



TUETH KEENEY  
COOPER MOHAN JACKSTADT P.C.

# TITLE IX COMPLIANCE SERIES

## Part 1: The Role of the Title IX Coordinator

*Presented by:*  
Celynda Brasher  
Merry Rhoades

*Date:*  
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The materials available in this Guidance are for informational purposes only. You should contact legal counsel to obtain advice with respect to any particular issue or problem, as student discipline matters are all unique and specific.



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# Presenters

## Michelle Basi

Michelle is a shareholder and practices in the areas of school law, special education, school litigation, and labor and employment law. Michelle represents school districts with respect to employment and termination matters, special education, Section 504, student discipline and student rights, civil rights, and church/state issues. Michelle has successfully represented school districts in student and employment matters before various federal and state courts and administrative agencies, including the EEOC, Missouri Commission on Human Rights, and the Office for Civil Rights. She is a member of the Missouri Council of School Attorneys, Illinois Council of School Attorneys, and is a regular speaker at statewide and regional school law conferences. She has also authored chapter updates for the Missouri Bar School Law CLE Deskbook. As the daughter of a long-time special education teacher and the wife a high school math teacher turned administrator, Michelle is proud to represent schools and be a small part of the good work done for students in schools each day!

Michelle received two bachelors' degrees simultaneously from Saint Louis University, each *summa cum laude*. She earned her J.D., *Order of St. Ives*, from the University of Denver College of Law.

# Presenters

## Celynda Brasher

Celynda is a founding shareholder of the firm. She practices in the areas of education, litigation, and labor and employment law. She represents numerous school districts throughout Missouri. She regularly advises boards of education and administrators on matters involving employee hiring, evaluation, remediation, and termination; student rights and discipline; special education; school finance; civil rights; contracts; the Missouri Open Meetings Act; church/state issues; and other constitutional matters. Celynda also represents school districts in discrimination defense, collective bargaining, union organization, unemployment compensation, wage/hour compliance, and terminations, as well as a variety of other employment law areas.

Celynda has extensive litigation experience in federal and state courts and before federal and state administrative agencies. She is a frequent speaker and author on school law and private employment topics. She is a co-author of the Missouri Bar School Law CLE Deskbook, and has written a number of articles for legal, educational, and school nursing publications.

Celynda is a former tenured teacher and a registered nurse. Celynda has a B.A. in History from Drury University. She also has a B.S. from Saint Louis University School of Nursing. She earned her J.D., *cum laude*, *Order of the Woolsack*, from Saint Louis University School of Law, where she was also Managing Editor of the *St. Louis University Law Journal*.

Celynda is admitted to practice in Missouri and Illinois, and is a member of the Missouri Bar Association, the Bar Association of Metropolitan St. Louis, the National Council of School Attorneys (presenter and former member of amicus committee), the Missouri Council of School Attorneys (former chairperson and frequent presenter), and the Illinois Council of School Attorneys.

# Presenters

## Merry Rhoades

Merry Rhoades has more than 30 years of experience representing Illinois public education institutions. In her practice as an education law attorney, Merry regularly advises clients on all facets of school law, ranging from annexation and detachment matters to the employee/employer relationship to tax and finance matters.

She has been asked to speak for organizations such as the Illinois Association of Administrators of Special Education (IAASE), the Illinois Association of School Administrators (IASA), the Illinois Principal's Association (IPA) and the Illinois School Boards Association (IASB) on special education issues. She also participates in the Illinois Council of School Attorneys' Special Education Concerns Committee. In addition to her work on student-related matters, Merry is also well-versed in the non-renewal of probationary employees, the termination of the educational support person and the dismissal of the long-standing tenured teacher. Her experience includes providing up-to-date advice on employee due process rights when disciplining or terminating the school district employee. Merry has a particular interest in advising clients on the American with Disabilities Amendment Act and the corresponding Illinois Human Rights Act.

Because of Merry's 30-plus years of experience in representing Illinois public school districts, she has key insights regarding the day-to-day operation of the school district. That experience includes school district compliance with the Illinois Open Meetings Act (OMA), the Freedom of Information Act (FOIA), and other laws governing board of education operation. Most recently, Merry represented several school districts in the first court challenge to the 1% School Facility Occupation Tax.

Merry is an active member of several school related organizations. She is a member of the Illinois Council of School Attorneys Executive Committee and served as a past Chairperson. She serves as an Illinois Association of School Boards (IASB) PRESS advisory committee.

# Your Participation

- Please submit any questions or comments using the Questions panel located on your screen
- Michelle Basi will be monitoring the questions to ensure they are addressed by the presenters

AGAIN, WE THANK YOU FOR YOUR PARTICIPATION. YOU WILL RECEIVE AN EMAIL FOLLOWING THE WEBINAR. PLEASE TAKE TIME TO COMPLETE THE SURVEY. YOUR INPUT IS IMPORTANT TO US.



# Title IX – From 1972 to 2020

Title IX of the Education Amendments of 1972 (Title IX) provides that:

“[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. . . .”

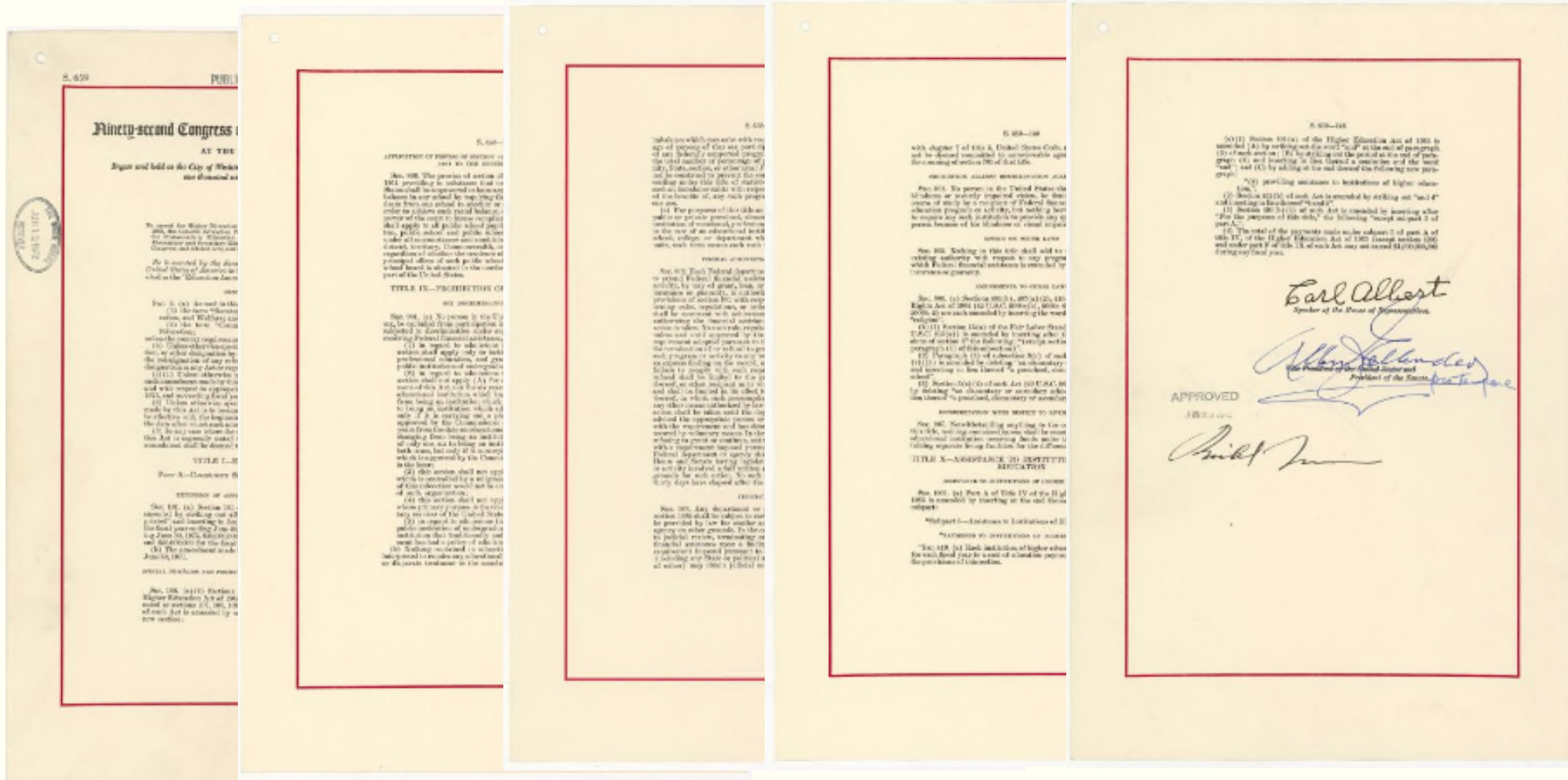


# Title IX – From 1972 to 2020

1972

- Passage of Title IX

# Title IX – From 1972 to 2020



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# Title IX – From 1972 to 2020

1979

- *Cannon v. Univ. of Chicago* (May 14, 1979)

# Title IX – From 1972 to 2020

## *Cannon v. Univ. of Chicago*

- Plaintiff claimed she was denied admission to medical school because she was a woman.
- U.S. Court of Appeals for the Seventh Circuit held that plaintiff had “no right of action against respondents that may be asserted in federal court.”
- SCOTUS: “Petitioner may maintain her lawsuit, despite the absence of any express authorization for it in the statute.”

# Title IX – From 1972 to 2020

1979

- Carter signs the “Department of Education Organization Act” (October 17, 1979)

1980

- ED established (May 4, 1980)
- OCR given oversight responsibilities

# Title IX – From 1972 to 2020

1992

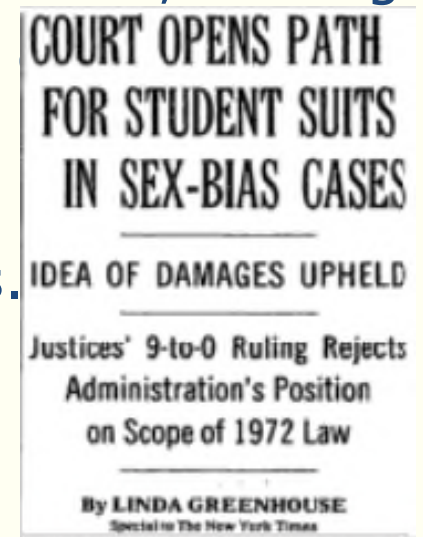
- *Franklin v. Gwinnett County Public Schools*



# Title IX – From 1972 to 2020

## ***Franklin v. Gwinnett County Public Schools***

- Student sued, ***alleging she had been subjected to continual sexual harassment by teacher.***
- Student sought ***money damages*** against the school district.
- District court and Court of Appeals dismissed the case, holding that Title IX did not provide an action for money
- In 9-0 decision, U.S. Supreme Court reversed, ruling that Gwinnett could seek money damages.





# Title IX – From 1972 to 2020

1998

- *Gebser v. Lago Vista Independent School District*

1999

- *Davis v. Monroe County Board of Education*



# Title IX – From 1972 to 2020

## ***Gebser v. Lago Vista Independent School District (1998)***

- Student engaged in a secret sexual relationship with a teacher. The District had no policy in place for investigating sexual harassment complaints. When the relationship was uncovered, the teacher was fired and arrested. The student and her family brought a claim against the District alleging sexual harassment.
- Supreme Ct. ruled that educational institutions may be liable for money damages where employees harass students if school officials had **actual knowledge of harassment**, and are **deliberately indifferent** to the harassment

# Title IX – From 1972 to 2020

## ***Davis v. Monroe Cnty. Bd. of Education (1999)***

- Mother of student sued the Board of Education, claiming the District failed to prevent another student from harassing her daughter.
- Question before the Supreme Court: Can a school be held liable for student on student harassment?
- Yes! Supreme Ct. holds that educational institutions may be liable for ***student-on-student*** harassment if the conditions in *Gebser* are met.
  - deliberate indifference to harassment that is severe enough to prevent victims from enjoying educational opportunities.

# Title IX – From 1972 to 2020

2001

- OCR replaces 1997 guidance regarding sexual harassment of students by other students, employees, or third parties

2005

- *Jackson v. Birmingham Bd. Of Educ.* SCOTUS rules that employee (coach) who complained of sex discrimination on behalf of his team could assert a claim for retaliation under Title IX.



# Title IX – From 1972 to 2020

- The district court had granted the school district's motion to dismiss; the Eleventh Circuit affirmed.
- In 5-4 decision, U.S. Supreme Court reversed.
- *NB*: "[T]he Board should have been put on notice that it could be held liable for retaliation by the fact that this Court's cases since *Cannon* have consistently interpreted Title IX's private cause of action broadly to encompass diverse forms of intentional sex discrimination; by Title IX itself, which expressly prohibits intentional conduct that violates clear statutory terms....; **by the regulations implementing Title IX, which clearly prohibit retaliation and have been on the books for nearly 30 years**; and by the holdings of all of the Courts of Appeals that had considered the question at the time of the conduct at issue that Title IX covers retaliation."

## *Jackson v. Birmingham Bd. of Educ. (2005)*



# Title IX – From 1972 to 2020

2011

- OCR issues the April 4, 2011 DCL

2013

- VAWA Reauthorization signed into law – codifying portions of the 2011 DCL

# Title IX – From 1972 to 2020

2014

- Creation of “White House Task Force to Protect Students from Sexual Assault.”
- VAWA regulations
- DOE issues 46-page FAQ related to how institutions should address sexual violence.

2015

- OCR issues guidance regarding obligations to designate a Title IX Coordinator

2017

- OCR withdraws April 4, 2011 DCL and April 29, 2014 Q & A
- OCR issues new Q & A on Campus Sexual Misconduct





# Title IX – From 1972 to 2020

2018

- November 2018: OCR issues draft Title IX regulations regarding sexual harassment and assault.

2019

- Notice and Comment (originally scheduled to end January 28, 2019) draws over 110,000 comments; comment period extended slightly due to technical difficulties.



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# Title IX – From 1972 to 2020

2020

- March 13, 2020: President declares national emergency concerning novel coronavirus disease (COVID-19).

2020

- May 6, 2020: Department of ED issues final regulations regarding Title IX; regulations are published in the Federal Register on May 19, 2020.

2020

- August 14, 2020: Implementation date of new Title IX regulations.



# Title IX – 1972 to 2020

## Challenges to August 14, 2020 Regulations

- Several sets of litigation filed in the D.C. Circuit seeking to enjoin the regulations from taking effect on 8/14/20 – TRO denied.
- NSBA has filed a Letter for Clarification with the DOE asking for the Dept. to provide clarity of several issues:
  - Effective date – is it possible to adopt new policies and provide training in three months, during global pandemic?
  - Complaint evaluation standard – how should a coordinator know whether they need to sign a formal complaint if the alleged victim is unwilling?
  - Clarify when confidential information should be released.
- **Best practice – Prepare to be compliant and document efforts.**

# OVERVIEW: August 14, 2020 Title IX Regulations

To quote Assistant Secretary Kenneth L. Marcus of the OCR:

"The new Title IX regulation is a game-changer. It establishes that schools and colleges must take sexual harassment seriously, while also ensuring a fair process for everyone involved. It marks the end of the false dichotomy of either protecting survivors, while ignoring due process, or protecting the accused, while disregarding sexual misconduct. There is no reason why educators cannot protect all of their students – and under this regulation there will be no excuses for failing to do so. In a string of recent major OCR Title IX cases, and in a large number of investigations over the last few years, we have shown that we will hold institutions accountable under federal civil rights laws. This regulation provides important new tools that will strengthen our ability to do so."

# OVERVIEW: August 14, 2020 Title IX Regulations

The DOE explains that the focus of the new Title IX regulations:

- Defines sexual harassment to include sexual assault, dating violence, domestic violence, and stalking, as unlawful discrimination on the basis of sex
- Provides a consistent, legally sound framework on which survivors, the accused, and schools can rely
- Requires schools to offer clear, accessible options for any person to report sexual harassment
- Empowers survivors to make decisions about how a school responds to incidents of sexual harassment

# OVERVIEW: August 14, 2020 Title IX Regulations

- Requires the school to offer survivors supportive measures, such as class or dorm reassignments or no-contact orders
- Protects K-12 students by requiring elementary and secondary schools to respond promptly when *any* school employee has notice of sexual harassment
- Holds colleges responsible for off-campus sexual harassment at houses owned or under the control of school-sanctioned fraternities and sororities
- Restores fairness on college and university campuses by upholding all students' right to written notice of allegations, the right to an advisor, and the right to submit, cross-examine, and challenge evidence at a live hearing
- Shields survivors from having to come face-to-face with the accused during a hearing and from answering questions posed personally by the accused
- Requires schools to select one of two standards of evidence, the preponderance of the evidence standard or the clear and convincing evidence standard – and to apply the selected standard evenly to proceedings for all students and employees, including faculty

# OVERVIEW: August 14, 2020 Title IX Regulations

- Provides "rape shield" protections and ensures survivors are not required to divulge any medical, psychological, or similar privileged records
- Requires schools to offer an equal right of appeal for both parties to a Title IX proceeding
- Gives schools flexibility to use technology to conduct Title IX investigations and hearings remotely
- Protects students and faculty by prohibiting schools from using Title IX in a manner that deprives students and faculty of rights guaranteed by the First Amendment



# OVERVIEW: August 14, 2020 Title IX Regulations

- Who is protected under by Title IX
  - Students of all genders
  - Staff of all genders
- What institutions are covered by Title IX
  - Must be a recipient of federal financial assistance
  - Public K-12 schools, colleges and universities, charter and non-profit schools, libraries, prisons and museums (if receive federal financial assistance) and athletic associations
- Applies only to sexual harassment as defined by the August 14, 2020 regulations

# OVERVIEW: August 14, 2020 Title IX Regulations

- Institutional procedural changes:
  - Designate an employee to be a “Title IX Coordinator”
  - Adopt Title IX compliant Board Policies
  - Provide notice of Title IX compliance efforts
  - Have a grievance process for Title IX complaints
  - Provide supportive measures to both complainant and respondent while investigation pending
  - CONDUCT INVESTIGATIONS
  - Act on the investigation outcome
  - Provide for an appeal process

# Key Title IX Terms

- Sexual Harassment
- Actual Knowledge
- Deliberate Indifference
- Complainant
- Respondent
- Education program/activity
- Formal Complaint/Grievance
- Supportive Measures
- Emergency Removal
- Formal Resolution
- Informal Resolution

# Key Title IX Terms

***Sexual harassment*** means conduct on the basis of sex that satisfies one or more of the following:

- (1) An employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct;
- (2) Unwelcome conduct determined by a reasonable person to be so severe, pervasive, **and** objectively offensive that it **effectively denies** a person equal access to the recipient's education program or activity; or
- (3) "Sexual assault" as defined in Violence Against Women Act (VAWA) 20 U.S.C. 1092(f)(6)(A)(v), "dating violence" as defined in 34 U.S.C. 12291(a)(10), "domestic violence" as defined in 34 U.S.C. 12291(a)(8), or "stalking" as defined in 34 U.S.C. 12291(a)(30).

# Key Title IX Terms

***Actual Knowledge*** means notice of sexual harassment or allegations of sexual harassment to a recipient's Title IX Coordinator or any official of the recipient who has authority to institute corrective measures on behalf of the recipient, or to any employee of an elementary and secondary school.

(Adopts standard from Supreme Court case law)

- Constructive notice is not sufficient.
- BUT note – any employee!
- **MHRA: uses a knew or should have known standard**
- **IHRA: actual knowledge except if the offender is a supervisor – knowledge is imputed to employer**

“Consent” – does not compel a specific definition.

# Title IX Key Terms

***Deliberate Indifference*** means a failure to respond reasonably in light of known circumstances.

***NOTE: This is a significant definitional change from prior OCR guidance:*** The school must take immediate action to eliminate the sexual harassment or sexual violence, prevent its reoccurrence, and address its effects.

# Title IX Key Terms

***Complainant*** is an individual who is alleged to be the victim of conduct that could constitute sexual harassment

***Respondent*** is an individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment



# Title IX Key Terms

***Education program or activity*** includes locations, events or circumstances where the district has substantial control over both the Respondent and the context in which alleged sexual harassment occurs

# Title IX Key Terms

***Formal Complaint*** means a document filed by a complainant or signed by the Title IX Coordinator alleging sexual harassment against a respondent and requesting that the district investigate the allegation of sexual harassment

# Title IX Key Terms

***Supportive measures*** mean non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available and without fee or charge to the Complainant or the Respondent before or after the filing of a Formal Title IX Sexual Harassment Complaint or where no Formal Title IX Sexual Harassment Complaint has been filed.

# Title IX Key Terms

***Emergency Removal*** is the removal of a respondent from an education program or activity on an emergency basis provided that the recipient

- Undertakes an **individualized safety and risk analysis**,
- Determines that an **immediate threat to the physical health or safety** of any student or other individual arising from the allegations of sexual harassment justifies removal, and
- Provides the respondent with **notice and an opportunity to challenge** the decision immediately upon removal.

# Title IX Key Terms

**Formal Resolution** is the processing of a complaint from intake by the Title IX coordinator, to investigation by an Investigator, to decision by a Decision-Maker and appeal to an Appeals Officer, if requested.

**Informal Resolution** is process to resolve a complaint without resorting to the formal resolution procedures. This may include the use of mediation or other restorative justice measures.

# Role of the Title IX Coordinator

- Ensure compliant policies are adopted and followed
- Provide notice of Title IX compliance
- Ensure training is provided to staff and students
- Make initial determination if a Title IX investigation is required
- Provide required notices to law enforcement and/or child welfare agency
- Coordinate Title IX grievance procedure efforts from:  

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graph LR; A[Grievance] --> B[Investigation]; B --> C[Response]; C --> D[Resolution]
```
- Take appropriate action(s) to eliminate sexual harassment, prevent its recurrence and remedy its effect(s)
- Review effectiveness of institutional Title IX policies and procedures

# Role of the Title IX Coordinator

## *Who should be a Title IX Coordinator*

- Professional employee — typically, a district-level administrator
- Been thoroughly trained in Title IX procedures — as they apply to the Coordinator position, as well as the three other positions required under the new regulations
- Have authority to implement supportive procedures — remembering that supportive measures include interventions pertaining to the respondent that do not constitute any form of discipline (which may not be “popular”)
- “Authority” means the ability to require certain actions and non-actions, and to provide consequences if the requirements are not observed

# Role of the Title IX Coordinator

## *Key Components of a Title IX Policy:*

- General nondiscrimination policy
- Define sexual harassment prohibited by Title IX
- Identify the coordinator to include:
  - Name(s)
  - Contact information
    - Address
    - Telephone number
    - Email address

## **THERE MUST BE CLEAR, ACCESSIBLE OPTIONS FOR REPORTING OF SEXUAL HARASSMENT**

- Provide for policy dissemination



# Role of the Title IX Coordinator

**The Title IX Coordinator will be the front line of defense in the event a complaint is filed with the OCR or a decision is challenged in a court or other applicable venue!**

- Will be responsible for providing information/testimony regarding procedural steps taken by the district
- Explain why certain decisions were made by the Coordinator
- Assignment of an investigator
- Show compliance with public notification
- Verify documents as business records of the district

# Role of the Title IX Coordinator

## ***District must disseminate Title IX Compliant Policies as follows:***

- Post materials used to train Title IX personnel on district websites, if they exist, or make materials available for members of the public to inspect
- Include reasonably prompt time frames for conclusion of the grievance process, including appeals and informal resolutions, with allowance for short-term, good cause delays or extensions of the time frames
- Describe the range, or list, the possible remedies a school may provide a complainant and disciplinary sanctions a school might impose on a respondent, following determinations of responsibility
- State whether the school will use the preponderance of the evidence standard, or the clear and convincing evidence standard, for all formal complaints of sexual harassment (including where employees and faculty are respondents)

# Role of the Title IX Coordinator

## ***District must disseminate Title IX Compliant Policies as follows (continued):***

- Describe the school's appeal procedures, and the range of supportive measures available to complainants and respondents
- State that the grievance process will not use, rely on, or seek disclosure of information protected under a legally recognized privilege, unless the person holding such privilege has waived the privilege
- Identify provisions, rules, or practices other than those required by the Final Rule that a school adopts as part of its grievance process for handling formal complaints of sexual harassment, and state that they will apply equally to both parties.

# Role of the Title IX Coordinator

## ***Provide/Oversee Title IX Required Trainings***

- All employees receive required sexual harassment training
  - Definition of sexual harassment
  - Reporting obligations
  - How to make a report
  - Retaliation
- Students are also to receive required sexual harassment training
  - Definition of sexual harassment
  - Reporting sexual harassment
  - Retaliation

# Coordinator's Processing of the Title IX Complaint

*Steps must be taken by the Title IX Coordinator IF:*

- A formal grievance is submitted to the Coordinator, **OR**
- An employee notifies the Coordinator of possible sexual harassment **OR**
- Report made of ANY incident that may constitute sexual harassment under Title IX

# Coordinator's Processing of the Title IX Complaint

*1<sup>ST</sup> Step: No formal complaint is provided*

- Promptly contact the alleged victim
  - Provide information of available supportive measures
- NOTE: A FORMAL COMPLAINT IS NOT REQUIRED FOR COMPLAINANT TO BE PROVIDED SUPPORTIVE MEASURES**
- Consider input from Complaint regarding support measures
- Explain the process for the filing of a Formal Complaint
  - By Complainant, OR
  - Title IX Coordinator
- Inform the complainant that confidentiality will be protected, to the greatest extent possible. **NO ASSURANCES CAN, HOWEVER, BE PROVIDED**

# Coordinator's Process of the Title IX Complaint

## *1<sup>st</sup> Step: No formal complaint is provided*

- Address supportive measures for both a complainant and possible respondent
- **Supportive measures** mean non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available and without fee or charge to the Complainant or the Respondent before or after the filing of a Formal Title IX Sexual Harassment Complaint or where no Formal Title IX Sexual Harassment Complaint has been filed.
  - Designed to restore or preserve equal access, without unreasonably burdening the other party
  - Designed to protect the safety of all parties, or
  - Deter sexual harassment
- To the extent possible, these are to be kept confidential
- Legal counsel may need to be consulted if complaint is in a protected category.

# Coordinator's Processing of the Title IX Complaint

## *2<sup>nd</sup> Step: The Intake Procedure*

- Analyze the complaint using this framework:

A recipient with **actual knowledge** of **sexual harassment** in an education program or activity against a person in **the united states** must respond promptly and in a manner that is not deliberately indifferent.



# Coordinator's Processing of the Title IX Complaint

## *2<sup>nd</sup> Step: The Intake Procedure*

Is there **actual knowledge** of a possible Title IX violation?

**Actual Knowledge** means notice of sexual harassment or allegations of sexual harassment to a recipient's Title IX Coordinator or any official of the recipient who has authority to institute corrective measures on behalf of the recipient, or to any employee of an elementary and secondary school.

(Adopts standard from Supreme Court case law)

- Constructive notice is not sufficient.
- BUT note – any employee!

# Coordinator's Processing of the Title IX Complaint

## *2nd Step: The Intake Procedure*

Is the alleged incident **SEXUAL HARASSMENT** as defined by Title IX?

- (1) An employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct;
- (2) Unwelcome conduct determined by a reasonable person to be so severe, pervasive, **and** objectively offensive that it **effectively denies** a person equal access to the recipient's education program or activity; or
- (3) "Sexual assault" as defined in Violence Against Women Act (VAWA) 20 U.S.C. 1092(f)(6)(A)(v), "dating violence" as defined in 34 U.S.C. 12291(a)(10), "domestic violence" as defined in 34 U.S.C. 12291(a)(8), or "stalking" as defined in 34 U.S.C. 12291(a)(30).

# Coordinator's Processing of the Title IX Complaint

## *2<sup>nd</sup> Step: The Intake Procedure*

Did the alleged incident occur during an education program or activity?

***Education program or activity*** includes locations, events or circumstances where the district has substantial control over both the Respondent and the context in which alleged sexual harassment occurs

# Coordinator's Processing of the Title IX Complaint

## *2<sup>nd</sup> Step: The Intake Procedure*

Did the alleged incident occur during an education program or activity?

- What was the location of the alleged incident?
- What event was occurring when the alleged incident occurred?
- What were the circumstances when the alleged incident occurred?
- DID THE DISTRICT HAVE SUBSTANTIAL CONTROL OVER BOTH THE RESPONDENT AND THE CONTEXT IN WHICH IT OCCURRED – **THINK NEXUS TO THE SCHOOL ENVIRONMENT**

# Coordinator's Processing of the Title IX Complaint

## *2<sup>nd</sup> Step: The Intake Procedure*

Did the alleged incident occur against a person in the United States?

# Coordinator's Processing of the Title IX Complaint

## *Optional Step 2A: Emergency Removal*

**Emergency Removal** is the removal of a respondent from an education program or activity on an emergency basis provided that the recipient

- Undertakes an **individualized safety and risk analysis**,
- Determines that an **immediate threat to the physical health or safety** of any student or other individual arising from the allegations of sexual harassment justifies removal, and
- Provides the respondent with **notice and an opportunity to challenge** the decision immediately upon removal.
- It is HIGHLY RECOMMENDED that legal counsel be consulted if considering an emergency removal of an employee or student

# Coordinator's Processing of the Title IX Complaint

## *Optional Step 2A: Emergency Removal*

- If an Emergency Removal is required, be prepared to:
  - Provide notice to the respondent (recommendation that this be in writing)
  - Must be provided immediately, i.e. without undue delay

# Coordinator's Processing of the Title IX Complaint

## *Optional Step 2B: Informal Resolution*

- Requested by either a Complainant or Respondent
  - Cannot be used if Respondent is an employee and Complainant is a student
- Have 30 school business days to seek an informal resolution but can be extended by mutual consent of both the Complainant and Respondent



# Coordinator's Processing of the Title IX Complaint

## *Optional Step 2C: Dismissal of Formal Complaint*

- Determination should only be made if, based on the information provided and through reasonable inquiry that:
  - there is no **actual knowledge** of a possible Title IX violation
  - the alleged incident does not constitute **Sexual Harassment** as defined by Title IX
  - the alleged incident did not occur during an **education program or activity?**
  - the alleged incident occur against a person in **the United States?**
  - Complainant or respondent has 5 school business days to seek an appeal after receiving notice of dismissal

# Coordinator's Processing of the Title IX Complaint

## *3<sup>rd</sup> Step: Initiating a Formal Complaint (if required)*

- **Complainant** asks that the Title IX procedures be followed, and the allegations constitute sexual harassment
  - If the allegations do not constitute sexual harassment other action may be required by law and/or BOE policy
- **Title IX Coordinator** initiated complaint
  - Coordinator is not a complainant
  - Consider filing if allegations sufficient to warrant further investigation
  - ESSA **may require** a Title IX Coordinator to initiate a formal complaint if made against an employee.

# Coordinator's Processing of the Title IX Complaint

*3<sup>rd</sup> Step: Initiating a Formal Complaint (if required)*

## **Components of a Complaint:**

- Identity of Complainant
- Identity of Respondent
- Summary of Incident

# Coordinator's Processing of the Title IX Complaint

## *Step 3: Initiating Formal Complaint (if required)*

- Provide written notice to both Complainant and Respondent that a Title IX investigation will occur
  - Ask if the informal resolution process can be utilized
  - Include notice that no retaliation is to occur because a Title IX complaint has been made
- Notify parents if the student is not an “eligible student” under FERPA

# Coordinator's Processing of the Title IX Complaint

## *4<sup>th</sup> Step: Investigation*

Referral to a designated **Investigator** (*Coordinator can also serve as an Investigator*)

- Cannot have a bias, either explicit or implicit
- Consider complainant's request for a specific investigator

**NOTE: COORDINATOR IS TO MONITOR THE INVESTIGATION PROCESS TO ENSURE:**

- Complete and thorough investigation within specified timelines
- There is no bias, either explicit or implicit during the investigation
- Applicable Title IX policies are followed by the Investigator

# Coordinator's Processing of the Title IX Complaint

*Step 4 – Referring matter to decision-maker after investigation is complete*

- Decision-maker cannot be the Title IX Coordinator or the Investigator
- Issues a written determination regarding
  - Findings of fact
  - Conclusion about whether the alleged conduct occurred
  - Rationale for the result as to each allegation
  - Disciplinary sanctions

# Coordinator's Processing of the Title IX Complaint

## *Step 5 – Appeal*

- After notifying both Complainant and Respondent of the decision (and consequences, if any), the Title IX Coordinator notifies parties of the right to an appeal
- Notice of appeal to be provided within 5 school business days after receipt of the decision from the decision-maker
- The appeal officer will have 10 school business days to provide a written decision to both complainant and respondent
- If no appeal is submitted, the decision is final 5 school business days after receipt of the decision from the decision-maker

# The Title IX Coordinator – Other Duties as Assigned by the DOE

- The Title IX Coordinator is responsible for overseeing the maintenance of records related to Title IX complaints.
  - Records related to alleged sexual harassment must be maintained for at least 7 years and includes:
    - Investigation records
    - Discipline/Remedies
    - Appeal records
    - Supportive measures
- For every claim, document:
  - Proof that response was not deliberately indifferent
  - What measures were taken to restore or preserve equal access to education
  - If no supportive measures, why that was not deliberate indifference



# The Title IX Coordinator – Other Duties as Assigned by the DOE

- Take appropriate action(s) to eliminate sexual harassment, prevent its recurrence and remedy its effect(s)
  - Oversee all staff trainings
    - Is there an adequate definition of sexual harassment
    - Is Coordinator information readily available
  - Pay attention to the school environment
  - Respond in a manner that reasonable and with commonsense
  - **FOLLOW THE TITLE IX PROCEDURES**

# The Title IX Coordinator – Other Duties as Assigned by the DOE

- Review effectiveness of institutional Title IX policies and procedures
  - Are policies written with a non-bias view
  - Analyze complaints filed for:
    - Effectiveness of process used
    - Any implicit or explicit bias present in the process
    - Effectiveness of resolution
  - Is additional training needed

# Title IX Coordinator – Other Duties as Assigned by the DOE

## Retaliation is specifically prohibited in Final Rule

- “For the purpose of interfering with Title IX rights” or
- “because a person has participated or refused to participate in any in a proceeding under Title IX regulations.”
- District must keep confidential the identity of a person who complains or reports sexual harassment, including parties and witnesses, except as permitted by law or to carry out the purpose of these regulations
- The Title IX Coordinator should remind all parties throughout the grievance process that retaliation is specifically prohibited.

# Additional Title IX Trainings

## Investigator Training

October 2<sup>nd</sup>

*Moderator: Margaret Hesse*

*Presenters: Christine Self*

*Aigner Carr*

## Decision-Maker Training

October 16<sup>th</sup>

*Moderator: Kylie Piatt*

*Presenters: Merry Rhoades*

*Michelle Basi*

## Appeals Officer Training

October 30<sup>th</sup>

*Moderator: Kylie Piatt/Michelle Basi*

*Presenters: Margaret Hesse*

*Christine Self*

# Questions?



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# **TITLE IX COMPLIANCE SERIES**

## **Part 2: The Role of the Title IX Investigator**

*Presented by:*  
Aigner Carr  
Christine Self

*Date:*  
October 2, 2020

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# CPDU

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# Presenters

## Aigner Carr

Aigner S. Carr practices in the areas of education, litigation, and labor & employment law. Her practice includes both appellate and trial courts matters involving complex legal questions. Aigner also works with public and private K-12 and post-secondary educational institutions, in addition to private corporations. She provides general advising to educational institutions on a range of legal issues, including student matters and employment matters. In addition, she works with colleges and universities to investigate matters related to equity and Title IX.

During law school, Aigner competed on the Thurgood Marshall Mock Trial Team and was awarded Best Trial Advocate of the Mid-West region for 2015-2016 competition. Aigner is also a former member of the Theodore McMillian American Inns of Court. Before joining the firm, Aigner interned for the Saint Louis Circuit Attorney's Office and the Federal Public Defender's Office of the Eastern District of Missouri.

Aigner is a member of the Counsel for School Attorneys and the National Association of College and University Attorneys

# Presenters

## Christine Self

Christine L. Self joined Tueth Keeney with 5 years of experience representing local municipalities and private clients. During this time, she gained experience in collective bargaining, conducting investigations into employee misconduct and advocating on behalf of municipalities and private clients before the Illinois Labor Relations Board, the Illinois Human Rights Commission, the Equal Employment Opportunity Commission and the U.S. Department of Labor. She has experience in the state and federal courts as well.

Christine is also knowledgeable about how local governments in Illinois operate. She has developed policies and ordinances and advised municipalities on laws such as the Illinois Freedom of Information Act and the Illinois Open Meetings Act. She has closely tracked legislative and case law changes that impact municipalities and assisted them in complying with those changes.

Christine also brings 15 years of experience as a public school teacher to her work in education law. Additionally, she taught at the community college and university levels. She is also involved in school related organizations in her hometown of Chatham, Illinois, including the Ball-Chatham Educational Foundation and Titan Fuel, a program to assist district students with food insecurity issues. These experiences provide her with multiple perspectives from which she can best advise clients.

Christine is a member of the Illinois Council of School Attorneys.

# Title IX

Title IX of the Education Amendments of 1972 provides that:

“[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...”

- Protected persons:
  - Students of all genders
  - Staff of all genders
- Applies only to sexual harassment as defined by the August 14, 2020 regulations

# Title IX Definitions

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

- (1) An employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct;
- (2) Unwelcome conduct determined by a reasonable person to be so severe, pervasive, **and** objectively offensive that it **effectively denies** a person equal access to the recipient's education program or activity; or
- (3) "Sexual assault" as defined in the Violence Against Women Act (VAWA) 20 U.S.C. § 12291(a)(10), "domestic violence" as defined in 34 U.S.C. § 12291(a)(8), or "stalking" as defined in 34 U.S.C. § 12291(a)(30).

# Title IX Definitions

- **Complainant** – individual who is alleged to be the victim of conduct that could constitute sexual harassment
- **Respondent** – individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment
- **Actual knowledge** – notice of sexual harassment or allegations of sexual harassment to a recipient's Title IX Coordinator or any official of the recipient who has authority to institute corrective measures on behalf of the recipient, or to any employee of an elementary or secondary school

# Title IX Definitions

- **Formal Complaint** – a document filed by a complainant or signed by the Title IX Coordinator alleging sexual harassment against a respondent and requesting that the recipient investigate the allegation of sexual harassment. At the time of filing a formal complaint, a complainant must be participating in or attempting to participate in the education program or activity of the recipient with which the formal complaint is filed.

# Title IX Key Terms

**Formal Resolution** is the processing of a complaint from intake by the Title IX Coordinator, to investigation by an Investigator, to decision by a Decision-Maker and appeal to an Appeals Officer, if requested.

**Informal Resolution** is the process to resolve a complaint without resorting to the formal resolution procedures. This may include the use of mediation or other restorative justice measures.

\*More on this later!



# Title IX Key Terms

## **Informal Resolutions:**

- Not allowed for allegations of an employee sexually harassing a student
- Parties must consent in writing to participate in an informal resolution process
- School must provide written notice disclosing the allegations and the requirements of the informal resolution process (including when the informal process precludes resuming the formal complaint process)
- At any time prior to agreeing on a resolution, either party can withdraw from the informal resolution process

# Role of the Investigator Under New Title IX Regulations

- 1) Must ensure the burden of proof and of gathering evidence is on the District, not the parties
- 2) Must provide an equal opportunity for the parties to present witnesses and evidence
- 3) Must not restrict either party's ability to discuss the allegations or gather and present evidence
- 4) Must provide the parties with the same opportunities to have others present during interviews or other related proceedings, including an advisor (for any part of the grievance process) who may but is not required to be an attorney

# Role of the Investigator Under New Title IX Regulations

- 5) Provide, to a party who is invited or expected to attend, written notice of the date, time, participants, purpose and location of any investigative interview, hearing, or other meeting with enough time to allow the party to prepare to participate
- 6) Provide both parties and advisors equal opportunity to review all evidence on which recipient does not intend to rely and any exculpatory or inculpatory evidence from any source, prior to the completion of the final investigation report and in time to give parties at least 10 days to prepare a written response, which the investigator must consider prior to completing the investigation report
- 7) Prepare a written investigation report that fairly summarizes the relevant evidence and provide the report to the parties and their advisors, if any, for their review and written response, at least 10 days before a hearing or other determination of responsibility

# Role of the Investigator Under New Title IX Regulations

## Role of advisors during investigations

- Parties may be accompanied by an advisor of their choice (attorney, co-worker, friend, family member, or etc.).
- The choice or presence of advisor may not be limited to any meeting or grievance proceeding.
- School may establish restrictions regarding the extent to which the advisor may participate in the proceedings, as long as the restrictions apply equally to both parties.
- Once advisor is confirmed, school should send communications to both parties and each advisor.

# Role of the Investigator Under New Title IX Regulations

## **When does the investigation begin?**

- When notice is received, preparations begin!
- The Title IX Investigator begins his or her job when selected by the Title IX Coordinator to conduct an investigation.
- Title IX Coordinator and Investigator need to be aware of reporting requirements to local law enforcement or other agencies, agreements in place for reporting, and agreements about reciprocity of investigation materials.

# Role of the Investigator Under New Title IX Regulations

## Working with Law Enforcement

- In some cases, law enforcement/state's attorneys may request that a school not conduct its investigation simultaneously.
- Do not impede law enforcement's efforts with your own investigation.
- Be sure to document attempts to follow up with law enforcement regarding inquiries as to when the school may start its own investigation.
- When Respondent is an employee, Garrity rights implicated if there are potential criminal charges.

# Role of the Investigator Under New Title IX Regulations

## Working with Law Enforcement

- Who is interviewing the student and for what purpose? (school official, SRO, law enforcement)
  - Law enforcement (inc. SROs and other school security personnel) do not have inherent authority to interview students on school property for law enforcement purposes
- Be careful when involving School Resource Officers during interviews
  - Consider 4<sup>th</sup> Amendment Constitutional rights at stake when dealing with law enforcement
  - Consider the need for a student's parents to be present during interviews
  - SROs can act on own initiative or at request of school personnel to further school response to misconduct, promote school interventions, or school discipline

# K-12 Title IX Compliance Training 2020- Hypothetical

**Let's apply the rules!**



# K-12 Title IX Compliance Training 2020- Hypothetical

- **Tuesday February 10<sup>th</sup>** the cheerleading team and coaches returned from Orlando to Indiana on a chartered bus. JANE DOE awoke to realize that a male cheerleader and 9th-grade student, Trevor Morris (“Morris”), had one hand underneath her sports bra.
- Same day, JANE DOE told another cheerleader, Jake Hafley (“Hafley”), and her older sister what occurred on the bus.

# K-12 Title IX Compliance Training 2020- Hypothetical

- The next week, on **Wednesday, February 18th,** at a home basketball game, Hafley informed the assistant cheerleading coach, Janice Frye (“Frye”), of the incident. When asked, JANE DOE confirmed the incident to Coach Frye
- After admitting to the incident, Coach Frye immediately took Morris home from the game. Morris was dismissed from the cheerleading team that night by the head coach.

# K-12 Title IX Compliance Training 2020- Hypothetical

- That same night, JANE DOE's father found out and immediately called principal Gary Fields ("Principal Fields") and left a voicemail on his phone regarding the incident.
- Principal Fields checked his voicemail during his late lunch the next day at **1:30 p.m on February 19<sup>th</sup>.**

**At what point did the school acquire *actual knowledge* on February 18<sup>th</sup>?**

# Initial Response Once Actual Knowledge is Received Pre-Investigation (Title IX Coordinator)

## “Supportive measures”

- Non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, and without fee or charge to the complainant or the respondent **before or after the filing of a formal complaint or where no formal complaint has been filed.**
- Designed to restore or preserve equal access to the recipient’s education program or activity without unreasonably burdening the other party, including measures designed to protect the safety of all parties or the recipient’s educational environment, or deter sexual harassment.
- Must be kept confidential to the extent possible.

# Initial Response Once Actual Knowledge is Received Pre-Investigation (Title IX Coordinator)

## “Supportive measures”

- Examples can include:
  - Counseling
  - Course Modifications
  - Schedule changes
  - Increased monitoring or supervision
  - No contact orders
- **A measure that completely removes a student from an activity would likely be considered punitive.**
- Exception – Emergency removals and administrative leave for employees.

# Initial Response Once Actual Knowledge is Received Pre-Investigation (Title IX Coordinator)

## Emergency Removal?

- Need to perform analysis of safety and risk on a case by case basis.
- Establish it is necessary to protect a student or another person from immediate threat to physical health or safety.
- Must give notice to the student and an opportunity for the student to immediately challenge the removal.
- Must consider other protections provided to the student, such as IEP and/or 504 Plan, which could take precedence.

# K-12 Title IX Compliance Training 2020- Hypothetical

- Principal Fields immediately called Morris and Hafley into his office. Both confirmed the incident.
- Principal Fields also met with Mr. DOE and contacted the Fictional Police Department.
- Principal Fields then contacted the Superintendent of Imaginary School District (“ISD”).
- Morris immediately transferred to an alternative school for students with behavioral problems.

# K-12 Title IX Compliance Training 2020- Hypothetical

- Any concerns with the way Principal Fields responded to the allegations?
- ***Deliberate Indifference*** means a failure to respond reasonably in light of known circumstances.



# K-12 Title IX Compliance Training 2020- Hypothetical Revised

## Same facts, except:

- Morris had been accused of having nonconsensual intercourse with a different student on the cheerleading team at the student's home, over winter break.
- Mr. Doe is the only person Jane Doe reports the incident to. Mr. Doe then contacts the school principal.
- Principal pulls Jane Doe from class. Jane Doe confirms the incident and files a formal complaint with the school's Title IX Coordinator.

# K-12 Title IX Compliance Training 2020- Hypothetical

**Under the new Title IX regulations, if it is necessary to proceed to a full investigation, how does the investigatory process operate?**

# The Investigation - Initiation

Title IX Coordinator refers case to a designated ***Investigator***

- Cannot have a bias, either explicit or implicit
- Consider complainant's request for a specific investigator
- Title IX Coordinator may also be the Investigator

## **THE COORDINATOR MONITORS THE INVESTIGATION PROCESS TO ENSURE:**

- Complete and thorough investigation within specified timelines
- There is no bias, either explicit or implicit during the investigation
- Applicable Title IX policies are followed by the Investigator

# The Investigation - Initiation

## Investigation Planning Stage

- **Who** will you interview?
- **What** questions will you ask?
- **What** documents do you need to review?
- **Where** will you interview each person?
- **When** will you interview each person?
- **Why** will each person be important to your investigation?
- **How** will you order your interviews?

# The Investigation - Initiation

## **Investigation Plan**

- Scope of investigation
- Timeline
- Potential witnesses

## **Gathering Resources**

- Written policies and procedures
- Collective Bargaining Agreements (if applicable)
- Police or other official reports
- Photos, videos, texts, voicemails
- Personnel files or work logs

## **Interviews**

- Need for special provisions? (translator, assistive devices, parent/guardian)

# The Investigation – Preparing to Investigate

## Employee Witnesses

### Review Collective Bargaining Agreement, if applicable

- Before you interview any employee, review the CBA to determine required procedures, including notice, timelines, right to union representation
- Weingarten rights providing for union representation are implicated if the employee's employment status may be threatened, but you may consider (or be required) to allow union representation for all union members regardless, unless there are other concerns

### Criminal Conduct Concerns

- If there are or may be a criminal investigation related to the same circumstances, employees are protected from having their statements provided to the employer used against them in a criminal proceeding
- The employer can compel employees to cooperate in an employment investigation, but statements provided during that investigation cannot be used by law enforcement against the employee during a criminal investigation.
- The Investigator should provide the employee with information about their Garrity rights that explains this and require signature of the employee indicating the information has been provided.

# The Investigation – Preparing to Investigate

## Garrity Warning for Employees

1. The purpose of this interview is to obtain information that will assist in the determination of whether administrative disciplinary action is warranted.
2. I am not questioning you for the purpose of instituting criminal proceedings against you.
3. During the course of this interview, even if you disclose information which indicates you may be guilty of criminal conduct in this matter, neither your self-incriminating statements, nor the fruits thereof, will be used against you in any criminal proceeding.
4. I am ordering you to answer the questions that I direct to you concerning this matter.
5. If you refuse to answer my questions, you will be subject to immediate dismissal.

# The Investigation – Investigative Strategies

- Determine potential witnesses from preparation phase and during interviews
- Review any documentation available from any witnesses or other sources
- If witness statements are provided, consider if you need to do interview as well
- Stay focused on the issues to be investigated
- Assess credibility of witnesses (demeanor, witness knowledge of event, witness motivation)



# The Investigation – Preparing to Investigate

## Reluctant Witnesses

- Anticipate questions and concerns of witnesses
- Presence of others during interviews
- Non-employee or non-student witnesses who cannot be compelled to cooperate

Break time – we will return  
in 5 minutes.

# The Investigation – Conducting Interviews

- Introduce yourself in your role as investigator
- Explain the reason for the interview
- Advise of timeframe and further steps as necessary
- Explain what information might be shared outside of the interview
- Build rapport with interviewee while being professional and unbiased

# The Investigation – Conducting Interviews

- Clearly explain importance and reasons for requesting confidentiality- make sure the interviewee understands why confidentiality matters.
- Clearly explain the school's prohibition against retaliation and identify a contact person to report retaliation to. Be sure to ensure the interviewee has the contact's information.
- Document the information provided to the interviewee. Considering asking them to sign and verify that they were provided with the information.
- Explain the scope of the investigation and the process to be followed.

# The Investigation – Conducting Interviews

## Questioning

- Ask open-ended questions.
- Allow sufficient time for interviewee to respond.
- Avoid compound questions.
- Be specific as to time, location, people in questions and request the same for the responses.
- Verify responses as necessary to avoid confusion or incorrect information.
- Use plain language that is not triggering (avoid terms like victim, attacker, legal terms, slang).
- Ask the interviewee to identify other persons or documents they believe would be helpful.

# The Investigation – Conducting Interviews

## Tips for interviewing Complainant

- Ask the complainant to tell his / her story without many interruptions
- Who? What? When? Where? How?
- Is there anyone you think may have heard or seen the incident?
- Were they close enough to see or hear?
- To whom have you spoken about the incident, both school personnel and others?
- Have you provided a written statement to anyone?
- Have you created any notes, diaries, online posts, other written records about the incident?
- Do you know of others who may have experienced the same or similar?
- Action or remedy sought?
- How has this affected you?

# The Investigation – Conducting Interviews

## Rape Shield Protections for Complainants

- The regulations provide rape shield protections for complainants.
- Any questions or evidence about a complainant's prior sexual behavior will be deemed irrelevant *unless* it is offered to prove that someone other than the respondent committed the alleged misconduct or offered to prove consent.

# The Investigation – Conducting Interviews

## Tips for interviewing Respondent

- Ask open ended questions first to establish the “baseline” – and ask clarifying questions later
  - Do you know Student/Employee A?
  - How do you know Student/Employee A?
  - Has there ever been a time when you’ve been alone with Student/Employee A?
    - Yes? Under what circumstances?



# The Investigation – Conducting Interviews

## Tips for interviewing Respondent

- Be straightforward and unbiased.
- Explain what the allegations are against individual.
- Allow the Respondent to tell his or her full story.
- If the Respondent denies the allegations, ask what reason the Complainant might have in making the allegation?
- Are there witnesses that will support the Respondent's side of the story?
- Inform the Respondent that no conclusions will be made until the investigation is complete.
- Reiterate that there can be no retaliation against the Complainant or witnesses supporting the Complainant.

# The Investigation – Conducting Interviews

## **Conduct any necessary follow up**

- Additional documentation?
- Follow up interviews?

# The Investigation – Documenting the Investigation

- Note name of interviewee, location of interview, date, time, additional persons in the interview.
- Note any documents being provided by the interviewee, if applicable.
- Is a recording necessary (or allowed)?
- If the investigator is unable to conduct the interview and take notes at the same time, have an assistant help with note-taking.
- Review notes as soon as possible after interview while information is fresh; review for accuracy, but also for additional details, potential witnesses for follow-up.

# The Investigation – Concluding the Investigation

- Ask again if the interviewee has any additional information to add.
- Thank the interviewee for cooperation.
- Remind interviewee of need for confidentiality.
- Provide method for follow up if the interviewee has anything to add.

# Investigation Interview Example

See handouts “Tueth Keeney K-12  
Title IX Compliance Training  
Example Interview Outlines”

# Investigation Report

Introduction/background – What occurred to lead to the investigation?

Allegations – statute, policies, etc. that are alleged to have been violated

Narrative – provide details of the information provided during the interviews; remember that the investigation report is not the decision-making stage

Note additional allegations that arose during investigation, if any

Conclusion – Tie together the narratives from the interviewees and any violations that occurred.

# Investigation Report

## Summary of witness interviews

- Identify the witness and connection to the district and investigation
- Identify when and where you interviewed the witness
- Identify any other individuals present during the interview
- Describe in detail each incident or topic discussed during the interview

# Investigation Report

## Summary of witness interviews

- Provide a chronology of the event as reported by the witness – what happened and in what order
- For any key statements, document verbatim what the witness reported was said
- Note the name of any other witnesses identified by the witness
- Describe in detail any alleged gestures or physical contact
- Describe any documents or other evidence provided by the witness
- Consider attaching documents to report if appropriate



# Investigation Report

## Summary of witness interviews

- Identify what information you provided to the witness (if any) about the complaint or your investigation
- Note any discussions about confidentiality, retaliation, next steps, etc.
- Describe in detail how the witness responded to the information provided
  - What did the witness say?
  - Any physical or emotional response?
  - Did they deny having any relevant information?

# Investigation Report

- Remember tone and voice
  - When recounting information from the parties or witnesses, identify the source of the information and avoid conclusory statements
    - Use statements such as:  
*"Maria reported that Dave called her fifteen times on Tuesday right after school."*  
  
*"The following is a summary of the information provided by Maria....."*
    - Instead of:  
*"Dave called Maria fifteen times after school on Tuesday."*

# Investigation Report

## Summary of witness interviews

- Note inconsistencies in the witness's account or discrepancies between what the witness says during the interview and any subsequent communications
- BUT again, avoid conclusions
  - Good:

"During my initial interview with Maria, she said David did X. After informing her that David denied doing X, she explained that David had actually done Y.
  - Not So Good:

"Maria lied during her initial interview when she said David did X. She later admitted David had actually done Y."

# Investigation Report

## Other considerations to include

- If witness was not contacted, explain way – Unavailable? Refused to participate? Not needed?
- If certain evidence was not obtained, explain why – Not accessible? Deemed irrelevant?
- Be as specific as possible – avoid vague terms like “some,” “many,” “a lot”
- Use consistent terminology throughout
- Focus on the facts and avoid subjective terms

# K-12 Title IX Compliance Training 2020- Hypothetical

- Morris's school records revealed that during his 5<sup>th</sup> grade year in Imaginary Elementary School, Morris and another male student received one day of in school suspension for kissing each other during recess.
- JANE DOE testified that Morris's actions were unexpected and were not representative of his past behavior.
- The Alternative Placement Committee recommended to the Superintendent that Morris return to IHS due to his good behavior, attendance and performance. The Superintendent, for the first time, rejected both of the recommendations.

# K-12 Title IX Compliance Training 2020-Hypothetical

- One month after school started, Morris was allowed to return to IHS for 10<sup>th</sup> grade.
- Monitoring of hallways, ensuring they would not have any classes together, requiring Morris to eat lunch in a separate room.
- No attempted contact and no future incidents between the Complainant and the Respondent were reported.

**Were the school's actions appropriate?**

# Frequent Occurrences

## What happens if:

- The complaint is anonymous?
- The complainant asks to remain anonymous?
- Witnesses asks to remain anonymous?
- The complainant discloses information to school but says they do not want to move forward with investigation?
- The school has actual knowledge, but the victim refuses to participate in the investigation?
  - Depending on allegations, supportive measures may suffice!

# Frequent Occurrences

## Other issues that arise:

- Is a victim who refuses to participate in the Title IX process entitled to:
  - Notice?
  - Presentation of witnesses?
  - Appeal ?



# Other issues that arise

What about a respondent or witnesses who refuse to participate in the process?

- No retaliation for failure to participate
- Under Title IX, employees have reporting obligations and other obligations to share information they have

# Completion of the Investigation

*Title IX Coordinator Refers matter to decision-maker after investigation is complete*

- Decision-maker cannot be the Title IX Coordinator or the Investigator

# Questions?



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# **TITLE IX COMPLIANCE SERIES**

## **Part 3: The Decisionmaker**

*Presented by:*  
Michelle Basi  
Merry Rhoades

*Date:*  
October 16, 2020

**DIFFERENT**  
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Our attorneys recognize the need to deliver real-world, tangible solutions with quality and transparency. We form enduring relationships and friendships with our clients. We strive to bring creative thinking and innovative solutions to every client's legal challenges.

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# Presenters

## Kylie Piatt

Kylie practices primarily in the areas of K-12 education law, school litigation, and labor and employment law, representing school districts and private schools throughout Missouri. Kylie also specializes in intellectual property matters affecting school districts, helping schools districts protect their assets and defending districts against copyright infringement claims. Prior to joining the Firm, Kylie practiced community association law where she represented numerous condominium and homeowners associations throughout the greater St. Louis area.

A Texas native, Kylie obtained her B.A. with honors from Southern Methodist University in Dallas, Texas, before moving to St. Louis to teach seventh- and eighth-grade Communication Arts at a downtown charter school through Teach for America. Kylie's experience in the classroom provides a unique perspective on her practice of education law. Kylie earned her J. D. from Saint Louis University School of Law.

# Presenters

## Michelle Basi

Michelle is a shareholder and practices in the areas of school law, special education, school litigation, and labor and employment law. Michelle represents school districts with respect to employment and termination matters, special education, Section 504, student discipline and student rights, civil rights, and church/state issues. Michelle has successfully represented school districts in student and employment matters before various federal and state courts and administrative agencies, including the EEOC, Missouri Commission on Human Rights, and the Office for Civil Rights. She is a member of the Missouri Council of School Attorneys, Illinois Council of School Attorneys, and is a regular speaker at statewide and regional school law conferences. She has also authored chapter updates for the Missouri Bar School Law CLE Deskbook. As the daughter of a long-time special education teacher and the wife a high school math teacher turned administrator, Michelle is proud to represent schools and be a small part of the good work done for students in schools each day!

Michelle received two bachelors' degrees simultaneously from Saint Louis University, each *summa cum laude*. She earned her J.D., *Order of St. Ives*, from the University of Denver College of Law.

# Presenters

## Merry Rhoades

Merry has more than 30 years of experience representing Illinois public education institutions. In her practice as an education law attorney, Merry regularly advises clients on all facets of school law, ranging from annexation and detachment matters to the employee/employer relationship to tax and finance matters.

She has been asked to speak for organizations such as the Illinois Association of Administrators of Special Education (IAASE), the Illinois Association of School Administrators (IASA), the Illinois Principal's Association (IPA) and the Illinois School Boards Association (IASB) on special education issues. She also participates in the Illinois Council of School Attorneys' Special Education Concerns Committee. In addition to her work on student-related matters, Merry is also well-versed in the non-renewal of probationary employees, the termination of the educational support person and the dismissal of the long-standing tenured teacher. Her experience includes providing up-to-date advice on employee due process rights when disciplining or terminating the school district employee. Merry has a particular interest in advising clients on the American with Disabilities Amendment Act and the corresponding Illinois Human Rights Act.

Because of Merry's 30-plus years of experience in representing Illinois public school districts, she has key insights regarding the day-to-day operation of the school district. That experience includes school district compliance with the Illinois Open Meetings Act (OMA), the Freedom of Information Act (FOIA), and other laws governing board of education operation. Most recently, Merry represented several school districts in the first court challenge to the 1% School Facility Occupation Tax.

Merry is an active member of several school related organizations. She is a member of the Illinois Council of School Attorneys Executive Committee and served as a past Chairperson. She serves as an Illinois Association of School Boards (IASB) PRESS advisory committee.

# Poll Time!



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# Title IX

Title IX of the Education Amendments of 1972 provides that:

“[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...”

- Protected persons:
  - Students of all genders
  - Staff of all genders
- Applies only to sexual harassment as defined by the August 14, 2020 regulations

# Title IX

## Principles Underlying New Regulations:

- Ensure prompt response to individuals who are alleged to be victims of sexual harassment by offering supportive measures
  - Supportive measures offered whether or not formal complaint filed
  - Offered to both parties
  - Designed to ensure equal access to program / activity
  - May not be disciplinary

# Title IX

## Principles Underlying New Regulations:

- Follow a fair grievance process to resolve sexual harassment allegations when a complainant requests an investigation or a Title IX Coordinator decides on the district's behalf that an investigation is necessary
  - Due process considerations
- Provide remedies to victims of sexual harassment
  - No discipline of respondents until a determination of responsibility has been made following the grievance process

# Title IX Definitions

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

1. An employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct;
2. Unwelcome conduct determined by a reasonable person to be so severe, pervasive, **and** objectively offensive that it **effectively denies** a person equal access to the recipient's education program or activity; or
3. "Sexual assault" as defined in 20 U.S.C. § 1092(f)(6)(A)(v), "domestic violence" as defined in 34 U.S.C. § 12291(a)(8), or "stalking" as defined in 34 U.S.C. § 12291(a)(30).



# Title IX Definitions

- **Complainant** – individual who is alleged to be the victim of conduct that could constitute sexual harassment
- **Respondent** – individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment
- **Actual knowledge** – notice of sexual harassment or allegations of sexual harassment to a recipient's Title IX Coordinator or any official of the recipient who has authority to institute corrective measures on behalf of the recipient, or to any employee of an elementary or secondary school

# Title IX Definitions

- **Formal Complaint** – a document filed by a complainant or signed by the Title IX Coordinator alleging sexual harassment against a respondent and requesting that the recipient investigate the allegation of sexual harassment. At the time of filing a formal complaint, a complainant must be participating in or attempting to participate in the education program or activity of the recipient with which the formal complaint is filed.

# Title IX Key Terms

**Formal Resolution** is the processing of a complaint from intake by the Title IX Coordinator, to investigation by an Investigator, to decision by a Decision-Maker and appeal to an Appeals Officer, if requested.

**Informal Resolution** is the process to resolve a complaint without resorting to the formal resolution procedures. This may include the use of mediation or other restorative justice measures.

# Title IX Key Terms

## **Informal Resolutions:**

- Not allowed for allegations of an employee sexually harassing a student
- Parties must consent in writing to participate in an informal resolution process
- School must provide written notice disclosing the allegations and the requirements of the informal resolution process (including when the informal process precludes resuming the formal complaint process)
- At any time prior to agreeing on a resolution, either party can withdraw from the informal resolution process

# Title IX Key Terms

## **Title IX Personnel:**

- **Title IX Coordinator**

- Policy implementation
- Complaint intake
- Supportive measures implementer
- Can be investigator

- **Investigator**

- Implement grievance procedures
- Fact finder
- Credibility determination maker
- Report writer

# Title IX Key Terms

## Title IX Personnel:

- **Decisionmaker**

- Facilitate the opportunity for parties to provide written, relevant questions and provision of answers
- Make written determination of whether sexual harassment under Title IX occurred
- Is respondent responsible for violation of Title IX?
- Notice of appeal rights

- **Appeals officer**

- Review determination of decisionmaker if appeal

- **Informal Resolution Facilitator**

- Facilitate informal resolution process

# Grievance Process

## Initial Steps:

- Title IX Coordinator intake of formal complaint
- Notice of formal complaint
- Implementation of supportive measures, as appropriate
- Assign investigator (could be Title IX Coordinator)
- Appoint decisionmaker

# Investigation Process

1. Notice of formal complaint to parties
2. Equal opportunity for the parties to present witnesses and evidence
3. Cannot restrict either party's ability to discuss the allegations or gather and present evidence
4. Provide the parties with the same opportunities to have others present during interviews or other related proceedings, including an advisor (for any part of the grievance process) who may but is not required to be an attorney



# Investigation Process

5. Provide, to a party who is invited or expected to attend, written notice of the date, time, participants, purpose and location of any investigative interview, hearing, or other meeting with enough time to allow the party to prepare to participate
6. Provide both parties and advisors equal opportunity to review all evidence on which recipient does not intend to rely and any exculpatory or inculpatory evidence from any source, prior to the completion of the final investigation report and in time to give parties at least 10 days to prepare a written response, which the investigator must consider prior to completing the investigation report
7. Prepare a written investigation report that fairly summarizes the relevant evidence and provide the report to the parties and their advisors, if any, for their review and written response, at least 10 days before a hearing or other determination of responsibility

# Decisionmaker Qualifications

- Cannot be Title IX Coordinator or investigator
- Cannot have a conflict of interest
- Cannot have any bias for or against complainants or respondents generally
- Cannot have any bias for or against an individual complainant or respondent

# Decisionmaker Qualifications

## Avoiding Biases

- Goal is preservation of integrity of process
- Everyone has biases, but as a Decision Maker, you must learn to recognize what those biases are, and ensure they do not influence your decision making
- Be aware of implicit bias
- Keep an open mind as a Decision Maker
- Objectively review the investigative reports
- Remember that each case is unique.

# Decisionmaker Qualifications

## Avoiding Biases

A Decision Maker must not rely on sex stereotypes

Examples of sex stereotype in comments:

- Women have regrets about sex and lie about sexual assault.
- Men are more sexually aggressive and likely to have perpetrated a sexual assault.

# Decisionmaker Qualifications

- Must be trained:
  - Definition of sexual harassment in regulations
  - Scope of the district's education program or activity
  - How to conduct an investigation and grievance process, including hearings, appeals, and informal resolution processes, as applicable
  - How to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias
  - Technology to be used at a live hearing
  - Issues of relevance of questions and evidence

# Decisionmaking Process

## 1. Obtain Investigative Report

- Investigator's report → Findings of Fact, Credibility Determinations
- Parties have had opportunity to review evidence and provide comments before report is finalized

# Decisionmaking Process

- 2. Each party & advisor can review the investigative report and provide written response**
  - After report is finished by investigator, but BEFORE determination by decisionmaker, parties and advisors have opportunity to review report
  - At least 10 days before determination

# Decisionmaking Process

**3. Afford each party the opportunity to submit written, relevant questions that a party wants asked of any party or witness, provide each party with the answers, and allow for additional, limited follow up questions from each party**

- Have clear process
- Equal opportunity to both parties
- You may have questions as well
- Make sure questions are relevant and consistent with regulatory restrictions



# Complainant's Questions

Subject Jane Doe Investigation - Follow Up Questions

Dear Ms. Decision-maker,

On behalf of my daughter, Jane Doe, I would like the following questions to be answered before you make your determination.

- Based on a review of Trevor's discipline records, we noted that Trevor received prior discipline when he kissed another male student in elementary school. Is Trevor bisexual? Gay? Or is he straight?
- In Jane's experience, Coach Frye does not like Jane and may not like girls generally. How can Coach Frye be a reliable witness when she is biased against Jane?
- Did Ms. Investigator talk to Paul Smith and Tom Baker about what they were discussing with Trevor before Trevor assaulted Jane?

Sincerely,

John

**JOHN Q. DOE**  
789 Appletree Drive  
Fictional, IN 12345  
555.867.5309

# Respondent's Questions

Subject Title IX Investigation - Follow Up Questions for Trevor Morris

Good afternoon, Ms. Decision-maker:

My name is Tony Morris, and I am Trevor's uncle. I am also an attorney in the community, and my sister (Trevor's mom) asked me to step in as Trevor's advisor. My understanding is that we have the opportunity to submit additional questions to be presented to the Complainant. Accordingly, please obtain answers to the following questions:

**Question 1:** Is it true that Trevor and Jane had been on three dates prior to the cheerleading trip?

**Question 2:** Is Jane sexually active, or has she been sexually active prior to this alleged incident?

**Question 3:** A review of Coach Frye's testimony suggests that other boys on the cheerleading squad have engaged in similar or worse behavior. Why has Jane not reported those incidents to Coach Frye or the Title IX coordinator?

**Question 4:** What was the lighting on the bus at the time of the alleged incident? What time of day did the incident occur? If it was dark on the bus, how did Jane know if it was really Trevor and not one of the other boys who have harassed girls in the past?

**Question 5:** If Jane did not think Trevor meant any harm by his alleged action, what result does she want to see come out of this investigation?

Very truly yours,

Tony  
Anthony J. Morris, Esq.  
The Morris Law Firm, LLC

# Decisionmaking Process

## 4. Issue written determination

- Include all required elements of written determination\*\* (will discuss more later!)
- Evaluate evidence
- Decide if evidence is relevant
- Reach conclusions regarding whether respondent is responsible
- Determine if remedies need to be offered
- Determine if any disciplinary actions are necessary; and
- Write decision

# Decisionmaking Standards

- Regulations require a presumption that the respondent is not responsible for the alleged conduct until a determination regarding responsibility is made at the conclusion of the grievance process
- Regulations require district to use one of two standards of evidence:
  - Preponderance of the evidence
  - Clear and convincing evidence
- Always use the same standard

# Decisionmaking Standards

- Three Standards in the United States:
  - Beyond a Reasonable Doubt
  - Clear and Convincing Evidence
  - **Preponderance of the Evidence**: A reasonable person, after a careful balancing of available information, would conclude that it is *more likely than not* that a violation of policy occurred and that the responding party is responsible for the violation

# Decisionmaking Standards

➤ What does this mean?



➤ Or what DOESN'T it mean?

- Beyond a Reasonable Doubt → *"firmly convinced of the defendant's guilt"*
- Clear and Convincing Evidence → *"substantially more likely than not"*

# Poll Time!



# Decisionmaking Standards

## Standard of Review for District's Response (including your decision!)

***Deliberate Indifference*** → a failure to respond reasonably in light of known circumstances.



# Decisionmaking Standards

## Relevance of Evidence

- When is evidence relevant?
  - it has any tendency to make a fact more or less probable than it would be without the evidence
  - the fact is of consequence in determining the action

# Decisionmaking Standards

## Relevance of Evidence

- Questions and evidence about the complainant's prior sexual behavior are not relevant, unless:
  - Such questions or evidence are offered to prove that someone other than the respondent committed the conduct alleged by the complainant, OR
  - Such questions and evidence concern specific incidents of the complainant's prior sexual behavior with respect to the respondent and are offered to prove consent

# Decisionmaking Standards

## Relevance of Evidence

- Cannot require, allow, rely upon, or otherwise use questions or evidence that constitute, or seek disclosure of, information protected under a legally recognized privilege, unless the person holding such privilege has waived the privilege
  - Medical / treatment records
  - Attorney-client communications
  - Confessions to clergy
  - Criminal implications
  - Spousal testimony in criminal matters
  - Confidentiality / Trade Secrets
- Decisionmaker must explain to the party proposing the questions any decision to exclude a question as not relevant

# Complainant's Questions

Subject Jane Doe Investigation - Follow Up Questions

Dear Ms. Decision-maker,

On behalf of my daughter, Jane Doe, I would like the following questions to be answered before you make your determination.

- Based on a review of Trevor's discipline records, we noted that Trevor received prior discipline when he kissed another male student in elementary school. Is Trevor bisexual? Gay? Or is he straight?
- In Jane's experience, Coach Frye does not like Jane and may not like girls generally. How can Coach Frye be a reliable witness when she is biased against Jane?
- Did Ms. Investigator talk to Paul Smith and Tom Baker about what they were discussing with Trevor before Trevor assaulted Jane?

Sincerely,

John

**JOHN Q. DOE**  
789 Appletree Drive  
Fictional, IN 12345  
555.867.5309

# Poll Time!



# Respondent's Questions

Subject Title IX Investigation - Follow Up Questions for Trevor Morris

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**Question 5:** If Jane did not think Trevor meant any harm by his alleged action, what result does she want to see come out of this investigation?

Very truly yours,

Tony  
Anthony J. Morris, Esq.  
The Morris Law Firm, LLC

# Poll Time!



Break time – we will return  
in 5 minutes.



# What Is the Decision?

**Is the Respondent responsible for sexual harassment under Title IX?**

# What Is the Decision?

- **Did the alleged conduct occur in a district education program or activity?**
  - “Education program or activity” → any location, event, or circumstance over which the district exhibits substantial control over both the alleged harasser and the context in which the harassment occurred
- **Did alleged sex discrimination occur against a person in the United States?**
- **At the time the complaint was filed, was complainant participating in or attempting to participate in the education program or activity of the district with which the complaint is filed?**

**If NO to any of these, DISMISS!**

# What Is the Decision?

- **Does the conduct, if true, rise to the level of “sexual harassment” under Title IX?**

# What Is the Decision?

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

- 1) An employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct; or

# What Is the Decision?

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

- 2) Unwelcome conduct determined by a reasonable person to be so severe, pervasive, **and** objectively offensive that it **effectively denies** a person equal access to the recipient's education program or activity; or

# What Is the Decision?

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

- 3) "Sexual assault" as defined in 20 U.S.C. § 1092(f)(6)(A)(v), "domestic violence" as defined in 34 U.S.C. § 12291(a)(8), or "stalking" as defined in 34 U.S.C. § 12291(a)(30).

# What Is the Decision?

**Sexual Assault** → An offense classified as a forcible or nonforcible sex offense under the uniform crime reporting system of the Federal Bureau of Investigation  
20 U.S.C. § 1092(f)(6)(A)(v)

- Currently includes any sexual act directed against another person without the consent of the victim, including instances where the victim is incapable of consent.

# What Is the Decision?

## **Sexual Assault specifically includes:**

- **Rape** (Except Statutory Rape) – The carnal knowledge of a person, without the consent of the victim, including instances where the victim is incapable of giving consent because of his or her age or because of his or her temporary or permanent mental or physical incapacity.
- **Sodomy** – Oral or anal sexual intercourse with another person, without the consent of the victim, including instances where the victim is incapable of giving consent because of his or her age or because of his or her temporary or permanent mental or physical incapacity.



# What Is the Decision?

## **Sexual Assault specifically includes:**

- ***Sexual Assault with an Object*** – To use an object or instrument to unlawfully penetrate, however slightly, the genital or anal opening of the body of another person, without the consent of the victim, including instances where the victim is incapable of giving consent because of his or her age or because of his or her temporary or permanent mental or physical incapacity.
- ***Fondling*** – The 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 his or her age or because of his or her temporary or permanent mental or physical incapacity.

# What Is the Decision?

## **Sexual Assault specifically includes:**

- ***Incest*** – Nonforcible sexual intercourse between persons who are related to each other within the degrees wherein marriage is prohibited by state law.
- ***Statutory Rape*** – Nonforcible sexual intercourse with a person who is under the statutory age of consent pursuant to state law.

# What Is the Decision?

**Domestic Violence** → includes felony or misdemeanor crimes of violence committed by a current or former spouse or intimate partner of the victim, by a person with whom the victim shares a child in common, by a person who is cohabitating with or has cohabitated with the victim as a spouse or intimate partner, by a person similarly situated to a spouse of the victim under the domestic or family violence laws of the jurisdiction..., or by any other person against an adult or youth victim who is protected from that person's acts under the domestic or family violence laws of the jurisdiction  
34 U.S.C. § 12291(a)(8)

# What Is the Decision?

**Stalking** → engaging in a course of conduct directed at a specific person that would cause a reasonable person to –

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

(b) suffer substantial emotional distress

34 U.S.C. § 12291(a)(30)

# Written Determination

## Required Elements of Written Determination

- Notification of the allegations potentially constituting sexual harassment as defined in regulations
- A description of the procedural steps taken from the receipt of the formal complaint through the determination, including any notifications to the parties, interviews with parties and witnesses, site visits, methods used to gather other evidence, and hearings held
- Findings of fact supporting the determination
- Conclusions regarding the application of the district's code of conduct to the facts

# Written Determination

## Required Elements of Written Determination

- A statement of, and rationale for, the result as to each allegation, including a determination regarding responsibility, any disciplinary sanctions the district imposes on the respondent, and whether remedies designed to restore or preserve equal access to the district's education program or activity will be provided by the district to the complainant
- The district's procedures and permissible bases for the complainant and respondent to appeal

# Written Determination

## Appeals

- The district must offer both parties an appeal from a determination regarding responsibility, and from a district's dismissal of a formal complaint or any allegations therein
- Bases for Appeal:
  - Procedural irregularity that affected the outcome of the matter
  - New evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter

# Written Determination

## Appeals

- Bases for Appeal:
  - The Title IX Coordinator, investigator(s), or decision-maker(s) had a conflict of interest or bias for or against complainants or respondents generally or the individual complainant or respondent that affected the outcome of the matter



# Written Determination

## Decision Writing Hints

- Review relevant policies first
  - Title IX policy
  - Student Code of Conduct or Employee Code of Conduct
  - Other non-discrimination policies
- Make sure you have information needed
  - Completed investigation report
  - Follow up questions/answers from parties/advisors
- Ask your own clarifying questions if needed

# Written Determination

## Decision Writing Hints

- Use clear organization
- Include both exculpatory and inculpatory evidence & explain reasons for determination
- Identify evidence deemed irrelevant and why
- If witness was not contacted or did not participate, explain why
- Be as specific as possible – avoid vague terms like “some,” “many,” “a lot”
- Use consistent terminology throughout
- Focus on the facts and avoid subjective terms

# Recordkeeping Requirements

- Records related to alleged sexual harassment must be maintained for at least 7 years.
  - Investigation records
  - Discipline/Remedies
  - Appeal records
  - Supportive measures
- Need to document for every claim:
  - Proof that response was not deliberately indifferent
  - What measures were taken to restore or preserve equal access to education
  - If no supportive measures, why that was not deliberate indifference

# K-12 Title IX Compliance Training 2020

## Hypothetical

**Let's apply the rules!**

# K-12 Title IX Compliance Training 2020

## Hypothetical

### Procedural History

# Hypothetical – Procedural History

- When was the Formal Complaint received?
- When were the parties notified about the Complaint?
- When did the investigation begin? Who investigated?
- When were interviews conducted? With whom?
- Did parties have advisors?
- What methods were used to gather evidence?
- Did parties submit written response to evidence?

# Hypothetical – Procedural History

- When did the Investigator forward the Investigation Report?
- Did the parties submit a written response to the Investigation Report?
- When did you notify the parties of their right to submit written questions?
- Did the parties submit written questions? Were any questions deemed irrelevant?
- Did you ask follow-up questions?

# K-12 Title IX Compliance Training 2020

## Hypothetical

### **Identify Each Allegation**



# Hypothetical - Allegations

- What were the allegations included in the Formal Complaint?
  - **Formal Complaint:** Trevor Morris placed his hand underneath Jane Doe's sports bra without consent.
  - **Determination Report:**
    - Whether Trevor Morris placed his hand underneath Jane Doe's sports bra?
    - If so, whether Mr. Morris did so without consent?
    - Did this action constitute sexual harassment under Title IX?
    - Did this action violate the District's code of conduct?

# K-12 Title IX Compliance Training 2020

## Hypothetical

### **Findings of Fact for Each Allegation**

# Hypothetical – Findings of Fact

- Did Trevor Morris place his hand underneath Jane Doe's sports bra?
  - **Summarize the facts that parties agreed upon:**
    - *Both Miss Doe and Mr. Morris agree that they were both on the charter bus driving from Orlando to Fictional.*
    - *Both Miss Doe and Mr. Morris agree that Miss Doe fell asleep in a row of seats in the back of the charter bus, nearby where Mr. Morris was sitting with friends.*

# Hypothetical – Findings of Fact

- Did Trevor Morris place his hand underneath Jane Doe's sports bra?
  - **Summarize the facts that most likely occurred, given the available evidence:**
    - *Miss Doe stated, and Mr. Hafley confirmed, that she took a nap around mid-afternoon after the team stopped to eat lunch. Mr. Morris could not remember when he saw Miss Doe taking a nap.*
    - *Mr. Morris denied moving seats to sit by Miss Doe. However, Mr. Hafley (who the Investigator found to be very credible) stated he saw Mr. Morris and Miss Doe both get up from the same row of seats.*

# Hypothetical – Findings of Fact

- Did Trevor Morris place his hand underneath Jane Doe's sports bra?
  - **Describe and reference exculpatory and inculpatory evidence:**
    - *Mr. Morris initially denied placing his hand underneath Miss Doe's sports bra. However, Mr. Morris later admitted in response to a question from Miss Doe that he was playing "Truth or Dare" with fellow teammates.*
    - *While Miss Doe asked for more information regarding Mr. Morris's sexual orientation, such question is irrelevant to this determination. Accordingly, the question was not provided to Mr. Morris for follow-up.*

# K-12 Title IX Compliance Training 2020

## Hypothetical

### Conclusion(s)



# Hypothetical - Conclusions

- **Reference your standard of evidence:**

- *I reviewed the Investigation Report and all relevant evidence under a "preponderance of the evidence" standard. Accordingly, based on a review of available evidence, I determined whether it is more likely than not that a violation of policy occurred and whether Mr. Morris is responsible for the violation.*

# Hypothetical - Conclusions

- **Clearly state determination of responsibility:**

- *Based on my review of the Investigation Report, the relevant evidence, and the additional evidence provided to me by the parties, it is my determination that Mr. Morris did place his hand underneath Miss Doe's sports bra without her consent. However, Mr. Morris's conduct does not constitute sexual harassment as defined by Title IX because Mr. Morris did not touch Miss Doe's breast for the purposes of sexual gratification. Instead, he was acting in response to a "dare" from his friends. The one-time incident, while wholly inappropriate, does not rise to level of severe and pervasive. Nevertheless, Mr. Morris's conduct is wholly inappropriate and unacceptable for the school environment. It is a clear violation of the District's student code of conduct. \*\*\**

*\*\*\*This is an **EXAMPLE** of a **POSSIBLE** conclusion. Actual conclusions will always depend on the specific factual circumstances.*





# Hypothetical - Conclusions

- **State disciplinary sanctions:**

- *Respondent's conduct violated District Board Policy EFG-1, Student Discipline, including provisions prohibiting assault and harassment. Because this is Mr. Morris's first offense, he will be suspended for 10 days. He will also be suspended from the cheerleading squad for the remainder of the year.*

- **State the remedies:**

- *Complainant's and Respondent's class schedules will be adjusted to allow Complainant to not have classes with Respondent in the future.*

# Summary

- **Be familiar with the relevant district policies**
- **Check your biases**
- **Be thorough and thoughtful**
- **Be objective**
- **Seek advice of legal counsel**
- **Document your decision, including the reasons**

# Questions??



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COOPER MOHAN JACKSTADT P.C.

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# CPDU

Reminder:

To obtain IL CPDU Credit, please complete the information requested at:  
<https://forms.gle/9uYuzkDj6urRhsvA6>



TUETH KEENEY  
COOPER MOHAN JACKSTADT P.C.

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# TITLE IX COMPLIANCE SERIES

## Part 4: The Role of the Title IX Appeals Officer

*Presented by:*  
Margaret Hesse  
Christine Self

*Date:*  
October 30, 2020

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# OUR FIRM

Our law firm is **DIFFERENT BY DESIGN**. We pride ourselves in our ability to provide quality legal services with significantly greater responsiveness, efficiency, and value. **PERSONAL CONTACT**, **QUALITY SERVICES** and **EFFICIENT RESULTS** are the deeply-held values that shape our relationships and drive our success. We believe clients deserve honest, accurate, and practical answers to their legal issues, delivered in the most efficient manner, from attorneys they know, like and trust.

Our attorneys recognize the need to deliver real-world, tangible solutions with quality and transparency. We form enduring relationships and friendships with our clients. We strive to bring creative thinking and innovative solutions to every client's legal challenges.

**PERSONAL CONTACT; QUALITY SERVICES; EFFICIENT RESULTS.** We invite you to learn more about our Firm, our practice areas and our attorneys.



### **Disclaimer**

The materials available in this Guidance are for informational purposes only. You should contact legal counsel to obtain advice with respect to any particular issue or problem, as student discipline matters are all unique and specific.



TUETH KEENEY  
COOPER MOHAN JACKSTADT P.C.

DIFFERENT  
BY DESIGN

# Presenters

## **Kylie S. Piatt**

Kylie practices primarily in the areas of K-12 education law, school litigation, and labor and employment law, representing school districts and private schools throughout Missouri. Kylie also specializes in intellectual property matters affecting school districts, helping schools districts protect their assets and defending districts against copyright infringement claims. Prior to joining the Firm, Kylie practiced community association law where she represented numerous condominium and homeowners associations throughout the greater St. Louis area.

A Texas native, Kylie obtained her B.A. with honors from Southern Methodist University in Dallas, Texas, before moving to St. Louis to teach seventh- and eighth-grade Communication Arts at a downtown charter school through Teach for America. Kylie's experience in the classroom provides a unique perspective on her practice of education law. Kylie earned her J. D. from Saint Louis University School of Law.



# Presenters

## Margaret A. Hesse

Margaret is the President and Managing Shareholder of Tueth Keeney. She focuses her work in the areas of education law, employment law, and litigation. She has represented school districts across both Missouri and Illinois for many years. Margaret's experience over the last twenty-five years includes defending school districts in matters involving the Americans with Disabilities Act, the Missouri Human Rights Act, Title VII, the Safe Schools Act, Title IX, the Equal Pay Act, Section 1983, First Amendment and Sunshine Act compliance, to name a few. She consults with educators on a daily basis on a variety of issues.

Margaret is committed to creating a world where school leaders are spending as little time as possible thinking about legal concerns, so they can maximize their time and attention shaping young lives.

# Presenters

## Christine L. Self

Christine L. Self joined Tueth Keeney with 5 years of experience representing local municipalities and private clients. During this time, she gained experience in collective bargaining, conducting investigations into employee misconduct and advocating on behalf of municipalities and private clients before the Illinois Labor Relations Board, the Illinois Human Rights Commission, the Equal Employment Opportunity Commission and the U.S. Department of Labor. She has experience in the state and federal courts as well.

Christine is also knowledgeable about how local governments in Illinois operate. She has developed policies and ordinances and advised municipalities on laws such as the Illinois Freedom of Information Act and the Illinois Open Meetings Act. She has closely tracked legislative and case law changes that impact municipalities and assisted them in complying with those changes.

Christine also brings 15 years of experience as a public school teacher to her work in education law. Additionally, she taught at the community college and university levels. She is also involved in school related organizations in her hometown of Chatham, Illinois, including the Ball-Chatham Educational Foundation and Titan Fuel, a program to assist district students with food insecurity issues. These experiences provide her with multiple perspectives from which she can best advise clients.

Christine is a member of the Illinois Council of School Attorneys.

# Poll Time!



# Poll Time!



# Poll Time!



# Title IX

Title IX of the Education Amendments of 1972 provides that:

“[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...”

- Protected persons:
  - Students of all genders
  - Staff of all genders
- Applies only to sexual harassment as defined by the August 14, 2020 regulations

# Title IX Definitions

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

- (1) An employee of the recipient **conditioning** the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct;
- (2) Unwelcome conduct determined by a reasonable person to be so severe, pervasive, **and** objectively offensive that it **effectively denies** a person equal access to the recipient's education program or activity; or
- (3) "Sexual assault" as defined in the Violence Against Women Act (VAWA) 20 U.S.C. § 12291(a)(10), "domestic violence" as defined in 34 U.S.C. § 12291(a)(8), or "stalking" as defined in 34 U.S.C. § 12291(a)(30).

# Title IX Definitions

- **Complainant** – individual who is alleged to be the victim of conduct that could constitute sexual harassment
- **Respondent** – individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment
- **Actual knowledge** – notice of sexual harassment or allegations of sexual harassment to a recipient's Title IX Coordinator or any official of the recipient who has authority to institute corrective measures on behalf of the recipient, or to any employee of an elementary or secondary school



# Title IX Definitions

- **Formal Complaint** – a document filed by a complainant or signed by the Title IX Coordinator alleging sexual harassment against a respondent and requesting that the recipient investigate the allegation of sexual harassment. At the time of filing a formal complaint, a complainant must be participating in or attempting to participate in the education program or activity of the recipient with which the formal complaint is filed.

# Title IX Key Terms

**Formal Resolution** is the processing of a complaint from intake by the Title IX Coordinator, to investigation by an Investigator, to decision by a Decision-Maker and appeal to an Appeals Officer, if requested.

**Informal Resolution** is the process to resolve a complaint without resorting to the formal resolution procedures. This may include the use of mediation or other restorative justice measures.

# Poll Time!



# Title IX Key Terms

## **Informal Resolutions:**

- Not allowed for allegations of an employee sexually harassing a student
- Parties must consent in writing to participate in an informal resolution process
- School must provide written notice disclosing the allegations and the requirements of the informal resolution process (including when the informal process precludes resuming the formal complaint process)
- At any time prior to agreeing on a resolution, either party can withdraw from the informal resolution process

# Title IX Key Terms

## **Title IX Personnel:**

- **Title IX Coordinator**

- Policy implementation
- Complaint intake
- Supportive measures implementer
- Can be investigator

- **Investigator**

- Implement grievance procedures
- Fact finder
- Credibility determination maker
- Report writer

# Title IX Key Terms

## Title IX Personnel:

- Decisionmaker
  - Facilitate the opportunity for parties to provide written, relevant questions and provision of answers
  - Make written determination of whether sexual harassment under Title IX occurred
  - Is respondent responsible for violation of Title IX?
  - Notice of appeal rights
- Appeals officer (aka Appellate decisionmaker)
  - Review determination of decisionmaker if appeal
- Informal Resolution Facilitator
  - Facilitate informal resolution process

# Grievance Process

## **Overall Process:**

- Prompt and equitable treatment
- Notice of allegations before interview
- Access to an advisor of their choice
- Equal opportunity to inspect and review evidence
- Equal opportunity to respond to allegations
- Objective evaluation of all relevant evidence
- No determination until after process is completed

# Grievance Process

## **Initial Steps:**

- Title IX Coordinator intake of formal complaint
- Notice of formal complaint
- Implementation of supportive measures, as appropriate

## **Investigation:**

- Assign investigator (could be Title IX Coordinator); consider any conflicts of interest or bias of investigator
- Investigator conducts interviews and reviews other evidence; ensure thoroughness and participation of both parties
- Investigator completes report, allows for feedback prior to finalization of report
- After feedback, submits report to decision-maker



# Grievance Process

## Decision Maker:

- Appointed by Title IX Coordinator
  - Unbiased in decision making
  - No conflicts of interest
  - Must understand the Title IX process
  - Reviews investigatory report and evidence
  - Issues a written determination

# Grievance Process

The process may stop once a decision is rendered, but it does not have to end there....appeals are allowed.

# Appeal – How does a party appeal?

Complainant or Respondent makes a written request to the Title IX Coordinator appealing the determination or dismissal within [xx] days\*

- must be based on one of the reasons for which appeals are allowed (three in new regulations, plus any additional allowed by recipient's policy)
- Title IX Coordinator must provide notice to the other party when an appeal has been filed, then:
  - Both parties provided five (5) school business days to submit a written statement in support of, or challenging the outcome
  - Promptly forwards all materials relative to the appeal to the Appeals officer

\*34 C.F.R. §106.45(b)(1)(v) requires Title IX sexual harassment complaint grievance process to include a "reasonably prompt time frame for filing and resolving appeals"

# Who has the right to appeal, and on what bases?

Both parties have the right to appeal a determination of responsibility and the recipient's dismissal of a complaint or any allegations therein for the following reasons:

- 1) A procedural irregularity that affected the outcome;
- 2) New evidence that was not reasonably available at the time of the determination and could affect the outcome;
- 3) Conflict of interest or bias on the part of the Title IX coordinator, investigator, or decision maker that affected the outcome;
- 4) Other reasons pursuant to the recipient's grievance procedure.\*

\*Recipients **may** include additional reasons for appeal, but are not required to do so.

# Additional Bases for Appeal

Recipients may provide additional bases for appeal in their grievance process.

Examples of additional bases:

- Appeal the severity of sanctions
- Remedy seen as punitive

But, don't forget that there are potentially appeal rights to the Board of Education if a student or employee is disciplined! Strongly consider this before adding any bases for appeal through the Title IX process.

# Why might a complainant appeal?

- Complaint is dismissed without investigation
  - Respondent found not in violation of Title IX after investigation, but new witness comes forward
  - Investigator stated during interview that “this is what happens when you have co-ed teams” and complainant believes this shows bias
  - Decision maker is a friend of respondent’s parents and complainant believes there was a bias as a result
- \* Appeal by any complainant must tie back to a mandatory or permissive reason for appeal.

# Why might a respondent appeal?

- None of respondent's suggested witnesses were interviewed
  - Complainant is the niece of the Title IX Coordinator and respondent believes Title IX Coordinator was biased as a result
  - Respondent wasn't allowed to review the evidence before investigation completed
- \* Appeal by any respondent must tie back to a mandatory or permissive reason for appeal.

# Additional examples of appeal arguments

- Inadequate or biased training materials (posting requirement)
- Inadequate or biased investigation
- Failure to provide both sides the opportunity to review the evidence
- Statements that imply bias by demonstrating favor to one party or the other
- Failure of Title IX personnel to follow the policies and procedures that are required



# Appeal – Who may be an appeals officer?

Must be trained as outlined in section 106.45(b)(1)(iii)

May NOT be the Title IX Coordinator, Investigator, or Decision Maker

May NOT have a conflict of interest or bias against complainant(s) and respondent(s) generally or the particular complainant and respondent

Could be the Board, but consider that the Board may have to hear a later related procedure (dismissal hearing, expulsion hearing, and that may raise specter of bias there).

# Appeal – Who may be an appeals officer?

Conflict of interest and bias are **not** defined in the regulations.

## Conflict of Interest

- Conflict between private interest and professional responsibilities of a person in a position of trust
- Conflict between competing duties

## Bias

- Fact determination
- Reasonable person standard
- Avoid sex stereotypes such as a known feminist will always side with the female, males are incapable of being sensitive to women, males are always guilty, etc.

# Appellate Decision-Maker Role

Within [xx] school business days, the appellate decision-maker affirms, reverses, or amends the written determination regarding responsibility or the notice of dismissal.

Within [xx] school business days after the decision, the appellate decision-maker simultaneously issues a written decision to both parties that describes the result of the appeal and the rationale for the result (34 C.F.R. § 106.45(b)(8)(iii)(E),(F))

# Decision on Appeal

Appellate Decision must include these components:

- 1) Name(s) of Complainant(s)
- 2) Name(s) of Respondent(s)
- 3) Date appeal was filed
- 4) Issues on appeal
- 5) Final decision (explain the result of the appeal and the rationale for the decision)
- 6) Signature of Appeals officer

Break time – we will return  
in 5 minutes.

# K-12 Title IX Compliance Training 2020- Hypothetical

**Let's apply the rules!**

# Hypothetical

Accusation by Miss Doe against Morris that Morris, without permission, placed his hand under her sports bra while she slept on the bus returning from a cheerleading competition.

- Title IX Coordinator determined a formal complaint and investigation required;
- Investigator conducted an investigation, including interviews with the parties and other potential witnesses;
- Decision maker made a determination that conduct was not a Title IX violation, but did violate the Student Code of Conduct.

# Hypothetical – Conclusions by DM

- **Clearly state determination of responsibility:**

➤ *Based on my review of the Investigation Report, the relevant evidence, and the additional evidence provided to me by the parties, it is my determination that Mr. Morris did place his hand underneath Miss Doe's sports bra without her consent. However, Mr. Morris' conduct does not constitute sexual harassment as defined by Title IX because Mr. Morris did not touch Miss Doe's breast for the purposes of sexual gratification. Instead, he was acting in response to a "dare" from his friends. The one-time incident, while wholly inappropriate, does not rise to the level of severe and pervasive conduct. Nevertheless, Mr. Morris' conduct is wholly inappropriate and unacceptable for the school environment. It is a clear violation of the District's student code of conduct. \*\*\**

*\*\*\*This is an **EXAMPLE** of a **POSSIBLE** conclusion. Actual conclusions will always depend on the specific factual circumstances.*





# Hypothetical – Conclusions by DM

- **State disciplinary sanctions:**

- *Respondent's conduct violated District Board Policy EFG-1, Student Discipline, including provisions prohibiting assault and harassment. Because this is Mr. Morris' first offense, he will be suspended for 10 days. He will also be suspended from the cheerleading squad for the remainder of the year.*

- **State the remedies:**

- *Complainant's and Respondent's class schedules will be adjusted to allow Complainant to not have classes with Respondent in the future.*

# Hypothetical Appeal #1

When interviewed about the allegations, complainant provides her side of the story and provides a list of five other members of the cheerleading team she has since learned witnessed the alleged action. Additionally, one of those witnesses talked with respondent and learned that respondent in fact liked complainant and stated he enjoyed the encounter. None of these witnesses were interviewed in the investigation.

# Poll Time!



# Poll Time!



# Hypothetical Appeal #2

The day after receiving the decision, complainant learns that the principal who was the decision-maker, is best friends with respondent's father. Further, complainant was told that the principal decision-maker had a meeting with respondent's father in his office behind closed doors the day before the decision was rendered.

# Poll Time!



# Poll Time!



# Hypothetical Appeal #3

Jake alleges that Sarah took nude photographs of him without his permission. He alleges that Sarah sent the photos to several students and now he is being bullied and is embarrassed to come to school. He files a formal complaint.

After going through the entire process, the Decisionmaker determines that Sarah engaged in misconduct that violated Title IX and suspended Sarah for 30 days, along with issuing certain remedies.



# Hypothetical Appeal #3

On appeal, Sarah argues that she didn't get to have an advisor of her choice for her interview. She also argues that she only received 48 hours' notice of her interview and therefore, didn't have sufficient time to prepare to participate.

# Poll Time!



# Poll Time!



# Hypothetical Appeal #4

On appeal, Sarah also argues that there is new evidence that proves that she did not engage in sexual harassment. She argues that she couldn't present the exculpatory evidence previously because the witness was intimidated by the complainant to not come forward.

# Poll Time!



# Poll Time!



# Hypothetical #5

Sarah loses her appeal. The Decisionmaker had suspended Sarah for 30 days.

Does the Appeals Officer examine the length of the suspension?

Can Sarah argue on appeal that her suspension was too long?

Can Jake argue on appeal that the suspension was too short?

# Hypothetical #6

Student files a formal complaint against an employee. The employee resigns from the district before the investigation is completed. The Investigator dismisses the appeal because the employee is no longer employed, i.e., a basis for dismissal.

Student appeals the dismissal.

What happens next?



# Hypothetical #6

A dismissal may be appealed.

Decisionmaker hears the appeal if the Title IX Coordinator or Investigator dismisses the matter.

Appeals Officer hears the appeal if the Decisionmaker dismisses the matter.

Use the same three bases for appeal to analyze the appeal.

# After the Appeal

- When the appeal process is completed, the process is **not necessarily ended**:
  - Title IX Coordinator is responsible for effective implementation of remedies.
  - There may be discipline for violation of Title IX, as well as other school policies.
  - Alternative school placement may be in order.
  - Expulsion may be in order.
  - For employees, dismissal may be in order.

**Note** that students and employees retain rights to procedures like expulsion hearings, collective bargaining agreement procedures, dismissal hearings, etc.

# Questions?



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# CPDU

Illinois Regional Office of Education #40 has partnered with Tueth Keeney to provide CPDU credit to participants.

To obtain IL CPDU Credit, please complete the information requested at:  
<https://forms.gle/ymFtRmAtVCMDipm76>