

TRACKING TITLE IX: What School Administrators Need to Know

Calhoun County Schools
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Before we begin:

- ▶ Today we are necessarily speaking in generalities rather than specifics
- ▶ The information provided is not legal advice
- ▶ **Information in this presentation may quickly become outdated**
(New Title IX regulations are expected to be released this fall)
- ▶ Always research original sources of authority and update this information to ensure accuracy when dealing with a specific matter
- ▶ Do not act or rely upon the information contained in this presentation without seeking the advice of an attorney

The Fundamentals of Title IX

Title IX, Education Amendments of (1972)

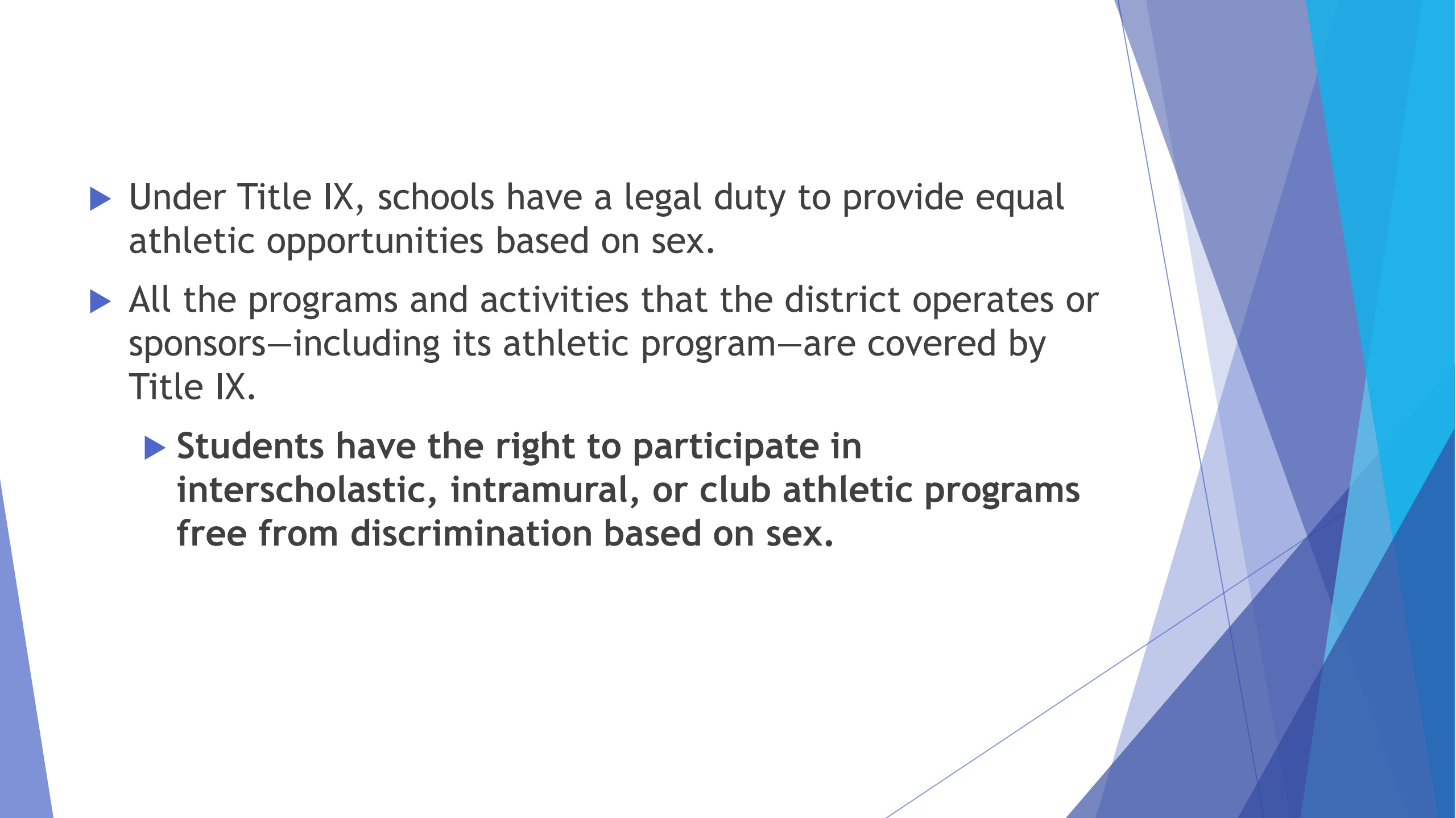
“No person . . . shall, **on the basis of sex**, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under **any education program or activity** receiving Federal financial assistance”

Does Title IX protect only students?

- ▶ No. Title IX protects everyone who interacts with a school from discrimination, including parents and guardians, students, employees, and applicants.



ATHLETICS, INTRAMURALS, INTERSCHOLASTIC, CLUBS

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- ▶ Under Title IX, schools have a legal duty to provide equal athletic opportunities based on sex.
 - ▶ All the programs and activities that the district operates or sponsors—including its athletic program—are covered by Title IX.
 - ▶ Students have the right to participate in interscholastic, intramural, or club athletic programs free from discrimination based on sex.

TITLE IX TASK:

Evaluate your programs

- ▶ Facilities
 - ▶ Practice, Training, Competitions
- ▶ Equipment and supplies
- ▶ Schedules
- ▶ Meeting and Practice Times
- ▶ Transportation and Allowances
- ▶ Coaching (time, qualifications, compensation, duties)
- ▶ Publicity



PREGNANCY

Can a school require a pregnant student to obtain a doctor's permission before allowing her to attend school?

- ▶ NO!
- ▶ Schools cannot require a pregnant student to produce a doctor's note in order to stay in school or participate in activities, including interscholastic sports, unless the same requirement to obtain a doctor's note applies to all students being treated by a doctor.
- ▶ Even when a student is in the later stages of pregnancy; schools should not presume that a pregnant student is unable to attend school or participate in school activities.

Does Title IX Apply to Pregnancy?

- ▶ Yes. Title IX specifically prohibits discrimination against a student based on pregnancy, childbirth, false pregnancy, termination of pregnancy, or recovery from any of these conditions.
- ▶ Title IX also prohibits a school from applying any rule related to a student's parental, family, or marital status that treats students differently based on their sex.
- ▶ **It is illegal for schools to exclude a pregnant student from participating in any part of an educational program.** This prohibition applies to specific classes such as advanced placement or honors classes, extracurricular programs, interscholastic sports, honor societies, and opportunities for student leadership, among other activities.
- ▶ May implement special instructional programs or classes for a pregnant student, but participation **MUST BE COMPLETELY VOLUNTARY ON THE PART OF THE STUDENT AND CLASSES/PROGRAMS MUST BE COMPARABLE TO THOSE OFFERED TO OTHER STUDENTS.**

- ▶ a school must excuse a student's absences because of pregnancy or childbirth for as long as the student's doctor deems the absences medically necessary. When a student returns to school, she must be allowed to return to the same academic and extracurricular status as before her medical leave began.

Office of Student Rights Guidance on Supporting The Academic Success of Pregnant and Parenting Students, June 2013

SEXUAL HARASSMENT

2020 Title IX Regulations

- ▶ Only applies to sexual harassment allegations
- ▶ Released informally by the United States Department of Education on May 6, 2020 (34 CFR Part 106)
- ▶ Effective August 14, 2020
- ▶ Does NOT apply retroactively
- ▶ Requires training for Title IX Coordinators, Investigators, Decision-makers, Appellate Decision-makers, and Facilitators of informal resolution processes

Title IX Requirements

- ▶ The District has a responsibility to respond **promptly and effectively**. If the District knows or reasonably should know about sexual harassment or sexual violence that creates a hostile environment, **it must take immediate action to eliminate the sexual harassment or sexual violence, prevent its recurrence, and address its effects.**
- ▶ Even if a student or his or her parent does not want to file a complaint or does not request that the District take any action on the student's behalf, **if a District knows or reasonably should know about possible sexual harassment or sexual violence, it must promptly investigate to determine what occurred and then take appropriate steps to resolve the situation.**

CHANGE IS ON THE WAY...

- ▶ **NEW 2023 TITLE IX REGULATIONS**
- ▶ U.S. Department of Education released Notice of Proposed Rule Making on June 23, 2022.
- ▶ A 60-day comment period resulted in twice as many comments as the 2020 NPRM.
- ▶ U.S. Department of Education initially planned to release the new regulations as early as May of 2023, but have now pushed that date back to October 2023.
- ▶ If enacted, the 2023 regulations would significantly change how schools respond to allegations, handle student/staff pregnancies, and decide Title IX matters, to name a few.
- ▶ **The information discussed in this presentation applies to the 2020 regulations currently in effect.**

...MORE CHANGES

▶ TITLE IX GENDER IDENTITY AND ATHLETICS RULE

- ▶ Proposed on April 6, 2023, Comment period ended May 15, 2023
- ▶ Would implement a new test for schools that wish to limit student participation in athletics based on gender identity.
- ▶ As drafted, the proposed rule would prohibit a school, college, or university from receiving federal funds from the Department of Education if it adopts or applies sex-related criteria limiting or denying a student's eligibility to participate on a male or female team consistent with their gender identity.
- ▶ A school could only use same-sex limiting criteria if it:
 - Is specific to each sport, level of competition, grade, and education level
 - Is substantially related to the achievement of an important educational objective
 - Minimizes harm to students whose opportunity to participate on a male or female team consistent with their gender identity would be limited or denied.

The U.S. Department of Education announced the final rule will be released at the same time as the 2023 Title IX final rule.

TITLE IX TERMS YOU NEED TO KNOW

SEXUAL HARASSMENT

is defined as:

- ▶ **Quid pro quo harassment**—that is, conditioning any educational opportunity or benefit on the granting of sexual favors—constitutes a *per se* violation of Title IX, regardless of its severity or pervasiveness. *Quid pro quo* harassment constitutes *conduct* without any constitutional protection.
- ▶ Any form of **sexual assault, dating violence, domestic violence, or stalking** as defined by the Clery Act/VAWA constitutes sexual harassment. These forms of misconduct are so serious in and of themselves that no finding of “pervasiveness” is required.
- ▶ ***Unwelcome conduct of a sexual nature*** that is “so serious, pervasive, and objectively offensive that it effectively denies a person equal access” to an educational program as determined under a ***reasonable person*** standard.

- ▶ A **Complainant** means an individual who is alleged to be a victim of sexual harassment
- ▶ A **Respondent** means any individual who is reported to be the perpetrator of sexual harassment
- ▶ Importantly, a person may be a **complainant**, or a **respondent**, even where no formal complaint has been filed and no grievance process is pending.

ACTUAL KNOWLEDGE

- ▶ A school district has ***actual knowledge*** when **any** employee knows of sexual harassment.
 - ▶ An employee knows of sexual harassment when they have observed it or have heard about it.
 - ▶ Notice to a Title IX Coordinator or to an official with authority to institute corrective measures is actual knowledge.
 - ▶ When a school district with actual knowledge of sexual harassment in its education program or activity refuses to respond to sexual harassment or a report of sexual harassment, such a refusal is clearly unreasonable under § 106.44(a) and constitutes a violation of the final regulations.

Can a Complainant file Anonymously?

- ▶ NO
- ▶ A complainant (i.e., a person alleged to be the victim of sexual harassment) cannot file a formal complaint anonymously because § 106.30 defines a formal complaint to mean a document or electronic submission (such as an e-mail or using an online portal provided for this purpose by the recipient) that contains the complainant's physical or digital signature or otherwise indicates that the complainant is the person filing the formal complaint.
- ▶ Fundamental fairness and due process principles require that a respondent knows the details of the allegations made against the respondent, to the extent the details are known, to provide adequate opportunity for the respondent to respond.

HOW TO HANDLE ALLEGATIONS OF SEXUAL HARASSMENT

How to respond once there is actual knowledge

Responses to Allegations of Sexual Harassment - 34 C.F.R. 106.44

- ▶ General response to sexual harassment:

- ▶ A school district with actual knowledge of sexual harassment in an education program or activity of the school district against a person in the United States **must** respond promptly in a manner that is **not deliberately indifferent**.
- ▶ A school district is **deliberately indifferent** only if its response to sexual harassment is **clearly unreasonable in light of the known circumstances**.

SUPPORTIVE MEASURES

- ▶ Non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, and without fee or charge to the complainant or the respondent before or after the filing of a formal complaint or where no formal complaint has been filed.
- ▶ Such measures are designed to restore or preserve equal access to the school district's education program or activity without unreasonably burdening the other party, including measures designed to protect the safety of all parties or the school district's educational environment or deter sexual harassment.

SUPPORTIVE MEASURES

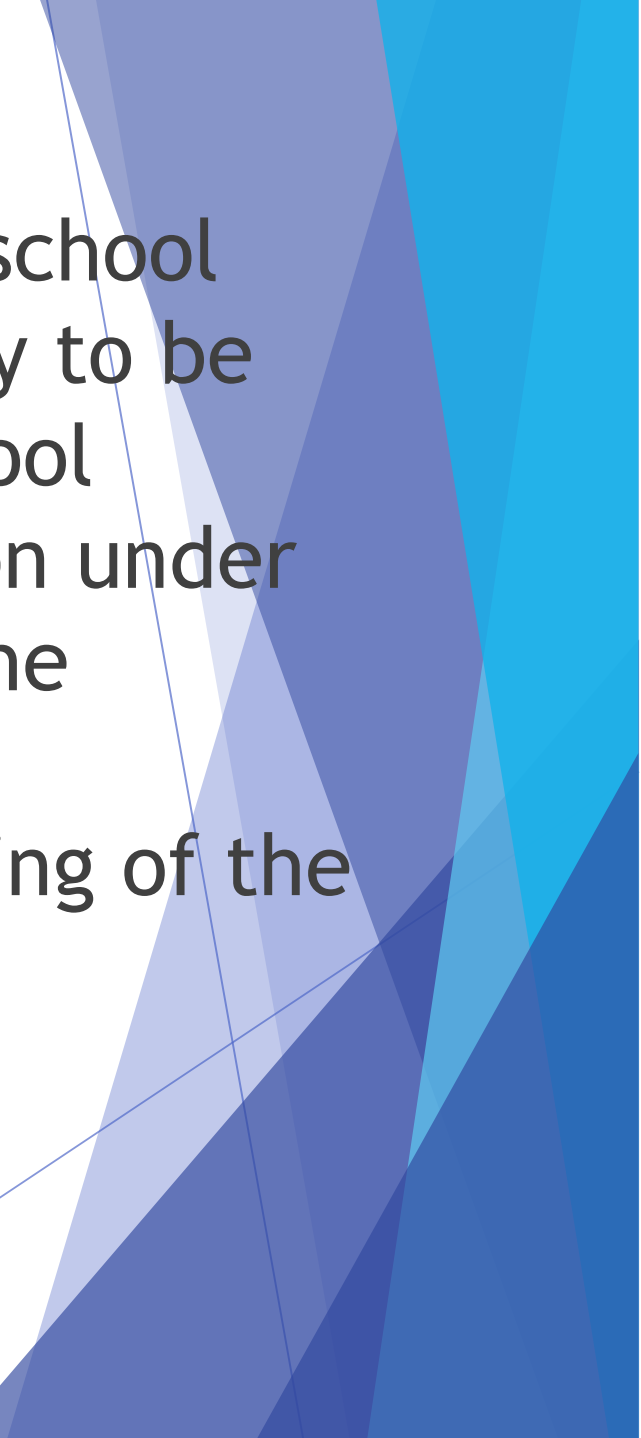
- ▶ DOCUMENT ALL SUPPORTIVE MEASURES OFFERED
- ▶ Supportive measures are **free** to the parties
- ▶ Supportive measures needed can be changed or modified as the grievance process continues

EMERGENCY REMOVAL

- ▶ Nothing precludes a school district from removing a respondent from the education program or activity on an emergency basis, provided that the school district undertakes an individualized safety and risk analysis, determines that an immediate threat to the physical health or safety of any student or other individual arising from the allegations of sexual harassment justifies removal, and provides the respondent with notice and an opportunity to challenge the decision immediately following the removal.
- ▶ This provision may not be construed to modify any rights under the Individuals with Disabilities Education Act, Section 504 of the Rehabilitation Act of 1973, or the Americans with Disabilities Act.

ADMINISTRATIVE LEAVE

- ▶ Nothing precludes a school district from placing a non-student employee respondent on administrative leave during the pendency of a grievance process that complies with § 106.45. This provision may not be construed to modify any rights under Section 504 of the Rehabilitation Act of 1973 or the Americans with Disabilities Act.
- ▶ Superintendent needs to notify employee as required by law

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- ▶ The Department of Education will not deem a school district's determination regarding responsibility to be evidence of deliberate indifference by the school district, or otherwise evidence of discrimination under Title IX by the school district, solely because the Department would have reached a different determination based on an independent weighing of the evidence.

CONSOLIDATION OF FORMAL COMPLAINTS

- ▶ A Title IX Coordinator, in their discretion, may consolidate formal complaints where the allegations arise out of the same facts
- ▶ What about FERPA?

THE TITLE IX GRIEVANCE PROCESS

What is it and when does it officially begin?

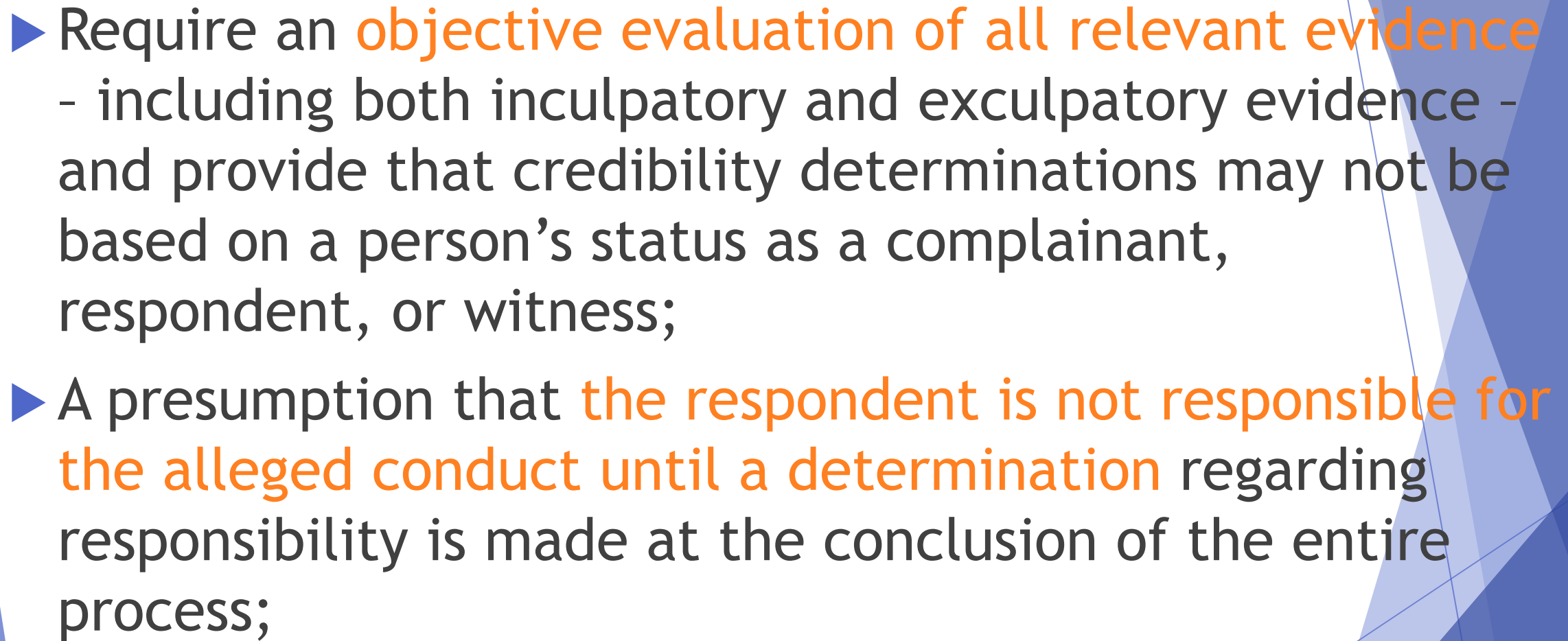
The Grievance Process

- ▶ **Begins once a formal complaint is filed**
- ▶ A school district's "grievance process" = its Title IX policy and procedures
- ▶ **DO NOT** confuse "grievance process" with filing something with the grievance board; a citizen's complaint or any other process where we file a "grievance."

TITLE IX TEAM TASK:

“EQUAL TREATMENT, EVERY TIME”

- ▶ The purpose of the grievance process is to ensure that both the complainant and respondent are treated equal.
- ▶ Treat complainants and respondents equitably at all stages
- ▶ Follow a process that complies with the regulations before the imposition of any disciplinary sanctions or other actions that are not supportive measures as defined in § 106.30, against a respondent.

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- ▶ Require an **objective evaluation of all relevant evidence** - including both inculpatory and exculpatory evidence - and provide that credibility determinations may not be based on a person's status as a complainant, respondent, or witness;
 - ▶ A presumption that **the respondent is not responsible for the alleged conduct until a determination** regarding responsibility is made at the conclusion of the entire process;



TITLE IX TEAM ROLES

Avoiding Conflicts and Serving Impartially

Personnel Needs and Training

- ▶ The Title IX Coordinator, investigator, and decision-maker are **3 different people**
- ▶ All 3, plus the person who facilitates informal resolutions, must be trained
- ▶ Training must be posted
- ▶ Do these people have to be employees of the school district?

The Importance of Impartiality

- ▶ An impartial process before unbiased officials promotes accurate, reliable outcomes, which effectuate the purpose of Title IX to provide individuals with effective protection from discriminatory practices.
-85 Fed. Reg. 30054.

What does it mean to be impartial? Who does it apply to?

ANY INDIVIDUAL DESIGNATED AS:

- ▶ Title IX Coordinator
- ▶ Investigator
- ▶ Decision-maker
- ▶ Appellate Officer
- ▶ Facilitator of an informal resolution process

MUST NOT HAVE A:

- ▶ Conflict of interest OR bias
- ▶ for OR against
- ▶ Complainants or Respondents generally OR an individual Complainant or Respondent

What is impermissible bias?

- ▶ Impermissible bias is deciding based on the characteristics of the parties, rather than based on the facts.
- ▶ This includes treating a party differently on the basis of the party's sex or stereotypes about how men or women behave with respect to sexual violence
- ▶ It also includes blaming, ignoring, or punishing a party due to stereotypes about the party

Transparent Title IX Team

- ▶ All members of the Title IX team need to be transparent at all times and notify the Title IX Coordinator of:
 - ▶ Any prior professional experiences and affiliations
 - ▶ Any prior or current personal experiences or conflicts
 - ▶ If there is ever a question, consider disclosing to the parties and providing them the opportunity to object.
 - ▶ If one party objects, an alternative needs to be selected.

If at any time you feel that you or any member of the Title IX team has a conflict of interest and are incapable of acting in an impartial manner, an alternative individual needs to be brought in to cover the role particular grievance process.

REQUIREMENTS DURING THE INVESTIGATION

When investigating a formal complaint and throughout the process, a school district must:

- ▶ Ensure that the **burden of proof and the burden of gathering evidence rests on the school district** and not on the parties.
- ▶ The school district cannot access, consider, disclose, or otherwise use a party's records that are made or maintained by a medical professional...unless the school district obtains that party's voluntary, written consent to do so.
- ▶ **Provide an equal opportunity for the parties to present witnesses**, including fact and expert witnesses, and other inculpatory and exculpatory evidence.

- ▶ Not restrict the ability of either party to discuss the allegations under investigation or to gather and present relevant evidence;
- ▶ Provide the parties with the same opportunities to have others present during the process, including the opportunity to be accompanied to any related meeting or proceeding by the **advisor of their choice**;
 - ▶ Does not need to be an attorney
- ▶ Provide **written notice** of the date, time, location, participants, and purpose of all hearings, investigative interviews, or other meetings, with sufficient time for the party to prepare to participate;
- ▶ Provide both parties an **equal opportunity to inspect and review ALL evidence obtained** as part of the investigation that is directly related to the allegations raised in a formal complaint

THE RULE OF 10

- ▶ **BEFORE THE INVESTIGATION REPORT:** The parties must **have at least 10 days** to review all evidence obtained during the investigation and submit a written response, which the investigator will consider prior to completion of the investigative report.
- ▶ **BEFORE GOING TO THE DECISION- MAKER:** At least **10 days prior** to being sent to the Decision-Maker, the parties must be provided a copy of the investigative report in an electronic format or a hard copy, for their review and written response.
- ▶ So **10 days** prior to issuing the investigation report the parties get to respond to the evidence and **10 days** prior to a hearing parties get to review and respond in writing to the investigation report.

TO DISMISS OR NOT TO DISMISS

When **MUST** you dismiss a Formal Complaint?

- ▶ If the allegations in a formal complaint do not meet the definition of sexual harassment

OR

- ▶ did not occur in the school's education program or activity against a person in the United States

You may still address the allegations in any manner the school deems appropriate under the school's own code of conduct.

When *MAY* you dismiss a Formal Complaint?

- ▶ If the complainant informs the Title IX Coordinator **in writing** that the complainant desires to withdraw the formal complaint or allegations therein,
- ▶ If the respondent is no longer enrolled or employed by the school,
- ▶ If specific circumstances prevent the school from gathering sufficient evidence to reach a determination.

You may still address the allegations in any manner the school deems appropriate under the school's own code of conduct.

How To Dismiss A Formal Complaint

- ▶ Schools must give the parties written notice of a dismissal (mandatory or discretionary)
- ▶ This Written Notice of Dismissal must include the reasons for the dismissal
- ▶ The parties have the right to appeal a Written Notice of Dismissal

COMMON QUESTIONS

- ▶ Do I need a lawyer?
- ▶ Did I do something wrong?
- ▶ Do I have to participate?
- ▶ Can I file a complaint anonymously?
- ▶ How long is this process going to take?
- ▶ Can I have an extension?
- ▶ Do you think I am going to be found responsible?

OTHER ISSUES THAT MIGHT NEED TO
BE ADDRESSED

REPRESENTATIVES

When an investigation could lead to discipline for Employee X, does she have a right to refuse to attend an investigative interview unless she is permitted to bring along a representative of her choice?

W. Va. Code 6C-2-3(g)(1):

- ▶ *“An employee may designate a representative who may be present at any step of the procedure as well as at **any meeting that is held with the employee for the purpose of discussing or considering disciplinary action.**”*



THE DECISION-MAKING PROCESS

RELEVANCY, DECISIONS, AND SANCTIONS

Only the Decision-Maker can make determination that a Title IX violation has or hasn't occurred.

Tasks of the Decision-Maker

- ▶ Provide the parties the opportunity to cross examine the other party and/or witnesses through the exchange of RELEVANT, written questions.
- ▶ Review the Investigation Report
- ▶ Issue a written decision which makes a finding as to:
 - ▶ EVERY Allegation
 - ▶ Remedies and/or sanctions to be imposed.

Inadmissible Evidence

Inadmissible evidence is evidence that cannot be presented to the Decision- maker

Examples of Inadmissible Evidence/Questions

Treatment records from a medical professional**

Any statements made by a party or witness who does not submit themselves to cross examination

Any questions that seek the disclosure of information that is protected under a legally recognized privilege, such as patient-doctor, attorney-client, or spousal privilege.**

** Unless the person holding the privilege waives the privilege in writing.

NON-COOPERATING PARTY OR WITNESS

- ▶ If a party or witness does not submit to cross-examination, the Decision-maker **MUST NOT** rely on any statement of that party or witness in reaching a determination regarding responsibility
 - ▶ **THIS INCLUDES ANY STATEMENTS MADE EARLIER TO THE INVESTIGATOR**
- ▶ Decision-maker cannot draw an inference (positive or negative) based solely on that party's or witness's absence or refusal to answer the questions
- ▶ School has no ability to compel parties or witnesses to cooperate, respond to questions, provide testimony, or otherwise participate in the process

Standard of Evidence: PREPONDERANCE OF THE EVIDENCE

Whether it is more likely than not that the Respondent committed the alleged sexual harassment.



ONCE A DECISION HAS BEEN MADE

- ▶ The written determination must be provided to the parties simultaneously.
 - Sent by the Decision-Maker
 - Title IX Coordinator copied
- ▶ The determination regarding responsibility becomes final either on the date that the school district provides the parties with the written determination of the result of the appeal, if an appeal is filed, or if an appeal is not filed, the date on which an appeal would no longer be considered timely.
- ▶ The Title IX Coordinator is responsible for effective implementation of any remedies.

THE APPEAL

- ▶ Both parties must be offered an appeal from a determination regarding responsibility, and from a school district's dismissal of a formal complaint or any allegations therein.

LIMITED GROUNDS FOR APPEAL

- ▶ An appeal may be made on the following grounds:
 1. Procedural irregularity that affected the outcome of the matter;
 2. New evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter; and
 3. The Title IX Coordinator, investigator(s), or decision-maker(s) had a conflict of interest or bias for or against complainants or respondents generally or the individual complainant or respondent that affected the outcome of the matter.

“I want to appeal this decision”

- ▶ If you receive written notice of a party’s desire to appeal the Decision-Makers decision OR your dismissal of a Title IX formal complaint, ask the party to provide a written statement specifying the grounds.
- ▶ If they provide appropriate grounds, proceed with the appeal

Record Keeping

A school district must maintain for a period of 7 years records of:

- ▶ (A) Each sexual harassment investigation including
 - ▶ any determination regarding responsibility
 - ▶ any audio or audiovisual recording or transcript
 - ▶ any disciplinary sanctions imposed on the respondent, and
 - ▶ any remedies provided to the complainant designed to restore or preserve equal access to the school district's education program or activity.
- ▶ (B) Any appeal and the result therefrom;
- ▶ (C) Any informal resolution and the result therefrom; and
- ▶ (D) All materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process.
 - A school district must make these training materials publicly available on its website, or if the school district does not maintain a website the school district must make these materials available upon request for inspection by members of the public.

Record Keeping

- ▶ For each response required under § 106.44, a school district must create, and maintain for a period of **7** years, records of any actions, including any supportive measures, taken in response to a report or formal complaint of sexual harassment.
- ▶ In each instance, the school district must document the basis for its conclusion that its response was not deliberately indifferent, and document that it has taken measures designed to restore or preserve equal access to the school district's education program or activity.
- ▶ If a school district does not provide a complainant with supportive measures, then the school district must document the reasons why such a response was not clearly unreasonable in light of the known circumstances.
- ▶ The documentation does not limit the school district in the future from providing additional explanations or detailing additional measures taken.



QUESTIONS?