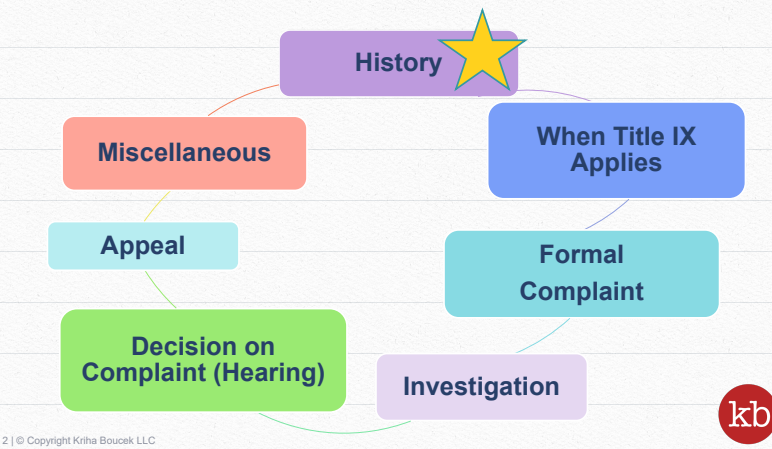


Title IX Final Regulations:
Training for Implementation



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

20 U.S.C. §1681(a)



Title IX of the Education
Amendments Act of
1972
20 U.S.C. §1681
Signed on June 23, 1972

History

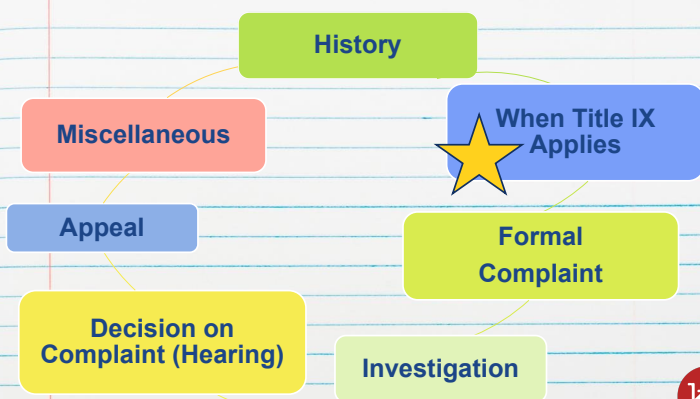
- 1972 : Title IX passed and signed into law
- 1975 : DOE issued first Regulations to implement Title IX (34 CFR Part 106 et seq.)
 - Addressed equal opportunities for men and women in hiring, admissions, athletics, etc.
 - Did not specifically address sexual harassment as a form of sex discrimination
- 1997, 2001, 2011, 2014, 2015, 2017 : DOE's Office for Civil Rights issued policy guidance documents to address sexual misconduct as a form of sex discrimination
- Mid-2017 : DOE started drafting proposed Regulations
- Nov. 29, 2018 : DOE published "Notice of Proposed Rulemaking"
- 2019 : DOE held committee hearings, listening sessions about proposed regulations
- May 6, 2020 : DOE issued Final Regulations (& 2000+ pages explaining them...)
- Aug. 14, 2020* : Final Regulations must be fully implemented
 - *In early June, 17 states (including IL)+ D.C. filed a lawsuit against DeVos and the DOE seeking to block implementation of the final regulations; in May, the ACLU joined with other organizations to file their own lawsuit to block the final rules

Transgender Students and Staff

The Illinois Human Rights Act prohibits discrimination based on the following in Illinois public schools [775 ILCS 5/1-102(A)]:

Race, color, religion, sex, national origin, ancestry, age, order of protection status, marital status, physical or mental disability, military status, sexual orientation, pregnancy, or unfavorable discharge from military service someone's actual or perceived sexual orientation, which is defined to include heterosexuality, homosexuality, bisexuality and gender-related identity.

On June 30, 2019, Governor J.B. Pritzker signed an executive order that protects the rights of transgender students attending public schools.



Who are the parties involved?

- **Complainant:** an individual who is alleged to be the victim of conduct that could constitute a Title IX violation
- **Respondent:** an individual who has been reported to be the perpetrator of conduct that could constitute a Title IX violation
- **Title IX Coordinator:** schools must designate a Title IX Coordinator to coordinate all the school's efforts to comply with the Title IX regulations
- **Investigator:** individual who investigates allegations of Title IX misconduct in a formal complaint and creates an investigative report
- **Decision-Maker:** individual who makes a determination of responsibility based on the investigation report, evidence and statements resulting from a formal complaint; *cannot* be the same person(s) as the Title IX Coordinator or Investigator
- **Appeal Decision-Maker (internal appeal):** individual (or board) who reviews the appeal of any determination of responsibility; *cannot* be the same person as the Title IX Coordinator, Investigator or Decision-Maker

What is Title IX Misconduct Based on Sex?

1. **Quid pro quo offer based on sex:** employee (not student) offers some kind of aid-benefit-service in exchange for unwelcome sexual conduct
2. **Violence based on sex:** sexual assault, dating violence, domestic violence and/or stalking, as defined in the *Clery Act* and the *Violence Against Women Act* (VAWA)
3. **Sexual harassment:**
 - Unwelcome sexual conduct (or conduct based on sex)
 - So severe AND pervasive AND objectively offensive
 - That it effectively denies a person equal access to educational programs or activities

Example Scenarios:

Example 1:

A fifth grader tells her teacher that a student in her class is trying to touch her chest and her private areas, and saying things to her like "I want to get in bed with you" and "I want to feel your boobs." The student says the classmate also put a door stop in his pants and tried to rub up against her in the hallway. This kind of behavior occurred nearly every day over several months. The student tells her teacher this is why her grades have dropped, that she is always nervous and anxious in school now. The girl's mother also met several times with the principal to discuss the behavior.

Does this behavior, as described, meet the definition of sexual harassment under the Title IX regulations? If so, which prong does it fit, and why?

WHAT does Title IX Cover?

"Sexual harassment": covers three classifications of sex-based discriminatory conduct:

1. **Quid pro quo:** employee offers some kind of aid/benefit/service in exchange for unwelcome sexual conduct
2. Any incident of **sexual assault, dating violence, domestic violence, or stalking**, as defined in the Clery Act / Violence Against Women Act
3. Unwelcome conduct that is:
 - Based on sex;
 - So severe AND pervasive AND objectively offensive;
 - That it effectively DENIES a person equal access to educational program or activity.

34 CFR § 106.30(a)

Example 2:

A male student in seventh grade is the target of bullying by football players. On multiple occasions, the players pushed the student against a locker, ridicule him, threaten him, and say things like he “would be better off dead” or that he “should commit suicide.” Given what is said to the student, teachers suspect that he is the target of bullying because he is perceived as “not masculine enough” and not presenting himself in the same way as other male students at the school. On one occasion, the student was bullied in a classroom, and when he asked to leave the classroom to go to the guidance counselor’s office, his teacher told him that he “needed to stop being a baby.”

Does this behavior, as described, meet the definition of sexual harassment under the Title IX regulations? If so, which prong does it fit, and why?



WHAT does Title IX Cover?

“Sexual harassment”: covers three classifications of sex-based discriminatory conduct:

1. **Quid pro quo**: employee offers some kind of aid/benefit/service in exchange for unwelcome sexual conduct
 2. Any incident of **sexual assault, dating violence, domestic violence, or stalking**, as defined in the Clery Act / Violence Against Women Act
 3. Unwelcome conduct that is:
 - Based on sex;
 - So severe AND pervasive AND objectively offensive;
 - That it effectively DENIES a person equal access to educational program or activity.
- 34 CFR § 106.30(a)



Example 3:

A female high school student is the only female student on the school’s wrestling team. Over the course of about three years that the student was on the wrestling team, the (male) coach made the following comments:
- When the female student was wrestling with a male student, the coach said to him, “How does it feel knowing that’s probably one of the only women you’ll ever have on top of you?” Another time, while the same two students were wrestling, the coach said to the male student, “she’ll be the only girl you’ll touch.”
- To the female student directly, the coach said, “You’ll have to be a ‘boy’ on the team,” at least twice. He also said that she would have to have “strap-ons” [referring to prosthetic penises] at least four times.
- The coach asked the student if she was having her menstrual cycle during a wrestling match, because he could see her “pad” through her singlet, and then laughed about it with another coach.

Does this behavior, as described, meet the definition of sexual harassment under the Title IX regulations? If so, which prong does it fit, and why?



Title IX vs. Illinois Sexual Harassment

- Illinois: “**Sexual Harassment**” is defined as unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature.
- Title IX: “**Title IX Sexual Harassment**” is defined as Conduct on the basis of sex that satisfies one or more of the following: (1) A District employee conditions the provision of an aid, benefit, or service 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 District’s education program or activity; or; (3) *Sexual assault, dating violence, domestic violence, or stalking*

WHERE does Title IX Apply?

“Educational Programs or Activities”: includes—

- Locations, events, or circumstances over which the school exercised substantial control over both the respondent AND the context in which the sexual harassment occurs; and
- Any building owned or controlled by a student organization that is officially recognized by a postsecondary institution.

“Against a person in the United States”:

- Sexual harassment that occurs abroad does not fall within the purview of Title IX and its implementing Regulations.
- BUT schools can choose to respond to sexual misconduct that occurs abroad via alternative means in Student/Employee Codes of Conduct.

CFR §§ 106.30(a), 106.44(a)

Complainant’s Enrollment

- At the time of filing a Title IX complaint, the Complainant must be participating in or attempting to participate in the school’s educational program or activities.



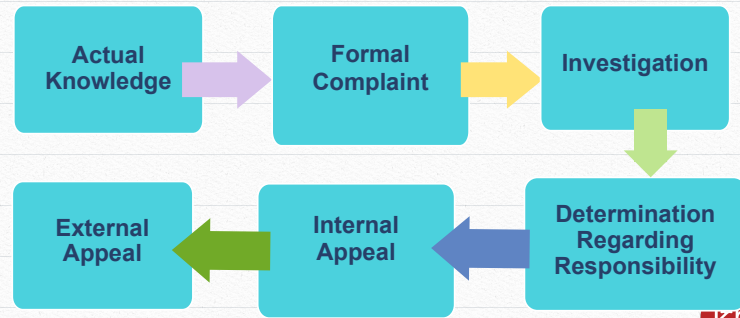
Examples

- During class or in the hallways?
- On the bus?
- On a field trip to the Zoo?
- At an extra-curricular event? (home v. away event ...?)
- At a student's home?
- On a Spanish Immersion Trip in Mexico?

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6 Phases of the Title IX Process



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Actual Knowledge is Required

- Title IX applies when school personnel have actual knowledge either informally through a verbal or written report (including anonymous reports) of sexual harassment or allegations of misconduct based on sex.
- In K-12 school systems, "any employee" can have actual knowledge.

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Discussion

A bus driver, on his daily route, nearly every day sees the same seventh grade girl get on at the third stop, and then two stops later, another seventh grade boy gets on and sits next to her. The first several times, she would get out of her seat and move away, but he would follow her or block her in to the seat. He appeared to be saying things that made her appear upset, but the driver couldn't hear what they were. After a few weeks, she stopped trying to move but would stare out the window and pull her sweatshirt up over most of her face when he sat down. The bus driver asks the girl if the boy is making her uncomfortable, and she says that every day, he says he wants to "hold her down and do what he wants with her," which makes her scared. *After his route ends, the bus driver calls the school principal to tell her about this incident, and the principal relays the information to the Title IX Coordinator.*

You are the Title IX Coordinator. What are your next steps, when you hear this report?

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Formal Complaint

Requirements of Formal Complaint:

- A document (electronic or physical)
- Alleging sexual harassment, and
- Requesting an investigation

EITHER:

- Filed by a Complainant and signed by this individual [may not be anonymous]
 - OR
- Signed by Title IX Coordinator. (see next slide)

Procedure for filing a Formal Complaint must be included in the school's Title IX policies that are "prominently displayed" on website and/or in Student and Employee Handbooks, along with Title IX Coordinator's contact information. Form may be provided via web portal.

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Formal Complaint

➤ Formal Complaint triggers several possible responses:



Formal Title IX Complaint

- School personnel must respond *promptly* and in a manner that is *not deliberately indifferent*.
Promptly: without unnecessary delay under the circumstances
Deliberately indifferent: clearly unreasonable in light of known circumstances
- Must treat complainants and respondents *equitably*.
Equitably: equal, fair and impartial
- Must offer *supportive measures* to both complainants and respondents
Supportive measures: non-punitive individualized services offered free of charge as appropriate in order to restore equal access.

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Formal Complaint Signed by School Staff

There are some circumstances under which the school district's Title IX coordinator "signs" a formal complaint instead of the complainant

When would this be necessary?

- X If the complainant is not willing or eligible (e.g., has graduated)
- X A potential safety risk continues for other students/employees
- X A staff member is accused of committing sexual misconduct against a student

Examples:

- X The school has actual knowledge of a pattern of alleged sexual harassment by a perpetrator in a position of authority
- X The school wishes to investigate allegations in order to determine whether it has probable cause to find that an employee is engaging in sexual misconduct
- X A Title IX coordinator receives multiple reports of sexual harassment against the same respondent

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Informal Resolution is (Sometimes) an Option

- After a formal complaint is filed, the parties may agree to engage in information resolution of the complaint
- Requirements for informal resolution:
 - X Can never be compelled; parties must mutually agree
 - X May be facilitated at any time before a determination regarding responsibility is reached
 - X Parties must provide written consent to participate in the informal resolution process
 - X Before conclusion of the informal resolution process, either party has the right to withdraw their consent and return to the grievance/complaint procedure
- Keep in mind that school districts are not allowed to use informal resolution for allegations of an employee's sexual misconduct against a student

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Impartiality (slide #1)

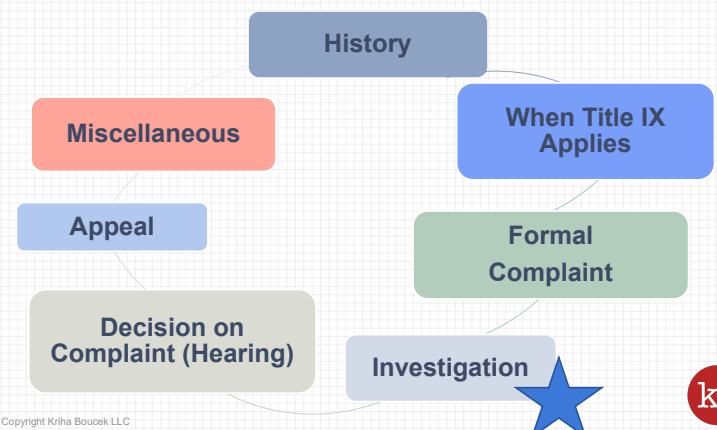
- We all have biases, whether conscious or unconscious
 - X <https://implicit.harvard.edu/implicit/>
 - X <https://trustandjustice.org/resources/intervention/implicit-bias>
- Resist the urge to categorize people or situations
- Reflect critically on your own identity and experience
- Recognize when your identity and experience may affect your judgment
- Hold yourself accountable and seek opportunities for continuous improvement

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Impartiality (slide #2)

- Being impartial means setting aside preconceived beliefs and the urge to judge.
- Being impartial means listening equally to all sides and perspectives and focusing on understanding the viewpoints of all involved.
 - X Listening impartially to others takes **time**
 - X Listening impartially requires **awareness** of one's own biases
 - X Listening impartially means **asking questions that open up dialogue**, rather than close it down
- Strategies for demonstrating impartiality include summarizing what you have heard and reflecting back. This can help you avoid bias and ensure that you are correctly understanding what the person has to say.
- Acknowledge where differences between accounts/perspectives exist; rather than seek to smooth over differences (which is human nature), seek more details.
- Take care that your words, tone of voice and body language are neutral and open.

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Investigations — An Overview

- Burden is on the school (not the parties) to gather evidence
- Evidence that is legally privileged may not be used; parties can opt to waive this privilege
- Equal opportunity for parties to present witnesses
 - Fact witnesses
 - Expert witnesses
- School is not able to restrict either party from discussing allegations or to gathering evidence
- Parties have an equal opportunity to select 'advisors' of their choice (may be attorney) at their own expense
- School staff must provide notice to all parties of hearings, interviews and meetings to allow time to prepare
- Equal opportunity for parties to inspect/review all evidence to ensure that each party can respond in a thoughtful and meaningful way
 - Must send all evidence to parties before final report created
 - Must allow at least 10 days to respond

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Investigations — Evidence to be Reviewed

- Gather any other relevant documentation available, such as documents, files, audio and video recordings, security camera footage, entry/exit logs, text messages, emails, social media posts, physical evidence, police reports, diary entries, etc.
 - X Privileged information, such as medical records, educational records or correspondence between a party and their lawyer is generally off limits, but a person may voluntarily offer this information
 - X Think about what evidence could potentially corroborate (support) the statements made in the interviews
 - X If a search is necessary, remember it must comply with the Fourth Amendment
- Once compiled, send all evidence to complainant and respondent (and their advisors) with plenty of time (at least 10 days) to meaningfully respond
- Refrain at this step the credibility of the parties or their statements, but document details that *do* and/or *do not* align with other parties' accounts and other relevant evidence

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Investigations — Tips and Strategies

- Plan investigation scope and timeline
- Identify and interview all involved parties and witnesses
 - X Interview the complainant and the respondent (separately) about what happened; additional interviews may be needed as evidence is uncovered
 - X Ask open-ended questions about the incident(s) in the complaint
 - Pre-script standardized, open-ended questions
 - Use neutral language
 - Allow time for follow-up questions
 - Refrain from using judgmental or projecting language
 - X Ask each person for the names of potential witnesses for additional interviews
 - X Understand and implement trauma-informed interviews

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Corey's Law and Student Interviews

- Corey's Law requires notice to parents before a student is interviewed by law enforcement, an SRO, or school security personnel
- Must make reasonable efforts to allow parents to be present during the interview if held on school grounds
- 105 ILCS 5/22-85

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Atwell Notice/Garrity Warning

Public employees do not have the right to remain silent. You can compel them to talk to you about the information contained in the complaint, even if the complaint involves criminal activity. However, you must give them a warning that explains that the information they share with you cannot be used against them to prosecute them.

Allow Other Investigations to Run Their Course*

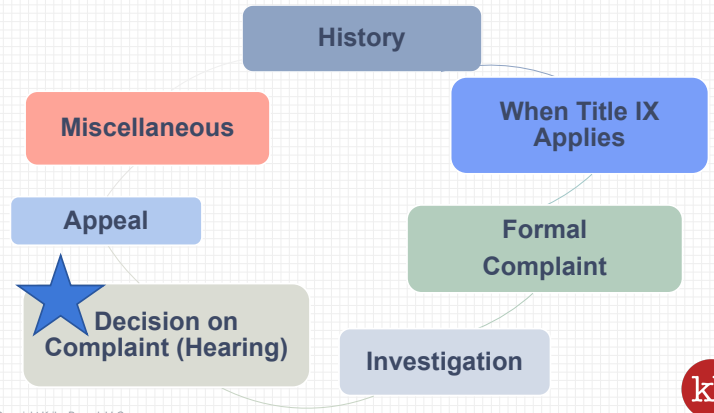


*Usually - Check with legal counsel



Investigation — The Written Report

- The investigator prepares a final written investigation report that fairly summarizes all the relevant evidence, without making a determination of responsibility or deciding 'fault'
- The investigator does not determine the credibility of parties, witnesses or evidence
- The investigator gathers all relevant evidence and turns everything over to the decision-maker to weigh credibility and make a decision (this happens during the next phase)
- The final written investigation report must be sent to each party
- Keep in mind that the complainant has the right to withdraw the complaint at any time
- The parties may also mutually agree to participate in the informal resolution process at any time



Hearing / Opportunity to Question



Live Hearing

- Presided over by Decision-maker (individual or group)
- Must be **direct, oral, live** questioning of parties and witnesses, including cross-examination
 - May be facilitated by technology, as long as simultaneous
 - Parties may not directly ask questions; only **advisors** for parties
 - **Advisors** for parties must be able to ask opposing party and witnesses all relevant questions
 - If a party does not have an **advisor**, school must appoint one
- If a party/witness will not submit to cross-examination, then Decision-maker **cannot use any** statements or evidence from that person in making decision
- Hearing must be recorded (audio or film or transcript), and made available to all parties for inspection and review after hearing

34 CFR § 106.46(b)(6)(i)

Live Hearing

Technology

- Upon request of any party, must permit cross-examination to occur with the parties located in separate rooms with technology facilitating the ability of all participants to see and hear the person answering questions
 - ****Testifying party must be seen and heard by all in real time, but testifying party does not have to be able to see all other parties**
 - *(i.e., if the Complainant is testifying, Complainant must have video/audio on, but Respondent does not have to be seen by Complainant)*
- Hearings must still be recorded, or have a transcript of all testimony created, including when technology is used
- Ensure all staff have been trained on the technology in use
- Ensure technology used does not expose the testimony to anyone outside those participating in the hearing

34 CFR § 106.46(b)(6)(i)

Opportunity to Question

For K-12 schools only, and only if there is no live hearing, then must provide an opportunity for each side to ask each other written questions:

- After investigative report sent to each party, each party must have the opportunity to submit written, relevant questions that it wants from any other involved party or witness
- School must facilitate written back-and-forth:
 - Must provide the answers to all the questions requested
 - Must allow for additional, limited follow-up questions from each party
- Same rules about relevance as in previous slide

34 CFR § 106.46(b)(6)(ii)

Relevancy of Questions

- Parties may only be asked relevant questions
- Does it tend to make a fact more or less probable than without that information?
- Is it likely to prove or disprove a fact or an allegation?
- Same standard for live hearing and for written opportunity to question
- Decision-maker must determine relevance of questions as they are asked, and before they are answered



Relevancy of Questions

Questions and Their Relevancy

- Parties may only be asked *relevant* questions
 - Legally privileged information cannot be used*
 - No party's treatment records can be used without voluntary written consent*
 - Questions about complainant's "prior sexual behavior or predisposition" are NOT relevant and must be excluded, UNLESS offered either 1) to prove someone else committed the alleged conduct, or 2) to prove consent, because it has to do with sexual behavior between complainant and respondent**
 - *Prior consent to past sexual conduct does not imply future consent*
- Decision-maker must determine relevance of questions *as they are asked*, and *before* they are answered



Decision-maker reviews investigative report, all evidence, all statements/answers from parties and witnesses during any live hearings or opportunity to question.

Decision-maker weighs the credibility of all relevant evidence and statements.

Next phase: Determination regarding Responsibility. . .



Standard of Review

The decision-maker applies the school district's chosen standard of evidence for Title IX investigations:

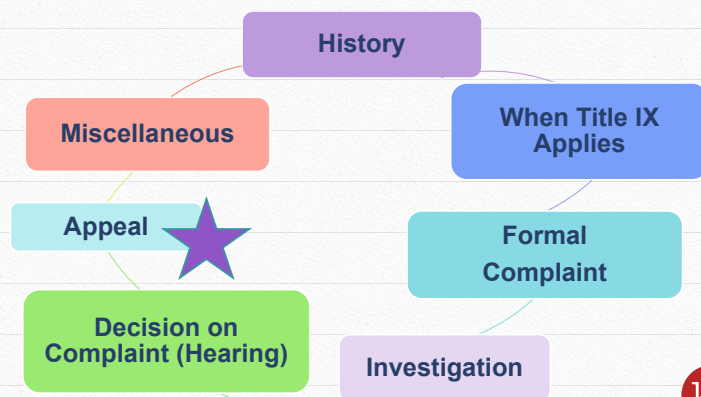
- Option 1:** "preponderance of the evidence" standard
- Option 2:** "clear and convincing" standard

Each school district must choose one of these standards for ALL sexual harassment investigations (those involving just students, just employees, and both students and employees)



The Written Decision

- The decision-maker issues a written determination regarding responsibility that includes:
 - Identification of allegations of sexual harassment that meet Title IX definition
 - Description of all procedural steps
 - Findings of fact supporting the determination
 - Conclusions regarding application of school's disciplinary code to the facts
 - Rationale for the decision regarding *each* allegation and determination regarding responsibility
 - Any disciplinary sanctions imposed upon a party
 - Any other remedies and supportive measures recommended or warranted
 - Procedures and permissible bases for appeal
- School must provide written determination to parties simultaneously
- Title IX Coordinator implements remedies / coordinates disciplinary consequences



Appeals

- Parties can appeal:
 - The determination of responsibility, OR
 - School's decision to dismiss complaint
- Bases for appeal:
 - Procedural irregularity that *affected the outcome*
 - New evidence not reasonably available previously that *could affect outcome*
 - That Title IX Coordinator OR Investigator(s) OR Decision-maker(s) had a bias or conflict of interest that *affected the outcome*
 - Generally, either for or against complainants or respondents, OR
 - Specifically, either for or against an involved party
 - Another basis for appeal allowed by the school, as long as it is equally available to either party

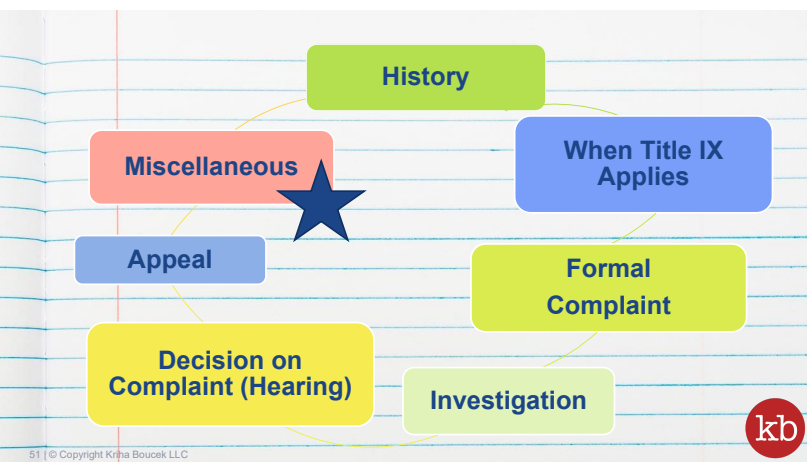
34 CFR § 106.46(b)(8)



Appeals

- School must do following for an appeal:
 - Notify the other party in writing when an appeal is filed and on what basis
 - Implement appeals procedure equitably
 - The appeals decision-maker must not have been involved in the Title IX complaint process thus far
 - The appeal decision-maker must be trained and is neutral/impartial
 - Give both parties a reasonable, equal opportunity to submit a written statement about the outcome of the investigation phase
 - Issue a written decision describing the result (final decision) and rationale
 - Provide decision simultaneously to all parties
- Can a Title IX matter be appealed any farther? Presumably yes, in a court of local jurisdiction and potentially also to OCR

34 CFR § 106.46(b)(8)



Recordkeeping

The Title IX Coordinator must keep written records for 7 years of all of the following:

- Title IX complaints, including:
 - Supportive measures provided
 - If no supportive measures provided, document why not warranted
 - Basis for school's conclusion that its response was not deliberately indifferent
 - Documentation of measures designed to restore or preserve equal access for the complainant
- Investigation reports and records
- Recordings/transcripts of hearings (if any)
- Written determinations regarding responsibility
- Disciplinary consequences (if any)
- Appeals
- Informal Resolutions

34 CFR § 106.46(b)(10)



Training

All training materials used to train

- Title IX coordinator
- Investigator(s)
- Decision-maker(s)
- Appeals decision-maker(s)

Training must include:

- Title IX regulations
- How to use technology
- How to avoid prejudgment
- How to serve impartially
- How to determine issues of relevance of questions or evidence

Training materials must be kept for seven years AND posted publicly to school's website for public review

34 CFR § 106.46(b)(10)(i)(D)



Retaliation is Prohibited

- Retaliation is prohibited against anyone involved in a Title IX complaint, investigation, or grievance procedure
- The exercise of rights protected under the First Amendment does not constitute retaliation that is prohibited
- School can charge someone with a disciplinary violation for making a "materially false statement in bad faith" during grievance proceeding



School Board Policy Integration

Policy Revisions to Align with Title IX Regulations

- Section 2:260 – Uniform Grievance Procedure
- Section 2:265 – Title IX Policy
- Section 7:10 – Equal Educational Opportunities
- Section 7:20 – Harassment of Students Prohibited



Next Steps for Schools:

1. Decide who will fulfill the various roles
2. Update policies and procedures in accordance with the Regulations
 - Who needs to be involved?
 - Approval by the Board? Committee? Unions?
3. Train staff
4. Communicate information to all stakeholders
 - Update website, handbooks, etc.
5. For any questions that arise, consult experts or counsel



Questions?

REMEMBER
WHY YOU
STARTED

