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TITLE IX COMPLIANCE TRAINING: A Review of the Grievance Process

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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 While current as of the date of presentation, the information given today may be superseded by court decisions and legislative amendments.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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Title IX prohibits discrimination based on sex by entities that receive federal funding. Under the regulations to Title IX that took effect August 14, 2020, a school or school district's Title IX Coordinator(s), investigator(s), decision-maker(s), and informal resolution process facilitator(s) must all be trained on the following topics: the definition of sexual harassment, the scope of a school's education program or activity, the new regulatory requirements of the Title IX investigation and grievance process, and how to avoid conflicts of interest and bias. Investigators and decision-makers must also be trained on how to recognize relevant evidence and questioning. 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.

I. DEFINITIONS

- A. Sexual Harassment.** Sexual harassment is now defined, by regulation, as conduct on the basis of sex that also satisfies one or more of the following conditions:
1. A school employee conditioning the provision of an aid, benefit, or service of school on an individual's participation in unwelcome sexual conduct;
 2. 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 school's education program or activity; or
 3. Sexual assault dating violence, domestic violence, or stalking, as those terms are defined by federal law.
 - a. "Sexual Assault" means any sexual act directed against another person, without the consent of the victim, including instances where the victim is incapable of giving consent. *See* 20 U.S.C. 1092(f)(6)(A)(v). Sexual acts range from groping and fondling to forcible penetration.
 - b. "Dating Violence" means violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the victim. Whether such a relationship exists depends on the length of the relationship, the type of relationship, and the frequency of interaction between the persons involved in the relationship. *See* 34 U.S.C. § 12291(a)(10).
 - c. "Domestic Violence" means felony or misdemeanor crimes of violence committed by a current or former spouse or intimate partner of the victim, by a person with whom the victim shares a child in common, by a person who is cohabitating with or has

cohabitated with the victim as a spouse or intimate partner, by a person similarly situated to a spouse of the victim under the domestic or family violence laws of the jurisdiction receiving grant monies, or by any other person against an adult or youth victim who is protected from that person's acts under the domestic or family violence laws of the jurisdiction. *See* 34 U.S.C. § 12291(a)(8).

- d. "Stalking" means engaging in a course of conduct directed at a specific person that would cause a reasonable person to fear for his or her safety or the safety of others; or suffer substantial emotional distress. *See* 34 U.S.C. § 12291(a)(30).

34 C.F.R. § 106.30(a). In June 2021, the U.S. Department of Education's Office for Civil Rights issued a Notice of Interpretation clarifying that it currently interprets "conduct on the basis of sex" to include conduct on the basis of sexual orientation or gender identity.

- B. **Actual Knowledge.** Actual knowledge, which triggers a school or district's duty to respond in a manner that is not deliberately indifferent, means, in relevant part, "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 C.F.R. § 106.30(a) (emphasis added). "This standard is not met when the only official of the recipient with actual knowledge is the Respondent." *Id.*
- C. **Complainant.** "Complainant means an individual who is alleged to be the victim of conduct that could constitute sexual harassment." 34 C.F.R. § 106.30(a).
- D. **Respondent.** "Respondent means an individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment." 34 C.F.R. § 106.30(a).
- E. **Party.** The term "party" refers to a Complainant or a Respondent. The term "parties" refers to both. Some reports of sexual 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.
- F. **Supportive Measures.** The terms "supportive measures" or "interim supportive measures" mean "non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, and without fee or charge to the Complainant or the Respondent before or after the filing of a formal complaint or

where no formal complaint has been filed.” 34 C.F.R. § 106.30(a). Supportive measures “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.” *Id.* 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 or housing locations, leaves of absence, increased security and monitoring of certain areas of the campus, and other similar measures.” *Id.*

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.

- G. **Education Program or Activity.** “Education program or activity” includes locations, events, or circumstances over which the school or district exercised substantial control over both the Respondent and the context in which the sexual harassment occurs. 34 C.F.R. § 106.44(a).

II. GENERAL RESPONSIBILITIES

- A. **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). The Title IX Coordinator receives complaints of sexual harassment and sex discrimination, either by telephone, e-mail, mail to their office, or in person. *Id.* Accordingly, the identity of the Title IX Coordinator and that person’s contact information must be provided to (1) applicants for admission and employment, (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. *Id.*

Key Point: The Title IX Coordinator must be a school employee, per the regulations. All other roles can be contracted out.

- B. **Dissemination of Policy.** Schools and school districts must provide notice to the persons listed in Paragraph A above that the school or district does not discriminate on the basis of sex in its education program or activities, including in employment, that it is required by Title IX not to discriminate in such a manner, and that questions regarding Title IX may be referred to the Title IX Coordinator. 34 C.F.R. § 106.8(b)(1).

This notice must be listed on the school or school district’s website, and in each handbook or catalog that it makes available to students, parents, employees, applicants for employment or admission, and unions. 34 C.F.R. § 106.8(b)(2).

- C. **Grievance Procedure.** The new regulations establish the guidelines for a grievance procedure. *See* 34 C.F.R. § 106.45. All schools and/or school districts who receive federal funding are required to adopt a grievance procedure that complies with the regulations. 34 C.F.R. § 106.8(c).

III. **General Rules for Responding to a Report of Sexual Harassment**

- A. **Respond in a Manner that is Not Deliberately Indifferent.** When a school or district has actual knowledge of an allegation of sexual harassment, it has a duty to respond to that complaint in a manner that is not deliberately indifferent. 34 C.F.R. § 106.44(a). “Deliberate indifference” means a response that is “clearly unreasonable in light of the known circumstances.” *Id.*

It is the responsibility of the Title IX Coordinator to contact the Complainant promptly, discuss supportive measures that are available with or without the filing of a formal complaint, consider the Complainant’s wishes with respect to supportive measures, and explain the process for filing a formal complaint to the Complainant. *Id.*

The response must treat the Complainant and Respondent equitably, by offering supportive measures to the Complainant, and by following the grievance process if a formal complaint is filed. *Id.*

STEP ONE – ROLE OF THE TITLE IX COORDINATOR

I. RECEIPT OF A COMPLAINT

A. Verify Document Meets the Standard of a Formal Complaint

1. Report is a physical document (not an oral report), filed either in person, electronically or by mail.
2. The report is filed by a Complainant (or Complainant's parent) or signed by the Title IX Coordinator.
3. The report alleges sexual harassment against a Respondent and requests that the school or school district investigate the allegation of sexual harassment.

B. Responding to a "Report" or "Actual Knowledge" of Sexual Harassment

1. Information is conveyed about conduct that could constitute "sexual harassment."
2. The information or report was received by the:
 - a. Title IX Coordinator;
 - b. any school or school district employee who has authority to institute corrective measures on behalf of the school or school district; or
 - c. any employee of an elementary or secondary school.
3. Respond in a manner that is not deliberately indifferent when they have knowledge of a complaint, regardless of whether or not the complaint is a formal complaint.
4. If the Title IX Coordinator obtains actual knowledge of sexual harassment based on observations or an oral complaint, the complaint should be reduced to writing and signed by either the Complainant or the Title IX Coordinator in order to create a "formal complaint."

II. INITIAL EVALUATION OF THE COMPLAINT

A. Immediate Dismissal of Complaint

1. Standard for Mandatory Dismissal of a Complaint

A formal complaint must be dismissed if:

- a. The conduct alleged in the formal complaint, even if proven, does not meet the definition of sexual harassment set by the regulations and school policy;
- b. The conduct alleged in the formal complaint did not occur in the school or school district's education program or activity; or
- c. The conduct alleged did not occur against a person in the United States.

2. Standard for Permissive Dismissal

A formal complaint may be dismissed if:

- a. The Complainant notifies the Title IX Coordinator, in writing, that he or she would like to withdraw the complaint;
- b. The Respondent is no longer enrolled at or employed by the school; or
- c. Specific circumstances prevent the school or school district from gathering evidence sufficient to reach a determination as to the complaint.

3. Responsibilities When Dismissing a Complaint

- a. The parties shall be notified, in writing, if a formal complaint is dismissed and the reason(s) for the dismissal.
- b. Dismissal of a formal 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's 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 ALLEGATION

A. Individuals Who Must Receive Notice of the Complaint

Upon receipt of a formal complaint, the Title IX Coordinator must provide all known parties with a written notice.

B. Contents of Notice

1. Notice of this grievance process, including any informal resolution process;
2. Notice of the allegations, including sufficient details to the extent they are known at the time.
 - a. “Sufficient details” includes, but is not limited to: the identities of the parties involved in the incident; the conduct allegedly constituting sexual harassment, and the date and location of the alleged incident;
 - b. To the extent that any of these details are not known at the time the formal complaint is filed, the Title IX Coordinator must provide a supplemental notice when new or additional information is discovered.
3. 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;
4. Notice that the parties may have an advisor of their choice; and

NOTE: A party is entitled to the advisor of their choice. 34 C.F.R. § 106.45(b)(5)(iv). The advisor may be, but need not be, an attorney. Id. The advisor must be permitted to attend any meeting or grievance proceeding that the party attends. Id. However, the school or school district may limit the extent to which the advisor may participate in such meetings, so long as the restrictions are imposed equally on both the Complainants’ advisors and Respondents’ advisors. Id.

5. 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.

C. Time Requirements for Providing Notice

The initial written notice must be provided to both parties with sufficient time for either party to prepare before any initial interview.

D. Interim Support Measures

1. Notice to the Complainant

The Title IX Coordinator is responsible for contacting the Complainant promptly, to:

- a. Discuss supportive measures that are available with or without the filing of a formal complaint;
- b. Consider the Complainant's wishes with respect to supportive measures; and
- c. Explain the process for filing a formal complaint to the Complainant.

2. What Constitutes an Interim Support Measure

Supportive measures are non-disciplinary measures including: 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.

3. Equality of Access to Support Measures

- a. Interim Support Measures must be provided on an equal basis to all parties.
- b. Any measure that is made available to a Complainant shall not be denied to a Respondent, and vice versa.

4. Confidentiality

Any supportive measures provided to either party shall be maintained as confidential, to the extent that confidentiality will not impair the school or school district's ability to provide such measures.

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 immediate threat arising from the allegations of sexual harassment.
3. The threat must relate to the physical health or safety of any student or other individual, including the Respondent themselves.

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

Schools and school districts may still suspend, exclude, expel, or otherwise remove a student from school for any reason other than a pending sexual harassment 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 sexual harassment on administrative leave pending the completion of the investigation without any specific limitation that would otherwise be applicable to students.

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

A. Timing

1. A school or school district may offer informal resolution at any time after a formal complaint has been filed 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.

B. Required Notice

Before obtaining the parties' voluntary written consent, 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 formal complaint arising from the same allegations;
3. A provision specifying that any party has the right to withdraw from the process at any time prior to agreeing to an informal resolution, at which point the formal grievance process will resume; and
4. Any consequences from participating in the informal resolution process, including the records that will be maintained or could be shared.

C. Non-Availability of the Informal Resolution Process

Informal resolution is not available where the allegation is that an employee sexually harassed a student.

VII. ADVANCED MANEUVERS

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

1. Under the Supremacy Clause of the United States Constitution, federal law takes precedence over state law, and to the extent that they may conflict, federal law controls. Title IX is a federal law, enforced by the U.S. Department of Education. That authority cannot be overridden by a state or local agency.
2. 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 formal 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.
3. 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. North Dakota's Open Meeting Law requires the Board to close a meeting where private or confidential data is discussed. *See* N.D.C.C. § 44-04-17.1(3). This would apply to any private personnel or student data.
2. Additionally, the Title IX regulations require schools to maintain the confidentiality of any Complainant, Respondent, or witness, except as permitted by FERPA, required by law, or as necessary to carry out the grievance process. 34 C.F.R. § 106.71. As North Dakota's Open Meeting Law and Open Records Law do not require the disclosure of this information to the public, the Title IX regulations control and these identities must not be discussed at a public school board meeting.
3. While these comments are out-of-order for purposes of the School Board meeting, however, they may also create "actual 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 to keep the identities of parties and witnesses confidential, except as permitted by FERPA, as required by law, or as necessary to carry out the Grievance Process. 34 C.F.R. § 106.71. Failure to do so could be construed as retaliation. *Id.*
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 sexual 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 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 decision-makers all must be trained on the entire grievance process. 34 C.F.R. § 106.45(b)(1)(iii). 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 decision-makers, staff who are not involved in the steps of the grievance process need to be trained to report actual *or suspected* sexual 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 sexual harassment even if proven.
2. In particular, all staff with disciplinary authority should be advised that disciplining an incident of potential sexual harassment as violation as 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.4rth 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. GENERAL RULES FOR CONDUCTING INVESTIGATIONS

- A. 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.
- B. Burden of Proof.** The school or 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(b)(5)(i).
- C. Privileged Information.** A school or district cannot require, allow, rely upon, or use evidence that either constitutes or seeks disclosure of any information protected by a legally recognized privilege, unless the person holding such privilege has waived the privilege. 34 C.F.R. § 106.45(b)(1)(x). Examples of privileged information that may arise in this context would include communications between pupils and qualified school counselors, *see* N.D.C.C. § 31-01-06.1, as well as the lawyer-client and physician-patient privilege.
- D. External Records.** A party's medical or psychological records may only be obtained, accessed, considered, disclosed, or otherwise used with the voluntary written consent of the student, or of a parent if the student is a minor. As part of this consent, students and parents should be advised that any medical or psychological records that are disclosed to the investigator will be shared with the other party or parties in the course of the investigation, as all parties have the right to review and respond to all evidence prior to the completion of the investigation report.
- E. 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). The commentary relating to the regulations makes clear that the same applies to state laws, such as North Dakota's Open Records Laws, *see* N.D.C.C. §§ 44-04-18 *et seq.*
- F. Consolidation of Complaints.** Multiple formal complaints may be consolidated into a single investigation if the allegations of sexual harassment arise out of the same facts or circumstances. 34 C.F.R. § 106.45(b)(4).
- G. 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(b)(5)(ii). The school or district cannot restrict the ability of either party to discuss the allegations

under investigation or to gather and present relevant evidence. 34 C.F.R. § 106.45(b)(5)(iii).

- H. Notice of Interviews & Other Proceedings.** If a Complainant or Respondent is expected to attend a hearing, investigative interview, or other meeting, that party must be given written notice of that hearing, interview, or meeting, with sufficient time to prepare. The notice must contain the date, time, location, and purpose of the meeting, hearing, or interview, as well as a list of the other individuals who will attend or participate.

Non-party witnesses are not entitled to advance notice of an interview under the regulations.

- I. Review of Evidence.** All parties and their advisors must be given the opportunity to inspect and review any evidence obtained by the investigation that is directly related to the allegations, regardless of whether or not the school or district intends to rely on that evidence to reach a determination. 34 C.F.R. § 106.45(b)(5)(vi). 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. *Id.*

The parties must have at least ten (10) days to submit a written response to the evidence before the investigator can complete the investigation report. 34 C.F.R. § 106.45(b)(5)(vi). The investigator must consider any written responses from the parties before completing the report. *Id.*

- J. Investigation Reports.** The investigative report must fairly summarize relevant evidence. 34 C.F.R. § 106.45(b)(5)(vii). A copy of the investigative report must be provided simultaneously to all parties and advisors. *Id.* Each party must have an additional 10 days to respond to the investigation report in writing. *Id.*

II. CONSIDERATIONS APPLICABLE TO ALL INVESTIGATIONS THAT ARE PARTICULARLY RELEVANT IN THE CONTEXT OF TITLE IX

- A. Determining Who Will be Present at Each Interview.** As mentioned, parties are entitled to advance notice of who will be present at each interview or proceeding, as well as the purpose of that interview. 34 C.F.R. § 106.45(b)(5)(v). A party has the right to have their advisor present during the interview. 34 C.F.R. § 106.45(b)(5)(iv).

However, depending on the circumstances, it may be beneficial to have more than one school or district representative present. 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.

B. Voluntary Interviews. Schools cannot coerce anyone to participate, or retaliate against anyone for failing to participate, in a Title IX investigation. *See* 34 C.F.R. § 106.71. Compelling an interview could constitute retaliation under the Title IX regulations. *Id.*

1. The investigator should decide in advance how to respond if a party 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.
2. The parties are entitled to the opportunity to be interviewed. They are not entitled to an interview, and the process is not invalidated by a party's refusal to be interviewed. In other words, a complaint cannot be dismissed because the Complainant does not want to be interviewed (absent a written request for dismissal from the Complainant to the Title IX Coordinator), and the Respondent cannot avoid a determination regarding responsibility by simply refusing to be interviewed.
3. Likewise, the Complainant and the Respondent are entitled to an equal opportunity to gather and present evidence. This does not mean, however, that the Complainant and Respondent are entitled to demand that the Investigator interview any particular witness, particularly if the proposed witness does not have any relevant personal knowledge.

C. Data Privacy Considerations. Although the Department of Education has concluded that Title IX obligations are not obviated by FERPA or state data privacy laws, the district's (or school's) inability to use, store, or disseminate the collected data may still be impacted by those laws. A broadly written notice about how the school or school district intends to use the data and who it will be shared with, should be provided before all interviews, especially interviews of the parties. Additionally, notice of the fact that the interviewee can choose not to provide the data will assist in averting claims of coercion.

In addition, it is best practice to be up-front with parties and witnesses about the dissemination of evidence, including interview summaries, to the Complainant, the Respondent, their advisors, and the decision-maker.

D. Ask the Tough Questions. Even if the subject matter is uncomfortable—in a sexual 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. Furthermore, under the current Title IX regulations, the school or school district, not the Complainant or Respondent, has the burden to gather sufficient evidence for the decision-maker's determination regarding responsibility.

E. Ask About Impact and Intent.

1. When interviewing the Complainant, part of what the Investigator should be exploring is the impact that the alleged behavior has had on the Complainant. For many Title IX complaints, even if the evidence shows the Respondent engaged in behavior toward the Complainant that was unwelcome, based on sex, severe, pervasive, and objectively offensive, the decision-maker must still determine whether the Complainant has been "effectively deprived of equal access" to the school or district's education program or activity. Evidence that the Complainant has not been deprived of such access is directly relevant to the issue of whether the behavior, even if proven, meets the definition of sexual harassment, and the Investigator should be seeking this evidence. Examples of facts that may be relevant include, but are not limited to:
 - a. The Complainant seeking psychological counseling;
 - b. The Complainant expressing a fear of attending school or a particular class;
 - c. The Complainant avoiding attending school or a particular class;
 - d. Decrease in academic performance; and/or
 - e. The Complainant transferring to another school or school district altogether.
2. If the Respondent admits to any particular action, ask what his/her intent was. The Respondent's intent is often relevant to the issue of whether he or she engaged in behavior toward the Complainant "on the basis of sex."

F. Check Everyone's Credibility. Whether the interviewee is a Complainant, a Respondent, or a witness, the decision-maker is likely limited to the Investigator's interview summary. Accordingly, it is crucial that the Investigator provide the decision-maker with information necessary to assess an interviewee's credibility.

1. **Credibility Clues.** When interviewing the Complainant, the Respondent, or any other witness, the investigator should look for credibility clues.
 - a. Eye contact;
 - b. Unnatural or inconsistent hesitations;

- c. Change in skin coloration (i.e. face turning red or white);
- d. Change in pitch of voice;
- e. Change in affect over the course of the interview;
- f. Subtle or direct attempts to influence the outcome of the investigation through inducement or threat;
- g. Statements reflecting a skewed view of reality.

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

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

G. Provide the Same Information to the Complainant and the Respondent. Ensure that any opening statements before each interview, including any explanation of the process, contain the same information

Practice Pointer: This does not necessarily mean that every party is given the same verbatim language. Particularly in investigations where students, especially younger students, make allegations against older students or staff, the words that an investigator uses may vary somewhat to ensure the younger child's understanding. However, all basic factual information, such as the investigator's role, the ground rules for the interview, and the importance of providing honest and accurate information, should be imparted to both parties.

Caution: On the other hand, the fact that the Title IX Investigator uses slightly different language when speaking to a young student as opposed to an adult does not relieve the Title IX Investigator of the responsibility

to use a neutral tone. Using a friendly, cajoling tone with one party while using an aggressive, accusatory tone with the other could be construed as evidence of bias.

- H. Refer Questions about the Process, Supportive Measures, or Allegations Outside the Scope of the Complaint to the Title IX Coordinator.** The Title IX Investigator's role is limited to gathering evidence related to the allegations in the formal complaint. Occasionally, during Title IX interviews, a party or witness may raise additional allegations of sexual harassment, sex discrimination, or other misconduct that were not mentioned in the formal complaint. To preserve the neutrality of the investigation, the Investigator should provide these allegations to the Title IX Coordinator and leave the Title IX Coordinator to determine whether the scope of the investigation needs to be expanded or amended. Similarly, any questions regarding supportive or safety measures implemented during the investigation should be answered by the Title IX Coordinator, not the Investigator.
- a. Relatedly, in order to safeguard against the Complainant later coming up with additional complaints/accusations that the school or district has never been informed of and then saying that the school or 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.
 - b. Likewise, to avoid allegations of bias, the Respondent should be asked whether there is any other information related to the complaint, the Complainant, or the topics discussed in the interview that has not been addressed. This protects against claims that the Investigator failed to seek out all potentially relevant information if the Respondent is later determined to be responsible for the alleged behavior.
- I. School Officials Should Not Retain Copies of Actual or Suspected Child Pornography.** In March, 2008, a high school assistant principal in Loudoun County, Virginia, was charged with possession of child pornography and failure to report child abuse because he mishandled a sexting investigation. *State v. Ting-Yi Oei*, Loudoun County, Virginia (2008).

Title IX investigations are more likely than some other types of investigations to lead to images or videos, including but not limited to school surveillance footage, that contain pornographic images of children. E-mailing a pornographic image of a child, even if it is an e-mail from the Title IX Coordinator to the Title IX investigator, is a federal crime. Unlike FERPA and state data privacy laws, the Title IX regulations do not create an exception to these criminal statutes for the purpose of complying with the Title IX grievance process. ***Under absolutely no***

circumstances should an image or video containing a pornographic image of a child be disseminated to the parties and their advisors.

In some circumstances, a written description of the image or video may be necessary to the investigation. These should only be prepared with the advice of counsel, and only if the video or image itself is also being provided to law enforcement.

III. WRITING AN INVESTIGATION REPORT

- A. Timing of Completion of Investigation Report.** The Title IX regulations provide that, “prior to completion of the investigative report,” the school or district “must send to each party and the party’s advisor, if any, the evidence subject to inspection and review in an electronic format or a hard copy.” The parties have at least ten days to submit a written response to the investigator before the investigation report can be completed.
- B. Provision of Investigation Report to Parties.** The investigation report must be provided to the parties at least ten days before the decision-maker makes a decision (or at least ten days before any hearing, if the school or district has a hearing procedure).
- C. Required Contents of the Investigation Report.** The Title IX regulations provide that the investigation report must “fairly summarize” the relevant evidence.
- D. Tips for Writing an Investigation Report.**
 - 1. Summarize each interview separately.
 - 2. Include a list of each exhibit considered.
 - 3. Identify the allegations under investigation.
 - 4. Make specific findings and identify the relevant evidence that supports each finding.
 - 5. If any evidence is excluded as irrelevant, explain why that evidence was excluded.
 - 6. Explain any credibility determinations and the basis for each such determination (e.g., the witness’s statement is not credible because he or she contradicted himself or herself multiple times or is directly contrary to video evidence).

7. Write objectively, avoiding unnecessary adjectives. For example, it may be necessary to describe a party as wearing a “yellow” shirt. Unless quoting a party or witness as part of a witness summary, however, it is unnecessary (and potentially evidence of bias) to refer to an action as “brutal” or “traumatic.”
8. Write professionally. Remember that the investigation report will be sent to the parties before a determination is made, the decision-maker (who may be the investigator’s superior at the school or district), and, potentially, will be an exhibit in further administrative proceedings or a lawsuit.
 - a. Check spelling and grammar before finalizing the investigation report.
 - b. Avoid colloquialisms, jargon, slang, profanity, and contractions, unless directly quoting a party or witness, in which case, the word or phrase should be inside of quotation marks.
9. The investigation report should be concise, but thorough.

E. Addressing Parties’ Responses to the Evidence. Before the Investigator can finalize the investigation report, any written response to the evidence by the parties has to be considered. The written responses are not themselves evidence, and do not need to be circulated amongst the parties.

As a best practice, “consider” means something more than “read.” Investigators should be prepared to professionally address a party’s written response in writing as part of the report. This may vary from explaining certain investigative steps that were or were not taken, explaining why certain witnesses were or were not interviewed, or at a minimum acknowledging any disagreements that a party may have raised with the evidence.

Practice Pointer: A party’s written response to the evidence should be provided to the decision-maker, who will have to also consider the parties’ written responses to the investigation report. Leaving a decision-maker to consider a written response that was not expressly addressed by the investigator, particularly if the investigator and decision-maker are not members of the same organization, can lead to confusion and inconsistent messaging.

F. What Does it Mean for Evidence to Be Relevant? Both investigators and decision-makers are tasked with limiting their reports and/or the questions asked by the parties during cross-examination to information and questions that are “relevant.”

1. Evidence is relevant if “it has any tendency to make a fact more or less probable than it would be without the evidence” and when “the fact is of consequence in determining the action.” Fed. R. Evid. 401.
2. The **only** type of evidence that is **never** relevant in a Title IX investigation is evidence relating to the Complainant’s sexual predisposition or prior sexual behavior. *See* 34 C.F.R. § 106.45(b)(1)(iii) & 106.45(b)(6).
3. Other than this restriction, an investigator must use judgment when drafting the investigation report to determine whether the evidence is related to a fact that would potentially impact the outcome of the complaint, and whether the evidence makes that fact more or less likely to be true.
 - a. Investigators must be cautious, however, to avoid intruding on a decision-maker’s role and resolving issues of responsibility in the investigation report. Such overreach may expose the investigator to an allegation of bias, or could constitute a procedural irregularity justifying appeal.

IV. 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 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 the "boys' 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.

D. Sexual Orientation and Gender Identity. As mentioned, "on the basis of sex," for purposes of Title IX, is currently interpreted by OCR to include sexual orientation and gender identity. An investigator should be careful, therefore, to avoid dismissing an allegation as not rising to the level of sex harassment because it pertains to harassment because the Complainant is not heterosexual or cisgendered, or is perceived as not being heterosexual or cisgender.

V. ADVANCED MANEUVERS – HIGH STRESS INVESTIGATION SCENARIOS

- A. Advisor vs. Advocate.** Typically, advisors are understanding, particularly after receiving advance notice, that the investigator needs to obtain information directly from the party. Occasionally, however, an advisor may become obstructive or attempt to control the interview. As part of avoiding bias, investigators (and decision-makers) need to be careful not to impute the statements or actions of advisors 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.
- B. Advisor vs. Witness.** Most commonly, advisors are parents, attorneys, or union representatives. Sometimes, however, a Complainant or Respondent may designate a coworker or classmate who is also likely to be a witness in the

investigation. The regulations do not allow for any limitations on who a party may select as their advisor. However, having an advisor also be a witness can create significant issues related to credibility and personal knowledge that need to be accounted for when asking questions.

STEP THREE – ROLE OF THE DECISION-MAKER

I. REVIEW OF INVESTIGATION REPORT

A. Standard of Review

1. The decision-maker is responsible for reviewing the Investigator's report and determining whether the Respondent is responsible for the conduct alleged.
2. In determining whether the conduct occurred, the decision-maker must use one of the following the standards of evidence selected by the school or school district:
 - 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. It is suggested in the preamble to the regulations that when the evidence is truly 50/50, the determination should be non-responsibility on the part of the Respondent.
4. The same standard of proof shall apply regardless of whether the Respondent is a student or a staff member.

B. Opportunity for Parties to Respond to Report

1. The decision-maker is responsible for receiving the response of the parties or their advisors to the investigation report.
2. The response must be delivered to the decision-maker within ten (10) calendar days from the day that the investigation report is provided to the parties.

C. Notification of Rights to a Hearing/Written Questions

When the investigation report is provided to the parties and the decision-maker, either the Title IX Coordinator or the decision-maker should notify the parties of their rights to submit written questions, and/or the scheduling of a hearing and their rights during the hearing, if applicable.

II. WRITTEN QUESTIONS

A. Submission of Written Questions

1. All schools must allow for an exchange of written questions, between the parties, regardless of whether a live hearing is also offered.
2. After the investigation report has been sent to the parties, and before the decision-maker makes a determination regarding responsibility, the parties must be permitted to submit written, relevant questions to be asked of any other party or witness.

B. Relevancy

1. Upon receipt of the written questions, the decision-maker makes determinations as to what is relevant and may exclude irrelevant questions as long as the party asking the question receives an explanation as to why the question is not relevant.
2. The Title IX regulations do not contain a definition or standard by which relevancy determinations are to be made other than noting that the ordinary meaning of the word should be understood and applied.
3. Evidence is relevant if “it has any tendency to make a fact more or less probable than it would be without the evidence” and when “the fact is of consequence in determining the action.” Fed. R. Evid. 401.
4. The only type of evidence that is never relevant in a Title IX investigation is evidence relating to the Complainant’s sexual predisposition or prior sexual behavior, unless:
 - a. such questions and evidence about prior sexual behavior are offered to prove that someone other than the Respondent committed the alleged conduct; or
 - b. if the questions and evidence concern a specific incident so the Complainant’s prior sexual behavior with respect to the Respondent are offered to prove consent.

C. Privileged Information

The decision-maker, similar to the investigator, also cannot require, allow, rely upon, or use evidence that either constitutes or seeks disclosure of any information protected by a legally recognized privilege, unless the person holding such privilege has waived the privilege.

D. Time Limitations

The Regulations do not contain a specific time limitation for the written question process but require that the process must include sufficient time for follow-up questions.

III. LIVE HEARINGS

A. Live Hearings are Optional

1. K-12 schools have the option to allow for a live hearing as part of the grievance process, but are not required to do so.
2. There is no specific time frame as to when a hearing must be held. The decision-maker must provide the parties with notice of the hearing and sufficient time for the parties to prepare to participate.

B. Procedures for Live Hearings

1. Recording

Any live hearing must be recorded or transcribed and made available to the parties for inspection and review.

2. Appointment of Advisor

- a. A Complainant and a Respondent are entitled to have an advisor during the investigation portion of the complaint/grievance process as well as during any live hearing.
- b. If the party does not have a representative, the school or school district is required to appoint one for that party at the cost of the school or school district.

3. Questioning

- a. At the hearing, each party's advisor is allowed to ask relevant questions of the other party or parties, and of the witnesses and to examine and follow-up with questions including those challenging credibility.
- b. Cross-examination may only be conducted directly, orally, and in real time by the parties' adviser and never by the party personally.
- c. The decision-maker must decide whether each question is relevant before the party or witness answers the question.
- d. A party may request that the live hearing occur with the parties located in separate rooms with technology enabling the decision-maker and parties to simultaneously see and hear the party or witness answering questions.
- e. If a party or witness refuses to submit to cross-examination at the hearing, the decision-maker cannot rely on any statement of that party when making a determination regarding responsibility; however, the decision-maker also cannot draw an inference regarding responsibility based solely on a party's or witness's absence.

III. WRITTEN DETERMINATIONS REGARDING RESPONSIBILITY

A. Obligation of decision-maker to Issue a Written Determination

After reviewing the investigation report, the parties' submissions in response to the investigation report, the written cross-examination questions and answers, and any live hearing testimony (if any), the decision-maker must issue a written determination simultaneously to all parties.

B. Contents of the Determination

The report must contain the following information:

- 1. Identification of the allegations potentially constituting sexual harassment;
- 2. A description of the procedural steps taken under this process, including any notifications, interviews, hearings, and other methods used to gather evidence, if applicable;
- 3. Findings of fact supporting the determination;

4. Conclusions applying the school or school district's code of conduct or policies to the facts found by the decision-maker;
5. A statement of the result as to each allegation, including:
 - a. a determination regarding responsibility;
 - b. the rationale for the result;
 - c. any disciplinary sanctions imposed on the Respondent, and
 - d. any remedies designed to restore or preserve the Complainant's equal access to the school or school district's education program or activity.
6. The procedure for appealing the determination of responsibility.

C. Referral of the Determination

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

D. Finality of the Determination

The determination of the decision-maker only becomes final when the appeal period expires or any appeal is adjudicated.

IV. ADVANCED MANEUVERS – HIGH STRESS SCENARIOS FOR DECISION-MAKERS

- A. Cross-Examination Questions.** As mentioned, the decision-maker must provide any party or witness with a party's cross-examination questions and a reasonable amount of time to respond. The party can work with an advisor to formulate the questions. As also mentioned, although a party's advisor is not required to be an attorney, it is not uncommon for attorneys to serve as advisors. Some attorney-advisors are familiar with Title IX, while others may be less familiar. In particular, attorneys who practice criminal defense are, like law enforcement agencies, accustomed to focusing on different facts and different burdens of proof than educators and school law attorneys. Likewise, parents, who may not be familiar with the Title IX process, can also have a different view of what is relevant.
- B. Investigator Missteps.** As also mentioned, the written determination regarding responsibility must describe the procedural steps of the investigation. Occasionally, decision-makers completing this description find a procedural

issue that the investigator may have inadvertently overlooked, a notice that was missed, or something else required by the regulations. Depending on the severity of the misstep, an amended or supplemental investigation report may be needed. However, the decision-maker can also address the 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; however, it is an important decision because procedural irregularities that affect the outcome are a basis for appeal.

STEP FOUR – IMPLEMENTATION OF THE DECISION AND THE APPEALS PROCESS

I. REQUIRED APPEAL PROCESS

- A. The opportunity to appeal a dismissal or a determination of responsibility must be equally available to both parties. 34 C.F.R. § 106.45(b)(8)(i). The school or district may set the length of the appeal period. 34 C.F.R. § 106.45(b)(1)(v).
- B. There are three grounds for appeal that the school or District is required to recognize:
 - 1. A procedural irregularity affected the outcome of the matter;
 - 2. New evidence that was not reasonably available at the time of the determination or dismissal and that could affect the outcome of the matter; or
 - 3. The Title IX Coordinator, investigator, or decision-maker had a conflict of interest or bias for or against Complainants or Respondents generally or the individual Complainant or Respondent, and the conflict of interest or bias affected the outcome of the matter.

34 C.F.R. § 106.45(b)(8)(i). The school or district may designate additional bases as it deems appropriate, so long as the basis for appeal is equally available to Complainants and Respondents. 34 C.F.R. § 106.45(b)(8)(ii).

- C. For all appeals, the school or district's process must include the following:
 - 1. Notify the other party in writing when an appeal is filed.
 - 2. Use a different, adequately trained, decision-maker than the decision-maker who made the additional determination. This decision-maker cannot 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.

II. ADVANCED MANEUVER: BONUS POST-DECISION STRESSOR

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 sexual 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 it does not satisfy the regulatory definitions of sexual harassment or retaliation, but need to be extremely careful when doing so.

- A. The Title IX Regulations *expressly* provide that “a determination regarding responsibility, alone, is not sufficient to conclude that any party made a materially false statement in bad faith.” 34 C.F.R. § 106.71(b)(2). In other words, the fact that the decision-maker’s determination does not align with statements made by a party in an interview does not, in and of itself, prove that that party lied in their interview.
- B. To violate the policy, (1) the statement or evidence must be false, (2) the statement or evidence must be material, meaning it must have impacted the outcome of the grievance process, and (3) the statement or evidence must have been made or submitted in bad faith, meaning the school or school district needs to be able to prove that the party knew the statement was false and made it anyway.

LEGAL UPDATE

Since the Title IX regulations went into effect in August 2020, most of the legal disputes have involved colleges and universities, which have different processes (such as required live hearings) and a different set of harassment fact patterns (such as dorm life). There are, however, a couple of cases that schools should keep in mind.

- A. *Victim Rights Law Center et al. v. Cardona*, 552 F.Supp.3d 104 (D. Mass. 2021), clarified by *Victim Rights Law Center et al. v. Cardona*, Civil Action No. 20-11104-WGY, 2021 WL 3516475 (D. Mass. Aug. 10, 2021). As enacted in August 2020, the regulation governing live hearings stated that, if a party or witness did not submit to cross-examination at a live hearing, the decision-maker could not rely on any statement of that party or witness when making a determination regarding responsibility. See 34 C.F.R. § 106.45(b)(6)(i) (2020). In July 2021, the U.S. District Court for the District of Massachusetts vacated that language, finding that it was arbitrary and capricious. In particular, the Court expressed concern that a Respondent could admit to the alleged conduct in an interview with the investigator, or to other third parties, and then void that admission by simply not attending the hearing.

The regulations do not similarly bar a decision-maker from considering statements made by a witness or party who does not answer written cross-examination questions. 34 C.F.R. § 106.45(b)(6)(ii). In light of *Victim Rights Law Center*, schools and school districts should refrain from imposing such a bar.

- B. *Tennessee et al v. U.S. Department of Education*, Case No. 3:21-cv-308, 2022 WL 2791450 (E.D. Tenn. Jul. 15, 2022). Tennessee and 19 other states, including South Dakota, moved for a preliminary injunction to prevent the U.S. Department of Education's Office for Civil Rights ("OCR") from enforcing its June 2021 Notice of Interpretation, in which OCR took the position that sex discrimination extends to sexual orientation and gender identity. The states argued that the Notice of Interpretation, which was not adopted via an official regulation, conflicted with state laws regarding participation in sports and designation of bathrooms based on assigned sex rather than gender identity. The Court found that the Notice of Interpretation was invalid because the notice-and-comment procedures that apply to regulatory rulemaking were not followed, and enjoined its enforcement in the 20 states that had sued.

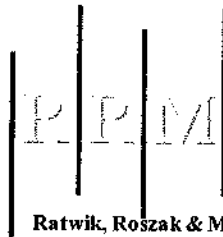
This injunction does not apply in Minnesota or North Dakota.

- C. *KD v. Douglas County Sch. Dist. No. 001*, 1 F.4th 591 (8th Cir. 2021). This case involved a middle school student, L.D., who was sexually assaulted by her algebra teacher. In April 2014, a school staff member notified the principal that the algebra teacher was mentoring the student, despite the fact that opposite-sex

mentor-mentee pairings were prohibited. The principal prohibited the teacher from mentoring the student without parental consent, which the teacher eventually obtained. Later that same month, the teacher chaperoned a weekend field trip, and sent the principal pictures of students, including L.D. The e-mail also included correspondence between the teacher and L.D. in which he referred to her as “sweetheart” and told her “I’ve never had a student mean this much to me;” however, the principal did not scroll down the e-mail chain, and only noticed the photographs. During the 2014-2015 school year, incidents continued, including reports that L.D. and the teacher were eating lunch alone in his classroom, that the teacher tied L.D.’s shoe and poked her stomach in the hallway, and that he was hugging students for excessive periods of time. The principal investigated each of these reports, as well as an anonymous note he received calling into question a school day on which both L.D. and the teacher were absent, but did not find any evidence of a sexual or romantic relationship. Nevertheless, the principal repeatedly counseled the teacher regarding expectations for his interactions with students. Another teacher also contacted Child Protective Services regarding the algebra teacher’s behavior toward L.D. and other students. Six months after L.D. graduated from middle school, the algebra teacher was arrested for sexually assaulting her.

The student’s parents sued the school district, the principal, and the teacher who assaulted their daughter under Title IX, as well as various other legal theories. The court granted summary judgment in favor of the principal and school district, however because, while the teacher’s behavior toward L.D. was strange, the school had no knowledge of any sexual interactions between the two until it learned of the teacher’s arrest.

The teacher, on the other hand, was found individually liable for \$1.25 million in damages, which the school district was not required to cover because it was not responsible for his intentional actions.



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A DEEP DIVE INTO TITLE IX INVESTIGATIONS

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September 30, 2022

- I. RECAP OF THE GENERAL RULES FOR CONDUCTING TITLE IX INVESTIGATIONS**
 - A. 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.
 - B. Burden of Proof.** The school or 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(b)(5)(i).
 - C. Privileged Information.** A school or district cannot require, allow, rely upon, or use evidence that either constitutes or seeks disclosure of any information protected by a legally recognized privilege, unless the person holding such privilege has waived the privilege. 34 C.F.R. § 106.45(b)(1)(x). Examples of privileged information that may arise in this context would include

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. ©2022 Ratwik, Roszak & Maloney, P.A.

communications between pupils and qualified school counselors, *see* N.D.C.C. § 31-01-06.1, as well as the lawyer-client and physician-patient privilege.

- D. **External Records.** A party's medical or psychological records may only be obtained, accessed, considered, disclosed, or otherwise used with the voluntary written consent of the student, or of a parent if the student is a minor. As part of this consent, students and parents should be advised that any medical or psychological records that are disclosed to the investigator will be shared with the other party or parties in the course of the investigation, as all parties have the right to review and respond to all evidence prior to the completion of the investigation report.
- E. **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). The commentary relating to the regulations makes clear that the same applies to state laws, such as North Dakota's Open Records Laws, *see* N.D.C.C. §§ 44-04-18 *et seq.*
- F. **Consolidation of Complaints.** Multiple formal complaints may be consolidated into a single investigation if the allegations of sexual harassment arise out of the same facts or circumstances. 34 C.F.R. § 106.45(b)(4).
- G. **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(b)(5)(ii). The school or district cannot restrict the ability of either party to discuss the allegations under investigation or to gather and present relevant evidence. 34 C.F.R. § 106.45(b)(5)(iii).
- H. **Notice of Interviews & Other Proceedings.** If a Complainant or Respondent is expected to attend a hearing, investigative interview, or other meeting, that party must be given written notice of that hearing, interview, or meeting, with sufficient time to prepare. The notice must contain the date, time, location, and purpose of the meeting, hearing, or interview, as well as a list of the other individuals who will attend or participate.

Non-party witnesses are not entitled to advance notice of an interview under the regulations.

- I. **Review of Evidence.** All parties and their advisors must be given the opportunity to inspect and review any evidence obtained by the investigation that is directly related to the allegations, regardless of whether or not the school or district intends to rely on that evidence to reach a determination. 34 C.F.R. § 106.45(b)(5)(vi). 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. *Id.*

The parties must have at least ten (10) days to submit a written response to the evidence before the investigator can complete the investigation report. 34 C.F.R. § 106.45(b)(5)(vi). The investigator must consider any written responses from the parties before completing the report. *Id.*

- J. Investigation Reports.** The investigative report must fairly summarize relevant evidence. 34 C.F.R. § 106.45(b)(5)(vii). A copy of the investigative report must be provided simultaneously to all parties and advisors. *Id.* Each party must have an additional 10 days to respond to the investigation report in writing. *Id.*

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.
 - a. **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 N.D.C.C. ch. 50-25.21.

- B. Act Promptly.** Even minimal delays may result in lost evidence or provide opportunities to conceal the truth or come up with a “story.” In addition, the investigation must follow any applicable legal timelines, including any Title IX requirements.

C. Data Practices Consideration in Investigations

1. Although the Department of Education has concluded that Title IX obligations are not obviated by FERPA or state data privacy laws, the district’s (or school’s) inability to use, store, or disseminate the collected data may still be impacted by those laws. A broadly written notice about how the school or school district intends to use the data and who it will be shared with, should be provided before all interviews, especially interviews of the parties. Additionally, notice of the fact that the interviewee can choose not to provide the data will assist in averting claims of coercion.

2. **Garrity Warnings.** *Garrity* warnings should not be used in Title IX proceedings. Parties have the right to choose not to participate in the Title IX grievance process, and coercing any individual refusing to participate in an investigation or proceeding is defined as retaliation under the regulations. 34 C.F.R. § 106.71.

- D. **Determining the Scope and Strategy of the Investigation.** Most investigations follow the same pattern: (1) receive complaint and/or interview Complainant; (2) interview fact witnesses; and (3) interview the Respondent. Under the new Title IX regulations, however, both parties must be afforded an equal opportunity to present witnesses. 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 district level) policies prior to conducting the investigation. As a best practice, the 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. 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 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.

- E. **Determining Who Will be Present at Each Interview.** As mentioned, parties are entitled to advance notice of who will be present at each interview or

proceeding, as well as the purpose of that interview. 34 C.F.R. § 106.45(b)(5)(v). A party has the right to have their advisor present during the interview. 34 C.F.R. § 106.45(b)(5)(iv).

However, depending on the circumstances, it may be beneficial to have more than one school or district representative present. 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.

F. 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 interview subject demands that the interview be recorded;
2. The interview subject's advisor or union representative repeatedly interjects or tries to help the interview subject frame his or her answers;
3. The interview subject refuses to answer questions;
4. The interview subject 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.

PRACTICE EXERCISES FOR INITIAL INVESTIGATION PREPARATION

1. Suppose your Title IX Coordinator receives a formal complaint from three Complainants alleging that a Respondent has engaged in an escalating pattern of sitting too close to the Complainants, grabbing them without permission, groping them, and licking them. The Complainants indicate that telling the Respondent to stop has been ineffective, and has only resulted in further escalation. The Complainants originally brought their complaint to two teachers, who remembered their training and contacted the Title IX Coordinator. The alleged incidents reportedly occurred in the hallway, the lunchroom, at theater rehearsal, and in math class. The students' math teacher is not one of the two teachers who contacted the Title IX Coordinator. One Complainant alleges that the Respondent groped her in the lunchroom on September 13, 2022. All three Complainants say they have talked to their friends about these incidents, both in person and via text or social media messages.

In pairs or small groups, take some time to identify:

- a. Who is on your initial list of interviewees;
 - b. What source(s) of evidence, besides interview testimony, are likely to be involved;
 - c. What steps need to be taken to preserve evidence;
 - d. Who, if anyone, needs to be notified that is not already aware of the report (e.g., other staff, parents, etc.); and
 - e. Any other steps that you believe should be taken prior to commencing the investigation.
2. During a pending investigation in which Student A claims to have been sexually harassed by Student B, a group of unnamed students creates an anonymous social media account alleging that they, too, have been harassed by Student B, and that they stand in support of Student A.
- a. Does this impact the scope of your investigation? If so, how?
 - b. Brainstorm some strategies for figuring out who is behind the anonymous account. What questions do you ask? Who do you ask them to?
 - c. Student B complains that this anonymous group is lying and is cyberbullying Student B with these claims. Is that in the scope of your Title IX investigation, or does it require a separate investigation? Discuss what sorts of facts might affect your answer.
3. You are investigating a complaint where Student Y allegedly sexually assaulted Student Z in a school bathroom after the end of the school day. The Title IX Coordinator learned of this complaint from the principal and school resource officer, who in turn found out about the allegations when Students E, F, G, H, I, J, K, and L went to confront Student Y and disrupted art class. The principal provided the following descriptions:

- a. Student E found Student Z crying in the locker room and learned of the allegations directly from Student Z.
- b. Students F and G are friends with Student Z, but were not present in the locker room and learned of the allegations from Student E.
- c. Student H is friends with Student E and was present in the locker room for Student E's conversation with student Z, but is not friends with Student Z.
- d. Students I and J are friends with Student E but were not present in the locker room for the conversation between Students E and Z.
- e. Student K briefly dated Student Y earlier in the school year and the relationship did not end amicably. Student K heard other students were going to confront Student Y and decided to join in. Student K does not know Student Z.
- f. Student L was in the back of the group and believed they were confronting a completely unrelated student.

In pairs or small groups, discuss amongst yourselves the pros and cons of interviewing each of students E through L, and whether you would include them on your initial list of interviewees based on the information you currently have.

4. In pairs or small groups, take turns being the investigator and each of the following roles:

- a. The lawyer who demands that the complaint be dismissed because these allegations would never result in criminal charges;
- b. The parent who asks to be interviewed instead claiming they "already got all the answers" from their child;
- c. The union representative who insists that if their constituent refuses to be interviewed you cannot proceed with the investigation; and
- d. The non-school counselor/therapist/psychologist who insists that they be given the opportunity to review all of the investigator's questions before the interview commences.

If you are working in small groups, anyone who is not role-playing as the investigator or distractor should keep track of any responses by the investigator that you thought were particularly effective or ineffective. The distractor and any observer(s) should provide feedback on how they might have responded differently if they were in the investigator's shoes.

III. INTERVIEW BASICS

- A. **Provide Required Notice.** As discussed yesterday, the Title IX regulations require that Complainants and Respondents be provided notice containing certain required elements with “sufficient time” to prepare for the interview. Witnesses do not receive this notice.
- 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 the 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 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 opportunities that party will have to respond to the evidence and the investigation report.
- E. **Do *Not* Promise Confidentiality.** As discussed yesterday, 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. Both parties, and their advisors, have the opportunity to review the evidence, and the decision-maker will also review the final investigation report.
- F. **Ask Specific Questions.** Who, what, when, where, why, how? Get as detailed of 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 sexual 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, time sheets, or calendars, might all contain relevant and valuable information. Recordings of voice mail messages might also contain helpful information.
- I. **Ask Each Interview Subject to Identify Other Witnesses to the Alleged harassment.**

- 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 the interview summaries *will* be considered relevant evidence and be made available 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.

- 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 Extent of Complaint Has Been Covered.** In order to safeguard against the Complainant later coming up with additional complaints/accusations that the school or district has never been informed of and then saying that the school or 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, pervasive, and objectively offensive, and is effectively denying the Complainant equal access to the school or 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 he/she tells you, explain that the 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.

PRACTICE EXERCISES FOR INTERVIEWING COMPLAINANTS AND WITNESSES

1. In pairs, interview your partner about what they did for the Fourth of July this past summer (Summer 2022). Get the basic facts — who, what, when, where, and why — as well as any other information you can out of your partner. When it is your turn to be interviewed, you must be honest, but should be as unhelpful as possible. The interviewer

should practice asking broad questions that get narrower as they gather information, and practice asking follow-up questions. As you are being interviewed, keep track of questions your partner asks you that you feel were particularly helpful or particularly unhelpful. Share them with your partner once you have both had the opportunity to be interviewed.

2. In pairs or small groups, come up with potential options for responding to the following questions, comments, or occurrences. Role-play these scenarios if you feel that role-playing would be effective.

- a. At the end of the interview, the Complainant's parent asks you to hold off on interviewing anyone else for two weeks while the Complainant decides if they still want to move forward with the process.
- b. The Complainant or their advisor demands to know the exact date that each step of the grievance process will be completed.
- c. A community member witness who the Complainant identified as someone with knowledge and information explains that they want to assist the investigation, but are concerned how it will impact the witness's participation in a non-school-sponsored cribbage where the Respondent is also a member.
- d. A witness agrees to be interviewed, only to spend the entire interview changing the subject to the witness's belief that one of the parties (either the Complainant or the Respondent) has been embezzling money from the hockey booster club.

3. During their interview, a student-Complainant tells you that the teacher-Respondent makes him or her "uncomfortable." Assume you have no information besides this statement. In pairs or small groups, brainstorm follow-up questions that you would ask the Complainant. Be prepared to share your questions with the group as a whole.

4. Consider the same scenario, except where the Respondent who makes the Complainant "uncomfortable" is also a student. Do any of your follow-up questions change? Do you have additional follow-up questions? Discuss in your pair or small group.

5. In pairs or small groups, take turns interviewing each other about something the witness is unlikely to recall (such as what they ate for each meal last Tuesday, or the theme of their junior prom, or the first song they ever sang at karaoke). The investigator should practice asking follow-up questions to gather as much details as they can, even if the interviewee is unable to recall the exact answer by the end of the exercise.

6. You have been assigned to investigate an allegation of forcible groping of a Complainant's groin area in a classroom. Without necessarily crafting specific questions (unless everyone in your pair or group is comfortable doing so), what sorts of considerations inform how you would frame questions to a Complainant or witness who is:

- a. Four years old;**
- b. Eight years old;**
- c. 12 years old;**
- d. 16 years old;**
- e. A newly hired staff member; or**
- f. A veteran staff member?**

Include considerations of how you might build rapport with the Complainant or witness, who else is likely to be present in the room for this interview and what sort of distractions they may pose, the language or terminology each of the Complainants or witnesses is likely to use to describe the actions and body parts related to this sort of allegation, and what sorts of follow-up questions may be necessary depending on the language or terminology that they use in answering your questions.

V. INTERVIEWING THE RESPONDENT

- A. **Avoiding Bias.** Prior to interviewing the Respondent, the investigator should review the summary, notes, and any recording, if applicable 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, the Respondent's advisor, and the Respondent's union representative, if applicable:
 - 1. The role of the investigator as a neutral fact finder;
 - 2. Any data privacy notice, 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.
- 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. 34 C.F.R. § 106.45(b)(5)(iii). Again, 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 Respondent, 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 the Respondent said and to whom.

PRACTICE EXERCISES FOR INTERVIEWING RESPONDENTS

1. In pairs or small groups, discuss how you would respond to a Respondent's refusal to answer your question, while making sure that your proposed response is not threatening or coercive. Develop responses for a number of scenarios, including language for:

- a. A Respondent who refuses to answer any questions whatsoever;
- b. A Respondent who answers only background questions (name, grade in school or years of employment and job title, etc.) and refuses to answer any substantive questions; and
- c. A Respondent who asks if they can "plead the Fifth" to one or more of your questions.

2. In pairs or small groups, brainstorm responses and potential follow-up questions for a Respondent who can remember specific details of everything except the facts relevant to the alleged incident(s) that is/are the subject of the formal complaint. When does it make more sense to pursue follow-up questions, and when does it make more sense to call out the Respondent's apparently selective memory?

3. Suppose you are investigating allegations that the Respondent has been making homophobic and transphobic comments toward the Complainant at recess last Wednesday, and about the Complainant to the Respondent's friends during fourth period social studies class last Monday and during lunch last Tuesday. The recess incident was allegedly a one-on-one conversation. During the social studies and lunch incidents, the Respondent was allegedly sitting with friends at a table adjacent to the table where the Complainant was seated.

Take turns in pairs or small groups role-playing as the Investigator and as the Respondent. The Respondent begins the interview by saying "I have read the allegations in the Notice of Complaint, and none of them are true." Practice asking follow-up questions to this general denial. Keep track of questions or areas of questioning that are particularly helpful or unhelpful in your investigation.

4. In pairs or small groups, come up with potential responses to a Respondent who asks what will happen if they admit to the alleged conduct. Do your responses change based on the nature of the allegations, or are they largely consistent? Be prepared to discuss with the group.

5. Brainstorm potential reasons why it could be harmful to the investigation to tell who the Respondent who you have interviewed. Even though they will ultimately learn the identities of all the witnesses you interviewed in your report, there are reasons why

disclosing their identities in the interview can make your interview less effective. What do you think those reasons might be?

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;
 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?

PRACTICE EXERCISES FOR CREDIBILITY DETERMINATIONS

1. Think of a time, whether during an investigation or in your own life, when you could tell, or thought you could tell, that someone was lying to you. In pairs or small groups, discuss how you were able to determine that the other person was lying. What were the signs? What other information, if any, helped you determine that this person was lying?

- 2. Think of the worst liar you know or have known (“worst” meaning “least effective,” not “most frequent/prolific”). What makes/made them a bad liar? Are/were they a bad liar because of knowledge you acquired over time, or could anyone tell that this person was bad at lying?**
- 3. Now think of the best (most effective) liar you know or have known. Although that person is effective, you still know that they have lied to you. How did you figure that out? What types and sources of information made you realize that you were being lied to?**
- 4. Identify sources of potential information, other than witness testimony, that are common in school investigations and that could refute or disprove a party or witness’s interview statements. In pairs or small groups, come up with as many examples as you can and how they would be used.**

VII. PRESERVING ELECTRONIC EVIDENCE

A. Computer Evidence. School districts should take steps to preserve any evidence of sexual harassment that may exist on 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.

B. Video Surveillance. Preserve any surveillance video footage.

C. 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)).
4. **School Officials Should Not Retain Copies of Actual or Suspected Child Pornography.** In March, 2008, a high school assistant principal in Loudoun County, Virginia, was charged with possession of child pornography and failure to report child abuse because he mishandled a sexting investigation. *State v. Ting-Yi Oei*, Loudoun County, Virginia (2008).

PRACTICE EXERCISES ABOUT ELECTRONIC EVIDENCE

1. You are conducting a Title IX Investigation where the central allegation is that a Respondent student pulled their pants and underwear down on a school bus and exposed their genitals to a group of Complainants. All students involved are in high school, but none are 18 years of age. The bus company does record audio and video surveillance footage, and retains the footage for up to two weeks. This incident allegedly occurred one week ago. In pairs or small groups, discuss the following:
 - a. Do you ask for the surveillance footage?
 - i. *If yes:*
 - a. How do you phrase the request to the bus company so that you can be sure that you are not receiving child pornography?
 - b. Suppose the bus company tells you that the Respondent’s genitals are visible on the footage. Again, the Respondent is under the age of 18. What actions do you need to take and why? Is there a way for this evidence to still be part of the Title IX Investigation?
 - ii. *If no:*

- a. How do you explain the lack of footage to a Complainant's parent who asks whether there is surveillance footage of the incident?
 - b. How do you respond to a Complainant's parent who learns that the footage existed at the time the complaint was made but was not preserved and is presumably angry?
 - b. Suppose you ask for the surveillance footage, and, without warning you, the bus company sends you a video that very clearly contains footage of the minor Respondent's genitals. In your pair or small group, identify the steps you need to take upon receipt of this video. Identify all individuals or entities who need to be contacted, what documents, if any, need to be created or preserved, and the order in which these contacts and documents need to occur.
 - c. Suppose you ask for the surveillance footage, and, without warning you or discussing it further, the bus company sends you a video that you suspect may include footage of the minor Respondent's genitals, but the video quality is too bad for you to be certain. What portions of your answer to 1(b) change?
2. Switching gears, suppose you are investigating a complaint that is based on non-consensual sharing of photos and videos in which the Complainant and the Respondent are engaged in a sex act. There are disputes as to whether the recorded act was consensual, as well as whether the dissemination of these photos and videos was consensual. During your interview, one particularly eager witness pulls out her cell phone and starts showing you a group Snapchat chain with at least five other individuals that includes the photos and videos in question. In your pairs or small groups, discuss how you would respond to this witness, and what actions you take regarding the evidence the witness is showing you. In addition to any topics you believe are relevant, your discussion should encompass:
- a. Responding to an offer from the witness to take screenshots of the Snapchat group thread and send them to you;
 - b. Whether and how you might attempt to determine who the other individuals in the Snapchat group are;
 - c. Appropriate ways to describe this evidence in your interview summary of this witness;
 - d. Individuals or entities who need to be notified and the timing of such notices;

- e. **Addressing evidence of photos or videos that you are able to identify as videos or photos of minor students other than the Complainant; and**
 - f. **Responding to allegations that one of the members of the Snapchat group chat is a staff member.**
3. **As part of an investigation, a Complainant staff member provides you with screenshots that they say are copies of Instagram direct messages (“DMs”) between Complainant and Respondent in which Respondent is engaged in harassment. Respondent, after reviewing these screenshots, claims that they are forged/Photoshopped. In your pairs or small groups, discuss how you might go about resolving this dispute, assuming that these DMs have not been publicly posted on social media.**

Be prepared to share your pair or small group’s thoughts with the group as a whole after you have discussed all three scenarios.

VIII. WHAT DOES IT MEAN TO BE RELEVANT?

Both investigators and decision-makers are tasked with limiting their reports and/or the questions asked by the parties during cross-examination to information and questions that are “relevant.”

- A. Evidence is relevant if “it has any tendency to make a fact more or less probable than it would be without the evidence” and when “the fact is of consequence in determining the action.” Fed. R. Evid. 401.
- B. The **only** type of evidence that is **never** relevant in a Title IX investigation is evidence relating to the Complainant’s sexual predisposition or prior sexual behavior. *See* 34 C.F.R. § 106.45(b)(1)(iii) & 106.45(b)(6).
- C. Other than this restriction, an investigator must use judgment when drafting the investigation report to determine whether the evidence is related to a fact that would potentially impact the outcome of the complaint, and whether the evidence makes that fact more or less likely to be true.
 - 1. Investigators must be cautious, however, to avoid intruding on a decision-maker’s role and resolving issues of responsibility in the investigation report. Such overreach may expose the investigator to an allegation of bias, or could constitute a procedural irregularity justifying appeal.
- D. Likewise, when reviewing a written cross-examination question, or a question at a live hearing, a decision-maker must decide whether the question goes to a fact that will help determine the outcome of the complaint, and whether an answer to that question would make the fact more or less likely to be true.

IX. WRITING AN INVESTIGATION REPORT

- A. **Timing of Completion of Investigation Report.** The Title IX regulations provide that, “prior to completion of the investigative report,” the school or district “must send to each party and the party’s advisor, if any, the evidence subject to inspection and review in an electronic format or a hard copy.” The parties have at least ten days to submit a written response to the investigator before the investigation report can be completed.
- B. **Provision of Investigation Report to Parties.** The investigation report must be provided to the parties at least ten days before the decision-maker makes a decision (or at least ten days before any hearing, if the school or district has a hearing procedure).

- C. Required Contents of the Investigation Report.** The Title IX regulations provide that the investigation report must “fairly summarize” the relevant evidence.
- D. Tips for Writing an Investigation Report.**
1. Summarize each interview separately.
 2. Include a list of each exhibit considered.
 3. Identify the allegations under investigation.
 4. Make specific findings and identify the relevant evidence that supports each finding.
 5. If any evidence is excluded as irrelevant, explain why that evidence was excluded.
 6. Explain any credibility determinations and the basis for each such determination (e.g., the witness’s statement is not credible because he or she contradicted himself or herself multiple times or is directly contrary to video evidence).
 7. Write objectively, avoiding unnecessary adjectives. For example, it may be necessary to describe a party as wearing a “yellow” shirt. Unless quoting a party or witness as part of a witness summary, however, it is unnecessary (and potentially evidence of bias) to refer to an action as “brutal” or “traumatic.”
 8. Write professionally. Remember that the investigation report will be sent to the parties before a determination is made, the decision-maker (who may be the investigator’s superior at the school or district), and, potentially, will be an exhibit in further administrative proceedings or a lawsuit.
 - a. Check spelling and grammar before finalizing the investigation report.
 - b. Avoid colloquialisms, jargon, slang, profanity, and contractions, unless directly quoting a party or witness, in which case, the word or phrase should be inside of quotation marks.
 9. The investigation report should be concise, but thorough.
- E. Addressing Parties’ Responses to the Evidence.** Before the Investigator can finalize the investigation report, any written response to the evidence by the

parties has to be considered. The written responses are not themselves evidence, and do not need to be circulated amongst the parties.

As a best practice, “consider” means something more than “read.” Investigators should be prepared to professionally address a party’s written response in writing as part of the report. This may vary from explaining certain investigative steps that were or were not taken, explaining why certain witnesses were or were not interviewed, or at a minimum acknowledging any disagreements that a party may have raised with the evidence.

Practice Pointer: A party’s written response to the evidence should be provided to the decision-maker, who will have to also consider the parties’ written responses to the investigation report. Leaving a decision-maker to consider a written response that was not expressly addressed by the investigator, particularly if the investigator and decision-maker are not members of the same organization, can lead to confusion and inconsistent messaging.

PRACTICE EXERCISES ABOUT RELEVANCE DETERMINATIONS AND WRITING INVESTIGATION REPORTS

1. Imagine a scenario where two students were previously in a consensual dating and sexual relationship, but when Complainant ended the relationship, Respondent allegedly sexually assaulted them. Respondent contends that the last sexual encounter was also consensual. In pairs or small groups, brainstorm circumstances under which each of the following would or would not be relevant, or if any of them are always relevant or never relevant, subject to the assumption that there are no particularly specific lurid details at issue in this allegation:

- a. The number of previous instances of sexual conduct between the Complainant and Respondent;
- b. The length of the prior romantic relationship between Complainant and Respondent;
- c. The length of the prior sexual relationship between Complainant and Respondent;
- d. The ages of the Complainant and Respondent;
- e. The Complainant and the Respondent’s preferred sexual position(s);
- f. The Complainant and the Respondent’s preferred sexual act(s);
- g. The Complainant and/or the Respondent’s status with regard to special education services;
- h. The sexual orientation(s) of the Complainant and/or the Respondent;
- i. The gender identity of the Complainant and/or the Respondent;
- j. The respective sexes of the Complainant and the Respondent;
- k. The respective ages of the Complainant and the Respondent;
- l. Whether the Complainant or the Respondent has/have a history of being sexually abused;

- m. The respective races of the Complainant and the Respondent;
- n. The location(s) of any previous sexual encounters between Complainant and Respondent;
- o. The language(s) spoken by the Complainant and the Respondent; and
- p. The behavior of the Complainant's and/or Respondent's advisor(s) during their respective interviews.

Be creative, but reasonable, in your arguments for why any of the above is or is not relevant, or the circumstances under which it could be relevant. Be prepared to share your thoughts with the group as a whole.

2. In your pairs or small groups, brainstorm a list *non-sexual* slang terms that you overhear your students or children use.¹ Discuss how you would explain each of those terms in an investigation report if you had to do so.

3. Discuss how you would explain the following slang terms related to social media and texting in an interview summary/investigation report:

- a. A Twitter or Instagram "DM;"
- b. A Snapchat "streak;"
- c. A "thumbs up" or "haha" reaction in iMessage;
- d. "Abbrevs" in text messages (e.g., "LOL," "WTF");
- e. "Going live;" "Instagram Live;" "Facebook Live;"
- f. Emojis;"
- g. "Stories" (on Facebook, Instagram, or Snapchat); and
- h. A TikTok "challenge."

4. Think back to the interviews you have done of your partner(s) or group member(s) earlier today. Was there any information you learned during your interview that you would exclude from your final report because it is irrelevant? If so, what evidence and why?

¹ To ensure the comfort and safety of all participants and avoid inadvertently sexually harassing anyone during a training on investigating sexual harassment, please refrain from using any vulgar slang terms.

X. 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 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 the "boys' 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.

SELF-REFLECTION QUESTIONS ABOUT BIASES

Note: Personal or implicit biases can be challenging conversations and admissions. It is important for Title IX Investigators to have these reflections, but sometimes the most productive reflections on these topics do not involve others. As such, the following are a list of prompts to consider on your own time.

1. We have talked about a lot of different potential Title IX scenarios today—were there any that you thought you might personally find difficult to investigate?
2. Did any of the scenarios discussed during training pose unexpected emotional challenges or triggers that you may not have been aware of before discussing them? Think about which ones and why.
3. Think about whether there are any types of Title IX scenarios, whether it is because of the nature of the allegations, the identity of the Complainant, the identity of the Respondent, the relationship between the Complainant and the Respondent, or the basis for the claim (e.g., sexual propositions, harassing comments based on sexual orientation or gender identity, sexual assault) that you do not believe you could effectively serve as a neutral investigator. Is there anything you can do, or any steps you could take, to be able to remain neutral in these scenarios? If not, what is your planned response if you are asked to investigate this sort of complaint?
4. Would you be more naturally inclined to be sympathetic to a Complainant who was a student or a staff member? Why? What steps can you take to ensure neutrality?
5. Would you be more naturally inclined to be sympathetic to an older student or a younger student who reported sexual harassment? Why? What steps can you take to ensure neutrality?
6. Could you believe a high schooler who reported being sexually harassed by an elementary school student? If not, why not? What steps would you need to take to be neutral as an investigator in this sort of complaint?
7. Could you believe a staff member who reported being sexually harassed by a student? Does the age of the student matter? Are there steps you could take to ensure your neutrality in this sort of investigation?
8. Are there any specific individuals who you have a professional relationship with that you do not believe you could remain neutral while investigating? Who are they? What is your planned response if you are asked to investigate them?

