



kriha boucek

Title IX Final Regulations: Training for Implementation



krihaboucek.com



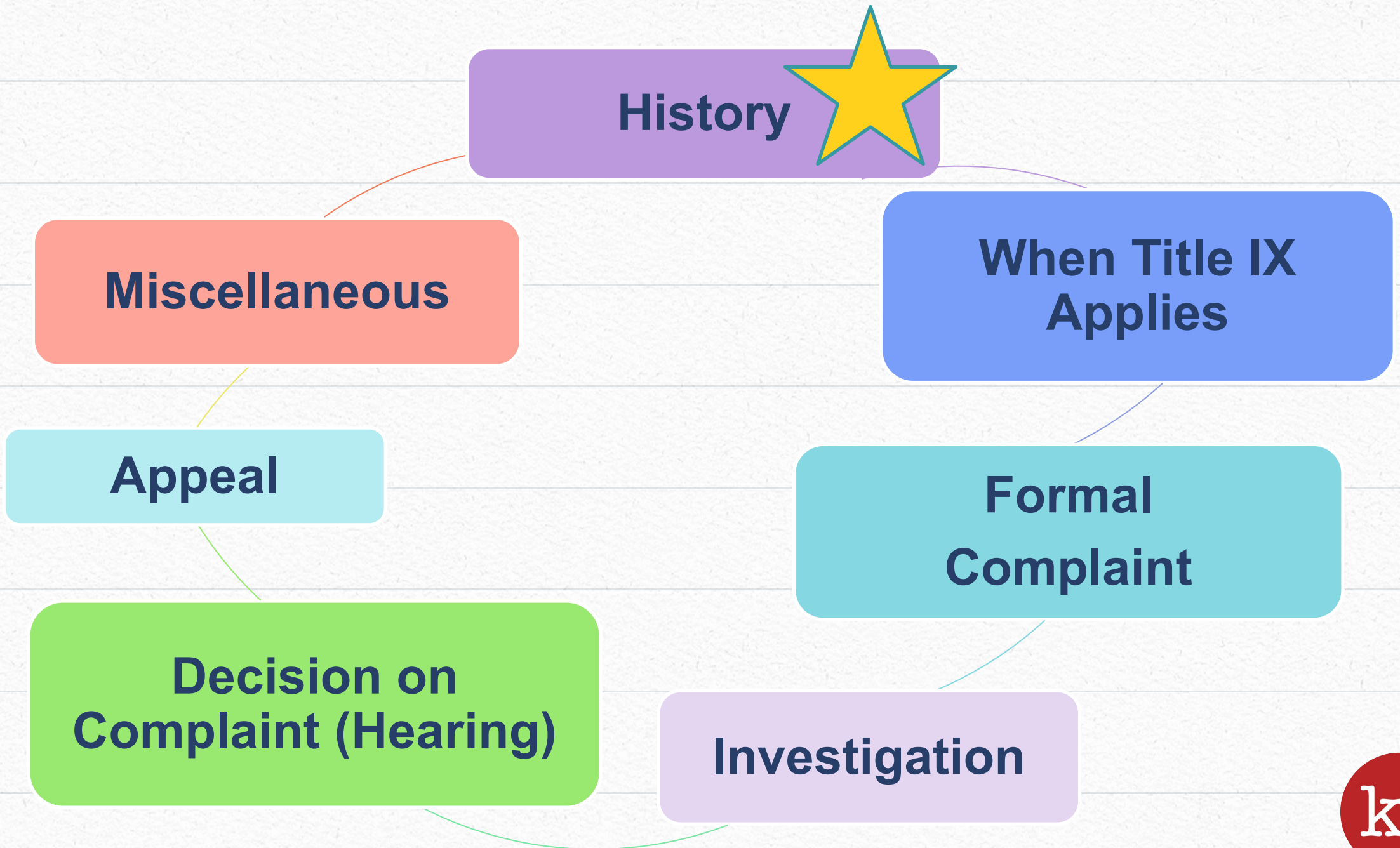
[@krihabouceklaw](https://twitter.com/krihabouceklaw)

Oakbrook Terrace Office

2 Trans Am Plaza Dr., Suite 450
Oakbrook Terrace, IL 60181

Southern Illinois Office

3 Club Centre Court Suite D
Edwardsville, IL 62025



“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)





Title IX of the Education Amendments Act of 1972

20 U.S.C. §1681
Signed on June 23, 1972



1972 → 2020

- **In 1972**, Congress was primarily concerned with equal access for men and women to school admission, school-related activities (like sports), and employment in schools.
- **In the 1980's**, courts universally held that sex-based discrimination also includes actions based on sex, including sexual harassment, sexual assault and sexual violence.
- From the late 1990's till 2015, Dear Colleague Letters and Other Policy Guidance expanded Title IX's reach
- **Today**, Title IX's protective reach has even extended to transgender and LGBTQ individuals.



Original Focus: Sex Equity



Sex Equity Policy

“It is the policy of the State of Illinois and the State Board of Education that ***no person shall be subjected to discrimination on the basis of sex in any program or activity supported by school district funds.***”

Rules largely aimed at ensuring equal access to opportunities and equal treatment

- Compare to new Title IX Regulations aimed at addressing *Sexual Harassment*

Requires schools to have written policies on sex equity and a grievance procedure for investigating complaints of alleged discrimination on the basis of sex

- “Uniform Grievance Procedure” + “Non-discrimination” + “Harassment” policies all in place to meet this requirement

Supplement to Title IX obligations

- Title IX is the floor/baseline of what a school must do
- Sex Equity Rules elevate and clarify expectations

Applying The Sex Equity Rules

Sports / Extra-Curricular Activities:

- Required to offer **equal opportunities** to participate in athletic programs / activities
- Different rules for contact v. non-contact activities
- “The nature and extent of the athletics programs offered by a system shall accommodate the interests and abilities of both sexes to a comparable degree”
- Factors looked at here =
- Selection of sports offered; scheduling of games and practices, ratios of coaches to athletes; quality of coaching and officiating; supplies and equipment; budget

Facilities:

- Okay to have single-sex locker rooms, bathrooms, shower facilities
- Transgender Student Rights – Equal access to ALL students to choose the restroom, locker room, shower facility they prefer

Classes:

- All courses open to all students; advertised to attract all students
- Can segregate students for portions of a class or class sessions when discussing human sexuality content
- PE can be segregated for purpose of participating in contact sports
- History, roles, and contributions if both sexes should be discussed in curriculum

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 a Title IX violation
- **Respondent**: an individual who has been reported to be the perpetrator of conduct that could constitute a Title IX violation
- **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 who investigates allegations of Title IX misconduct in a formal complaint and creates an investigative report
- **Decision-Maker**: individual who makes a determination of responsibility based on the investigation report, evidence and statements resulting from a formal complaint; *cannot* be the same person(s) as the Title IX Coordinator or Investigator
- **Appeal Decision-Maker (internal appeal)**: individual (or board) who reviews the appeal of any determination of responsibility; *cannot* be the same person as the Title IX Coordinator, Investigator or Decision-Maker



What is Title IX Misconduct Based on Sex?

1. **Quid pro quo offer based on sex:** employee (not student) offers some kind of aid-benefit-service in exchange for unwelcome sexual conduct
2. **Violence based on sex:** sexual assault, dating violence, domestic violence and/or stalking, as defined in the *Clery Act* and the *Violence Against Women Act (VAWA)*
3. **Sexual harassment:**
 - Unwelcome sexual conduct (or conduct based on sex)
 - So severe AND pervasive AND objectively offensive
 - That it effectively denies a person equal access to educational programs or activities



Title IX vs. Illinois Sexual Harassment

- Illinois: "***Sexual Harassment***" is defined as unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature.
- Title IX: "***Title IX Sexual Harassment***" is defined as Conduct on the basis of sex that satisfies one or more of the following: (1) A District employee conditions the provision of an aid, benefit, or service 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 District's education program or activity; or; (3) *Sexual assault, dating violence, domestic violence, or stalking*



Example Scenarios:



Example 1:

A fifth grader tells her teacher that a student in her class is trying to touch her chest and her private areas, and saying things to her like “I want to get in bed with you” and “I want to feel your boobs.” The student says the classmate also put a door stop in his pants and tried to rub up against her in the hallway. This kind of behavior occurred nearly every day over several months. The student tells her teacher this is why her grades have dropped, that she is always nervous and anxious in school now. The girl’s mother also met several times with the principal to discuss the behavior.

Does this behavior, as described, meet the definition of sexual harassment under the Title IX regulations? If so, which prong does it fit, and why?



Example 2:

A male student in seventh grade is the target of bullying by football players. On multiple occasions, the players pushed the student against a locker, ridicule him, threaten him, and say things like he “would be better off dead” or that he “should commit suicide.” Given what is said to the student, teachers suspect that he is the target of bullying because he is perceived as “not masculine enough” and not presenting himself in the same way as other male students at the school. On one occasion, the student was bullied in a classroom, and when he asked to leave the classroom to go to the guidance counselor’s office, his teacher told him that he “needed to stop being a baby.”

Does this behavior, as described, meet the definition of sexual harassment under the Title IX regulations? If so, which prong does it fit, and why?



Example 3:

A female high school student is the only female student on the school's wrestling team. Over the course of about three years that the student was on the wrestling team, the (male) coach made the following comments:

- When the female student was wrestling with a male student, the coach said to him, "How does it feel knowing that's probably one of the only women you'll ever have on top of you?" Another time, while the same two students were wrestling, the coach said to the male student, "she'll be the only girl you'll touch."

- To the female student directly, the coach said, "You'll have to be a 'boy' on the team," at least twice. He also said that she would have to have "strap-ons" [referring to prosthetic penises] at least four times.

- The coach asked the student if she was having her menstrual cycle during a wrestling match, because he could see her "pad" through her singlet, and then laughed about it with another coach.

Does this behavior, as described, meet the definition of sexual harassment under the Title IX regulations? If so, which prong does it fit, and why?



Location of the Misconduct

- Title IX only applies to conduct that occurs during educational programs or activities, both on-campus and off-campus.
- This includes locations, events or circumstances over which the school exercises substantial control over the **respondent** (perpetrator) and the **context** in which the misconduct occurs.
- A school district may address sexual harassment affecting its students or employees that falls outside Title IX's jurisdiction in any manner the school district chooses, including providing supportive measures and/or pursuing discipline.



Examples

- At a high school football game?
- During class or in the hallways?
- On the bus?
- On a field trip to the Zoo?
- At a student's job at the convenience store across the street from school?
- At a student's home?
- On a student's Instagram page?
- On a Spanish Immersion Trip in Mexico?



In the United States

- The facts underlying a Title IX complaint must arise in the United States. Misconduct that occurs abroad does not fall under the purview of Title IX (although it could still be subject to the school's disciplinary code of conduct).



Complainant's Enrollment

- At the time of filing a Title IX complaint, the Complainant must be participating in or attempting to participate in the school's educational program or activities.



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



Supportive Measures: What are they?

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

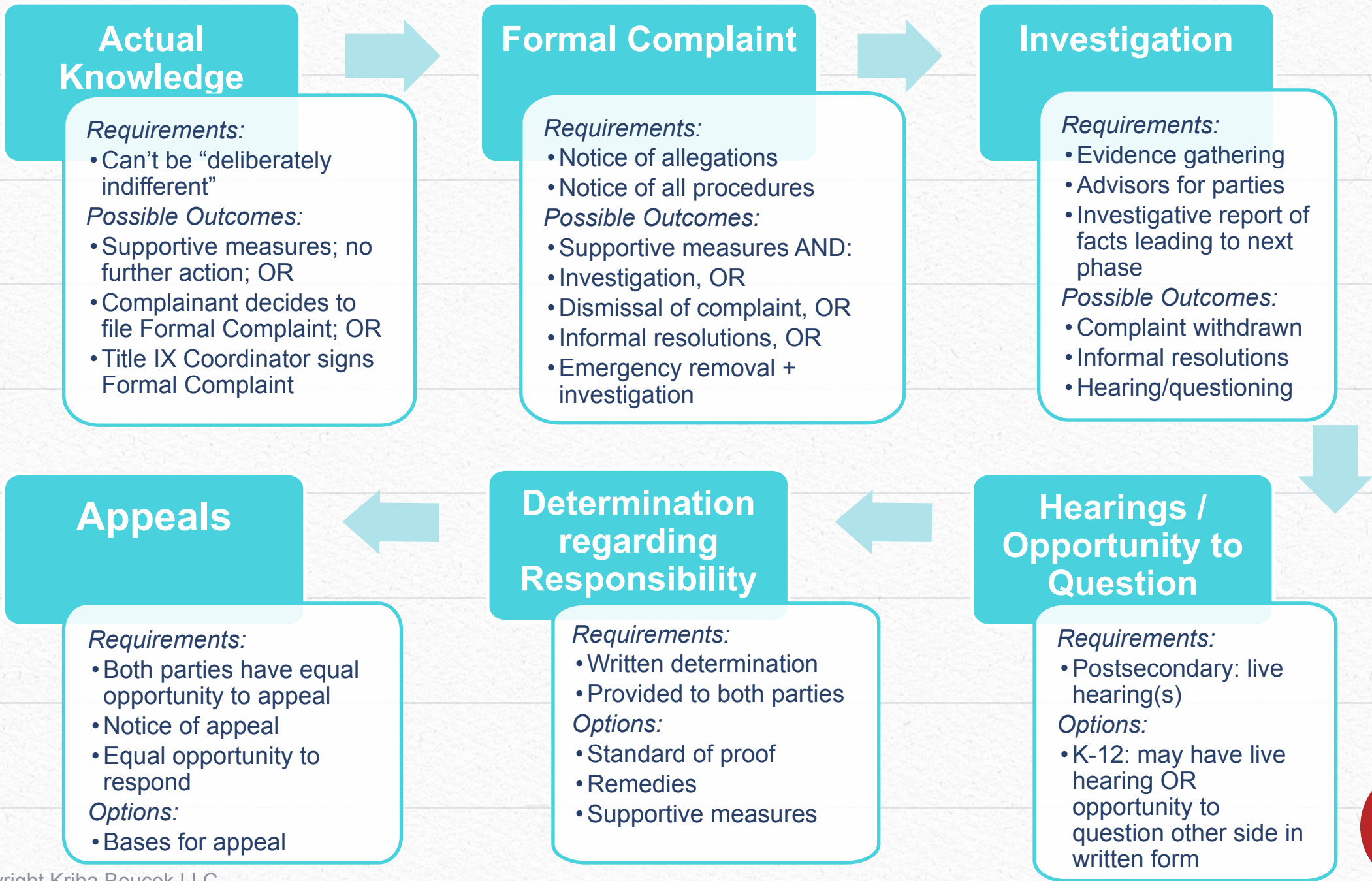
*Must NOT *unreasonably burden* the other party; remain confidential

34 CFR §§ 106.30(a), 106.44(b)





6 Step Title IX Process



Actual Knowledge is Required

- Title IX applies when school personnel have actual knowledge either informally through a verbal or written report (including anonymous reports) of sexual harassment or allegations of misconduct based on sex.
- In K-12 school systems, “any employee” can have actual knowledge.



Formal Title IX Complaint

- A formal Title IX process is (generally speaking) not necessary in situations where the building administration and families reach consensus on how to move forward under the circumstances.
- Many situations involving misconduct based on sex are resolved at the building level without the filing of a formal Title IX complaint.
- Remember that the filing of a Title IX complaint is always the decision of the complainant and his/her parents. Complainants should never be dissuaded or discouraged from filing a Title IX complaint.
- When a formal Title IX complaint is filed, the school must respond by following the grievance procedures contained in board policy 2:265.
- A Title IX complaint may be withdrawn by the complainant at any time.



Formal Title IX Complaint

- School personnel must respond *promptly* and in a manner that is *not deliberately indifferent*.
- Must treat complainants and respondents *equitably*
- Must offer *supportive measures* to both complainants and respondents

Promptly: without unnecessary delay under the circumstances

Deliberately indifferent: clearly unreasonable in light of known circumstances

Equitably: equal, fair and impartial

Supportive measures: non-punitive individualized services offered free of charge as appropriate in order to restore equal access.

Formal Complaint Signed by School Staff

There are some circumstances under which the school district's Title IX coordinator "signs" a formal complaint instead of the complainant

When would this be necessary?

- x If the complainant is not willing or eligible (e.g., has graduated)
- x A potential safety risk continues for other students/employees
- x A staff member is accused of committing sexual misconduct against a student

Examples:

- x The school has actual knowledge of a pattern of alleged sexual harassment by a perpetrator in a position of authority
- x The school wishes to investigate allegations in order to determine whether it has probable cause to find that an employee is engaging in sexual misconduct
- x A Title IX coordinator receives multiple reports of sexual harassment against the same respondent



Informal Resolution is (Sometimes) an Option

- After a formal complaint is filed, the parties may agree to engage in informal resolution of the complaint
- Requirements for informal resolution:
 - x Can never be compelled; parties must mutually agree
 - x May be facilitated at any time before a determination regarding responsibility is reached
 - x Parties must provide written consent to participate in the informal resolution process
 - x Before conclusion of the informal resolution process, either party has the right to withdraw their consent and return to the grievance/complaint procedure
- Keep in mind that school districts are not allowed to use informal resolution for allegations of an employee's sexual misconduct against a student



New Legislation re Forensic Interviews by the Child Advocacy Center (CAC)

55 ILCS 80/4.5 new

Effective January 1, 2020

Sec. 4.5. Forensic interviews; electronic recordings.

(a) Parental consent is no longer required for a forensic interview to be electronically recorded by the CAC. Failure to record does not render a forensic interview inadmissible.

(b) The recording of a forensic interview may be provided to school districts in relation to an administrative hearing (teacher dismissal, student expulsion, etc.) to limit re-traumatization of the child victim.

Impartiality (slide #1)

- 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 people or situations
- Reflect critically on your own identity and experience
- Recognize when your identity and experience may affect your judgment
- Hold yourself accountable and seek opportunities for continuous improvement



Impartiality (slide #2)

- Being impartial means setting aside preconceived beliefs and the urge to judge.
- Being impartial means listening equally to all sides and perspectives and focusing on understanding the viewpoints of all involved.
 - ✗ Listening impartially to others takes **time**
 - ✗ Listening impartially requires **awareness** of one's own biases
 - ✗ Listening impartially means **asking questions that open up dialogue**, rather than close it down
- Strategies for demonstrating impartiality include summarizing what you have heard and reflecting back. This can help you avoid bias and ensure that you are correctly understanding what the person has to say.
- Acknowledge where differences between accounts/perspectives exist; rather than seek to smooth over differences (which is human nature), seek more details.
- Take care that your words, tone of voice and body language are neutral and open.



Investigations — An Overview

- Burden is on the school (not the parties) to gather evidence
- Evidence that is legally privileged may not be used; parties can opt to waive this privilege
- Equal opportunity for parties to present witnesses
 - Fact witnesses
 - Expert witnesses
- School is not able to restrict either party from discussing allegations or to gathering evidence
- Parties have an equal opportunity to select ‘advisors’ of their choice (may be attorney) at their own expense
- School staff must provide notice to all parties of hearings, interviews and meetings to allow time to prepare
- Equal opportunity for parties to inspect/review all evidence to ensure that each party can respond in a thoughtful and meaningful way
 - Must send all evidence to parties before final report created
 - Must allow at least 10 days to respond



Investigations — Tips and Strategies

- Plan investigation scope and timeline
- Identify and interview all involved parties and witnesses
- ✗ Interview the complainant and the respondent (separately) about what happened; additional interviews may be needed as evidence is uncovered
- ✗ Ask open-ended questions about the incident(s) in the complaint
 - Pre-script standardized, open-ended questions
 - Use neutral language
 - Allow time for follow-up questions
 - Refrain from using judgmental or projecting language
- ✗ Ask each person for the names of potential witnesses for additional interviews
- ✗ Understand and implement trauma-informed interviews



Investigations — Evidence to be Reviewed

- 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.
 - ✗ Privileged information, such as medical records, educational records or correspondence between a party and their lawyer is generally off limits, but a person may voluntarily offer this information
 - ✗ Think about what evidence could potentially corroborate (support) the statements made in the interviews
 - ✗ If a search is necessary, remember it must comply with the Fourth Amendment
- Once compiled, send all evidence to complainant and respondent (and their advisors) with plenty of time (at least 10 days) to meaningfully respond
- Refrain at this step the credibility of the parties or their statements, but document details that *do* and/or *do not* align with other parties' accounts and other relevant evidence



Additional Considerations for Witnesses

- A. Should you record the interview?
- B. Should you have the witness sign a statement?
- C. For student witnesses, should parents be involved?
- D. For staff witnesses, should union representatives be involved?
- E. Should the employee be placed on leave during an investigation?
- F. Should you involve law enforcement or DCFS?



Investigation — The Written Report

- The investigator prepares a final written investigation report that fairly summarizes all the relevant evidence, without making a determination of responsibility or deciding 'fault'
- The investigator does not determine the credibility of parties, witnesses or evidence
- The investigator gathers all relevant evidence and turns everything over to the decision-maker to weigh credibility and make a decision (this happens during the next phase)
- The final written investigation report must be sent to each party
- Keep in mind that the complainant has the right to withdraw the complaint at any time
- The parties may also mutually agree to participate in the informal resolution process at any time

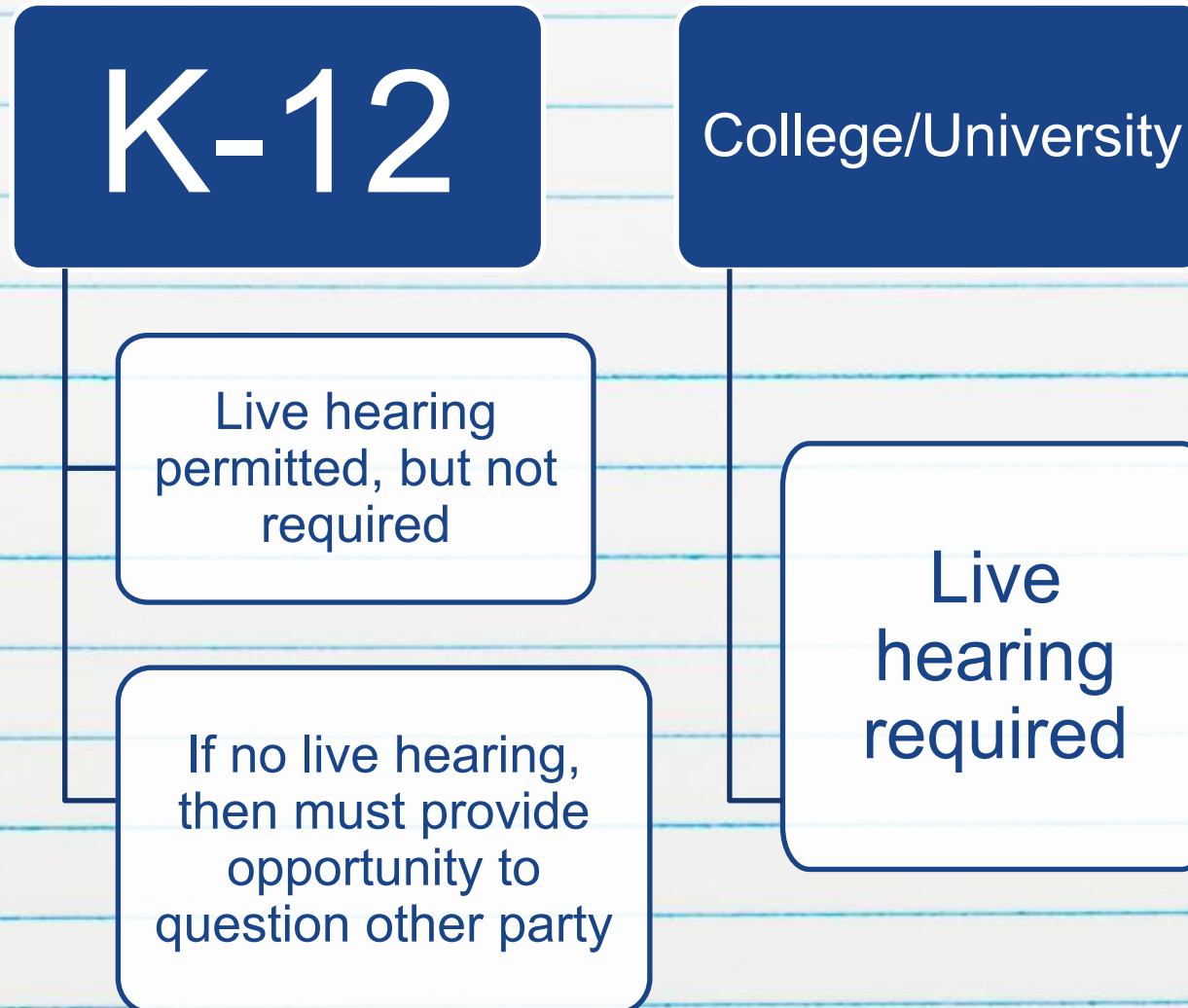




Corey's Law and Student Interviews

- Corey's Law requires notice to parents before a student is interviewed by law enforcement, an SRO, or school security personnel
- Must make reasonable efforts to allow parents to be present during the interview if held on school grounds
- 105 ILCS 5/22-85

Hearing / Opportunity to Question



Opportunity to Question

- Parties may only be asked *relevant* questions
 - Does it tend to make a fact more or less probable than without that information?
 - Is it likely to prove or disprove a fact or an allegation?
- Same standard for live hearing and for written opportunity to question
- Decision-maker must determine relevance of questions as they are asked and before they are answered
- What will be unique in this process is the 'back and forth' nature of the questions between the parties, with the decision-maker determining the relevance of all questions posed in writing



Opportunity to Question

Parties may only be asked *relevant* questions

- Legally privileged information cannot be used
- Treatment records may not be used without voluntary written consent
- Questions about a party's "prior sexual behavior or predisposition" are not considered relevant and must be excluded, unless offered either
 - 1) to prove someone else committed the alleged conduct, or
 - 2) to prove consent, because it has to do with past sexual behavior between complainant and respondent



Opportunity to Question

For K-12 schools only, when no live hearing is held, then the school district must provide an opportunity for each side to ask each other written questions. These written questions are 'funneled' through the decision-maker.

- After the investigative report is sent to each party, each party must have the opportunity to submit written, relevant questions that it wants from any other involved party or witness
- School must facilitate this written back-and-forth between the parties:
 - Each party must provide the answers to all the questions requested
 - The decision-maker must allow for additional, limited follow-up questions from each party, as he/she determines relevant



Standard of Review

The decision-maker applies the school district's chosen standard of evidence for Title IX investigations:

- **Option 1:** “preponderance of the evidence” standard
- **Option 2:** “clear and convincing” standard

Each school district must choose one of these standards for ALL sexual harassment investigations (those involving just students, just employees, and both students and employees)



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. . .



The Written Decision

- The decision-maker issues a written determination regarding responsibility that includes:
 - Identification of allegations of sexual harassment that meet Title IX definition
 - Description of all procedural steps
 - Findings of fact supporting the determination
 - Conclusions regarding application of school's disciplinary code to the facts
 - Rationale for the decision regarding *each* allegation and determination regarding responsibility
 - Any disciplinary sanctions imposed upon a party
 - Any other remedies and supportive measures recommended or warranted
 - Procedures and permissible bases for appeal
- School must provide written determination to parties simultaneously
- Title IX Coordinator implements remedies / coordinates disciplinary consequences



Appeals

- Parties can appeal:
 - The determination of responsibility, OR
 - School's decision to dismiss complaint
- Bases for appeal:
 - Procedural irregularity that *affected the outcome*
 - New evidence not reasonably available previously that *could affect outcome*
 - That Title IX Coordinator OR Investigator(s) OR Decision-maker(s) had a bias or conflict of interest that *affected the outcome*
 - Generally, either for or against complainants or respondents, OR
 - Specifically, either for or against an involved party
 - Another basis for appeal allowed by the school, as long as it is equally available to either party



Appeals

- School must do following for an appeal:
 - Notify the other party in writing when an appeal is filed and on what basis
 - Implement appeals procedure equitably
 - The appeals decision-maker must not have been involved in the Title IX complaint process thus far
 - The appeal decision-maker must be trained and is neutral/impartial
 - Give both parties a reasonable, equal opportunity to submit a written statement about the outcome of the investigation phase
 - Issue a written decision describing the result (final decision) and rationale
 - Provide decision simultaneously to all parties
- Can a Title IX matter be appealed any farther? Presumably yes, in a court of local jurisdiction and potentially also to OCR



Recordkeeping

The Title IX Coordinator must keep written records for 7 years of all of the following:

- Title IX complaints, including:
 - Supportive measures provided
 - If no supportive measures provided, document why not warranted
 - Basis for school's conclusion that its response was not deliberately indifferent
 - Documentation of measures designed to restore or preserve equal access for the complainant
- Investigation reports and records
- Recordings/transcripts of hearings (if any)
- Written determinations regarding responsibility
- Disciplinary consequences (if any)
- Appeals
- Informal Resolutions



Training

All training materials used to train

- Title IX coordinator
- Investigator(s)
- Decision-maker(s)
- Appeals decision-maker(s)

Training must include:

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

- Title IX regulations
- How to use technology
- How to avoid prejudgment
- How to serve impartially

34 CFR § 106.46(b)(10)(i)(D)



- How to determine issues of relevance of questions or evidence

Retaliation is Prohibited

- 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 that is prohibited
- School can charge someone with a disciplinary violation for making a “materially false statement in bad faith” during grievance proceeding



School Board Policy Integration

Policy Revisions to Align with Title IX Regulations

- Section 2:260 – Uniform Grievance Procedure
- Section 2:265 – Title IX Policy
- Section 7:10 – Equal Educational Opportunities
- Section 7:20 – Harassment of Students Prohibited



Questions?

REMEMBER
WHY YOU
STARTED

