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Title IX Amended Regulations Update and Review

IASPA
2024



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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.”

20 U.S.C. §1681(a)

The Evolution of Title IX

1972 Title IX passed by Congress; sex harassment not included in definition of sex based discrimination

1980's Courts universally held that sex-based discrimination includes actions "based on sex" including sexual harassment, sexual assault, and sexual violence

1990's Department of Education attempts to create processes and parameters for measuring sex based discrimination in schools

1999 Davis v. Monroe County School District defines sexual harassment for the first time

The Evolution of Title IX

2000's Department of Education continues to define sexual harassment and provide guidance to schools

2011 Obama administration issued guidance on dating violence in schools. First guidance to recognize rights of transgender students

2016 The Obama Administration issued guidance protecting transgender students

2017 The Trump Administration revoked all previous guidance on Title IX, began the process of revising regulations

The Evolution of Title IX

2020 *Bostock v. Clayton County, Georgia*: Title VII prohibits any discrimination because of sex, even discrimination based on homosexuality or transgender status

2020 Trump Era Title IX regulations take effect, focus extensively on process and due process, including requirements for formal complaint, siloed investigation and decision making process

2021 The Biden Administration issues guidance in interpreting the Trump era regulations, attempts to expand regulatory reach, and initiates revisions to the regulations

2024 The Biden Era Title IX regulations take effect, revoking prescribed process requirement, redefining sex harassment, and adding regulatory protections for LGBTQ+ individuals

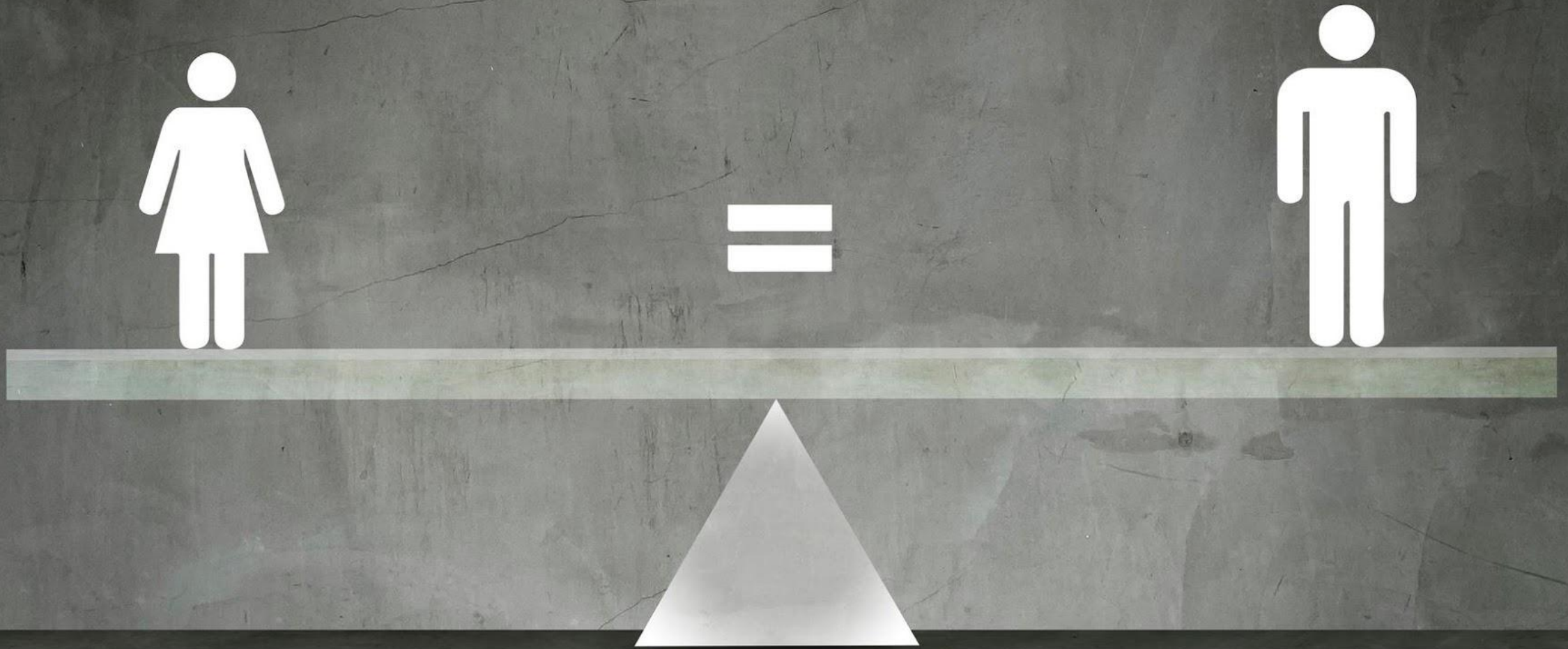
August 2024

Effective Date of New Regulations

Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday
				1	2	3
4	5	6	7	8	9	10
11	12	13	14	15	16	17
18	19	20	21	22	23	24
25	26	27	28	29	30	31



Sex Equity



“It is the policy of the State of Illinois and the State Board of Education that *no person shall be subjected to discrimination on the basis of sex in any program or activity supported by school district funds.*”

Sex Equity Rules Remain Unchanged



- Sports
 - Balance of interests
- Facilities
 - Equitable access
- Classes
 - Non-segregated, except in specific circumstances

Changes in the New Regulations

Expanded protections for LGBTQ+ individuals

Expanded protections for pregnancy related conditions

New definition of Sexual Harassment

Streamlined complaint process

No more prescribed roles

More training

More general responsibilities for school districts to prevent sex discrimination

More responsibility for Title IX Coordinator

Expanded Protections for LGBTQ+ Individuals

Title IX will now extend to prohibit discrimination based on sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity.

- Consistent with the Executive Orders and Notice of Interpretation
- Relying on decision in *Bostock* by the US Supreme Court

Rights of Transgender Students Athletes is not addressed in the new regulations

- Anticipate these regulations in the fall or next spring

Expanded Pregnancy Protections:

More specific definition of “pregnancy” and “conditions related to pregnancy”:

- Includes potential, presumed, past pregnancies
- Recovery and related conditions

More specific requirements for lactation spaces:

- Clean; shielded from view; free from interruption
- NOT just a bathroom
- Applies for students and employees

New requirements for providing information to pregnant students:

- Inform students of their rights to no discrimination
- Offer reasonable accommodations / academic adjustments
- Access to separate and comparable educational programs, if wanted
- Allow voluntary leave
- Provide lactation space
- Applicable grievance procedure

Key Definitions

- ***Disciplinary sanctions*** means consequences imposed on a respondent following a determination under Title IX that the respondent violated the recipient's prohibition on sex discrimination.
- ***Peer retaliation*** means retaliation by a student against another student.
- ***Relevant*** means related to the allegations of sex discrimination under investigation as part of the grievance procedures under § 106.45, and if applicable § 106.46. 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.
- ***Remedies*** means measures provided, as appropriate, to a complainant or any other person the recipient identifies as having had their equal access to the recipient's education program or activity limited or denied by sex discrimination. These measures are provided to restore or preserve that person's access to the recipient's education program or activity after a recipient determines that sex discrimination occurred.

Key Definitions

- **Retaliation** means intimidation, threats, coercion, or discrimination against any person by the recipient, a student, or an employee or other person authorized by the recipient to provide aid, benefit, or service under the recipient's education program or activity, for the purpose of interfering with any right or privilege secured by Title IX or this part, 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 this part, including in an informal resolution process under § 106.44(k), in grievance procedures under § 106.45, and if applicable § 106.46, and in any other actions taken by a recipient under § 106.44(f)(1). Nothing in this definition or this part precludes a recipient from requiring an employee or other person authorized by a recipient to provide aid, benefit, or service under the recipient's education program or activity to participate as a witness in, or otherwise assist with, an investigation, proceeding, or hearing under this part.

Key Definitions

- ***Supportive measures*** means 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 recipient's education program or activity, including measures that are designed to protect the safety of the parties or the recipient's educational environment; or
 1. Provide support during the recipient's grievance procedures under § 106.45, and if applicable § 106.46, or during the informal resolution process under § 106.44(k).

How Do We Define Sex Discrimination Under the 2024 Title IX Regulations?

Davis v. Monroe County Board of Education

526 U.S. 629 (1999)

FACTS:

A fifth grader told her teacher that a student in her class is trying to touch her chest and her private areas and said things to her like “I want to get in bed with you” and “I want to feel your boobs.” The student said 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 told 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. Nothing was done by the school district to stop the behavior.



Davis v. Monroe County Board of Education

526 U.S. 629 (1999)



DECISION:

School Districts that are deliberately indifferent to peer on peer sexual harassment may be held liable for money damages for their deliberate indifference.

To avoid deliberate indifference, School Districts must respond in a way that is not clearly unreasonable in light of the known circumstances.

The Court is specific that this does not require School Districts to discipline every student accused of sexual harassment.

Davis v. Monroe County Board of Education

526 U.S. 629 (1999)

DEFINITION OF SEXUAL HARASSMENT

Sexual harassment under Title IX constitutes conduct based on sex that is so severe AND pervasive AND objectively offensive that it effectively denies a person access to the educational programs and activities of the school district.



Bostock v. Clayton County, GA *590 U.S. 644 (2020)*

- Title VII litigation addressing protections of homosexual and transgender employees from sex discrimination
- Decision addressed three cases where employees were fired shortly after being identified as homosexual or transgender
- Employers argued that homosexuality and transgender status was not identified by Title VII as protected classes so termination based on homosexuality or transgender status is not sex discrimination
- Supreme Court held that Title VII protects employees for any discrimination that occurs “because of sex” and that there is no way to argue that termination because of homosexuality or transgender status is not because of sex
- Advocate for LGBTQ+ rights assert that this ruling applies to Title IX because of the similarity in the statutes

What is Sex Based Discrimination Under New Regulations

- Quid Pro Quo – Offer of aid, benefit, or service in exchange for unwelcome sexual conduct
- Violence based on sex – sexual assault, dating violence, domestic violence, and/or stalking defined by federal criminal statute
- 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 recipient's education program or activity

Determining Hostile Environment Harassment

- **Fact specific review:**
 - What degree was their access impacted?
 - Type, frequency, duration of conduct
 - Age, role in the program, previous interactions between parties relevant to the effects of the conduct
 - Location and context of conduct
 - Systematic harassment concerns



What about Illinois Sexual Harassment?

"Sexual Harassment" is defined as unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature.

What about Illinois Sexual Harassment? (IHRA - Employment)

Sexual Harassment means any unwelcome sexual advances, requests for sexual favors, or any conduct of a sexual nature when:

- Submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment
- Submission to or rejection of such conduct by an individual is made either explicitly or implicitly a term or condition of an individual's employment
- Submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or
- Such conduct has the purpose or effect of substantially interfering with the individual's work performance or creating an intimidating, hostile or offensive working environment.

BREAK OUT



Does this behavior, as described, meet the definition of sexual harassment under the Title IX regulations? Why/not?

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.

How Do We Process Complaints under the 2024 Regulations?

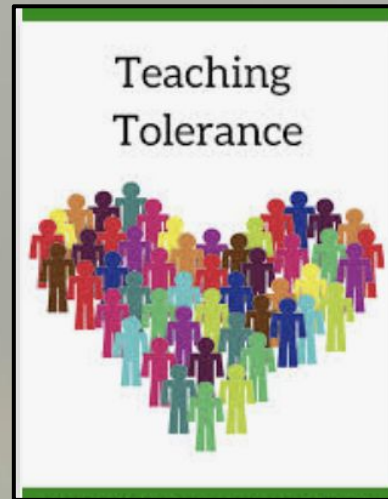
Impartiality



<https://trustandjustice.org/resources/intervention/implicit-bias>



<https://implicit.harvard.edu/implicit/>



www.facinghistory.org



Impartiality

Listen.

Really listen.



Constructive Knowledge

Requirements:

- Can't be "deliberately indifferent"

Possible Outcomes:

- Supportive measures; no further action; OR
- Complainant decides to file Formal Complaint; OR
- Title IX Coordinator signs Formal Complaint

Complaint

Requirements:

- Notice of allegations
- Notice of all procedures

Possible Outcomes:

- Supportive measures AND:
- Investigation, OR
- Dismissal of complaint, OR
- Informal resolutions, OR
- Emergency removal + investigation

Investigation

Requirements:

- Evidence gathering
- Opportunity to review and respond to evidence

Possible Outcomes:

- Complaint withdrawn
- Informal resolutions

Record Keeping

Requirements:

- All documentation of constructive knowledge
- All documentation of supportive measures
- All documentation of complaint process

Appeals

Requirements:

- Notice of appeal
- Equal opportunity to respond

Options:

- Upheld
- Overturned for bias, procedural error, or new evidence

Determination regarding Responsibility

Requirements:

- Written investigation and findings
- Provided to both parties

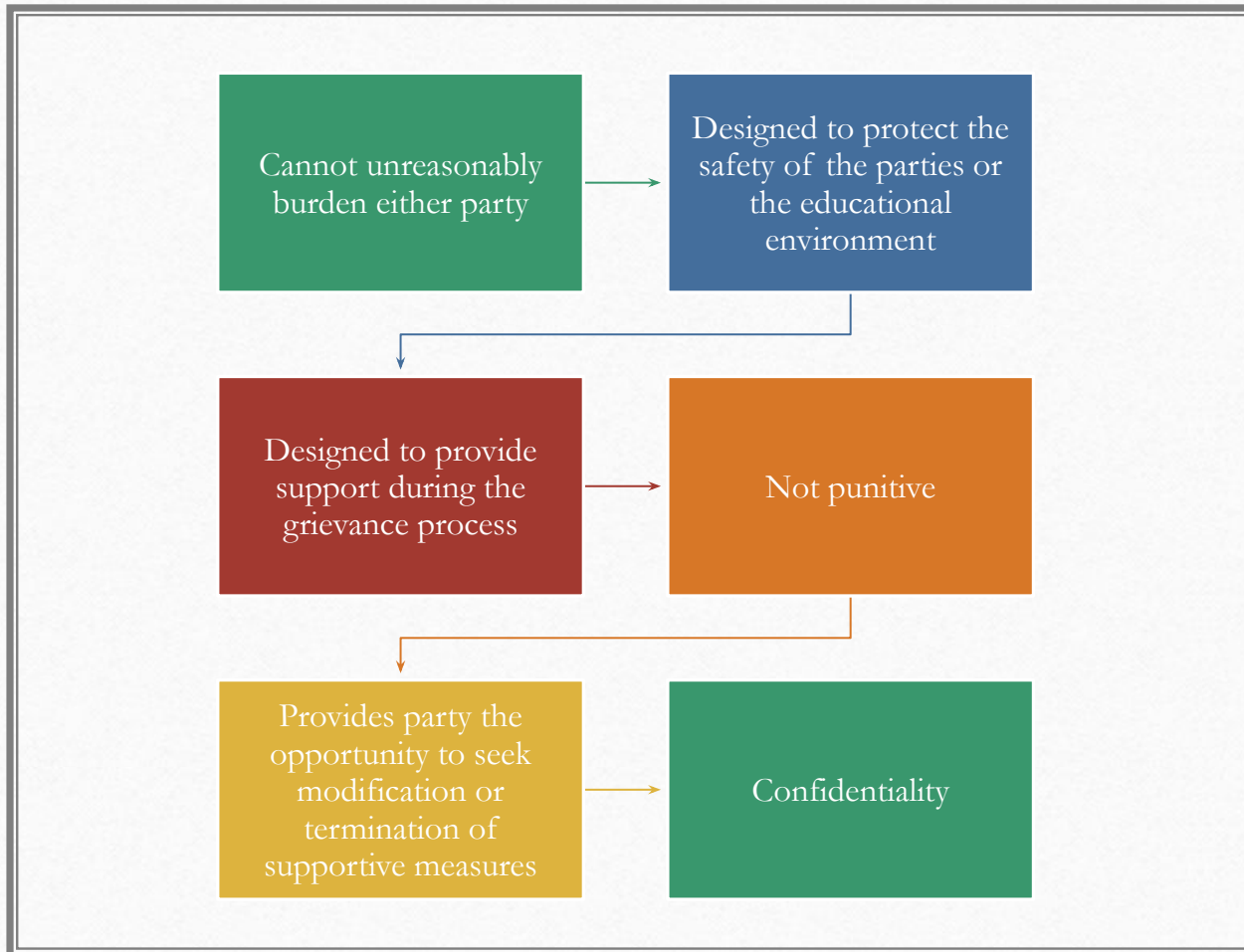
Options:

- Remedies/Discipline
- Dismissal
- Supportive measures

Supportive Measures: What are they?



- Counseling
- Extension of deadline
- Modification of work/class schedules
- Campus escort services
- Mutual restrictions on contact
- Changes in housing/ work locations
- Leaves of absence
- Increased security



Considerations for Supportive Measures

Informal Resolution Encouraged



Can agree to informal prior to any complaint being filed



Not available where the allegations include a staff/employee and a student



Still requires agreement by both parties; still can be withdrawn at any time



Facilitator of informal process cannot be the Title IX Coordinator, investigator, or decision-maker.

What does informal resolution look like?



Lead by a trained facilitator that is not the Title IX Coordinator, Investigator, Decision Maker or Appeals Decision Maker



Employs techniques in dispute resolution like restorative justice, mediation, arbitration, facilitated dialogue, peace circle, negotiated agreement



Allows parties a say in the outcome



Sanctions can still be imposed



Supportive measures should be imposed



Confidential

Knowledge of Discrimination

- Modified rule from “Actual Knowledge” standard
- **New Standard:**
 - Information about conduct reasonably may constitute sex discrimination.
- Still required to report to Title IX Coordinator promptly and effectively.
- Need to provide possible complainants with contact information for Title IX Coordinator and information on how to make a complaint
- Special rule for “Confidential Employees”

School Responsibility for Conduct

- Under previous regulations, schools were responsible when respondent and circumstances were under their control and complainant was attempting to access programs or services
- Now applies to conduct that contributes to the hostile school environment
 - Can be outside of school
 - Includes programs that a school district collaborates with others to provide
 - YMCA before and after school programs
 - Head Start
 - Open gym / swimming pool hours for members of the community, etc.

School Response to Complaint

New rules for filing a complaint / responding to a complaint

- Students can now report sex discrimination for the purpose of seeking assistance only, or for requesting the grievance procedure
- More support for resolving through an informal process

More response by the District is required:

- Must respond promptly AND take effective actions to end the discrimination, prevent recurrence, and remedy the effects.
- Must take action to monitor for sexual harassment – preventative measures now required
- Informal grievance option is available regardless of a formal grievance request

Revisions to Grievance Process:

General Requirement Changes:

- Investigator and Decision-maker can be the same person
- Title IX Coordinator can be the Decision-maker
- Can dismiss a complaint prior to the investigation

Changes to Investigation Stage:

- Combined "opportunity to question" phase into the investigation stage
- Good-bye 10-day timelines
- No need to send all evidence to both parties – just offer each a chance to review and respond.

Changes to Decision-Making Stage:

- Going to apply Preponderance of the Evidence standard unless Clear and Convincing is used in other contexts (What is used in your Uniform Grievance procedure?)
- Written decision is more streamlined –
 - Was there discrimination and why
 - How to appeal the decision.

Tips for Investigations

The background of the slide is a blurred photograph of several people in a meeting or interview setting. The focus is on the text in the foreground, while the people in the background are out of focus, showing their heads and shoulders. The lighting is warm and indoor.

Investigations: Tips and Tricks

Gather artifacts before interviews

Open-ended questions

Neutral language

Allow time for follow-up questions

Use trauma-informed strategies

Additional Considerations for Witnesses

Should you record the interview?

Should you have the witness sign a statement?

For student witnesses, should parents be involved?

For staff witnesses, should union representatives be involved?

Should the employee be placed on leave during an investigation?

Should you involve law enforcement or DCFS?

What is Involved in Decision Making?



Relevancy of Evidence

- Questions are relevant when they seek evidence that may aid in showing whether sex discrimination occurred, and evidence is relevant when it may aid a decisionmaker in determining whether the alleged sex discrimination occurred

Burden of Proof

Preponderance of the evidence standard unless another standard is used in similar cases

Written Report

Complaint

Process

Credibility of
Evidence and
Witnesses

Determination
of
Responsibility

Remedies

Right to
Appeal

Retaliation
Prohibited

What Else Has Changed?

Updated Title IX Coordinator Responsibilities

- More flexibility to file a complaint on their own - consider list of factors:
 - Why did Complainant not file a complaint?
 - Safety concerns?
 - Risk of future issues?
 - Relationship / age / dynamic between the parties.
- More recordkeeping responsibilities
- Can delegate duties to others
- More training requirements
- Obligations to notify pregnant students of their rights under the Rules

IEP Team Involvement



Supportive Measures



Outcome of complaint



Remedies

Updated Rules for Training:

- **More Training**

- X ALL employees must get some level of training on Title IX
 - Obligations to address sex discrimination in the educational setting
 - What is “sex discrimination” and “why do I need to know?”
 - Who do I tell when I see it?
 - What does it mean to have constructive knowledge (Less than the old standard of Actual Knowledge)
- X Role players and persons in a position to apply the grievance procedure need training on:
 - Grievance procedure
 - Impartiality, conflict of interest, bias
 - Relevancy in evaluating evidence
- X Title IX Coordinator also must be trained on record-keeping requirements.
- X Informal resolution process facilitator must be trained on the internal process and how to be unbiased and impartial.

Record Keeping



Complaints: all records documenting the informal resolution or grievance process and the resulting outcome



Constructive knowledge: documentation of actions taken to comply with Title IX once the Title IX coordinator had knowledge of conduct that may reasonably constitute sex discrimination



Training: All materials used to provide training to staff and the Title IX Coordinator

Policy Compliance:

- Notice of Non-Discrimination must include:
 - ✗ Contact information for Title IX Coordinator
 - ✗ Where to find the policies and procedures
 - ✗ How to make a complaint
- Posting Notice on website, handbooks, and bulletin boards
- Update Title IX grievance procedure to reflect more stream-lined approach
- Rely on Uniform Grievance Procedure as your template
- PRESS anticipates having new Title IX draft policies to members by August 1. Boards should anticipate taking these up for first reading as soon as their own procedures allow.

Questions?

REMEMBER
WHY YOU
STARTED

