NEW TITLE IX REGULATIONS

Role Training

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July 13, 2021

SCHOOLS LEGAL SERVICE

Schools Legal Service is a joint powers entity providing legal and collective bargaining services to public education agencies since 1976.

1

TITLE IX ROLES

- Title IX Coordinator
- Informal Resolution Facilitator
- Investigator
- Decision Maker
- Appeal Decision Maker

Each position requires specific training

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2

REQUIRED TRAINING FOR TITLE IX ROLES

- Definition of sexual harassment in 34 C.F.R. § 160.30.
- Scope of recipient's education program or activity.
  - District will need to provide separate training materials for the website.
- How to conduct an investigation and grievance process, including hearings, appeals, and informal resolution process.
- How to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias.
  - Required not to have a conflict of interest or bias against complainant or respondent, as a group or individuals.
- Materials used for training must not rely on "sex stereotypes and must promote impartial investigations and adjudications of formal complaints of sexual harassment."

(34 CFR 106.45(b)(1)(iii))

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TITLE IX COORDINATOR

- Responsible for the independent implementation of Title IX grievance process.
  - Receives complaints or may sign a complaint if receive report of sexual harassment.
  - May sign for an anonymous report.
- Responsible for effective implementation of any supportive measures or remedies.
- Must be an employee of the district.
- Cannot be the same person for this role and the role of Decision Maker or Appeal Decision Maker.
- While not specifically required by the regulations, should be responsible for the notice of the policy.

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NOTICE OF POLICY

- Must prominently display Title IX Coordinator contact information.
- Must publish no discrimination policy and grievance policy.
- Who must receive written notice:
  - Students
  - Applicants for Admission
  - Parent/Legal Guardian of K-12
  - Employees
  - Applicants for Employment
  - Unions or Professional Organizations Holding Collective Bargaining or Agreements with Recipient
- *How*: Must prominently display contact information, training materials, and policy on website. If don't have website, may use other means such as handbook.
  - *Potential Copyright Issues*: If cannot obtain consent to publish, must create own training materials to publish on website.
- If any changes are made to process due to COVID-19, must notify students and employees.

(34 CFR 106.8)

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INVESTIGATOR

- Cannot be the same person as the either of the Decision Maker roles.
- Cannot make a decision on your own work.
- Additional required training:
  - Issues of relevance to create an investigative report that fairly summarizes relevant evidence

(34 CFR 106.45(b)(1)(iii))

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DECISION MAKER

- Cannot be the same person as the Title IX Coordinator or the Investigator.
  - If using district personnel, consider using an upper-level administrator.
- Additional required training:
  - Any technology to be used at a live hearing
  - Issues of relevance of questions and evidence
  - Issues of relevance of complainant's sexual predisposition

(34 CFR 106.45(b))

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APPEAL DECISION MAKER

Cannot be:

- Decision Maker that reached the determination regarding responsibility or dismissal
- Investigator
- Title IX Coordinator

Consider appointing the Superintendent

(34 CFR 106.45(b)(8)(iii)(B))

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RESOLUTION FACILITATOR

- Title IX does not prohibit the Resolution Facilitator to be or not be any particular person - this role can be filled by someone who has another Title IX role.
- When choosing the Resolution Facilitator, keep in mind that this is similar to mediation. A mediator is independent.
  - Best practice is to try to avoid appointing the Investigator or the Decision Maker as the Resolution Facilitator due to their roles in this process.

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CHANGES TO TITLE IX EMPHASIZE:

Due Process:

Was it a fair and just process?

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WHAT TITLE IX DOES NOT DO:

- Interfere with any other constitutional right
- Allow FERPA to obviate obligation to comply with Title IX
- Derogate any rights under Title VII
- Derogate any rights a parent or guardian has to act on behalf of child
- Allow state law to alleviate obligation to comply with Title IX

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EXCLUSIONS

- No longer covers sex discrimination occurring against a person outside of the United States (i.e., study abroad programs).
- Institutions whose primary purpose is the training of individuals for military or merchant marine services.
- Membership Policies of Certain Groups:
  - Fraternities and sororities that are tax exempt pursuant to Internal Revenue Code § 501(a)
  - YMCA, YWCA, Girl Scouts, Boy Scouts, and Camp Fire Girls
  - Volunteer youth service organizations that are tax exempt pursuant to Internal Revenue Code § 501(a)

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DEFINITIONS

- *Recipient*: School/education agency.
- *Complainant*: Alleged victim.
- *Respondent*: Alleged perpetrator.
- *Consent*: Not required to adopt any particular definition, but consider having a definition in your grievance process.
  - CALCRIM defines consent as a person must act freely and voluntarily and know the nature of the act.

(34 CFR 106.30(a))

SCHOOLS LEGAL SERVICE 13

DEFINITIONS

Formal Complaint: Document filed by complainant or signed by Title IX Coordinator, alleging sexual harassment against respondent and requesting an investigation.

- May be made by any person.
- May be filed in person, by telephone, by mail, email, or an other means that results in a verbal or written report.
- "Document filed by a complainant" means that it contains the physical or digital signature of complainant or otherwise indicates that the complainant is person filing formal complaint.
- If Title IX Coordinator is person that actually signs, does not make him/her a party.

(34 CFR 106.30(a))

SCHOOLS LEGAL SERVICE 14

DEFINITIONS

Sexual Harassment:

- Federal definition pursuant to 34 C.F.R. § 106.30:
  1. An employee conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct.
  2. Unwelcome conduct as determined by a *reasonable* person that is "severe, pervasive, ***and*** objectively offensive" that it effectively denies a person equal access to the recipient's education program or activity.
     - Reasonable is not defined in the regulations.
     - OCR September 4, 2020 Q&As acknowledge that people respond to sexual harassment in a variety of ways. The regulations do not require any certain manifestations of trauma or "constructive explosion."
       - "The 106.30 definition neither requires nor permits school officials to impose notions of what a 'perfect victim' does or says, nor may a recipient refuse to respond to sexual harassment because a complainant is 'high-functioning' or not showing particular symptoms following a sexual harassment incident."

(34 CFR 106.30(a))

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DEFINITIONS

Sexual Harassment (con't.):

- "No concrete injury is required to conclude that serious harassment would deprive a reasonable person in the complainant's position of the ability to access the recipient's education program or activity on an equal basis with persons who are not suffering such harassment." *(Sept. 4, 2020 Q&A regarding Final Title IX Rule.)*
- Does not require complete exclusion from education, but rather a denial of "equal" access. May include skipping class, declining grades, difficulty concentrating in class, etc.

3. Sexual assault, dating violence, domestic violence, and stalking.
   - *Dating and Domestic Defined by VAWA*: Former spouse, spouse, former cohabitant, cohabitant, someone have a child with, and have or previously have had dating or engagement relationship.
   - Includes same sex relationships.
   - OCR recently issued statement that they will interpret "discrimination on the basis of sex" will include discrimination on the basis of sexual orientation and gender identity.

- Recipient's treatment of a complainant or respondent in regards to a complaint may constitute harassment.
- Can also file complaint based on retaliation.

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HYPOTHETICALS

- Jane and John dated for two months. Jane reports that John is constantly waiting for her at the school's entry, follows her to class, asks her friends about her, and has sent threatening messages to her on Snapchat. John has now threatened to post a naked photo she sent to him while they were dating.
- Same facts, but it is Mark and John that have dated.
  - Mark and John have dated for six months. A custodian, who knows that they were dating, observes them get into an argument and Mark punches John.
- Student reports that her teacher told her that if she sent him a photograph of her in a bathing suit, she would get an A in the class and would be one of the starters for the basketball team.
  - Jane reports that Mark, the captain of the football team, told her that if she sent him a nude photograph of herself, he would make sure that she was on the cheerleading team.

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DEFINITIONS

- Actual Knowledge:
  - Notice to Title IX Coordinator.
  - Notice to any official recipient who has authority to institute an investigation/corrective measure.
  - Having the responsibility to report does not give the person the authority to punish the student.
    - "The mere ability or obligation to report sexual harassment or to inform a student about how to report sexual harassment, or having been trained to do so, does not qualify an individual as one who has authority to institute corrective measures on behalf of the recipient." (*34 CFR 106.30(a)*)
  - *As to Elementary and Secondary*: ***Any employee*** with knowledge.
    - Staff are now seeing more kids' online activity due to distance learning. Watch out for inappropriate activity: online harassment, stalking, human trafficking, Zoom bombers, etc.

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DEFINITIONS

- What is not actual knowledge:
  - Imputation of knowledge based solely on vicarious liability or constructive notice
    - *Vicarious Liability*: Legally liable for actions of another
    - *Constructive Notice*: A legal fiction that a person received notice even though they did not actually receive it (i.e., notice to a party for certain types of legal actions that left the state, can give notice in an approved newspaper)
    - *What this Means*: Even though you should have known, if you did not actually know, it is not "actual notice" *if* notice is solely based on one of these principals.
  - The only official of the recipient with actual knowledge is the respondent

(34 CFR 106.31(a))

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DEFINITIONS

- *Standards of Evidence:*
  - *Preponderance of the Evidence*: It is more likely than not that the allegations are true.
  - *Clear and Convincing Evidence*: Evidence is of such a convincing force that it demonstrates a high probability that the allegations are true. A higher standard than preponderance of the evidence.
  - Must use the same standard for both students and employees.
    - Employees are entitled to preponderance of the evidence during discipline investigation.

SCHOOLS LEGAL SERVICE 20

DEFINITIONS

- *Education Program or Activity:*
  - Includes locations, events, or circumstances over which the recipient exercised substantial control over both the respondent and the context in which the sexual harassment occurs.
    - Review your district's individual programs and activities.
  - Any building owned or controlled by a student organization that is officially recognized by a post-secondary institution.

(34 CFR 106.44(a))

- *Participating in or attempting to participate in the education program or activity:*
  - "A complainant who has left the school because of sexual harassment, but expresses a desire to re-enroll if the recipient appropriately responds to the sexual harassment, is 'attempting to participate' in the recipient's education program or activity."

(Sept. 4, 2020 Q&A regarding Final Title IX Rule)

- *Types of Evidence:*
  - *Inculpatory*: Tends to show a person is guilty.
  - *Exculpatory*: Tends to show a person is not guilty.

SCHOOLS LEGAL SERVICE 21

SUPPORTIVE MEASURES

- *Definition*: Non-disciplinary, non-punitive, individual services offered to complainant or respondent before or after the filing of formal complaint or where no formal complaint has been filed.
  - Services are to be offered as appropriate, as reasonably available, and without fee.
- Must be made available to complainant and respondent.
- These services are to remain confidential to extent possible.
- *Purpose:* Restore or preserve equal access to the recipient's education program or activity without unreasonably burdening the other party.
- *May Include*: Counseling, extensions of deadlines or other course-related adjustments, modifications of work or class schedules, campus escort services, mutual restrictions on contact between the parties, changes in work or housing locations, leaves of absences, increased security and monitoring of certain areas of the campus, and other similar measures.
  - Measures should be designed to protect the safety of all parties and recipient's educational environment and deter sexual harassment.
- Be aware of special education students and possible changes to their services and/or placement.

(34 CFR 106.30(a))

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SUPPORT PERSON/ADVISOR

- Must provide both parties the same opportunity to have others present during any portion of the grievance proceeding (interview, hearing, etc.).
  - Cannot place restrictions on who the support person/advisor is.
  - May have restrictions regarding the support person's participation, as long as those restrictions apply equally to both parties. Consider including any limitations in your policy.
- May include:
  - Advisor
  - Attorney
  - Support Person
  - If involves employee, will likely have union representative or attorney.

(34 CFR 106.45(b)(5)(iv))

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RESPONSE

- A recipient with actual knowledge of sexual harassment must respond promptly in a manner that is not deliberately indifferent.
  - This response is required regardless of whether or not a formal complaint was filed.
- *Standard of Review:* Was response clearly unreasonable in light of the known circumstances?

(34 CFR 106.44(a))

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TITLE IX COORDINATOR'S RESPONSE ONCE HAVE ACTUAL KNOWLEDGE OF HARASSMENT:

- Must treat complainants and respondents equitably by offering:
  - Supportive measures.
  - Following an appropriate grievance process before any disciplinary sanction or other adverse action that is not a supportive measures.
- Specifically as to complainant:
  - Must "promptly contact" to discuss available supportive measures.
  - Inform him/her that supportive measures are available with or without the filing of a formal complaint.
  - Consider complainant's wishes in regards to those supportive measures
  - Explain the process for filing a formal complaint.
    - Must be signed by complainant or Title IX Coordinator - cannot be made anonymously.
  - Must comply regardless of whether the complainant files a formal complaint or not.
    - Remember your mandated reporting obligations.

(34 CFR 106.44(a))

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RESPONSE TO FORMAL COMPLAINT

- Must respond in accordance with the district's written grievance process that is in accordance with Title IX required grievance procedures.
  - Must investigate a formal complaint.
- Will not find that responded inappropriately if Assistant Secretary would have reached a different conclusion, as long as responded in a manner that was not deliberately indifferent.

(34 CFR 106.44(b))

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REMOVALS

- *Students*: Can do an emergency removal as long as they follow procedures outlined in the statute.
  - This ***DOES NOT*** modify any rights under IDEA or 504.
  - Must also consider suspension and expulsion rules in the California Education Code.
    - Education Code section 48900.2 only allows suspension of students in grades 4-12.
    - Education Code section 48915(c)(4) requires the Superintendent or designee to recommend expulsion, regardless of grade, who commits sexual assault or battery.
- *Employee*: Statute does not preclude administrative leave for a non-student employee, but follow Education Code, BP/AR and CBA.

(34 CFR 106.44(d))

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EMERGENCY REMOVAL OF STUDENTS PROCEDURE

- May remove a student respondent from the education program or activity if:
  - Recipient performs an individualized safety and risk analysis;
  - Determines that an immediate threat to the physical health or safety of any student or other individual justifies the removal;
  - Excludes threat to mental health; and
  - Recipient provides respondent with notice and an opportunity to challenge the decision immediately.
- This statute does not modify any rights under IDEA, 504 or ADA.
  - Must follow process and timelines in those statutes.
  - Cannot remove a special education student for more than 10 days.

(34 CFR 106.44(c))

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SPECIAL EDUCATION CONSIDERATIONS

- Will need to work closely with special education staff to assure compliance with Title IX and IDEA/504.
  - May have to attend IEP or manifestation meetings.
- A special education student can seek monetary damages for failure to protect from harassment or assault.
- Do the actions trigger child find?
  - Do the actions indicate an FBA, BIP, or other assessment is needed?
- Accessibility issues in regards to the grievance procedure.
  - Will special education student and parent be able to access the evidence and attend any interview, hearing, propose questions, etc.?
  - Advocates and other members of IEP team may want to access the records for the IEP meeting, but it involves other students who may be entitled to confidentiality.

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SPECIAL EDUCATION CONSIDERATIONS (CON'T)

- *Supportive Measures*: Likely will need to be addressed in IEP.
  - Change placement, change in schedule, counseling, etc.
  - Do supportive measures trigger IDEA or 504?
- *Emergency Removal*: If disabled student is the accused, a manifestation will be required if emergency removal is more than 10 days.
- The process takes 20 plus days to complete, excluding an appeal, it will always be more than 10 days.
- Only exception would be "serious bodily injury" exception that would allow 45 days.
- Can you use the misconduct data to support a change in placement?

SCHOOLS LEGAL SERVICE 30

HYPOTHETICALS

- A female general education student reports that a male student with down syndrome is constantly hugging her and sometimes kisses her cheek. She has tried to nicely tell him to stop and has tried avoiding going through the hallway that he is in, but he still finds her at lunch time to hug her.
  - Female student told her teacher last month
- Special education student reports that a general education student touched her inappropriately.

SCHOOLS LEGAL SERVICE 31

EMERGENCY REMOVAL OF EMPLOYEES

- May place a non-student employee respondent on administrative leave (paid) during pendency of the grievance process.
- The statute does not modify any rights under 504 or ADA.
- Follow labor laws and any provisions for administrative leave contained in your MOU or contract with the employee; follow your policies, procedures, and practices.
  - Education Code section 44932
  - Education Code section 44934
  - Education Code section 44934.1
  - Education Code section 44939
  - Education Code section 44940
  - Education Code section 44940.5
  - Education Code section 45110

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LABOR CONSIDERATIONS

- Not allowed to restrict the ability of either party to discuss the allegations under investigation or to gather and present relevant evidence. No "Gag Order." *(34 CFR 106.45(b)(5)(iii).)*
  - National Labor Relations Board has ruled that an employer has a right to order employees to abide by confidentiality rules during an open investigation. *(Apogee Retail LLC d/b/a Unique Thrift Store, 368 NLRB No. 144 (2019).*)
  - Rule only applies to Title IX investigations.
  - *Recommendation:* Request, not order, that the employee abide by confidentiality.
    - In order to keep this process fair and not taint other witnesses, our expectation is that you not disclose information about your interview or information that you provided during interview to others.

SCHOOLS LEGAL SERVICE 33

LABOR CONSIDERATIONS (CON'T)

- Under labor laws, have right to confidentiality during investigation.
  - Should advise that will keep information confidential to the extent possible.
  - Never promise that you will not disclose information given during investigation .
- Determinations in labor investigation must be by preponderance of the evidence, more likely than not.
- District can be liable for a defective investigation:
  - An employer who fails to follow its own complaint policy/procedures and uses a potentially biased investigator and fails to interview witnesses for potentially exculpatory information evidences pretext for purposes of claims of discrimination in violation of public policy, FEHA.

(Nazir v. United Airlines, Inc. (2009).)

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GRIEVANCE PROCEDURE

Each district must adopt a grievance policy that includes the complete process to be followed and how recipient will respond to any complaint.

New Title IX regulations apply to sexual harassment alleged to have occurred after August 14, 2020.

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PRINCIPLES OF GRIEVANCE PROCESS

- Treat complainants and respondents equitably.
- An objective evaluation of all relevant evidence, including inculpatory and exculpatory evidence .
- Credibility determinations are not to be made based on status of complainant, respondent, or witness.
- Those involved in the investigation cannot have a conflict of interest.
- *Presumption that the Respondent is not Responsible*: Presumption of innocence.

SCHOOLS LEGAL SERVICE 36

CONFLICT OF INTEREST/BIAS

- *Conflict of Interest:* Occurs when a person has a personal interest (whether actual, potential or perceived) that conflicts with the interests of the investigation.
  - Either the complainant, respondent, or witness is related to the investigator or decision maker.
- *Bias:* Allowing a personal feeling or past dealing affect your judgment.
  - Belief that all football players are liars and get away with everything so that they can play football.

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HOW TO AVOID CONFLICT/BIAS IN YOUR TITLE IX PROCEDURE

- Don't allow past behaviors by a party or feelings towards a party affect your judgment
- Focus on the evidence, not your feelings about any party or issue
- Avoid showing that you agree or disagree with either party or that you're on their side or not on their side
  - "Yes, I agree." "I understand what you are going through."
  - "In my opinion this is not sexual harassment, you're overreacting." "She's overreacting."
- Don't allow wishes of others (administration) to affect your judgment, focus on the evidence

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HYPOTHETICALS

- Your son's friend is the respondent.
  - Your son's best friend that is at your home at least once a week is the respondent.
- The respondent's parents previously filed a complaint against you.
- You have previously punished the female complainant for smoking marijuana with a boy in the bathroom after school.
- You believe that for years the boys on the football team have gone unpunished for bad behavior.
- You volunteer for a domestic violence organization.

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DELAY FOR GOOD CAUSE

- Temporary delay of the grievance process or limited extension of time frames for good cause are allowed.
  - Must provide written notice to the complainant and respondent of the delay and reasons for the action.
  - Good cause may include (illustrative list in 34 C.F.R. § 106.45(b)(1)(v)):
    - Absence of a party, a party's advisor, or a witness.
    - A concurrent law enforcement activity.
    - Need for language assistance or accommodations of disabilities.
- *COVID-19:* Can be cause for reasonable delay. OCR COVID-19 Guidelines issued September 28, 2020, state that the "Department trusts recipients to make sound determinations regarding the length of a brief delay; we believe recipients are in the best position to make these decisions…."
  - Be more specific than delay due to COVID-19.
  - OCR also warned that should not delay on the basis that in-person interviews are "cumbersome or not feasible."

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NOTICE REQUIREMENTS

- Once receive formal complaint, must provide written notice to the known parties of the following:
  - Recipient's grievance process.
  - Any informal resolution process that is available.
    - Note that an informal resolution process is not available if an employee is the respondent and complainant is student.
  - Sufficient details of the allegations, as known at the time, that allows a sufficient amount of time to prepare a response before initial interview.
    - *Sufficient Details*: Identities of the parties involved, the conduct, date of incident, and location of incident.
  - Inform respondent that he/she is presumed not responsible.
  - A determination of responsibility will be made at the end of the grievance process.

(34 CFR 106.45(b)(2))

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NOTICE REQUIREMENTS (CON'T)

- Parties may have an advisor of their choice.
  - May or may not be an attorney.
  - District does not have to provide.
- Right to inspect and review all evidence pursuant to 34 C.F.R. § 106.45(b)(5)(vi).
- Must advise of any provision in the recipient's code of conduct that prohibits knowingly making a false statement or submitting false information.

(34 CFR 106.45(b)(2))

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NOTICE REQUIREMENTS ONCE INVESTIGATION IS INITIATED

- Must provide written notice of the following to each party whose participation is invited or expected of the date, time, location, participants, and purpose of:
  - All hearings
  - Investigative interviews
  - Meetings
  - Written notice must be given with sufficient time for the party to prepare to participate

(34 CFR 106.45(b)(5)(v))

- If determine should investigate additional allegations, must provide additional written notice to the parties that are known.

(34 CFR 106.45(b)(2)(B)(ii))

- While not required by Title IX, consider informing the parties of the name of each person in each role so that the party may raise concerns about any conflict of interest or bias.

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WHEN A FORMAL COMPLAINT *MUST* BE DISMISSED

- Conduct does not constitute sexual harassment even if proved.
  - "severe, pervasive, and objectively offensive."
- Conduct did not occur against a person in the United States
- Conduct did not occur in the recipient's education program or activity.
  - What about social media?
    - Students now required to be online.

(34 CFR 106.45(b)(3)(i))

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WHEN A FORMAL COMPLAINT *MAY* BE DISMISSED

- Complainant notifies the Title IX Coordinator, in writing, that he/she would like to withdraw complaint.
- Respondent is no longer enrolled or employed by recipient.
- A specific circumstance prevents the recipient from gathering sufficient evidence to reach a determination.
- *Inconsistency:* The regulation does not qualify, in any way, the ability to dismiss a case at request of complainant when it involves a teacher/employee or when employee is no longer employed. However, a complaint cannot be handled by informal resolution if a teacher/employee is the respondent.

(34 CFR 106.45(b)(3)(ii))

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DISMISSED CASE

- If dismissed, must promptly send written notice of dismissal and reasons for dismissal simultaneously to the parties.
- Complainant may appeal a dismissal.
- Comply with mandated reporting requirements.
- If dismissed, may still proceed as a violation of district's code of conduct.

(34 CFR 106.45(b)(3)(ii))

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CONSOLIDATION OF COMPLAINTS

- May consolidate if same set of facts or circumstances.
- Must provide written notice and supportive measures as previously outlined to all parties.

(34 CFR 106.45(b)(4)

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THE INVESTIGATION

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DETERMINING RELEVANT EVIDENCE

- The final Title IX rule does not define relevance.
- Does not adopt the Federal Rules of Evidence for hearings.
  - May not adopt rules that contravene those evidentiary requirements prescribed in 34 C.F.R. § 106.45.
  - For example, the Preamble to Title IX states that a recipient "may not adopt a rule excluding relevant evidence whose probative value is substantially outweighed by the danger of unfair prejudice; although such a rule is part of the Federal Rules of Evidence."
    - Similarly, it also states that may not adopt rules excluding relevant evidence, such as lie detector results and rape kits.

(Preamble to Title IX, pp. 980-82)

- There are three types of evidence that is deemed irrelevant by the Rule:
  - A party's treatment records without consent.
  - Information protected by a legally recognized privilege.
  - Complainant's prior sexual history.

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RELEVANT EVIDENCE (CON'T)

- Title IX "does not prescribe rules governing how admissible, relevant evidence must be evaluated for weight or credibility by a recipient's decision maker, and recipients thus have discretion to adopt and apply rules in that regard, so long as such rules do not conflict with section 106.45 and apply equally to both parties."

(Preamble to the Title IX Rule, at pp. 980-82)

  - You may decide the weight or credibility to give to any particular evidence as long as that rule is applied equally to both sides.
  - Each side must be given the opportunity to argue the weight and credibility the decision maker should give to each piece of evidence.
- Some types of evidence that is generally excluded from a criminal trial cannot be excluded from a Title IX investigation: unfairly prejudicial evidence, evidence concern bad acts, or evidence that constitutes character evidence.

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HOW DO I DETERMINE WHAT WEIGHT TO GIVE EVIDENCE?

- Was the person offering the evidence credible?
- How is the evidence relevant to the issues?
  - Does it go to a party's credibility?
    - Did that person have any motive for coming forward?
  - Does it tend to prove or disprove a material fact?
- How many levels of hearsay?
- Does it tend to show the respondent has committed similar acts in the past?

SCHOOLS LEGAL SERVICE 51

HYPOTHETICALS

- Samantha files a complaint alleging that Mr. Smith, her PE teacher, makes comments to her about her physical appearance every day and tells her he wishes she was 18. Mr. Smith presents evidence that Samantha lied earlier in the year about why her homework in a different class was not completed.
  - Mr. Smith presents evidence that two months prior, Samantha falsely reported that a student named Mark had slapped her buttocks during PE class.
- Sally files a complaint alleging that Tom has been verbally sexually harassing her and that it has caused her to have severe anxiety prior to class. Tom seeks to gain access to her therapy records that show she had been treated for severe anxiety the prior year.

SCHOOLS LEGAL SERVICE 52

REQUIREMENTS OF INVESTIGATION OF FORMAL COMPLAINT

- Burden of proof and gathering evidence rests on the recipient, not the parties.
- Cannot access or consider a party's records maintained by any treating professional unless the party or parent, if minor, consents.

(34 CFR 106.45(b)(5)(i))

- Cannot restrict the ability of either party to discuss the allegations or ability to gather and present relevant evidence; no "gag order" may be issued.

(34 CFR 106.45(b)(5)(iii))

SCHOOLS LEGAL SERVICE 53

REQUIREMENTS OF INVESTIGATION OF FORMAL COMPLAINT

- Must provide an equal opportunity for the parties to present:
  - Fact or expert witnesses
  - *Inculpatory Evidence*: Incriminating evidence, tends to prove guilt.
  - *Exculpatory Evidence*: Exonerating evidence, tends to prove not guilty.

(34 CFR 106.45(b)(5)(ii))

- Must still comply with investigation and remainder of grievance process even if there is an investigation by law enforcement.
  - Consider how you want to work with law enforcement.
  - Do not depend on whether or not charges were filed in making your determination as law enforcement uses a different standard.

SCHOOLS LEGAL SERVICE 54

RIGHT TO INSPECT EVIDENCE

- Provide opportunity for each party to inspect any evidence obtained; includes evidence from each party or any other witness.
- Must include evidence do not intend to rely on.
- Must include inculpatory and exculpatory evidence.
- Must allow meaningful time to respond.

SCHOOLS LEGAL SERVICE 55

THE INVESTIGATION

- Statements/Interviews of complainant, respondent, and witnesses.
  - Record interview.
  - Decide order of interviews.
  - Use words that the witness uses.
  - Is what the person reporting age or ability appropriate?
- Review prior discipline and reports of incidents.
  - Be mindful of any privacy concerns.
- Surveillance cameras at location.
- Social media of those involved.
- Notes/letters/photos of those involved – most likely electronic. Go through cell phone, iPad, computer, etc.

SCHOOLS LEGAL SERVICE 56

THE INVESTIGATION (CON'T)

- Photographs:
  - Area of occurrence.
  - *Those involved:* Damage to clothing, injuries, etc.
- Schedules and attendance of those involved, including witnesses.
- Any evidence going to credibility of any witness.
  - *Motive to Lie:* Did teacher recently give student bad grade? Did student respondent recently break up with student complainant?
  - Has person been dishonest in the past?
- If involves student, contact parents – anything relevant going on at home?

SCHOOLS LEGAL SERVICE 57

SEARCH & SEIZURE

- The Fourth Amendment protects an individual's justified expectations of privacy against unreasonable government intrusions.
- ***Consent:*** "Consent searches are part of the standard investigatory techniques of law enforcement agencies' and are 'a constitutionally permissible and wholly legitimate aspect of effective police activity."
- *Caveats:* Must be informed and voluntary.
  - *Submission to Authority:* Consent is not voluntary if the student is acquiescing to a show of authority.
  - *Examples:* A student's consent to search after it was expressed or implied that the search would be conducted with or without his consent is involuntary.
    - "*You don't have anything in your pockets you don't want me to see, do you?*"
    - (Negative response.)
    - Followed by: "*Then you wouldn't mind me looking, would you?*"
    - Will invalidate consent.

SCHOOLS LEGAL SERVICE 58

SEARCH & SEIZURE

- The legality of a search of a student depends on the reasonableness of it. This requires a twofold inquiry:
  - Was the search justified at **inception**?
    - Under ordinary circumstances, a search of a student by a teacher or other school official will be "justified at its inception" when there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school.
  - Was the search **permissible in scope**?
    - A search will be permissible in its scope when the measures adopted are reasonably related to the objectives of the search and are not excessively intrusive in light of the age and sex of the student and the nature of the infraction.

SCHOOLS LEGAL SERVICE 59

SEARCH AND SEIZURE

Scope of Search (con't):

- Education Code section 49050:
  - No school employee shall conduct a search that involves:

    (a) Conducting a body cavity search of a pupil manually or with an instrument.

    (b) Removing or arranging any or all of the clothing of a pupil to permit a visual inspection of the underclothing, breast, buttocks, or genitalia of the pupil.

SCHOOLS LEGAL SERVICE 60

INTERVIEWS

- If involves potential criminal conduct, do not have to advise a student of *Miranda* rights (Fifth Amendment right to remain silent). *Miranda* only applies if an officer is conducting a custodial interrogation designed to elicit an incriminating statement.
- Know who the complainant, respondent and witnesses are.
  - Rapport Building.
    - Do not be immediately confrontational.
- Ages/grade level.
- Understand the person's mental capabilities – determine if in special education.
- Is investigator bilingual or need an interpreter?
- Recognize that the act might appear minimal to you as the investigator, but that it was extremely traumatic to the complainant.

SCHOOLS LEGAL SERVICE 61

INTERVIEWS (CON'T)

- Ask open ended questions.
  - Can ask questions to clarify.
- Avoid promises, oral agreements, and coercion.
- Use the words that the person your interviewing uses.
  - May need to clarify that speaking of the same body parts when allegations involve touching.
- At the end, ask if there is anything else the person wants you or the district to know and let the person know that they can contact you with any additional information they might have.

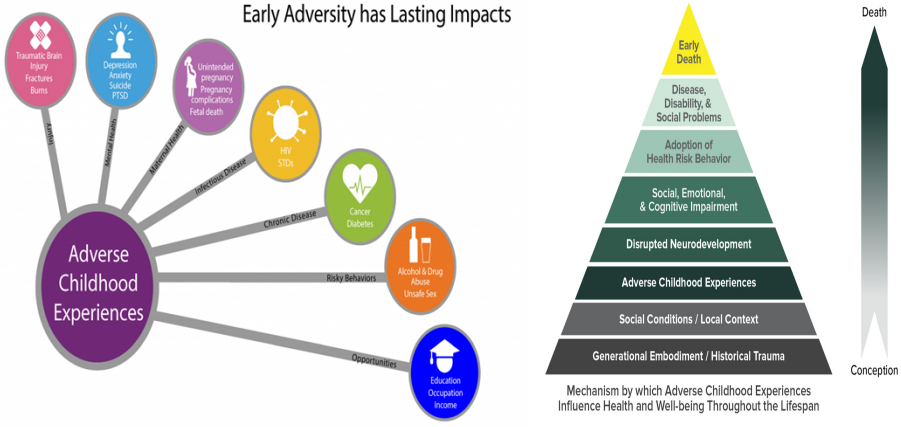
SCHOOLS LEGAL SERVICE 62

TRAUMA INFORMED CARE

- *Trauma:* An event, or series of events, that overwhelms the central nervous system.
  - Trauma occurs when one's ability to defend, protect or say no is overwhelmed.
  - Trauma is what occurs when your solution (active response to threat) does not work.
    - Empoweringeducation.org
- It is about considering/treating the whole person, not just the immediate incident.
  - Ask "What happened to you?" Do not ask, "What's wrong with you?" "What's wrong?"
- Key concepts to speaking with a person using trauma informed care:
  - Safety
  - Trustworthiness
  - Choice
  - Collaboration
  - Empowerment
    - Office for Victims of Crime, Training and Technological Assistance Center

SCHOOLS LEGAL SERVICE 63

Adverse Childhood Experiences (ACEs)



HYPOTHETICALS

- A female fourth grade student reports that her male classmate has been showing her videos of people "doing bad stuff" on his cell phone. She tells him she does not want to see that.
  - Same student reports that the classmate was showing her videos of sex acts on his phone.

SCHOOLS LEGAL SERVICE 65

EMPLOYEE RIGHTS DURING INTERVIEW

- *Weingarten Rights:* If it reasonably appears employee could be subject to discipline, employee has right to have union representative present.
  - Representative cannot be intrusive or unduly adversarial.
- Employee that is mere witness to events and non-suspected of being culpable do not typically have *Weingarten* right unless required by personnel rules, collective bargaining agreement or past practice.
- *Spielbauer Warning:* If the employee invokes their Fifth Amendment right to remain silent, he or she can be ordered to answer questions. The statements may not be used in a criminal proceeding, but may be used in a discipline proceeding. Must give a *Spielbauer* warning:
  - You do not have a right to refuse to answer these questions. Should you refuse, you may be guilty of insubordination, an offense that can and will lead to discipline up to and including termination. Any information you provide to us, however, will not be used against you in any criminal proceeding.

SCHOOLS LEGAL SERVICE 66

CONSIDERATIONS REGARDING LAW ENFORCEMENT

- Do you have a district policy?
- Generally advise cooperating with law enforcement to the extent legally permissible.
- Law Enforcement Investigation:
  - Pre-text call
  - Multiple interviews of victim
  - Interview of suspect
    - Will *Miranda* apply?
  - Investigative techniques

SCHOOLS LEGAL SERVICE 67

EXCLUSION OF PRIOR SEXUAL HISTORY

- Evidence of a complainant's sexual history is generally not relevant and should be excluded.
  - Examples:
    - She had sex with Sam, therefore, she had consensual sex with John.
    - Evidence regarding a reputation for being promiscuous.
- Evidence can be considered if it is directly relevant to an issue.
  - Examples:
    - Complainant previously consented to an act with respondent, therefore, respondent reasonably believed he/she consented during the current incident (state of mind).
    - The evidence will explain an injury the complainant has or other evidence.
- Title IX specifies the only two conditions that sexual history may be asked:
  - Someone other than respondent committed the act; and
  - Specific incidents between respondent and complainant to prove consent.

(34 CFR 106.45(b)(6)(ii))

SCHOOLS LEGAL SERVICE 68

HYPOTHETICALS

- Jane files a complaint alleging that John touched her buttocks and breasts on the bus on the way home from a field trip. John attempts to introduce evidence that on the previous field trip Jane allowed Mark to touch her breasts on the trip home.
  - John attempts to introduce evidence that the weekend prior to the field trip he and Jane "made out" at a party and she allowed him to touch her buttocks and breasts. He believed that because she acted the same way at the party and on the bus that she was consenting to the touching on the bus.
- Jane files a complaint alleging that John had raped her in the campus restroom. Jane had injuries, including a black eye, that she said John inflicted during the assault. John attempts to introduce evidence that Jane had sex with Mark in the restroom and that Mark had punched Jane during an argument.

SCHOOLS LEGAL SERVICE 69

REQUIREMENTS OF INVESTIGATION REPORT PROCESS

- Prior to completion of the investigation report, must send each party and their advisor, if any, the evidence in electronic format or hard copy.
- Must provide at least 10 days from receipt of evidence for each party to submit a written response.
- Investigator must consider each written response.
- Investigator must write a report of investigation, but does decide responsibility.
- If conducting a hearing, report must be provided 10 days prior to the hearing.
- If not conducting a hearing, report must be provided to each party and advisor in electronic or hard copy.
  - Each party is allowed to review and provide written response.

SCHOOLS LEGAL SERVICE 70

WRITTEN REPORT REQUIREMENTS

- Only specific requirement is that the report "fairly summarizes relevant evidence." *(34 CFR 106.45(b)(5)(vii).)*
- *34 C.F.R. § 106.45 (b)(5)(vi)* includes evidence for inspection that recipient does not intend to rely on to make a determination.
- Summarize all evidence.
  - Exculpatory and inculpatory evidence.
  - All witness statements.
  - Description of any physical evidence; videos, photos, etc.
- Cite to any applicable policies, code of conduct that are considered.
- Assume that it will be released to public or used in future law suit.

(34 CFR 106.45(b)(5)(vi-vii))

SCHOOLS LEGAL SERVICE 71

POST-SECONDARY HEARING

- If a party does not have an advisor, the recipient must provide an advisor of the recipient's choice without fee or charge to the party.
  - May or may not be an attorney.
- Decision Maker must permit each party's advisor to ask questions of any witness.
  - Parties are not allowed to ask questions of witnesses.
  - Limitations as what advisor may ask does not apply to post-secondary hearings.
- Only relevant cross-examination and other questions may be asked of a party or witness.
- If a party or witness refuses to submit to cross-examination at the hearing, the Decision Maker must not rely on that person's statements.
- Must create audio or audio-visual recording or transcript of any live hearing and make available to either party.

(34 CFR 106.45(b)(6)(i)

SCHOOLS LEGAL SERVICE 72

PROCEDURE FOR K-12

- Allows for a live hearing or "written hearing."
- Once the report is written, but before a determination regarding responsibility, the Decision Maker must:
  - Afford each party the opportunity to submit written relevant questions the party wants asked of another party or witness.
  - Provide each party with the answers.
  - Allow for additional, limited follow-up questions from each party.
- Exclusion of prior sexual history as previously described.

(34 CFR 106.45(b)(6)(ii))

SCHOOLS LEGAL SERVICE 73

PROCEDURE FOR K-12 (CON'T)

- Decision Maker must explain to the party proposing the questions any decision to exclude a question.
  - Example: The question regarding consensual sex between complainant and John Doe is not relevant as cannot prove that she consented to the act with respondent, nor does it prove that another person committed the act respondent is alleged to have committed.

(34 CFR 106.45(b)(6)(ii))

SCHOOLS LEGAL SERVICE 74

DETERMINATION OF RESPONSIBILITY

- Decision Maker must make a determination of responsibility based on the standard of proof selected by the district in their guidelines.
- The determination must be in writing.
- Written determination must be provided to parties simultaneously.
- Determination is final on:
  - Date appeal is issued; or
  - Date on which appeal must be filed; appeal no longer timely.

(34 CFR 106.45(b)(7)(i) & (iii)

SCHOOLS LEGAL SERVICE 75

WRITTEN DETERMINATION REPORT MUST INCLUDE:

- Identification of the allegations as defined in 34 C.F.R. § 106.30 (sexual harassment) or 34 C.F.R. § 106.71 (retaliation)
- Detailed description of the procedural steps taken from the receipt of formal complaint through conclusion
  - *Includes*: Notifications to the parties, interviews with parties/witnesses, site visits, methods used to gather evidence and hearings held.
- Findings of fact supporting the determination.
- Any conclusions made in regards to code of conduct to the facts.

(34 CFR 106.45(b)(7)(ii))

SCHOOLS LEGAL SERVICE 76

WRITTEN REPORT (CON'T)

- Statement/rationale for the result of each allegation, including:
  - Determination regarding responsibility.
  - Any disciplinary sanctions recipient imposes on respondent.
  - Whether remedies designed to restore or preserve equal access to education/activities will be provided by recipient to complainant.
- Procedures and bases for complainant and respondent to appeal.
- Assume it may be released or at least used in a future law suit.

(34 CFR 106.45(b)(7)(ii))

SCHOOLS LEGAL SERVICE 77

APPEAL PROCESS

- Can appeal a dismissal or a finding of responsibility.
- District must offer appeal to both parties for these three bases:
  - Procedural irregularity that affected the outcome of the matter;
  - New evidence that was not reasonably available at the time of the determination of responsibility that could affect the outcome; and
  - The Title IX Coordinator, Investigator, or Decision Maker had a conflict of interest or bias that affected the outcome.
- Recipient may add additional basis for appeal, but must be made available equally to both parties.

(34 CFR 106.45(b)(8)(i) & (ii)

SCHOOLS LEGAL SERVICE 78

APPEAL PROCESS (CON'T)

- Must provide written notice to the other party when appeal is filed.
- Implement appeal procedures equally for both parties.
- Must give both parties opportunity to submit written statement in support of or challenging the outcome.
- Must issue written decision containing the result of appeal and the rationale for the result.
- Must provide written appeal decision simultaneously to both parties.

(34 CFR 106.45(b)(8)(iii))

SCHOOLS LEGAL SERVICE 79

INFORMAL RESOLUTION

- Different than supportive measures.
  - May include strategies such as arbitration, mediation, or restorative justice.
- Recipient may offer/suggest informal resolution if:
  - A formal complaint has been filed; and
  - A determination of responsibility has not been made.
- Cannot require either party to participate.
- Cannot require either party to participate in informal resolution or waive right to investigation or adjudication as a condition of enrollment, continued enrollment, employment, continued employment, or enjoyment of any other right.

(34 CFR 106.45(b)(9))

SCHOOLS LEGAL SERVICE 80

INFORMAL RESOLUTION PROCESS

May facilitate informal resolution process without a full investigation and adjudication if:

- Recipient provides written notice to parties disclosing:
  - Allegations in the complaint.
  - Requirements of informal resolution process, including circumstances under which it precludes parties from resuming the formal complaint process.
    - Policy must allow any party the right to withdraw and resume the formal complaint process prior to agreeing to a resolution.
    - This policy must be written in grievance policy.
  - Any consequences resulting from participating in informal resolution, including that the records will be maintained or could be shared.

(34 CFR 106.45(b)(9))

SCHOOLS LEGAL SERVICE 81

INFORMAL RESOLUTION PROCESS (CON'T)

May facilitate informal resolution process without a full investigation and adjudication if (con't):

- Obtain each party's voluntary, written consent to the informal resolution process.
- Does not involve an employee sexually harassing student.

SCHOOLS LEGAL SERVICE 82

CONDUCTING THE RESOLUTION SESSION

- Do both parties agree on how to proceed?
- Understand alleged conduct
- What resolution is sought?
  - What would make victim feel safe? Stay away order?
  - Avoid making complainant move, can be revictimizing.
  - Does complainant just want respondent to understand the issue?
  - *Think about restorative justice:* Engagement, accountability and restoration.
- If it involves SPED, does anyone from IEP team need to be involved?
- Not required by Title IX, but good practice to write resolution out and have both parties sign.

SCHOOLS LEGAL SERVICE 83

REMEDIES

- List of range of possible disciplinary sanctions and remedies must be listed in grievance process.
- Remedy shall be designed to "restore or preserve equal access to the recipient's education program or activity."
- May include same services as supportive measures.
- "Remedies need not be non-disciplinary or non-punitive and need not avoid burdening the respondent."
  - Can be disciplinary, punitive or a burden on respondent.
- Provide the remedy to complainant when there is a finding against respondent.

(34 CFR 106.45(b)(1)(i))

SCHOOLS LEGAL SERVICE 84

RECORDKEEPING

Must maintain the following for seven years:

- *The Investigation - Keep Everything*: Investigation report, decision report, any determination of responsibility, any audio/audiovisual recording or transcript, disciplinary sanctions, and remedies.
- Any appeal and result.
- Any informal resolution and result.
- All materials used to train each of the five roles.
  - Must make these materials available on website or if don't have website, make them available.
    - *Be aware of copyright issues:* Must create own materials if not given consent to publish. *(Office for Civil Rights Blog 202000518.)*
    - Yearly student/parent notices are not sufficient, statute specifically states must be on website.

(34 CFR 106.45(b)(10))

SCHOOLS LEGAL SERVICE 85

RECORDKEEPING (CON'T)

If just received complaint or had notice, but did not go through full grievance process, a recipient must create and maintain for seven years:

- Records of any actions, including supportive measures, taken in response to the report or complaint.
  - If don't provide supportive measures, must document the reasons it was not "clearly unreasonable in light of the known circumstances."
- Document basis for its conclusion that its response was not deliberately indifferent.
- Document that it has taken measures designed to restore or preserve equal access to the recipient's education program or activity.

(34 CFR 106.45(b)(10))

SCHOOLS LEGAL SERVICE 86

SUMMARY OF TIMELINE OF GRIEVANCE PROCESS

- Title IX Coordinator responds "promptly" in a manner that is not deliberately indifferent.
  - Once have "actual knowledge" must provide written notice.
- *Removals:* Max of 10 days for SPED or 45 days if serious bodily injury.
- *Investigation:*
  - Must allow inspection of evidence with reasonable time to respond.
  - Must give parties 10 days from receipt of evidence to respond.
  - Must provide report 10 days prior to hearing or determination.
- Decision maker must allow parties time to submit questions and additional, limited, follow-up.
- *Appeal Period:* In district's specific policy.
  - Reasonable time for written response.
  - Issue decision.
- Where do not have specific time requirement, look to 34 C.F.R. (b)(1)(v) which provides for "reasonably prompt time frames."

SCHOOLS LEGAL SERVICE 87

FERPA

- The records created in the Title IX grievance hearing are likely "student records" of the perpetrator and victim.
- Title IX specifies that a school cannot hide behind FERPA to avoid obligations.
- *Parent Inspection of Records*: Should not let parent inspect until completion of entire grievance process.
- *Hearing to Challenge Student Records*: Should only allow the parent, person responsible for creating the record and Superintendent. Should not allow parent to subject victim to any further type of investigation/hearing.
  - The Title IX process allows for a written response to be part of the record, but could allow them to file another written response.
- *Law Enforcement Records*: If law enforcement was involved in investigation, those reports are not "student records" pursuant to FERPA.

SCHOOLS LEGAL SERVICE 88

RETALIATION

- Statute now specifically states that retaliation for exercising one's rights pursuant to Title IX is prohibited.
- Retaliation includes:
  - A recipient or other person intimidating, threatening, coercing, or discriminating against any individual:
    - For the purpose of interfering with any right or privilege pursuant to Title IX.
    - Because the individual has made a report or complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing.
  - Acts that violate code of conduct that do not involve sex discrimination or harassment, but arise out of the same facts or circumstances as a report or complaint for the purposes of interfering with any right or privilege guaranteed by Title IX.
  - Making a report or formal complaint of sexual harassment for the purpose of interfering with any right or privilege secured by Title IX.

(34 CFR 106.71(a))

SCHOOLS LEGAL SERVICE 89

RETALIATION (CON'T)

Must keep identity of complainant, respondent, witnesses, and any person who has made a report or complaint confidential.

Exceptions:

- As permitted by FERPA statutes and regulations.
- As permitted by Code of Federal Regulations regarding FERPA.
- Carrying out the purpose of Title IX, including investigations, hearings, or judicial proceedings arising thereunder.

Breaking confidentiality of the investigation can constitute retaliation

SCHOOLS LEGAL SERVICE 90

RETALIATION (CON'T)

What does not constitute retaliation:

- Exercise of rights protected under First Amendment.
- Charging an individual with a code of conduct violation for making materially false statements in bad faith during the course of a grievance proceeding.
  - The determination of responsibility cannot be, alone, sufficient to conclude that any party made a materially false statement in bad faith. *(34 CFR 106.71(b).)*

Complaint of retaliation may be filed in accordance with the grievance procedure. *(34 CFR 106.71(a); 34 CFR 106.8(c).)*

SCHOOLS LEGAL SERVICE 91

HYPOTHETICALS

- A sixth grade female student reports that a sixth grade male student told her that he liked her.
  - The sixth grade male student has now left numerous notes for her saying that he likes her and has slapped her buttocks several times. She has made it clear to him that she does not like him.
- A fourth grade student reports that her teacher hugs her everyday when she gets to school and when she leaves. He does not hug any other student. She has missed several days due to being ill and her grades are falling.
  - She has told the playground aide that she does not want to go to class because her teacher keeps making her feel "weird" by hugging her.
- A custodian finds inappropriate photos and notes between two sixth grade students. The notes indicate Sam has been demanding more photos from Sally and threatening to put the others on social media if she does not provide more.

SCHOOLS LEGAL SERVICE 92

HYPOTHETICALS

- Over a weekend, John posts several inappropriate photographs with sexually explicit comments of Jane on social media. Jane sees the posts and is very upset and humiliated.
- Other boys add sexually explicit comments to the photos.
- Several of the boys make comments to Jane about the photographs during the week at school.
  - Jane refuses to come to school and leaves the campus when her parents drop her off.

SCHOOLS LEGAL SERVICE 93

RESOURCES

- www.ed.gov/titleix
- https://www2.ed.gov/about/offices/list/ocr/docs/tix_dis.html
- https://www.cde.ca.gov/re/di/eo/genequitytitleix.asp
- https://www.justice.gov/crt

SCHOOLS LEGAL SERVICE 94

Thank you for your participation

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SCHOOLS LEGAL SERVICE

95