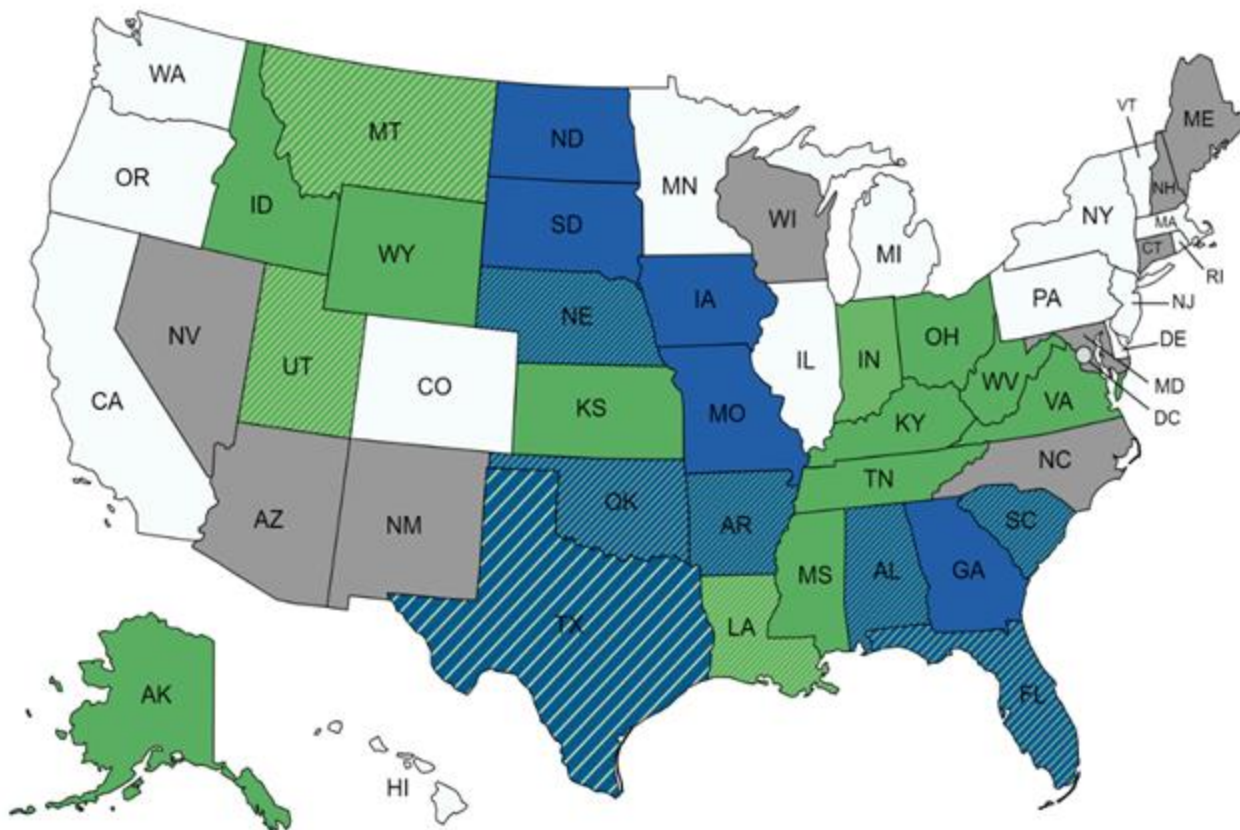


K12 TITLE IX
DECISIONMAKER AND
APPEAL OFFICER
TRAINING

Litigation Limiting Enforcement of 2024 Regulations



ATIXA Litigation Tracker

- No Action
- Amicus Brief
- Complete Injunction
- Injunction and DNI
- Current or Pending Litigation
- Litigation & DNI

*Other Litigation targets specific schools/districts

Moms For Liberty – List of Schools

**President Biden requests Supreme Court review



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- This training is intended for educational purposes only and does not contain sample forms for use in Title IX investigations and/or decision-making processes.
- This training does not constitute legal advice.
- This training will not be recorded by Title IX, LLC and/or any participant.

Overview of Title IX Coordinator Training



- Title IX – Law and Regulations
- Title IX – Covered Acts and Definitions
- Title IX Grievance Procedure – Title IX Decisionmaker Lens
- Title IX Appeals Officers
- 2 Breaks
 - 1PM EST/10AM Pacific
 - 2:15 EST/11:15 Pacific

Stages of Grievance Procedure



1

Notification of Incident to Title IX Coordinator

2

Initial Evaluation

Supportive Measures
Jurisdiction
Dismissal
Removal
Discussion of informal
resolution with Complainant

3

Investigation

Notice to Respondent
Interviews/Review of
Documents, Digital Records
Review of Investigation File by
Parties
Report (optional)

4

Determination

Questions/Cross Examination
Credibility Assessment
Determination:
-Policy Violation, Discipline
-Remedies
Outcome Notification

5

Appeal

*No set timelines; “reasonably prompt” standard



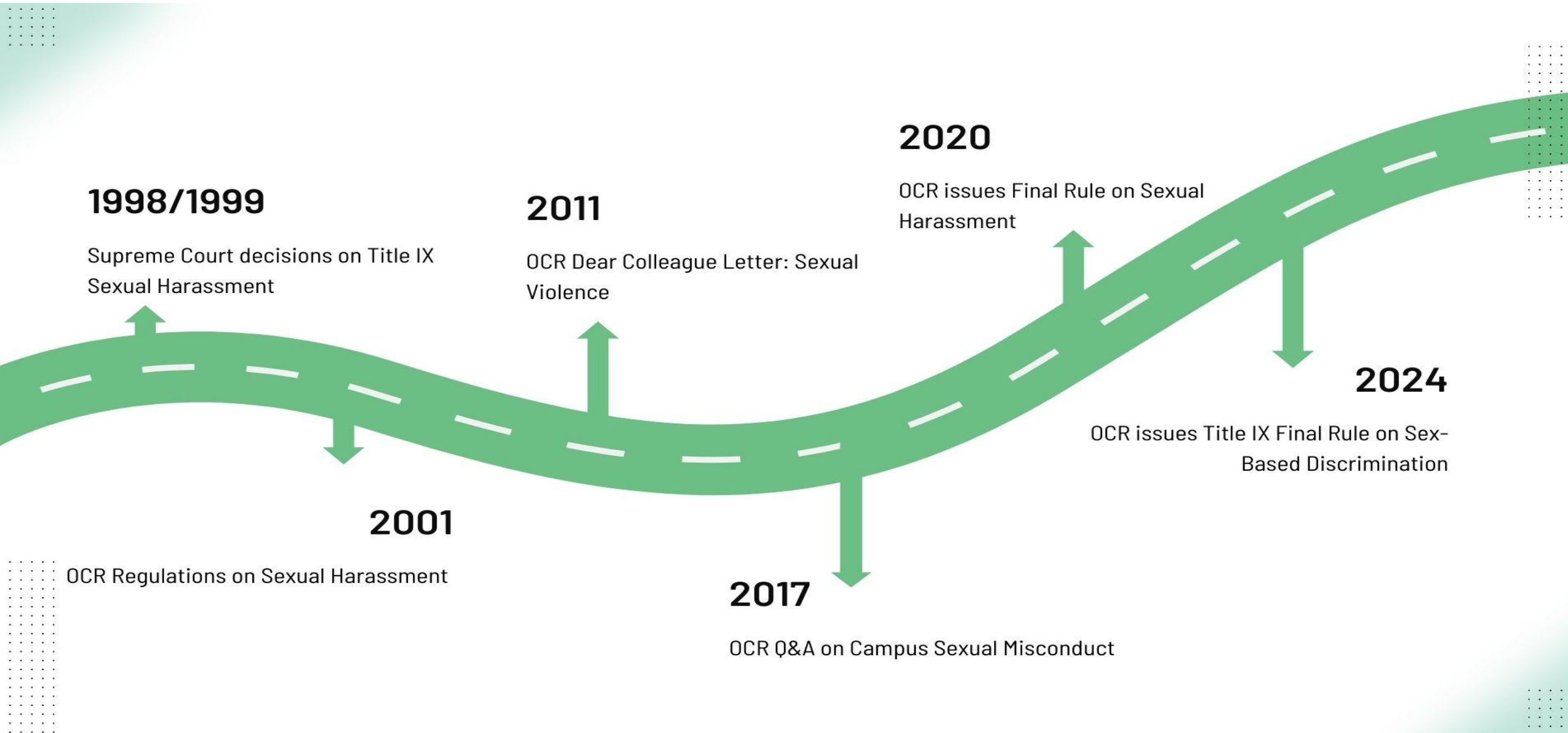
Legal Framework of Title IX



“No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”

- Federal law passed in 1972
- Enforced through the Department of Education, Office for Civil Rights (OCR)

Title IX Regulations Timeline



1998/1999

Supreme Court decisions on Title IX Sexual Harassment

2011

OCR Dear Colleague Letter: Sexual Violence

2020

OCR issues Final Rule on Sexual Harassment

2001

OCR Regulations on Sexual Harassment

2017

OCR Q&A on Campus Sexual Misconduct

2024

OCR issues Title IX Final Rule on Sex-Based Discrimination

Title IX Matters Excluded from Coverage under 2024 Regulations



Pre-August 1, 2024, Incidents

Athletics





K12 School Districts' Obligation to Prevent Sex Discrimination

Preliminary Definitions



Complainant –

- 1) student or employee who person who has been subject to conduct that could be sex-based discrimination; under Title IX
- 2) person other than a student or employee who is alleged to have been subject to sex-based discrimination and who was participating in the school's education program or activity at the time of the alleged discrimination.

Respondent – person who is alleged to have violated the school's prohibition on sex discrimination.

Complaint – an **oral or written request** to school that can objectively be understood as a request for the school to investigate and make a determination about alleged sex-based discrimination.

Parents/Guardians – permitted to make decisions for minor students related to filing a complaint, accompanying students to interview/hearings/meetings, investigation process, and accessing records.

- **Advisors** – Parents/guardians can serve in this capacity; policy will define if others can act as advisors to parties in Title IX matter.

Investigator – individual who conducts a fair and impartial investigation on behalf of the district.

Decisionmaker – after investigation concludes, reviews investigation file and makes credibility assessments (if needed), policy violation decision, and discipline/remedies.

Appeal Officer – respond to matters appealed – supportive measures, dismissal, outcomes



K12 school districts have an obligation to take **prompt and effective action** to **end** any sex discrimination in their educational programs or activities, to **prevent** its recurrence, and to **remedy** its effects.



- Prompt and effective action
- End sex discrimination
- Prevent its recurrence
- Remedy its effects



NOTICE

In relation to sex discrimination and/or sex-based harassment, the school must **respond to information about conduct that reasonably may constitute sex discrimination**, including sexual violence and other forms of sex-based harassment.

Reporting Obligations of Employees



Non-Confidential Employees

All employees, except Confidential Employees, have an obligation to report to Title IX Coordinator upon notice *about conduct that reasonably may constitute sex discrimination under Title IX.*

Confidential Employees

Designated as Confidential
No duty to report

Confidential employees

must share with potential Complainants:

- 1) they are confidential and not required to report to Title IX Coordinator;
- 2) how to contact Title IX Coordinator;
- 3) how to file a complaint;
- 4) Title IX Coordinator may be able to provide supportive measures, initiate an informal resolution, and/or start an investigation.

Pregnancy and Related Conditions – Notice



Purpose: To prevent sex discrimination and ensure equal access to its education program or activity.

Response: Take steps to provide **reasonable modifications** for students, reasonable break time for lactation, and lactation space for students and employees.

Documentation: Prohibited from requiring documentation from students to obtain reasonable modifications unless documentation is necessary and reasonable.

Upon notification of pregnancy from student, employee must provide student with Title IX Coordinator contact information when they receive notice from student of pregnancy or related condition.



Conduct that occurs under a District's education program or activity in the United States and includes conduct that is subject to the District's disciplinary authority.

Includes

- Conduct that occurs in a building owned or controlled by a student organization that is officially recognized by the school.
- Conduct that is subject to the school's disciplinary authority.

Expansion of Jurisdiction

1. Sex-based hostile environment allegations even if some of the alleged conduct took place outside the District's education program or activity and/or outside of the United States.
2. Definition of Complainant also includes a party who is no longer participating in or attempting to participate in the District's education program or activity.

Parties with Special Education Services



- Pro-active, mandatory requirement to consult with Special Education Department when a party is receiving special education services and a Title IX matter has arisen
- Potential modifications to the grievance process may be necessary to accommodate
- Title IX Coordinator should manage this outreach, but if it has not taken place, the Investigator should request guidance



Title IX Definitions

Sex Discrimination and Sex-Based Harassment



- Sex Discrimination:

- Sex Stereotypes

- Sex Characteristics

- Sexual Orientation

- Gender Identity

- Pregnancy & Related Conditions

- Sex-Based Harassment:

- Quid Pro Quo

- Hostile Environment

- Sexual Assault

- Dating/Domestic Violence

- Stalking

Sex-Based Harassment Definition



Sex-based harassment is a form of sex discrimination and refers to sexual harassment and other harassment on the basis of sex, including on the basis of sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity.

- **Quid Pro Quo**
- **Hostile Environment**
- **Specific Offenses: sexual assault, dating/domestic violence and stalking**

● Quid Pro Quo Harassment

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

- * Contemplates the possibility that a student could be found responsible for quid pro quo harassment under certain circumstances.



Hostile Environment Harassment

“Unwelcome sex-based conduct that, based on the totality of the circumstances, is subjectively and objectively offensive and is so severe or pervasive that it limits or denies a person’s ability to participate in or benefit from the school’s education program or activity (i.e., creates a hostile environment). Whether a hostile environment has been created is a fact-specific inquiry that includes consideration of the following:

- The degree to which the conduct affected the complainant’s ability to access the school’s education program or activity;
- The type, frequency, and duration of the conduct;
- The parties’ ages, roles within the school’s education program or activity, previous interactions, and other factors about each party that may be relevant to evaluating the effects of the conduct;
- The location of the conduct and the context in which the conduct occurred; and
- Other sex-based harassment in the school’s education program or activity.”

Specific Offenses: Sexual Assault, Dating/Domestic Violence and Stalking

Sexual assault meaning an offense classified as a forcible or nonforcible sex offense under the uniform crime reporting system of the FBI.

Forcible:

- Any sexual act directed against Complainant, forcibly, against Complainant's will, or without consent, including rape, sodomy, sexual assault with an object, and fondling.

Non-Forcible:

- Offenses that do not involve force where the Complainant is incapable of giving consent, including statutory rape and incest.



Dating/Domestic Violence

Dating violence meaning violence committed by a person:

- (1) Who is or has been in a social relationship of a romantic or intimate nature with the victim; and
- (2) Where the existence of such a relationship shall be determined based on a consideration of the following factors:
 - The length of the relationship;
 - The type of relationship; and
 - The frequency of interaction between the persons involved in the relationship.

Domestic violence meaning felony or misdemeanor crimes committed by a person who:

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



Stalking

Stalking meaning engaging in a course of conduct directed at a specific person that would cause a reasonable person to:

(1) Fear for the person's safety or the safety of others; or

(2) Suffer substantial emotional distress.



Pregnancy and Related Conditions

Pregnant students (or person who has a legal right to act on behalf of the student) must be promptly informed of the Title IX Coordinator's contact information and informed that the Title IX Coordinator can coordinate specific actions to prevent sex discrimination and ensure the student's equal access to the school's education program or activity.
Reasonable modifications must be permitted.
"Related conditions" are expansive.

Complying with Pregnancy Provisions



Students

- Must NOT discriminate against any student on the basis of the student's current, potential, or past pregnancy or related conditions
- Provide information about school's obligations
- Provide reasonable "modifications"
- Voluntary access to separate and comparable program/activity
- Voluntary leave of absence
- Lactation space
- Comparable to other medical conditions

Employees

- MUST treat pregnancy or related conditions as any other temporary medical conditions for ALL job-related purposes
 - Leave
 - Disability
 - Other Benefits
- Lactation spaces
- Pre-employment questions



Retaliation meaning intimidation, threats, coercion, or discrimination against any person by the school, a student, or an employee or other person authorized by the school to provide aid, benefit, or service under the school's education program or activity, for the purpose of interfering with any right or privilege secured by Title IX or its regulations, or because the person has reported information, made a complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing under the Title IX regulations.

- New regulations explicitly include a prohibition against **peer retaliation**
- Schools can require employees to participate in investigations as witness – does not constitute retaliation
- Schools may NOT require students to participate in investigation for either student parties and/or witnesses
- Retaliation allegations follow the Title IX Grievance Procedures

Important Terms Not Defined by Regulations



- Consent
- Peer Retaliation
Example provided



Grievance Procedure/Required Response – Title IX Decisionmaker and Appeal Officer Lens

Stages of Grievance Procedure



1

Notification of Incident to Title IX Coordinator

2

Initial Evaluation

Supportive Measures
Jurisdiction
Dismissal
Removal
Discussion of informal
resolution with Complainant

3

Investigation

Notice to Respondent
Interviews/Review of
Documents, Digital Records
Review of Investigation File by
Parties
Report (optional)

4

Determination

Questions/Cross Examination
Credibility Assessment
Determination:
-Policy Violation, Discipline
-Remedies
Outcome Notification

5

Appeal

*No set timelines; “reasonably prompt” standard



“Fair, Transparent, and Reliable Process”

Impartial, No Bias, No Conflicts of Interest

“Flexibility to adopt the regulations’ grievance procedure requirements to their educational communities.”

“Avoiding unreasonable delays.”



Notice of Complaint of Discrimination

Complaint meaning an **oral or written request** to the school that **objectively can be understood** as a **request for the school to investigate and make a determination** about alleged discrimination under Title IX or its regulations.

Rights of Parties to Investigation



Treat parties equitably

Provide notice of allegations
(writing not required)

Objective evaluation of
evidence, including relevance

Provide appropriate
supportive measures

Have parent (or advisor)
attend meetings, interviews,
etc.

Receive written outcome

Title IX Administrators with no
conflicts of interest or bias

Ability to provide and respond
to evidence

Completed in a reasonably
prompt timeframe and
explain delays in procedure

Presumption of non-
responsibility for Respondent

Review evidence/receive
description of evidence with
ability to inspect

Offer of appeal (if offered in
other proceedings)

Ability to not participate in
the Title IX grievance process

Take steps to protect
confidentiality of parties and
witnesses

Prohibit retaliation

Title IX Coordinator Role



- Shepherds the Title IX process
- Receives report
- Evaluates the complaint and holds initial meeting with Complainant
 - Supportive Measures
 - Procedure Options – Investigation, Informal Resolution
- Identifies investigator
- Sends notice of allegations letter
- Provides supportive measures for Respondent
- Engages in regular outreach to the parties about investigation and potential delays
- Shares investigation information with the parties
- Identifies Decisionmaker
- Addresses challenges based on bias or conflict of interest
- Delivers outcome letter to parties
- Processes a potential appeal



- Policy will define expectations for the Investigator
- Seek clarity about role
 - Investigator OR Investigator-Decisionmaker
 - Information that will be shared
 - Full file OR list of evidence
 - Managed by TIXC or Investigator
- Gather relevant evidence
- Create and maintain the investigation record
- Develop and revisit your investigation strategy
- Collect the investigatory information into the proper format
 - Report OR something else?

Decisionmaker Role



- Permitted to be:
 - Anyone trained
 - Title IX Coordinator
 - Title IX Investigator
- Reviews:
 - All evidence collected in the investigation
 - Parties' responses to the investigation file review
- **Engages in Questioning of Parties**
 - **Credibility**
 - **Seeks answers to unanswered, relevant questions**
- **Determines**
 - **Policy violation**
 - **Discipline**
- **Must avoid**
 - Partiality
 - Conflicts of interest and
 - Bias are still prohibited
- **Respect parties' rights under the process**

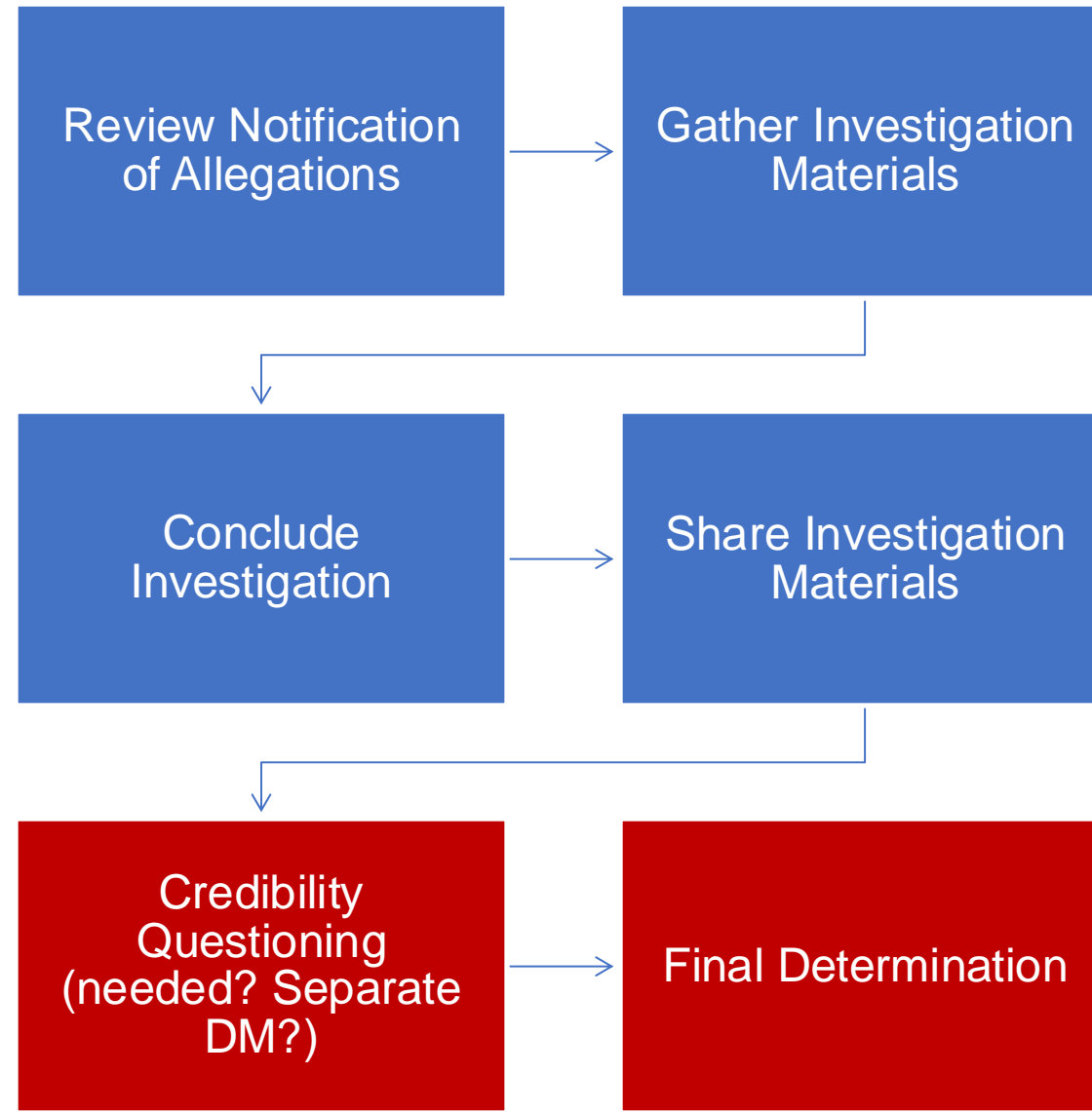


- Decisionmaker must have ability to question parties and witnesses to assess credibility based on their evidence review
- Credibility assessment process should be outlined in the current Title IX policy
- Questioning by parties not required but follow-up questions may be necessary based on parties' responses to investigation file
- Decisionmaker meets with parties in individual meetings to ask questions and assess credibility
 - May also meet with investigator (if separate investigator)
 - May meet with witnesses as needed



- Relevance
- May refuse parties' suggested questions that are unclear or harassing
- May place little/no weight on statements by a party or witness who refuses to respond to relevant questions
- May not draw a negative inference about whether sex-based harassment occurred **based solely** on a party/witness's refusal to respond to relevant questions

Decisionmaker Flow Chart for Investigation Process





Where to Begin?

Policy Review!

Expectations and timelines

Review Notice of Allegations

Review Evidence

All evidence

Report (if one exists) or Summary

Credibility Assessment if necessary

Outcome Letter

Notice of Allegations



Description of the incident(s) giving rise to the complaint

Parties' names

Allegations

Dates

Location

The Notice of Allegations must be updated if additional allegations of sex discrimination by Respondent toward the Complainant arise

Notice that the parties will receive equal opportunity to access relevant and “not otherwise impermissible” evidence or an accurate description of the evidence

Parents-Guardians/Advisors Role in Decisionmaking Process



Parent-Guardian/Advisor Role at K12 Districts – review your policy

-Parent-Guardian Role – regulations specifically protect

-Potential Advisor (non-parent) – permissible?

1. Invited to/accompany student to all meetings, interviews, and hearings
2. Make decisions on behalf of the student
3. Review of all relevant evidence or receive a description of evidence
4. Provide questions and challenges to evidence after file review
5. Receive final outcome letter
6. May file an appeal



- All investigation materials gathered
 - List or full file
 - Requests and what has been shared
- Optional Report may exist
- Regardless of whether the parties have reviewed full evidence file, Decisionmaker should review



- Decisionmaker inquiries
- Follow-up
- Relevance
- Discretion
- Holding follow-up meetings and transcripts/notes



- o Relevant means related to the allegations of sex discrimination under investigation as part of these grievance procedures
- o Questions are relevant when they seek evidence that may aid in showing whether the alleged sex discrimination occurred, and evidence is relevant when it may aid a decisionmaker in determining whether the alleged sex discrimination occurred



1. Inherent plausibility
2. Motive to lie (based on the existence of a bias, interest or other motive)
3. Corroboration
4. Extent a witness was able to perceive, recollect or communicate about the matter
5. History of honesty/dishonesty

6. Habit/consistency
7. Inconsistent statements
8. Manner of testimony
9. Demeanor

Source:

<https://calcivilrights.ca.gov/wp-content/uploads/sites/32/2017/06/DFE-H-Workplace-Harassment-Guide.pdf>

Gather information that will allow Decisionmaker to articulate credibility



Possible Modifications to Questioning Process

- Conducting interviews
- Summarizing process
- Sharing information

Discipline

- Manifestation determinations

Informal Resolution – A Quick Word



- Parties may select the informal process at any time
- If the process is not successful, parties return to investigation process
- Informal resolution can (re)start at anytime before final resolution of the matter



- Do any matters remain in dispute from your review of investigation file?
- What areas have the parties identified as needing follow-up?
- What will bring clarity to a decision on policy violation?
 - Review policy provisions
 - Begin to craft your finding

Preponderance of the Evidence



- More likely than not
- 50% + ?
- Same as standard in civil lawsuits
- Lower than the standard in criminal lawsuits



- Facts
- Credibility
- Preparation
 - Introduction
 - Questions prepared
 - Additional and follow-up – RESPONSIVE, FLEXIBLE
 - Identify other potential witnesses
 - Any other information?
- Record-keeping

Specifically Excluded Under Regulations



- Evidence protected under privilege
 - Medical professionals (doctors, therapists)
- Rape shield protection
 - Prior sexual conduct not relevant, except
 - Prove that someone other than Respondent committed the act
 - Prior sexual conduct with Respondent, if offered to prove consent to the act
- **NEW** – Evidence related to Complainant's sexual interests is never relevant
- **NOTE** – Impermissible, even when offered by Complainant



- Hearsay
- Documents (paper, digital) no longer exist
- No one has admitted the behavior
- Not “convinced” this happened
- Credibility and honesty
 - Investigator or Decisionmaker assessment
- Expert testimony
 - Policy will advise whether experts are permitted
 - Expert testimony will require unique preparation
 - Qualifications, Expected Testimony, Reliance/Challenges

Avoid Bias and Conflict of Interest



Impartiality

Address conflicts of interest
as soon as they arise

Equitable process

Not favor Complainant
or Respondent

Initial communications
about participants in
the process

Bias could occur
throughout the
process and needs to
remain checked

Title IX Factors to Consider



Whether a hostile environment has been created is a fact-specific inquiry that includes consideration of the following:

- The degree to which the conduct affected the complainant's ability to access the school's education program or activity;
- The type, frequency, and duration of the conduct;
- The parties' ages, roles within the school's education program or activity, previous interactions, and other factors about each party that may be relevant to evaluating the effects of the conduct;
- The location of the conduct and the context in which the conduct occurred; and
- Other sex-based harassment in the school's education program or activity.



- Decision about policy violation
- Rationale for decision
- Discipline
 - Scope of discipline should be covered in policy
- Consider including other state-specific requirements



Appeal Officers

Appeals Permitted



- Supportive Measures
- Dismissal from Title IX
- Outcome



- Supportive measures are individualized measures offered as appropriate, as reasonably available, **without unreasonably burdening a complainant or respondent, not for punitive or disciplinary reasons**, and without fee or charge to the complainant or respondent to:
 - (1) **Restore or preserve that party's access** to the school's education program or activity, including measures that are designed to protect the safety of the parties or the school's educational environment; or
 - (2) **Provide support** during the school's grievance procedures or during an informal resolution process.
- **APPEAL:** Either party may seek modification or reversal of the school's decision to provide, deny, or modify supportive measures if the impartial employee finds that the measures (or lack of measures) are inconsistent with the definition of supportive measures.



Upon dismissal, the Title IX Coordinator shall promptly notify the complainant of the dismissal and the reasons for the dismissal. Additionally, if the dismissal occurs after the respondent has been notified of the allegations, the Title IX Coordinator shall provide such notification to the respondent, which shall occur simultaneously to both parties if the notification is in writing. The Title IX Coordinator shall also inform the complainant, and the respondent if the dismissal occurs after the respondent has been notified of the allegations, of their right to appeal. Dismissals may be appealed on the following bases:

1. A procedural irregularity that **would change the outcome**
2. New evidence that **would change the outcome** and that was not reasonably available when dismissal was made
3. The Title IX Coordinator, Investigator, or Decisionmaker had a conflict of interest or bias for or against complainants or respondents generally or the individual complainant or respondent that would **change the outcome.**

Example Proposed Policy Language

Steps to Follow After a Dismissal of a Complaint Prior to Investigation



If the dismissal is appealed, the district shall: (34 CFR 106.45)

Notify the parties of any appeal, including notice of the allegations, if notice was not previously provided to the respondent

2. Implement appeal procedures equally for the parties

3. Ensure that the Decisionmaker for the appeal did not take part in an investigation of the allegations or dismissal of the complaint

4. Ensure that the Decisionmaker for the appeal has been trained consistent with the Title IX regulations

5. Provide the parties a reasonable and equal opportunity to make a statement in support of, or challenging, the outcome

6. Notify the parties of the result of the appeal and the rationale for the result

If a complaint is dismissed, the Title IX Coordinator or designee shall offer supportive measures as described above in "Supportive Measures" to the Complainant and Respondent.

Example Policy Language



- Either party may appeal the district's decision of a complaint or any allegation in the complaint. (34 CFR 106.45)
- When conducting an appeal, the district shall permit a final appeal to the [which entity] using a process that is in accordance with law and otherwise consistent with the appeal process as specified in [state specific process].
- Consult with legal counsel about how your appeals will be handled.
- Ensure appeal officers have been trained.

Example Policy Language

Appeal of Outcome – Potential Options



- Grounds provided for other, non-sex discrimination/harassment matters
- Similar to Dismissal of Title IX Matter
- Other grounds



Other TIX Responsibilities



The institution's policy may not allow “discipline of a party, witness, or others participating in a school's grievance procedures for making a false statement or for engaging in consensual sexual conduct based solely on the school's determination whether sex discrimination occurred.”



Prohibit schools from disclosing personally identifiable information that they obtain through compliance with Title IX.

Exceptions

- prior written consent of party
- information disclosed to parent of a minor



- A school must take reasonable steps to prevent and address the parties' and their advisors' unauthorized disclosure of information and evidence obtained solely through the grievance procedures.
- Exception: May share evidence gathered in investigation with parties and parents.
- Parties may not share the school's "work product" that may be disclosed during the resolution process.

Trauma-Informed Approach



- Location of the interview
- Impact of trauma on memory
- Non-judgmental
- Acknowledge that some content might be awkward or uncomfortable
- Breaks and conclusion



“Show Your Work”

- ✓ School responded promptly and effectively
- ✓ Investigation File
- ✓ Outreach to request interviews, documents, digital records, videos AND responses
- ✓ Dates of interviews, meetings, etc.
- ✓ Outreach to parties regarding delays
- ✓ Responses to questions about process
- ✓ Summary of investigation information
- ✓ Investigation file
- ✓ Responses from parties to investigation file
- ✓ Additional steps in investigation (if taken) after file review
- ✓ Outcome Letter



What Next?

Certificate for Attending
Training Slides – *no need to post*
Handbook Forms available through
Title IX Consult, LLC

Join Us!



Title IX Informal Resolution Training – 10/18/24

Title IX Consult, LLC Newsletter

First of each month

Title IX Thursdays – FREE Title IX updates

First Thursday of each month 12:30PM Pacific Time

9/5/24 at 12:30 Pacific

www.titleixconsult.com

megan@titleixconsult.com

Sarah@titleixconsult.com