TITLE IX TRAINING

ST. CLOUD AREA
SCHOOL DISTRICT 742

2023-2024 TRAINING
FOR ADMINISTRATORS
Title IX: What is it exactly?

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

- Title IX of the Education Amendments of 1972
- Definition of sexual harassment
- Scope of the school’s education program and activities
- How to conduct an investigation and grievance process
- How to serve impartially, including how to avoid prejudgment of the facts at issue, conflicts of interest, and bias.
- How to create an investigative report that fairly summarizes relevant evidence
- Relevant questions and evidence, including when questions and evidence about a complainant’s sexual predisposition or prior sexual behavior are not relevant.
- Decisions & Appeals
New Definitions of Sexual Harassment

- **Quid Pro Quo** - A school employee conditioning an educational benefit or service upon a person’s participation in unwelcome sexual conduct

- **Sexual Assault, dating violence, domestic violence or stalking**
  
  NOTE: These types of misconduct are not evaluated for severity, pervasiveness, offensiveness, or denial of equal educational access

- **Unwelcome conduct** on the basis of sex that is
  - so severe, pervasive, and objectively offensive
  - that it effectively denies a person equal access to the school’s education program or activity
  - “reasonable person” standard
Parties

- **Complainant**: The person who experienced the alleged sexual harassment ("victim")
  - Usually, the complainant files the formal complaint

- **Respondent**: The person accused of engaging in sexual harassment ("perpetrator")
  - Presumed innocent and credible
“unwelcome sexual conduct”

- Conduct is based on sex
- It is:
  - Severe
  - Pervasive and
    - Objectively offensive (to the reasonable person)
- It effectively denies equal access to education
- It occurs in the school’s educational program
How bad does it have to be?

- "Severe" AND
  - "of a great degree"

- "Pervasive" AND
  - "existing in or spreading through every part of something"

- "Objectively offensive"
  - "undistorted by emotion or personal bias"
  - "perceptible to persons other than the individual affected"
Must meet the same standards, regardless of the method of harassment

Examples:
- Use of computer/internet networks owned or operated by school
- Use of a personal device during class time to perpetrate online harassment

Expressed concerns about First Amendment rights

Severity and pervasiveness required so as not to punish verbal conduct in a manner that chills and restricts speech

The school can investigate the matter under Board policy or the Code of Conduct even if not required by Title IX
Where it must occur:

**Scope of the Education Program and Activities**

- Any school event
  - Employment
  - Extracurricular activities
  - Athletics, performances
  - Community engagement and outreach programs
- Any location where a school event was taking place
  - Remote/virtual learning
  - School bus or other school-related vehicle
  - Enroute to or from school
  - Off campus on a telecommunications access device or service provider owned or under the control of the Academy
- Does not cover actions off campus unless the school exercised **substantial control** over both the **respondent** and the **context** in which the sexual harassment occurred
The result: “Denied equal access”

Reasonable person standard

- Doesn’t require dropping out of school, panic attack or “breaking point”
- Doesn’t require manifestations of trauma or “constructive expulsion”
- May not refuse to respond because complainant is “high functioning”

Signs of unequal access

- Skipping class to avoid harasser
- Decline in grades
- Difficulty concentrating in class
Title IX vs. Code of Conduct Violations

<table>
<thead>
<tr>
<th>Behavior that doesn't meet the Title IX requirements</th>
<th>Not so severe, pervasive, and objectively offensive that it effectively denies a person equal access to an education OR Not done within the scope of the educational program or activity</th>
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<tbody>
<tr>
<td>Disciplined under the Code of Conduct</td>
<td>School is entitled to take action under another provision of the Code of Conduct</td>
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<tr>
<td></td>
<td>Preponderance of the evidence standard</td>
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</table>
Sexual Misconduct vs. Sexual Harassment:
Severe? Pervasive? Objectively offensive?

Examples of Sexual Misconduct

- Unwelcome sexual advances
- Sexual jokes, comments, gestures regarding another’s sex life, sexual orientation, or gender identity
- Sexting
- Spreading sexual rumors
- Sexual assault, violence, threats, stalking
- Insults or threats based on sex or gender
- Change of academic or employment responsibilities based on sex, gender identity or expression, or sexual orientation
Nondiscrimination Policy & Grievance Procedures

- Notice of School’s Nondiscrimination policy and grievance procedures, including
  - how to file or report sexual harassment and
  - how the School will respond

- Must be provided to
  - students
  - parents/legal guardians
  - applicants for admission
  - applicants for employment

- Must be posted to the website
Who is covered:

- The complainant must be a current student or employee or "attempting to participate"
- If the respondent is no longer enrolled the school may end its investigation
- The complainant may withdrawal the complaint at any time and the school may end its investigation

Caveat: must avoid "deliberate indifference"
Mandatory Reporting

- **All** employees/staff members have an obligation to report instances of sexual harassment.
  - Witnessed
  - Heard about

- A school has “actual knowledge” of a Title IX allegation if notice is given to any employee/staff of the school.
Mandatory Initial Response

- Legal obligation to “respond promptly”
- in a manner that is not deliberately indifferent
  - response that is not clearly unreasonable in light of the known circumstances.
- Offer appropriate supportive measures to restore or preserve equal access to the educational program or activity
- Confirm whether the complainant wants to initiate or participate in a grievance process
- Title IX Coordinator to file a formal complaint when necessary to avoid deliberate indifference if the complainant chooses not to do so.
What Does a Response Look Like?

- Promptly contact the complainant to:
  - Discuss supportive measures
  - Offer restorative practices
  - Explain the process for filing a formal complaint

- Offer supportive measures to the complainant and respondent
“Supportive Measures”

- Reasonably available individualized services
- non-punitive, non-disciplinary prior to decision
- not unreasonably burdensome to the other party

- designed to:
  - ensure equal educational access,
  - protect safety or
  - deter sexual harassment.
Examples of Supportive Measures

- Move student(s) from classes
- Mental health support
- Altered schedules
- Extended deadlines
- Student conference(s) with administrator
- Counseling/therapeutic interventions
- Classroom reassignment
- Teacher notification plan
- Parent meeting(s)
- Safe person plan
- Increased monitoring/supervision
- Mutual restrictions on contact between parties
- Check in – Check out
- Unstructured areas safety plan
- Bus planning/notification
**Mandatory Response:**

<table>
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<tr>
<th>Investigate</th>
<th>Investigate sexual harassment allegations in any formal complaint</th>
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<tbody>
<tr>
<td>Process</td>
<td>Follow a grievance process that complies with the regulations</td>
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<tr>
<td>No Discipline</td>
<td>School may not use disciplinary measures against Respondent during the grievance process</td>
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</table>
School may impose discipline sanctions against the Respondent prior to completion of the grievance process only if:

- Individualized safety and risk analysis completed
  - determined that emergency removal is necessary
  - to protect a student or other individual from
    - an *immediate* threat to *physical* health or safety

If there is an emergency removal, the School must provide the respondent with:

- notice and
- an opportunity to challenge the decision immediately after the removal

**Exception:**

Emergency Removals
Confidentiality – Pre-Formal Complaint

Someone can report anonymously (though a school will be unable to provide supportive measures without knowing the complainant's identity)

A complainant may report and receive supportive measures while keeping the complainant's identity confidential from the respondent (unless the respondent must know the complainant's identity in order for the school to implement a supportive measure)
Informal Resolution

- May use informal resolution processes but only if:
  - There has been a formal complaint filed and
  - both parties voluntarily agree in writing
- Either party has right to withdraw from informal resolution and resume grievance process
- Not an option in cases involving allegations that an employee sexually harassed a student.
- Mediation or restorative justice
Formal Complaint

- Written document signed by a complainant or Title IX Coordinator requesting that the school investigate allegations of sexual harassment

- Triggers investigation/grievance process

- Must provide both parties with written notice of the allegations upon receipt of a formal complaint

- Withdrawn complaint: usually respected and the Title IX investigation would end

- School may continue to investigate if the complaint is severe to avoid deliberate indifference
Confidentiality – Post-Formal Complaint

- Once a formal complaint is filed against the respondent, the respondent will know the complainant’s identity.

- The complainant’s identity is to be kept confidential to the extent possible for people outside the grievance process, except as permitted by FERPA, required by law, or as necessary to conduct the grievance process.
The Title IX Team

- **Title IX Coordinator**
- **Investigator**
  - May be the Title IX Coordinator
- **Decision maker**
  - May not be either the Title IX Coordinator or the Investigator
- **Appeal decision maker**
  - (none of the former)
The Title IX Team:

Impartiality is Key

- Goal: protect students from victimization while at the same time providing appropriate due process to both complainants and respondents.
- It is essential to avoid prejudging the facts
- Recognize conflicts of interest
- cannot have other job responsibilities that may create a conflict of interest.
- Prior involvement with a student or employee that creates a conflict or bias
- Recognize Bias
The regulations require school to appoint a “Title IX Coordinator”

- Name, Office address, email address and phone number at posted on website

- Need to maintain records of annual training for the Title IX Coordinator

- NOTE: Rule says the Title IX Coordinator must be “an employee of the [school]”
Title IX Coordinator Responsibilities

- Provide **access to information** about how to file a complaint and how the School will respond to reports and complaints.
- Promptly and confidentially **contact complainants** to discuss the availability of supportive measures with or without the filing of a formal complaint.
- **Sign a formal complaint** when the complainant is unwilling to do so but failure to investigate could result in deliberate indifference by the School.
- **Assign an unbiased investigator** to each complaint of alleged sexual harassment.
Title IX Coordinator Responsibilities

- Pursue informal resolution options such as mediation or restorative justice.
- Ensure transparency and consistency in grievance process.
- Meet all notice requirements.
- Ensure that all Title IX personnel are free of conflicts of interest and bias.
- Ensure that there is an objective evaluation of all relevant evidence.
Title IX Coordinator Responsibilities

- Oversee Title IX personnel training.
- **Post** Title IX training materials on the website
- Enforce *rape shield protections*
- **Maintain confidentiality** to extent permitted by law
Grievance Process

- This is the investigative process and subsequent decision
- Emphasis on “fair, equitable and without bias” process
- The school has the burden of gathering the evidence
- The investigator(s) cannot be the decision-makers
# Notice Requirements

## 1. Initial notice to parties

- Allegations (in sufficient detail to allow respondent to prepare a response)
  - names of known parties
  - conduct alleged
  - date and location of conduct, if known
- Opportunity to present fact and expert witnesses and other evidence
- Opportunity to select an advisor, including an attorney, of their choice

## 2. Investigation Notice

- Notice of any investigative interview, meetings, or hearings and
  - Opportunity to submit questions
- submitted questions must be sent to other party
Investigation began promptly following report

Free from conflicts of interest or bias for or against complainant(s) or respondent(s)

Received required Title IX training

Understands that there is a presumption that the respondent is not responsible for the alleged conduct until a determination regarding responsibility is made at the conclusion of the grievance process.
Agrees to **treat complainants equitably** by providing remedies any time a respondent is found responsible, and **to treat respondents equitably** by not imposing disciplinary sanctions without following the grievance process.

Agrees to **objectively evaluate all relevant evidence**, inculpatory and exculpatory, and **avoid credibility determinations** based on a person’s status as a complainant, respondent or witness.

Understands the **standard of evidence** for determining whether sexual harassment has occurred:
- **preponderance of the evidence**
- not clear and convincing evidence
Investigation

An impartial investigator meets with the parties to gather information.

Notice to both parties of the allegations and of the policies alleged to have been violated.

Opportunity for parties to provide a list of witnesses and additional evidence.

Meetings with all relevant witnesses.

Opportunity for the parties to provide list of questions for the other party and witnesses.
Investigation

Gather all available and relevant evidence

Provide parties the opportunity to review all evidence and information before the report is finalized.

Provide parties a copy of the draft investigation report for review and comment

Provide parties opportunity to address investigative report with the decision maker.
Typical Investigation

- Interview complainant(s)
- Interview respondent(s)
- Interview witnesses
- Written witness statements
- Interview complainant parent/guardian
- Interview respondent parent/guardian
- Examine physical evidence
- Review medical information if privilege is waived
- Review student records
- Review social history b/w parties
- Interview teachers and/or school staff
- Review student attendance /grades
- Review video surveillance
- Review electronic/web content
- Consider history of prior conflicts and/or problematic behavior
Retaliation Prohibited

- All parties, including the witnesses, are protected.

- No intimidation, threats, coercion or discrimination for reporting, testifying, refusing to participate etc.

- Includes charges for Code of Conduct violations that do not involve sex discrimination or harassment but arises out of same set of facts.
## Investigator Tips

<table>
<thead>
<tr>
<th>Prepare</th>
<th>Prepare the questions in advance</th>
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<tbody>
<tr>
<td>Deviate</td>
<td>Be prepared to deviate from written list of questions as the story unfolds</td>
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<tr>
<td>Create</td>
<td>Create an interview environment that feels safe - Don’t be intimidating!</td>
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<tr>
<td>Listen</td>
<td>Listen carefully and objectively (non-biased)</td>
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<tr>
<td>Share</td>
<td>It is important for reporting parties to know who you are and what your role is</td>
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<tr>
<td><strong>Connect</strong></td>
<td>Connect with them before questioning</td>
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<tr>
<td><strong>Assure</strong></td>
<td>Assure them of no retaliation</td>
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<tr>
<td><strong>Allow</strong></td>
<td>Allow reporting parties to self-identify, so avoid assumptions about gender and sexual orientation.</td>
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<tr>
<td><strong>Communicate</strong></td>
<td>Be clear about how often you’ll communicate with them throughout the process.</td>
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<tr>
<td><strong>Share</strong></td>
<td>Let them know what happens next.</td>
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Investigator Tips

Start with open-ended questions that provide individuals control over how they share their accounts.

- “What can you tell me about what happened?”
- “Where would you like to start?”

This leaves the reporting party in control.

Follow up with soft-approach questions

- “Can you tell me more?”
- “Can you help me understand?”
Investigator Tips

“Who, what, where, when, why, and how” questions

Summarize what you think you heard them say and repeat it back

Get a good sense of the timeline and the details

Pay attention to nonverbal cues

Take detailed notes of witness observations and information
Complainant Interview
Potential Questions

Where and when did it occur?

Who was involved?

What happened?

Did anyone else see it happen?

Have you talked to anyone about it since?

Has it happened before?

Do you know anyone else with information about it?
Relevant questions and evidence

No standard for "relevance"

Focus on behavior rather than intention or opinion

Does the evidence being offered have the potential to prove/explain or disprove an incident under investigation?
Irrelevant/Precluded Evidence

- Complainant’s treatment records
  - Unless you receive prior written consent
- Legally recognized privilege
- Questions about complainant’s sexual predisposition or history
Rape Shield

- May not ask questions about complainant’s prior sexual behavior
- Unless it is used to prove someone other than the respondent committed the offense
- Or offered to prove consent
- Does not apply to respondents
- Evidence of a pattern of inappropriate behavior by respondent is relevant
Respondent Interview

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<tr>
<th>Be</th>
<th>Approach</th>
<th>Ask</th>
<th>Notes</th>
<th>Focus</th>
</tr>
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<tbody>
<tr>
<td>Be non-judgmental and unbiased</td>
<td>Approach with curiosity, seeking to hear respondent’s side of the story</td>
<td>Ask about each of the allegations separately</td>
<td>Keep good notes of respondent’s responses</td>
<td>Focus on behavior rather than state of mind or intent</td>
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Assessing Credibility

Investigator cannot begin with an assumption that one party is more credible than the other.

Credibility is the process of weighing the accuracy and veracity of evidence.

To assess credibility, evaluate the source, content, and plausibility of what is offered in light of other evidence.
## Notice Requirements

3. **Evidentiary Notice**
- Evidence directly related to the allegations
- In electronic or hard copy format
- With at least 10 days for the parties/advisors to
  - inspect
  - review and
  - respond to the evidence before the investigative report is finalized.

4. **Investigative Report Notice**
- Investigative report that fairly summarizes relevant evidence
- Provide at least 10 days to respond before the matter is heard by the decision-maker.
- Must include information about the opportunity to submit written, relevant questions that a party wants asked of any party or witness prior to a decision.
Preparing the Investigative Report

Create an investigative report that fairly summarizes relevant evidence

Exclude privileged information

Many cases hinge on nuance and credibility so the report should identify this

Keep the principles of due process and equity at the forefront

Address each allegation separately, reporting facts that support or negate
Most K-12 schools are opting not to hold live hearings.

If the school chooses to hold live hearings, it must ensure that the decision-maker is fully trained in the use of technology.
A final written report must be issued and sent to all parties

No timeline for completing an investigation, but must be reasonable

Neither the Title IX Coordinator nor the Investigator may be the decision maker

A third party may act as decision maker

Different decision maker for appeals
Decision-maker is neither the investigator nor the Title IX Coordinator

Free from conflicts of interest or bias for or against complainant(s) or respondent(s)

Received required Title IX training

Understands that there is a presumption that the respondent is not responsible for the alleged conduct until a determination regarding responsibility is made at the conclusion of the grievance process

Agrees to treat complainants equitably by providing remedies any time a respondent is found responsible, and to treat respondents equitably by not imposing disciplinary sanctions without following the grievance process
- **Objectively evaluate** all relevant evidence, inculpatory and exculpatory, and avoid credibility determinations based on a person’s status as a complainant, respondent or witness.

- Provide **remedies**, when a respondent is found responsible, that are designed to maintain the complainant’s equal access to education. Such remedies may be disciplinary or punitive and may burden the respondent when necessary.

- **Understands the standard of evidence** for determining whether sexual harassment has occurred:
  - **preponderance of the evidence**
  - not clear and convincing evidence
Burden and Standard of Proof

- The school has the burden of proof, not the respondent.
- The school must decide which standard of proof it is going to apply to ALL complaints:
  - **Preponderance of the Evidence**: met when the party with the burden convinces the fact finder that there is a greater than 50% chance that the claim is true.
  - **Clear and Convincing Evidence**: met when the evidence is highly and substantially more likely to be true than untrue; the fact finder must be convinced that the contention is highly probable.
Decision: Reasonable & Defensible

- To find responsibility, decision-maker must find:
  - the incident meets the definition of sexual harassment and
  - the incident occurred within the School’s educational program or activity

- Failure to find both must result in dismissal of the complaint and no disciplinary sanctions under Title IX

- Final Determination must include:
  - A finding on each alleged violation
  - Rationale for each finding
“Determination Regarding Responsibility” Elements

- List of **allegations** that could constitute sexual harassment;

- A **description of procedural steps** undertaken, including notifications to parties, interviews and site visits, methods used to gather evidence, and hearings;

- **Findings of fact** that support the determination regarding responsibility;

- **Conclusions** about whether the alleged conduct occurred;

- **Rationale** of the result as to each allegation;

- Any **disciplinary sanctions** imposed on respondent;

- Whether **Remedies** will be provided to the complainant;

- **Appeal** procedures and grounds
Available Sanctions upon finding responsibility (students)

- Loss of privileges
  - suspension of bus riding/transportation privileges
  - removal from extra-curricular activity
  - any other sanction authorized by the Student Code of Conduct
- Detention
- In-school suspension
- Out-of-school suspension
- Expulsion
Available Sanctions upon finding responsibility (staff)

- Leave of Absence
- Termination
- Removal from school
- Reassignment
## Notice Requirements

<table>
<thead>
<tr>
<th>5. Response Notice</th>
<th>6. Final Determination Notice</th>
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<tbody>
<tr>
<td>Must provide the answers to the questions submitted</td>
<td>Final written determination including</td>
</tr>
<tr>
<td>Must allow for additional, limited follow-up questions from each party</td>
<td>• statement of and rationale for result as to <strong>each</strong> allegation,</td>
</tr>
<tr>
<td>Must send follow-up questions and responses to other party</td>
<td>• including determination of responsibility,</td>
</tr>
<tr>
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<td>• any disciplinary sanctions, and</td>
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<td>• whether remedies to restore or preserve equal access to the educational program or activity will be provided.</td>
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<td>• Right to appeal</td>
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</table>
Notice Requirements

7. Appeal Notice
- Must provide notice that a party has appealed
- Must provide opportunity to respond in writing to the appeal

8. Appeal Decision Notice
- Result of appeal
- Rationale for decision
- The appeal decision is final
Either party (or parent/guardian) is allowed an appeal for

- **Procedural irregularity** that affected the outcome
- **Newly discovered evidence** not reasonably available that could affect the outcome
- Investigator or Decision maker had a **conflict of interest or bias** that affected the outcome
There are many notice requirements that must be followed.

Appeals alleging procedural irregularity require careful analysis of the checklists identifying all notices and paperwork going to the parties during the process.

This is a fact-based inquiry for the Appeal decisionmaker.
This appeal may come long after the typical deadline for filing an appeal.

To overturn the decision, there must be findings that:

The evidence was not "reasonably available" at the time of the initial decision.

AND

This evidence could affect the outcome.
This appeal involves an allegation that either the Investigator or the Decision maker had a conflict of interest or was biased.

Such an allegation need to be supported by some evidence rather than mere conjecture.

The Appeal Decision Maker conducts its own investigation into whether there was a conflict or bias.

If there is such a finding, there would need to be a finding that the conflict/bias affected the outcome.
Appeal Decision Maker Assurances

- Not the investigator, the Title IX Coordinator nor the original decision-maker.

- Free from conflicts of interest or bias

- Has received required Title IX training.

- Will objectively evaluate all relevant evidence

- Will avoid credibility determinations

- Understands the preponderance of the evidence standard for determining whether sexual harassment has occurred.
Appeal Process

Title IX Coordinator provides notice to all parties within 3 days of receiving an appeal.

Each party has 5 days to submit a written statement in support of, or challenging, the decision.

The appeal decision maker must issue a written decision within 10 days after the time to submit a written statement has passed.

The appeal decision must provide the rationale for the result.

Both parties receive the written decision simultaneously.
Record Keeping

- 7 years retention of:
  - Investigation documents
  - Written determinations
  - Disciplinary sanctions
  - Supportive Measures
  - Remedies provided
  - Appeals
  - Informal resolutions
  - Training materials
Essential to treat both parties equitably

Address personal bias by:

- Nurturing an attitude of humility
- Nurturing a continuous curiosity about others and their points of view and experiences
- Understanding microaggressions and how to avoid and address them.

- Race, Gender, Sexual Orientation, Ethnicity, Poverty
Anti-bias

- Don’t give credence to rumors
- Don’t speculate
- Investigators should refrain from lecturing during interviews
- Stay in your lane. Allow others to focus on developmental and educational efforts if deemed appropriate for the situation
Anti-bias

- Take the time to look in the mirror
- Appreciate the nuances and uniqueness of those who come from a different background, gender, sexuality, culture, disability, heritage, generation, etc. from your own.
- Evaluate the neutrality of Title IX investigator and decision maker
- Encourage implicit bias training
While investigators may have a general understanding of experiences common to certain groups, it remains essential to not assume that the issues common to a certain group have been important to or experienced by a specific member of that population.

Investigators and coordinators should develop an awareness of how their individual experiences and privilege may create expectations in their conversations with others.
Summary

- **Understand**: Understand the legal standard
- **Train**: Train the team
- **Explore**: Find out what the complainant really wants
- **Pursue**: Pursue informal resolution
- **Investigate**: Investigate if a formal complaint is filed
- **Ensure**: Ensure impartiality
- **Process**: Have checklists
- **Notice**: Meet notice requirements
- **Justify**: Justify decision
- **Ask**: Ask for help along the way!
Questions?