



K-12 Title IX Training

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Agenda

1. Overview of Title IX and when it is applicable;
 - a) The scope of the education program or activity;
 - b) The definition of sexual harassment provided within Title IX;
2. The Title IX grievance process (including appeals, and informal resolution processes, as applicable);
3. Title IX Coordinator responsibilities;
4. Responsibilities of Administrators that *are not* the Title IX Coordinator;
5. Discussion Questions



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Posting is **REQUIRED**



Title IX

“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.”



Title IX Regulations

- Provide detailed grievance procedure for Title IX sexual harassment allegations and are adopted by district policy.
- Per district policy, allegations of all other forms of sex discrimination should be addressed under the District's applicable non-discrimination or anti-harassment policies.
 - For example: gender identity issues, facilities issues, salary issues, hiring issues
- Focus today is on the Title IX sexual harassment regulations and grievance procedure.



Title IX Sexual Harassment Team Members

Position	Scope of Responsibility	Requirements
Title IX Coordinator	Person designated to coordinate and conduct intake reports and complaints, initiate formal complaints if necessary, and implement supportive measures and remedies, as necessary.	N/A
Investigator	Person designated to investigate, gather evidence, and compile an investigation report. Dismisses if mandatory or permissive.	May be the Title IX Coordinator.
Decision-Maker	Person who conducts an objective evaluation of all relevant evidence, administers question and answer period and rules on relevancy, issues a written determination regarding responsibility, dismisses if required.	Must not be the same person as the Title IX Coordinator or the Investigator.
Appeal Designee	Person designated to handle appeal, if any.	Must not be the same person as the Title IX Coordinator, Investigator, or Decision-Maker.

Title IX Sexual Harassment Parties

Complainant	An individual who is alleged to be the victim of conduct that could constitute sexual harassment
Respondent	An individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment.
Advisor	An individual that accompanies the complainant or respondent to any related meeting or proceeding in order to offer them support. The reporting party chooses their advisor, who may be, but is not required to be, an attorney.
Witness	An individual that have or could potentially have information related and/or relevant to the alleged incident.



Scope of “Educational Program or Activity”

- “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.”
- Jurisdictional trigger
- “locations, events, or circumstances over which the recipient [the school/district] exercised substantial control over both the respondent and the context in which the sexual harassment occurs . . .”

- Whether misconduct occurs on campus or off campus is not dispositive
- Title IX obligations for sexual harassment in K-12 institutions include incidents that occur off campus if:
 - the off-campus incident occurs as part of the school’s “operations” or
 - the school exercised substantial control over the respondent and the context of alleged sexual harassment that occurred off campus.

Definition of “Sexual Harassment”

- Conduct **on the basis of sex** that satisfies one or more of the following:
 - (1) An employee of the school conditioning the provision of an aid, benefit, or service of the school on an individual’s participation in unwelcome sexual conduct (quid pro quo sexual harassment);
 - (2) Unwelcome conduct determined by a reasonable person to be so severe, pervasive, AND objectively offensive that it effectively denies a person equal access to the school’s education program or activity; or
 - (3) “Sexual assault”, “dating violence”, “domestic violence”, or “stalking” (as defined under Clery Act)



- Sexual assault” means an offense classified as a forcible or nonforcible sex offense under the uniform crime reporting system of the Federal Bureau of Investigation.
- “Dating violence” means violence committed by a person—
 - (A) who is or has been in a social relationship of a romantic or intimate nature with the victim; and
 - (B) where the existence of such a relationship shall be determined based on a consideration of the following factors:
 - (i) The length of the relationship.
 - (ii) The type of relationship.
 - (iii) The frequency of interaction between the persons involved in the relationship.

- “Domestic violence” includes felony or misdemeanor crimes of violence committed by a current or former spouse or intimate partner of the victim, by a person with whom the victim shares a child in common, by a person who is cohabitating with or has cohabitated with the victim as a spouse or intimate partner, by a person similarly situated to a spouse of the victim under the domestic or family violence laws of the jurisdiction receiving grant monies, or by any other person against an adult or youth victim who is protected from that person’s acts under the domestic or family violence laws of the jurisdiction.
- “Stalking” means engaging in a course of conduct directed at a specific person that would cause a reasonable person to—
 - (A) fear for his or her safety or the safety of others; or
 - (B) suffer substantial emotional distress.



An employee of the school conditioning the provision of an aid, benefit, or service of the school on an individual's participation in unwelcome sexual conduct (quid pro quo sexual harassment)

- **Quid pro quo-#1**

- Encompasses situations where the quid pro quo nature of the incident is implied from the circumstances.
- Ex: if you do or don't do x, I will or won't do x
- Applies to all of a school's employees
- May involve a power differential
- "unwelcome" as used in the first and second prongs of the definition of sexual harassment is a subjective element



Unwelcome conduct determined by a reasonable person to be so severe, pervasive, AND objectively offensive that it effectively denies a person equal access to the school's education program or activity

- “Catch-all”-#2

- Focus factually on the nature of the misconduct itself – not on the victim's response to the misconduct.
- Determinations of severity, pervasiveness, and objective offensiveness depends on a constellation of factors including the ages and numbers of parties involved, disability status, positions of authority of involved parties etc.
- Whether harassing conduct is “objectively offensive” must be evaluated under a reasonable person standard, as a reasonable person in the complainant's position.
- No intent aspect.
- Does not require that a complainant has already suffered loss of education before being able to report sexual harassment



“On the Basis of Sex”

- Where conduct is sexual in nature, or where conduct references one sex or another, that suffices to constitute conduct “on the basis of sex.”
- Any individual – irrespective of sexual orientation or gender identity – may be victimized by the type of conduct defined as sexual harassment to which a school must respond under the Title IX regulations.

- “If the conduct alleged in the formal complaint would not constitute sexual harassment as defined . . . then the recipient must dismiss the formal complaint with regard to that conduct for purposes of sexual harassment under title IX”
- BUT such a dismissal does not preclude action under another provision of the recipient’s code of conduct.

- Definition under Title IX is different than interpretation under Title VII—must comply with both.
- Schools may continue to address harassing conduct that does not meet the new definition of sexual harassment under other provisions of the school's own code of conduct.

Reports of Sexual Harassment

- **The school is deemed to have actual knowledge of sexual harassment allegations if ANY staff member has knowledge.**
- The School is REQUIRED to respond promptly when it has actual knowledge in a way that is not deliberately indifferent.
- Any person may report sex discrimination, including sexual harassment (whether or not the person reporting is the person alleged to be the victim of conduct that could constitute sex discrimination or sexual harassment), in person, by mail, by telephone, or by electronic mail, using the contact information listed for the Title IX Coordinator, or by any other means that results in the Title IX Coordinator receiving the person's verbal or written report.
- Such a report may be made at any time (including during non-business hours) by using the telephone number or electronic mail address, or by mail to the office address, listed for the Title IX Coordinator.



Actual Knowledge Responsibilities

- Train ALL staff on what is ACTUAL KNOWLEDGE
- =Notice of sexual harassment or allegations of sexual harassment **to:**
 - The Title IX Coordinator, OR
 - Any official of the recipient who has authority to institute corrective measures on behalf of the recipient, OR
 - **Any employee of an elementary and secondary school**
- **NOTICE IS NOT JUST A REPORT TO THE TITLE IX COORDINATOR**
- REQUIRE that staff report any notice of sexual harassment or allegations of sexual harassment SAME DAY





Title IX Grievance Process

Grievance Procedure for Sexual Harassment

Formal Complaints

1. Report
2. Supportive measures and information on formal complaint
3. Formal complaint
4. Written notice to parties
5. Investigation
6. Inspection and review of evidence
7. Investigative report with review and written response
8. Question and Answer period (and hearing if applicable)
9. Written determination
10. Appeal on certain bases
11. Notice of appeal and opportunity to respond
12. Final written decision on appeal

Overarching Requirements for Sexual Harassment Grievance Procedure

1. Have Presumption that Respondent is Not Responsible.
2. Exclude Privileged Information
3. Follow Grievance Procedure Before Imposing Sanctions
4. No Bias or Conflict of Interest
5. Consider All Relevant Evidence Under Proper Standard (Preponderance or Clear and Convincing)
6. Include Range of Possible Sanctions/Remedies and Describe Supportive Measures
7. Follow Reasonable and Prompt Timelines
8. Removal/Administrative Leave Permitted in Certain Instances
9. Remember Grounds for Dismissal
10. Informal Resolution Process After Formal Complaint is Optional
11. Train Staff
12. Keep Records
13. No Retaliation
14. Maintain Confidentiality



Report Received

Title IX Coordinator must promptly reach out to the individual who is alleged to be the victim of conduct that could constitute sexual harassment (aka the complainant) to:

1. discuss the availability of supportive measures,
2. consider the complainant's wishes with respect to supportive measures,
3. inform the complainant of the availability of supportive measures with or without the filing of a formal complaint, and
4. explain to the complainant the process for filing a formal complaint.



Supportive Measures

- *Supportive measures* means non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, and without fee or charge to the complainant or the respondent.
- Such measures are designed to restore or preserve equal access to the School's education program or activity without unreasonably burdening the other party, including measures designed to protect the safety of all parties or the School's educational environment, or deter sexual harassment.
- Supportive measures may include counseling, extensions of deadlines or other course-related adjustments, modifications of work or class schedules, campus escort services, mutual restrictions on contact between the parties, changes in work locations, leaves of absence, increased security and monitoring of certain areas of the campus, and other similar measures.
- The School must maintain as confidential any supportive measures provided to the complainant or respondent, to the extent that maintaining such confidentiality would not impair the ability of the School to provide the supportive measures.



Formal Complaint

- “*Formal complaint*” means a document filed by a complainant or signed by the Title IX Coordinator alleging sexual harassment against a respondent and requesting that the School investigate the allegation of sexual harassment.
- At the time of filing a formal complaint, a complainant must be participating in or attempting to participate in the education program or activity of the School with which the formal complaint is filed.



Written Notice to Parties

- Upon receipt of a formal complaint (or later as additional allegations become known), the School has to provide the following written notice to the parties who are known
 1. Notice of the School's grievance process that complies with this section, including any informal resolution process.
 2. Notice of the allegations of sexual harassment potentially constituting sexual harassment, including sufficient details known at the time and with sufficient time to prepare a response before any initial interview.
 3. Notice that the respondent is presumed not responsible for the alleged conduct and that a determination regarding responsibility is made at the conclusion of the grievance process.
 4. Notice to the parties that they may have an advisor of their choice, who may be, but is not required to be, an attorney, and may inspect and review evidence.
 5. Notice of any provision in the School's code of conduct that prohibits knowingly making false statements or knowingly submitting false information during the grievance process.



Conducting the Investigation

- Requirement 1: Trained Investigator
- Requirement 2: Equitable Treatment of Parties
- Requirement 3: Impartial Assessment (no prejudgment, no bias, no conflict of interest)
- Requirement 4: Evidence Review
- Requirement 5: Detailed Written Investigative Report



Investigative Report

- Prior to completion of their investigative report, send to each party and the party's advisor, if any, the evidence subject to inspection and review in an electronic format or a hard copy.
- The parties must have at least ten (10) business days to submit a written response, which the investigator will consider prior to completion of the investigative report.
- Create an investigative report that fairly summarizes relevant evidence.
- Send investigative report to each party at least 10 days prior to the determination regarding responsibility.
- All for review and written response.



Timeline and Notices

- “Reasonably prompt” (30 working days to gather the evidence).
- Temporary delays can be granted for good cause.
- Investigation should start immediately.
- If union involved expect union reps to be present from the start and review any application CBA provisions.
- Written notice of the details regarding investigative meetings, including the purpose.



The Duty to Investigative

- The thoroughness of the investigation is critical to the school's ability to determine whether or not misconduct or harassment occurred and which type of disciplinary action, if any, is required as a matter of law or organizational policy.
- Failure to carry out an adequate investigation may contribute to potential liability for the district.

Evidence

- Objective evaluation of all relevant evidence – including both inculpatory and exculpatory evidence
- Credibility determinations may not be based on a person's status as a complainant, respondent, or witness
- The standard of evidence to be used to determine responsibility must be either the clear and convincing standard or the preponderance of the evidence standard



Privileged Evidence Excluded

- Precludes a recipient from using information or evidence protected by a legally recognized privilege unless the holder of the privilege has waived the privilege.
 - Medical records
 - Mental health treatment records
 - Attorney-client communications
 - Spousal privilege

When investigating, the school “cannot access, consider, disclose, or otherwise use a party’s records that are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in the professional’s or paraprofessional’s capacity, or assisting in that capacity, and which are made and maintained in connection with the provision of treatment to the party, unless the recipient obtains that party’s voluntary, written consent to do so for a grievance process under this section.”

“A recipient’s grievance process must . . . not require, allow, rely upon, or otherwise use questions or evidence that constitute, or seek disclosure of, information protected under a legally recognized privilege, unless the person holding such privilege has waived the privilege.”



Burden of Proof 106.45(b)(5)(i)

- Schools cannot restrict either party's ability to discuss the allegations or gather and present evidence, HOWEVER . . .
- Burden of proof sufficient to reach a determination regarding responsibility, rests on the school.
- Burden of proof is on school to conduct investigation, interview witnesses, gather evidence.



Hearing and Question and Answer Period

- Institutions of higher education must hold a hearing prior to a determination of responsibility.
- **K-12 schools do not have to hold a hearing**, though they may choose to add a hearing to their grievance procedure.
- With or without a hearing, the decision-maker must still afford each party the opportunity to submit written, relevant questions that a party wants asked of any party or witness, provide each party with the answers, and allow for additional, limited follow-up questions from each party.



Written Determination

- Provided simultaneously to the parties;
- Identification of the allegations potentially constituting sexual harassment;
- A description of the procedural steps taken from the receipt of the formal complaint through the determination;
- Findings of fact supporting the determination;
- Conclusions regarding the application of the School's code of conduct to the facts;
- A statement of, and rationale for, the results as to each allegation
 - A determination regarding responsibility,
 - Any disciplinary sanctions the School imposes on the respondent,
 - Whether remedies designed to restore or preserve equal access to the School's education program or activity will be provided by the School to the complainant;
- Procedures and permissible bases for appeal.



Appeal Bases

- (A) Procedural irregularity that affected the outcome of the matter;
- (B) New evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter;
- (C) The Title IX Coordinator, investigator(s), or decision-maker(s) had a conflict of interest or bias for or against complainants or respondents generally or the individual complainant or respondent that affected the outcome of the matter; or
- (D) Any other bases allowed equally to either party.



Appeal

- Different decision-maker
- Notice to the other party
- Opportunity for both parties to submit a written statement in support of, or challenging, outcome
- Written decision describing the result of the appeal and the rationale for the result and provided simultaneously to the parties
- Make sure no conflict of interest or bias
- Train

Good Cause Delay – With Written Notice

- Good cause may include considerations such as:
 - The absence of a party, a party's advisor, or a witness;
 - Concurrent law enforcement activity; or
 - The need for language assistance or accommodation of disabilities.

Emergency Removal

- BEFORE removal
 - Undertake an individualized safety and risk analysis, and
 - Determine 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.
- Provide the respondent with notice and an opportunity to challenge the decision immediately following the removal.
- Follow the IDEA and Section 504 before any removals.



Grounds for Dismissal

- The School MUST investigate the formal complaint
- If the conduct alleged in the formal complaint
 1. would not constitute sexual harassment even if proved,
 2. did not occur in the School's education program or activity, or
 3. did not occur against a person in the United States,

Then the School must dismiss the formal complaint with regard to that conduct for purposes of sexual harassment under Title IX.

- However, such a dismissal does not preclude action under another provision of the School's code of conduct.



Permissive Grounds for Dismissal

- The School may also dismiss the formal complaint or any allegations therein, if at any time during the investigation:
 1. a complainant notifies the Title IX Coordinator in writing that the complainant would like to withdraw the formal complaint or any allegations therein;
 2. the respondent is no longer enrolled or employed by the School; or
 3. special circumstances prevent the School from gathering evidence sufficient to reach a determination as to the formal complaint or allegations therein.



Informal Resolution

- Cannot require that the student or employee waive their right to the grievance process
- Cannot go forward with an informal process for sexual harassment allegations prior to there being a formal complaint
- Obtain voluntary written consent
- Not permitted for allegations that an employee sexually harassed a student
- Written notice to the parties is required, disclosing:
 1. the allegations,
 2. 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,
 3. 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
 4. any consequences resulting from participating in the informal resolution process, including the records that will be maintained or could be shared



Recordkeeping

- Keep for 7 years
- Investigation Records
- Appeal Records
- Informal Resolution Records
- Training Materials
- Response to all reports and formal complaints

No Retaliation Provision Added for All Sex Discrimination Complaints

- No recipient or other person may intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by Title IX or this part, or because the individual has made a report or complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing under this part.
- Intimidation, threats, coercion, or discrimination, including charges against an individual for code of conduct violations that do not involve sex discrimination or sexual harassment, but arise out of the same facts or circumstances as a report or complaint or sex discrimination, or a report or formal complaint of sexual harassment, for the purpose of interfering with any right or privilege secured by Title IX or this part, constitutes retaliation.
- Complaints alleging retaliation may be filed according to the grievance procedures for sex discrimination complaints not alleging sexual harassment



Maintain Confidentiality

- The recipient must keep confidential the identity of any individual who has made a report or complaint of sex discrimination, including any individual who has made a report or filed a formal complaint or sexual harassment, any complainant, any individual who has been reported to be the perpetrator of sex discrimination, any respondent, and any witness, except as may be permitted by [FERPA], or as required by law, or to carry out the purposes of [Title IX], including the conduct of any investigation, hearing, or judicial proceeding arising thereunder.



Rape Shield Law – Complainants

- Evidence and questions regarding complainants sexual predisposition or prior sexual behavior are not relevant.
- Unless
 - Offered to prove someone else committed alleged conduct
 - Offered to prove past sexual relationship with Respondent to establish consent



Title IX Coordinator Responsibilities

Title IX Coordinator Responsibilities

- Designations of Title IX team
- Posting notices, contact info, and training docs
- Notice to school community
- Confirm training completion
- Actual knowledge responsibilities
- Review/Update policies and procedures (including CBAs and Handbooks)
- Review form documents
- Timely review/handle reports
- Keep documentation



Title IX Coordinator Responsibilities *Cont.*

- Be available/accessible for reports
- Determine what Policy/Procedure to apply
- Provide details on grievance process and formal complaints
- Discuss availability of and coordinate effective implementation of supportive Measures
- Consider signing formal complaint if not filed by Complainant
- Provide Notices to Respondent and Complainant
- Consider Dismissal



Title IX Coordinator Responsibilities *Cont.*

- Consider removal/admin leave
- Informal resolution process management
- Ensure grievance process (as applicable) is followed and all notices provided
- Coordinate the effective implementation of any remedies



Title IX Coordinator *MAY* also

- Coordinate notices, party inspection and review of evidence and investigative report
- Coordinate appeal process
- Perform investigation



**Responsibilities for Staff and Administrators
that are NOT the Title IX Coordinator**

Responsibilities for Staff and Administrators that are NOT the Title IX Coordinator

- CALL THE TITLE IX COORDINATOR IMMEDIATELY
- Report all knowledge of sexual harassment or alleged sexual harassment
- DO NOT start the investigation yourself
- DO NOT impose discipline for alleged sexual harassment, without ensuring that the Title IX process is followed or does not apply



Responsibilities for Staff and Administrators that are NOT the Title IX Coordinator

- If a report is made to you and you are unable to involve the Title IX Coordinator before details are given by the reporter, immediately pass on all information received from the reporter to the Title IX Coordinator.
- Be familiar with the Title IX definition of sexual harassment
- Be familiar with the scope of the district's educational program or activity
- Discuss police involvement with legal and Title IX Coordinator



Responsibilities for Staff and Administrators that are NOT the Title IX Coordinator *cont.*

- Assist with emergency removal or administrative leave decisions
- Assist with supportive measures as requested
- Assist with any resolutions from informal resolution agreements
- Assist with remedies as requested
- Assist with instituting discipline recommended by decision-maker



Responsibilities for Staff and Administrators that are NOT the Title IX Coordinator *cont.*

- Keep parties and information confidential
- Keep documentation of incidents that occur
- Keep documentation of supportive measures/remedies that are instituted

Responsibilities for Staff and Administrators that are NOT the Title IX Coordinator *cont.*

- Notify Title IX Coordinator if a respondent or complainant withdraws or quits
- Direct students/parents to the Title IX policy and Title IX Coordinator when information is requested
- Recognize and report acts of retaliation



Responsibilities for Staff and Administrators that are NOT the Title IX Coordinator *cont.*

- Report knowledge of allegations of sexual harassment to the Title IX Coordinator EVEN IF the complainant/reporter does not want you to
- Know that you may not be told what the final decision is after Title IX proceedings conclude—need to know basis
- Refer parties to the Title IX Coordinator for status updates on pending grievance procedure



If you are the witness in a Title IX investigation...

- Be honest
- What you say is being notated and will be shared with the parties and the decision-maker.
- You cannot be retaliated against for participating in the process. Report any retaliation.
- Provide answers based on personal knowledge. Do not guess or give opinions.



Discussion Questions

1. Katie and Sarah are 11th graders who snuck into a party held by Charlie, a 12th grader, on a Friday night. After the party, Katie tells Sarah that Charlie cornered her and touched her in a way that made Katie uncomfortable. Sarah is worried about Katie and, on Monday, tells one of her teachers about the incident.

- What should the teacher do?
- Is this conduct covered by Title IX?
- Should any other actions be taken? If so, what?

2. High school student Tony accuses fellow student Sam of sexual harassment. Tony has a long disciplinary record, multiple suspensions, and has, on at least one occasion, false accused another student of theft.

- What are some potential concerns that might arise in this scenario?
- What should the Title IX Coordinator do?
- What should the Investigator do?



3. 11th grader Emmanuel tells a teacher at his school that he was sexually assaulted by a fellow student. The teacher tells Emmanuel that the offense is a crime, so it must be reported to the police.
 - What else, if anything, does the teacher need to do?
 - Does this fall under Title IX?

4. High school principal Lisa overhears teachers discussing an incident where a student inappropriately touched another student while on a school bus. Principal Lisa interviews the students. Both students seem dismissive of the incident and deny that they are bothered or hurt by what occurred.
 - Should Principal Lisa investigate further?
 - Should Principal Lisa inform the students' parents?
 - Is there anything else Principal Lisa should do in reference to this incident?
 - Is there anyone else who might have Title IX reporting or investigating responsibilities in this scenario? Who?

Lawyerly Disclaimer ...(we can't help it)

- These training materials are informational in nature and should not be construed as legal advice and are not provided to address specific grievance situations.
- Consult with your legal counsel as necessary to address specific Title IX report and grievance situations and investigations.
- Or email your school law attorney, or Aimee Gibbs or Angelina Delmastro at:
 - agibbs@dickinsonwright.com
 - adelmastro@dickinsonwright.com

