

2024 Title IX Regulations & Important Changes You Need to Know

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ATTORNEYS AT LAW

Training Agenda

1. Status of Title IX 2024 Regs
2. Understanding the 2024 regulations
3. Mandatory, Confidential and Responsible- a review of employee obligations
4. Identifying, Investigation and Analyzing Title IX Claims
5. Collaboration with Special Education

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2024 Title IX Implementation Date w August 1, 2024

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

United States Code at 20 U.S.C. §1681-§1688

Avoiding the Chaos Focus on the Fundamentals

- The new rule changes definitions and the grievance process. The rule's fundamentals have remained-evaluation, investigation, decision-making, appeals and informal resolutions.
- Serving impartially, recognizing relevant information, developing effective investigation plans, effective interviews and analyzing information to make decisions are areas of need to ensure Title IX team understands the fundamentals of their role.

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Why so many changes to Title IX?

- The statutory language of Title IX has remained constant.
- It is the varied interpretations of the language and decisions therefrom that have caused instability.

Chaos at the Federal level

“Consistent with the Supreme Court’s interpretation of discrimination **because of sex** in the Title VII context, the new Title IX regulations provide that discrimination **on the basis of sex** in educational programs encompasses discrimination based on sexual orientation and gender identity.” The regs also provide that schools may not engage in differential treatment based on sex that imposes more than a de minimis harm, except as permitted by Title IX.”

Jared P. Cole, legislative attorney for Congressional Research Service. CRS operates solely at the behest of and under direction of Congress.

Continued chaos?

CRS recommendations:

- Expressly address the meaning of sex discrimination under Title IX
- Alter, remove or add exceptions to Title IX to refine who to apply the exceptions under the statute.
- Address how allowances for treatment bases on sex apply to transgender students.

And more chaos...

- On June 13th the House Education and Workforce committee approved a resolution of disapproval of the 2024 Title IX rules by a party-line vote.
- IF passed by Congress and signed by President Biden, H.J. Res. 165 would rescind the Title IX regulations.
- IF Congress passes the resolution a Presidential Veto could only be overridden with 2/3 majority in both chambers.

And even more chaos....

- PDE issued guidance on Wednesday, July 29, 2024 regarding a press release issued by OCR.
- A Federal injunction has barred the enforcement of the 2024 rule for some school districts located in PA. PA is not a party to the lawsuit.
- School Districts with a Moms for Liberty (party to the suit) student were part of a list subject to the injunction

PHRC issues guidance in support of 2024 Rule

<https://www.pa.gov/en/agencies/phrc/phrc-news---information/newsroom/the-phrc-joins-the-attorney-general-in-support-of-new-title-ix-r.html>

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Lessons learned for when Title IX is implicated

- Val Verde Unified School District (OCR Case No. 09-15-5001)(June 2023)
 - Sexual cyber bullying
 - Exposure of private body parts
 - Sharing of sexual acts or naked student images at school
 - Inappropriate sexualized 'games' such as 'pantsing'
 - Inappropriate Employee Conduct
 - Physical appearance of female students, whispered to students, made students feel uncomfortable

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Overview of 2024 Title IX

- Adds and revises definitions
- Clarifies impact of Title IX as controlling guidance over conflicting state laws
- Clarifies there can be no override of any legal right of parent, guardian or legal representative to act on behalf of a complainant, respondent or other person
- Administrative requirements-designation of Title IX coordinator, notice of nondiscrimination, training

Overview of 2024 Title IX

- Scope of Sex discrimination-Applies to all sex discrimination that occurs under a recipient's education program or activity in the US.
- Must address sex-based hostile environment under educational program or activity or when some conduct alleged contributed to the hostile environment occurred outside the educational program or activity or outside the US

Overview of 2024 Title IX

- Clarifies that schools cannot separate or treat any person differently based on sex in a manner that subjects them to more than de minimis harm, except in limited circumstances permitted by Title IX.
- Preventing a person from participating in a recipient's educational program or activity consistent with gender identity is more than de minimis harm.

Overview of 2024 Title IX

- Prohibits schools from treating students, employees, or applicants differently based on sex in connection with parental, family or marital status.
- Prohibits discrimination against students, employees, or applicants on pregnancy or pregnancy related conditions.
- Requires Reasonable modifications, break time for lactation for employees and students
Lactation space –private and not a restroom
Clarifies that schools cannot require medical documentation from students, unless necessary and reasonable.

Overview of 2024 Title IX

106.44

Offering and coordinating supportive measures

Initiating complaints

Taking prompt and effective action to end sex discrimination and prevent its recurrence.

Informal Resolutions

Clarifies confidentiality of information

Overview of 2024 Title IX

Grievance Procedures

- Reasonable steps to protect the privacy of parties and witnesses
- Reasonably prompt-major stages-assessment, investigation, decision-maker, appeal
- Equal opportunity for the parties to receive an accurate description of the relevant and not otherwise impermissible evidence. Must permit the parties ability to request to review/access. **Not receive!** School must take reasonable steps to prevent unauthorized disclosures.

Overview of 2024 Title IX

Grievance Procedures

- Process for assessing credibility and documenting how assessment was made.
- Preference for preponderance of the evidence standard.
- Determine sex discrimination occurred, remedies for the complainant and others; disciplinary sanctions; and other appropriate prompt and effective steps to ensure that sex discrimination does not continue or recur.

Overview of 2024 Title IX

Grievance Procedures

- Addresses retaliation, including peer retaliation and requirement to respond to conduct that constitutes retaliation.

- 4 DIFFERENT CATEGORIES FOR TRAINING

- All employees
- Investigators, Decision-makers, others responsible for implementing the grievance procedures or have the authority to modify or terminate supportive measures
- Facilitators of Informal Resolution
- Title IX Coordinators

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Title IX Coordinator

- Must have ultimate oversight for school's compliance with Title IX

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Are there any restrictions to who can serve as a Title IX Coordinator?

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Title IX Coordinator Supportive Measures

- Responsible for coordinating the effective implementation of supportive measures
- Serves as the point of contact for the impacted students/employees to ensure the supportive measures are effectively implemented
- Should not pass the burden of navigating the paperwork on the impacted student/employee
- Ongoing oversight, documentation and tracking of reports received

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NEW

- Supportive Measures

- Offered for any type of conduct that constitutes sex discrimination
- Permits a burden upon respondent during the pendency of the grievance procedures- only if the Respondent is given an opportunity to seek modification-appeal to official other than one who imposed. No more restrictive of respondent than necessary to restore or preserve the C's access to program or activity
- Offered to both Complainant and Respondent-to the extent necessary to restore or preserve the party's access to the education program or activity

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NEW

Title IX Coordinator, Investigator and Decision-maker

CAN BE ONE INDIVIDUAL

Permits single-investigator model

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Who can make a complaint?

- A complainant includes, a student or employee who is alleged to have been subject to conduct that could constitute sex discrimination or;
- 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 at a time when that individual was participating or attempting to participate in school's educational program or activity; or
- A parent, guardian or other authorized legal representative with the legal right to act on behalf of complainant; or
- Title IX Coordinator

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Sex-based harassment

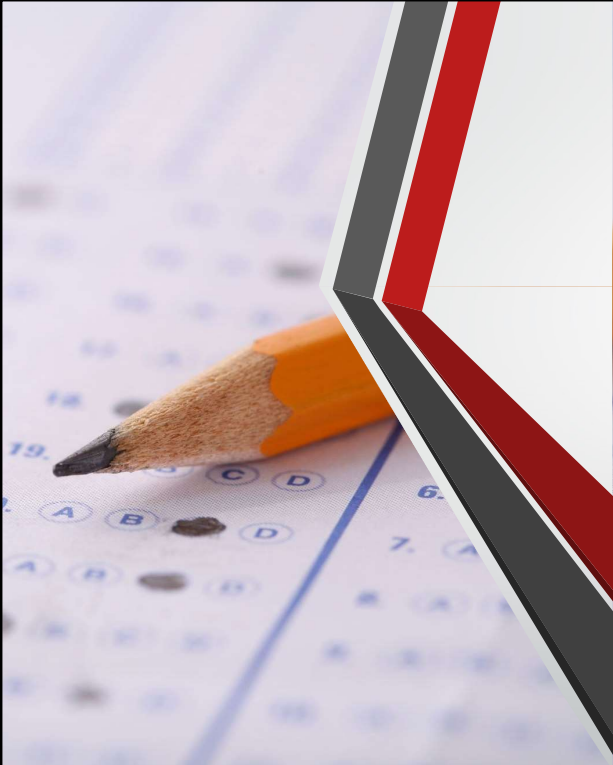
- A person is entitled to make a complaint only if they themselves are alleged to have been subjected to the sex-based harassment, if they have a legal right to act on behalf of such person, or if the Title IX Coordinator initiates a complaint consistent with the 8 factor determination.

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Eight Factors for Title IX Coordinator Determination Make a Complaint

- “The complainant’s request not to proceed with initiation of a complaint”
- “The complainant’s reasonable safety concerns” associated with initiation of a complaint”
- “The risk that additional acts of sex discrimination would occur if a complaint is not initiated”
- “The severity of the alleged sex discrimination”
- “The age and relationship of the parties”
- “The scope of the alleged sex discrimination”
- “The availability of evidence”
- “Whether the [institution] could end the alleged sex discrimination and prevent its recurrence without initiating its grievance procedures”

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When is a school
required to
investigate?

NEW

Formal complaint not required before an investigation begins.

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Important for employee of a school district who receives initial report to work with the complainant to identify the problematic behavior

If misconduct implicates **sexual discrimination** MUST report to Title IX Coordinator

What is the Relationship to other School District Policies?

Notice of Complaint

Contact with respondent

Must include specific information in order for the responding party to prepare before investigatory interview

Who, what, where, when-description of conduct alleged to be sexual harassment

Avoid generalizations

Inform against acts of retaliation and disclosure

Dismissal of a Complaint is discretionary

Respondent?

- Unable to identify the respondent after taking reasonable steps to do so

Respondent

- Is no longer participating in the School's programs or activity and is not employed by the school

Withdraw

- Complainant withdraws allegations ; Title IX declines to initiate using 8 factors, conduct does not constitute sex discrimination

NEW

All decisions to dismiss are permissive not mandatory.

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Required Action following Dismissal

- Must send written notice of the dismissal and reasons to both Complainant and Respondent and Notice of Right to Appeal.

NEW

Now permitted to offer informal resolution upon consent of both parties.

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Informal Resolution

- Cannot be used for complaints alleging employee/student sexual harassment
- Must have consent of both parties
- Must keep records of any informal resolutions for 7- year period

NEW

- 2024 rule covers retaliation and defines as “intimidation, threats, coercion, or discrimination against any person by the recipient or by a specific individual affiliated with the recipient, including a student, an employee, or a person who provides aid, benefit or service on behalf of the recipient.”
- Adds “peer retaliation” as retaliation by and against students.

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M.D. v. Trinity Area S. D.

A recent court decision out of Pennsylvania provides an excellent case study on retaliation rules in Title IX cases. In M.D. v. Trinity Area School District, No. 2:22-CV-517, 2022 WL 9465862 (W.D. Pa. Oct. 14, 2022), a Federal trial court allowed a student’s Title IX retaliation lawsuit against her school to move forward to the discovery stage. A key to the court’s decision was the “suggestive timing” between the student’s participation in the Title IX process and a negative action taken against her by a coach. The case is a good reminder of many of the fundamentals of Title IX retaliation claims, including the importance of timing and actions taken by others not necessarily involved in the Title IX process.

Standard for Liability

The M.D. court applied the standard for proving retaliation under Title IX in the courts:

A plaintiff who lacks direct evidence of retaliation must first make out a prima facie case of retaliation by showing (a) that he or she was engaged in protected activity, (b) that he or she suffered an adverse action, and (c) that there was a causal link between the two.

Lessons Learned

Schools should take care when implementing changes that could be seen as negative or “adverse” against a person who is involved in the Title IX process.

Evaluate supportive measures to ensure that they are evenly applied to both parties.

Investigator Role & Responsibility

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Impermissible evidence

- Evidence that is protected under a privilege by Federal or State law or evidence that provided to a confidential employee, unless the person to whom the privilege or confidentiality is owed has voluntarily waived the privilege or confidentiality, unless waiver is received

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Impermissible evidence

- A party or witnesses records that are made or maintained by a physician, psychologist or other recognized professional or paraprofessional in connection with the provision of treatment to the party or witness, unless consent is provided

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Impermissible evidence

- Evidence that relates to the complainant's sexual interests or prior sexual conduct unless evidence about the complainant's sexual conduct is offered to prove that someone other than the respondent committed the alleged conduct or evidence of consent.

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Proposed Acknowledgement

I understand that as the [Complainant, Respondent, Witness] that the [name of entity] prohibits a person from intimidating, threatening, coercing, or discriminating "against any individual for the purpose of interfering with any right or privilege secured by the [name of entity] Title IX policy and grievance process, or because the individual has made a report or complaint, testified, assisted, or participated or refused to participate in any manner in an investigation under [name of entity] Title IX policy. I expressly acknowledge that I am prohibited for taking any retaliatory action against a person participating in this investigation and that I agree to keep the information I receive through the grievance process confidential.

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Investigation

Interview techniques

- What do you mean by ___?
- I need you to clarify____
- Can you explain____?
- I need to make sure I understand_____

Note taking

- Date and time of interview
 - Names of all present
 - Document any refusal to answer
 - Document breaks and adjournments
- Thoughts on recordings?

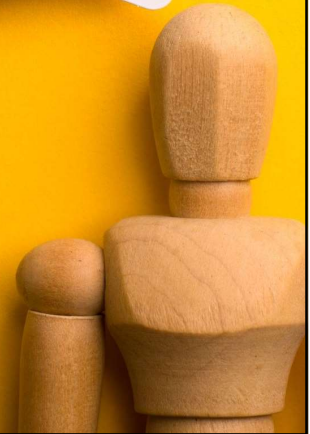
“

Let the witness do the talking and
tell their story and in their voice.

”

Summary of Evidence

- Easy to read
- Factually accurate
- Neutral tone
- Avoid editorial comments or opinions



NEW

- No longer requires providing the parties opportunity for review of evidence-only a summary of evidence collected. If asked by party must provide access to relevant evidence.
- No longer requires a formal investigative report!



Assessing Credibility

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NEW

- Assessment of credibility occurs without written exchange of cross-examination by parties
- Must develop a process to adequately assess the credibility and document factors for decision.

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Credibility Factors

1. the internal consistency of her/his testimony, and possible self-contradiction,
2. whether it is true,
3. the history/reputation/character of the witness,
4. his/her motivation to lie,
5. any relation of the witness to the respondent or complainant,
6. any other conflicts of interest,
7. whether the person is testifying without duress,
8. whether the person makes statements against self-interest,
9. whether other witness testimony supports the witness's testimony,

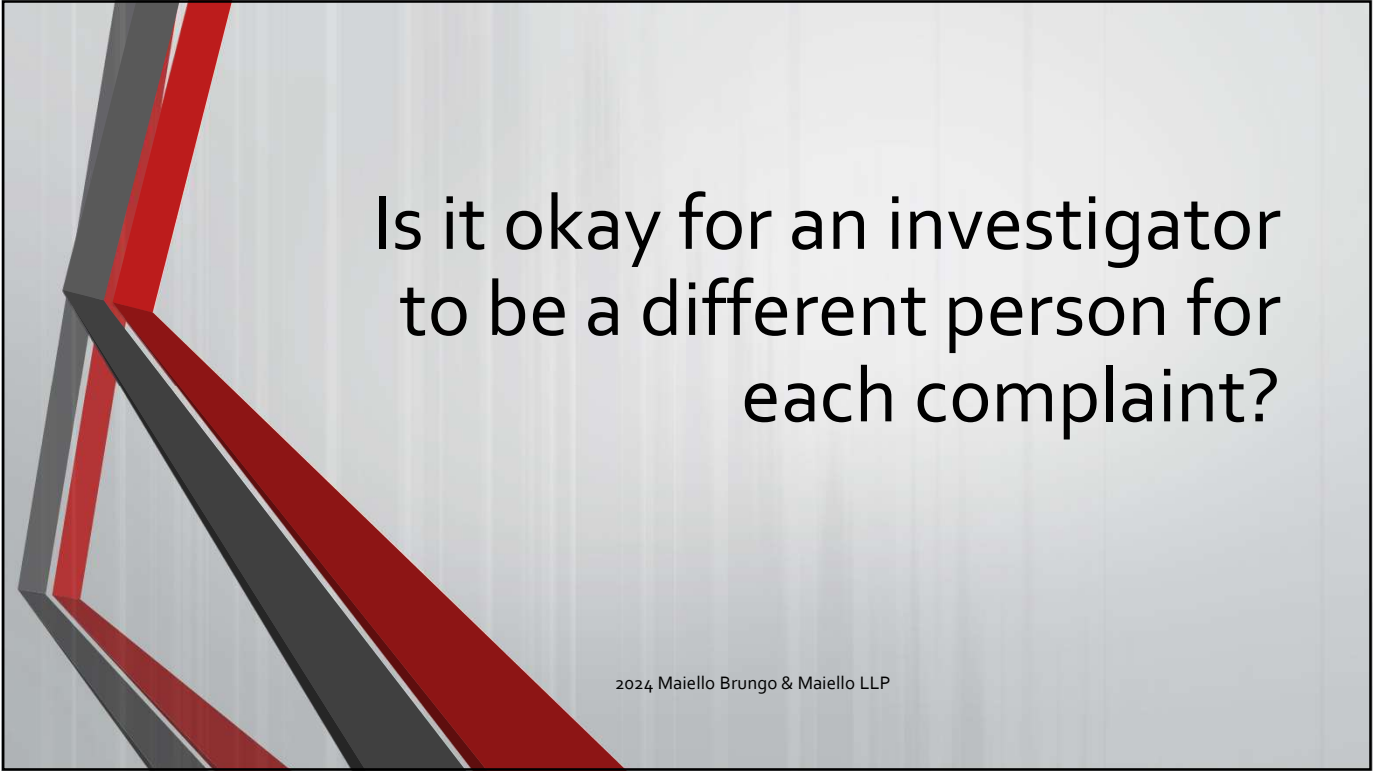
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Credibility Factors continued

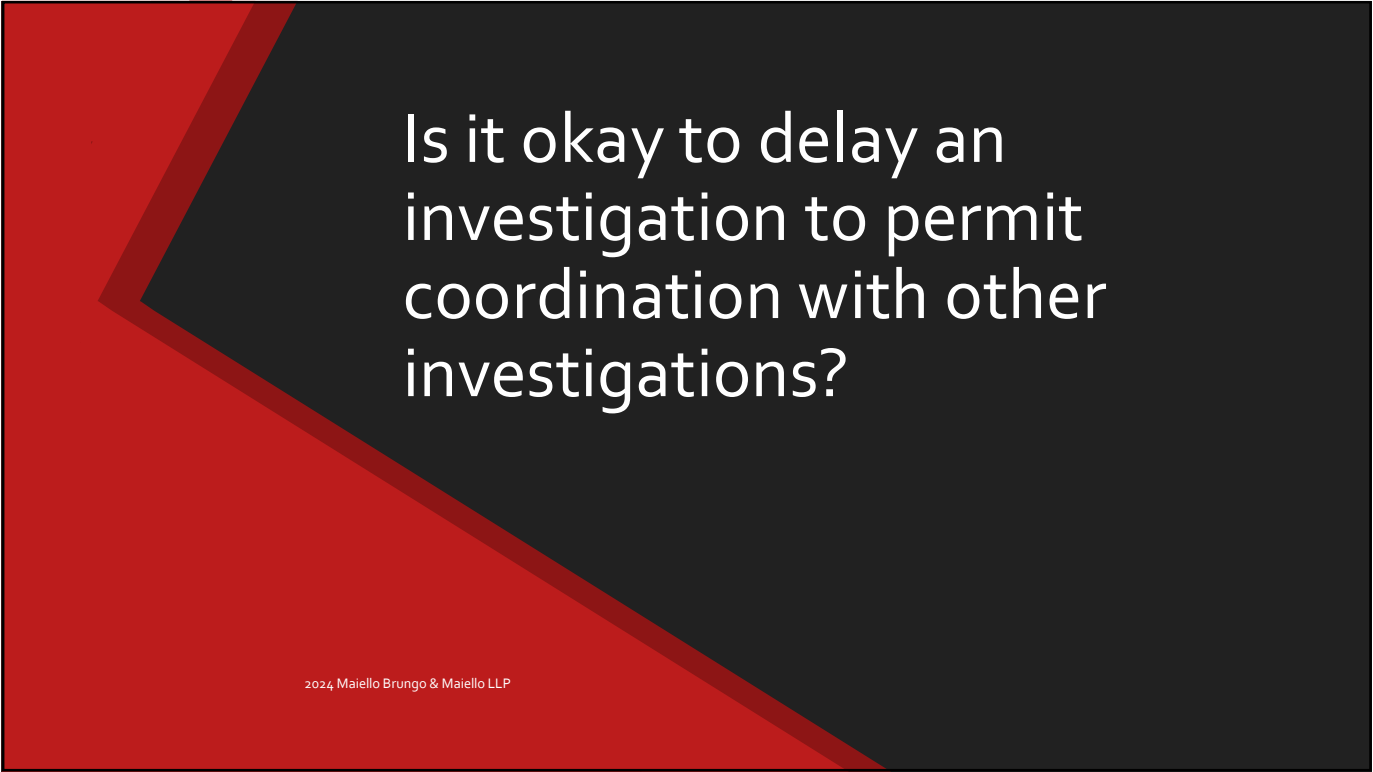
10. the witness's proximity to the alleged event in time and place,
11. any cognitive impairments,
12. the language ability of the witness, use of words within ability of witness
13. correct orientation as to time/place/circumstance,
14. differences and similarities to previous testimony,
15. rote or repeated nature of testimony to other witness's testimony (which may speak to preparation or advice or coercion by a third party),
16. is the level of detail provided appropriate to the nature of the circumstances,
17. corroboration of witness testimony,
18. biased statements by the witness.

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Is it okay for an investigator
to be a different person for
each complaint?

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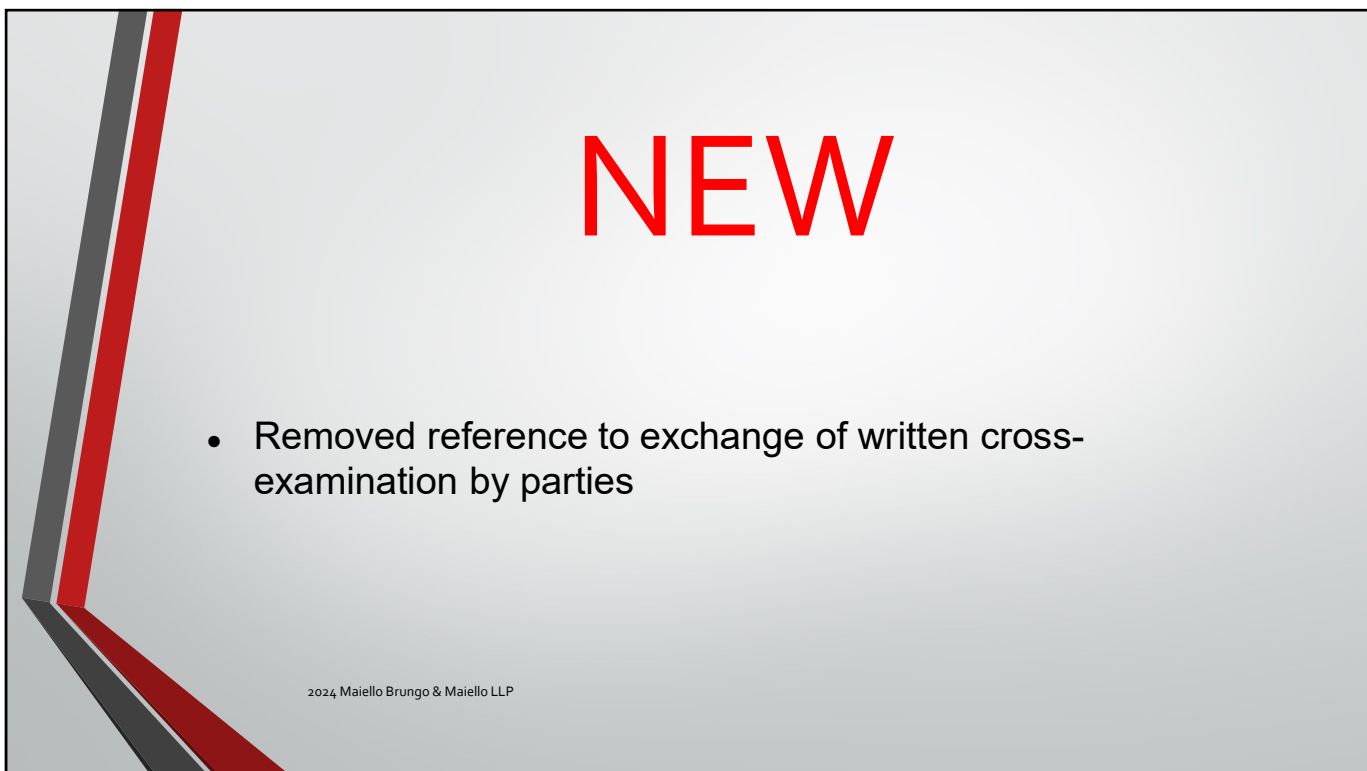
Is it okay to delay an
investigation to permit
coordination with other
investigations?

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Decision-Maker

Role & Responsibility



NEW

- Removed reference to exchange of written cross-examination by parties

Relevance

**TENDS TO MAKE A FACT
MORE OR LESS
PROBABLE THAN IT
WOULD BE WITHOUT THE
PROFFERED EVIDENCE**

**RELATED TO A FACT AT
ISSUE**

Preponderance of the Evidence

- In civil cases this is the lowest degree of proof
- More likely than not inquiry
- Fact-finder finds the existence of a contested fact more probable than its nonexistence

- Value decision-maker assigns to the piece of evidence
 - What is relationship between the parties?
 - Any bias?
 - Demeanor of witness?

Weight of evidence

Privilege

- Grievance process must not require, allow, rely upon or otherwise use questions or evidence that constitute a legally recognized privilege, unless the person holding the privilege has waived the privilege.

NEW

- Proposed rule requires notification of outcome
- Flexibility to choose what information to share
- Only a summary of findings

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Sanctions and Remedies

Disciplinary decisions
enforce code of conduct

Proportionate response
to the violation

Emergency removal

Cannot remove a student unless an individualized safety assessment has been conducted

Removal must be necessary to protect a student or other individual from immediate threat to **physical health** or safety

Notice, opportunity to challenge removal

- IDEA –change in placement
- School code requires hearing

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Emergency removal of employee

- No restriction
- Permissible to place employee on **paid leave** until determination of responsibility
- Follow CBA and Loudermill process

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Appeals

Appeals

- Most likely heard before Board of School Directors
- Appeals should be allowed for
 - Procedural irregularity
 - Newly discovered evidence
 - Investigator/Decision-maker had a conflict of interest



What impact does an appeal have on the decision to discipline?

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Impartial Process

- Any individual designated by a recipient as a Title IX Coordinator, investigator, decision-maker, or any person designated by a recipient to facilitate 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.

Fair and Impartial Proceeding

- Relies upon evidence that is:
- RELEVANT
- RELIABLE
- TRUSTWORTHY

FAIR AND IMPARTIAL PROCESS

Avoids

Prejudgment/bias
Gut feelings
Stereotypes
Rumors
Facts not in evidence

Seeks

Reliable evidence
Legitimizes the process
Impartial
Accurate
Truth seeking

Bias

- Personal and unreasoned judgment
- Prejudice
- Focused on characteristics of a party rather than the evidence

Review of Key concepts

Reporting Obligation of all employees	Respond Promptly Offer supportive measures Explain Grievance Process	Notice Inform Repondent sufficient detail Inform sufficient time before meetings
Investigate District responsibility to collect evidence, follow all leads, treat both equitably and provide access to evidence	Basis for Decision Based on relevant evidence. No bias in decision-making. Reasoned and objective. Support conclusions with fact. Apply standard of evidence.	Appeal Must provide notice and timeframes

Recap of 2024 Rule

Expands Grievance process to include sex -based discrimination not just harassment

Does not require split roles between coordinator/investigator and decision-maker

Removes requirement for a formal complaint to initiate investigation

Removes advisor of choice for parties

Removes review of evidence collected by parties

Removes preparation of a full investigative report

Removes mandatory dismissals (outside of program or US)

Provides clarity on consolidation of complaints-same facts and circumstances

Recap of 2024 Rule

Notification of outcome only. No longer required to provide findings of facts, conclusions and rationale

Cannot discipline a party or witness for false statements

Permits informal resolution process without the initiation of a formal complaint

Not limited to sexual harassment

Adds credibility assessment by decision-maker. Removes cross-examination through questions exchanged

Remedies expanded to cover "others, if appropriate."

Includes harassment based on sex-stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity.

Summary of expanded coverage

- Sex discrimination-all forms including discrimination based on sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity
Proposed rule Section 106.10
- Sex-based harassment –sexual harassment, harassment based on sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity and other sex-based conduct
 - Quid pro quo
 - Hostile environment-sufficiently severe or pervasive that denies or limits a person’s ability to participate in or benefit from the recipient’s education program or activity
 - Dating violence, sexual assault, domestic violence stalkingProposed rule Section 106.2

Summary of expanded coverage

Conduct that occurs off-campus when the respondent is a representative of the recipient or otherwise engaged in conduct under the recipient’s authority.

Now required to address when sex-based harassment contributing to the hostile environment occurred outside the recipient’s education program or activity or outside the United States.

Proposed rule Section 106.11

Required Response

- Take prompt and effective action to end any prohibited sex discrimination that has occurred in its education program or activity, prevent its recurrence, and remedy its effects.

Proposed rule Section 106.44(a)

Collaboration with Special Education

Title IX Coordinator to consult with IEP/504 team throughout implementation of the grievance procedure.

Title IX Coordinator to consult with IEP/504 on implementation of supportive measures

Policy Considerations

- Update/revise policies. Consider use of ARs
- Administrative procedures or regulations are specific steps, methods, and processes that bring policies to life. They offer detailed instructions on how to execute the policies and provide practical guidance for staff, students, and administrators on handling specific situations. Procedures, with their operational focus, outline the day-to-day actions necessary for administrators to implement and enforce policies effectively in their educational institutions.

Discretion to adopt a single process to address all forms discrimination

- How does that work?
- Policy of non-discrimination in educational settings
 - ARs outlining one grievance procedure
- Policy of non-discrimination in employment
 - ARs outlining one grievance procedure

Updated Notice of Nondiscrimination

Who, where to locate information and who to report.

Display prominently on website and publications.

2024 amendments permit to include a paired down version of notice

Penn-Trafford School District prohibits sex discrimination in any educational program or activity that it operates. Individuals may report concerns or questions to the X. The District's notice of nondiscrimination is located at [insert website address]

Different procedures for K-6 and 8-12?

- Schools are permitted to choose certain procedures for some, but not all, complaints of discrimination.
- Required to articulate how you will be consistent and how the district will determine which procedures to apply.

Title IX Coordinator level. Analysis of parties (age levels of or educational levels of students)



Thanks!

Any questions?

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