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TITLE IX COMPLIANCE TRAINING: NAVIGATING THE TITLE IX FINAL RULE

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NOTE: The purpose of this presentation, and the accompanying materials, is to inform you of interesting and important legal developments. While current as of the date of presentation, the information given today may be superseded by court decisions and legislative amendments. We cannot render legal advice without an awareness and analysis of the facts of a particular situation. If you have questions about the application of concepts discussed in the presentation or addressed in this outline, you should consult your legal counsel.

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WHAT EVERYONE NEEDS TO KNOW ABOUT THE TITLE IX FINAL RULE

Title IX, 34 C.F.R. § 106, et seq., prohibits discrimination on the basis of sex by education institutions that receive federal funding. Under the Title IX Final Rule that took effect August 1, 2024, all school district employees must be trained on certain aspects of Title IX. The purpose of this training is to cover those topics, to explain the new regulations, and to offer practical advice on how to conduct and resolve a Title IX investigation under the new grievance procedure. All underlined materials illustrate changes to Title IX under the Title IX Final Rule, which was released in April 2024.

I. TRAINING REQUIREMENTS

Training of the following individuals must be “promptly” completed upon hiring or change of position that alters the individual’s duties under Title IX, and annually thereafter.

A. All employees must be trained on: (34 C.F.R. § 106.8(d)(1))

1. The school or school district’s obligation to address sex discrimination in its education program or activity;
2. The scope of conduct that constitutes sex discrimination under Title IX, including the definition of sex-based harassment; and
3. All applicable notification and information requirements under 34 C.F.R. §§ 106.40(b)(2) and 106.44.

Specifically, 34 C.F.R. §§ 106.40(b)(2) and 106.44 include the following:

- a. Responsibility of employees to provide the below information to a student or person with the legal right to act on a student’s behalf when that individual informs the employee of the student’s pregnancy or related condition(s). See 34 C.F.R. §§ 106.40(b)(2).
 - A. Unless the employee reasonably believes that the Title IX Coordinator has already been notified, the employee must promptly provide the person with the Title IX Coordinator’s contact information and inform the person that the Title IX Coordinator can coordinate specific actions to prevent sex discrimination and ensure equal access to the education program or activity. *Id.*

- b. General obligation to respond promptly and effectively when having knowledge of conduct that reasonably may constitute sex discrimination. See 34 C.F.R. § 106.44(a).
- c. General requirement that all employees notify the Title IX Coordinator when the employee has information about conduct that reasonably may constitute sex discrimination. See 34 C.F.R. § 106.44(c).
- d. General obligation to comply with Title IX to address sex discrimination. See 34 C.F.R. § 106.44(a).
- e. Barriers to reporting. See 34 C.F.R. § 106.44(b).
 - A. Title IX Coordinator is required to: (1) monitor for barriers individuals may face to reporting sex discrimination; and (2) take steps reasonably calculated to address those barriers identified.
- f. Requirements related to any confidential employees. See 34 C.F.R. § 106.44(d).
- g. The Title IX Coordinator's specific requirements. See 34 C.F.R. § 106.44(f).
- h. Supportive measures. See 34 C.F.R. § 106.44(g).

Generally speaking, for most employees, this training obligation includes a basic understanding of the school or school district's Title IX policy and grievance procedure.

- B. In addition to the training requirements in Part A above, all investigators, decisionmakers, and other persons who are responsible for implementing the school or school district's grievance procedures or who have the authority to modify or terminate supportive measures under § 106.44(g)(4) must be trained on the following topics to the extent related to their responsibilities:
 - 1. The school or school district's obligations under § 106.44, as stated above;
 - 2. The school or school district's grievance procedures;

3. How to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias; and
 4. The meaning and application of the term “relevant” in relation to questions and evidence, and the types of evidence that are impermissible regardless of relevance.
- C. In addition to the training requirements in Part A above, facilitators of an informal resolution process must be trained on the rules and practices associated with the school or school district’s informal resolution process and on how to serve impartially, including by avoiding conflicts of interest and bias.
- D. In addition to the training requirements in Parts A, B, and C above, the Title IX Coordinator and any designees must be trained on their specific responsibilities under 34 C.F.R. §§ 106.8(a), 106.40(b)(3), 106.44(f) and (g), the school or school district’s recordkeeping system requirements, and any other training necessary to coordinate the school or school district’s compliance with Title IX. The Title IX Coordinator must receive training regarding the specific actions to prevent discrimination and ensure equal access.

See 34 C.F.R. § 106.8(d) (as amended).

II. DEFINITIONS

- A. **Discrimination on the Basis of Sex.** The Title IX Final Rule expanded “discrimination on the basis of sex” to include discrimination on the basis of sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity. 34 C.F.R. § 106.10 (as amended).

The Title IX Final Rule defines the following terms in the comments section:

1. Sex Stereotypes: Sex stereotypes are “fixed or generalized expectations regarding a person’s aptitudes, behavior, self-presentation, or other attributes based on sex.” See Notice of Proposed Rule Making from July 2022.
2. Sex Characteristics: Sex discrimination “based on a person’s physiological sex characteristics may include discrimination based on a person’s anatomy, hormones, and chromosomes associated with male or female

bodies,” which was addressed in the Notice of Proposed Rule Making in July 2022.

3. Pregnancy or Related Conditions: see page 6 of this outline.
4. Sexual Orientation: The comments do not define this term, but the U.S. Department of Education suggested relying on case law to determine what constitutes sexual orientation. The U.S. Department of Education stated that it recognizes that a concept like sexual orientation is distinct from sex, even if it is “inextricably bound up with sex.”
5. Gender Identity: Gender identity describes an individual’s sense of their gender, which may or may not be different from their sex assigned at birth.

KEY POINT: Title IX was first passed by Congress in 1972. Since that date, there have been several revisions to Title IX with the most relevant changes occurring in 2020, 2021, 2022, and 2024. In 2020, Title IX did not define the scope of sex discrimination in educational institutions. In 2021, the U.S. Department of Education released a Notice of Interpretation, which included the scope of sex discrimination. The U.S. Department of Education stated that Title IX includes discrimination on the basis of sex, gender identity, and sexual orientation. In 2022, the U.S. Department of Education released a Notice of Proposed Rulemaking, which further expanded the scope of sex discrimination under Title IX. Specifically, the U.S. Department of Education stated Title IX includes discrimination on the basis of sex, sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity. In 2024, the U.S. Department of Education released the Title IX Final Rule, which adopted the language from the Notice of Proposed Rulemaking.

- B. **Sex-Based Harassment.** Formerly defined as sexual harassment, sex-based harassment is now defined, by regulation, as sexual harassment and other harassment on the basis of sex that also satisfies one or more of the following conditions:

1. *Quid pro quo harassment.* An employee, agent, or other person authorized by the school or school district to provide an aid, benefit, or service under the school or school district’s education program or activity explicitly or impliedly conditioning the provision of such an aid, benefit, or service on a person’s participation in unwelcome sexual conduct;

2. 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 school or school district's education program or activity (*i.e.*, creates a hostile environment). Whether a hostile environment has been created is a fact-specific inquiry that includes consideration of the following:
 - a. The degree to which the conduct affected the complainant's ability to access the school or school district's education program or activity;
 - b. The type, frequency, and duration of the conduct;
 - c. The parties' ages, roles within the school or school district's education program or activity, previous interactions, and other factors about each party that may be relevant to evaluating the effects of the conduct;
 - d. The location of the conduct and the context in which the conduct occurred; and
 - e. Other sex-based harassment in the school or school district's education program or activity; or
3. Specific offenses. The following offenses constitute sex-based harassment:
 - a. "Sexual assault" meaning an offense classified as a forcible or nonforcible sex offense under the uniform crime reporting system of the Federal Bureau of Investigation¹;
 - b. "Dating violence" meaning violence committed by a person:
 - i. Who is or has been in a social relationship of a romantic or intimate nature with the victim; and
 - ii. Where the existence of such a relationship shall be determined based on a consideration of the following factors: (1) length of relationship, (2) type of relationship, and (3) frequency of interaction between the persons involved in the relationship.

¹ See https://ucr.fbi.gov/nibrs/2018/resource-pages/nibrs_offense_definitions-2018.pdf.

- c. “Domestic violence” meaning felony or misdemeanor crimes committed by a person who:
 - i. Is a current or former spouse or intimate partner of the victim under the family or domestic violence laws of the jurisdiction of the school or school district, or a person similarly situated to a spouse of the victim;
 - ii. Is cohabitating, or has cohabitated, with the victim as a spouse or intimate partner;
 - iii. Shares a child in common with the victim; or
 - iv. Commits acts against a youth or adult victim who is protected from those acts under the family or domestic violence laws of the jurisdiction.
- d. “Stalking” meaning engaging in a course of conduct directed at a specific person that would cause a reasonable person to:
 - i. Fear for the person’s safety or the safety of others; or
 - ii. Suffer substantial emotional distress.

See 34 C.F.R. § 106.2 (as amended).

It is noteworthy that while the definition of sex-based harassment has been broadened, the Title IX Final Rule did not adopt a specific definition of consent.

C. **Pregnancy or Related Conditions.** “Pregnancy or related conditions” means:

- 1. Pregnancy, childbirth, termination of pregnancy, or lactation;
- 2. Medical conditions related to pregnancy, childbirth, termination of pregnancy, or lactation; or
- 3. Recovery from pregnancy, childbirth, termination of pregnancy, lactation, or related medical conditions.

34 C.F.R. § 106.2 (as amended).

- D. **Knowledge.** The Title IX Final Rule eliminated “actual knowledge” and replaced it with “knowledge of conduct that reasonably may constitute sex discrimination.” This new “knowledge” standard triggers a school or school district’s duty to respond to sex discrimination in a prompt and effective manner. 34 C.F.R. § 106.44(a) (emphasis added).
- E. **Complaint.** “Complaint” means an oral or written request to the school or school district that objectively can be understood as a request for the school or school district to investigate and make a determination about alleged discrimination under Title IX and its regulations. 34 C.F.R. § 106.2 (as amended).
- F. **Complainant.** “Complainant” means:
1. A student or employee who is alleged to have been subjected to conduct that could constitute sex discrimination under Title IX and its regulations; or
 2. A person other than a student or employee who is alleged to have been subjected to conduct that could constitute sex discrimination under Title IX and its regulations, and who was participating or attempting to participate in the school or school district’s education program or activity at the time of the alleged sex discrimination.
- 34 C.F.R. § 106.2 (as amended).
- G. **Respondent.** “Respondent” means a person who is alleged to have violated the school or school district’s prohibition on sex discrimination. 34 C.F.R. § 106.2 (as amended).
- H. **Party.** The term “party” refers to a complainant or a respondent. The term “parties” refers to both. Some reports of sex-based harassment may involve multiple complainants or multiple respondents, or both. For purposes of clarity, these materials use the singular form. However, these regulations apply equally to both single- and multi-complainant or respondent complaints.
- I. **Confidential Employee.** “Confidential employee” means:
1. An employee of a school or school district whose communications are privileged or confidential under federal or state law. The employee’s confidential status is only with respect to information re-

ceived while the employee is functioning within the scope of their duties to which privilege or confidentiality applies; or

2. An employee of a school or school district whom the school or school district has designated as confidential for the purpose of providing services to persons related to sex discrimination. If the employee also has a duty not associated with providing those services, the employee's confidential status is only with respect to information received about sex discrimination in connection with providing those services.

34 C.F.R. § 106.2 (as amended).

- J. **Supportive Measures.** “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 school or school district's education program or activity, including measures that are designed to protect the safety of the parties or the school or school district's educational environment; or
2. Provide support during the school or school district's grievance procedures, and if applicable, during the informal resolution process.

34 C.F.R. § 106.2 (as amended).

Examples 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 location, leaves of absence, increased security and monitoring of certain areas of the campus, and other similar measures.

Supportive measures are coordinated by the Title IX Coordinator and should be kept confidential, to the extent that maintaining confidentiality does not otherwise interfere with the provision of supportive measures.

- K. **Education Program or Activity.** The Title IX Final Rule eliminated the definition of an education program or activity. However, it does state that a school or school district has an obligation to address a hostile work environment under its education program or activity, even when some conduct alleged to be contributing to the hostile environment occurred outside the

school or school district's education program or activity or outside the United States. 34 C.F.R. § 106.11 (as amended).

III. GENERAL RESPONSIBILITIES

- A. **Nondiscrimination Policy.** Each school or school district must adopt, publish, and implement a policy stating that the school or school district does not discriminate on the basis of sex and prohibits sex discrimination in any education program or activity that it operates, as required by Title IX and its regulations, including in admission and employment. 34 C.F.R. § 106.8(b)(1) (as amended).
- B. **Grievance Procedures.** A school or school district must adopt, publish, and implement grievance procedures consistent with the requirements of § 106.45, that provide for the prompt and equitable resolution of complaints made by students, employees, or other individuals who are participating or attempting to participate in the school or school district's education program or activity, or by the Title IX Coordinator, alleging any action that would be prohibited by Title IX or its regulations. 34 C.F.R. § 106.8(b)(2) (as amended).
- C. **Barriers to Reporting.** A school or school district must require its Title IX Coordinator to:
 - 1. Monitor the school or school district's education program or activity for barriers to reporting information about conduct that reasonably may constitute sex discrimination under Title IX or its regulations; and
 - 2. Take steps reasonably calculated to address such barriers.

34 C.F.R. § 106.44(b) (as amended).

Designation of Title IX Coordinator. Every school or school district must designate at least one Title IX Coordinator. 34 C.F.R. § 106.8(a) (as amended). The school or school district may delegate specific duties to one or more designees, but if there is more than one Title IX Coordinator, then one of the coordinators must retain the ultimate oversight of responsibilities and ensure consistent compliance with Title IX. *Id.* The Title IX Coordinator may receive complaints of sex-based harassment and sex discrimination, either by telephone, e-mail, mail to their office, or in person. Accordingly, the identity of the Title IX Coordinator and that person's contact information must be provided to (1) applicants for admission and employ-

ment, (2) students, (3) parents or legal guardians, (4) employees, and (5) all unions and professional organizations that have collective bargaining or professional agreements with the school or district. *See* 34 C.F.R. § 106.8(c) (as amended).

Key Point: The Title IX Coordinator must be a school or school district employee. *See* 34 C.F.R. § 106.8(a) (as amended). All other roles can be contracted out.

D. **Notice of Nondiscrimination.** Schools and school districts must provide a Notice of Nondiscrimination to students, parents, guardians, or other authorized legal representatives of elementary and secondary students, employees, applicants for admission and employment, and all unions and professional organizations that have collective bargaining or professional agreements with the school or district. The Notice of Nondiscrimination must include the following elements:

1. A statement that the school or school district does not discriminate on the basis of sex and prohibits sex discrimination in any education program or activity that it operates;
2. A statement that inquiries about the application of Title IX and its regulations to the school or school district may be referred to the Title IX Coordinator, the Office for Civil Rights, or both;
3. The name or title, office address, email address, and telephone number of the school or school district's Title IX Coordinator;
4. How to locate the school or school district's nondiscrimination policy and grievance procedures; and
5. How to report information about conduct that may constitute sex discrimination under Title IX; and how to make a complaint of sex discrimination under Title IX.

34 C.F.R. § 106.8(b)(1) (as amended).

E. **Publication of Notice of Nondiscrimination.** All elements of a school or school district's Notice of Nondiscrimination (items 1 through 5 above) must be prominently included on the school or school district's website, and in each handbook, catalog, announcement, bulletin, and application form that it makes available to persons entitled to the Notice of Nondiscrimination (students, parents, guardians, other authorized legal representa-

tives of students, employees, applicants for employment or admission, and unions), or which are otherwise used in connection with the recruitment of students or employees. 34 C.F.R. § 106.8(c)(2) (as amended).

Key note: If necessary, due to the format or size of a publication, the school or school district may instead include in those publications a statement that the school or school district prohibits sex discrimination in any education program or activity that it operates and that individuals may report concerns or questions to the Title IX Coordinator, and provide the location of the notice on the school district's website. *Id.*

F. **Recordkeeping.** A school or school district must maintain the following for a period of at least seven years:

1. For each complaint of sex discrimination, records documenting the informal resolution process under 34 C.F.R. § 106.44(k) or the grievance procedures under C.F.R. § 106.45 and the resulting outcome;
2. For each notification the Title IX Coordinator receives of information about conduct that reasonably may constitute sex discrimination under Title IX or its regulations, including notifications under 34 C.F.R. § 106.44(c)(1) or (2), records documenting the actions the school or school district took to meet its obligations under 34 C.F.R. § 106.44; and
3. All materials used to provide training. A school or school district must make these training materials available upon request for inspection by members of the public.

34 C.F.R. § 106.8(f) (as amended).

G. **Reasonably Prompt Timeframes.** The Title IX Final Rule requires “reasonably prompt timeframes for the major stages of the grievance procedures” including: evaluation, investigation, determination, and appeal. 34 C.F.R. § 106.45(b)(4) (as amended).²

H. **Confidential Employee Requirements**

² The Title IX Final Rule also states that the grievance procedures must include “a process that allows for the reasonable extension of timeframes on a case-by-case basis for good cause with notice to the parties that includes the reason for the delay.” 34 C.F.R. § 106.45(b)(4) (as amended)

A school or school district must notify all participants in the school or school district's education program or activity of how to contact its confidential employees, if any, excluding any employee whose confidential status is only with respect to their conducting an Institutional Review Board-approved human subjects research study designed to gather information about sex discrimination as set out in the definition of confidential employee in 34 C.F.R. § 106.2.

A school or school district must require a confidential employee to explain to any person who informs the confidential employee of conduct that reasonably may constitute sex discrimination under Title IX or this part:

1. The employee's status as confidential, including the circumstances in which the employee is not required to notify the Title IX Coordinator about conduct that reasonably may constitute sex discrimination;
2. How to contact the school or school district's Title IX Coordinator and how to make a complaint of sex discrimination; and
3. That the Title IX Coordinator may be able to offer and coordinate supportive measures, as well as initiate an informal resolution process or an investigation under the grievance procedures.

34 C.F.R. § 106.44(d) (as amended).

III. PARENTAL, FAMILY, MARITAL STATUS, AND PREGNANCY OR RELATED CONDITIONS NON-DISCRIMINATION

A. Pregnancy or Related Conditions for Students

1. **Status Generally.** A school or school district must not adopt or implement any policy, practice, or procedure concerning a student's current, potential, or past parental, family, or marital status that treats students differently on the basis of sex. 34 C.F.R. § 106.40(a) (as amended).
2. **Pregnancy or Related Conditions.** A school or school district must not discriminate in its education program or activity against any student based on the student's current, potential, or past preg-

nancy or related conditions. A school or school district does not engage in prohibited discrimination when it allows a student, based on pregnancy or related conditions, to voluntarily participate in a separate portion of its education program or activity provided the school or school district ensures that the separate portion is comparable to that offered to students who are not pregnant and do not have related conditions. 34 C.F.R. § 106.40(b)(1) (as amended).

3. **Responsibility to Provide Title IX Coordinator Contact and Other Information.** A school or school district must ensure that when a student, or a person who has a legal right to act on behalf of the student, informs any employee of the student's pregnancy or related conditions, unless the employee reasonably believes that the Title IX Coordinator has been notified, the employee promptly provides that person with the Title IX Coordinator's contact information and informs that person that the Title IX Coordinator can coordinate specific actions to prevent sex discrimination and ensure the student's equal access to the school or school district's education program or activity. 34 C.F.R. § 106.40(b)(2) (as amended).
4. **Specific Actions to Prevent Discrimination and Ensure Equal Access.** A school or school district must promptly and effectively prevent sex discrimination and ensure equal access to the school or school district's education program or activity once the student, or a person who has a legal right to act on behalf of the student, notifies the Title IX Coordinator of the student's pregnancy or related conditions. The Title IX Coordinator must coordinate these actions. 34 C.F.R. § 106.40(b)(3) (as amended).
5. **Notice Requirements.** The school or school district must inform the student, and if applicable, the person who notified the Title IX Coordinator of the student's pregnancy or related conditions and has a legal right to act on behalf of the student, of the school or school district's obligations of non-discrimination and provide the school or school district's notice of nondiscrimination. 34 C.F.R. § 106.40(b)(3)(i) (as amended).
6. **Reasonable Modifications.** The school or school district must make the following reasonable modifications:
 - a. Reasonable modifications to the school or school district's policies, practices, or procedures as necessary to prevent sex discrimination and ensure equal access to the school or school

district's education program or activity. Each reasonable modification must be based on the student's individualized needs. In determining what modifications are required, the school or school district must consult with the student. A modification that a school or school district can demonstrate would fundamentally alter the nature of its education program or activity is not a reasonable modification. 34 C.F.R. § 106.40(b)(3)(ii)(A) (as amended).

- b. The student has discretion to accept or decline each reasonable modification offered by the school or school district. If a student accepts a school or school district's offered reasonable modification, the school or school district must implement it. 34 C.F.R. § 106.40(b)(3)(ii)(B) (as amended).
 - c. Reasonable modifications may include, but are not limited to, breaks during class to express breast milk, breastfeed, or attend to health needs associated with pregnancy or related conditions, including eating, drinking, or using the restroom; intermittent absences to attend medical appointments; access to online or homebound education; changes in schedule or course sequence; extensions of time for coursework and re-scheduling of tests and examinations; allowing a student to sit or stand, or carry or keep water nearby; counseling; changes in physical space or supplies (for example, access to a larger desk or a footrest); elevator access; or other changes to policies, practices, or procedures. 34 C.F.R. § 106.40(b)(3)(ii)(C) (as amended).
7. The school or school district must allow the student to voluntarily access any separate and comparable portion of the school or school district's education program or activity. 34 C.F.R. § 106.40(b)(3)(iii) (as amended).
8. **Voluntary Leave of Absence.** The school or school district must allow the student to voluntarily take a leave of absence from the school or school district's education program or activity to cover, at minimum, the period of time deemed medically necessary by the student's licensed healthcare provider. To the extent that a student qualifies for leave under a leave policy maintained by a school or school district that allows a greater period of time than the medically necessary period, the school or school district must permit the student to take voluntary leave under that policy instead if the student

so chooses. When the student returns to the school or school district's education program or activity, the student must be reinstated to the academic status and, as practicable, to the extracurricular status that the student held when the voluntary leave began. 34 C.F.R. § 106.40(b)(3)(iv) (as amended).

9. **Lactation Space.** The school or school district must ensure that the student can access a lactation space, which must be a space other than a bathroom, that is clean, shielded from view, free from intrusion from others, and may be used by a student for expressing breast milk or breastfeeding as needed. 34 C.F.R. § 106.40(b)(3)(v) (as amended).
10. **Limitation on Supporting Documentation.** A school or school district must not require supporting documentation unless the documentation is necessary and reasonable for the school or school district to determine the reasonable modifications to make or whether to take additional specific actions. Examples of situations when requiring supporting documentation is not necessary and reasonable include, but are not limited to, when the student's need for a specific action is obvious, such as when a student who is pregnant needs a bigger uniform; when the student has previously provided the school or school district with sufficient supporting documentation; when the reasonable modification because of pregnancy or related conditions at issue is allowing a student to carry or keep water nearby and drink, use a bigger desk, sit or stand, or take breaks to eat, drink, or use the restroom; when the student has lactation needs; or when the specific action is available to students for reasons other than pregnancy or related conditions without submitting supporting documentation. 34 C.F.R. § 106.40(b)(3)(vi) (as amended).
11. **Comparable Treatment to Other Temporary Medical Conditions.** A school or school district must treat pregnancy or related conditions in the same manner and under the same policies as any other temporary medical conditions with respect to any medical or hospital benefit, service, plan, or policy the school or school district administers, operates, offers, or participates in with respect to students admitted to the school or school district's education program or activity. 34 C.F.R. § 106.40(b)(4) (as amended).
12. **Certification to Participate.** A school or school district must not require a student who is pregnant or has related conditions to provide certification from a healthcare provider or any other person that the

student is physically able to participate in the school or school district's class, program, or extracurricular activity unless:

- a. The certified level of physical ability or health is necessary for participation in the class, program, or extracurricular activity;
- b. The school or school district requires such certification of all students participating in the class, program, or extracurricular activity; and
- c. The information obtained is not used as a basis for discrimination prohibited by Title IX.

34 C.F.R. § 106.40(b)(5) (as amended).

B. Parental, Family, Marital Status, Pregnancy, or Related Conditions in Pre-Employment and Employment

- 1. **Status Generally.** A school or school district must not adopt or implement any policy, practice, or procedure, or take any employment action, on the basis of sex:
 - a. Concerning the current, potential, or past parental, family, or marital status of an employee or applicant for employment, which treats persons differently; or
 - b. That is based upon whether an employee or applicant for employment is the head of household or principal wage earner in such employee's or applicant's family unit.

34 C.F.R. § 106.57(a) (as amended).

- 2. **Pregnancy or Related Conditions.** A school or school district must not discriminate against any employee or applicant for employment on the basis of current, potential, or past pregnancy or related conditions. 34 C.F.R. § 106.57(b) (as amended).
- 3. **Comparable Treatment to Other Temporary Medical Conditions.** A school or school district must treat pregnancy or related conditions as any other temporary medical conditions for all job-related purposes, including commencement, duration, and extensions of leave; payment of disability income; accrual of seniority and any

other benefit or service; and reinstatement; and under any fringe benefit offered to employees by virtue of employment. 34 C.F.R. § 106.57(c) (as amended).

4. **Voluntary Leaves of Absence.** In the case of a school or school district that does not maintain a leave policy for its employees, or in the case of an employee with insufficient leave or accrued employment time to qualify for leave under such a policy, a school or school district must treat pregnancy or related conditions as a justification for a voluntary leave of absence without pay for a reasonable period of time, at the conclusion of which the employee shall be reinstated to the status held when the leave began or to a comparable position, without decrease in rate of compensation or loss of promotional opportunities, or any other right or privilege of employment. 34 C.F.R. § 106.57(d) (as amended).
5. **Lactation Time and Space.** A school or school district must provide reasonable break time for an employee to express breast milk or breastfeed as needed and ensure that an employee can access a lactation space, which must be a space other than a bathroom that is clean, shielded from view, free from intrusion from others, and may be used by an employee for expressing breast milk or breastfeeding as needed. 34 C.F.R. § 106.57(e) (as amended).
6. **Pre-Employment Inquiries**
 - a. **Marital Status.** A school or school district must not make a pre-employment inquiry as to the marital status of an applicant for employment, including whether such applicant is “Miss or Mrs.”
 - b. **Sex.** A school or school district may ask an applicant for employment to self-identify their sex, but only if this question is asked of all applicants and if the response is not used as a basis for discrimination prohibited by Title IX or this part.

34 C.F.R. § 106.60 (as amended).

V. GENERAL RULES FOR RESPONDING TO A REPORT OF SEX-BASED HARASSMENT

While the prior standard for responding to reports of sex-based harassment was “deliberate indifference,” the Title IX Final Rule states, “A school district with

knowledge of conduct that reasonably may constitute sex discrimination in its education program or activity must respond promptly and effectively.” 34 C.F.R. § 106.44(a)(1) (as amended).

The Title IX Coordinator must treat the complainant and respondent equitably. 34 C.F.R. § 106.44(f)(1)(i) (as amended).

STEP ONE – ROLE OF THE TITLE IX COORDINATOR

I. RECEIPT OF A COMPLAINT

A. Who May Bring a Complaint

The following persons have a right to make a complaint of sex discrimination, including complaints of sex-based harassment, requesting that the school or school district investigate and make a determination about alleged discrimination under Title IX:

1. A complainant;
2. A parent, guardian, or other authorized legal representative with the legal right to act on behalf of a complainant;
3. The Title IX Coordinator;

With respect to complaints of sex discrimination other than sex-based harassment, in addition to the above persons, the following persons have a right to make a complaint:

4. Any student or employee; or
5. Any person other than a student or employee who was participating or attempting to participate in the school or school district’s education program or activity at the time of the alleged sex discrimination.

34 C.F.R. § 106.45(a)(2) (as amended).

B. Responding to a “Report” or “Knowledge” of Sex Discrimination

1. Information conveyed about conduct that could constitute “sex discrimination” was received by the:
 - a. Title IX Coordinator;

- b. any employee who is not a confidential employee.

See 34 C.F.R. § 106.44(c) (as amended).

- 2. Upon receipt of this information, schools and school districts must respond promptly and effectively when they have knowledge of a complaint.

Key note: The Title IX Final Rule requires all employees who are not confidential employees to notify the Title IX Coordinator when the employee has information about conduct that reasonably may constitute sex discrimination under Title IX. 34 C.F.R. § 106.44(c)(1) (as amended). However, a confidential employee is not required to notify the Title IX Coordinator about conduct that reasonably may constitute sex discrimination. See 34 C.F.R. § 106.44(d) (as amended).

C. Initiation of a Complaint by the Title IX Coordinator

In the absence of a complaint or the withdrawal of any or all of the allegations in a complaint, and in the absence or termination of an informal resolution process, determine whether to initiate a complaint of sex discrimination that complies with the grievance procedures under 34 C.F.R. § 106.45. 34 C.F.R. § 106.44(f)(1)(v) (as amended).

To make this fact-specific determination, the Title IX Coordinator must consider, at a minimum, the following factors:

- 1. The complainant's request not to proceed with initiation of a complaint;
- 2. The complainant's reasonable safety concerns regarding initiation of a complaint;
- 3. The risk that additional acts of sex discrimination would occur if a complaint is not initiated;
- 4. The severity of the alleged sex discrimination, including whether the discrimination, if established, would require the removal of a respondent from campus or imposition of another disciplinary sanction to end the discrimination and prevent its recurrence;

5. The age and relationship of the parties, including whether the respondent is an employee of the school or school district;
6. The scope of the alleged sex discrimination, including information suggesting a pattern, ongoing sex discrimination, or sex discrimination alleged to have impacted multiple individuals;
7. The availability of evidence to assist a decisionmaker in determining whether sex discrimination occurred; and
8. Whether the school or school district could end the alleged sex discrimination and prevent its recurrence without initiating its grievance procedures under § 106.45.

34 C.F.R. § 106.44(f)(1)(v)(A) (as amended).

If, after considering these and other relevant factors, the Title IX Coordinator determines that the conduct as alleged presents an imminent and serious threat to the health or safety of the complainant or other person, or that the conduct as alleged prevents the school or school district from ensuring equal access on the basis of sex to its education program or activity, the Title IX Coordinator may initiate a complaint. 34 C.F.R. § 106.44(f)(1)(v)(B) (as amended).

D. Consolidation of Complaints

A school or school district may consolidate complaints of sex discrimination against more than one respondent, by more than one complainant against one or more respondents, or by one party against another party, when the allegations of sex discrimination arise out of the same facts or circumstances. 34 C.F.R. § 106.45(e) (as amended).

Key note: While consolidation is allowed under the Title IX Final Rule, the school or school district may want to consider the data privacy implications before consolidating complaints.

E. Students with Disabilities

If a complainant or respondent is an elementary or secondary student with a disability, the Title IX Coordinator must consult with one or more members, as appropriate, of the student's Individualized Education Program (IEP) team, 34 CFR § 300.321, or one or more members, as appropriate, of the group of persons responsible for the student's placement decision under

34 CFR § 104.35(c), to determine how to comply with the requirements of the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. 1400 *et seq.*, and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794, throughout implementation of grievance procedures under 34 C.F.R. § 106.45. 34 C.F.R. § 106.8(e) (as amended).

II. INITIAL EVALUATION OF THE COMPLAINT

A. Immediate Dismissal of Complaint

1. The Title IX Final Rule eliminated the grounds for mandatory dismissal of a complaint.
2. Standard for Permissive Dismissal

A complaint may be dismissed if:

- a. the school or school district is unable to identify the respondent after taking reasonable steps to do so;
- b. the complainant voluntarily withdraws any or all of the allegations in the complaint, the Title IX Coordinator declines to initiate a complaint under 34 C.F.R. § 106.44(f)(1)(v), and the school or school district determines that, without the complainant's withdrawn allegations, the conduct that remains alleged in the complaint, if any, would not constitute sex discrimination under Title IX or its regulations even if proven;
- c. The respondent is not participating in the school or school district's education program or activity and is not employed by the school or school district; or
- d. The school or school district determines the conduct alleged in the complaint, even if proven, would not constitute sex discrimination under Title IX or its regulations.

34 C.F.R. § 106.45(d)(1) (as amended).

4. Responsibilities When Dismissing a Complaint
 - a. Prior to dismissing the complaint, the school or school district must make reasonable efforts to clarify the allegations with the complainant. 34 C.F.R. § 106.45(d)(1)(iv) (as amended).

- b. Upon dismissal, a school or school district must promptly notify the complainant of the basis for the dismissal. If the dismissal occurs after the respondent has been notified of the allegations, then the school or school district must also notify the respondent of the dismissal and the basis for the dismissal promptly following notification to the complainant, or simultaneously if notification is in writing. 34 C.F.R. § 106.45(d)(2) (as amended).
- c. A school or school district must notify the complainant that a dismissal may be appealed and provide the complainant with an opportunity to appeal the dismissal of a complaint on the bases set out in 34 C.F.R. § 106.46(i)(1). Under 34 C.F.R. § 106.46(i)(1), those bases are:
 - i. Procedural irregularity that would change the outcome;
 - ii. New evidence that would change the outcome and that was not reasonably available when the determination of whether sex-based harassment occurred or dismissal was made; and
 - iii. The Title IX Coordinator, investigator, or decisionmaker had a conflict of interest or bias for or against complainants or respondents generally or the individual complainant or respondent that would change the outcome.

34 C.F.R. § 106.46(i)(1) (as amended).

- d. If the dismissal occurs after the respondent has been notified of the allegations, then the school or the school district must also notify the respondent that the dismissal may be appealed on the bases set out in 34 C.F.R. § 106.46(i)(1) (and listed above). 34 C.F.R. § 106.45(d)(3) (as amended).
- e. If the dismissal is appealed, the school or school district must:
 - i. Notify the parties of any appeal, including notice of the allegations if notice was not previously provided to the respondent;

- ii. Implement appeal procedures equally for the parties;
- iii. Ensure that the decisionmaker for the appeal did not take part in an investigation of the allegations or dismissal of the complaint;
- iv. Ensure that the decisionmaker for the appeal has been trained as set out in 34 C.F.R. § 106.8(d)(2);
- v. Provide the parties a reasonable and equal opportunity to make a statement in support of, or challenging, the outcome; and
- vi. Notify the parties of the result of the appeal and the rationale for the result.

34 C.F.R. § 106.45(d)(3) (as amended).

- f. Dismissal of a complaint does not preclude the imposition of discipline arising out of the same conduct for any other violations of the student code of conduct or the school or school district's policies.

B. Referral of Complaint to Other Staff or Entities

- 1. Referral or Coordination of Allegations of Harassment Based on Protected Class
- 2. Referral or Coordination of Allegations of Bullying
- 3. Referral or Coordination of Allegations of Code of Conduct Violation
- 4. Referral or Coordination with Law Enforcement
- 5. Maltreatment of Minors Reporting

III. NOTICE OF ALLEGATIONS

A. Individuals Who Must Receive the Notice of Complaint/Notice of Allegations

Upon receipt of a complaint, the Title IX Coordinator must provide all known parties with a written notice. This is often referred to as either the Notice of Complaint or Notice of Allegations.

B. Contents of Notice

1. Notice of the grievance process, including any informal resolution process;
2. Notice of the allegations, including sufficient information to the extent they are known at the time.
 - a. “Sufficient information” includes, but is not limited to: the identities of the parties involved in the incident; the conduct allegedly constituting sex-based harassment, and the date and location of the alleged incident; and
 - b. To the extent that any of these details are not known at the time the complaint is made, the Title IX Coordinator must provide a supplemental notice when new or additional information is discovered.
3. A statement that retaliation is prohibited;
4. A statement that the parties are entitled to an equal opportunity to access the relevant and not otherwise impermissible evidence or an accurate description of this evidence; and if the school or school district provides a description of the evidence, the parties are entitled to an equal opportunity to access to the relevant and not otherwise impermissible evidence upon the request of any party.

34 C.F.R. § 106.45(c) (as amended).

While not required by the Title IX Final Rule, the notice should also contain:

5. A statement that the respondent is presumed not responsible and that a determination regarding responsibility will be made at the conclusion of the grievance process; and
6. Notice informing the parties of any provision of the school or school district’s code of conduct that prohibits knowingly making false

statements or knowingly submitting false information during the grievance process.

Key note: Under the Title IX Final Rule, complainants and respondents enrolled in elementary or secondary schools no longer have a right to an advisor during the grievance process or at their interviews. However, the commentary from the Department of Education focused on including parents in the grievance process. Further, there may not be a derogation of any legal right of a parent, guardian, or other authorized legal representative to act on behalf of a complainant, respondent, or other person, including but not limited to making a complaint through the school or school district's grievance procedures for complaints of sex discrimination. 34 C.F.R. § 106.6(g) (as amended).

C. Timing for Providing Notice

The initial written notice should be provided to both parties in a reasonably prompt timeframe so that the parties can prepare to participate in the grievance process.

D. Interim Support Measures

1. Offer and Coordinate Supportive Measures

The Title IX Coordinator is responsible for:

- a. Offering and coordinating supportive measures for the complainant.
- b. In addition, if the school or school district has initiated grievance procedures or offered an informal resolution process to the respondent, the Title IX Coordinator is responsible for offering and coordinating supportive measures, as appropriate, for the respondent.

34 C.F.R. § 106.44(f)(1)(ii) (as amended).

2. What Constitutes an Interim Support Measure

Supportive measures are non-disciplinary measures including, but not limited to: extensions of deadlines and other course-related adjustments; campus escort services; increased security and monitoring of certain areas of the campus; restrictions on contact applied to one

or more parties; leaves of absence; changes in class, work, or extra-curricular or any other activity, regardless of whether there is or is not a comparable alternative; and training and education programs related to sex-based harassment.

3. No Unreasonable Burden or Punishment

Supportive measures must not unreasonably burden either party and must be designed to protect the safety of the parties or the school or school district's educational environment, or to provide support during the school or school district's grievance procedures. A school or school district must not impose such measures for punitive or disciplinary reasons. See 34 C.F.R. § 106.44(g)(2) (as amended).

4. Confidentiality

A school or school district must not disclose information about any supportive measures to persons other than the person to whom they apply, including information informing one party of supportive measures provided to another party, unless necessary to provide the supportive measure or restore or preserve a party's access to the education program or activity, or when an exception applies (e.g., prior written consent, disclosing to parent/guardian with legal right, as required by Federal law, Federal regulations, to the extent not in conflict with Title IX or its regulations, when required by State or local law, or when permitted under FERPA).

5. Modification or Termination of Supportive Measures

A school or school district may, as appropriate, modify or terminate supportive measures at the conclusion of the grievance procedures, and or at the conclusion of the informal resolution, or the school or school district may continue them beyond that point. 34 C.F.R. § 106.44(g)(3) (as amended).

A school or school district must provide a complainant or respondent with a timely opportunity to seek, from an appropriate and impartial employee, modification or reversal of the school or school district's decision to provide, deny, modify, or terminate supportive measures applicable to them. The impartial employee must be someone other than the employee who made the challenged decision and must have the authority to modify or reverse the decision, if the impartial employee determines that the decision to provide, deny, modify, or ter-

minate the supportive measure was inconsistent with the definition of supportive measures in 34 C.F.R. § 106.2. A school or school district must also provide a party with the opportunity to seek additional modification or termination of a supportive measure applicable to them if circumstances change materially. 34 C.F.R. § 106.44(g)(4) (as amended).

6. Students with Disabilities

If the complainant or respondent is an elementary or secondary student with a disability, the Title IX Coordinator must consult with one or more members, as appropriate, of the student's Individualized Education Program (IEP) team, 34 CFR 300.321, or one or more members, as appropriate, of the group of persons responsible for the student's placement decision under 34 CFR 104.35(c), to determine how to comply with the requirements of the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. 1400 *et seq.*, and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794, in the implementation of supportive measures. 34 C.F.R. § 106.44(g)(6)(i) (as amended).

IV. EMERGENCY REMOVAL OF STUDENT RESPONDENTS

A. Presumption of Non-Removal

Generally, consistent with the school or school district's presumption of non-responsibility until the investigation has been completed and a determination of responsibility has been made, a student respondent will not be suspended, expelled, excluded, or otherwise removed while an investigation is pending under the grievance process.

B. Standards for Immediate Removal

1. A mandatory individualized safety and risk analysis must be conducted.
2. The respondent must pose an imminent and serious threat arising from the allegations of sex discrimination.

3. The threat must relate to the physical health or safety of a complainant, any student, employee, or other individual, including the respondent themselves.

34 C.F.R. § 106.44(h) (as amended).

C. Procedural Requirements of Emergency Removal for Students

1. A respondent who is removed on an emergency basis must be notified of the school or school district's decision.
2. A respondent must be provided with an opportunity to challenge the decision immediately following removal.
3. The respondent bears the burden of proving that the removal decision was incorrect.

D. Non-Applicability to Conduct Outside Title IX

A school or school district may still suspend, exclude, expel, or otherwise remove a student from school for any reason other than a pending Title IX investigation. The fact that a student has been named as a respondent in a pending Title IX grievance process does not insulate them from consequences for other policy violations.

Students may *not*, however, be suspended for other reasons to circumvent the Title IX process. To the extent that the alleged harassment may also implicate other policies, in some cases the safest approach is to allow the Title IX process to play out and then address other policies as well.

V. INTERIM EMERGENCY REMOVAL OF EMPLOYEE

A. Permissible Removal of Non-Student Employee

A school or school district may place a non-student employee who is accused of sex-based harassment on administrative leave pending the completion of the investigation without any specific limitation that would otherwise be applicable to students. 34 C.F.R. § 106.44(i) (as amended).

B. Factors to Consider

When making such a decision to place an employee on administrative leave pending investigation, among other factors, the school or school district may wish to consider the following:

1. The applicability of any restrictions or procedures on placement of an employee on administrative leave in a contract or collective bargaining agreement;
2. Whether the employee has the ability to destroy relevant information;
3. Whether a secret investigation may adduce more relevant evidence; and
4. Whether placing the employee on administrative leave is necessary to limit the employer's potential exposure to losses and/or negative publicity.

C. Directives During Administrative Leave

Depending on the specific situation, employers may wish to issue specific directives to employees placed on paid leave. Such directives typically include:

1. Prohibiting the employee from performing any work for the school or school district;
2. Prohibiting the employee from having retaliatory contact with complainants or witnesses about the investigation;
3. Requiring the employee to turn in all employer property, including electronic files and school-issued laptops, as soon as they are placed on leave;
4. Directing the employee to appear for an interview; and
5. Ordering the employee to not access any of the employer's electronic resources during the investigation.

VI. INFORMAL RESOLUTION

Under the Title IX Final Rule, a school or school district may offer to a complainant and respondent an informal resolution process, unless the complaint includes

allegations that an employee engaged in sex-based harassment against an elementary school or secondary school student or such a process would conflict with federal, state, or local law.

Subject to the limitations above, a school or school district has the discretion to determine whether it is appropriate to offer an informal resolution process when it receives information about conduct that reasonably may constitute sex discrimination under Title IX or its regulations, or when a complaint of sex discrimination is made, and may decline to offer informal resolution despite one or more of the parties' wishes. One reason why the school or school district may decline to offer an informal resolution is if it would present a future risk of harm to others.

34 C.F.R. § 106.44(k)(1) (as amended).

A. Timing

1. A school or school district **may** offer informal resolution at any time after a complaint has been made and before a determination regarding responsibility has been made.
2. No party may be forced to participate in such a process.
3. Both parties must voluntarily consent in writing to the informal resolution process.
4. The grievance process may be suspended while the parties work through the informal resolution process.

34 C.F.R. § 106.44(k)(1) and (2) (as amended).

B. Required Notice

Before obtaining the parties' voluntary written consent to participate in informal resolution, the school or school district must provide a notice that contains the following information.

1. The allegations;
2. The requirements of the informal resolution process, including the circumstances under which it would preclude the parties from resuming a complaint arising from the same allegations;

3. A provision specifying that any party has the right to withdraw from the informal resolution process at any time prior to agreeing to an informal resolution, at which point the formal grievance process will resume;
4. That the parties' agreement to a resolution at the conclusion of the informal resolution process would preclude the parties from initiating or resuming grievance procedures arising from the same allegations;
5. The potential terms that may be requested or offered in an informal resolution agreement, including notice that an informal resolution agreement is binding only on the parties; and
6. What information the school or school district will maintain and whether and how the school or school district could disclose such information for use in grievance procedures under § 106.45, if grievance procedures are initiated or resumed.

34 C.F.R. § (k)(3) (as amended).

VII. ADVANCED MANEUVERS

A. Requests from Law Enforcement or Social Services Not to Investigate

1. Concurrent law enforcement investigations can be a justification to delay the grievance process for a *reasonable* amount of time. The grievance process cannot, however, be postponed indefinitely. Further, the grievance process can only be delayed via written notice, and that notice can only be provided after a Notice of Allegations has been issued. In other words, all parties need to be aware that the school or school district has received a complaint before a notice of delay or extension can be sent. Moreover, the notice that the investigation is being delayed or the timeframes are being extended must provide the reason for the delay or extension.
2. Bear in mind as well that law enforcement uses a different standard of proof than schools. Law enforcement is looking for evidence of a

crime that would allow a prosecutor to build a case beyond a reasonable doubt, whereas schools are only looking for a preponderance of the evidence or clear and convincing evidence, both of which are lower standards.

B. Public Comment at School Board Meetings

1. Minnesota's Open Meeting Law prohibits the discussion of private educational data during an open meeting. Accordingly, during the public comment session, no person may discuss private educational data on an identifiable student.
2. Minnesota's Open Meeting Law also requires the School Board to close a meeting for preliminary consideration of allegations against an employee. Accordingly, community members who have concerns about an employee, or want to file a complaint or allegations against an employee, should not be allowed to do so during the public comment period of an open meeting.
3. While these comments are out-of-order for purposes of the School Board meeting, however, they may also create "knowledge" for the school or school district. Accordingly, the Board Chair should contact the Title IX Coordinator after the meeting with the name of the commenter so that the Title IX Coordinator can follow up.

C. Media Attention

1. In some situations, Title IX complaints may attract or be brought to the attention of various news organizations. The regulations, however, require schools and school districts to not disclose personally identifiable information obtained in the course of complying with Title IX and its regulations except when limited exceptions apply, such as to the extent such disclosures are not otherwise in conflict with Title IX or its regulations, when required by State or local law, or when permitted under FERPA or its regulations. 34 C.F.R. § 106.44(j)(5) (as amended).
2. FERPA and state open-records laws further limit the disclosure of non-directory data on individual students, and of much of the data related to employees that would be gathered during the process of a Title IX investigation. Given these substantial restrictions, the best practice is either to say nothing, or to give a generic statement that

the school or school district complies with all applicable laws and is following its policies and does not comment on any pending investigation.

D. Restraining Orders

1. Some allegations of sex-based harassment, particularly harassment that is alleged to constitute sexual assault, stalking, or dating violence, may also involve parties where a restraining order is in place. Restraining orders impose obligations on the individuals, and may, but do not always, address how those restrictions apply at school.
2. A restraining order does not change the presumption of non-responsibility, nor does it allow the school or school district to remove the respondent absent an imminent risk of bodily harm. It may, however, inform the Title IX Coordinator's development of supportive measures.

E. Complaints Against Your Title IX Personnel

1. Title IX coordinators, investigators, and decisionmakers all must be trained on the entire grievance process. 34 C.F.R. § 106.8(d). Accordingly, anyone designated as part of a school or school district's Title IX personnel ought to have sufficient training that they could temporarily serve in a different role.
2. Schools and school districts also have the option to designate multiple trained individuals for each role.

F. Complaints of Conduct that has Already Been Investigated Under a Different Policy

1. Although more extensive training is required for individuals designated as Title IX Coordinators, investigators, and decisionmakers, staff who are not involved in the steps of the grievance process need to be trained to report actual *or suspected* sex-based harassment to the Title IX Coordinator. Staff should be aware that the Title IX Coordinator, not individual staff members or other building administrators, is the individual with the authority to determine that conduct would not be sex-based harassment even if proven.
2. In particular, all staff with disciplinary authority should be advised that disciplining an incident of potential sex-based harassment as a

violation of some other policy, such as bullying or disorderly conduct, can subject the school district to serious liability. In *Doe on behalf of Doe #2 v. Metro. Gov't of Nashville & Davidson Cnty., Tenn.*, 35 F.4th 459 (6th Cir. 2022), the Sixth Circuit reviewed a Title IX claim where two former students claimed, in part, that a school district was deliberately indifferent to systemic Title IX violations which, had they been addressed, could have saved the plaintiffs from being sexually assaulted at school. Discovery showed that, in the four-year period preceding the first plaintiff's assault, the school district had documented over 950 instances of sexual harassment, over 1200 instances of inappropriate sexual behavior, 45 instances of sexual assault, and 218 instances of inappropriate sexual contact," many of which were never reported to the Title IX Coordinator. In fact, discovery uncovered a widespread pattern of assistant principals only reporting the incidents that they had already screened and decided were sexual harassment to the Title IX Coordinator. Based on these facts, the Court allowed the plaintiffs' claim to proceed to trial.

STEP TWO - ROLE OF THE TITLE IX INVESTIGATOR

I. RECOMMENDED PROCEDURE FOR CONDUCTING INVESTIGATIONS

A. Steps in an Investigation

1. The Title IX Coordinator contacts the Title IX Investigator requesting that the Title IX Investigator conduct an investigation into the allegations contained in the Notice of Allegations.
2. The Title IX Investigator schedules interviews typically in the following order: Complainant, Complainant's identified witnesses, Respondent, and Respondent's identified witnesses.
3. The Title IX Investigator completes all interviews and collects relevant evidence.
4. The Title IX Investigator compiles the relevant evidence for the Title IX Decisionmaker and may choose to draft a summary or an investigation report.

5. The Title IX Investigator sends a copy of the relevant evidence to the Title IX Decisionmaker, including any summary or an investigation report if one was prepared.
6. The Title IX Investigator's role is complete.

B. Independent Investigator. The investigator must be a neutral party, with no conflicts of interest regarding or bias for or against either the complainant, or respondent, or complainants or respondents in general. Under the Title IX Final Rule, the investigator and the decisionmaker may be the same person as long as the individual does not have a conflict of interest or bias. However, the investigator and the Title IX Coordinator cannot be the same.

34 C.F.R. § 106.45(b)(2) (as amended).

C. Burden of Proof. The school or school district retains, at all times, the burden of proof and the burden of gathering sufficient evidence to reach a determination regarding responsibility. This burden does not rest on either party. 34 C.F.R. § 106.45(f)(1) (as amended).

II. CONDUCTING AN EFFECTIVE INVESTIGATION – FIRST STEPS

A. Before Investigating, Some Up-Front Reporting May Be Necessary

1. Report any suspected crimes to law enforcement. Examples of crimes that should be reported to law enforcement include, but are not limited to, assault, sexual assault, possession or distribution of child pornography, etc.
2. **Maltreatment of Minors Reporting.** Remember your obligation as a mandated reporter when you know or have reason to believe a child is being neglected or physically or sexually abused or has been neglected or physically or sexually abused within the preceding three years. *See* Minn. Stat. Ch. 260E.

B. Data Practices Consideration in Investigations

1. **Data Privacy.** The duty to comply with the Title IX regulations is not obviated or alleviated by the Family Educational Rights and Privacy Act ("FERPA"). 34 C.F.R. § 106.6(e). Likewise, the obligation to comply with Title IX and its regulations is not obviated or allevi-

ated by any state or local law or other requirement that conflicts with Title IX or its regulations. 34 C.F.R. § 106.6(b) (as amended).

A school or school district must not disclose personally identifiable information obtained in the course of complying with the Title IX Final Rule, except in the following circumstances:

- a. When the school or school district has obtained prior written consent from a person with the legal right to consent to the disclosure;
- b. When the information is disclosed to a parent, guardian, or other authorized legal representative with the legal right to receive disclosures on behalf of the person whose personally identifiable information is at issue;
- c. To carry out the purposes of Title IX, including action taken to address conduct that reasonably may constitute sex discrimination under Title IX in the school or school district's education program or activity;
- d. As required by federal law, federal regulations, or the terms and conditions of a federal award, including a grant award or other funding agreement; or
- e. To the extent such disclosures are not otherwise in conflict with Title IX or its regulations, when required by State or local law or when permitted under FERPA, 20 U.S.C. 1232g, or its implementing regulations, 34 CFR part 99.

34 C.F.R. § 106.44(j) (as amended).

2. ***Tennessee Warnings.*** The MGDPA states that an individual who is asked to provide any private or confidential data concerning the individual shall be informed of the following:

- a. The purpose and intended use of the requested data;
- b. Whether the individual may refuse or is legally required to supply the requested data;
- c. Any known consequences arising out of supplying or refusing to provide the private or confidential data; and

- d. The identity of other persons or entities authorized by state or federal law to receive the data.

(Minn. Stat. § 13.04, subd. 2)

BEST PRACTICE: Although the Title IX Final Rule states that Title IX obligations are not obviated by FERPA or state data privacy laws, the failure to administer a *Tennesen* Warning may still result in the district's (or school's) inability to use, store, or disseminate the collected data. A broadly written *Tennesen* Warning should be provided before all interviews, especially interviews of the parties.

- C. **Determining the Scope and Strategy of the Investigation.** Most investigations follow the same pattern: (1) receive a complaint and/or interview the complainant; (2) interview fact witnesses; and (3) interview the respondent. In Title IX investigations, both parties must be afforded an equal opportunity to present witnesses. 34 C.F.R. § 106.45(f)(2) (as amended). Accordingly, a fourth step, reviewing witnesses identified by the respondent, may need to be added to this pattern in Title IX investigations.

At each stage of this process, the investigator should reevaluate whether additional investigation is warranted or needed and who should be interviewed next.

- 1. **Review Policies Beforehand.** It is beneficial to review any applicable school or school district policies prior to conducting the investigation. As a best practice, the Title IX investigator should also review the grievance procedure prior to conducting the investigation.
- 2. **Identifying Fact Witnesses.** For purposes of Title IX investigations, both the complainant and the respondent must have the opportunity to present fact witnesses. 34 C.F.R. § 106.45(f)(2) (as amended). However, the investigator may also independently determine that an individual should be interviewed as a fact witness. When making this determination, the investigator should consider the following:
 - a. Does the complaint list witnesses to the alleged misconduct?
 - b. Does the complaint leave out individuals who may have important information relevant to the investigation?
 - c. Who was present for the alleged misconduct?

- d. Who can provide the necessary background information?
- e. Who received the initial complaint?

Keep in mind that additional witnesses may also be identified through a review of the relevant documents or other evidence.

- 3. **Presentation of Evidence.** The parties must be given equal opportunities to present witnesses, including both fact and expert witnesses, as well as other inculpatory and exculpatory evidence. 34 C.F.R. § 106.45(f)(2) (as amended).

D. Determining Who Will be Present at Each Interview.

Notice of Interviews & Other Proceedings. Under the Title IX Final Rule, schools and school districts are no longer required to provide written notice of interviews. However, if possible under the circumstances, it is advisable to provide each party a separate written notice regarding the date, time, location, and purpose of their interview. This helps the school or school district establish that it afforded the parties an opportunity to be interviewed. It also helps guard against any claim by a party that they misunderstood when the interview was to occur.

Advisors. Under the Title IX Final Rule, complainants and respondents enrolled in elementary or secondary schools no longer have a right to an advisor during the grievance process or at their interviews.

Depending on the circumstances, it may be beneficial to have more than one school or school district representative present at interviews. The investigator will need to make a determination as to who else may be present.

Upon request, an employee who is in a union has a right to have a union representative present if it appears that the interview may result in discipline. Some union contracts provide this right even if there is not a request by the employee. Investigators should bear this in mind when preparing for the interview of an employee-respondent.

E. Prepare a Response to Common Distractions. Before conducting any interview, the investigator should decide how he/she will respond to the following types of complications:

- 1. The respondent demands that the interview be recorded;

2. The respondent's union representative repeatedly interjects or tries to help the interview subject frame his or her answers;
3. The respondent refuses to answer questions;
4. The respondent asks who you have interviewed or plan to interview;
5. The respondent asks whether the employer is going to discipline him or her; and
6. The respondent or his/her union representative asks for a written list of questions or asks to be allowed to submit written answers to questions in lieu of a face-to-face interview.

III. INTERVIEW BASICS

- A. **Review the *Tennessen* Warning with the Interviewee.**
- B. **Explain the Purpose of the Interview.** Do not make any comments that could be perceived as minimizing the complaint. This explanation should also reflect the statement of purpose that was provided in a notice of interview.
- C. **Define your Role in the Investigation.** Regardless of your other roles, make it clear that you are there as an impartial investigator. Do not take sides.
- D. **Explain the Investigation Process.** Explain that the school or school district will follow up on information it receives, in accordance with Title IX procedures. Ask the interviewee to report any retaliation (from whatever source) immediately. When interviewing a party (complainant or respondent), discuss the opportunity that party will have to respond to the evidence.
- E. **Do *Not* Promise Confidentiality.** Information received during the scope of an investigation is subject to the MGDPA and FERPA. As discussed above, information provided during a Title IX investigation may be available to the complainant, respondent, and, potentially, other witnesses. and must be released in accordance with its provisions.
- F. **Ask Specific Questions.** Who, what, when, where, why, how? Get as much detailed information as possible. Do not allow an interview subject to make generalizations or to offer conclusions as opposed to facts.

- G. **Ask the Tough Questions.** Even if the subject matter is uncomfortable—in a sex-based harassment investigation, the subject matter is often uncomfortable. That does not absolve the investigator or the school or district of its obligation to provide due process.
- H. **Ask for Documents.** Ask each interviewee if he/she has any tangible evidence that corroborates his/her recollection of events. Documents such as e-mail correspondences, notes, diary entries, timesheets, or calendars, might all contain relevant and valuable information. Recordings of voicemail messages, photographs, and video recordings might also contain helpful information.
- I. **Ask Each Interview Subject to Identify Other Witnesses to the Alleged Harassment.** If the individual identifies other potential witnesses, it is ultimately up to the investigator to decide if the potential witnesses have pertinent information related to the Title IX investigation. There is no requirement to interview every individual identified over the course of the investigation.
- J. **Do *Not* Guarantee Results.** Investigators should not expressly or implicitly guarantee any particular outcome of the investigation. Nor should they suggest or imply that disciplinary action will be taken against the respondent. Remember, the respondent is presumed not responsible until the grievance process is completed.

IV. GENERAL TIPS FOR INTERVIEWING COMPLAINANTS AND FACT WITNESSES

- A. **Ask Short, Open-Ended Questions.** The goal is to have the witness talk more than the investigator. Investigators should avoid “leading” questions. This is not a time for cross-examination.
- B. **Always Cover the Who, What, When, Where, Why, and How Questions.** Follow each line of questioning to its logical conclusion based on the witness’s *personal knowledge*, as opposed to what he or she has heard from others. Get the details.
- C. **Assume that the Investigator will Defend the Interview Questions in Court or an Administrative Appeal.** Be impartial and thorough. Keep in mind that any interview summaries *will* be considered relevant evidence and be accessible to the parties. Take thorough, but professional notes.

Practice Pointer: Title IX interviews, particularly interviews involving students, may involve slang or otherwise non-professional terms for body parts or actions (e.g., “boobs” instead of “breasts”). If those terms appear in interview summaries, they should be clearly identified as quotes from the interviewee. Also, consider including a definition of the term if necessary.

- D. Keep Bias in Mind.** The investigator should also bear in mind that their alleged bias for or against a complainant or respondent, or complainants or respondents in general, may form the basis for an appeal of the final determination regarding responsibility. The investigator should plan and structure their interview of the complainant to ensure that a fair and equal opportunity will be given to the respondent to address the same issues.
- E. Observe Witness Demeanor.** Document those observations in the investigation notes.
- F. Follow Up.** If a witness answers, “I don’t know” or “I can’t recall,” break the question down and/or rephrase it to determine whether the witness does not have the information or is being evasive. If you believe the witness is being evasive, circle around and come back to the question at other points in the interview. If you have an objective reason to believe that the witness would know or remember particular information, do not hesitate to express surprise when the witness answers “I don’t know” or “I don’t remember.”
- G. Visual Representations.** If you believe it would be helpful, have the witness draw a picture of the alleged misconduct or the location at which it occurred. It may also be helpful to have the witness take you to the site of the alleged misconduct for a personal inspection.
- H. Disclose as Little as Possible.** Use your judgment as to how much to tell the witness about the complaint, subject to data privacy and Title IX requirements.
- I. Ask the Complainant if the Extent of the Complaint Has Been Covered.** In order to safeguard against the Complainant later coming up with additional complaints/accusations that the school or school district has never been informed of and then saying that the school or school district did not respond appropriately to those complaints/accusations, it is important to ask the complainant whether what they have stated is everything that forms the basis of his/her complaint.
- J. Impact.** Inquire about the impact of the alleged conduct. This is particularly critical for an evaluation of whether the alleged conduct is severe, perva-

sive, and objectively offensive, and is effectively denying the complainant equal access to the school or school district's education program or activity.

- K. Understand the Complainant's Concerns.** Remember the complainant may be embarrassed or fear retaliation.
- L. Take Appropriate Action.** If the complainant expresses a desire that you do not do anything with the information that he/she tells you, explain that the school or school district must take appropriate action and why.
- M. Do Not Make Promises.** Do not make any promises about who will be interviewed or when the investigation will be completed. Do not disclose the identity of witnesses, except to the extent required by Title IX.
- N. Retaliation.** Ask the complainant to bring any retaliation to your attention and explain what that means.
- O. Supportive Measures.** Remind the complainant that questions about supportive measures can be directed to the Title IX Coordinator.

V. INTERVIEWING THE RESPONDENT

- A. Avoiding Bias.** Prior to interviewing the respondent, the investigator should review the summary, notes, and any other documentation or evidence obtained from the complainant's interview. The investigator should then prepare questions to ensure that the respondent's interview will be comparable to the complainant's interview, including with respect to who is in attendance, what questions are asked, what topics are covered, and what statements regarding the investigation process are made by the investigator.
- B. Opening Remarks.** Prior to asking any questions, the investigator should explain the following to the respondent and the respondent's union representative, if applicable:
 - 1. The role of the investigator as a neutral fact finder;
 - 2. The *Tennessee* Warning, which the respondent should be asked to sign prior to asking any questions;
 - 3. Ground rules for the interview, such as not interrupting each other and professional conduct; and

4. Any other initial statements, ground rules, or explanations that were provided to the complainant.

C. Refusals to Answer. The investigator should decide in advance how to respond if the respondent refuses to voluntarily answer questions. Typically, an individual will voluntarily cooperate if he/she knows that the interview may be his/her only chance to tell his/her side of the story. A typical *Tennessee* Warning contains language to that effect.

D. Follow-up Questions. Be prepared to ask appropriate follow-up questions in order to obtain the full response to each allegation. In addition to the general considerations discussed above, the following tips may help an investigator get the full response from a respondent:

1. **Be Blunt.** Do not dance around delicate topics. Ask the question directly.
2. **Ask Why.** If the respondent admits to any particular action, ask what his/her intent was.
3. **Check Credibility.** If the respondent denies the allegations, ask whether he/she believes anyone would have a reason to fabricate the allegations.
4. **Closing Remarks.** Before ending the interview, the investigator should:
 - a. Ask for any other information that may be helpful, or other information that the respondent would like to provide;
 - b. Provide the respondent with the same information regarding retaliation that was provided to the complainant;
 - c. As with the complainant, the respondent's ability to gather and present evidence cannot be restricted. The investigator will need to be careful regarding how he or she phrases the warning to the respondent not to tamper with witnesses.

5. Additional Tips for Interviewing the Respondent

- a. Be prepared for anger and defensiveness on the part of the respondent. As with the complainant, avoid making any statements that could be interpreted as bias for or against the re-

spondent, regardless of any emotion displayed by the respondent.

- b. Insist on details of the respondent's version of the facts. Do not settle for a general denial.
- c. Do not merely state the complainant's allegations and ask the respondent to simply verify or deny. Remember, the respondent is entitled to the same opportunity to present evidence as the complainant.
- d. Do not threaten.
- e. Do not describe what disciplinary action might be taken. Advise the respondent that any decisions regarding disciplinary action will be made at the conclusion of the investigation, and only after a determination regarding responsibility has been made.
- f. Do not make any promises about when the investigation will be completed or who will be interviewed.
- g. Do not reveal the names/identities of witnesses. The respondent will eventually learn this information but identifying witnesses in the interview risks allowing respondents to adjust their answers.

Practice Pointer: However, if the respondent reveals that they have communicated with one or more witnesses about your interviews, follow up to learn what was said.

VI. ASSESSING CREDIBILITY

A. Credibility Clues. When interviewing the complainant, the respondent, or any other witness, the investigator should look for credibility clues.

- 1. Eye contact;
- 2. Unnatural or inconsistent hesitations;
- 3. Change in skin coloration (i.e. face turning red or white);
- 4. Change in pitch of voice;

5. Change in affect over the course of the interview;
6. Subtle or direct attempts to influence the outcome of the investigation through inducement or threat; and
7. Statements reflecting a skewed view of reality.

B. Consistency. When assessing credibility, consider the consistency of the witness/party statements.

1. Are there other witnesses or documents that support or refute the interviewee's testimony?
2. Is the conduct of the parties consistent with their description of the overall environment?
3. Does the chronology make sense from a practical standpoint?
4. Is the described behavior consistent with what came before and afterward?
5. Are there unexplainable lapses in recollection or periods of time that are not accounted for?

C. Caveat Regarding Credibility Clues. When assessing credibility, remember to guard against implicit bias on the part of the investigator. Be aware of the potential for the interviewee's cultural norm to be different than the investigator's.

VII. PRESERVING ELECTRONIC EVIDENCE

A. Act Promptly. Even minimal delays may result in lost evidence or provide opportunities to conceal the truth or come up with a "story."

B. Computer Evidence. Schools and school districts should take steps to preserve any evidence of sex-based harassment that may exist on school or school district computers. For example:

1. Secure an employee's computer by physically removing it from the employee's office or work area.

- a. Where the investigation involves a student who does not have a specific computer, secure any computer evidence available. Involve IT where necessary.
2. Disable the employee's password and ability to access the employer's computer system.
3. Allow only a knowledgeable computer technician, technical coordinator, or computer forensic specialist to access the computer. Do not hesitate to hire an outside computer forensic specialist when necessary.
4. Preserve the chain of custody. You should be able to identify everyone who touched the computer from the time it was removed from the employee's work area or office.
5. Before searching the computer, verify that the school district's computer use policy states that the computer is the sole property of the district and that the computer and any data stored or processed on it is subject to monitoring at any time without notice. Such language will defeat a claim that the employee had a reasonable expectation of privacy in the data stored on the computer.

C. Video Surveillance. Preserve any surveillance video footage.

D. Utilizing Social Media in Investigations

1. **Is it Relevant?**
2. **Public social media sites.** At least two courts have held that individuals have no expectation of privacy with respect to information posted to a completely public social media site. *See Moreno v. Hartford Sentinel*, 172 Cal.App.4th 1125 (Cal. App. 5, 2009) (no reasonable expectation of privacy regarding Myspace writings open to public view); *see also U.S. v. Charbonneau*, 979 F.Supp. 1177 (S.D. Ohio 1997) (no reasonable expectation of privacy regarding posting in a public "chatroom").
3. **Private pages on social networking sites.** At least one court has held that individuals do not have a reasonable expectation of privacy in material posted on a "private" social media page. *Romano v. SteelCase Inc.*, 30 Misc.3d 426 (N.Y. Sup. Ct. 2010). The court's decision was based on the nature of social media as a tool for mass

dissemination of information, a fact that users are well aware of. The court specifically noted that hundreds of people may be able to access a “private” social media page and held that, “in this environment, privacy is no longer grounded in reasonable expectations, but rather in some theoretical protocol better known as wishful thinking.” *Id.* at 434 (citing Dana L. Fleming and Joseph M. Herlihy, *Department Heads Up: What Happens when the College Rumor Mill Goes Online? Privacy, Defamation and Online Social Networking Sites*, 53 B.B.J. 16 (Jan./Feb. 2009)).

VIII. WHAT DOES IT MEAN TO BE RELEVANT?

Both investigators and decisionmakers are tasked with limiting their considerations to information that is “relevant” and not otherwise impermissible. The Title IX Final Rule defines “relevant” as “related to the allegations of sex discrimination under investigation as part of the grievance procedures under [34 C.F.R.] § 106.45...” The Title IX Final Rule further states that “[q]uestions 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.” 34 C.F.R. § 106.2 (as amended).

- A. Under the Title IX Final Rule, the following evidence is impermissible regardless of whether it is relevant:
1. “Evidence that is protected under a privilege as recognized by Federal or State law or evidence provided to a confidential employee, unless the person to whom the privilege or confidentiality is owed has voluntarily waived the privilege or confidentiality;”
 2. “A party’s or witness’s records that are made or maintained by a physician, psychologist, or other recognized professional or paraprofessional in connection with the provision of treatment to the party or witness, unless the school or school district obtains that party’s or witness’s voluntary, written consent for use in the school or school district’s grievance procedures; and”
 3. “Evidence that relates to the complainant’s sexual interests or prior sexual conduct, unless evidence about the complainant’s prior sexual conduct is offered to prove that someone other than the respondent committed the alleged conduct or is evidence about specific incidents of the complainant’s prior sexual conduct with the respondent that is offered to prove consent to the alleged sex-based harassment.

The fact of prior consensual sexual conduct between the complainant and respondent does not by itself demonstrate or imply the complainant's consent to the alleged sex-based harassment or preclude determination that sex-based harassment occurred[.]”

See 34 C.F.R. § 106.45(b)(7) (as amended).

- B. An investigator must use judgment to determine whether the evidence is relevant and if it is impermissible.
 - 1. Investigators must be cautious, however, to avoid intruding on a decisionmaker's role and resolving issues of responsibility in the investigation report. Such overreach may expose the investigator to an allegation of bias.

IX. EVIDENCE GATHERED

- A. **Review of Evidence.** All parties must be given “an equal opportunity to access the evidence that is relevant to the allegations of sex discrimination and not otherwise impermissible,” consistent with 34 C.F.R. § 106.2 and 34 C.F.R. § 106.45(b)(7), in the manner set forth below. 34 C.F.R. § 106.45(f)(4) (as amended).

Specifically, a school or school district must “provide an equal opportunity to access either the relevant and not otherwise impermissible evidence, or an accurate description of this evidence. If the school or school district provides a description of the evidence, it must further provide the parties with an equal opportunity to access the relevant and not otherwise impermissible evidence upon the request of any party.

This requirement extends to all evidence, inculpatory or exculpatory, whether obtained from a complainant, respondent, witness, or other third party, so long as the evidence is directly related to the allegations in the complaint.

- B. **Response to Evidence.** A party must have a “reasonable opportunity to respond to the evidence or to the accurate description of the evidence.” 34 C.F.R. § 106.45(f)(4)(ii) (as amended). Title IX no longer requires 10 days for parties to respond to the evidence. 34 C.F.R. § 106.45(b)(4) (as amended).

If a party responds to evidence, that response should be passed on to the decisionmaker along with the evidence.

D. Tips for Documenting the Evidence

1. Include the date, time, location, who was present in the room, and review of the Tennessee Warning in your documentation.
2. Include all relevant information that the party or witness stated during the interview.
3. Reference exhibits when appropriate.
4. Write objectively and professionally.

X. WRITING AN INVESTIGATION REPORT

- A.** Previously, the Title IX Regulations required that the investigator “[c]reate an investigative report that fairly summarizes relevant evidence and, at least 10 days prior to a hearing...or other time of determination regarding responsibility, send to each party and the party’s advisor, if any, the investigation report in an electronic format or a hard copy, for their review and written response.” 34 C.F.R. § 106.45(b)(5)(vii) (2020).
- B.** The new Title IX Final Rule does not contain any mention of an investigative report in the context of elementary and secondary education. Note, however, that there may be other applicable school or school district policies that require some form of written report. At a minimum, we recommend the investigator prepare a written summary of what they learned to pass on to the decisionmaker along with the evidence.

XI. AVOIDING BIAS AND CONFLICT OF INTEREST

- A. Conflicts of Interest.** The investigator’s role is to investigate the complaint objectively. Accordingly, the investigator cannot have any personal interest in the outcome of the investigation. The following are examples of personal interests that may present a conflict of interest that disqualifies the investigator from serving impartially:
1. Financial interest in the outcome of the investigation.
 2. Personal interest stemming from the investigator’s personal relationship with a party to the investigation, or that of the investigator’s family.

3. Professional interest or incompatible roles within the school or school district.

B. Bias. The investigator must not allow any personal bias to influence the outcome of the investigation. A biased investigation, such as one based on the predetermination that “all boys are violent” or “all girls are liars” will likely result in an appeal and/or liability under Title IX. Similarly, the investigator cannot allow his or her past experience with a particular party or witness to influence the outcome of the investigation. Instead, all investigations must be based on credible, relevant evidence considered as part of that investigation.

C. Addressing Implicit Biases.

1. Avoid characterizations or statements based on an individual’s race, sex, gender, sexual orientation, disability status, religion, or other protected class status.
2. Give equal consideration to complainants, respondents, and witnesses, regardless of their race, sex, gender, sexual orientation, disability status, religion, or other protected class status.
3. Impose the same ground rules, adopt the same tone of voice, and otherwise treat all interviewees the same, regardless of race, sex, gender, sexual orientation, disability status, religion, or other protected class status.
4. Avoid “spokesperson questions” such as asking for the “female’s” view on things or for the “boy’s perspective.”
5. Investigators should examine their own behavior and be aware of their own unconscious biases. An investigator should refrain from making assumptions about different student or employee groups based on race, sex, gender, sexual orientation, disability status, religion, or other protected class status.

XI. ADVANCED MANEUVERS – HIGH STRESS INVESTIGATION SCENARIOS

A. Parent vs. Advocate. Typically, parents understand particularly after receiving advance notice, that the investigator needs to obtain information directly from their child. Occasionally, however, if permitted to sit in on an

interview, a parent may become obstructive or attempt to control the interview. As part of avoiding bias, investigators (and decisionmakers) need to be careful not to impute the statements or actions of parents to the party. Investigators should avoid threatening to end the interview wherever possible, to avoid allegations of unequal treatment. However, a complainant or respondent is only entitled to the *opportunity* to present evidence, and the regulations do not require a party to actually be interviewed.

STEP THREE – ROLE OF THE TITLE IX DECISIONMAKER

I. REVIEW OF EVIDENCE/ANY INVESTIGATION REPORT

A. Standard of Review

1. The decisionmaker is responsible for reviewing the evidence, including any Investigator's report, and determining whether the respondent is responsible for the conduct alleged. The decisionmaker may be the same person as the Title IX Coordinator or Investigator. 34 C.F.R. § 106.45(b)(2) (as amended).
2. In determining whether the conduct occurred, the decisionmaker must use one of the following standards of evidence as set forth in Paragraph 3 below:
 - a. "Preponderance of the evidence" is understood to mean a conclusion that a fact is more likely than not to be true."
 - b. "Clear and convincing evidence" means that a fact is highly probable to be true.
3. The "preponderance of the evidence" standard must be used to determine whether sex discrimination occurred, unless the school or school district uses the "clear and convincing" standard of proof in all other comparable proceedings, including proceedings related to other discrimination complaints, in which case the school or school district can elect to use the "clear and convincing" standard to determine whether sex discrimination occurred. 34 C.F.R. § 106.45(h)(1) (as amended).
4. The same standard of proof shall apply regardless of whether the respondent is a student or a staff member.

5. As set forth in the Title IX Final Rule, “[b]oth standards of proof require the decisionmaker to evaluate relevant and not otherwise impermissible evidence for its persuasiveness; if the decisionmaker is not persuaded under the applicable standard by the evidence that sex discrimination occurred, whatever the quantity of evidence is, the decisionmaker must not determine that sex discrimination occurred.”
34 C.F.R. § 106.45(h)(1) (as amended).

C. Notification of Rights to a Hearing/Written Questions

For elementary and secondary schools, the Title IX Final Rule eliminated the right to a hearing and to ask parties and witnesses written questions prior to a decision.

II. WRITTEN DETERMINATIONS REGARDING RESPONSIBILITY

A. Issuance of a Written Determination

After reviewing the evidence and making a determination, the decisionmaker must notify the parties in writing of the determination. 34 C.F.R. § 106.45(h)(2) (as amended).

B. Contents of the Determination

After an investigation and the evaluation of all relevant and not otherwise impermissible evidence, the school or school district must notify the parties in writing of:

1. The determination whether sex discrimination occurred under Title IX or its regulations;
2. the rationale for such determination; and
3. the procedures and permissible bases for the complainant and respondent to appeal.

34 C.F.R. § 106.45(h)(2) (as amended).

C. Referral of the Determination

A copy of the determination should be forwarded to the Title IX Coordinator who is responsible for implementing any remedies.

D. Finality of the Determination

The determination of the decisionmaker only becomes final when the appeal period expires, or any appeal is adjudicated.

IV. ADVANCED MANEUVERS – HIGH STRESS SCENARIOS FOR DECISIONMAKERS

- B. **Investigator Missteps.** Occasionally, decisionmakers may notice that the investigator may have inadvertently overlooked a notice that was missed, or something else required by the regulations. The decisionmaker could address this issue in the written determination regarding responsibility if the error would not have any impact on the outcome of the matter. This is a fact-specific determination that will vary from investigation to investigation.

STEP FOUR – IMPLEMENTATION OF THE DECISION AND THE APPEALS PROCESS

I. APPEAL PROCESS

- A. The school or school district may set the length of the appeal period as long as it is reasonably prompt. 34 C.F.R. § 106.45(b)(4) (as amended).
- B. The Title IX Final Rule eliminated the specific grounds for appeal. Instead, it states the school or school district must offer the parties an appeal process that, at a minimum, is the same as it offers in all other comparable proceedings, if any, including proceedings relating to other discrimination complaints. 34 C.F.R. § 106.45(i) (as amended).
- C. For all appeals, the school or school district’s process is recommended to include the following:
1. Notify the other party in writing when an appeal is filed.
 2. Use a different, adequately trained, decisionmaker than the decisionmaker who made the initial determination. This “appellate decisionmaker” should not be the Title IX Coordinator or the Investigator.
 3. Give both parties a reasonable, equal opportunity to submit written statements in support of, or challenging, the determination or dismissal.

4. Issue a written decision describing the result of the appeal and the rationale for the result simultaneously to both parties.

STEP FIVE – AFTERMATH OF TITLE IX GRIEVANCE PROCESS

The grievance process required by the regulations can be extremely emotionally challenging for parties. Once the written determination has been issued, a respondent who was found not to have engaged in sex-based harassment or a complainant whose allegations were not substantiated, may express these emotions by alleging that the other party made materially false statements or submitted materially false evidence in bad faith during the investigation. Schools and school districts can discipline students or employees, even though the conduct at issue does not satisfy the regulatory definitions of sex-based harassment or retaliation, but need to be extremely careful when doing so.

I. RETALIATION

Retaliation. “Retaliation” means intimidation, threats, coercion, or discrimination against any person by the school or school district, a student, or an employee or other person authorized by the school or school district to provide aid, benefit, or service under the school or school district’s education program or activity, for the purpose of interfering with any right or privilege secured by Title IX or its regulations, 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 including in an informal resolution process under 34 C.F.R. § 106.44(k), in grievance procedures under 34 C.F.R. § 106.45, and in any other actions taken by a school or school district under 34 C.F.R. § 106.44(f)(1). Nothing in this definition or in the Title IX Final Rule precludes a school or school district from requiring an employee or other person authorized by a school or school district to provide aid, benefit, or service under the school or school district’s education program or activity to participate as a witness in, or otherwise assist with, an investigation, proceeding, or hearing. 34 C.F.R. § 106.2 (as amended).

Peer Retaliation. “Peer retaliation” means “retaliation by a student against another student.” 34 C.F.R. § 106.2 (as amended).

Retaliation Requirements. A school or school district “must prohibit retaliation, including peer retaliation, in its education program or activity.” When a school or school district has information about conduct that reasonably may constitute retaliation under Title IX, the school or school district is obligated to comply with § 106.44. Upon receiving a complaint alleging retaliation, a school or school district must initiate its grievance procedures under 34 C.F.R. § 106.45, or, as appropriate,

an informal resolution process under 34 C.F.R. § 106.44(k). 34 C.F.R. § 106.71 (as amended).