

## HANDOUT

### Details

#### 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

#### Location of the Misconduct

- Title IX only applies to conduct that occurs during educational programs or activities, both on-campus and off-campus.
- This includes locations, events or circumstances over which the school exercises substantial control over the respondent (perpetrator) and the context in which the misconduct occurs.
- A school district may address sexual harassment affecting its students or employees that falls outside Title IX's jurisdiction in any manner the school district chooses, including providing supportive measures and/or pursuing discipline.

## How Do Schools Fulfill Their Title IX Obligations?

### 34 CFR §§ 106.6(d)-(h), 106.44(a)

**General Response:** A school 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*.

- **“Deliberately indifferent”**: clearly unreasonable in light of known circumstances
- **Must treat complainants and respondents equitably**
- Must offer **supportive measures** to an alleged victim
- Must not impose disciplinary measures against Respondent until full grievance process carried out

**Maintaining other Legal Obligations:** While responding to Title IX allegations, schools should not compromise other rights including:

- **First Amendment**: e.g., freedom of speech
- **Fifth/Fourteenth Amendments**: due process rights
- **FERPA requirements**
- **Title VII obligations**
- **Parents’ rights** to act on behalf of minor child
- **State laws and regulations**
  - *BUT* if State law conflicts with federal law, then federal law preempts State law

## 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

## 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

## Opportunity to Question

- 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
- What will be unique in this process is the 'back and forth' nature of the questions between the parties, with the decision-maker determining the relevance of all questions posed in writing

Parties may only be asked *relevant* questions

- Legally privileged information cannot be used
- Treatment records may not be used without voluntary written consent
- Questions about a party's "prior sexual behavior or predisposition" are not considered 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 past sexual behavior between complainant and respondent

For K-12 schools only, when no live hearing is held, then the school district must provide an opportunity for each side to ask each other written questions. These written questions are 'funneled' through the decision-maker.

- After the investigative report is 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 this written back-and-forth between the parties:
  - Each party must provide the answers to all the questions requested
  - The decision-maker must allow for additional, limited follow-up questions from each party, as he/she determines relevant

## 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 basis 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
- Basis 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
- 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