 - The person who experienced the alleged sex discrimination;
 - Other persons involved in the alleged sex discrimination; and
 - Any other relevant facts (date, time, location, etc.)
- Failure to provide such notification may result in discipline, up to and including suspension or termination of employment

Parental Rights

Parents, guardians, or other authorized legal representatives with the legal right to act on behalf of a complainant may file a complaint for a student.

What triggers the reporting obligation?

- Information about conduct that reasonably may constitute sex discrimination or sex-based harassment
- Observing potential Sex Discrimination
- Or learning about potential Sex Discrimination through another means
- This is significantly less than a preponderance (*i.e.*, “likely”) standard

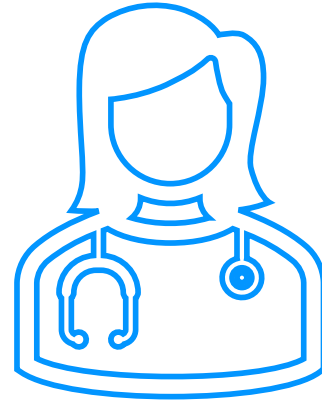


Which employees can maintain confidentiality?

- An employee whose communications are privileged or confidential under the law
- An employee designated as confidential for purposes of providing services to persons related to sex discrimination or sex-based harassment

When does confidentiality apply?

- Only when the employee is acting in their confidential capacity
- Information learned in a non-confidential capacity may be subject to mandatory reporting



Do confidential employees have information-sharing obligations?

- A confidential employee must:
 - Notify a person of the employee's confidential status, and
 - How to contact the Title IX Coordinator and make a complaint, and
 - That the Title IX Coordinator may be able to offer supportive measures as well as initiate informal resolution or grievance procedures

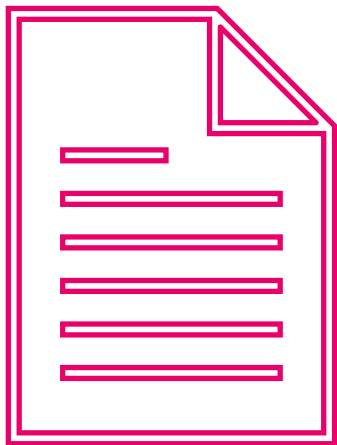
Neola's Recommendations Re: Confidential Employees

- Neola does not recommend that the Board include the definition of or designate “confidential employees” based on:
 1. the confusion that may result from designating a confidential employee(s) – in particular, Board-designated confidential employees will have different responsibilities as compared to ALL other Board employees when it comes to the actions they must take if a person notifies them of alleged sex discrimination;
 2. they require additional training concerning the responsibilities mentioned in the preceding paragraph, which are different from the responsibilities required of ALL other Board employees; and
 3. students or persons who are acting on their behalf may “lose” the “confidentiality” they are seeking if they communicate their concerns about alleged sex discrimination to a person who is not actually a confidential employee – it is safer for students, and those acting on their behalf, to operate on the assumption that if they tell a Board employee about alleged sex discrimination that the Board employee will report it to the Title IX Coordinator.

Practical Point

A district should develop a short handout or pamphlet that confidential employees can provide to persons and that satisfies the confidential employee's information sharing obligation. Using a document, rather than relying on an oral conversation, improves consistency of sharing and accuracy of information.

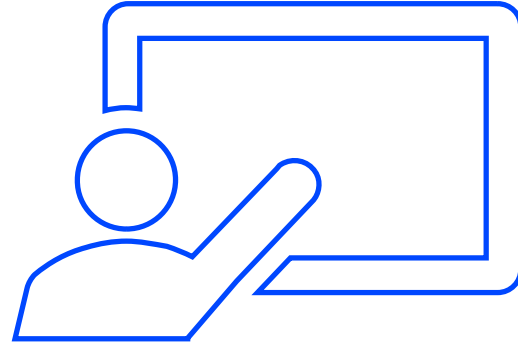
What must the Title IX Coordinator do once the Title IX Coordinator receives a report?



- Offer and coordinate supportive measures to the alleged victim
- Notify the alleged victim, or if unknown, the reporting party, of grievance procedures, including informal resolution, if available and appropriate

What if no complaint is filed?

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



What if the report does not implicate Title IX?

- Title IX Coordinator is not required to offer supportive measures and other steps
- If the Title IX Coordinator reasonably determines the conduct
- Could not constitute sex discrimination or sex-based harassment

Break Time


Supportive Measures

Module 6

What are supportive measures?


- Individualized measures
- Offered as appropriate
- As reasonably available
- Without unreasonably burdening a party
- Not for punitive or disciplinary reasons
- Without fee or charge
- To restore or preserve access
- Or provide support during the grievance process or informal resolution

What are examples of supportive measures?

 Counseling

 Academic accommodations

 Security escorts

 Leave of absence

 Increased security or monitoring

 Modified work schedules

 Mutual no-contact order if implicated by facts

Examples

Student reports that Fellow Student sexually harassed Student by repeatedly propositioning Fellow Student until Student's brother intervened. Student would like to receive counseling, but does not wish to file a complaint. Student does not believe Fellow Student poses a physical threat.

Is this a reasonable supportive measure?



Examples

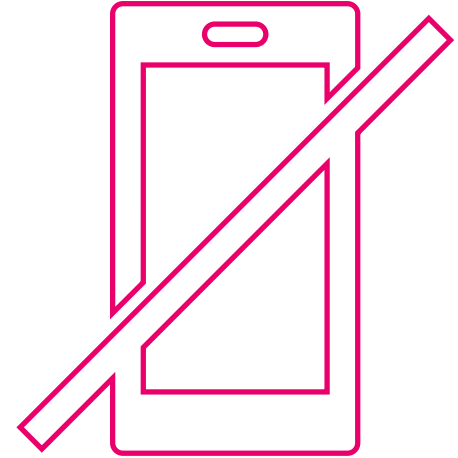
One student reports another student committed sexual assault three years ago when they were freshman. The reporting student has received strong academic marks since then. The reporting student requests a refund of all private counseling charges for the last three years.

Is this a reasonable supportive measure?



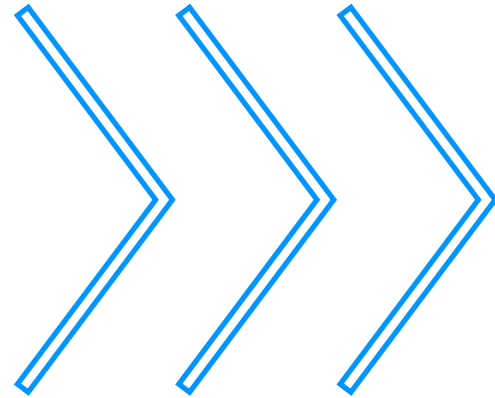
When is a no contact order appropriate as a supportive measure?

- When reasonably available
- When not an unreasonable burden
- When necessary to restore access or preserve safety
- Never for disciplinary or punitive reasons

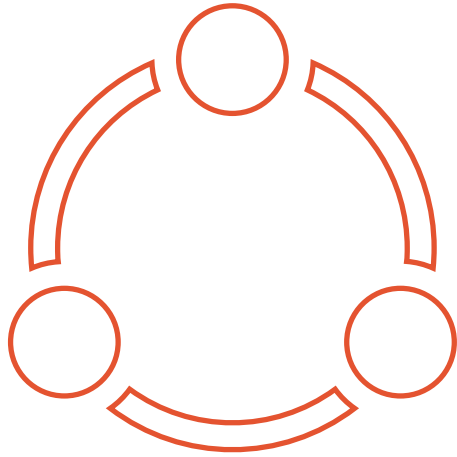


When are supportive measures offered?

- For the alleged victim, promptly after receiving a report
- For the alleged perpetrator, when grievance procedures or informal resolution are initiated



May a district terminate supportive measures?



- A school district may modify or terminate supportive measures “as appropriate” at the conclusion of grievance procedures or informal resolution
- Or a recipient may continue them beyond that point

Practical Point

Supportive measures that do not impact a respondent can and often are continued after a determination, for at least some period. Supportive measures that burden a respondent typically either convert to an element of action (if a finding of a violation is made) or terminate if a finding of no violation is made.

What if a party disagrees with a supportive measure decision?

- District must provide either party a “timely opportunity” to seek modification or reversal of supportive measure decision applicable to that party
- Appeal goes to an “appropriate and impartial employee” who was not the initial decision-maker

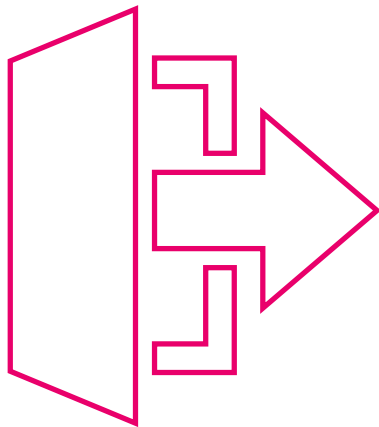
What if circumstances change?

- District must provide a party with the opportunity to seek modification or termination of supportive measures applicable to them
- If circumstances change materially

What if a party has a disability?

- In K-12, Title IX Coordinator must consult with IEP team and officials responsible for IDEA and Section 504 compliance

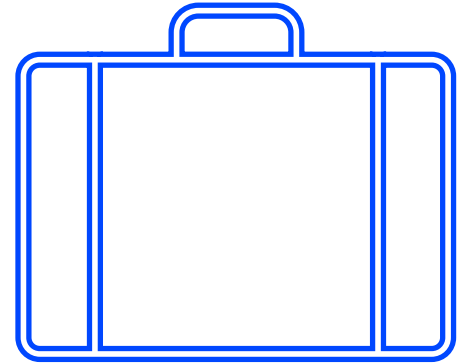
Can a respondent be removed on an emergency basis?



- A respondent can be removed on an emergency basis if individualized analysis finds:
 - Imminent and serious threat to health or safety of another person, and
 - The respondent is provided an immediate opportunity to appeal the removal decision

Can an employee respondent be placed on leave?

- A school district may place an employee respondent on administrative leave from their job duties during the pendency of grievance procedures
- Due process, state law, and contractual obligations may be relevant limitations

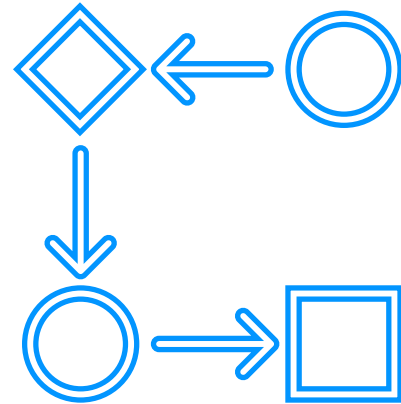


The Grievance Procedures

Module 7

Must a district have grievance procedures?

- A district must adopt, publish, and implement grievance procedures
- For the prompt and equitable resolution of complaints
- Alleging any action prohibited by Title IX



Practical Point

The August 2020 Title IX regulation almost exclusively addressed complaints of sexual harassment. The new 2024 Title IX regulation imposes more explicit grievance procedures for complaints of other forms of sex discrimination and sex-based harassment.

What are the general principles of grievance procedures?

- Prompt and equitable
- Published in writing
- Administered by persons free of conflicts of interest and bias
- Presumption respondent not responsible until a determination is made
- Reasonable steps to protect privacy
- An objective evaluation of all relevant and not otherwise-impermissible evidence
- Credibility determinations not based on a party's status

What does the grievance process look like?



What are the two grievance processes?

- General grievance process in § 160.45
- Minimum grievance process that applies to
- All sex discrimination and sex-based harassment except that covered by *46
- Augmented grievance process in § 160.46
- Augmented grievance process in § 160.46
- Applies additional requirements to cases with
- *Sex-based harassment involving a college or university student as a complainant or respondent*
 - *We will not be covering this in our presentation*

The *45 General Process

Who can make a complaint?

- The alleged victim
- A parent, guardian, or other authorized legal representative with the legal right to act on behalf of an alleged victim
- For sex discrimination other than sex-based harassment, any student or employee, or other person who was participating or attempting to participate at the time of the alleged discrimination, and
- The Title IX Coordinator, subject to certain factors

Example

An assistant coach believes that members of women's sports teams are being discriminated against by receiving poor quality food, old uniforms, few training opportunities, and insufficient facilities, relative to men's teams.

The assistant coach can file a complaint, even though it is the players who are allegedly being discriminated against.



When can the Title IX Coordinator make a complaint?

- In the absence of a complaint, or when any or all allegations in a complaint have been withdrawn
- And provided informal resolution is not ongoing
- And provided a fact specific determination justifies making the complaint

What facts must the Title IX Coordinator consider?

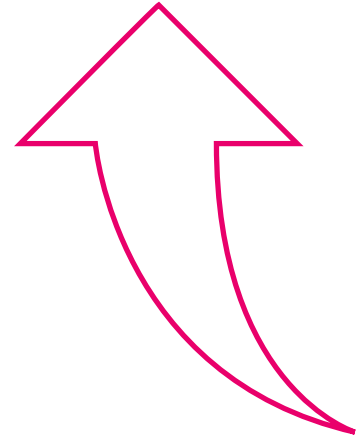
- The alleged victim's desire not to proceed
- The alleged victim's safety concerns
- The risk misconduct will recur
- Severity of the alleged misconduct
- The likelihood action would be removal, if case was proven
- The age and relationship of the parties
- Multiple alleged victims
- Ongoing misconduct or a pattern
- Availability of evidence
- Whether alternatives exist

Practical Point

It will be an unusual case where the Title IX Coordinator exercises authority to initiate a complaint of sex-based harassment against the alleged victim's wishes. Substantial concerns about an ongoing risk of significant misconduct will often be present.

Are complaints evaluated for dismissal?

- Under the new regulation, all dismissals are permissive, rather than mandatory
- But a complaint should still initially be evaluated for dismissal on one or more of several specific grounds



What are the grounds for dismissal?

- District is unable to identify the respondent after taking reasonable steps to do so;
- Respondent is no longer a participant and is not employed;
- The complainant voluntarily withdraws any or all the allegations in the complaint, the Title IX Coordinator declines to initiate a complaint, and the District determines that, without the complainant's withdrawn allegations, the conduct that remains alleged in the complaint, if any, would not constitute sex discrimination under Title IX even if proven; or
- The District determines the conduct alleged in the complaint, even if proven, would not constitute sex discrimination under Title IX. Before dismissing the complaint, the Title IX Coordinator will make reasonable efforts to clarify the allegations with the complainant.

Example

Joe, a student, makes a complaint that Joe's sister, Jean, was subjected to discrimination by a teacher who gave Jean a bad grade solely because the teacher is trying to weed women out of the field. When Jean is notified of the complaint, Jean states that she was not discriminated against and received a grade merited solely by her deficient work. Jean indicates a desire for the complaint not to proceed.



Questions for Discussion

Has Jean “withdrawn” the allegations?

Should the Title IX Coordinator dismiss the complaint?



Example

An assistant special education teacher is accused of sexually propositioning a custodian. After being notified of the complaint, the assistant special education teacher resigns and has no remaining relationship with the district.

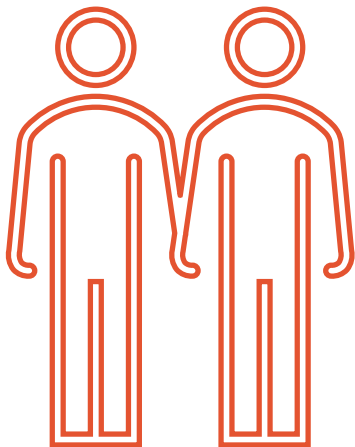
The Title IX Coordinator may dismiss the complaint, but is not required to do so under the new regulations.



Who receives notice of the dismissal?

- The alleged victim
- And, if the respondent has been notified of the complaint, the respondent too
- The notice can be given orally, or in writing, but if in writing, must be simultaneous

Can a dismissal be appealed?

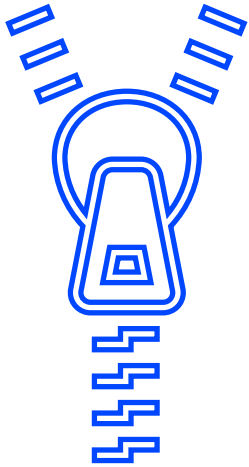


- District must notify the alleged victim that the dismissal can be appealed
- And if the respondent has already been notified, district must notify the respondent too
- Appeal is permitted on the same specified grounds and procedures that govern a final decision

Are there obligations after a dismissal?

- District must offer supportive measures to the alleged victim, as appropriate
- If the respondent is known, is a current participant or employee, and has already been notified of the complaint, offer supportive measures to the respondent too
- Title IX Coordinator must implement other prompt and effective steps to prevent future sex discrimination and/or sex-based harassment

Are complaints evaluated for consolidation?



- Complaints may be consolidated when allegations arise out of the same facts and circumstances
- Can involve multiple parties
- *If one party is a post-secondary student alleging or accused of sex-based harassment, *46 procedures apply to the consolidated case*

Example

Crystal alleges that Newt sexually assaulted Crystal one month ago, in Newt's office, when Crystal was too drunk to consent after an employee reception. Separately, Reagan alleges that Newt sexually assaulted Reagan two weeks ago, in Newt's office, when Reagan was too drunk to consent after an employee resource group reception. Crystal and Reagan are aware of each-other's complaints, and both refer to Newt as a "sexual predator."



Questions for Discussion

Can these two complaints against Newt be consolidated?

**If they are not consolidated, how would they proceed?
And would each complainant be involved in the other's
grievance process? If so, how?**



Break Time

Is there an investigation under *45?

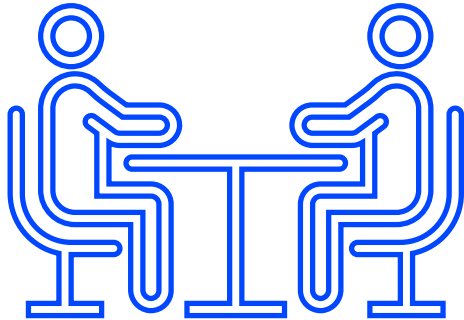
- After a complaint has passed the evaluation stage
- There is an adequate, reliable, and impartial investigation



What are the key elements of a *45 investigation?

- Burden is on the recipient to gather sufficient evidence
- Parties have equal opportunity to present fact witnesses and other relevant evidence
- District must review corpus to determine relevant and not otherwise impermissible evidence
- Provide each party an equal opportunity to access the evidence that is relevant and not otherwise impermissible

What form will the investigation take?



- Likely interviews of the parties and witnesses with relevant information, unless non-testimonial evidence is dispositive
- Collection of non-testimonial evidence that is relevant and not otherwise impermissible

What evidence is considered relevant?

- Evidence is relevant if it “may aid a decision-maker in determining whether the alleged sex discrimination occurred”
- Questions are relevant if they seek evidence that may aid in showing whether the alleged sex discrimination occurred

What evidence is impermissible, even if it may be relevant?

- Evidence that is protected under a legal privilege, or that was provided to a confidential employee, unless the party voluntarily waives the privilege or confidentiality
- A person's health care records, unless the person gives voluntary, written consent
- Evidence of the complainant's sexual interests and history

What are examples of evidence subject to a legal confidentiality privilege?

- Attorney-client communications
- Communications with health care providers
- Communicat with psychologists, counselors, ionsand social workers
- Communications with a priest or cleric



How do the regulations define a complainant's sexual history?

- Any evidence that “relates to the complainant’s sexual interests or prior sexual conduct,” unless:
 - Offered to prove that someone other than the respondent committed the alleged misconduct, or
 - The evidence is about prior, specific sexual incidents with the respondent and offered to prove the presence of consent with regard to allegations of sex-based harassment

Example

A complainant alleges the respondent coerced the complainant into performing oral sex. During the interview, the complainant states, “I think oral sex is gross. It’s not something I normally do, even with people I’m dating.” May the investigator ask how many times the complainant has voluntarily performed oral sex?

This likely is not permissible under the Title IX regulations.



Example

A complainant alleges the respondent coerced the complainant into performing oral sex, which the complainant considers “gross, and something I just don’t do.” The respondent has claimed oral sex between the two parties was routine, and the complainant often initiated it without being specifically asked to. May the investigator ask the complainant whether the complainant voluntarily performed oral sex on respondent on prior occasions, and if so, whether complainant initiated the incidents?

This may be permissible under the Title IX regulations.



Is there a prohibition on asking about the respondent's sexual history?

- No explicit prohibition
- But evidence about the respondent's sexual history must still be relevant, and
- Overall process must still be equitable and fair



Are there guidelines for questions about a respondent's sexual history?

- Respondent's prior sexual encounters should not be used simply to demonstrate a character trait
- Prior sexual encounters may be relevant to show a *modus operandi*
- Prior sexual encounters may be relevant to show motive, opportunity, intent, absence of mistake, lack of accident or to respond to something the respondent has put at issue

Example

A complainant alleges that a respondent fondled the complainant by groping the complainant's crotch during a dance. The respondent claims the contact was an accident. Ten witnesses have been identified who will testify that, at various dances over the last six months, they experienced similar groping from the respondent. *This may be permissible under the Title IX regulations.*



How are interviews to be documented/recorded?

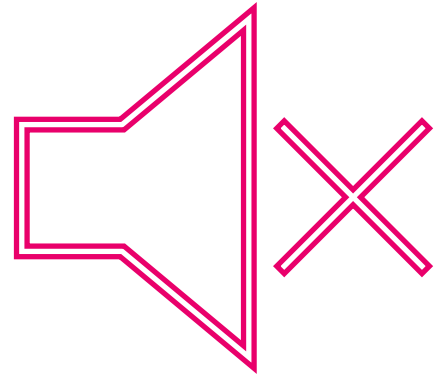
- *45 grievance process does not require any particular form of documentation or recording
- “Interviews” could even be written questions and written answers (provided, the investigator is not also the decision-maker—*more on that in a bit*)

How are parties provided access to the evidence?

- Parties get access to either: (1) the evidence itself, or (2) an “accurate description of this evidence”
- If a description is provided, the district must allow either party to access the underlying evidence, if requested
- Parties must be given a “reasonable opportunity” to respond before a decision is made

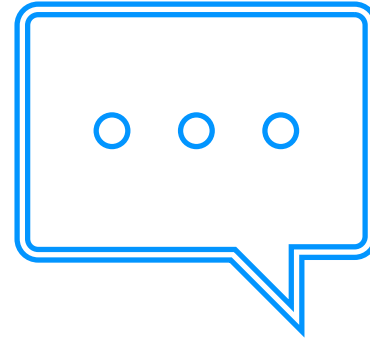
Are the parties required to maintain confidentiality of the evidence (or description)?

- District must take reasonable steps to prevent and address parties' unauthorized disclosure of evidence obtained solely through grievance procedures
- Use of evidence for administrative proceedings or litigation related to the complaint itself is authorized



What is a reasonable opportunity to respond?

- “Reasonable” implies both time and form
- Time depends upon complexity of the case, but districts can set a default rule (i.e., seven days)
- Form could be in writing or in a subsequent meeting



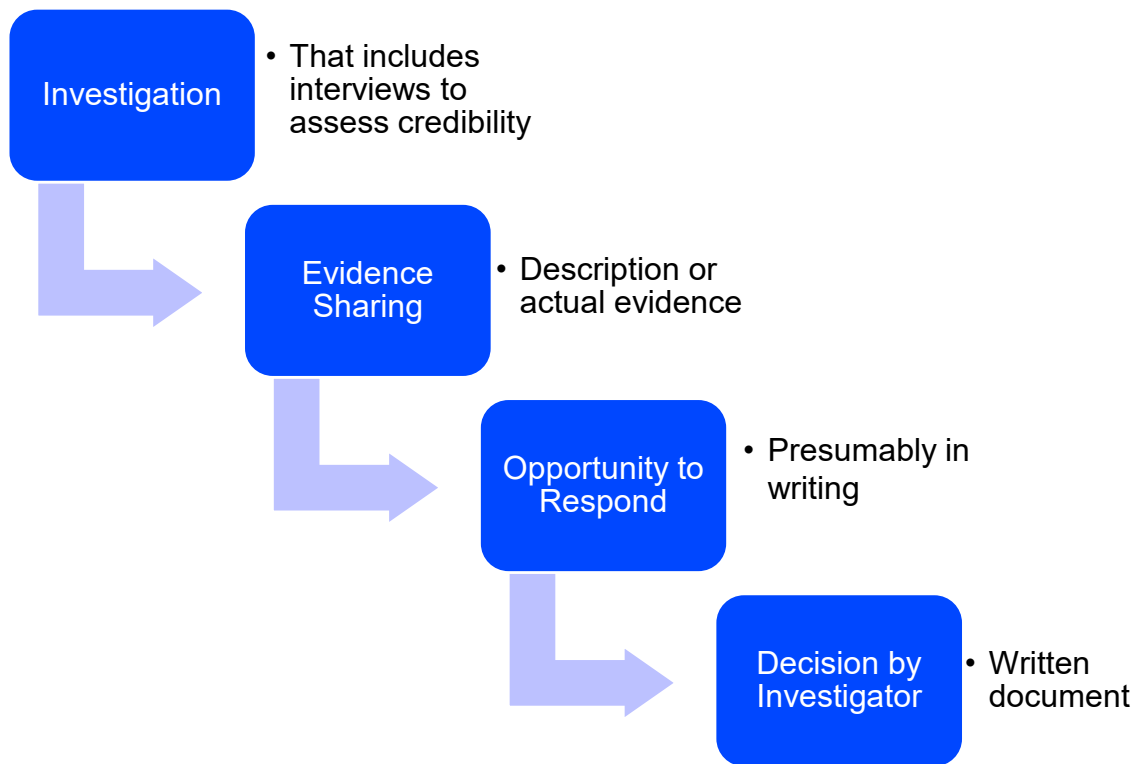
When does the decision occur?

- After the parties have had a “reasonable” opportunity to respond to the relevant evidence and/or accurate description
- After the decision-maker has had the ability to “question parties and witnesses to adequately assess a party or witness’s credibility to the extent credibility is in dispute and relevant”

Who is the decision-maker under the *45 process?

- The person who determines whether or not the allegations are supported under the standard of evidence
- The decision-maker can be “the same person as the Title IX Coordinator or investigator”

Can you have a *45 “single person” model?



Can you have a *45 “two person” model?

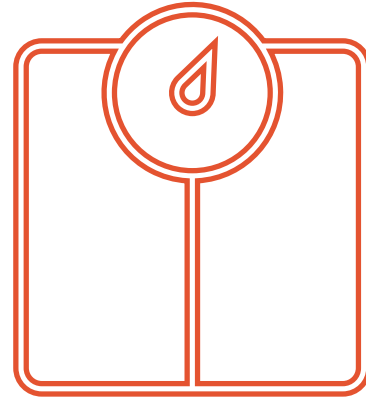


What rules govern the determination?

- Decision-maker must question parties and witnesses to assess credibility when in dispute and relevant
- Standard used must be preponderance or clear and convincing (only if used in all other comparable proceedings)
- Based solely on relevant and not otherwise impermissible evidence
- Written notice to both parties with certain mandatory elements

What is a preponderance of the evidence?

- More likely than not
- Greater than 50% likelihood



What are the written elements to the determination?

- Determination for each allegation
- Rationale for each determination
- Procedures and permissible bases for appeal

Does the written determination include remedies and action?

- “If there is a determination that sex discrimination occurred . . .”
- Title IX Coordinator must coordinate remedies and coordinate imposition of disciplinary sanctions
- Complainant has the right to written notice of the disciplinary sanctions

Disciplinary Sanctions and Remedies for Students

- **Formal discipline**

- Suspension of bus riding/transportation privileges
- Removal from co-curricular and/or extracurricular activity(ies), including athletics
- Emergency removal
- Suspension for up to 10 school days
- Expulsion for up to 80 school days or the number of school days remaining in a semester, whichever is greater
- Expulsion for up to one year
- Permanent exclusion
- Any other sanction authorized by the Student Code of Conduct

- **Informal discipline**

- Writing assignments
- Changing of seating or location
- Preschool, lunchtime, and after-school detention
- In-school discipline
- Saturday school

Disciplinary Sanctions and Remedies for Employees

- Oral or written warning
- Written reprimands
- Required counseling
- Required training or education
- Demotion
- Suspension with pay
- Suspension without pay
- Termination and any other sanction authorized by any applicable Board Policy, Employee/Administrator Handbook, and/or collective bargaining agreement

Appeals

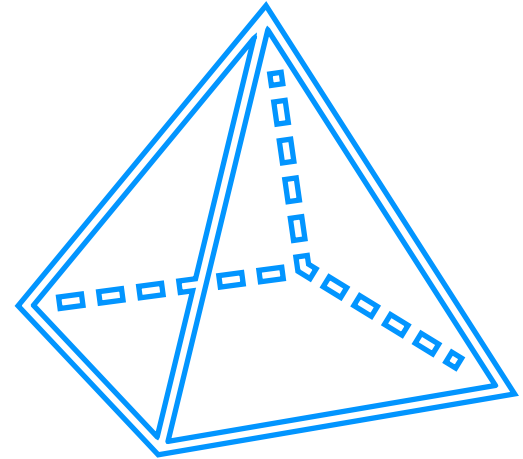
Module 8

What types of appeals are required?

- Appeals of supportive measure decisions
- Appeals of emergency removals
- Appeals of dismissals on specified grounds
- Appeals of final decisions in *45 processes the same as offered for “all other comparable proceedings”

How do supportive measure appeals work?

- A party who disagrees with a supportive measure decision (including a request to modify or eliminate) that affects them
- Can appeal to someone other than the person who made the decision and who has authority to implement a change
- The regulation does not specify the “grounds” for appeal



Example Language

A party who disagrees with a supportive measure decision, including a decision relating to a request to modify or terminate supportive measures based on materially changed circumstances, may file an appeal with the Principal. The Principal may provide, deny, modify, or terminate the supportive measure at issue if the Principal determines the initial decision was not consistent with this policy.



How do appeals of dismissals work?

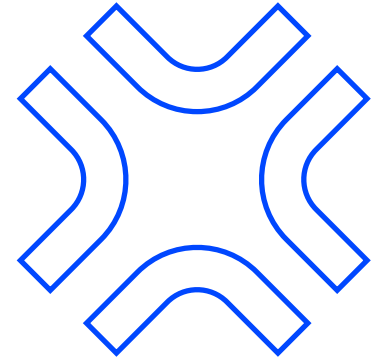
- If a dismissal is appealed, district must:
 - Notify the parties of the appeal
 - Implement appeal procedures equally
 - Ensure that appellate officer did not take part in the investigation or dismissal
 - Provide parties a reasonable and equal opportunity to make a statement regarding the appeal
 - Notify the parties of the result of the appeal and rationale

What are the grounds for appeal of a dismissal?

- Procedural irregularity that would change the outcome
- New evidence that would change the outcome and was not reasonably available when the determination of dismissal was made
- The Title IX Coordinator, investigator, or decision-maker had a conflict of interest or bias that would change the outcome

How do final decision appeals work for *45?

- The regulation does not list specified grounds for appeal or procedures for appeal
- District must offer an “appeal process that, at a minimum, is the same as it offers in other comparable proceedings, if any”



Neola's Grounds For Appeal

- Procedural irregularity that would change the outcome;
- New evidence that would change the outcome and that was not reasonably available when the Determination was made; and
- The Title IX Coordinator, investigator, or decision-maker had a conflict of interest or bias for or against complainants or respondents generally or the individual complainant or respondent that would change the outcome.
- *Optional:* any other additional grounds on which an appeal can be filed, such as the recommended remedies are unreasonable in light of the findings of fact.

Informal Resolution

Module 9

What is informal resolution?

- An alternative process to the grievance procedure for resolving a complaint of sex discrimination or sex-based harassment



When can it be used?

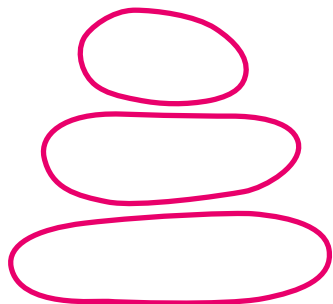


- Any time prior to a final determination under a grievance process
- Practical Note: Unless the accusation is that an employee engaged in sex-based harassment of a K-12 student or informal resolution would conflict with federal, state, or local law

What are the procedural predicates for informal resolution?

- Must be at least a report of sex discrimination or sex-based harassment
- District must determine it is appropriate to offer informal resolution
- Parties must voluntarily consent after receiving notice with certain required elements

How does the district consider whether informal resolution is appropriate?



- District may, but is not required, to offer informal resolution
- Must consider whether the alleged conduct would present a future risk of harm to others
- Additional factors may be considered

What other factors may guide district decision?

- Severity and nature of the conduct
- Pattern of misconduct
- Likelihood dismissal would be a sanction under grievance procedure if misconduct found
- How long process has already lasted
- Publicity
- Potential effect on campus climate
- Desires of the parties
- Ability of the parties to abide by a resolution
- Likelihood a resolution will result

Impermissible Example

A teacher liaison to a student club is accused of fondling two members of the student club. The students alleged the fondling occurred at the student organization club's hotel after the teacher had been drinking in the bar. The student members request to have an informal resolution because they believe the teacher has a drinking problem and should seek treatment. They do not want the teacher to be terminated.



What are the elements of the required notice to the parties?

- The allegations
- The requirements of the informal resolution process
- Each party may withdraw prior to a resolution and return the case to grievance procedures
- Agreement to a resolution would preclude grievance procedures for the same allegations
- Potential terms, including that a resolution is binding only on the parties
- What information will be maintained and how it may (or may not) be used if grievance procedures are resumed

Must the notice be in writing?



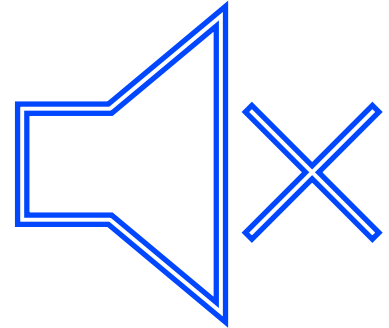
- Notice should be in writing for all cases, but
 - *Regulation only requires the notice to be in writing for *46 cases (higher ed)*

What are some potential terms of informal resolution?

- Restrictions on contact
- Restrictions on a respondent's participation in certain activities or events
- Training or education
- Withdrawal or resignation
- Apology
- Negotiated action or sanctions
- Others?

Is information shared during informal resolution confidential?

- District may elect to make information shared during informal resolution confidential in the event resolution fails and grievance procedures resume
- District may prohibit informal resolution coordinator from serving as a witness in grievance procedures
- The parameters must be disclosed to the parties in the notice

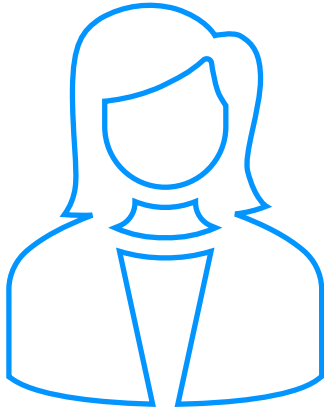


Example

Asako accuses Ronaldo of fondling Asako when Asako was intoxicated. During an informal resolution Ronaldo candidly admits to the Title IX Coordinator, “I should have known better than to touch her like that. But I just didn’t think about it at the time. I’d like to apologize.” Informal resolution fails and the grievance procedures resume.



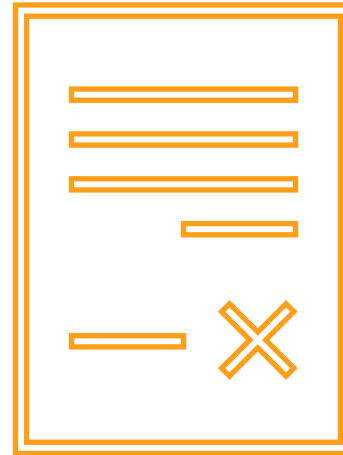
Who manages the informal resolution?



- Informal resolution facilitator
- Cannot be the investigator or decision-maker
- Must be free of conflicts and bias, and appropriately trained on duties and policy provisions

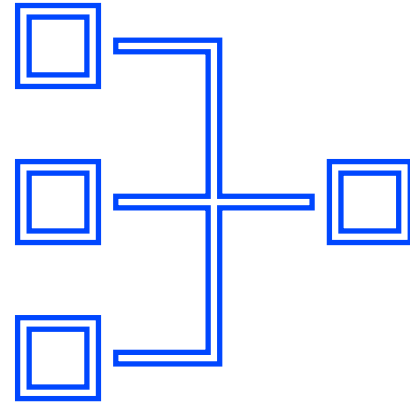
How are informal resolutions documented?

- Informal resolution agreements should be reduced to writing with all essential terms
- Parties should sign, and district should give written approval



What happens if someone doesn't abide by an informal resolution?

- Regulation states that completed informal resolution forecloses grievance process for the allegations resolved
- Consequences for failure to comply should be addressed in the resolution



Group Scenario

- Jesse, sophomore non-starter on the basketball team, accuses the captain and star power forward, Toni, of sexual harassment after Toni kisses Jesse in a hotel room during an in-season basketball away game.
- At the intake meeting, in August (outside of basketball season), Jesse explains that Jesse will never informally resolve this issue. Jesse files a complaint, and proper notices have been sent to the parties and support measures are in place. The day after the basketball season starts, while the investigation is underway, Jesse decides that Jesse wants to proceed informally. Toni is “totally on board.”
- You are brought in to lead the informal resolution discussions.

Group Scenario Questions

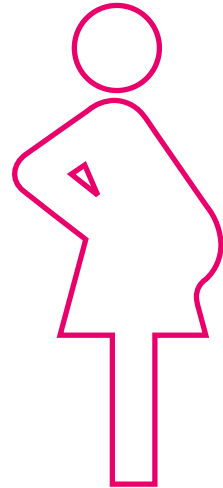
1. What issues from the facts above do you want to figure out/dig into more?
2. What questions will you raise with Jesse?
3. What questions will you raise with Toni?
4. Who (if anyone) will you talk to while the informal resolution process is underway?

Pregnancy

Module 10

What does the new regulation say about pregnancy?

- Discrimination and harassment based on pregnancy and related conditions is “sex” discrimination and sex-based harassment
- Districts have a duty to provide certain accommodations to persons with pregnancy and related conditions



What are pregnancy and related conditions?

- Pregnancy
- Childbirth
- Termination of pregnancy
- Lactation
- Medical conditions related to pregnancy, childbirth, termination of pregnancy, or lactation
- Recovery from pregnancy, childbirth, termination of pregnancy, lactation, or related medical conditions

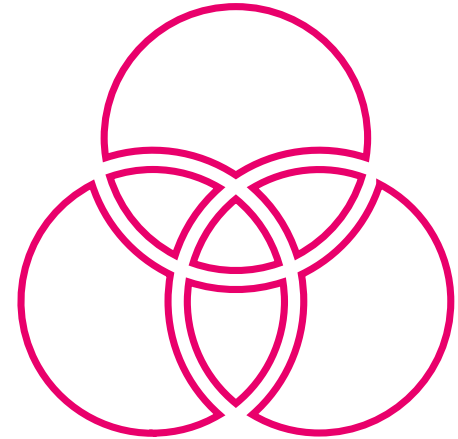
Example

A pregnant student gives birth without complication, fully recovers after six weeks, and returns to school. The student is breastfeeding and is also having challenges finding a babysitter to watch her child while the student attends class.



What do we do if pregnancy presents a health concern with a particular program or course?

- For purposes of assessing eligibility, pregnancy must be treated the same as other temporary medical conditions
- It is not discrimination for a pregnant student to voluntarily participate in a “separate portion” of a program if it is comparable

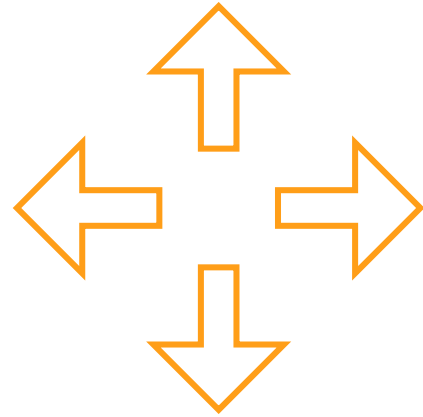


May a district require a pregnant student to provide a doctor's certification?

- Only when certified level of physical ability or health is necessary
- Such certification is required of all students participating in the class
- Information obtained is not used for discriminatory purpose

What reasonable accommodations are pregnant students allowed?

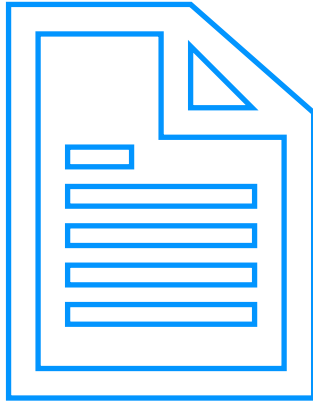
- Reasonable modifications
- Based on individualized needs
- Determined after consultation with the student
- Fundamental alteration is not required



What are some common examples of reasonable accommodations?

- Breaks during class to express breast milk or breast feed
- Breaks to attend to pregnancy related needs, including eating, drinking, or using the restroom
- Intermittent absences to attend appointments
- Access to online or homebound education
- Changes in schedule or course sequences
- Extensions of time and rescheduling
- Counseling

Can we require documentation before granting an accommodation?



- Documentation must not be requested unless it is necessary and reasonable to determine modifications
- Some accommodation needs related to pregnancy are obvious or inherent and need not be documented

Example

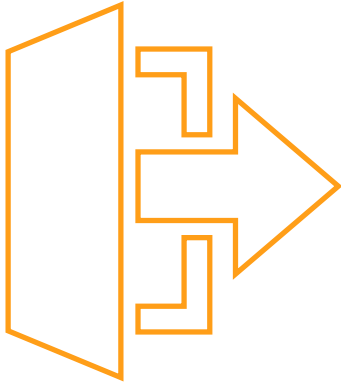
A pregnant student is no longer able to fit into the standard desk used in a particular classroom.

A pregnant student needs to take more frequent bathroom breaks.

A student who recently gave birth has lactation needs.



What about voluntary leaves?



- Must allow a pregnant student to take a voluntary leave for at least the period of time medically necessary
- When returning, student must be reinstated to academic status, and as practicable, to the extracurricular status before leave

Must a school provide lactation space?

- Must provide access to lactation space, other than a bathroom, that is clean and private
- Space must be available both for expressing breast milk or for breastfeeding, as needed



Are there reporting obligations for the needs of pregnant students?

- When student informs employee of student's pregnancy or related condition
- Employee must promptly provide student with Title IX Coordinator's contact information and inform student of Title IX Coordinator's ability to prevent sex discrimination and ensure equal access



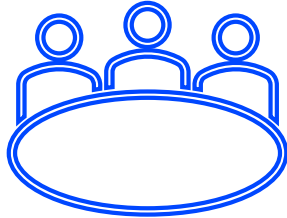
Navigating Investigations

Module 11

What is the purpose of Title IX investigation?

- For the district
- To collect relevant inculpatory and exculpatory evidence
- Sufficient to permit an impartial decision-maker to determine
- Whether or not the reported sex discrimination occurred

How do we collect evidence in an investigation?



Interviews of parties and
witnesses



Collection of
non-testimonial evidence

How do you structure an interview?



Rapport building/information providing phase



Substantive testimony collection



Closure/information providing phase

How do I ask questions in the substantive phase?



- Open-ended and non-suggestive invitations
- Use facilitator words to keep the narrative flowing
- Use cued-invitations to expand particular topics
- Delay use of specific questions (“recognition prompts”) as long as possible
- Avoid suggestive or leading questions

Interviewing minors

- Adhere to state laws and district/school policies
- Conduct the interview in a safe, private space
- Straightforward and age-appropriate questioning
- Begin the interview with rapport building
- Documentation is critical

Managing Trauma, Conflicts of Interest, and Bias

Module 12

What is the definition of trauma?



Merriam-Webster: A very difficult or unpleasant experience that causes someone to have mental or emotional problems usually for a long time



English Oxford: Deeply distressing or disturbing experience



Wikipedia: Is a type of damage to the psyche that occurs as a result of a severely distressing event. Trauma is often the result of an overwhelming amount of stress that exceeds one's ability to cope, or integrate the emotions involved with that experience

What is trauma's impact on the brain?

- Brain senses threat and sets off alarm
- Thinking brain assesses
- Thinking brain shuts down
- Emotional brain
 - Fight, flight, freeze
- Thinking brain comes back online, turns off alarm, helps calm down
- Emotional brain may continue to sound the alarm, and overwhelming the system going forward



How do we approach trauma in a Title IX case?

- Balance
 - “Trauma-informed investigation techniques that bleed over into ... bias detract from the fundamental tenets of fairness and impartiality that are [key to] disciplinary proceedings.”
 - Candace Jackson, Acting Asst. Secretary of ED (2017)

What does it mean to be “trauma informed”?

- Title IX regulations do not define the term
- There is no standard or commonly accepted definition
- In practice, it means:
 - Prompt provision of supportive measures such as counseling to address the immediate and ongoing effects of trauma
 - Understanding the neurobiology of trauma and its impact on a victim’s neurobiological functioning
 - Adopting investigation and hearing techniques that minimize the risk of exacerbating trauma while still being fair and impartial

When does trauma affect a person?

- Not in every case
- Never *assume* anyone participating has suffered any trauma
- Trauma may arise before, during, or after alleged Title IX misconduct, and may impact an individual's response during proceedings
- Not just complainant

Possible trauma impact

People who have suffered trauma may, but may not, experience any or a mix of the following:

Flashbacks

Delayed recollection

Inability to concentrate

Non-linear recollection

Self-blame

HUSCH BLACKWELL

Conduct that Allegedly Occurred Prior to August 1, 2024



Relevant Policies

- For reports involving conduct that allegedly occurred prior to August 1, 2024, the following policies and guidelines govern:
 - Po2266
 - Ag2266
- These documents comply with the 2020 Title IX regulations

Key Differences in the 2020 Regulations

- 2020 regulations only refer to “sexual harassment,” but new policies use the term “sex-based harassment” and “sex discrimination”
- Different definitions for quid pro quo harassment and hostile environment harassment
- 2020 regulations require a Formal Complaint

Key Differences in the 2020 Regulations cont.

- 2020 regulations do not require district to respond to sexual harassment that occurred outside the scope of the district's education program or activity, or outside of the U.S.
- Informal resolution cannot be offered in the absence of a Formal Complaint
- No requirement to appeal supportive measures decisions

Key Differences in the 2020 Regulations cont.

- 2020 regulations contemplate live hearings with cross-examination
- 2020 regulations do not require employees to provide a student with options if they learn about a student's pregnancy or related condition

