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Title IX Final Regulations: Training for Implementation

August 14, 2020



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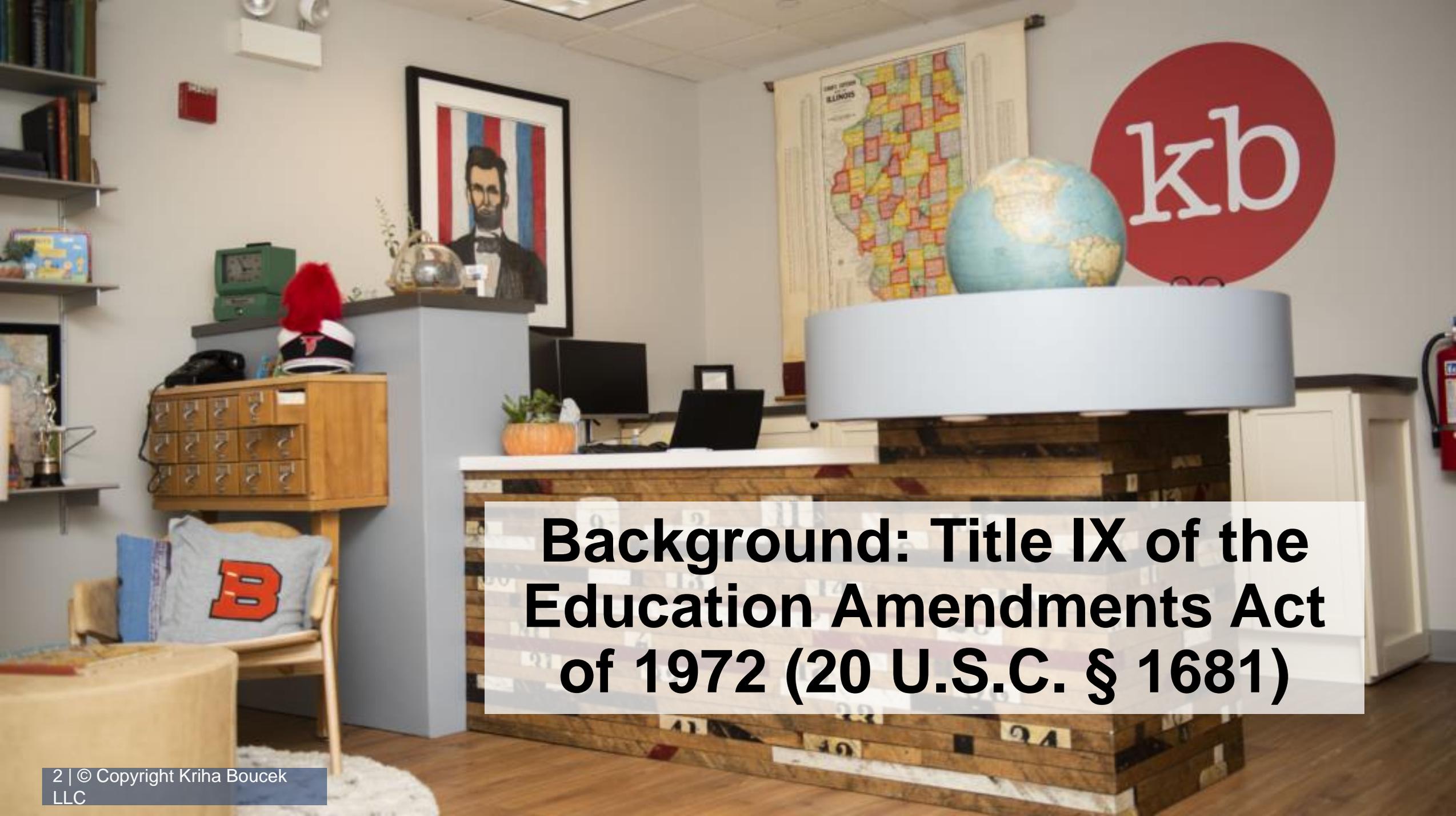
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Oakbrook Terrace Office

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Oakbrook Terrace, IL 60181

Southern Illinois Office

3 Club Centre Court Suite D
Edwardsville, IL 62025

The image shows a modern office reception area. In the foreground, there is a desk made of stacked wooden pallets. On top of the desk is a large, light blue cylindrical lamp. Behind the desk, a globe and a map of Illinois are displayed on the wall. To the right, a large red circular logo with the letters 'kb' in white is visible. In the background, there is a framed portrait of Abraham Lincoln, a computer monitor, and a laptop. To the left, there is a wooden cabinet with many small drawers, a red pom-pom hat, and a chair with a blue cushion featuring a large red letter 'B'.

**Background: Title IX of the
Education Amendments Act
of 1972 (20 U.S.C. § 1681)**

“No person in the United States shall, **on the basis of sex**, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance.”
20 U.S.C. § 1681(a)

*Sexual misconduct constitutes
sex-based discrimination*



Brief History

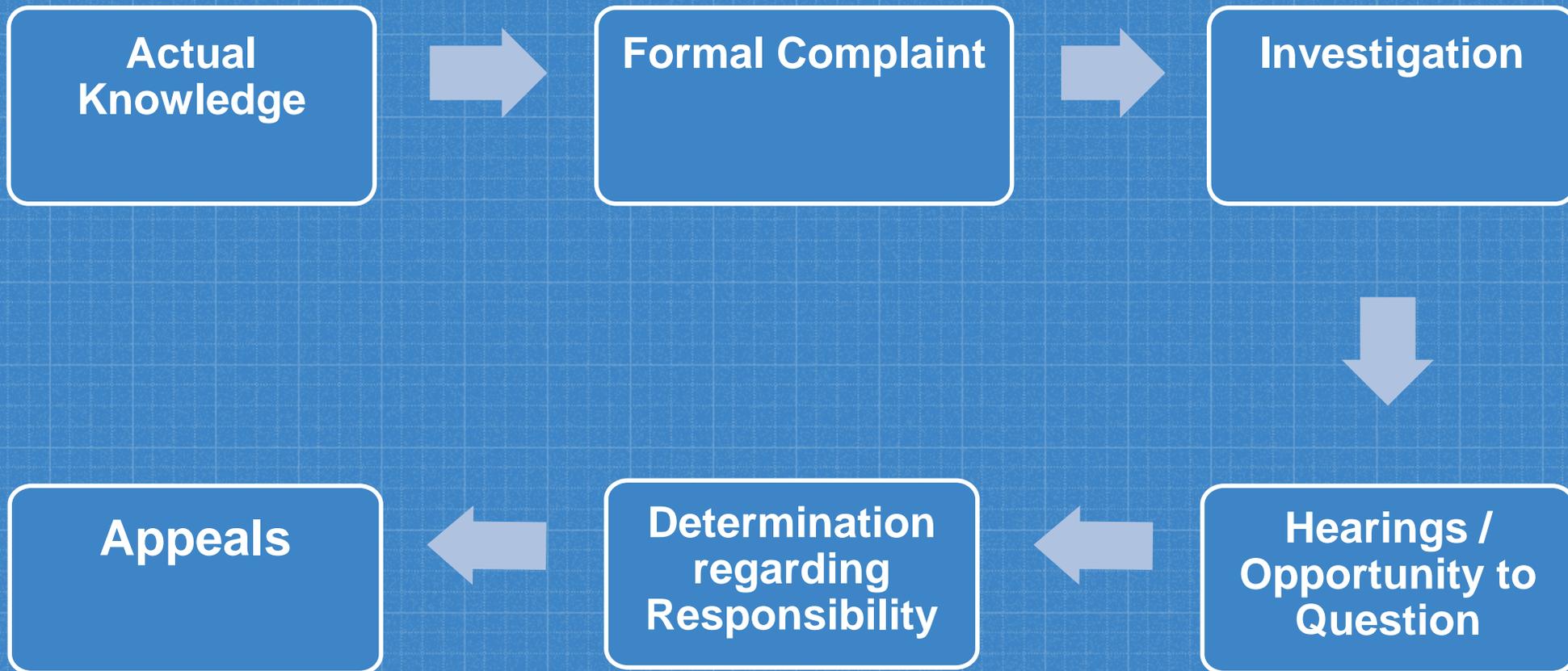
- **1972** : Title IX passed and signed into law
- **1975** : DOE issued first Regulations to implement Title IX (34 CFR Part 106 et seq.)
 - X Addressed equal opportunities for men and women in hiring, admissions, athletics, etc.
 - X Did not specifically address sexual harassment as a form of sex discrimination
- **1997, 2001, 2011, 2014, 2015, 2017** : DOE's Office for Civil Rights issued policy guidance documents to address sexual misconduct as a form of sex discrimination
- **Mid-2017** : DOE started drafting proposed Regulations
- **Nov. 29, 2018** : DOE published "Notice of Proposed Rulemaking"
- **2019** : DOE held committee hearings, listening sessions about proposed regulations
- **May 6, 2020** : DOE issued Final Regulations (& 2000+ pages explaining them...)
- **Aug. 14, 2020*** : Final Regulations must be fully implemented
 - X **In early June, 17 states (including IL)+ D.C. filed a lawsuit against DeVos and the DOE seeking to block implementation of the final regulations; in May, the ACLU joined with other organizations to file their own lawsuit to block the final rules*



First:

The Big Picture





Scope of Title IX Under the New Regulations



WHO are the parties involved?

- **Complainant**: an individual who is alleged to be the victim of conduct that could constitute sexual harassment
- **Respondent**: an individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment
- **Title IX Coordinator**: schools must designate a Title IX Coordinator to coordinate all the school's efforts to comply with the Title IX Regulations
- **Investigator**: individual(s) who investigate(s) allegations sexual harassment made in a formal complaint and create(s) investigative report; may be Title IX Coordinator, but not in all circumstances (*more on this later*)
- **Decision-maker**: individual(s) who make(s) a determination of responsibility based on investigative report, evidence, statements, and any hearings as to alleged sexual harassment made in a formal complaint; *cannot* be the same person(s) as the Title IX Coordinator or Investigator (*more on this later*)
- **Appeals Decision-maker**: individual(s) who review(s) the appeal of any determination of responsibility; *cannot* be the same person(s) as the Title IX Coordinator, Investigator, or original Decision-maker (*more on this later*)

34 CFR §§ 106.8, 106.30(a), 106.46(b)(5)-(8)



WHAT does Title IX Cover?

- “**Sexual harassment**”: covers three classifications of sex-based discriminatory conduct:
 1. **Quid pro quo**: employee offers some kind of aid/benefit/service in exchange for unwelcome sexual conduct
 2. Any incident of **sexual assault, dating violence, domestic violence, or stalking**, as defined in the Clery Act / Violence Against Women Act
 3. **Unwelcome conduct** that is:
 - Based on sex;
 - So severe AND pervasive AND objectively offensive;
 - That it effectively DENIES a person *equal access* to educational program or activity.

34 CFR § 106.30(a)



WHEN does Title IX Apply?

- **“Actual notice”**: Title IX applies when *certain individuals* have notice—either informally through verbal or written report, or via a formal written complaint by a Complainant—of sexual harassment or allegations of sexual harassment. These individuals include:
 - Title IX Coordinator; or
 - Any school official with authority to institute corrective measures on school’s behalf; or
 - *“The mere ability or obligation to report sexual harassment or to inform a student about how to report sexual harassment, or having been trained to do so, does not qualify an individual as one who has authority to institute corrective measures”*
 - **Any employee of elementary/secondary school (K-12 ONLY).**
- **IF a Formal Complaint is filed, there are additional temporal restrictions:**
 - At the time of filing, Complainant **MUST** be participating in or attempting to participate in the school’s education program or activity

34 CFR § 106.30(a)



WHERE does Title IX Apply?

- **“Educational Programs or Activities”**: includes—
 - **Locations, events, or circumstances** over which the school exercised *substantial control* over both the *respondent* AND the *context* in which the sexual harassment occurs; and
 - Any building owned or controlled by a student organization that is officially recognized by a postsecondary institution.
- **“Against a person in the United States”**:
 - Sexual harassment that occurs abroad does not fall within the purview of Title IX and its implementing Regulations.
 - BUT schools can choose to respond to sexual misconduct that occurs abroad via alternative means in Student/Employee Codes of Conduct.

34 CFR §§ 106.30(a), 106.44(a)



HOW Do Schools Fulfill Their Title IX Obligations?

General Response: A school with actual knowledge of sexual harassment in an education program or activity against a person in the United States must respond *promptly* and in a manner that is *not deliberately indifferent*.

- **“Deliberately indifferent”:** clearly unreasonable in light of known circumstances
- **Must treat complainants and respondents equitably**
- Must offer **supportive measures** to an alleged victim
- Must not impose disciplinary measures against Respondent until full grievance process carried out (*more on this later*)

Maintaining other Legal Obligations:

While responding to Title IX allegations, schools should not compromise other rights including:

- **First Amendment:** e.g., freedom of speech
- **Fifth/Fourteenth Amendments:** due process rights
- **FERPA requirements**
- **Title VII obligations**
- **Parents’ rights** to act on behalf of minor child
- **State laws and regulations**
 - *BUT* if State law conflicts with federal law, then federal law preempts State law

HOW Do Schools Fulfill Their Title IX Obligations?

Supportive Measures: *non-disciplinary, non-punitive* individualized services* offered free of charge as appropriate and reasonably available, in order to restore equal access. Title IX Coordinator helps get these resources. Examples:

- Counseling
- Extension of deadlines
- Modification of work/class schedules
- Campus escort services
- Mutual restrictions on contact*
- Changes in housing/work locations
- Leaves of absence
- Increased security

*Must NOT *unreasonably burden* the other party; remain confidential

When a Formal Complaint is filed, then school must respond by following grievance procedures that conform to the Regulations' requirements

34 CFR §§ 106.30(a), 106.44(b)

Basic Response Requirements

- Equitable treatment for all parties
- Objective evaluation of *all* relevant evidence, both inculpatory and exculpatory
- **No conflicts of interest/bias of Title IX Coordinator, Investigator(s), Decision-maker(s)**
- Presumption of innocence until proven guilty
- Training for Title IX Coordinator, Investigator(s), Decision-maker(s) on the Regulations and **impartiality**
- Same standard of evidence for students and employees
- Reasonably prompt timelines for procedures
- Clear descriptions of grievance & appeals procedures, range of disciplinary sanctions & remedies
- Supportive measures available to Complainants and Respondents at any point
- Can't require production of legally privileged evidence

34 CFR § 106.46(b)(1)(i)-(x)



Impartiality

- We all have biases, whether conscious or unconscious
 - x <https://implicit.harvard.edu/implicit/>
 - x <https://trustandjustice.org/resources/intervention/implicit-bias>
- Resist the urge to categorize
- Reflect critically on your own identity and experience
- Recognize when your identity and experience may affect your judgment
- Hold yourself accountable



Impartiality

- An impartial party puts aside one's preconceived beliefs or the urge to judge
- Listen equally to all sides and focus on understanding the viewpoints of all involved
 - X Listening impartially to others takes **time**
 - X Listening impartially requires **awareness** of one's own biases
 - X Listening impartially means **asking questions that open up dialogue**, rather than close it down
- Strategies like summarizing what you have heard and reflecting back can help you avoid your biases and ensure you are correctly understanding the person you're questioning
- Acknowledge where differences between accounts/perspectives exist; rather than seek to smooth over differences, seek more details
- Take care that your words, tone of voice, and body language are neutral



Actual Knowledge

Requirements:

- Can't be "deliberately indifferent"

Possible Outcomes:

- Supportive measures; no further action; OR
- Complainant decides to file Formal Complaint; OR
- Title IX Coordinator signs Formal Complaint

Formal Complaint

Requirements:

- Notice of allegations
- Notice of all procedures

Possible Outcomes:

- Supportive measures AND:
- Investigation, OR
- Dismissal of complaint, OR
- Informal resolutions, OR
- Emergency removal + investigation

Investigation

Requirements:

- Evidence gathering
- Advisors for parties
- Investigative report of facts leading to next phase

Possible Outcomes:

- Complaint withdrawn
- Informal resolutions
- Hearing/questioning

Appeals

Requirements:

- Both parties have equal opportunity to appeal
- Notice of appeal
- Equal opportunity to respond

Options:

- Bases for appeal

Determination regarding Responsibility

Requirements:

- Written determination
- Provided to both parties

Options:

- Standard of proof
- Remedies
- Supportive measures

Hearings / Opportunity to Question

Requirements:

- Postsecondary: live hearing(s)

Options:

- K-12: may have live hearing OR opportunity to question other side in written form

3. Investigation



3. Investigation

- Burden on school, not parties, to gather evidence
- Cannot request evidence that would be legally privileged; parties can opt to waive this privilege
- Equal opportunity for parties to present witnesses
 - Fact
 - Expert
- Cannot restrict ability of either party to discuss allegations or to gather evidence
- Parties have equal opportunity to select advisors of their choice (may be attorney)
- Must provide notice to all parties of all hearings, interviews, and meetings to allow time to prepare
- Equal opportunity for parties to inspect/review any and all evidence so each party can meaningfully respond
 - Must send all evidence to parties before final report created
 - Must allow at least 10 days to respond



Trauma-Informed Response for Investigations

1. Understand the impact of trauma on a neurobiological, physical, and emotional level
2. Promote safety and support
3. Know positive ways to respond that avoid re-traumatization
4. Provide choice with a goal of empowerment



Investigation

How To Conduct Investigation

- Plan investigation scope and timeline (must be prompt)
- Identify and interview all involved parties
 - X Interview the Complainant and the Respondent (separately) about what happened; additional interviews may be needed as evidence is uncovered
 - X Ask open-ended questions about the incident(s) in the complaint
 - Pre-script standardized, open-ended questions, screened for neutral language
 - Allow time for follow-up questions, for more details
 - Do not use judgmental or projecting language in questions
 - Asking about how certain events made the interviewee feel is okay
 - Asking sensory questions may also help memory recall
 - X Ask each person for the names of potential witnesses for additional interviews
 - X Understand the trauma-informed approach to interviewing



Investigation

How To Conduct Investigation

- Gather any other relevant documentation available, such as documents, files, audio and video recordings, security camera footage, entry/exit logs, text messages, emails, social media posts, physical evidence, police reports, diary entries, etc.
 - X You cannot request privileged information, such as medical records, educational records, or correspondence between a party and their lawyer—but a person may voluntarily offer this information
 - X Think about what kinds of evidence could potentially corroborate the statements made in the interviews, and ask for if from interviewees
 - X If a search is necessary, remember it must comply with 4th Amendment rights
- Once compiled, send all evidence to Complainant and Respondent (and their advisors) with plenty of time--at least 10 days--to meaningfully respond
- Do not judge credibility of any parties or their statements, but document details that do/do not align with other parties' accounts and other evidence



Investigation

Investigator(s) must create a final *investigative report* that fairly summarizes all the relevant evidence, without making a determination of responsibility.

It is not the investigator's job to determine credibility of parties, witnesses, or evidence. It is the investigator's job to gather the relevant evidence, and turn this over to the decision-maker to weigh credibility during next phase.

- Create categories of facts that parties agree on, and facts that are in dispute, without inserting your own judgment of what is true or false
- Must send full report to each party at least 10 days before any hearing
- Must send full report to the Decision-maker in advance of any hearing / opportunity for parties to question each other

At any time, Complainant has right to withdraw the Complaint.

At any time, parties can mutually agree to Informal Resolutions, as applicable.



4. Hearing / Opportunity to Question



Decision-maker reviews investigative report, all evidence, all statements/answers from parties and witnesses during any live hearings or opportunity to question.

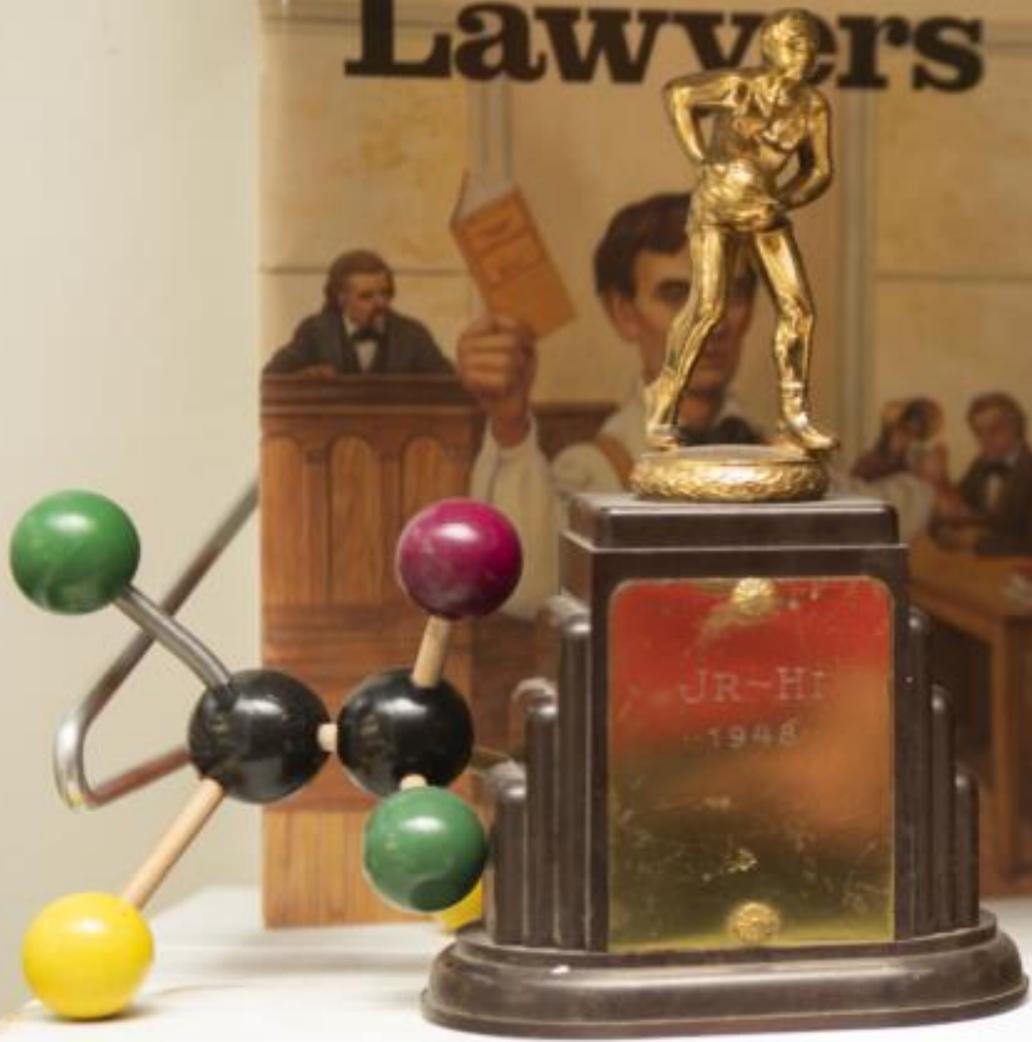
Decision-maker weighs the credibility of all relevant evidence and statements.

Next phase: Determination regarding Responsibility.



Great Lawyers

Other Matters



Recordkeeping

The Title IX Coordinator must keep records for 7 years of:

- Formal Complaints, including
 - Supportive measures
 - Basis for school's conclusion that its response was not deliberately indifferent
 - Documentation of measures designed to restore or preserve equal access
 - If no supportive measures provided, documentation reasons *why* response was not deliberately indifferent [i.e., clearly unreasonable in light of known circumstances]
- Investigations
- Recordings/transcripts of hearings
- Determinations regarding responsibility
- Disciplinary sanctions for Respondent, remedies provided Complainant
- Appeals
- Informal Resolutions

34 CFR § 106.46(b)(10)



Training

All training materials used to train

- Title IX Coordinator
- Investigator(s)
- Decision-maker(s)
- Appeals Decision-maker(s)

Training must include:

- Regulations
- How to use technology
- How to avoid prejudice
- How to serve impartially
- How to determine issues of relevance of questions or evidence

Training materials must be kept for seven years AND **posted publicly to school's website for public review and scrutiny.**



Retaliation

Retaliation is prohibited against anyone involved in a Title IX complaint, investigation, or grievance procedure.

“The exercise of rights protected under the First Amendment does not constitute retaliation prohibited”

School can charge someone with a Code of Conduct violation for making a “materially false statement in bad faith” during grievance proceeding.



School Board Policy Integration

Consider Policy Revisions to Align with Title IX Regulations to:

- Section 2:260 – Uniform Grievance Procedure
- Section 7:10 – Equal Educational Opportunities
- Section 7:20 – Harassment of Students Prohibited



Next Steps for Schools:

1. Decide who will fulfill the various roles
2. Update policies and procedures in accordance with the Regulations
 - Who needs to be involved?
 - Approval by the Board? Committee? Unions?
3. Train staff
4. Communicate information to all stakeholders
 - Update website, handbooks, etc.
5. For any questions that arise, consult experts or counsel



Contact us!

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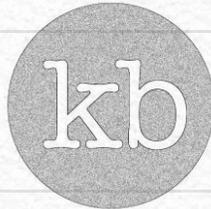
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