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TACKLING TITLE IX
Title IX Training

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I. INTRODUCTION

This presentation provides an overview of Title IX, including all required training elements for Title IX Coordinators, investigators, decisionmakers, and informal resolution facilitators. It will explain the current status of the law, including relevant caselaw and key changes in the 2024 regulations from the United Stated Department of Education (the "Department") that went into effect on August 1, 2024 ("2024 Regulations").

II. STATE OF THE REGULATIONS

A. **Pending Litigation.** A number of courts around the country are hearing challenges to the Title IX Regulation. Title IX litigation is moving quickly, but as of August 5, 2024, six federal district (trial) courts cases have granted injunctions preventing the Department from implementing and enforcing the Title IX Regulations in a combined 21 states.

B. **Core Disputes.** Below are several arguments pending in the courts, including arguments on the enforceability of the new Title IX regulations.

1. **Can the Department define "sex" to including transgender and nonbinary individuals?**

   a) **U.S. Supreme Court Precedent.** A key dispute relates to the applicability of a 2020 U.S. Supreme Court case, *Bostock v. Clayton Cnty.*, 590 U.S. 644 (2020). In *Bostock*, the United States Supreme Court held that Title VII's definition of "sex discrimination" encompasses sexual orientation and gender identity discrimination, and that discrimination based on transgender status is a form of sex discrimination. Title VII is another federal discrimination law that covers employment discrimination based on race, color, religion, sex, or national origin. The dispute is whether *Bostock*, which was decided in the context of Title VII, extends to the Title IX context.

   b) **Statutory Argument.** Relatedly, others have argued that the text of Title IX as a whole requires "sex" to means "male or female." For example, one section of Title IX refers to several organizations, such as Girl Scouts, being limited to persons "of one sex." Looking at this, several other provisions of Title IX, and the dictionary definitions from over 50 years ago, some federal district courts referenced above reason that the meaning of sex is unambiguous and means male or female.

2. **Must courts follow the Department's definitions?** Up until this summer, courts have been required to defer to an agency's interpretation of a statute when a statute is ambiguous or silent. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984). This meant the courts ordinarily would not question the Department's interpretation of Title IX. The U.S Supreme Court overruled this 40-year legal precedent in June 2024. *Loper Bright Enterprises v. Raimondo*, 603 U.S. __, 122 S.Ct. 2244 (2024).

   Congress did not define "sex" in Title IX. This case is relevant to the current Title IX issue because Congress does not define "sex" in Title IX. Under *Chevron*, the Department could "fill in the gaps" when there was no definition. After *Chevron*, the courts are not required to defer to the Department's interpretation. One district court has already relied on *Raimondo* to state that any ambiguity in the term sex "no longer results in deference to Department's interpretation of the meaning of 'sex' under Title IX." *Kansas v. United States Dep't of Educ.*, No. 24-4041-JWB, 2024 WL 3273285, at *11 (D. Kan. July 2, 2024).

3. **Do the regulations interfere with state laws and religion?** *Arkansas v. United States Dep't of Educ.*, 4:24 CV 636 RWS, 2024 WL 3518588 (E.D. Mo. July 24, 2024). This case was brought by one minor student and the states of Arkansas, Missouri, Iowa, Nebraska, North Dakota, and South Dakota. It is illustrative of the general challenges throughout the country.

   a) The States argue the Department seeks to regulate Title IX in a manner that is not compatible with their state laws regarding separation of students based on sex for overnight school travel, restrooms and changing rooms, and dormitories. Specifically, the Plaintiffs argue the new regulations requiring schools not to separate students in a manner that subjects them to more than de minimis harm is in conflict with their state laws.

   b) The minor Plaintiff argues that her religious beliefs are that there are two sexes; a person's sex cannot be changed; and that she must use pronouns which align with a person's biological sex. The minor is fearful that she would be subject to potential discipline for continuing to speak her views, and that if she were forced to use restroom, locker room, or shower facilities with individuals she believes are "male," she would be deeply distressed, embarrassed, anxious, and would avoid these areas. *Id*.

   c) The District Court granted Plaintiffs motion for a preliminary injunction and prevented the Department from implementing, enacting, enforcing, or taking any action in any manner to enforce the new rule in the states that are parties to the litigation.

4. **Is the entire new rule unenforceable, or just the definition of "sex"?** A key argument the Department is raising on appeal challenging these injunctions is that the scope of the injunctions is overbroad. Generally, the district courts enjoined the entire Final Rule despite the fact that the plaintiffs challenged only certain provisions of the regulations. Both of the appeals courts that have considered this argument to date have rejected the argument.

C. **How do the court decisions affect Minnesota and Wisconsin school districts?**

1. With one exception, the court decisions do not apply to schools in Minnesota and Wisconsin. As of August 5, there are no cases we are aware of that seek to stop enforcement of the new rule across all of Minnesota or Wisconsin.

a) The decisions largely do not apply to individual schools or districts. The defendant in these cases is the Department. Courts have issued "injunctions," which is a temporary court order prohibiting or requiring some action, in this case, prohibiting the Department from enforcing the new rule.

2. One decision in Kansas relates to individual schools, but the official ruling only applies to the Department. *Kansas v. United States Dep't of Educ.*, 2024 WL 3273285 (D. Kan. July 2, 2024) (Kansas, Alaska, Utah, and Wyoming). This case claims to apply to all schools, nationwide, that have minor children of members of Moms for Liberty or any students in the Young America's Foundation enrolled.

a) Some Minnesota and Wisconsin schools are included in the lists of schools that have minor children enrolled of members of Moms for Liberty or any students in the Young America's Foundation.

b) However, the order issuing the injunction is clear that it *only* applies to the Department's enforcement of the final rule. The order specifically states that schools may adopt policies consistent with the final rule and state law.

D. **What has the Department said?** In a webinar on August 1, 2024, the Department stated it will begin enforcing the final rule in school districts not subject to an injunction.

E. **Should our district adopt a new policy?** School districts should contact their legal counsel for specific advice on whether or not to adopt a policy and what it should include. As a general rule, schools should consider the following:

1. State Law. For Minnesota and Wisconsin, state law already protects students from discrimination based on gender identity. Thus, the changes in Title IX with respect to the definition of "sex" do not expand nondiscrimination requirements to students who were not previously protected.

a) In Minnesota, the Minnesota Human Rights Act ("MHRA," Minn. Stat. § 363A) already prohibits discrimination against transgender and gender nonconforming students. This statute has been interpreted to include allowing access to restrooms and locker rooms that are consistent with a student's gender identity. *N.H. v. Anoka-Hennepin School District No. 11*, 950 N.W.2d 553 (Minn. App. 2020).

b) In Wisconsin, the Pupil Nondiscrimination Law prohibits discrimination based on sex and sexual orientation. Wis. Stat. § 118.13. In 2013, joint guidance from the Department of Public Instruction and Wisconsin Interscholastic Athletics Association interpreted "sex" to include "gender identity."

2. Benefit of Revising 2020 Policies

a) The revised regulations remove some of the onerous investigative requirements and simplify the grievance process. Modifying a policy to remove those will remove some of the difficulty districts face in that process.

b) The definitions in the revised regulations are consistent with state law, so no new rights or protections are created by adopting a policy incorporating them.

c) The Department has stated it will enforce the new regulations, so adopting a revised policy will demonstrate compliance in case OCR receives a complaint.

3. Risks of Revising 2020 Policies

a) In general, risks are relatively low. No injunction prohibits a school district from adopting a policy compliant with the 2024 regulations.

b) In districts where there may be political opposition to adopting an amended policy, the district does not need to adopt a long and complicated policy. The minimum requirement is for schools to have a nondiscrimination statement and grievance procedures. This could replace the 2020 policy and grievance procedures.

4. School districts should consult their legal counsel to analyze any risks and benefits specific to the school district.

III. TITLE IX PERSONNEL

A. **Title IX Coordinator.**

1. Title IX Coordinator must be "authorized" to coordinate the district's efforts to comply with Title IX. This is a critical role and should not be taken lightly.

2. Can be any employee, but should be an administrator or director-level employee because of the nature of information they will need to access and the responsibilities of the role. Often, Human Resources personnel serve as the Title IX Coordinator.

3. May be designated by title rather than name, i.e. "Human Resources Director" rather than "Jane Smith," to account for turnover in important positions.

4. A district may designate more than one Title IX Coordinator to "Assistant" or "Deputy" coordinators.

5. **A Title IX Coordinator may now serve as the investigator and decisionmaker** (this may not be recommended except in rare circumstances).

B. **Title IX Investigator(s).**

1. An investigator assesses allegations of sexual harassment by interviewing witnesses and examining evidence. The investigator prepares a report following the conclusion of the investigation.

2. A non-employee can serve as an investigator. If the district utilizes a non-employee, it must be cognizant of its data practices obligations, and ensure that it has the ability to control the non-employee's use of data.

3. Districts may designate multiple individuals to serve as investigators, or may identify specific individuals for specific investigations, and multiple investigators may investigate any given Title IX complaint.

C. **Title IX Decisionmaker.**

1. A decisionmaker makes the final determination regarding responsibility with respect to a Title IX complaint.

2. The decisionmaker may now be the Title IX Coordinator.

3. A district may utilize non-employees to serve as the district's decisionmaker.

D. **Title IX Appellate Decisionmaker.**

1. Any party has a right to appeal the dismissal of a complaint. Districts must identify a Title IX appellate decisionmaker to adjudicate appeals. New in 2024, a district is only required to offer appeals of determinations of responsibility if they offer appeals for other discrimination claims, which is unlikely.

2. This individual may not be the same person as the Title IX Coordinator, investigator, or decisionmaker.

E. **Informal Resolution Facilitator.** In some cases, districts may offer to facilitate an informal resolution process, like a mediation or restorative justice meeting, to resolve a Title IX grievance prior to full adjudication. The informal resolution facilitator oversees this process.

IV. TITLE IX TRAINING REQUIREMENTS

A. The below training must be provided "promptly upon hiring or a change of position that alters an employee's duties under Title IX, and annually thereafter." 34 C.F.R. § 106.8(d).

B. **All Employees.** Previously, we recommended that all employees receive training in identifying and reporting conduct that could implicate Title IX. The 2024 regulations now require all employees to be trained in:

1. The school district's obligation to address sex discrimination in its education program or activity;

2. The scope of conduct that constitutes sex discrimination under Title IX; and

3. The responsibility of all employees to notify the Title IX Coordinator when the employee has information about conduct that reasonably may constitute sex discrimination (34 C.F.R. § 106.44(c)) and all other applicable notification and information requirements.
34 C.F.R. § 106.8(d)(1).

C. **Investigators and Decisionmakers.** All investigators, decisionmakers, and other individuals responsible for implementing grievance procedures must also be trained on:

1. The school district's obligation to respond promptly and effectively to end sex discrimination or prevent it from continuing;

2. The school district's grievance procedures;

3. How to serve impartially, including by avoiding prejudgment of facts, conflicts of interest, and bias; and

4. The meaning of the term "relevant" in relation to questions and evidence, and the types of evidence that are impermissible regardless of relevance.
34 C.F.R. § 106.8(d)(2).

D. **Facilitators of Informal Resolution.** Facilitators of the informal resolution process must also be trained on the rules and practices associated with this process and how to serve impartially, including by avoiding conflicts of interest. 34 C.F.R. § 106.8(d)(3).

E. **Title IX Coordinator and Assistant Coordinators/Designees.** Title IX Coordinators and their designees must also be trained on their specific responsibilities, including everything above and the following:

1. The responsibility to coordinate the school district's efforts to comply with its Title IX responsibilities (34 C.F.R. § 106.8(a));

2. The responsibility to take specific actions to ensure equal access to the school's programs or activities for students who are pregnant or are experiencing pregnancy-related conditions (34 C.F.R. § 106.40(b)(3));

3. The requirements of the grievance process and implementation of supportive measures (34 C.F.R. § 106.44(f), (g));

4. The school district's recordkeeping system and obligations (34 C.F.R. § 106.8(f)); and

5. any other training necessary to coordinate the school district's compliance with Title IX.
34 C.F.R. § 106.8(d)(4).

V. PREVENTING AND DEFINING SEX-BASED DISCRIMINATION AND SEXUAL HARASSMENT

A. **Responding to Allegations of Sex Discrimination.** The new regulations require a school district with knowledge of conduct that reasonably may constitute sex discrimination in its education program or activity must respond promptly and effectively." 34 C.F.R. § 106.31(a)(1). Previously, school officials only had to "respond promptly in a manner that is not deliberately indifferent." In the

commentary to its regulations, the Department of Education explains its reasoning for this change as follows:

> The Department has concluded that Title IX does not permit a [school district] to act merely without deliberate indifference and otherwise allow sex discrimination to occur. Rather, in the administrative enforcement context, in which the Department is responsible for ensuring that its own Federal funds are not used to further discrimination, the Department expects [school district]s to fully effectuate Title IX. 89 Fed. Reg. 33561.

B. **Scope of Regulations.** One change in 2024 is that the regulations are now intended to cover ALL sex-based discrimination prohibited by Title IX. The previous version only addressed sexual harassment, which is one type of sex-based discrimination.

C. **Geographic Boundaries Expanded.** 34 C.F.R. § 106.11 makes schools responsible for conduct that occurs off campus or even out of the country as long as it the conduct is "subject to the [school district]'s disciplinary authority." The revised regulation provides: A school district "has an obligation to address a sex-based hostile environment under its education program or activity, even when some conduct alleged to be contributing to the hostile environment occurred outside the [school district]'s education program or activity or outside the United States."

D. **What is discrimination on the basis of sex?** The 2024 regulations state that "discrimination on the basis of sex [under Title IX] includes discrimination on the basis of sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity." 34 C.F.R. § 106.10.

E. **Prohibition on Sex Separation Causing More than De Minimus Harm.** The new regulations require that, except as permitted by certain provisions of Title IX or the regulations (such as athletics), "a [school district] must not carry out any otherwise permissible different treatment or separation on the basis of sex in a way that would cause more than de minimis harm, including by adopting a policy or engaging in a practice that prevents a person from participating in an education program or activity." 89 F.R. 33477; *See also* C.F.R. § 106.31(a)(2) ("In the limited circumstances in which Title IX or this part permits different treatment or separation on the basis of sex, a [school district] must not carry out such different treatment or separation in a manner that discriminates on the basis of sex by subjecting a person to more than de minimis harm.") According to the Department, a "de minimus" harm "must be genuine and objectively non-trivial and assessed from the perspective of a reasonable person in the individual's position." 89 F.R. 33815

F. **What is sex-based harassment?** Per 34 C.F.R. § 106.2, sex-based harassment is a form of sex discrimination and means sexual harassment and other harassment on the basis of sex, which can include one or more of the following:

1. An employee conditioning the provision of an aid, benefit, or service of the school district on an individual's participation in unwelcome sexual conduct (also called "*quid pro quo* harassment");

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 a school's education program or activity (also called "hostile environment harassment." Whether a hostile environment has been created is a fact-specific inquiry that includes consideration of the following:

   a) The degree to which the conduct affected the complainant's ability to access the school district's education program or activity;

   b) The type, frequency, and duration of the conduct;

   c) The parties' ages, roles, previous interactions, and other factors relevant to evaluation the effects of the conduct;

   d) The location and context of the conduct; and

   e) Other sex-based harassment in the school district's education program.

3. Specific Offenses

   a) Sexual assault, meaning "an offense classified as a forcible or nonforcible sex offense under the uniform crime reporting system ["UCRS"] of the Federal Bureau of Investigation."

      (1) The FBI UCRS defines "Sex Offenses – Forcible" as "[a]ny sexual act directed against another person, forcibly and/or against that person's will; or not forcibly or against the person's will where the victim is incapable of giving consent." This definition includes forcible rape, forcible sodomy, sexual assault with an object, and forcible fondling.

      (2) The FBI UCRS defines "Sex Offenses – Non-forcible unlawful, non-forcible sexual intercourse" as "Incest – Non-

forcible sexual intercourse between persons who are related to each other within the degrees wherein marriage is prohibited by law" and "Statutory Rape – Non-forcible sexual intercourse with a person who is under the statutory age of consent."

b) Dating violence, meaning violence committed by a person:

(1) who is or has been in a social relationship of a romantic or intimate nature with the victim; and

(2) where the existence of such a relationship shall be determined based on a consideration of the following factors:

(a) The length of the relationship,

(b) The type of relationship,

(c) The frequency of interaction between the persons involved in the relationship.

c) Domestic violence means felony or misdemeanor crimes of violence committed by a person who:

(1) Is a current or former spouse or intimate partner of the victim (defined by state law), or a person similarly situated to a spouse of a victim;

(2) Is cohabitating, with or has cohabitated, with the victim as a spouse or intimate partner;

(3) Shares a child in common with the victim; or

(4) Commits acts against a youth or adult victim who is protected from those acts under the family or domestic violence laws of the state.

d) Stalking means engaging in a course of conduct directed at a specific person that would cause a reasonable person to—

(1) fear for their safety or the safety of others; or

(2) suffer substantial emotional distress.

G. **What about consent?**

1. Similar to 2020, the regulations expressly decline to adopt a definition of consent and give schools the ability to choose one most appropriate to their circumstances.

2. The MSBA and WASB model policies do not include a definition of consent.

II. TITLE IX GRIEVANCE PROCEDURES.

A. **Minimum Requirements.** The Title IX regulations require districts to develop and implement a grievance procedure that "provide[s] for the prompt and equitable resolution of student and employee complaints alleging any action prohibited by [Title IX]." All grievance procedures must meet the following minimum requirements:

1. Treat complainants and respondents equally.

2. Individuals involved in administering the grievance process must not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent.

3. The respondent is presumed not responsible for the alleged conduct until a determination of responsibility is made after the grievance process.

4. There must be reasonably prompt time frames for conclusion of the grievance process.

5. The school district must take reasonable steps to protect the privacy of the parties and witnesses during the pendency of grievance procedures, to the extent it does not interfere with the parties' ability to obtain and present evidence, including by speaking to witnesses; consulting with family members, other resources or advisors; or otherwise preparing for and participating in the grievance procedures.

6. All relevant evidence that is not otherwise excluded must be objectively evaluated, and credibility determinations must not be solely based on a person's status as a complainant, respondent, or witness.

7. Exclude the following types of evidence and questions seeking that evidence as impermissible, except in the defined circumstances, regardless of relevance:

   a. Evidence protected by a privilege under federal or state law;

   b. Records maintained by a physician or psychologist, unless the school district has the party or witness's voluntary written consent for use in the grievance process;

   c. Evidence related to the complainant's sexual interests or prior sexual conduct, unless evidence about the complainant's prior sexual conduct is offered to prove that someone other than the respondent committed the alleged conduct or is evidence about specific incidents of the complainant's prior sexual conduct with the respondent that is offered to prove consent to the alleged sex-based harassment.

8. If a school district adopts grievance procedures applying to the resolution of some, but not all complaints, identify the principles for how the school district will determine which procedures apply.

B. **Additional Requirements for Sex-Based Harassment.** For complaints of sex-based harassment, grievance procedures must also "[d]escribe the range of supportive measures available to complainants and respondents," and describe "the range the possible disciplinary sanctions that the [school district] may impose and remedies that the [school district] may provide following a determination that sex-based harassment occurred." 34 C.F.R. § 106.45(l).

C. **Prohibition on Retaliation.** Title IX prohibits retaliation, which is "intimidation, threats, coercion, or discrimination against any person by the [school district], a student, or an employee or other person authorized by the [school district] to provide aid, benefit, or service under the [school district]'s education program or activity, for the purpose of interfering with any right or privilege secured by Title IX… or because the person has reported information, made a complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing" under Title IX. 34 C.F.R. § 106.2.

Under the revised definition, a school district may require an employee to participate as a witness or otherwise assist with an investigation without such conduct being deemed to be retaliation.

III. COMPLAINT INTAKE PROCEDURES.

A. **Definition of "Complaint."** Complaints under Title IX are an "an oral or written request to the [school district] that objectively can be understood as a request for the [school district] to investigate and make a determination about alleged discrimination under Title IX or this part." 34 C.F.R. § 106.02.

B. **Who Can Bring a Complaint?**

1. A "complainant," which is:

   a. A student or employee who is alleged to have been subjected to conduct that could constitute sex discrimination under Title IX or this part; or

   b. A person other than a student or employee who is alleged to have been subjected to conduct that could constitute sex discrimination under Title IX or this part and who was participating or attempting to participate in the school district's education program or activity at the time of the alleged sex discrimination. 34 C.F.R. § 106.2.

2. In addition to a complainant, the following people can bring a complaint of sex-based harassment:

   a. A parent/guardian or other legal representative with the right to act on behalf of a complainant; or

   b. The Title IX Coordinator if no complaint has been filed or the allegations have been withdrawn, and if there is no informal resolution process. 34 C.F.R. § 106.44(f)(1)(v).

3. A complaint of sex discrimination other than sex-based harassment can be made by the individuals who can make a complaint of sex-based harassment, and:

   a. Any student or employee; or

   b. Any person other than a student or employee who was participating or attempting to participate in the school district's education program or activity at the time of the alleged sex discrimination.34 C.F.R. § 106.45(a)(2)(v).

C. **Notice Upon Initiation of Grievance Procedures.**

1. When the grievance process begins, the school district must notify the parties whose identities are known of the following:

   a) Notice of grievance procedures and any informal resolution process;

   b) Sufficient information was available at the time to allow the parties to respond to the allegations. Sufficient information includes:

      (1) Identities of the parties involved in the incident(s);

      (2) The conduct alleged to constitute sex discrimination;

      (3) The date(s) and location(s) of the alleged incident(s), if the school district has that information.

   c) A statement that retaliation is prohibited;

   d) A statement that the parties are entitled to an equal opportunity to access the relevant and not otherwise impermissible evidence, or an accurate description of this evidence; if a description, the parties are entitled to an equal opportunity to access the relevant and not otherwise impermissible evidence upon the request of any party.

2. If, during the course of the investigation, the school district decides to expand the scope of the investigation, or to consolidate a complaint, the district must provide notice of the additional allegations to the parties that are known. 34 C.F.R. § 106.45(c).

3. **Writing Not Required.** A significant change from 2020 is that notice of allegations is not required to be in writing. However, in light of the lengthy list of required items, schools may wish to have a form document including all of these requirements so the investigator can ensure all required notice is provided.

D. **Dismissal of Complaint.**

1. A school may dismiss a complaint based on the following grounds:

   a) The school is unable to identify a respondent after taking reasonable steps to do so;

b) The respondent is not participating in the school district's education program or activity and is not employed by the school district;

c) The complainant voluntarily withdraws the complaint, the Title IX Coordinator chooses not to initiate the grievance procedure, and the school district determines that without the withdrawn allegations, the conduct, even if proven, would not constitute sex discrimination.

d) The school district determines that the conduct alleged in the complaint, even if proven, would not constitute sex discrimination. Prior to dismissal for this reason, the school district must make reasonable efforts to clarify the allegations with the complainant. 34 CFR § 106.45(d)(1).

2. **Notification of Dismissal.** Upon dismissal, the school district must notify the complainant and respondent, if they have been notified of the allegations, of the basis for the dismissal. The respondent must be notified "promptly" after the complainant, or simultaneously if the dismissal is in writing. Both parties must also receive notice that the complainant may appeal the dismissal and the bases for the appeal.

3. **Appeal of Dismissal.** A complainant may appeal a dismissal.

a) **Grounds for Appeal.** An appeal may be made on any of the following three bases:

(1) Proof of a procedural error that would change the outcome of the grievance process;

(2) New evidence that would change the outcome of the grievance process that was not reasonably available when the determination was made; or

(3) Proof of a conflict of interest or bias. 34 C.F.R. §§ 106.45(d)(3); 106.46(i).

b) **Requirements for Appeal Process.** The following requirements apply during an appeal:

(1) If the respondent has not been notified of the allegations prior to dismissal, they must receive notice of the allegations and notice of the appeal;

(2) Appeal procedures must be implemented equally for both parties;

(3) The decisionmaker for the appeal must be appropriately trained and must not have taken part in the initial investigation or dismissal;

(4) The parties must have a reasonable and equal opportunity to make a statement in support or, or challenging, the dismissal; and

(5) The school district must notify the parties of the result of the appeal and the rationale for the result.
34 C.F.R. § 106.45(d)(3).

c) **Obligations after dismissal.** A school district must comply with the following when a complaint is dismissed:

(1) Offer supportive measures to the complainant as appropriate;

(2) Offer supportive measures to the respondent if they have been notified of the allegations, as appropriate; and

(3) Require Title IX Coordinator to "take other appropriate prompt and effective steps to ensure that sex discrimination does not continue or recur within the school district's education program or activity."

E. **Consolidation of Complaints.** A school district may consolidate complaints of sex discrimination that arise out of the same facts or circumstances, even if there are multiple complainants against multiple respondents. 34 C.F.R. § 106.45(e).

VII. CONDUCTING THE INVESTIGATION

A. A school district's investigations must be "adequate, reliable, and impartial," and comply with the following requirements:

1. The school district bears the burden of proof and is responsible for gathering evidence, not the parties;

2. There is an equal opportunity for the parties to present fact witnesses and other inculpatory and exculpatory evidence that are relevant and not otherwise impermissible;

3. The investigator must review all evidence gathered through the investigation and determine what evidence is relevant and what evidence is impermissible regardless of relevance; and

4. The investigator must provide each party with an equal opportunity to access the evidence that is relevant to the allegations of sex discrimination and not otherwise impermissible, in the following manner:

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

   b) The investigator must provide a reasonable opportunity to respond to the evidence or to the accurate description of the evidence; and

   c) The investigator must take reasonable steps to prevent and address the parties' unauthorized disclosure of information and evidence obtained solely through the grievance procedures. Disclosures of such information and evidence for purposes of administrative proceedings or litigation related to the complaint of sex discrimination are authorized.
   34 C.F.R. § 106.45(f).

B. **Questioning Parties and Witnesses.** During the grievance process, the decisionmaker must be allowed to question parties and witnesses to adequately assess a party's or witness's credibility, if credibility is both in dispute and relevant to evaluating one or more allegations of sex discrimination.

1. **Making Credibility Determinations.** Although it is not binding in Title IX investigations, the EEOC has provided guidance on factors to consider in determining whether a witness is credible in a workplace investigation. Many of those factors are relevant regardless of the topic of the investigation. They include:

a) ***Inherent Plausibility:*** Is the testimony believable on its face? Does it make sense?

b) ***Demeanor:*** Did the person seem to be telling the truth or lying?

c) ***Motive to falsify:*** Did the person have a reason to lie?

d) ***Corroboration:*** Is there witness testimony (such as testimony by eye-witnesses, people who saw the person soon after the alleged incidents, or people who discussed the incidents with him or her at around the time that they occurred) or physical evidence (such as written documentation) that corroborates the party's testimony?

e) ***Past record:*** Did the respondent have a history of similar behavior in the past?

f) ***None of the above factors are determinative as to credibility.*** For example, the fact that there are no eyewitnesses to the alleged conduct by no means necessarily defeats the complainant's credibility, since sexual harassment often occurs behind closed doors. Furthermore, the fact that the respondent engaged in similar behavior in the past does not necessarily mean that he or she did so again.
*EEOC Enforcement Guidance: Vicarious Liability for Unlawful Harassment by Supervisor*s; June 18, 1999.

C. **Evaluating Evidence.** Investigators/Decisionmakers have a responsibility to consider evidence that is "relevant and not otherwise impermissible." 34 C.F.R. § 106.45(h).

1. **Relevant evidence**. "Relevant" means that the evidence is related to the allegations of sex discrimination being investigated. 34 C.F.R. § 106.2. A question or piece of evidence is relevant if it may aid the decisionmaker in determining whether the alleged sex discrimination occurred.

2. **"Otherwise impermissible" evidence**. The investigator may not consider the following types of evidence, unless the specified exception applies:

a) Evidence protected by a privilege under federal or state law;

b) Records maintained by a physician or psychologist, unless the school district has the party or witness's voluntary written consent for use in the grievance process;

c) Evidence related to the complainant's sexual interests or prior sexual conduct, unless evidence about the complainant's prior sexual conduct is offered to prove that someone other than the respondent committed the alleged conduct or is evidence about specific incidents of the complainant's prior sexual conduct with the respondent that is offered to prove consent to the alleged sex-based harassment.
34 C.F.R. § 106.45(b)(7).

VIII. DETERMINATION OF RESPONSIBILITY

A. **Making the Decision.** After evaluating the relevant and not otherwise impermissible evidence, the decisionmaker (which can be the investigator) makes a determination of responsibility by applying the "preponderance of the evidence" standard.[1] That means determining whether it is more likely than not that an incident or violation occurred. The decisionmaker should consider whether they are persuaded by the evidence that it is more likely than not that sex discrimination occurred. If the answer is no, the decisionmaker may not determine that sex discrimination occurred. 34 C.F.R. § 106.45(h)(1).

B. **Written Notice.** The school district must notify the parties in writing of the determination whether sex discrimination occurred and the rationale for the determination. The notice must include procedures for appeal, if applicable (discussed below). 34 C.F.R. § 106.45(h)(2).

C. **Remedies.** If there is a determination that sex discrimination occurred, the Title IX Coordinator, as appropriate, must:

1. Coordinate the provision and implementation of remedies to the complainant and other persons the school district identifies as having had equal access to the school district's education program or activity limited or denied by sex discrimination;

2. Coordinate the imposition of disciplinary sanctions on a respondent, including informing the complainant of any such discipline; and

[1] A school district may choose to apply a different evidentiary standard, "clear and convincing" evidence, if they use that standard in all other comparable proceedings. Most school districts do not have a "clear and convincing" standard in policies for other proceedings. *See* 34 C.F.R. § 106.45(h)(1).

3. Take other appropriate prompt and effective steps to ensure that sex discrimination does not continue or recur within the school district's education program or activity.
34 C.F.R. § 106.45(h)(3).

D. **Limitations on Discipline.**

1. A respondent must not be disciplined for sex discrimination unless, at the end of the grievance procedures, there is a determination that the respondent engaged in prohibited sex discrimination. 34 C.F.R. § 106.45(h)(3).

2. The school district must comply with the grievance procedures before the imposition of discipline. 34 C.F.R. § 106.45(h)(4).

3. The school district may not discipline a party, witness, or others participating in the grievance procedures for making a false statement or for engaging in consensual sexual conduct based solely on the determination whether sex discrimination occurred. 34 C.F.R. § 106.45(h)(5).

VII. APPEALS

A. **Appeals of Determination of Responsibility.** A school district is not required to have an appeal process for determinations of responsibility, unless it offers an appeal process for other, similar complaints. Most school districts do not offer appeals for similar complaints and would not be required to offer one here. 34 C.F.R. § 106.45(i); *see Resource for Drafting Nondiscrimination Policies, Notices of Nondiscrimination, and Grievance Procedures under 2024 Amendments to the U.S. Department of Education's Title IX Regulations*, at 11, n. 14 ("If a [school district] does not offer an appeal process for determinations, it may opt to omit a section of appeals of determinations from its published grievance procedures.")

B. **Appeals of Dismissals.** As discussed elsewhere in this outline, school districts are required to have an appeal process to appeal from dismissal of a complaint.

VIII. INFORMAL RESOLUTION PROCESS

A. **Option to Offer Informal Resolution.** A school district may, but is not required to, offer an informal resolution process to resolve complaints. However, the informal resolution process may not be used when the complaint contains an

allegation that an employee engaged in sex-based harassment of an elementary or secondary student. 34 C.F.R. § 106.44(k)(1).

B. **Requirements for Informal Resolution Process.**

1. **Process is Voluntary.** The parties must voluntarily consent to the process. The school district must not require or pressure parties to participate. The school district cannot require parties to waive their right to an investigation as a condition for exercising any right. 34 C.F.R. § 106.44(k)(2).

2. **Notice requirements.** Before initiating the process, the district must provide notice to the parties of the following:

   a) The allegations;

   b) The requirements of the informal resolution process;

   c) That, prior to agreeing to a resolution, any party has the right to withdraw from the informal resolution process and to initiate or resume the school district's grievance procedures;

   d) That the parties' agreement to a resolution at the conclusion of the informal resolution process would preclude the parties from initiating or resuming grievance procedures arising from the same allegations;

   e) The potential terms that may be requested or offered in an informal resolution agreement, including notice that an informal resolution agreement is binding only on the parties; and

   f) What information the school district will maintain and whether and how the school district could disclose such information for use in grievance procedures, if grievance procedures are initiated or resumed.
   34 C.F.R. § 106.44(k)(3).

3. **Facilitator.** The facilitator must not be the same person as the investigator/decisionmaker. The facilitator must also be trained and not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent. 34 C.F.R. § 106.44(k)(4).

4. **Potential Terms.** Potential terms of an agreement could include restrictions on contact and restrictions on participation in one or more of the school district's programs or activities. 34 C.F.R. § 106.44(k)(5).

C. **Concurrent Responsibilities of Title IX Coordinator.** If a complaint is resolved through the informal resolution process, the Title IX Coordinate has the same responsibility they have following a dismissal or determination, which is "to take other appropriate prompt and effective steps to ensure that sex discrimination does not continue or recur within the [school district]'s education program or activity." 34 C.F.R. § 106.44(k)(1).

IX. SUPPORTIVE MEASURES

A. **Definition.** "Supportive Measures" means individualized measures offered as appropriate, as reasonably available, without unreasonably burdening a complainant or respondent, not for punitive or disciplinary reasons, and without fee or charge to the complainant or respondent to:"

1. Restore or preserve that party's access to the school district's education program or activity, including measures that are designed to protect the safety of the parties or the school district's educational environment; or

2. Provide support during the grievance procedures or during the informal resolution process.
34 C.F.R. § 106.2.

B. **Availability.** The Title IX Coordinator must offer and coordinate supportive measures for a complainant. During the grievance process or informal resolution process, the Title IX Coordinator must also offer and coordinate supportive measures for a respondent. 34 C.F.R. § 106.44(f)(1)(ii).

C. **Types of Supportive Measures.** The school district determines what types of supportive measures are "reasonably available." These may include counseling, extensions of deadlines, increased security and monitoring, restrictions on contact, leave of absence, changes in class schedules, and training and education. 34 C.F.R. § 106.44(g)(1).

D. **Purpose of Supportive Measures.** Supportive measures must not "unreasonably burden" either party. The intent is to protect safety of the parties or offer support during the grievance procedures. Supportive measures are not punitive or disciplinary. 34 C.F.R. § 106.44(g)(2).

E. **Modification or Termination of Supportive Measures.** The school district may modify, support, or continue supportive measures at the conclusion of the grievance procedures or informal resolution process. 34 C.F.R. § 106.44(g)(3).

F. **Review of Supportive Measures by Impartial Employee.** A complainant or respondent may seek modification or reversal of a school district's decision to provide, deny, modify or terminate supportive measures applicable to them. Such challenges are heard by an "impartial employee." The impartial employee must be someone other than the employee who made the challenged decision and have the authority to modify or reverse the decision. 34 C.F.R. § 106.44(g)(4).

G. **Privacy.** A school district must not disclose information about supportive measures to someone else, unless it is necessary to provide the supportive measure or preserve a party's access to the education program or activity. 34 C.F.R. § 106.44(g)(5).

H. **Students with Disabilities.** If a student has an individualized education plan ("IEP"), the Title IX Coordinator must consult with at least one member of the student's IEP team to determine how to comply with the Individuals with Disabilities in Education Act while implementing supportive measures. 34 C.F.R. § 106.44(g)(6)(i).

I. **Complaints of Sex Discrimination Other than Sex-Based Harassment.** For complaints of sex discrimination other than complaints of sex-based harassment, the school district is not required to "alter the alleged discriminatory conduct for the purpose of providing a supportive measure." 34 C.F.R. § 106.44(g).

X. IMPARTIALITY AND BIAS IN INVESTIGATIONS

A. Bias

1. All persons participating in the Title IX process on behalf of the district should take care not to let bias affect their participation in the process. A district representative should not serve as an investigator or decision-maker if there are any potential issues regarding bias.

2. Individuals involved in Title IX investigations should also be aware of implicit bias, which can cause attitudes and stereotypes to unconsciously affect decisions. The Harvard Implicit Association Test (https://implicit.harvard.edu/implicit/takeatest.html) is a great individual resource for individuals to start exploring their own perceptions.

3. The Title IX regulations specifically state that credibility determinations cannot be based on a person's status as a complainant, respondent, or witness. This means that it is inappropriate for someone to let someone's mere status as an alleged "victim" or "perpetrator" influence how that person's credibility is measured.

B. Conflicts of Interest

1. Individuals should not participate in a grievance process as an investigator or decision-maker if they have a conflict of interest that would affect their judgment in the outcome. The regulations do not specifically define conflicts of interest.

2. **Relationships.** Of course, individuals should not participate in a grievance process that includes a family member, but there may be other types of relationships that could affect an investigator or decision-maker's ability to effectively evaluate the claims.

    a) For example, if the investigator and complainant have a close working relationship and will need to continue to work closely together, that could (consciously or unconsciously) affect the investigator's decision in order to preserve a good working environment.

    b) However, merely having a prior interaction with that person is not a disqualifying conflict of interest, so long as those interactions were in a work/educational context. Thus, a principal would not have a conflict of interest in investigating a student, even if the principal had other interactions with a student. And an HR Director who met an employee once when they interviewed for the position would not have a conflict of interest with that person.

C. Avoid Prejudging Facts

1. The Title IX regulations specifically state that a respondent is to be presumed not responsible.

2. Investigators and decision-makers should not reach their conclusions until they have received all of the evidence and heard from all of the witnesses.

3. Investigators and decision-makers should base their findings on facts obtained during the investigation process, not on generalizations or reputations of the people involved.

XI. PUBLICATION AND RECORDKEEPING

A. **Adoption, Publication, and Implementation of Nondiscrimination Policy, Notice of Nondiscrimination, and Grievance Procedures.** Samples of these documents are available from the U.S. Department of Education here: https://www2.ed.gov/about/offices/list/ocr/docs/resource-nondiscrimination-policies.pdf

1. **Nondiscrimination Policy.** The policy may be very brief. The following contains all required elements of the nondiscrimination policy identified in 34 C.F.R. § 106.8(b) for a K-12 school:

   [SCHOOL DISTRICT NAME] does not discriminate on the basis of sex and prohibits sex discrimination in any education program or activity that it operates, as required by Title IX, including in employment.

2. **Notice of Nondiscrimination.** Section 106.8(c) of the regulations requires school districts to have a notice of nondiscrimination.

   a) The notice must contain the following elements:

      (1) A statement of the nondiscrimination policy containing the same elements as a);

      (2) A statement that inquiries about the application of Title IX and its regulations to the school district may be referred to the Title IX Coordinator, OCR, or both;

      (3) The name or title, office address, email address, and telephone number of the Title IX Coordinator;

      (4) How to locate the school district's nondiscrimination policy and grievance procedures; and

      (5) How to report information about conduct that may constitute sex discrimination under Title IX and how to make a complaint of sex discrimination.
      34 C.F.R. § 106.8(c)(1).

   b) Publication of notice.

      (1) A school district must publish all elements of the notice of nondiscrimination on its website and in each handbook,

catalog, announcement, or bulletin that it makes available to students, parents/guardians, employees, applicants for employment; and unions or professional organizations with CBAs or professional agreements. 34 C.F.R. § 106.8(c)(2)(1).

(2) If, due to format or size of any publication, the full notice of nondiscrimination does not fit, the school district may instead include a statement that the school district prohibits sex discrimination in any education program or activity that it operates and that individuals may report concerns or questions to the Title IX Coordinator and provide the location of the notice on its website.

3. **Grievance Procedure.** The other item that must be drafted under Title IX is grievance procedures. Requirements for grievance procedures are identified elsewhere in this outline.

B. **Recordkeeping.** The following must be maintained for a period of seven years:

1. Documentation of the informal resolution process or grievance procedures for each complaint of sex discrimination and the outcome of each complaint.

2. For every notice of conduct that reasonably may constitute sex discrimination, records documenting the school district's response.

3. All materials used to provide training. The school district must make these training materials available upon request for inspection by members of the public. (This is a change from 2020, which required school districts to publish all training materials on their website)
34 C.F.R. § 106.8(f).

XII. ADDITIONAL REQUIREMENTS

A. **Emergency removal.** The Title IX regulations do not prohibit a school district from removing a respondent from an education program or activity on an emergency basis, as long as the school district conducts "an individualized safety and risk analysis, determines that an imminent and serious threat to the health or safety of a complainant or any students, employees, or other persons arising from the allegations of sex discrimination justifies removal, and provides the respondent with notice and an opportunity to challenge the decision immediately following the removal." 34 C.F.R. § 106.44(h).

1. Although Title IX does not prohibit this type of removal, school districts must comply with the Minnesota Pupil Fair Dismissal Act or Wis. Stat. § 120.13.

2. Schools must also ensure that any emergency removals are consistent with the Individuals with Disabilities in Education Act ("IDEA") and Section 504.

B. **Administrative Leave.** Employees may be placed on administrative leave pending the completion of the grievance procedures. School districts must apply with any applicable collective bargaining agreements, personnel policies, or handbooks. 34 C.F.R. § 106.44(i).

C. **Privacy of Educational Data.** provides that Title IX supersedes any conflicting state or local law. 34 C.F.R. § 106.6(b) Title IX also supersedes FERPA. 34 C.F.R. 106.6(e).

1. In the Department's commentary, it provides: "To the extent that a conflict exists between a [school district]'s obligations under Title IX and under FERPA, § 106.6(e) expressly states that the obligation to comply with the Title IX regulations is not obviated or alleviated by the FERPA statute or regulations." 89 Fed. Reg. 33535.

2. However, that does not mean that disclosure of educational data is limitless. 34 C.F.R. § 106.44(j) permits disclosure of personally identifiable information obtained in the course of complying with Title IX in only the following circumstances:

   a) When the school district has prior written consent from a person with the legal right to consent to such disclosure;

   b) When the information is disclosed to a parent, guardian, or other legal representative with the right to receive such disclosures;

   c) To fulfill a requirement under Title IX, including taking action to address conduct that may reasonably constitute sex discrimination;

   d) As required by federal law;

   e) To comply with a state, local, or federal law that is not in conflict with Title IX.

D. **Monitoring Barriers to Reporting.** Title IX Coordinators must be required to monitor school programs and activities for any barriers that might prevent complainants from reporting potential sex discrimination and take reasonable steps to address these barriers. C.F.R. § 106.44(b).

Two potential barriers identified by the Department of Education include the possibility of being disciplined for engaging in consensual sexual activity and the fear of being accused of making false statements. The new regulations clarify that Title IX regulations prohibit collateral discipline for consensual activities and accusations of false statements based solely on the determination that sex discrimination occurred. C.F.R. § 106.45(h)(5).

XIII. PROTECTIONS FOR PREGNANT STUDENTS

A. **Prohibition on Discrimination Based on Pregnancy and Related Conditions.** A school district is prohibited from discriminating "in its education program or activity against any student based on the student's current, potential, or past pregnancy or related conditions." 34 C.F.R. § 106.40(b).

B. **What conditions are covered?** The new regulations define "pregnancy and related conditions" to include:

1. Pregnancy, childbirth, termination of pregnancy, or lactation;

2. Medical conditions related to pregnancy, childbirth, termination of pregnancy, or lactation;

3. Recovery from pregnancy, childbirth, termination of pregnancy, lactation, or related medical conditions.
34 C.F.R. § 106.2.

C. **Notification.** When a student (or a person who has a legal right to act on behalf of the student) informs a school district employee that they are pregnant or have a related condition, the employee must provide them with the Title IX Coordinator's contact information and inform them that the Title IX Coordinator can "coordinate specific actions to prevent sex discrimination and ensure the student's equal access" to the education program and activity. 34 C.F.R. § 106.40(b)(2).

D. **Reasonable Modifications.** A school district must make reasonable modifications to its policies, practices, or procedures as necessary to prevent sex discrimination and ensure equal access for pregnant students.

1. Reasonable modifications are based on a student's individualized needs and in collaboration with the student. A school district is not required to make a modification if it would fundamentally alter the education program or activity. 34 C.F.R. § 106.40(b)(3)(ii)(A).

2. A student has discretion to accept or decline each offered reasonable modification. If accepted, the school district must implement it. 34 C.F.R. § 106.40(b)(3)(ii)(B).

3. Reasonable modifications may include breaks during class to express breastmilk or attend to pregnancy-related health needs; intermittent absences to attend medical appointments; access to online or homebound education; changes in courses or sequences of courses; allowing student to sit or stand; changes in physical space, elevator access, etc. 34 C.F.R. § 106.40(b)(3)(ii)(C).

E. **Voluntary Access to Separate Program.** The school district must allow a student to voluntarily access any separate and comparable portion of the education program. 34 C.F.R. § 106.40(b)(3)(iii).

F. **Voluntary Leaves of Absence.** A school district must allow a student to take a leave of absence from school for, at minimum, the period of time deemed medically necessary by the student's licensed health care provider. 34 C.F.R. § 106.40(b)(3)(iv).

G. **Lactation Space.** A school district must ensure that the student can access a lactation space, other than a bathroom, that is clean, shielded from view, free from intrusion from others, and may be used by a student for expressing breast milk or breastfeeding. 34 C.F.R. § 106.40(b)(3)(v). These requirements are similar to those required for employees under other laws; there is no requirement to establish a separate space if a student could access the same space as staff when needed.

H. **Limitation on Supporting Documentation.** A school district must not require supporting documentation for reasonable modifications unless it is "necessary and reasonable" to determine the accommodations or whether to take additional actions. 34 C.F.R. § 106.40(b)(3)(vi). Similarly, a school district cannot require a certification that a pregnant student is physically able to participate in an education program or activity unless: a certified level of physical ability is necessary for participation, all students are required to provide certification, and the information is not used to discriminate against the pregnant student. 34 C.F.R. § 106.40(b)(5).

XIV. ADDITIONAL INVESTIGATION TIPS

A. Preliminary Steps.

1. **Consider the Complaint.** Determine that the alleged conduct, if true, would meet the definition of sexual harassment (or retaliation for reporting sexual harassment). If so, the Title IX process must be followed. If not, the investigator may approach the complaint consistent with other applicable policies.

2. **Preliminary Plan.** Identify people who should be interviewed, including the complainant, respondent, and any witnesses. Identify whether there are any documents that would be useful to review before interviewing witnesses and, if possible, make arrangements to obtain those documents.

3. **Notice.** Ensure the pre-investigation notice has been provided to the known parties, which will typically include any complainants and respondents. This may be provided at the complainant or respondent's interview, if the interview takes place promptly after the complaint.

B. General Investigation Tips

1. **Starting an Investigative Interview**

   a) Provide each witness with a Tennessen warning/data practices notice and, if complainant or respondent, the required Title IX notice.

   b) Explain the purpose of the interview and that the district takes complaints of this nature seriously.

   c) Define your role in the investigation process as an impartial investigator.

   d) If there are others present (complainant or respondent representative, union representative for employee, attorneys), explain that they are there to offer support, but you need the information to come from the witness.

   e) Explain the investigation process. Inform the witness that the district may follow up on information that they provide.

f) Also inform the person being interviewed that retaliation in any form will not be tolerated. Instruct them to report suspected retaliation immediately.

2. **During the Interview**

a) Open with questions about the witness's background/ interests. This helps you establish a rapport with the witness and gives you a baseline for their demeanor in responding to questions.

(1) For employees, their employment background, role, job duties, job environment, and identifying their supervisor or anyone they supervise, are typically relevant and good to evaluate demeanor.

(2) With students, background questions should be age-appropriate but not overly personal, and may not be relevant to the investigation. Questions about their favorite classes, favorite color, who their teacher is, are usually safe, as are questions based on observations. For example, if a young student is wearing a Star Wars t-shirt, "do you like Star Wars? I do too! Which movie is your favorite?"

(3) Observe the witness's behavior when they respond to these questions and compare it to their responses to later questions. This is particularly helpful if you are attempting to discern whether a reaction is due to nerves or because the witness is lying.

(4) This opening also gives you an opportunity to put the witness at ease. Many respondents will be guarded initially but asking "easy" questions gives you a chance to connect to see if they will let their guard down.

b) Don't be so committed to asking questions you developed ahead of time that you miss an opportunity to ask follow-up questions.

(1) Consider grouping questions into topics, like "October 10 incident" or "allegations related to cafeteria." Then ensure you have obtained all the information you need with respect to a specific topic before moving on. This strategy limits the need to look through all of your pre-written questions and all of your notes at the end to ensure you have asked everything you intended.

(2) Sometimes, unanticipated answers will lead you to important information and change the direction of the interview.

c) Avoid leading questions. Instead, ask short, open-ended questions. Your goal is to have the witness talk more than you do.

d) Use the funnel approach by starting with broad questions that get increasingly narrower.

e) Always be sure to cover the who, what, when, where, why and how questions. Get specific details and do not allow the witness to generalize or draw conclusions rather than offer facts. Follow each line of questioning to its logical conclusion.

(1) Use "what do you mean by that?" "tell me more about that" or "I don't understand, can you explain…"

(2) Make sure you understand what the witness means by the language they are using, especially if the witness is young or using slang terms.

f) Ask questions designed to separate what the witness knows from personal knowledge from information the witness heard from others. If the witness heard the information from someone else, ask the witness to identify the source of the information.

g) Ask if there are any other people who might have information about the incident and determine what information they might have.

h) Do not be afraid to ask tough questions. The subject matter in a Title IX investigation will almost certainly be a difficult topic. Individuals who are not comfortable asking detailed questions to gather information about allegations of sexual harassment should not serve as an investigator.

i) Ask for corroborating evidence, including e-mail and voicemail messages, texts, Facebook or other social media posts, notes, diary entries, a calendar, and the names of other witnesses. Get this on the spot, if the witness is able to provide it, even if this adds some time to the interview.

j) Follow-up on all "I don't know" and "I can't recall" answers.

(1) Break the question down and/or rephrase it to determine whether the witness does not have the information or is being evasive.

(2) If you sense the witness is being evasive, circle around and come back to the question at other points in the interview.

(3) Do not hesitate to express your surprise that the witness is answering "I don't know" or "I don't recall" if you can back up your expression of surprise with an objective reason.

k) Make sure the individual answers the question you have asked, rather than some other question that was not asked.

l) Ask "wrap-up" questions to ensure there isn't confusion about multiple events. "Was this the only time Respondent spoke to you about X in person?" "Are there any other times you did Y?"

m) Use your judgment in determining how much to tell the witness about the complaint. You should disclose as little as possible, but also be mindful of the fact that there are circumstances where it may be necessary to disclose what another witness said in order to determine whether someone is being honest.

n) Observe witness demeanor throughout the interview and document your observations in your notes.

3. **Concluding the Interview**

a) Inform every witness that retaliation will not be tolerated and that it should be reported immediately.

b) Explain the next steps after interviewing the witness, whether there will be any follow-up with them, and the time frames for completion of those steps.

4. **Interview don'ts.**

a) Do *not* guarantee any particular results from the investigation, and do not suggest that disciplinary or any other specific action will be taken against the respondent.

b) Do *not* promise confidentiality because such a promise is unrealistic, inconsistent with Title IX requirements, and can impede the ability to investigate the complaint.

c) Do *not* take sides with either the complainant or respondent.

d) Do *not* be intimidated by a witness or their representative. It is your role to get the answers you need, and others do not have the right to interfere with that process.

C. **Specific Student/ Staff**

1. **Students**

a) Decide in advance whether parents will be permitted or invited to attend the interview of their child. Factors such as the age of the student and the subject matter of the investigation should be considered.

b) Unless a school district has adopted a policy to the contrary, school officials are not required to permit parents to attend interviews.

2. **Staff**

a) Staff being interviewed as fact witnesses are not entitled to have a representative attend with them, except in the rare case that a contract or policy says otherwise.

b) If an employee is a respondent and a member of a union has the right to have a union representative present because the interview could reasonably result in discipline to the employee. *N.L.R.B. v. Weingarten, Inc.*, 95 S. Ct. 959 (1975).

3. **Refusals to Answer.** Decide in advance how you will respond if the witness refuses to voluntarily answer your questions. In many cases, respondents will voluntarily cooperate if they are advised the investigation interview may be their only opportunity to provide information.

a) Under the prior regulations, employees could not be required to answer questions. Under the new regulations, employees who are witnesses may be required to answer questions. If an employee witness refuses to answer, they should be provided a *Garrity* notice (in Minnesota) and directed to answer.

b) However, students may not be required to provide information in an investigation.