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Title IX: Putting it All Together

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Agenda for Today

- Informal Resolution
- Emergency Removal
- Administrative Leave
- Title IX Scenario

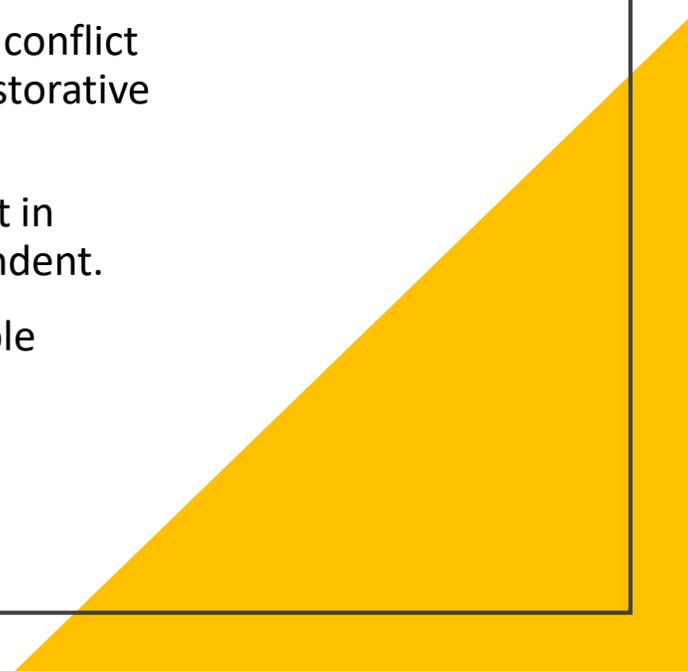
Informal Resolution 34 CFR 106.45(b)(9)

- The Title IX regulations permit school divisions to offer informal resolution but its use is limited.
- Informal Resolution (1) cannot be mandatory, (2) cannot be used unless a formal complaint has been filed, and (3) cannot be used to resolve allegations that an employee sexually harassed a student.

Informal Resolution 34 CFR 106.45(b)(9)

- Any time before reaching a determination regarding responsibility, the school division may facilitate an informal resolution process (such as mediation), that does not involve a full investigation and adjudication, if the school division
 - Provides to the parties a written notice disclosing:
 - the allegations,
 - the requirements of the informal resolution process including the circumstances under which it precludes the parties from resuming a formal complaint arising from the same allegations, provided, however, that at any time prior to agreeing to a resolution, any party has the right to withdraw from the informal resolution process and resume the grievance process with respect to the formal complaint, and
 - any consequences resulting from participating in the informal resolution process, including the records that will be maintained or could be shared; and
 - Obtains voluntary written consent from both parties.

Informal Resolution 34 CFR 106.45(b)(9)

- Must be completed in a reasonably prompt timeframe.
 - Commentary (p. 1370) – “Informal resolution may encompass a broad range of conflict resolution strategies, including, but not limited to, arbitration, mediation, or restorative justice.”
 - The commentary acknowledges (p. 1370) that an informal resolution may result in disciplinary action, including suspension and expulsion taken against the respondent.
 - Note, however, if that is the case, the written notice must state any such possible consequences.
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Informal Resolution – Policy

GBA/JFHA

- At any time during the formal complaint process and prior to reaching a determination regarding responsibility, the parties may participate in an informal resolution process, such as mediation, that does not involve a full investigation and determination of responsibility.
 - When one party requests an informal resolution process, the other party must respond to the request within 3 days. The informal resolution process must be completed within 10 days of the agreement to participate in the process.
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Informal Resolution – Policy

GBA/JFHA

- The informal resolution process may be facilitated by a trained educational professional, consultant, or other individual selected by the Title IX Coordinator under the following conditions:
 - the parties are provided a written notice disclosing the allegations, the requirements of the informal resolution process, including the circumstances under which it precludes the parties from resuming a formal complaint arising
 - from the same allegations; provided, however that at any time prior to agreeing to a resolution, any party has the right to withdraw from the informal resolution process, resume the grievance process with respect to the formal complaint, and be informed of any consequences resulting from participating in the informal resolution process, including the records that will be maintained or could be shared;

Informal Resolution – Policy GBA/JFHA

- The informal resolution process may be facilitated by a trained educational professional, consultant, or other individual selected by the Title IX Coordinator under the following conditions:
 - the parties, voluntarily and in writing, consent to the informal resolution process; and
 - the informal resolution process cannot be used to resolve allegations that an employee sexually harassed a student.

Informal Resolution – Policy GBA/JFHA

- If the matter is resolved to the satisfaction of the parties, the facilitator shall document the nature of the complaint and the resolution, have both parties sign the documentation and receive a copy, and forward it to the Title IX Coordinator. If the matter is not resolved, the formal complaint process is resumed.

Informal Resolution – Policy GBA/JFHA

- Parties cannot be required to participate in an informal resolution process.
- An informal resolution process is not offered unless a formal complaint is filed.



Emergency Removal 34 CFR § 106.44(c)

- Remember that 34 CFR § 106.45(b)(1) prohibits taking any “disciplinary sanctions or other actions that are not supportive measures” against the respondent until the grievance process has been concluded.
- Significant impacts on discipline process for students and, to some extent, employees.
- Limited exception for emergency removal.

Emergency Removal 34 CFR § 106.44(c)

- A school division may remove the respondent from the education program or activity “on an emergency basis, provided that the recipient 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.”

Emergency Removal 34 CFR § 106.44(c)

- Must still comply with other laws, including IDEA, 504, ADA.
- According to the commentary, “Emergency removal under § 106.44(c) is not a substitute for reaching a determination as to a respondent’s responsibility for the sexual harassment allegations; rather, emergency removal is for the purpose of addressing imminent threats posed to any person’s physical health or safety, which might arise out of the sexual harassment allegations.” (Commentary p. 727)

Emergency Removal 34 CFR § 106.44(c)

- Additionally, the threat must be one “arising from the allegations of sexual harassment”, this the allegations themselves or circumstances arising from the allegations may form the basis of the threat.
- “For example, if a respondent threatens physical violence against the complainant in response to the complainant’s allegations that the respondent verbally sexually harassed the complainant, the immediate threat to the complainant’s physical safety posed by the respondent may ‘arise from’ the sexual harassment allegations.” (Commentary p. 728)

Emergency Removal 34 CFR § 106.44(c)

- Emergency Removal is a high threshold: “An emergency removal under § 106.44(c) separates a respondent from educational opportunities and benefits, and is permissible only when the high threshold of an immediate threat to a person’s physical health or safety justifies the removal.” (Commentary p. 756).

Emergency Removal 34 CFR § 106.44(c)

- Intersection with risk assessment under state law:
- “[W]e decline to require recipients to follow more prescriptive requirements to undertake an emergency removal (such as requiring that the assessment be based on objective evidence, current medical knowledge, or performed by a licensed evaluator). While such detailed requirements might apply to a recipient’s risk assessments under other laws, for the purposes of these final regulations under Title IX, the Department desires to leave as much flexibility as possible for recipients to address any immediate threat to the physical health or safety of any student or other individual.” (Commentary P. 727-28)

Emergency Removal 34 CFR § 106.44(c)

- Intersection with risk assessment under state law:
- Nothing in these final regulations precludes a recipient from adopting a policy or practice of relying on objective evidence, current medical knowledge, or a licensed evaluator when considering emergency removals under § 106.44(c).” (Commentary P. 728)
- “To the extent that other applicable laws establish additional relevant standards for emergency removals, recipients should also heed such standards. To the greatest degree possible, State and local law ought to be reconciled with the final regulations, but to the extent there is a direct conflict, the final regulations prevail.” (p. 731)

Emergency Removal 34 CFR § 106.44(c)

- Post-Removal Challenges
 - Requires notice and an opportunity to be heard, otherwise flexible
 - Notice and opportunity to be heard must be provided immediately
 - “The term “immediately” will be fact-specific, but is generally understood in the context of a legal process as occurring without delay, as soon as possible, given the circumstances. “Immediately” does not require a time frame of “minutes” because in the context of a legal proceeding the term immediately is not generally understood to mean an absolute exclusion of any time interval. “Immediately” does not imply the same time frame as the “reasonably prompt” time frames that govern the grievance process under § 106.45, because “immediately” suggests a more pressing, urgent time frame than “reasonable promptness.”

Emergency Removal 34 CFR § 106.44(c)

- A post-removal challenge “is not designed to resolve the underlying allegations of sexual harassment against a respondent, but rather to ensure that recipients have the authority and discretion to appropriately handle emergency situations that may arise from allegations of sexual harassment. As discussed above, the final regulations revise the language in § 106.44(c) to add the phrase “arising from the allegations of sexual harassment,” which clarifies that the facts or circumstances that justify a removal might not be the same as the sexual harassment allegations but might “arise from” those allegations.” (p. 744)

Emergency Removal 34 CFR § 106.44(c)

- Emergency removal may be labeled as a suspension or expulsion under state law. “[T]he final regulations prohibit suspending or expelling a respondent without first following the § 106.45 grievance process, or **unless an emergency situation justifies** removal from the recipient’s education program or activity (which removal may, or may not, be labeled a “suspension” or “expulsion” by the recipient).” (Commentary p. 753).

Emergency Removal 34 CFR § 106.44(c)

- **May a school division assign a respondent to alternative education pending the grievance process absent facts that would establish “emergency removal?”**
- Maybe. According to the commentary: “Whether an elementary and secondary school recipient may implement an “alternate assignment” during the pendency of an investigation (or without a grievance process pending), in circumstances that do not justify an emergency removal, when such action is otherwise permitted by law, depends on whether the alternate assignment constitutes a disciplinary or punitive action or unreasonably burdens the respondent (in which case it would not qualify as a supportive measure as defined in § 106.30). (p. 751-52)

Emergency Removal of Students

- What does this all mean from a practical standpoint?
 - A student respondent cannot be disciplined (or be subjected to any other adverse action) before the completion of the grievance process, unless grounds for emergency removal exist.
 - In the absence of grounds for emergency removal, the student stays in place until the conclusion of the grievance process, unless there is an alternative educational placement that does not unreasonably burden the respondent.
 - **BUT REMEMBER**, you must also follow state law as well as IDEA, 504, and ADA.

Administrative Leave 34 CFR § 106.44(d) (Employees)

- A school division may place employee respondents on administrative leave during pendency of the grievance process (but not before the grievance process is initiated).
- The standard for emergency removal does not apply to administrative leave.
- Additionally, the post-removal notice and opportunity to challenge do not apply to administrative leave.

Administrative Leave 34 CFR § 106.44(d) (Employees)

- The regulations do not specify whether the administrative leave must be with or without pay (or with or without benefits).
- BUT school divisions must still comply with state law, Va. Code § 22.1-315.
 - Superintendent/designee can suspend an employee with pay for up to 5 days. After 5 days, the employee must be given notice of the reasons for the suspension and the right to a hearing on the suspension before the school board.
 - Only the school board can suspend an employee without pay, after notice and opportunity for a hearing.

Administrative Leave 34 CFR § 106.44(d) (Employees)

- The practical impact of this section is that employee respondents will likely rarely be removed under the emergency removal provisions because it will be a far lower bar to use administrative leave/suspension.
- The commentary recognizes that this section sets up a different standard for student respondents and employee respondents.
 - “[T]he final regulations permit, but do not require, what may amount to an interim suspension of an employee-respondent (i.e., administrative leave without pay) even though the final regulations prohibit interim suspensions of student-respondents.” (p. 772)

Administrative
Leave 34 CFR
§ 106.44(d)
(Employees)

- Must still comply with other laws, including 504, ADA.

Title IX Scenario

- On November 2, 2020, Nicole Doe, an eleventh-grade student at Westside High School reports to her teacher, Mrs. Smith, that another student, Josh Roe, has been harassing her for two weeks and that today he touched her breast in the hallway between classes. She says that she was walking down the hall when Josh grabbed her from behind, touched her breast, and then walked away laughing as he said “you liked that didn’t you.”
- What should Mrs. Smith do? (Q1)

Title IX Scenario

- Mrs. Smith reports Nicole's concern directly and immediately to the Title IX Coordinator.
- What should the Title IX Coordinator do? (Q2)

Title IX Scenario

- If the school division has actual knowledge of sexual harassment in an education program or activity of the recipient against a person in the United States, then the school division must make a “general response.”
- The Title IX Coordinator must promptly take the following steps: contact the complainant (alleged victim) to discuss the availability of supportive measures, consider the complainant’s wishes with respect to supportive measures, inform the complainant of the availability of supportive measures with or without the filing of a formal complaint, explain to the complainant the process for filing a formal complaint.

Title IX Scenario

- The Title IX Coordinator, Dr. James, speaks with Nicole the following morning. Nicole's mother attends the meeting with her daughter.
- Dr. James discusses supportive measures that are available, including counseling and a no-contact order. Dr. James explains that these supportive measures are available regardless whether Nicole files a formal complaint and asks Nicole if she would like these supportive measures to be put in place. Nicole says that she does not want Josh to have any contact with her but she does not want to participate in counseling at this time. Dr. James tells Nicole that if she changes her mind about counseling, she should let Dr. James know.

Title IX Scenario

- Dr. James then explains to Nicole that she can file a formal complaint by filling out and signing form JFHA-F or by writing out her complaint on a separate sheet of paper and signing it. Dr. James explains that if Nicole decides to file a formal complaint, then the grievance process will be followed and an investigation will be conducted. Nicole takes the complaint form and thanks Dr. James. Dr. James follows up with Form Letter 1 confirming their conversation.

Title IX Scenario

- Later that afternoon, Nicole and her mother drop off the completed and signed complaint form.
- On the complaint form, Nicole wrote the following:
 - Josh Roe has been sexually harassing me for weeks. It started in late October when I heard him talking to his friends and saying I was “hot” and commenting about my body. Other people heard it. Then a few days later, Josh started texting me. He kept asking if I wanted to hook up and saying he heard I had hooked up with some other guys which wasn’t true. He kept texting me and asking for pics. I mostly ignored his texts. At school last week, he tried to corner me at my locker and put his arm up to block me. He looked at my chest and leered at me and said I was a slut and he wanted to have a turn. I cussed him out and pushed past him. Then yesterday, November 2, I was walking down the hallway on my way to second block when Josh grabbed me from behind and touched my breast. Then he walked away laughing and said “you liked that didn’t you.”

Title IX Scenario

- What should the Title IX Coordinator do next? (Q3)

Title IX Scenario

- Upon receipt of a formal complaint, the school division must provide written notice to the known parties of the following:
- Notice of the grievance process, including any informal resolution process
- Notice of the allegations, with sufficient details known at the time and sufficient time to prepare a response before any initial interview, including the following:
 - The identities of the parties, if known.
 - The alleged conduct.
 - The date and location of the incident, if known.
- A statement that the respondent is presumed not responsible and that responsibility will be determined at the conclusion of the grievance process.
- Notice of right to have an advisor (may be but not required to be an attorney) to inspect and review evidence.
- Notice of any Code of Conduct provision prohibiting false statements or the submission of false information.
- Availability of supportive measures.
- May use FORM LETTER 2.

Title IX Scenario

- Dr. James sends the completed Form Letter 2 to both Nicole and Josh.
- What should the Title IX Coordinator do next? (Q4)

Title IX Scenario

- Dr. James decides to determine whether any grounds for mandatory or permissive dismissal exist.
- Mandatory Dismissal
 - The school division must dismiss a formal complaint (or allegations therein) if:
 - The alleged conduct would not constitute sexual harassment even if proved,
 - The alleged conduct did not occur in the educational program or activity, or
 - The alleged conduct did not occur against a person in the United States.

Title IX Scenario

- Permissive Dismissal
 - The school division may dismiss a formal complaint (or allegations therein) if at any time during the investigation or hearing:
 - The complainant notifies the Title IX Coordinator in writing that the complainant would like to withdraw the complaint,
 - The respondent is no longer enrolled or employed in the school division, or
 - Specific circumstances prevent the recipient from gathering evidence sufficient to reach a determination.

Title IX Scenario

- What should the Title IX Coordinator conclude regarding dismissal? (Q5)

Title IX Scenario

- Dr. James determines that there are no grounds for dismissal.
- What should the Title IX Coordinator do next? (Q6)

Title IX Scenario

- Dr. James follows the grievance process and initiates an investigation. Dr. James appoints the Principal, Mr. Johnson, to conduct the investigation.
- What step should Mr. Johnson take first? (Q7)

Title IX Scenario

- Mr. Johnson plans his investigation by reviewing the formal complaint, Form Letter 1 and Form Letter 2, and Dr. James' notes from the earlier meeting with Nicole. Mr. Johnson also reviews Policy JFHA and several provisions of the student Code of Conduct. He has identified four separate allegations:
 - Nicole heard Josh calling her “hot” and commenting about her body.
 - Josh repeatedly texted Nicole asking her to “hook up” and saying she has “hooked up” with others.
 - Josh tried to corner Nicole at her locker, blocked her, leered at her and said she was a slut and he wanted a turn.
 - Josh grabbed Nicole from behind, touched her breast and then said “you liked that didn’t you.”

Title IX Scenario

- Is there anything else Mr. Johnson should do before starting interviews?
(Q8)

Title IX Scenario

- Mr. Johnson checks Nicole's class schedule to determine which hallway the Nov. 2 incident likely occurred on and pulls the relevant surveillance video. He is able to see a male student approach Nicole quickly from behind but the footage is too blurry to see whether any contact is made. After the male student passes Nicole, the male student looks back over his shoulder as he walks away. The video reveals no other significant details.

Title IX Scenario

- Mr. Johnson also looks up Nicole's locker assignment and checks the video footage from the week before. The video from Friday, October 30 shows what appears to be the same male student approach Nicole while she is at her locker. The male student's back is to the camera. At one point, the male student holds his hand up, apparently resting it on the locker next to Nicole's. A moment later, Nicole walks away. The video quality is somewhat poor so it is impossible to tell whether the male student moved his arm before Nicole walked away or whether she pushed his arm out of the way. The video reveals no other significant details.

Title IX Scenario

- What should Mr. Johnson do next? (Q9)

Title IX Scenario

- Next, Mr. Johnson contacts Nicole to schedule a time to interview her the following morning. During that call, Mr. Johnson asks Nicole whether she has any of the text messages between her and Josh. Nicole says that she deleted them all and blocked Josh's number after he grabbed her in the hallway.

Title IX Scenario

- The next morning, Mr. Johnson interviews Nicole. He starts by saying “The purpose of this interview is to get more information about the sexual harassment complaint that you filed regarding Josh Roe. This process will include me asking you some questions. I will interview other witnesses that you identify, and I will interview Josh. After I review all relevant evidence, I will write a report of my investigation. My role is to be an objective fact finder. Do you have any reason to believe that I cannot be fair and objective in this process?” Nicole agrees that Mr. Johnson can be fair and objective.

Title IX Scenario

- Next Mr. Johnson reviews the written complaint with Nicole. She confirms that the written complaint is complete and accurate. Mr. Johnson goes through each allegation in the complaint to get additional details from Nicole. He goes allegation by allegation, in chronologic order.

Title IX Scenario

During Nicole's interview, Mr. Johnson learns the following additional information:

- Nicole states that Josh's friend, Joe Rodriguez, and her friend, Sarah Sizemore, heard Josh calling her "hot" and making comments about her body.
- When pressed for details, Nicole could not remember any of the specific comments about her body.
- Although Nicole has deleted all the texts from Josh, when Mr. Johnson asked her whether she had any other record of them, such as screenshots, Nicole remembered that she had sent a few screen shots to her friend, Sarah Sizemore. Nicole looked on her phone and was able to find two screenshots that appear to be text messages from 804-555-1234.

Title IX Scenario

During Nicole's interview, Mr. Johnson learns the following additional information:

- The first screen shot read: "Want to hook up at the party this weekend? I know U want some." Nicole responded "shut up." The other number (alleged to be Josh) responded "I know you hooked up with Joe this summer so don't play like you innocent." The screenshot did not show any response from Nicole. In the text forwarding the screen shot, which was sent to Sarah, Nicole wrote "can u believe this? josh is such a creep and a liar."
- The second screen shot read "come on, send me a pic." Nicole wrote "f off." The response was "if you don't send nudes, I will tell everyone that you screwed Joe." Nicole wrote "leave me alone i'm in class." The response was "how about a topless pic." In the text to Sarah, Nicole wrote "another one. he won't leave me alone. Imma block him." Sarah responded with a mad face emoji and a thumbs up emoji.

Title IX Scenario

During Nicole's interview, Mr. Johnson learns the following additional information:

- Nicole provided Mr. Johnson with screen shots of these exchanges with Sarah.
- Nicole said that sometimes Josh texted her while she was at school and sometimes at night. She said that there were at least a dozen more text exchanges similar to the ones she sent Sarah.
- Regarding the locker incident, Nicole said she did not think there were any witnesses and said she did not tell anyone about the incident until she filed her formal complaint.

Title IX Scenario

During Nicole's interview, Mr. Johnson learns the following additional information:

- Nicole repeated the allegation from her complaint fairly consistently that Josh tried to corner her at her locker and put his arm up to block her. She said she was intimidated by Josh's actions. When asked what specifically Josh said at the locker, however, Nicole first said she could not remember what he said and then said she thought it was something about going to a party. She said she told him no and pushed past him.
- Nicole said that after the locker incident she went into the bathroom and cried. She skipped her next class and then called her mother to pick her up early, but didn't tell her mother why.

Title IX Scenario

During Nicole's interview, Mr. Johnson learns the following additional information:

- Regarding the incident in the hallway on November 2, Nicole said that she thought that Josh's friend Joe was with Josh when he touched her breast. She did not think anyone else saw it but she did text her friend Sarah right after it happened. Nicole showed Mr. Johnson a text message on her phone in which Nicole said "that perv just grabbed my boob!" Sarah responded "you gotta tell someone." Nicole provided Mr. Johnson a screen shot of that exchange.
- Nicole said that she immediately went to Mrs. Smith's classroom because she has a close relationship with Mrs. Smith and told her what had just happened. Then she called her mother to pick her up early again. Nicole did not go to school the following day either. She met with Dr. James and then went back home.
- Nicole said she has not been back to school yet because she is afraid Josh will do something else.

Title IX Scenario

- What should Mr. Johnson do to wrap up the interview? (Q10)

Title IX Scenario

- Mr. Johnson asks Nicole whether there is anything else she wants him to know. Nicole says there is not.
- Mr. Johnson asks Nicole how the issue could be resolved. Nicole says she wants Josh to leave her alone and stop talking about her and that she doesn't ever want to see him again. Mr. Johnson reiterates that counseling is available and Nicole agrees that she would like to meet with the school counselor.
- Mr. Johnson tells Nicole that he will conduct some additional interviews and that the process will take several more weeks to complete.
- He then prints his notes, which he has been typing throughout the interview. He asks Nicole to read the notes, make any additions or changes, and then sign. Nicole reads and then signs the notes.

Title IX Scenario

- What should Mr. Johnson do next? (Q11)

Title IX Scenario

- Mr. Johnson records his observations of Nicole's demeanor during her interview. Nicole looked him in the eye for the most part, answered each question promptly, and gave consistent answers. Her face reddened several times when discussing some of the specific language used by Josh but otherwise she appeared unfazed.
- What should Mr. Johnson do next? (Q12)

Title IX Scenario

- Mr. Johnson decides that he needs to interview Sarah Sizemore and Joe Rodriguez before he interviews Josh.
- Mr. Johnson follows the same format for opening and closing each interview and has each witness read and sign his notes. The following are the significant details of each interview.

Title IX Scenario

Sarah Sizemore:

- In response to a general question “tell me about Nicole and Josh,” Sarah responds “Josh is such a jerk. He is always bothering Nicole and trying to sext her and hook up.”
- Sarah says she never overheard Josh talking about Nicole’s body or calling her “hot.”
- When shown the screenshots, Sarah confirmed that Nicole had sent them to her. When asked if the phone number 804-555-1234 was Josh’s number, Sarah said that Nicole told her it was but she did not have Josh’s number so she could not say for sure.
- Sarah said that Nicole also talked to her several times about Josh, complaining that he was wanting to hook up and would not leave her alone but Sarah could not remember the specifics of those conversations

Title IX Scenario

Joe Rodriguez

- Joe told Mr. Johnson that Josh had been his best friend since middle school.
- Joe said that he and Nicole dated briefly over the summer and that Josh was jealous and had a crush on Nicole and constantly asked Joe about her.
- Joe recalled a conversation a couple weeks earlier in which Josh was talking loudly about Nicole, called her “hot,” and talked about the size of her breasts. Joe did not think that Nicole overheard the conversation. “In fact,” Josh says, “she wasn’t even around then. I didn’t see her anywhere.”

Title IX Scenario

Joe Rodriguez

- Joe said he didn't know anything about text messages between Josh and Nicole.
- When asked if Josh's phone number was 804-555-1234, Joe said "uh, I don't know." When asked if he could look at his phone to determine whether that was Josh's number, Joe looks at his phone, avoids making eye contact with Mr. Johnson, and then said "that's not Josh." Joe refuses to let Mr. Johnson look at his phone.

Title IX Scenario

Joe Rodriguez

- When asked what he observed in the hallway on November 2, Joe said that he and Josh were walking down the hall. They saw Nicole in front of them. Josh ran up behind Nicole, said something to her (that Joe did not hear) and then started laughing. Then he and Josh proceeded to class.
- “Did you see Josh touch Nicole?” asked Mr. Johnson. Joe says “No.”
- Mr. Johnson asked Joe to clarify where he was when Josh said something to Nicole, Joe said he was about two yards behind them and Nicole’s back was to him.

Title IX Scenario

- After each interview, Mr. Johnson records his observations of each. Regarding Sarah, Mr. Johnson noted that she was firm in her answers, made eye contact fairly consistently, and gave consistent answers. Regarding Joe, Mr. Johnson noted that he initially made consistent eye contact and answered promptly. Once he was asked about Josh's phone number, Joe began to look away and fidget.
- What should Mr. Johnson do after interviewing Sarah and Joe? (Q13)

Title IX Scenario

- Mr. Johnson contacts Josh's parents to schedule a time to interview Josh the following day.
- Mr. Johnson reviews the complaint, the video footage, his notes of the other interviews and the screenshots. He also reviews the policy and Code of Conduct again. He plans several areas of inquiry but does not script the questions.

Title IX Scenario

- The next day, Josh shows up for his interview with his father and an attorney. Mr. Johnson starts the interview the same way as the others, explaining his role and the process.
- Then Mr. Johnson says “Josh, can you tell me what has been going on with Nicole Doe?” The attorney interjects, saying “That girl’s parents are threatening to press charges, he’s not answering any questions about her.”
- Mr. Johnson explains “that’s his right to not answer questions but we still have to conduct our investigation. If Josh does not cooperate, then we will have to make a decision based on the information we have.”

Title IX Scenario

- The attorney eventually agrees to allow Josh to answer some limited questions.
- Josh denied ever calling Nicole “hot.” Josh also denied making comments about Nicole’s body. When asked if he ever made comments like that to Joe Rodriguez, Josh said “No way. Joe is my best friend and he used to date Nicole. I never talked like that about her. You can ask Joe.”
- Josh said he had texted Nicole a few times but nothing inappropriate. When asked what types of things he would text her, Josh said it was about class assignments.
- When Mr. Johnson asked Josh what his cell phone number was, the attorney told Josh not to answer.

Title IX Scenario

- Josh denied ever talking to Nicole at her locker. When asked if he was sure about that Josh said he was positive and that he did not even know where Nicole's locker was. Mr. Johnson said that the video footage shows him at Nicole's locker. The attorney said he would not allow any more questions about the locker.
- Josh denied touching Nicole in the hallway. Josh said he and Joe were walking to class and Nicole dropped a piece of paper. Josh said he picked up the paper and ran up to Nicole to hand it to her. She said "thanks" and he looked back to say "welcome."
- When Mr. Johnson asked Josh whether the video from the hallway would show Josh picking something up off the floor, Josh did not answer.
- Mr. Johnson asked Josh whether he should speak to anyone else that might confirm his version of the events. Josh responded, "No, only Joe."

Title IX Scenario

- After the interview, Mr. Johnson recorded his observations of Josh's demeanor. He noted that Josh was fidgety throughout the interview. He looked to his father and attorney with every question. He took a long time to answer even the simplest of questions. When confronted with the information about the video footage of the locker incident, Josh became noticeably pale and appeared to sweat.
- What should Mr. Johnson do next? (Q14)

Title IX Scenario

- Mr. Johnson reviewed all the information again, including watching the videos a third time. He confirmed that the male student who approached Nicole at her locker was Josh. He also confirmed that the hallway video from November 2 did not show Josh bending down as if to pick anything up from the floor. He reviewed additional footage to track Josh from the classroom he exited until after he passed Nicole and there was nothing to indicate that Josh had picked anything up from the floor.
- What should Mr. Johnson do next? (Q 15)

Title IX Scenario

- Bothered by the fact that he had not been able to confirm Josh's phone number, Mr. Johnson checked with the baseball coach, who confirmed that Josh had been on the baseball team since eighth grade. The baseball coach had a roster of players' numbers so that he could let them know about practice cancellations and the like. The coach provided a copy of the roster, which indicated Josh Roe's cell phone number was 804-555-1234.
- What should Mr. Johnson do next? (Q16)

Title IX Scenario

- Mr. Johnson followed up with Nicole by phone. He said he had just a few questions. He asked whether Josh tried to hand her anything in the hallway on November 2. She said that he did not. Mr. Johnson asked Nicole to describe the incident again. She gave a description that was almost identical to the description that she put in her complaint and that she gave Mr. Johnson previously.

Title IX Scenario

- Nicole also said that she had been thinking about the texts and her mother had been able to pull the detail from her cell phone provider.
- Mrs. Doe sent Mr. Johnson an email later that evening that had a call and text log attached which appeared to have been downloaded from Verizon's website. In the email, Mrs. Doe said it was the log for Nicole's cell phone.
- The log showed no phone calls to or from 804-555-1234 but showed 27 texts from 804-555-1234 and 7 texts to 804-555-1234 over a three-week period from mid-October to early November. The messages appeared to stop on November 2. A total of 15 of the texts occurred on school days during school hours.

Title IX Scenario

- What should Mr. Johnson do next? (Q17)

Title IX Scenario

- **Remember** that once the investigation is complete but before the report is finalized, both parties must be given the opportunity to inspect and review any evidence that is “directly related to the allegations raised in the formal complaint, including evidence upon which the recipient does not intend to rely and inculpatory and exculpatory evidence” and respond. 34 CFR § 106.45(b)(5).
- The evidence must be sent to both parties and their advisors, if any, in electronic format or hard copy.

Title IX Scenario

- Mr. Johnson compiles all of the evidence including a copy of the complaint, copies of the interview notes for each witness, the screenshots, the video footage of the locker incident and the hallway incident, the baseball roster, and the Verizon call logs. He sends all of this in an email to Nicole and her parents and to Josh, his parents, and his attorney, advising them that they have ten days to respond.

Title IX Scenario

- Nicole and her parents do not respond to the sharing of evidence. Josh's attorney does respond. The attorney says that the baseball roster should not be considered evidence of Josh's phone number because it is hearsay and that the screen shots provided by Nicole are "not authenticated and should be disregarded." The attorney also says that the information provided by Sarah should be disregarded because she is biased towards her friend, Nicole.
- What should Mr. Johnson do next? (Q18)

Title IX Scenario

- The Title IX regulations require that the investigator create a written report that “fairly summarizes relevant evidence.” 34 CFR § 106.45(b)(5).

Title IX Scenario

- Every report should include certain basic information. The following is a recommended format to follow:
 - Introduction
 - Name of the complainant and respondent and date of complaint
 - Brief summary of the allegations
 - List of supportive measures implemented at the outset.
 - Applicable School Board Policy
 - Citation to the relevant policies and excerpts of relevant provisions, if appropriate
 - Investigative Procedure
 - A summary of the investigation process, including names of all witnesses and identifying all documents, etc.
 - Statement of Facts
 - The allegations in the formal complaint
 - The respondent's response to each allegation
 - The facts relevant to each allegation, including other witness's statements and documents, etc. that support or refute the allegation.
 - Conclusions
 - Reach a conclusion as to each allegation and explain how the conclusion was reached.
 - Explanation of credibility determinations
 - Explain how conflicts were resolved

Title IX Scenario

- Discuss Sample Report.
- After Mr. Johnson completes his report, he submits it to Dr. Atkins, Assistant Superintendent for Curriculum and Instruction, who has been designated and trained as a decision maker for purposes of Title IX.
- What should Dr. Atkins do first? (Q19)

Title IX Scenario

- Dr. Atkins allows each party the opportunity to submit written, relevant questions to be asked of any party or witness.
- Nicole does not submit any questions.
- Josh's attorney submits the following four questions, which he wants Dr. Atkins to ask Nicole: (1) Did you ever have sex with Joe Rodriguez? (2) If so, how many times? (3) When was the last time you had sex with Joe Rodriguez? (4) How many partners have you had sex with in the last year?
- What should Dr. Atkins do? (Q20)

Title IX Scenario

Limitation on Subject Matter

- Questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant, unless offered to prove either
 - That someone other than the respondent committed the alleged conduct, or
 - If the questions and evidence concern specific incidents of the complainant's prior sexual behavior with respect to the respondent and are offered to prove consent.

Title IX Scenario

- Dr. Atkins does not allow any of the questions posed by Josh's attorney.

Title IX Scenario

The decision-maker (who must be a different person from the Title IX Coordinator and the investigator) must apply the standard of review that has been adopted and issue a written determination of responsibility that includes six elements:

- Identification of the allegations that potentially constitute sexual harassment.
- A description of the procedural steps taken.
- Findings of fact.
- Conclusions regarding the application of the code of conduct to the facts.
- A statement of and rationale for the result for each allegation, including a determination of responsibility, disciplinary sanctions, and whether remedies will be provided to complainant.
- Procedures and bases for appeal.

Title IX Scenario

- Discuss Sample Determination of Responsibility.
- After the Determination of Responsibility is issued, Josh's attorney files a notice of appeal.

Title IX Scenario

In the notice, the attorney claims the following:

- The School Board's decision was wrong because Josh did not engage in the behaviors alleged.
- Another friend of Josh's, Aaron Rogers, says that Josh was with him on October 30 and that Josh did not go to Nicole's locker that day.
- Josh's preacher, youth group leader, boy scout troop leader, and several family friends all submitted letters attesting to Josh's character.
- Josh submitted a notarized statement saying that he never harassed Nicole.
- Josh's parents submitted a signed statement saying that they would withdraw Josh from the school system if the matter is dropped with no finding. They also vaguely threatened to sue the school board if there was a finding adverse to Josh.

Title IX Scenario

- What should the appeal decision-maker do? (Q21)

Title IX Scenario

- Both parties have the right to appeal a determination of responsibility and the dismissal of a formal complaint or any allegations on the following bases:
 - A procedural irregularity that affected the outcome
 - New evidence not reasonably available at the time the determination was made and that could affect the outcome
 - The Title IX Coordinator, investigator, or decision maker had a conflict of interest or bias for or against complainants or respondents generally or individually that affected the outcome of the matter
 - Any additional bases the school division chooses to offer (but must be available to both parties)

Title IX Scenario

- The appeal decision maker determines that there is no valid basis for appeal both parties are notified.

Title IX Scenario

- Alternatively, assume that the grounds for appeal are that Josh's friend, Aaron Rogers, was hospitalized from October 31 until November 10. Josh's attorney claims that Aaron was with Josh on October 30 and that Josh did not go to Nicole's locker that day. The appeal decision maker decides to allow the appeal on this limited ground and requests that Aaron submit a written statement.

Title IX Scenario

- Aaron submits a statement which says: “I was with Josh most of the day on October 30. I remember because it was the day before I got sick. Josh and I have all the same classes together and we walked together all day. I do not remember him going to Nicole’s locker that day.”
- The School Board considers Aaron’s statement and decides to uphold the decision-maker’s decision.
- The School Board would issue an appeal decision similar to the Determination of Responsibility but focusing on the grounds for the appeal.



Questions?

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