

# Title IX Training for PreK-8 Administrators

## Lincolnwood School District No. 74

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## **I. Introduction**

Title IX of the Higher Education Act of 1972 promises equal access to education for all students and it protects them against discrimination on the basis of sex. (U.S. Dept. of Education, <https://sites.ed.gov/titleix/>, last visited August 8, 2023.) Title IX was enacted to ensure: “No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.” (20 U.S.C. § 1681(a).)

### **A. What types of entities does Title IX apply to?**

“[A]ny State or political subdivision thereof, or any instrumentality of a State or political subdivision thereof, any public or private agency, institution, or organization, or other entity, or any person, to whom Federal financial assistance is extended directly or through another recipient and which operates an education program or activity which receives such assistance, including any subunit, successor, assignee, or transferee thereof.” 34 CFR § 106.2(i).

These are “*recipients* of Federal financial assistance.” 34 CFR § 106.2(g). This financial assistance can include any of the following, when authorized or extended under a law administered by the U.S. Department of Education:

- (1) A grant or loan of Federal financial assistance, including funds for:
  - (i) The acquisition, construction, renovation, restoration, or repair of a building or facility or any portion thereof; and
  - (ii) Scholarships, loans, grants, wages or other funds extended to any entity for payment to or on behalf of students admitted to that entity, or extended directly to such students for payment to that entity.
- (2) A grant of Federal real or personal property or any interest therein, including surplus property, and the proceeds of the sale or transfer of such property, if the Federal share of the fair market value of the property is not, upon such sale or transfer, properly accounted for to the Federal Government.
- (3) Provision of the services of Federal personnel.
- (4) Sale or lease of Federal property or any interest therein at nominal consideration, or at consideration reduced for the purpose of assisting the recipient or in recognition of public interest to be served thereby, or permission to use Federal property or any interest therein without consideration.
- (5) Any other contract, agreement, or arrangement which has as one of its purposes the provision of assistance to any education program or activity, except a contract of insurance or guaranty.

## B. Who must receive this Title IX training?

**Title IX Coordinators** – Each recipient of Federal financial assistance must designate and authorize at least one employee to coordinate its efforts to comply with its responsibilities under Title IX, and this employee must be referred to as the “Title IX Coordinator.” 34 CFR § 106.8(a). The organization must notify applicants for admission and employment, students, parents or legal guardians of elementary and secondary school students, employees, and all unions or professional organizations holding collective bargaining or professional agreements with the organization, of the name or title, office address, electronic mail address, and telephone number of the employee or employees designated as the Title IX Coordinator. (See IASB’s PRESS Policy 2:265 “Title IX Sexual Harassment Grievance Procedure”.)

Any person may report sex discrimination, including sexual harassment (whether or not the person reporting is the alleged victim of the harassing/discriminating conduct), in person, by mail, by telephone, or by electronic mail, using the contact information listed for the Title IX Coordinator, or by any other means that results in the Title IX Coordinator receiving the person’s verbal or written report. Such a report may be made at any time (including during non-business hours) by using the telephone number or electronic mail address, or by mail to the office address, listed for the Title IX Coordinator.

**Investigators** – Each recipient of Federal financial assistance must investigate the allegations in a formal complaint. 34 CFR § 106.45(b)(3)(i). This could be the Title IX Coordinator who received the complaint, or it could be another (trained) individual appointed by the Title IX Coordinator. The organization’s policies and procedures must ensure that the Title IX Coordinator, investigator(s), or decision-maker(s) do not have a conflict of interest or bias for or against complainants or respondents generally, or the individual complainant or respondent specifically, that would potentially affect the outcome of the matter. 34 CFR § 106.45(b)(8)(i)(C).

**Decision-makers** – The employee(s) within the organization that is a recipient of Federal financial assistance who “must issue a written determination regarding responsibility.” 34 CFR § 106.45(b)(7)(i). If the organization’s policies and procedures call for a live hearing to be conducted on formal complaints, the decision-maker conducts the live hearing. 34 CFR § 106.45(b)(6)(i). Live hearings are optional for elementary and secondary schools. 34 CFR § 106.45(b)(6)(ii). The decision-maker(s) *cannot* be the same person(s) as the Title IX Coordinator or the investigator(s). 34 CFR § 106.45(b)(7)(i).

**Any person who facilitates an informal resolution process** – After a formal complaint has been filed, and before reaching a determination regarding responsibility, the organization *may* offer “an informal resolution process, such as mediation, that does not involve a full investigation and adjudication.” 34 CFR § 106.45(b)(9). The organization cannot require the use of the informal resolution process and cannot use an informal resolution process to resolve allegations that an employee sexually harassed a student.

## **II. Discrimination and the Education Program or Activity**

### **A. Program or Activity in General**

The Title IX regulations define the term “Program or activity” broadly, as “all of the operations of”:

- i. A department, agency, special purpose district, or other instrumentality of a State or local government; or
- ii. A college, university, or other postsecondary institution, or a public system of higher education; or
- iii. A local educational agency, a system of vocational education, or other school system;
- iv. A corporation, partnership, sole proprietorship, or other private organization which is principally engaged in the business of providing education, health care, housing, social services, or parks and recreation, if Federal assistance is extended to such entity; or
- v. Any other entity that is established by two or more of the entities described above which is extended Federal financial assistance.

34 CFR § 106.2(h).

### **B. Prohibitions on Discrimination**

The general prohibition under Title IX is that: “no person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any academic, extracurricular, research, occupational training, or other education program or activity operated by a recipient which receives Federal financial assistance.” 34 CFR § 106.31(a).

The regulations also provide specific prohibitions – “in providing any aid, benefit, or service to a student, a recipient shall not, on the basis of sex:

- (1) Treat one person differently from another in determining whether such person satisfies any requirement or condition for the provision of such aid, benefit, or service;
- (2) Provide different aid, benefits, or services or provide aid, benefits, or services in a different manner;
- (3) Deny any person any such aid, benefit, or service;
- (4) Subject any person to separate or different rules of behavior, sanctions, or other treatment;
- (5) Apply any rule concerning the domicile or residence of a student or applicant, including eligibility for in-state fees and tuition;

- (6) Aid or perpetuate discrimination against any person by providing significant assistance to any agency, organization, or person which discriminates on the basis of sex in providing any aid, benefit or service to students or employees;
- (7) Otherwise limit any person in the enjoyment of any right, privilege, advantage, or opportunity.”

34 CFR § 106.31(b).

A similar prohibition exists with regard to employment in education programs or activities. “No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination in employment, or recruitment, consideration, or selection therefor, whether full-time or part-time, under any education program or activity operated by a recipient which receives Federal financial assistance.” 34 CFR § 106.51(a). This applies to all aspects of employment, from recruitment through collective bargaining, with essentially no described exceptions. There is one possibility of creating or maintaining separate jobs or systems which classify persons on the basis of sex, but only if sex “is a bona-fide occupational qualification for the positions in question.” 34 CFR § 106.55 (citing § 106.61).

### C. More Specifics to Consider

The Title IX regulations address a number of other specific situations that are relevant to providing educational services. For example, the regulations provide that an organization “may provide separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities provided for students of the other sex.” 34 CFR § 106.33.

With regard to classes, an organization generally is prohibited from providing or carrying out any education programs or activities separately on the basis of sex, or requiring or refusing participation in such programs or activities on the basis of sex. 34 CFR § 106.34(a). However, a number of exceptions are described:

- i. Contact sports in physical education classes or activities, including wrestling, boxing, rugby, ice hockey, football, and basketball;
- ii. Ability grouping of students in physical education classes “as assessed by objective standards of individual performance developed and applied without regard to sex”;
- iii. Human sexuality classes in elementary and secondary schools; and
- iv. Choruses with requirements based on vocal range or quality.

There are further specifications which allow an organization to provide “nonvocational single-sex classes or extracurricular activities” if a number of requirements are met. 34 CFR § 106.34(b), (c). The separation must be based on an “important” educational objective and a “substantially equal” single-sex class or activity may be required for students of the excluded sex, with periodic evaluations at least every two years.

Similarly, there is a general prohibition on discrimination on the basis of sex in regards to interscholastic or intramural athletics, but with a number of exceptions which allow for the use of single-sex teams. 34 CFR § 106.41. The organization must provide “equal athletic opportunity for members of both sexes.” A number of factors would be considered, including:

- 1) Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes;
- 2) The provision of equipment and supplies;
- 3) Scheduling of games and practice time;
- 4) Travel and per diem allowance;
- 5) Opportunity to receive coaching and academic tutoring;
- 6) Assignment and compensation of coaches and tutors;
- 7) Provision of locker rooms, practice and competitive facilities;
- 8) Provision of medical and training facilities and services;
- 9) Provision of housing and dining facilities and services;
- 10) Publicity; and
- 11) Unequal aggregate expenditures for members of each sex or unequal expenditures for separate male and female teams.

### III. Sexual Harassment

An organization's response to a formal complaint of sexual harassment, if handled improperly, may constitute discrimination on the basis of sex which is prohibited under Title IX. 34 CFR § 106.45(a). The Title IX regulations define the term "sexual harassment" narrowly, as "conduct on the basis of sex" that falls into one or more of the following categories:

- A. Quid Pro Quo by an Employee;
- B. Hostile Environment; or
- C. Sexual Assault, Violence, and Stalking.

34 CFR § 106.30(a).

#### A. Quid Pro Quo by an Employee

*Quid pro quo* is a Latin phrase that translates as "something for something." The federal regulation defines this type of sexual harassment in more detail as "An employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct." 34 CFR § 106.30(a)(1). As of the 2020 rules revision, this only applies to a harassing employee, and does not apply to a volunteer, harassing student, or other individuals who might be a harasser.

#### B. Hostile Environment

The federal regulation now defines this type of sexual harassment as "Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity." 34 CFR § 106.30(a)(2). Complaints or allegations that do not fit the narrow criteria of the other two definitions will potentially fall into this category. Consider the key elements:

- Unwelcome conduct *based on sex* – judged by a "reasonable person" standard. Would a reasonable person have considered the conduct by the alleged harasser to be unwelcome to the alleged victim?
- Severe, pervasive, and objectively offensive –
  - More than just teasing, name-calling, juvenile, or crass behavior;
  - More than just one incident is required, even if the one incident alone was severe;
  - Offensive to a "reasonable person" under the circumstances, not just offensive to the alleged victim or complainant – consider the surrounding circumstances;
- Effectively *denies* a person *equal access* to the education program or activity.

Note that, unlike “quid pro quo” described above, this type of conduct is not limited to employees. Harassing conduct by a volunteer, a student, or any other person could qualify if the organization is aware of it.

### C. Sexual Assault, Violence, and Stalking

The federal regulation explicitly defines “sexual harassment” as including:

- a. “Sexual assault” (20 U.S.C. 1092(f)(6)(A)(v));
- b. “dating violence” (34 U.S.C. 12291(a)(10));
- c. “domestic violence” (34 U.S.C. 12291(a)(8)), or
- d. “stalking” (34 U.S.C. 12291(a)(30)).

34 CFR § 106.30(a)(3). The first definition references the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act, and the other three reference the Violence Against Women Act. If the allegations or investigation appear to fall into one of these categories in a general sense, the investigator or decision-maker should obtain the specific legal definition of the term to fully evaluate the complaint. Again, unlike “quid pro quo” described above, this type of conduct is not limited to employees.



#### **IV. How To Conduct An Investigation, Grievance Process, and Hearing**

Every investigation or grievance process under Title IX will be different, but the organization's policy must include a specific process with multiple steps.

##### **A. Actual Knowledge**

The organization's Title IX obligation begins with *actual knowledge* of alleged sexual harassment. The regulations define "actual knowledge" with specificity – it includes "notice of sexual harassment or allegations of sexual harassment to a recipient's Title IX Coordinator or any official of the recipient who has authority to institute corrective measures on behalf of the recipient, or to any employee of an elementary and secondary school." 34 CFR § 106.30(a). However, the regulatory definition specifically excludes imputed knowledge based on vicarious liability or constructive notice, and it also excludes situations where the only official with actual knowledge is the alleged harasser.

Although a formal complaint does qualify as actual knowledge, a formal complaint is not required. 34 CFR § 106.44. The alleged harassment need only have taken place against a person in the United States in an education program or activity of the organization. This includes "locations, events, or circumstances over which the recipient exercised substantial control over both the respondent and the context in which the sexual harassment occurs."

##### **B. The Organization's Response – Formal Complaint or Not**

With or without a formal complaint having been filed, once the organization has *actual knowledge* of alleged sexual harassment in an education program or activity, the organization must respond promptly in a manner that is not *deliberately indifferent*. 34 CFR § 106.44. The regulation defines an organization's response to sexual harassment as "deliberately indifferent" only if the response "is clearly unreasonable in light of the known circumstances."

The Title IX Coordinator must promptly contact the complainant to discuss the availability of *supportive measures*, consider the complainant's wishes with respect to supportive measures, inform the complainant that these supportive measures are available with or without the filing of a formal complaint, and explain to the complainant the process for filing a formal complaint. 34 CFR § 106.44. The regulations define "supportive measures" as:

- "[N]on-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, and without fee or charge to the complainant or the respondent";
- Measures which are "designed to restore or preserve equal access to the recipient's education program or activity without unreasonably burdening the other party, including measures designed to protect the safety of all parties or the recipient's educational environment, or deter sexual harassment."
- Examples provided include "counseling, extensions of deadlines or other course-related adjustments, modifications of work or class schedules, campus escort services, mutual restrictions on contact between the parties, changes in work or

housing locations, leaves of absence, increased security and monitoring of certain areas of the campus, and other similar measures.”

34 CFR § 106.30. The organization must treat all provided supportive measures as confidential, so long as doing so does not impair the organization’s ability to provide them. The Title IX Coordinator is responsible for coordinating the effective implementation of supportive measures.

### C. Responding to a Formal Complaint

Once a formal complaint has been filed, the organization must institute its *grievance process* to resolve the complaint of sexual harassment. 34 CFR §§ 106.44, 106.45. Note that, even if the victim of the alleged harassing behavior does not file a formal complaint, the Title IX Coordinator may elect to sign the formal complaint to initiate the grievance process. 34 CFR § 106.30.

The complainant and respondent must both be provided with notice of the allegations, notice of all procedures, and notice of the possible outcomes – supportive measures, investigation, dismissal of the complaint, informal resolution, and/or emergency removal. 34 CFR § 106.45. The process (see IASB’s PRESS Policy 2:265) must:

- 1) Treat complainants and respondents equitably by providing remedies designed to restore or preserve equal access to the recipient's education program or activity when a determination of responsibility for sexual harassment has been made against the respondent, and by following the grievance process before the imposition of any disciplinary sanctions or other actions against the respondent that are not supportive measures;
- 2) Require an objective evaluation of all relevant evidence – including both inculpatory and exculpatory evidence;
- 3) Provide that credibility determinations may not be based on a person's status as a complainant, respondent, or witness;
- 4) Require that any individual designated as a Title IX Coordinator, investigator, decision-maker, or a person designated to facilitate an informal resolution process, must not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent;
- 5) Require that any individual designated as a Title IX Coordinator, investigator, decision-maker, or a person designated to facilitate an informal resolution process must have received the appropriate Title IX training;
- 6) Include a presumption that the respondent is not responsible for the alleged conduct until a determination regarding responsibility is made at the conclusion of the grievance process;
- 7) Include reasonably prompt time frames for conclusion of the grievance process, the filing and resolving appeals, the use of informal resolution processes, and a

process that allows for the temporary delay of the grievance process or the limited extension of time frames for good cause with written notice to the parties;

- 8) Describe the range of possible disciplinary sanctions and remedies or list the possible disciplinary sanctions and remedies that the recipient may implement following any determination of responsibility;
- 9) State whether the standard of evidence to be used to determine responsibility is the preponderance of the evidence standard (“more likely than not”) or the clear and convincing evidence standard (“highly and substantially more likely to be true than untrue”), applying the same standard for all formal complaints, including those against and those against employees/faculty;
- 10) Include the procedures and permissible bases for the complainant and respondent to appeal;
- 11) Describe the range of supportive measures available; and
- 12) *Not* require, allow, rely upon, or otherwise use questions or evidence that constitute, or seek disclosure of, information protected under a legally recognized privilege, unless the person holding such privilege has waived the privilege.

34 CFR § 106.45(b)(1). If multiple formal complaints exist against multiple respondents or by multiple complainants, they may be consolidated by the Title IX Coordinator if the allegations of sexual harassment “arise out of the same facts or circumstances.” 34 CFR § 106.45(b)(4).

#### D. The Investigation

The Title IX Coordinator who received the complaint could act as the investigator themselves or could appoint another trained individual – but they cannot appoint the decision-maker.

The investigator is tasked with conducting the investigation, gathering evidence, and preparing an investigative report prior to the hearing (if one is required) or the time for the decision-maker to reach a determination regarding responsibility. This is a time-intensive and labor-intensive process that should be carefully considered, planned, and documented at each step. If multiple trained individuals are available, it may be prudent to assign someone to assist the designated investigator.

The burden of proof *and* the burden of gathering evidence rests on the organization. 34 CFR § 106.45(b)(5)(i). It does not rest on the parties (i.e. the complainant and the respondent), although the organization cannot access or use a party’s privileged records – i.e. made by a treating physician, psychiatrist, psychologist, or other recognized professional or paraprofessional – without the party’s voluntary written consent.

The investigation must provide an equal opportunity for both of the parties to present witnesses and other evidence. 34 CFR § 106.45(b)(5)(ii). This includes expert witnesses, if appropriate, and inculpatory or exculpatory evidence (i.e. evidence of guilt or innocence). The

investigation cannot restrict either party's ability to discuss the allegations or to gather and present relevant evidence. 34 CFR § 106.45(b)(5)(iii).

For meetings or other proceedings, the parties must receive the same opportunities to have others present, including the opportunity to be accompanied by an attorney or the advisor of their choice (i.e. a union representative). 34 CFR § 106.45(b)(5)(iv). The organization may establish restrictions regarding the extent to which the advisor may participate in the proceedings, as long as the restrictions apply equally to both parties; also be mindful of union rights and collective bargaining agreement terms in general.

Parties must be provided with written notice of the date, time, location, participants, and purpose of all hearings, investigative interviews, or other meetings, as well as sufficient time to prepare beforehand. 34 CFR § 106.45(b)(5)(v).

Both parties must receive an equal opportunity to inspect and review any evidence obtained as part of the investigation that is directly related to the allegations, including the evidence that the organization does not intend to rely on, so that each party can meaningfully respond to the evidence prior to conclusion of the investigation. 34 CFR § 106.45(b)(5)(vi). Prior to completing the investigative report, the organization must send to each party the evidence and provide at least 10 days for the party to submit a written response, which the investigator must consider prior to completion of the investigative report. The organization must make all such evidence subject to the parties' inspection and review available at any hearing to give each party equal opportunity to refer to such evidence during the hearing, including for purposes of cross-examination.

The investigator must create an investigative report that fairly summarizes relevant evidence and send it to each party for their review and written response at least 10 days prior to a hearing (if a hearing is required to be held) or other time of determination regarding responsibility. 34 CFR § 106.45(b)(5)(vii). In determining the "relevant" evidence, the investigator should refer to the discussion of relevance in the subsection below entitled "Hearings, Live or On Paper" which discusses this concept as it applies to the decision-maker and the questioning of parties and witnesses. The same concepts are equally applicable to the investigative report.

#### E. Resolving a Formal Complaint Without Determining Responsibility

***Dismissal*** – If, after investigation, the conduct alleged in the formal complaint would not constitute sexual harassment as defined in the regulations even if proved, the conduct did not occur in the organization's education program or activity as defined, or did not occur against a person in the United States, then the decision-maker *must* dismiss the formal complaint with regard to that conduct for purposes of sexual harassment under Title IX. 34 CFR § 106.45(b)(3)(i). A dismissal for one of these reasons does not prevent the organization from taking action, such as disciplinary action, under its ordinary policies, procedures, or code of conduct.

The Title IX Coordinator *may* dismiss the formal complaint, or any allegations within it, if, at any time during the investigation process or the hearing, the complainant notifies the Title

IX Coordinator in writing that they would like to withdraw the formal complaint or any allegations therein or the respondent becomes no longer enrolled in or employed by the organization. 34 CFR § 106.45(b)(3)(ii). In addition, a formal complaint *may* be dismissed if “specific circumstances” prevent the organization “from gathering evidence sufficient to reach a determination” on the complaint or allegations within it.

Upon a dismissal for any of the bases described above, the organization must promptly send written notice of the dismissal and reasons for it simultaneously to the parties. 34 CFR § 106.45(b)(3)(iii).

***Informal Resolution*** – The organization may offer – but not require – an informal resolution process at any time prior to reaching a determination regarding responsibility. 34 CFR § 106.45(b)(9). This could include mediation, and it need not involve a full investigation or adjudication. To do so, the organization must:

1. Provide to the parties a written notice disclosing: the allegations, the requirements of the informal resolution process, the circumstances under which the informal process would preclude the parties from resuming a formal complaint arising from the same allegations, each party’s right to withdraw from the informal resolution process and resume the grievance process with respect to the formal complaint at any time prior to agreeing to a resolution, and any consequences resulting from participating in the informal resolution process, including the records that will be maintained or could be shared; and
2. Obtain the parties’ voluntary, written consent to the informal resolution process.

An organization cannot use an informal resolution process to resolve allegations that an employee sexually harassed a student. Any informal resolution should implement supportive measures to restore or preserve equal access to the education program or activity, including measures designed to protect the safety of all parties or the recipient's educational environment, or deter sexual harassment as appropriate. 34 CFR § 106.44.

#### F. Resolving a Formal Complaint By Determining Responsibility

***Hearing, Live or On Paper*** – Once the investigation has been conducted, dismissal has been determined not to be required or appropriate, informal resolution has not been reached, and the investigator has prepared the investigative report that fairly summarizes relevant evidence and sent it to each party for their review and written response at least 10 days prior, some form of hearing must take place.

For postsecondary institutions, the Title IX regulations require that the grievance procedure must include a live hearing. 34 CFR § 106.45(b)(6)(i). In such a live hearing, the decision-maker must allow each party’s representative to ask the other party and any witnesses relevant questions, including cross examination and questions challenging credibility. Cross-examination at the live hearing must be conducted “directly, orally, and in real time” by the party’s representative or advisor of choice, and it may never be conducted by a party personally. Only relevant questions may be allowed, and the decision-maker must explain any decision to exclude a question as not relevant. Either party may request that the organization must provide

for the live hearing to occur with the parties in separate rooms and the questioning viewable through technology. Alternatively, the organization has discretion to conduct the hearing virtually. A transcript or audiovisual recording must be created and made available to the parties for inspection and review.

For all organizations that are not postsecondary institutions, including elementary and secondary schools, the grievance process *may* include a live hearing, but this is not required. 34 CFR § 106.45(b)(6)(ii). Whether or not the process includes a live hearing, the decision-maker must:

- a. afford each party the opportunity to submit written, relevant questions that the party wants asked of any party or witness after the investigative report has been sent to the parties;
- b. receive the answers from the party or witness and provide each party with those answers to those written questions and allow for additional, limited follow-up questions from the submitting party; and
- c. explain to the party proposing the questions any decision to exclude a question as not relevant.

As noted above, Title IX does not incorporate the Federal Rules of Evidence or require organizations to apply such rules to a hearing that is conducted live or “on paper.” However, Rule 401 “Test for Relevant Evidence” is still helpful in articulating the general concept of relevance. It states that “Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action.” However, the Title IX regulations do include one particularly important definition of relevance:

“Questions and evidence about the complainant’s sexual predisposition or prior sexual behavior are not relevant, unless such questions and evidence about the complainant’s prior sexual behavior are offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or if the questions and evidence concern specific incidents of the complainant’s prior sexual behavior with respect to the respondent and are offered to prove consent.”

34 CFR § 106.45(b)(6)(i), (ii). This limitation applies to live hearings or paper hearings conducted by elementary and secondary schools, as well as live hearings by postsecondary institutions.

***Determination Regarding Responsibility*** – Once the hearing has been conducted, the decision-maker must issue a written determination regarding responsibility. 34 CFR § 106.45(b)(7)(i). To reach this determination, the decision-maker must apply the standard of evidence described in the grievance process. As noted above, the process must already specify whether the standard of evidence to be used to determine responsibility will be either:

- i. the preponderance of the evidence standard (“more likely than not”); or

- ii. the clear and convincing evidence standard (“highly and substantially more likely to be true than untrue”).

The written determination must include:

- A. An identification of the allegations potentially constituting sexual harassment as defined in the regulations;
- B. A description of the procedural steps taken, starting with the receipt of the formal complaint through the issuance of the determination, including any notifications to the parties, interviews with parties and witnesses, site visits, methods used to gather other evidence, and hearings held;
- C. The decision-maker’s findings of fact supporting the determination;
- D. The decision-maker’s conclusions regarding the application of the organization’s code of conduct to the facts;
- E. A statement of, and rationale for, the result as to each allegation, including a determination regarding responsibility, any disciplinary sanctions the organization imposes on the respondent, and whether remedies designed to restore or preserve equal access to the education program or activity will be provided to the complainant; and
- F. The procedures and permissible bases for the complainant and respondent to appeal.

The decision-maker must provide the written determination to the parties simultaneously. The determination regarding responsibility becomes final on the date on which an appeal would no longer be considered timely or if an appeal is not filed. The Title IX Coordinator is responsible for implementing any specified remedies or supportive measures.

#### G. Appeals

The organization *must* offer both parties to a grievance process the opportunity to appeal from a determination regarding responsibility or from the dismissal of a formal complaint or any allegations contained therein, on the following bases:

- i. A procedural irregularity that affected the outcome of the matter;
- ii. New evidence that was not reasonably available at the time the determination or dismissal was made, that could affect the outcome of the matter; and
- iii. The Title IX Coordinator, investigator(s), or decision-maker had a conflict of interest or bias for or against complainants or respondents generally or the individual complainant or respondent that affected the outcome of the matter.

34 CFR § 106.45(b)(7)(i). The organization *may* offer both parties to a grievance process the opportunity to appeal on other specified bases. 34 CFR § 106.45(b)(7)(ii). For any appeal, the organization must:

- A. Notify the other party in writing when an appeal is filed and implement appeal procedures equally for both parties;
- B. Ensure that the decision-maker for the appeal is not the same person as the decision-maker who reached the prior determination regarding responsibility or dismissal, nor the investigator(s) or the Title IX Coordinator;
- C. Ensure that the decision-maker for the appeal has received the appropriate Title IX training as required for all Title IX Coordinators, investigators, and decision-makers;
- D. Give both parties a reasonable, equal opportunity to submit a written statement in support of, or challenging, the outcome;
- E. Issue a written decision describing the result of the appeal and the rationale for the result; and
- F. Provide the written decision simultaneously to both parties.

The determination regarding responsibility becomes final on the date that the recipient provides the parties with the written determination of the result of the appeal, if an appeal was timely filed.



## **V. How To Serve Impartially**

Title IX Coordinators, investigators, decision-makers, and any person designated to facilitate an informal resolution process must serve impartially by avoiding prejudgment of the facts at issue, conflicts of interest, and bias.

The Title IX regulations provide little explanation of these concepts. However, the U.S. Department of Education's Office of Civil Rights conducted a webinar on January 15, 2021, entitled "Bias, Conflicts of Interest, and Trauma-Informed Practices." In that webinar, OCR provided the following examples:

“[A] recipient may not provide training that instructs Title IX personnel to assume that complainants are always truthful when filing formal complaints, while respondents are always responsible for sexual harassment once accused. Nor may a recipient train Title IX personnel to scrutinize factual inconsistencies or errors more closely when offered by a respondent than by a complainant. Either of these types of training would be inconsistent with the Title IX regulations' prohibitions on prejudging the facts, conflicts of interest, and bias.”

\* \* \*

“because decision-makers must be trained to serve impartially without prejudging the facts at issue, the final regulations protect against any party being unfairly judged due to an inability to recount each specific detail of an incident in sequence, whether such inability is due to trauma, the effects of drugs or alcohol, or simple fallibility of human memory.”

\* \* \*

“a decision-maker who disallows relevant questions from being answered, out of a belief that such questions may be inconsistent with a trauma-informed approach, would run afoul of the Title IX regulations. Similarly, a decision-maker who discounts inconsistencies or errors made by a complainant, while relying on equally significant inconsistencies or errors when made by a respondent, in order to reach a finding of responsibility, would potentially run afoul of the Title IX regulations.”

The video is available on YouTube (<https://youtu.be/vHppcOdrzCg>, last visited August 9, 2023) and the written materials attached to this document and are available on the OCR website ([www2.ed.gov/about/offices/list/ocr/docs/ocr-tix-webinar-bci.pdf](http://www2.ed.gov/about/offices/list/ocr/docs/ocr-tix-webinar-bci.pdf), last visited August 9, 2023).

## **VII. Recordkeeping**

Each organization must maintain, for a period of seven years, records of:

- A. Each sexual harassment investigation, including any determination regarding responsibility, any audio or audiovisual recording or transcript of the hearing, any disciplinary sanctions imposed on the respondent, and any remedies or supportive measures provided to the complainant designed to restore or preserve equal access to the recipient's education program or activity;
- B. Any appeal and the result of that appeal;
- C. Any informal resolution and the result of that resolution;
- D. All materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process, which materials must be made publicly available on its website (or made available upon request for inspection by members of the public if the organization does not maintain a website); and
- E. For each response to a report or formal complaint of sexual harassment, records (existing or to be created) of any actions, including any supportive measures, taken by the organization, the basis for its conclusion that its response was not deliberately indifferent, documentation that it has taken measures designed to restore or preserve equal access to the recipient's education program or activity, and if supportive measures were not provided, documentation of the reasons why such a response was not clearly unreasonable in light of the known circumstances.

34 CFR § 106.45(b)(10).

## **VIII. Conclusion**

Title IX and its enabling regulations are not comprehensive. Significantly, they should be considered as setting the minimum baseline for an educational organization's policies and procedures to avoid sexual harassment and discrimination on the basis of sex in its programs and activities. State-specific laws and regulations often go much further beyond the scope of Title IX.

In addition, Title IX can, in some instances, be overly restrictive in its definitions. Consequently, behavior or conduct may fail to reach the necessary threshold to constitute "sexual harassment" under Title IX, but still may be wholly inappropriate, unprofessional, and against the ordinary policies and expectations of the educational organization – whether or not the conduct violates other laws.

For Illinois public school district's that subscribe to the Illinois Association of School Boards' PRESS Policy Service, the following policy references are relevant:

- 2:260 – Uniform Grievance Procedure
- 2:265 – Title IX Sexual Harassment Grievance Procedure
- 5:10 – Equal Employment Opportunity and Minority Recruitment
- 5:20 – Workplace Harassment Prohibited
- 7:10 – Equal Educational Opportunities
- 7:20 – Harassment of Students Prohibited
- 7:180 -- Prevention of and Response to Bullying, Intimidation, and Harassment
- 7:185 – Teen Dating Violence Prohibited

These policies all reference Title IX in some form, and they also illustrate the overlapping issues between Title IX and other laws regarding discrimination, harassment, and equal opportunities.

These materials are not legal advice. As training materials used to train Title IX personnel, these materials must be posted publicly by the organization that used these for training its Title IX personnel on that organization's website or, if it has no website, must be made available by such organization for public inspection and review at its offices. Accordingly, this organization has a limited license to post these materials on its website or otherwise make them available as required by 34 C.F.R. 106.45(b)(10). This organization and any party who in any way receives and/or uses these materials agree to accept all terms and conditions and to abide by all provisions. These materials may not be displayed, posted, shared, published, or used for any other purpose. No other public display, sharing, posting, or publication of these materials, no other use whatsoever is allowed. No party is authorized to copy, adapt, or otherwise use these materials without explicit written permission.

## OCR Title IX Webinar: Bias, Conflicts of Interest, and Trauma-Informed Practices

January 15, 2021

<https://youtu.be/vHppcOdrzCg>

The U.S. Department of Education’s Office for Civil Rights, or OCR, is a federal law enforcement agency tasked with enforcing certain laws that protect the civil rights of students in schools that receive federal funding. One of these laws is Title IX of the Education Amendments of 1972, which we commonly refer to as Title IX.

Schools, school districts, colleges and universities, along with certain other entities that receive federal funds, must comply with Title IX. Title IX prohibits these recipients of federal funds—which we’ll refer to as *recipients* in this video—from discriminating on the basis of sex. That includes the requirement that recipients appropriately receive and respond to allegations of sexual harassment, and adjudicate those allegations before deciding whether to discipline students.

On May 6, 2020, the Department announced new Title IX regulations that create a consistent, reliable, and effective framework for responding to sexual harassment allegations in education settings, while also protecting due process and free speech rights. This came after more than 124,000 public comments, which the Department reviewed and considered. The regulations became effective on August 14, 2020. This is the first time in history that protections against sexual harassment have been enshrined into federal education regulations.

The purpose of this video is to discuss how recipients must maintain and follow appropriate policies regarding investigating and adjudicating allegations of sexual harassment. That includes requirements to adopt and publish policies to ensure that sexual harassment allegations are fairly adjudicated, how they must train their Title IX personnel to avoid bias and conflicts of interest, and how they can effectively administer a grievance process that avoids bias and conflicts of interest. In particular, we will discuss these requirements in the context of what many commenters referred to as a “trauma-informed” approach to investigation and adjudication of sexual harassment allegations.

Let’s first discuss a recipient’s grievance process in response to a formal complaint of sexual harassment. Recipients must adopt and publish grievance procedures that meet the requirements of Title IX. These include provisions that require the objective evaluation of all relevant evidence—including inculpatory and exculpatory evidence—related to an allegation of sexual harassment. The recipient’s published grievance process must also require that credibility determinations will not be based on a person’s status as a complainant (that is, a person who is allegedly victimized by sexual harassment), a respondent (a person who is accused of sexual harassment), or a witness.

In addition to requiring that all relevant evidence be objectively evaluated, Title IX precludes a Title IX Coordinator, an investigator, or a decision-maker, from having a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or

respondent. The same is true for any individual who facilitates an informal resolution of sexual harassment allegations.

How can recipients help ensure that their Title IX Coordinators, investigators, and decision-makers do not have a conflict of interest or bias? Partly through the use of effective training required by the Title IX regulations. A recipient must ensure that its Title IX Coordinator, investigators, decision-makers, and any person who facilitates an informal resolution process on behalf of the recipient, receive training on the following: the definition of sexual harassment, the scope of the recipient's education program or activity, how to conduct an investigation and grievance process including hearings, appeals, and informal resolution processes, as applicable, and how to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias.

Any materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process, must not rely on sex stereotypes, and must promote impartial investigations and adjudications of formal complaints of sexual harassment. These training materials must also be posted on the recipient's website, if it maintains one.

Additionally, the Title IX regulations contain added safeguards to ensure that conflicts of interest or bias do not affect the ultimate outcome of a grievance process. The Title IX regulations require that recipients offer the parties appeals of any finding of responsibility or non-responsibility regarding a formal complaint of sexual harassment, on certain grounds, one of which is that there was a conflict of interest or bias. Specifically, a recipient must offer both parties an equal opportunity to appeal from a determination regarding responsibility—or from a recipient's dismissal of a formal complaint or any allegations therein—on the basis that a Title IX Coordinator, investigator, or decision-maker had a conflict of interest or bias for or against complainants or respondents generally (or with respect to the individual complainant or respondent), which affected the outcome of the matter.

Now let's discuss what many commenters refer to as a trauma-informed approach to investigating and adjudicating sexual harassment complaints. As mentioned, during the regulatory process prior to the announcement of the Title IX regulations in May 2020, the Department invited the public to comment on its proposed regulatory changes. The Department reviewed and considered more than 124,000 comments, many of which addressed this topic. Some commenters argued that the Department ought to explicitly reject or adopt what is commonly called a trauma-informed approach to allegations of sexual harassment.

The Department declined to include any reference to trauma-informed techniques in the final Title IX regulations themselves. However, the Department discussed trauma-informed practices throughout the Preamble to the regulations. The Preamble notes that there is no consensus on precisely what it means for a school to engage in a trauma-informed approach, but the Department made several points in the Preamble which are highlighted next.

Notably, the Department expressly stated that it understands that sexual violence is a traumatic experience for survivors. The Department also stated that it is aware that the neurobiology of trauma and the impact of trauma on a survivor's neurobiological functioning is a developing field

of study, with application to the way in which investigators of sexual violence offenses interact with victims in campus sexual misconduct proceedings.

In that regard, the Department included provisions specifically intended to take into account that complainants may be suffering results of trauma; for instance, the regulations require that recipients promptly offer supportive measures in response to each complainant, and inform each complainant of the availability of supportive measures with or without filing a formal complaint. If a formal complaint is filed, the grievance process protects traumatized complainants from facing the respondent in person, since cross-examination in live hearings held by postsecondary institutions must never involve parties personally questioning each other, and at a party's request, the live hearing must occur with the parties in separate rooms with technology enabling participants to see and hear each other.

With respect to trauma-informed techniques generally, the Preamble noted that trauma-informed practices can be implemented as part of an impartial, unbiased system that does not rely on sex stereotypes and otherwise complies with the Title IX regulations, but that doing so requires taking care not to permit general information about the neurobiology of trauma to lead Title IX personnel to apply generalizations to allegations in specific cases.

In that vein, schools have the discretion to train Title IX personnel in trauma-informed approaches or practices, so long as all of requirements of the Title IX regulations discussed above are met. In other words, a trauma-informed approach or training on trauma-informed techniques are not impermissible, as long as such an approach or training is consistent with the regulations. But the approach or training has to be consistent with the regulations, which require recipients to train Title IX personnel to serve impartially, without prejudging the facts at issue, and using materials free from reliance on sex stereotypes. The regulations additionally require Title IX personnel to avoid conflicts of interest and bias for or against complainants or respondents generally, or an individual complainant or respondent, in all contexts, regardless of whether a recipient adopts a trauma-informed approach. As a reminder, Title IX personnel include Title IX Coordinators, investigators, decision-makers, and persons who facilitate informal resolutions.

Thus, for example, a recipient may not provide training that instructs Title IX personnel to assume that complainants are always truthful when filing formal complaints, while respondents are always responsible for sexual harassment once accused. Nor may a recipient train Title IX personnel to scrutinize factual inconsistencies or errors more closely when offered by a respondent than by a complainant. Either of these types of training would be inconsistent with the Title IX regulations' prohibitions on prejudging the facts, conflicts of interest, and bias.

Many commenters expressed concern about cross-examination being traumatic for survivors of sexual harassment. As a reminder, cross-examination is only required for postsecondary institutions. But even in the context of cross-examination at a hearing, allowing the parties to test evidence through cross-examination is not a license to inflict trauma on any party, whether it be the complainant or respondent. A party's answers to cross-examination questions can and should be evaluated by a decision-maker in context, including taking into account that a party may experience stress or trauma while trying to answer questions. Moreover, precisely because decision-makers must be trained to serve impartially without prejudging the facts at issue, the final

regulations protect against any party being unfairly judged due to an inability to recount each specific detail of an incident in sequence, whether such inability is due to trauma, the effects of drugs or alcohol, or simple fallibility of human memory.

The Title IX regulations also build in a pause to the cross-examination process; before a party or witness answers a cross-examination question, the decision-maker must determine if the question is relevant. This helps ensure that content of the cross-examination remains focused on only relevant questions, and that the pace of cross-examination does not place undue pressure on a party or witness to answer immediately.

Additionally, we reiterate that schools retain the discretion under Title IX to control the live hearing environment to ensure that no party or witness is asked questions in an abusive or intimidating manner. We also note that cross-examination is just as valuable of a tool for complainants to challenge a respondent's version of events as it is for a respondent to challenge a complainant's narrative. Because cross-examination is conducted only through party advisors, the cross-examination procedure helps to equalize power and control. Both parties have an equal opportunity to ask questions from the party's own perspectives and beliefs about the underlying incident regardless of any power, control, or authority differential that exists between the parties.

All that said, a decision-maker who disallows *relevant* questions from being answered, out of a belief that such questions may be inconsistent with a trauma-informed approach, would run afoul of the Title IX regulations. Similarly, a decision-maker who discounts inconsistencies or errors made by a complainant, while relying on equally significant inconsistencies or errors when made by a respondent, in order to reach a finding of responsibility, would potentially run afoul of the Title IX regulations.

In sum, while the final regulations themselves do not use the term trauma-informed, nothing in the Title IX regulations precludes a recipient from applying trauma-informed techniques, practices, or approaches, so long as such practices are consistent with the requirements of the regulations that we outlined above, relating to an objective evaluation of all evidence, impartiality, and the need to avoid prejudging the facts at issue, conflicts of interest, and bias.

As stated in the Preamble to the Title IX regulations, the Department notes that while there is no uniform list of trauma-informed techniques, many practitioners and experts believe that application of trauma-informed techniques is possible – albeit challenging – to apply in a truly impartial, nonbiased manner.

Finally, we reiterate that the Title IX regulations require impartiality in investigations and are designed to further the truth-seeking function of a grievance process. The Department wishes to emphasize that treating all parties with dignity, respect, and sensitivity without bias, prejudice, or stereotypes infecting interactions with parties fosters impartiality and truth-seeking.

We hope this video has been helpful. The Department is prepared to provide additional technical assistance for recipients with questions. If you have questions or would like additional information or technical assistance, you may contact OCR's Outreach, Prevention, Education and Non-discrimination (OPEN) Center at [T9questions@ed.gov](mailto:T9questions@ed.gov) or visit [www.ed.gov/OCR/OPEN](http://www.ed.gov/OCR/OPEN).



Anyone that believes a recipient has violated Title IX or other federal civil rights law enforced by OCR may file a complaint online at [o-c-r-c-a-s-dot-ed-dot-gov](https://ocr.ed.gov).

Thank you for your help in ensuring that our educational system is safe for all students.