



Title IX Compliance: a New Road Map

The North Carolina Association for Public Charter Schools
and The Buckeye Community Hope Foundation

Presented by: Lisa Gordon Stella, Esq.

Lisa@lgstellaLaw.com

(919)274-5719

www.lgstellaLaw.com

September 24, 2020 and October 8, 2020

2020 Copyright North Carolina Association for Public Charter Schools and Buckeye Community Hope Foundation

Housekeeping

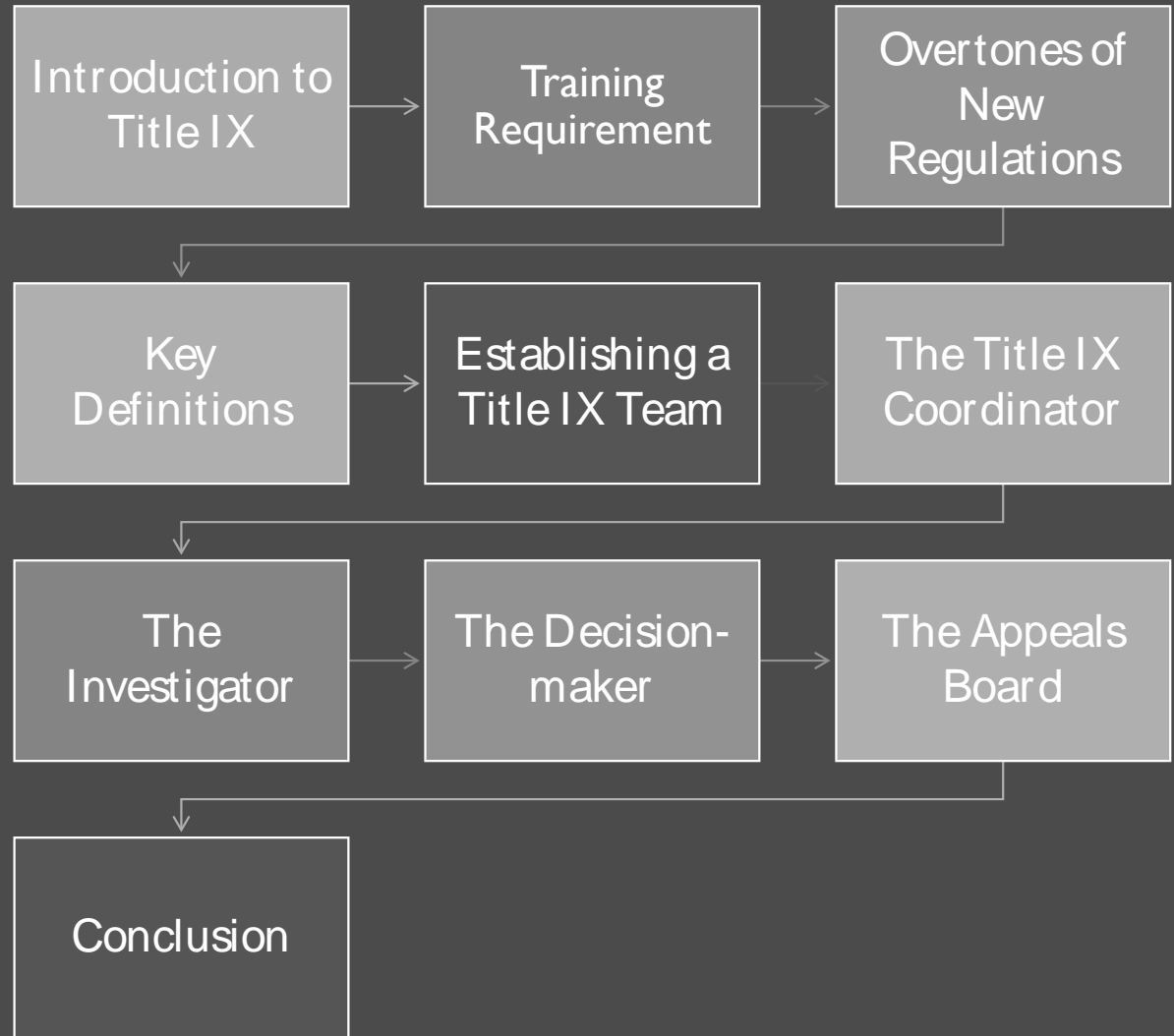
- Not here to give you legal advice
- Consult with your legal counsel regarding how best to address a specific situation
- You will receive a copy of the slides after this presentation to all who registered
- We will be monitoring the chat and I will break periodically for questions from the chat.



Objectives

1. Outline responsibilities under Title IX
2. Role of Title IX Team
 - Coordinator
 - Investigator
 - Decisionmaker
 - Appeals Panel
3. Assembling your Team
4. Understanding Title IX Process

Roadmap





Introduction to Title IX

- Title IX was passed in 1972 and prohibits discrimination on the basis of sex by schools that receive federal funding
- The **US Department of Education (DOE)** is the administrative agency empowered by Congress to interpret Title IX (i.e. issue regulations)
- The DOE has issued a series of **guidance documents**: most importantly, that sex discrimination includes sexual harassment, which in turn includes sexual assault, and that schools must address those offenses as a matter of sex equality
- Moving away from earlier Obama-era guidelines, Secretary of Education Betsy DeVos and the DOE released new Title IX regulations on May 6, which will go into effect on **August 14**

Training Requirement

- Title IX personnel (including faculty and staff and all mandatory reporters) must go through training on:
 - new definitions (e.g., of sexual harassment)
 - the scope of the school's education program or activity
 - how to conduct an investigation and the grievance process (including appeals, and informal resolution processes, as applicable)
 - how to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias
 - issues of relevance



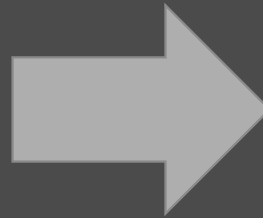
New training obligations are significant, and schools should take prompt action to implement the needed training infrastructure with the help of the Title IX Coordinator and others.

Overtone of New Regulations

- Focus on due process, including:
 - Equitable treatment of accuser and accused.
 - Eliminating immediate disciplinary actions taken against accused.
 - Slowing down of handling of Title IX cases (e.g. time given to parties to review the case file, time given to review and ask questions regarding the investigative report, etc.).
 - K-12 cases have tended to be handled faster than college/university cases due to school administrations' ability to more efficiently summon students.
 - New notice requirements, for example, prevent front offices from simply calling a respondent down to talk about allegations, as they may have done before.

Scope of Responsibility

- **“Actual knowledge”**
- **of “sexual harassment”** (as newly defined)
- **that occurred within the school’s “education program or activity”**
 - includes locations, events, or circumstances over which the recipient exercised substantial control over the respondent and the context in which the sexual harassment occurred
 - Note that this is a broad definition. E.g. did conduct occur in location/context where school:
 - Owned premises
 - Exercised oversight, supervision or discipline
 - Funded, sponsored, promoted or endorsed event
- **against a “person in the United States.”**



- **NOTE:** a school may address sexual harassment affecting its students or employees that falls outside Title IX’s jurisdiction in any manner the school chooses, including providing supportive measures or pursuing discipline
- This includes issues occurring outside narrow sexual harassment definition, education programs or activities, as well as issues occurring outside of the US.

Actual Knowledge

- Actual knowledge means notice of sexual harassment or allegations of sexual harassment to a School's Title IX Coordinator, or any official of the School who has authority to institute corrective measures on behalf of the recipient.
- For K-12 Schools, this means that ALL teachers and staff are required to report allegations of misconduct that they have witnessed or heard about to the Title IX Coordinator.



Once you have Knowledge, Response Must Not Be Deliberately Indifferent

- Deliberately indifferent means in a way that is clearly unreasonable in light of the known circumstances.
 - This "deliberate indifference" standard governs schools' responses to Title IX sexual harassment.
 - To avoid being deemed "deliberately indifferent," schools' mandatory responses must:
 - Provide supportive measures (discussed in the following slide).
 - Include prompt contact by Title IX coordinator to complainant.
 - Follow a grievance process before imposing discipline or sanctions.
 - Not restrict constitutional rights.
 - Observe meticulous record keeping requirements in order to protect against accusations of deliberate indifference.

Key Definitions

- Complainant means an individual who has reported being the victim of conduct that could constitute sexual harassment, or on whose behalf the Title IX Coordinator has filed a formal complaint.
 - Note: parents may file complaints for their children.
- Respondent means an individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment.
- Recipient means the institution charged with receiving and handling complaints, i.e., the school.
- Formal complaint means a document filed by a complainant or signed by the Title IX Coordinator alleging sexual harassment against a respondent and requesting that the school investigate the allegation of sexual harassment.

New Sexual Harassment Definition

- Sexual Harassment means conduct on the basis of sex that falls under one or more of the following:
 - 1) Quid pro quo harassment. An employee conditioning an educational aid, benefit, or service on an individual's participation in unwelcome sexual conduct.
 - 2) Unwelcome conduct on the basis of sex that is so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the school's education program or activity (i.e., hostile environment).
 - Note: THIS IS NARROW
 - 3) Sexual assault as defined in the Clery Act, or dating violence, domestic violence, or stalking as defined in the Violence Against Women Act.



Scope of Responsibility If Conduct Not Covered By Title IX

- The narrower definition of sexual harassment means that many K-12 cases may not fall under the new Title IX definition.
- Schools will need to act within their own codes of conduct or other policies to respond to cases and ensure they do not worsen to the levels described in the definition.
- A school may address sexual harassment affecting its students or employees that falls outside Title IX's jurisdiction in any manner the school chooses, including providing supportive measures or pursuing discipline.

Establishing a Title IX Team

- New regulations expressly prohibit the Single Investigator Model, where the investigator is also the decision-maker determining responsibility in Title IX cases.
- Thus, the decision-maker must be separate from the Title IX Coordinator or investigator.
 - Rationale: one person cannot effectively serve as detective, prosecutor, judge, and jury.
- As such, schools should consider splitting roles for handling Title IX issues.



4-part Title IX team: Title IX Coordinator, Investigator, Decision-maker, and Appeals Board

Role and New Significance of Title IX Coordinator

- The employee designated by a recipient (the school) to coordinate its efforts to comply with Title IX responsibilities must be referred to as the **“Title IX Coordinator”**
- The new regulations broadly expand a school’s obligation to ensure it not only has a Title IX Coordinator, but its educational community knows how to report to the coordinator.



Community Awareness of Title IX Coordinator

- Schools must notify students, employees, applicants for admission and employment, parents or legal guardians of elementary and secondary school students, and all unions, of the name or title, office address, e-mail address, and telephone number of the Title IX Coordinator.
- Schools **must** prominently display on their websites the required contact information for the Title IX Coordinator.
- Any person may report sex discrimination, including sexual harassment (whether or not the person reporting is the person alleged to be the victim of conduct), in person, by mail, by telephone, or by e-mail, using the contact information listed for the Title IX Coordinator, or by any other means that results in the Title IX Coordinator receiving the person's verbal or written report.
 - Such a report **may be made** at any time, including during non-business hours, by using the telephone number or e-mail address, or by mail to the office address, listed for the Title IX Coordinator.

Title IX Coordinator Responsibilities:



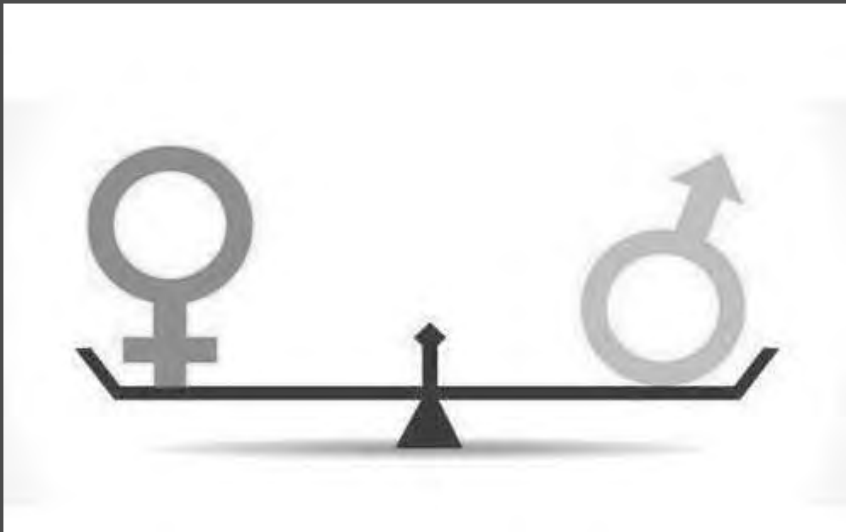
- The Title IX Coordinator is responsible for monitoring the overall implementation of policies and compliance with Title IX in all areas covered by the regulations.
- **The major responsibility is the prevention of sexual harassment and discrimination.** Other major monitoring duties include, but are not limited to, the following:
 - Admissions (Admissions and Recruitment)
 - Educational Programs and Activities
 - Financial Assistance, Employment Assistance, Health Services and Insurance,
 - Employment (Employment Criteria, Recruitment, Compensation, Job Classification, Fringe Benefits, Marital or Parental Status, Advertising, Pre-employment Activities)

Title IX Coordinator Responsibilities

- Other areas of consideration include:
 - Participating in the development and implementation of the school's sexual harassment policy. Be aware of new needs which may dictate changes or revisions in existing policies or practices.
 - Assisting faculty, counselors and administrators in complying with Title IX, and when a need arises, planning remedial actions.
 - Making your presence known in the community by disseminating civil rights information or by speaking at parent-teacher group meetings, social or professional organization meetings, and other community functions.



Title IX Coordinator Responsibilities



- Serving as a resource on Title IX/gender issues.
- Monitoring and evaluating the school's Title IX compliance efforts and making recommendations for any appropriate changes, including assisting/facilitating needed training for faculty and staff with respect to Title IX regulations.
- Providing updated information to the school on Title IX implementation and issues (e.g. impact of new regulations on school policy, and faculty/staff training).
- Identifying and disseminating information about Title IX educational resources (organizations, individuals, print, internet, and audio-visual).

Role of the Investigator:

- In Title IX cases, the investigator is primarily tasked with facilitating interviews of the complainant, witness(es), and respondent, documenting and making the concerned parties aware of the status of investigation proceedings, and issuing an investigative report summarizing evidence before a determination regarding responsibility is made.
- The investigator will work closely with the Title IX coordinator to execute all duties outlined above in accordance with the Title IX grievance process.
- The investigator may be a faculty member, administrator, or other actor (such as a hired attorney) depending on the circumstances of the complaint.



Role of the Decision-maker



- In Title IX cases, the decision-maker is primarily tasked with issuing a determination regarding responsibility after reviewing the evidence and findings of the investigation.
- The decision-maker may be a faculty member, administrator, or other actor (such as a school board member) depending on the circumstances of the complaint.

Role of the Appeals Board

- The new regulations dictate that schools must offer both parties an appeal from a determination regarding responsibility, and from a school's dismissal of a formal complaint or any allegations therein, on the following bases:
 1. procedural irregularity that affected the outcome of the matter;
 2. newly discovered evidence that could affect the outcome of the matter; and
 3. Title IX personnel had a conflict of interest or bias that affected the outcome of the matter.
 - NOTE: schools may also offer an appeal equally to both parties on additional bases
- The job of the appeals board is to review the case and determination and issue a ruling at the conclusion of their review.
- The appeals board may consist of faculty, administrators, or other actors (such as school board members) depending on the circumstances of the appeal.

2020 Copyright North Carolina Association for Public Charter Schools and Buckeye Community Hope Foundation



Who Should Be On Your Title IX Team: Create a Robust Team with Depth of Expertise

- Title IX Coordinator
- Legal Counsel
- Investigator(s)
- Decision-makers
- Head of School/Executive Director
- Dean(s)
- School counselor and/or social worker
- Human Resources
- Diversity/Inclusion Officer

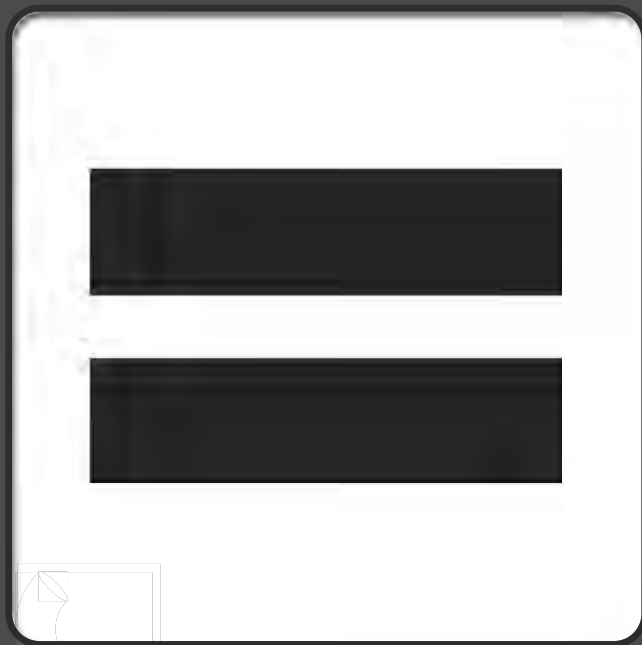


Identifying Staff for Roles

- Title IX Coordinator: Not your Head of School or anyone who may serve in another Title IX role. Consider HR, Dean of Students or Assistant Principals
- Investigator: Can be a school employee or outside third party contractor but cannot serve in another Title IX role. Consider Dean of Students or Assistant Principals.
- Decision-Maker: Head of School, Assistant Principal or similarly situated position. Cannot perform any other Title IX roles.
- Appeals Board: The appeals board may consist of faculty, administrators, or other actors (such as school board members) depending on the circumstances of the appeal. Cannot serve in any other Title IX role.

Requirements of Formal Grievance Process

- **1) Treat complainants and respondents equitably** by providing remedies to a complainant where a determination of responsibility for sexual harassment has been made against the respondent, and by following a grievance process
 - This includes not imposing disciplinary sanctions on respondent before investigation and handling of formal complaint
- **2) Objective evaluation of all evidence** and provide that credibility determinations may not be based on a person's status as a complainant, respondent, or witness
- **3) Train coordinators, investigators, and adjudicators**



Requirements of Formal Grievance Process Cont.

- 4) Include a **presumption of innocence for respondent**
- 5) Include **reasonably prompt timeframes** (which allow for delays or extensions for good cause)
- 6) Describe range of **possible sanctions and remedies**
- 7) Describe the **standard of evidence** to be used to determine responsibility
 - Preponderance of the Evidence standard or Clear and Convincing Evidence standard (discussed further in later slide)
- 8) Include **appeal** processes and standards
 - New mandatory appeals process (discussed further in later slide)
- 9) Describe the range of **supportive measures** available to complainants and respondents
- 10) Do not require, allow, rely upon, or otherwise use questions or evidence that constitute, or seek disclosure of, **information protected under a legally recognized privilege**, unless the person holding such privilege has waived the privilege

Notice of Allegations

- Upon receiving a formal complaint, schools must give **written notice** to the known parties **that includes:**
 - Description of the formal complaint process and the allegations
 - Sufficient details of allegations
 - A statement that the respondent is presumed innocent until a determination of responsibility has been made
 - Right to review evidence
 - Aiming to prevent lawsuits about not presenting exonerating evidence
 - Right to advisor (may be an attorney)
 - Prohibition against false statements or providing false information during formal complaint process

Guide to Investigations

- Schools **must investigate the allegations in any formal complaint** and send written notice to both parties (complainants and respondents) of the allegations upon receipt of a formal complaint.
- During the grievance process and when investigating, the following guidelines apply:
 - The **burden of gathering evidence and burden of proof** must remain on schools, not on the parties.
 - Schools **must provide equal opportunity** for the parties to present fact and expert witnesses and other inculpatory (implying responsibility) and exculpatory (denying responsibility) evidence
 - Note importantly that live hearings are **NOT REQUIRED** for K-12 schools
 - Schools **must not restrict** the ability of the parties to discuss the allegations or gather evidence
 - e.g. no “gag orders”

2020 Copyright North Carolina Association for Public Charter Schools and Buckeye Community Hope Foundation



Guide to Investigations: Communications to the Parties

- Guidelines continued: Investigative Reports
 - Schools **must send written notice** of any investigative interviews and meetings.
 - Schools must send the parties, and their advisors, **evidence directly** related to the allegations, in electronic format or hard copy, with **at least 10 days** for the parties to inspect, review, and respond to the evidence
 - Schools must send the parties, and their advisors, an **investigative report** that fairly summarizes relevant evidence, in electronic format or hard copy, with **at least 10 days** for the parties to respond

More on Investigations

- Guidelines continued: Complaint Dismissal

- Schools **must dismiss** allegations of conduct that do not meet the new definition of sexual harassment or did not occur in a school's education program or activity against a person in the U.S.
 - NOTE: such dismissal is only for Title IX purposes and **does not** preclude the school from addressing the conduct in any manner the school deems appropriate.
- Schools may, in their discretion, **dismiss a formal complaint or allegations therein if**:
 - the complainant informs the Title IX Coordinator in writing that the complainant desires to withdraw the formal complaint or allegations therein
 - if the respondent is no longer enrolled or employed by the school
 - if specific circumstances prevent the school from gathering sufficient evidence to reach a determination
 - NOTE: Schools must give the parties written notice of a dismissal (mandatory or discretionary) and the reasons for the dismissal.

Certain Information Off Limits

ASIDE: the new regulations protect the privacy of a party's medical, psychological, and similar treatment records by stating that schools cannot access or use such records unless the school obtains the party's voluntary, written consent to do so.



First Amendment Protections

- Schools must not infringe on student's First Amendment rights.
- Cannot issue blanket “gag orders.”
- Can prohibit and discipline for student conduct or behavior, on or off campus that impacts the school.
- Can discipline for speech that violates Code of Conduct, harassment, bullying, etc.
- K-12 Student have reduced First Amendment rights in the school setting
- Note: This is a tricky area so seek legal advice before taking action.

Written Questions

- While the new regulations dictate that colleges and universities must conduct a **live hearing with cross examination** for Title IX cases, **K-12 schools are NOT required** to do so.
- **After** the school has sent the investigative report to the parties and **before** reaching a determination regarding responsibility, the decision-maker(s) must afford each party the opportunity to submit written, relevant questions that a party wants asked of any party or witness, provide each party with the answers, and allow for additional, limited follow-up questions from each party.

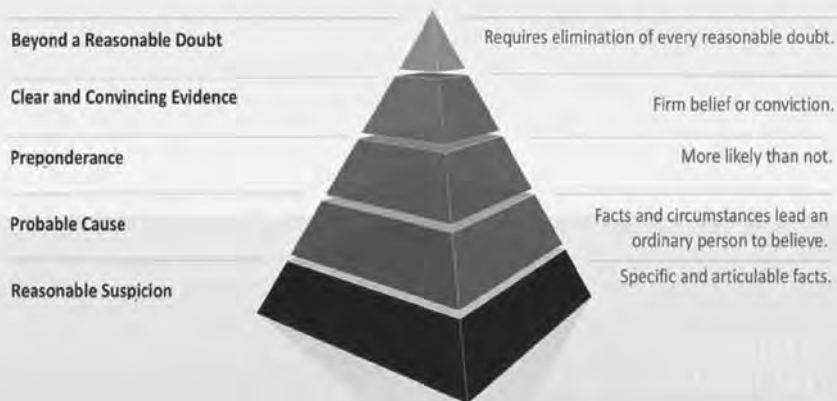
Written Questions: Not Permitted

- The new regulations provide **rape shield protections** for complainants (whether in postsecondary institutions, K-12 schools, or others)
- These protections deem questions and evidence about a complainant's prior sexual behavior irrelevant, **unless** offered to prove that someone other than the respondent committed the alleged misconduct or offered to prove consent



Evidentiary Standard

BURDENS OF PROOF



Why a pyramid? | As the level of proof required rises, the fewer number of cases meet the level of proof.

- Schools must choose between the **Preponderance of the Evidence** standard and the **Clear and Convincing Evidence** standard with respect to Title IX applications
- Must state what the standard is in the policy and apply it in determinations of responsibility
- Must apply the same standard of evidence for informal complaints against students as for formal complaints

Evidentiary Standard

- The decision-maker must issue a **written determination** regarding responsibility with the following:
 - **findings of fact**
 - **conclusions** about whether the alleged conduct occurred
 - **rationale** for the result as to each allegation
 - any **disciplinary sanctions** imposed on the respondent
 - whether **remedies** will be provided to the complainant
- The written determination must be sent simultaneously to the parties along with information about how to file an **appeal**

Appeals

- The new regulations dictate that schools must offer both parties an **appeal from a determination regarding responsibility, and from a school's dismissal of a formal complaint or any allegations** therein, on the following bases:
 - procedural irregularity that affected the outcome of the matter
 - newly discovered evidence that could affect the outcome of the matter
 - Title IX personnel had a conflict of interest or bias that affected the outcome of the matter.
- **NOTE:** schools may also offer an appeal equally to both parties on additional bases



Informal Resolution

- Schools, in their discretion, can offer informal resolution options, such as mediation or restorative justice.
- In order to pursue this option:
 - Both parties must give voluntary, informed, written consent.
 - Schools cannot require pursuing informal resolution as a condition of enrollment or employment.
 - Schools cannot offer informal resolution unless a formal complaint has been filed.
 - Schools cannot offer informal resolution for allegations that an employee sexually harassed a student.
- Note: At any time prior to agreeing to a resolution, any party has the right to withdraw from the informal resolution process and resume the grievance process with respect to formal complaint.

Retaliation Prohibited

- Expressly prohibits retaliation against any individual for exercising Title IX rights:
 - Protections for individuals making a complaint, giving a statement or otherwise assisting.
 - Prohibiting charges against an individual for another code of conduct violation not involving sex discrimination or sexual harassment arising out of same circumstances.
- Notable exception:
 - making a materially false statement during a proceeding.
- Any person retaliated against can file a complaint with the school, and the school must address the complaint promptly and equitably, as with Title IX complaints.
- NOTE: Schools should make every effort to keep the identities of parties and witnesses confidential to avoid retaliation complaints.



Record Keeping

- Title IX regulations require the school to keep the following records for 7 years:
 - Sexual harassment investigation documents, including any determination regarding responsibility, any audio or audiovisual recording or transcript, any disciplinary sanctions imposed on the respondent, any remedies provided to the complainant
 - Appeals and results therefrom
 - Informal resolution and results therefrom
 - All materials used to train coordinators, investigators, decision-makers, and persons who facilitate an informal resolution process (such materials must also be made available on school website)
- The school should meticulously keep records in case it must ever document how its behavior was not “deliberately indifferent” in a Title IX proceeding.



January Training: Handling Title IX Complaints

Assess the
Situation

Evaluate
Appropriate
Interim
Measures

Establish
Timelines and
Initiate
an Investigation

Interview the
Complainant,
Witnesses,
and the
Respondent

Prepare a
Summary or
Report

Issue
Investigation
Findings

Keep Records

Conclusion

- New regulations effective August 14, 2020.
- Recognize and begin preparing any needed policy and process revisions.
- Recognize and begin preparing for needed training.
- Recognize and be prepared for issues and complaints that may still come up despite COVID-19 and social distancing (e.g. cyberstalking, online harassment, inappropriate texting, etc.).

Questions?

