

Title IX Sexual Harassment Comprehensive Training

Title IX Sexual Harassment Comprehensive Training



Caution

- These slides reflect general legal standards for the related presentation and are not intended as legal advice for specific situations. Future legal developments may affect these topics.
- This document may not be reproduced or redistributed, in whole or in part, without the express written permission of Thrun Law Firm, P.C.

Training Certification

- This training is intended to satisfy the training requirements for Title IX Coordinators, Investigators, Decision-Makers, Informal Resolution Facilitators, and Appeals Officers.
- Review of these slides without the synchronous training may not satisfy training requirements.
- These training materials must be posted on your District's website.

Agenda

- Legal Landscape
- Overview of New Regulations
- Reporting Sexual Harassment
- Supportive Measures
- Respondent Removal
- How to Conduct a Grievance Process
- Informal Resolution Process
- How to Conduct an Investigation
- How to Write an Investigation Report
- Determination of Responsibility
 - Relevancy
 - Evidentiary Standards
- Hearings
- How to Process Appeals
- Student Privacy

Legal Landscape



Fluid Situation

- New regulations effective 8/14/20
- OCR Q&A issued 9/4/20
- OCR issued 2 Q&As on 1/15/21
- Biden administration changes
 - Executive Orders
 - DOJ Memo
- Public hearings held in June 2021
- OCR Q&A issued 7/20/21

Title IX Sexual Harassment Comprehensive Training

Next Steps

- New or revised OCR guidance on Title IX regulations very likely
- NPRM expected May 2022
- Stay tuned!



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 . . ."*

20 USC 1681

Broad Application

- Academics
- Extracurricular activities
- Athletics
- All school programs and activities, on school transportation, and in school-sponsored programs

Scope of New Regulations

- Went into effect August 14, 2020
- Do not apply to sexual harassment that allegedly occurred before effective date
- Address sexual harassment as subset of sex-based discrimination
- Apply to staff-to-staff, staff-to-student, student-to-staff, and student-to-student sexual harassment occurring **against persons in the U.S.**

Retroactivity

"With respect to sexual harassment that allegedly occurred prior to August 14, 2020, OCR will judge the school's Title IX compliance against the Title IX statute and the Title IX regulations in place at the time that the alleged sexual harassment occurred. In other words, the Rule governs how schools must respond to sexual harassment that allegedly occurs on or after August 14, 2020."

OCR, Question and Answers Regarding the Department's Final Title IX Rule, September 4, 2020

Key Changes

- **All** staff have reporting obligation
- "Single investigator" model eliminated
- Grievance process now includes specific required steps
- Respondent presumed not responsible until responsibility determination is made
- New policy, training, documentation, and record retention requirements
- Due process and constitutional protections emphasized

Title IX Sexual Harassment Comprehensive Training

Title IX Timeline

- 1972 – Title IX enacted
- 1974 – Dept. of Health, Education, & Welfare issues regulations
- 1992 – SCOTUS: student right to money damages for sexual harassment
- 1997 – OCR: schools must respond to sexual harassment allegations
- 1998 – SCOTUS: employee-to-student liability only if deliberate indifference following actual notice
- 1999 – SCOTUS: narrow definition of student-to-student sexual harassment
- 2020 – New Title IX regulations

Gebser v Lago Vista Ind Sch Dist (US, 1998)

Schools may be liable for money damages for **employee-to-student** sexual harassment if a school official who has authority to institute corrective action:

- Has actual notice of the employee's misconduct; and
- Is deliberately indifferent to the employee's misconduct, i.e. school made "an official decision...not to remedy the violation"

Davis v Monroe Cnty Bd of Ed (US, 1999)

Schools may be liable for money damages for **student-to-student** sexual harassment if:

- School official who has authority to institute corrective action has actual notice of the misconduct and is deliberately indifferent to the misconduct;
- School has substantial control over both the harasser and "context" where the harassment occurs; and
- Harasser's conduct is "so severe, pervasive, and objectively offensive" that it "effectively denies equal access to an institution's resources or opportunities."

OCR 2001 Guidance

Unwelcome conduct determined by a reasonable person to be so severe, pervasive, **or** persistent, and to **interfere with or limit** a student's ability to participate in or benefit from school services, activities, or opportunities.

Overview of New Regulations



New Terminology

- Alleged Victim → **Complainant**
- Alleged Perpetrator/Alleged Harasser → **Respondent**
- Complaint, Investigation, and Resolution → **Grievance Process**
- Educational Institution → **Recipient**
- Interim Measures → **Supportive Measures**

Title IX Sexual Harassment Comprehensive Training

Key Title IX Roles

- Title IX Coordinator: oversees school's Title IX compliance and is a school employee
- Investigator: Conducts investigation and issues investigation report
- Decision-Maker: Makes determination of responsibility
- Appeals Officer: Hears appeals
- Informal Resolution Facilitator: assists parties in reaching informal resolution, if applicable
- Investigator, Informal Resolution Facilitator, Decision-Maker, and Appeals Officer must be different persons and appropriately trained
- Title IX Coordinator may also serve as investigator or IRF

Impartiality is Key

- Persons serving in key roles must not have a conflict of interest or bias for or against:
 - Complainants and respondents generally, or
 - An individual complainant or respondent
- Prejudgment of the facts at issue must be avoided

Constitutional Concerns

Regulations emphasize protecting parties' constitutional rights:

- 1st Amendment (Freedom of Speech)
 - Exercising right doesn't constitute retaliation
 - Attempts to suppress free speech by school is not appropriate
- 5th Amendment (Due Process)
- 14th Amendment (Equal Protection)

Due Process Concerns

- Title IX can't be interpreted in a manner that denies any person due process
- Respondent presumed not responsible until determination made
- Grievance process must be "adequate, fair, and reliable" and "consistent with constitutional due process guarantees and conceptions of fundamental fairness"
- Due process is "critical part" of Title IX grievance process

What is Sexual Harassment?

Conduct **on the basis** of sex that satisfies one or more of the following:

- Employee *quid pro quo*;
- Sexual assault, dating violence, domestic violence, stalking (definitions from Violence Against Women Act); and
- Hostile environment (new stricter definition)

Quid Pro Quo

- Recipient's *employee* conditioning an aid, service, or benefit of the recipient on an individual's participation in unwelcome sexual conduct.
- **New:** only applicable to employee Respondents; not applicable to Respondent volunteer, student, etc.

Title IX Sexual Harassment Comprehensive Training

Sexual Violence Definitions

- "Sexual assault": an offense classified as a forcible or nonforcible sex offense under the uniform crime reporting system of the Federal Bureau of Investigation.
- "Dating violence": violence committed by a person who is or has been in a romantic or intimate relationship with the Complainant. The existence of such a relationship is based on a consideration of the length of the relationship, the type of relationship, and the frequency of interaction between the persons involved in the relationship.

Sexual Violence - Cont'd

- "Domestic violence": felony or misdemeanor crimes of violence committed by a current or former spouse or intimate partner of the Complainant, person with whom the Complainant shares a child, person who is cohabitating with or has cohabitated with the Complainant as a spouse or intimate partner, person similarly situated to a spouse of the Complainant under the domestic or family violence laws of Michigan; or any other person against an adult or youth Complainant who is protected from that person's acts under the domestic or family violence laws of Michigan.
- "Stalking": engaging in a course of conduct directed at a specific person that would cause a reasonable person to (1) fear for the person's safety or the safety of others; or (2) suffer substantial emotional distress.

Consent

- Term not defined in regulations
- District must define term in its policy
- How does your policy define consent?
 - Consider absence or negation of consent, and capacity to consent
- Persons in key Title IX roles must know how to apply your consent definition consistently, impartially, and in accordance with policy

Hostile Environment

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

Hostile Environment

Unwelcome conduct determined by a reasonable person to be:

Old Definition
Severe, pervasive, or **persistent**, and to **interfere with or limit** a student's **ability to participate** in or benefit from school services, activities, or opportunities.

New Definition
To be **so severe, pervasive, and objectively offensive** that it **effectively denies** a person's **equal access** to the recipient's education program or activity.

Denial of Equal Access

- Reactions to sexual harassment vary and should be assessed from perspective of a reasonable person in Complainant's position
- Denial may include skipping class to avoid harasser, grade decline, difficulty concentrating in class
- No concrete injury required
- Complainant need not drop out of school, fail a class, have a panic attack, or otherwise reach "breaking point"

OCR, *Question and Answers Regarding the Department's Final Title IX Rule*, September 4, 2020

Title IX Sexual Harassment Comprehensive Training

"Education Program or Activity"

"Includes locations, events or circumstances over which the recipient exercised substantial control over both the respondent and the context in which the harassment occurs..."

34 CFR 106.44(a)

Scope of Education Program or Activity

Consider:

- Location of conduct?
- Relationship to school or school activity?
- Involvement of student, employee, volunteer, contractor?
- Policy/handbook language?
- If no jurisdiction under Title IX, may have jurisdiction to address alleged misconduct under another policy, rule, or law

Off-Campus Sexual Harassment

- Case-by-case analysis
- Investigate if school doesn't know where misconduct occurred?
- Not during school activity? Consider effects of off-campus conduct at school!
- Consider applicable codes of conduct and Revised School Code provisions

Staff/Student Conduct

- Sexual conduct between a District employee and a student is **always** prohibited
- Consent is irrelevant
- Criminal charges may result
- CPS referral may be required

Deliberate Indifference

- Schools must not be **deliberately indifferent** to sexual harassment
- Deliberate Indifference = failure to respond **reasonably** in light of known circumstances
- School must respond in **reasonably prompt** time frame
- Take complaints seriously. Report and address behavior that may be sexual harassment; do not hope it will "just go away."

Questions?

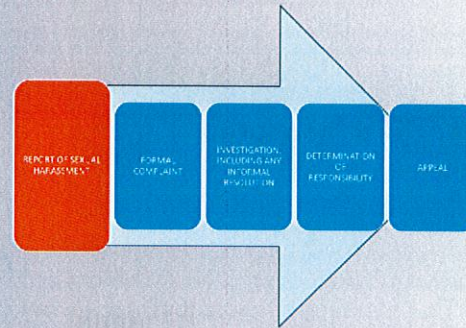
 **THRUN**
LAW FIRM, P.C.

Title IX Sexual Harassment Comprehensive Training

Reporting Sexual Harassment Under Title IX



Title IX Grievance Process



Making a Report

- Any person can make a sexual harassment report
- Reports can be made verbally, in writing, or electronically at any time to any school employee or the Title IX Coordinator
- Anonymous reports are permissible
- Report of sexual harassment ≠ Formal Complaint

Actual Knowledge

- School's obligation to respond to sexual harassment is triggered when it has "actual knowledge"
- "Actual knowledge" means notice of sexual harassment or allegations of sexual harassment to school's Title IX Coordinator **or any school employee**

Employee Reporting Obligation

- Check your policy for employee reporting steps and timelines!
- TLF Policy requires any District employee who receives a report of sexual harassment or has actual knowledge of sexual harassment to convey that information to the Title IX Coordinator **by the end of the next business day.**
- If you see something, say something!
- Noncompliance = discipline

Responding to Report

- Title IX Coordinator must, upon receipt of report:
 - Contact Complainant (alleged victim) to discuss "supportive measures"
 - Inform Complainant of "supportive measures" available
 - Explain process for filing Formal Complaint
- Failure to do the above = deliberate indifference

Title IX Sexual Harassment Comprehensive Training

Supportive Measures

Supportive Measures

- Must be non-disciplinary, non-punitive, and individualized
- Offered as appropriate, as reasonably available, and without fee or charge to parties
- Available before, during, and after Formal Complaint is filed, or when no Formal Complaint is filed
- Designed to restore or preserve equal access to education program or activity without “unreasonably” burdening other party

Examples

- Counseling
- Work/class schedule changes
- Extensions of deadlines
- Increased supervision or escorts
- Mutual no-contact order
- **But**, school may not impose discipline or other actions that are not supportive measures against Respondent before completing the grievance process

Offering Supportive Measures

- No “one size fits all”
- Must be offered whether Complainant files Formal Complaint or not
- Modify, as necessary, to avoid deliberate indifference
- Document whether supportive measures were offered and which were taken, and retain documentation
- Keep confidential to extent possible except as may be required by law
- Coordinated by Title IX Coordinator

TLF Supportive Measures Form

This form must be completed by the Title IX Coordinator

Documentation of Supportive Measures

1. Supportive measures offered to Complainant include description and date:

2. Supportive measures offered to Respondent include description and date:

3. Supportive measures requested by either party:

Respondent Removal

Title IX Sexual Harassment Comprehensive Training

General Rule

Disciplinary sanctions may **not** be imposed against respondents before grievance process concludes except:

- Employee Respondents may be placed on nondisciplinary administrative leave pending completion of grievance process
- Student Respondents may be removed from school programs or activities on emergency basis only

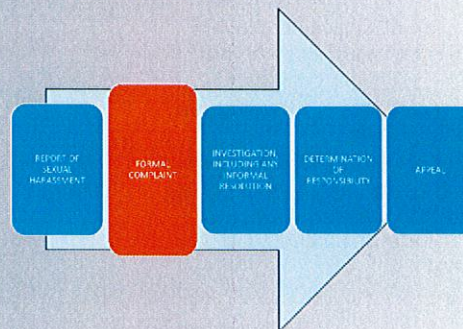
Student Emergency Removal

- Before removing student, school officials must:
 - Conduct individualized safety and risk analysis;
 - Determine that an immediate threat to **physical** health or safety of students or staff justifies removal; and
 - Provide removed student notice and opportunity to challenge removal immediately after being removed
- Consider IDEA and Section 504 requirements governing disciplinary removals of students with disabilities

How to Conduct a Grievance Process



Title IX Grievance Process



Formal Complaint

A document filed and signed by a complainant or signed by Title IX Coordinator alleging sexual harassment against a Respondent and requesting that District investigate the sexual harassment allegation.

34 CFR §106.3

Complainant's Status

- Complainant must be participating in or attempting to participate in school's education program or activity at the time the Complainant files a Formal Complaint
- But, nothing in the regulations prohibits a Title IX Coordinator from signing a Formal Complaint when the Complainant is not currently participating or attempting to participate in the school's programs

Title IX Sexual Harassment Comprehensive Training

Key Question

Is it clearly unreasonable in light of the known circumstances for the Title IX Coordinator to sign or not sign a Formal Complaint?



TLF Formal Complaint Form

TITLE IX SEXUAL HARASSMENT FORMAL COMPLAINT FORM

This form is being submitted by:
 Complainant Title IX Coordinator

Complainant Name: _____
Address: _____
Phone: _____ Email: _____

The Complainant is a student
Student Building/Address: _____ Grade: _____ Birthdate: _____

The Complainant is an employee
Job Title: _____ Building: _____

Reporter's Name (if different than Complainant): _____
Relationship to Complainant: _____
Reporter Address: _____
Reporter Phone: _____ Reporter Email: _____

1. Describe the alleged violation of the District's Title IX Sexual Harassment Policy that you are reporting to the District authorities. Please be specific. Describe the specific incidents and identify the individuals and potential witnesses involved. Describe or attach any evidence you believe is relevant. Attach additional pages if needed.

Notice to Parties

Upon receipt of Formal Complaint, provide written notice to the parties (if known) that includes:

- Notice of grievance process, including any informal resolution process
- Notice of allegations (with sufficient details)
- Statement that Respondent is presumed not responsible and that a determination of responsibility is made at conclusion of grievance process

Notice to Parties- Cont'd

- Right to have advisor of their choice, including an attorney
- Right to inspect and review evidence
- Notice of any code of conduct provision that prohibits knowingly making false statements or submitting false information

If, during the investigation, it is determined that additional allegations will be investigated, notice of additional allegations must be sent to the parties

Consolidation of Complaints

If there are multiple Formal Complaints alleging the same facts or against the same Respondent, the Formal Complaints may be consolidated to streamline the grievance process

Bifurcation of the Investigation

- New regulations *only* apply to Title IX sexual harassment
- If a report or Formal Complaint includes allegations implicating other harassment/discrimination policies, you can bifurcate the investigation
- BUT Title IX sexual harassment must be investigated pursuant to the new regulations

Title IX Sexual Harassment Comprehensive Training

Formal Complaint Dismissal

Mandatory

Must be dismissed if allegations, if proven:

- Would not constitute sexual harassment under new definition;
- Did not occur in recipient's (school) program or activity; or
- Did not occur against a person in the U.S.

Permissive

May be dismissed if:

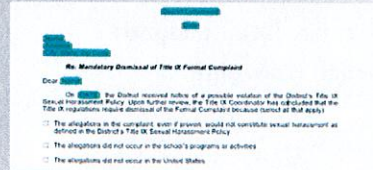
- Complainant requests withdrawal;
- Respondent's enrollment or employment ends; or
- Specific circumstances prevent the school from gathering evidence sufficient to reach a determination (e.g., Complainant not cooperating with investigation, many years between alleged misconduct and complaint filing)

REMEMBER: Even if complaint is dismissed under Title IX, school may address complaint under another policy or code of conduct provision in some circumstances.

Dismissal Notice

Prompt, simultaneous written notice to both parties that includes:

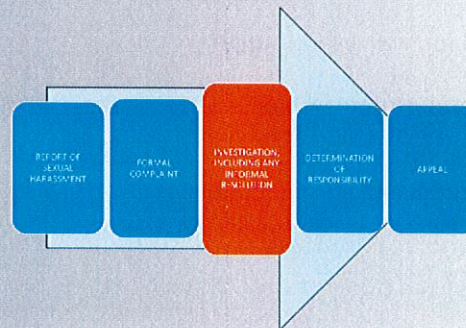
- Reasons for mandatory or discretionary dismissal, and
- Right to appeal



Questions?



Title IX Grievance Process



Informal Resolution Process



What is Informal Resolution?

- After Formal Complaint is filed but before determination of responsibility is made, school may offer parties the opportunity to informally resolve the complaint without a full investigation
- May encompass a broad range of conflict resolution strategies, including, but not limited to, arbitration, mediation, or restorative justice -- direct interaction between the parties is not required
- Not available for Formal Complaints alleging an employee sexually harassed a student

Title IX Sexual Harassment Comprehensive Training

School's Discretion

- School is not required to offer informal resolution
- If offered, school has discretion to determine what process will be used
- Consider:
 - What conduct has been alleged?
 - What resolution is sought?

Voluntary Process

- Neither party should be pressured to participate
- Schools cannot require parties to participate or otherwise waive their right to an investigation and adjudication of the Formal Complaint
- Parties may withdraw from the informal resolution process and resume the investigation at any time before resolution is reached

Notice and Consent Required

Title IX Coordinator or Investigator must:

- Provide both parties written notice of their informal resolution rights; and
- Obtain written, voluntary consent from both parties to enter into the informal resolution process.

Informal Resolution Notice

The written notice must include:

- Allegations being investigated;
- Informal resolution requirements, including when informal resolution would preclude resuming a formal complaint arising from same allegations;
- Right to withdraw from informal resolution and resume the grievance process; and
- Any consequences resulting from participating in the informal resolution process, including the records that will be maintained or could be shared.

How to Conduct a Title IX Investigation



General Considerations

- School has burden of proof and burden to "gather evidence sufficient to reach a determination of responsibility"
- Parties must be treated equally
- Standard of evidence must be same for all complaints (employee and student)
- Reasonably prompt timeline
- Respondent presumed not responsible
- Consult your policy for specific procedures!

Title IX Sexual Harassment Comprehensive Training

Law Enforcement Involvement

- Does *not* relieve school of Title IX obligation to investigate
- Do *not* use police involvement as excuse not to investigate
- Do *not* wait for criminal conclusion
- Can **briefly** delay Title IX investigation for concurrent criminal investigation

OCR: Law Enforcement

"Police investigations may be useful for fact-gathering; but because the standards for criminal investigations are different, police investigations or reports are not determinative of whether sexual harassment or violence violates Title IX. Conduct may constitute unlawful sexual harassment under Title IX even if the police do not have sufficient evidence of a criminal violation."

LaPorte Comm Sch Corp (OCR, 2015)

Delays and Time Extensions

- Temporary delays for "good cause" are permitted with written notice to parties
- "Good cause" examples:
 - Complexity of the investigation
 - Concurrent law enforcement investigation with time-dependent release of evidence
 - Absence of parties or witnesses
 - Need to provide accommodations for party or witness with a disability
- **Delays for administrative convenience is not "good cause"**

Advisors

- Parties may be accompanied by an advisor of their choice in any meeting or grievance process proceeding
- Advisors can be parents, staff members, attorneys, friends, or other persons -- the party is in the best position to decide who serves in this role
- School may not restrict who serves as advisor

General Investigation Tips

- Create investigation plan based on what you know from Formal Complaint
- Interview Complainant first to gather more information about the allegations
- Use information from Complainant's interview to determine who to interview next and what evidence to secure
- Conduct site visits, if applicable
- Secure evidence (physical, documentary, electronic, *i.e.*, video, digital, social media)
- Usually interview Respondent last

Notice of Interviews

- Must provide date/time/location, participants, and purpose of all hearings (if any), investigative interviews, and meetings, to party whose participation is invited or expected, in writing
- Notice must be given a sufficient time in advance so that a party may prepare for interview

Title IX Sexual Harassment Comprehensive Training

Establish Ground Rules

- May set ground rules for interviews so long as rules apply equally to both parties
- Examples:
 - Be honest and forthright
 - Abusive, disruptive behavior or language will not be tolerated
 - Advisor may not interrupt the interview but will be given an opportunity to provide additional information at end of interview
- Cannot restrict parties from discussing allegations or gathering/presenting relevant evidence

Interview Tips

- Establish rapport
- Explain allegations, as appropriate
- Ask simple, straightforward questions
- Ask awareness of applicable policies, rules, codes of conduct
- Ask who else may have useful information and whether there is anything you didn't ask that interviewee thinks you should know
- Re-interview parties or witnesses if needed
- Be cognizant of bias or conflicts of interest!

CAUTION: Photos and Videos of Students

- If allegation involves sexting or other photos or videos of students that could possibly be considered child pornography, **CALL LAW ENFORCEMENT**
- Do not view, save, copy, disseminate, handle or maintain photos and videos of students that could be considered child pornography
- Legal exposure for employee & school

Do's and Don'ts

- **DO:** Give parties equal opportunity to present witnesses, evidence
- **DON'T:** Use questions or evidence that constitute, or seek disclosure of, legally-privileged information
- **DON'T:** access, consider, disclose, or otherwise use a party's medical records, including mental health records without voluntary, written consent to do so

Notice of Additional Allegations

- If investigation reveals additional allegations not in original notice to parties and investigator decides to investigate those allegations, must provide notice of additional allegations to both parties
- Additional notice must:
 - Identify date notice of the additional allegations given to the parties, and
 - Describe additional allegations
- If additional allegations are made or discovered and will **not** be investigated, investigator must state basis for decision not to investigate in investigation report

Evidence Review

- Before the investigation report is completed, the investigator must send (in electronic or hard copy) the parties and their advisors all evidence obtained in the investigation so that they can respond to the evidence before the investigator finalizes the report
- Parties must be given **at least 10 days** to submit a written response to the evidence
- Investigator must consider any responses received before completing the report

Title IX Sexual Harassment Comprehensive Training

What Evidence?

- **ALL** evidence, including:
 - Evidence upon which the District does not intend to rely in reaching a determination regarding responsibility; and
 - Inculpatory or exculpatory evidence obtained from any source.
- Consider reminder to parties that redisclosure of evidence outside of Title IX grievance process is prohibited

What to Include in an Investigation Report



Parties' Information

- Name of Party
- Name of advisor (if any)
- If student: age, grade level, and building
- If employee: job title and building

Investigator's Information

- Investigator name and title
- Training verification
- Statement that investigator does not have conflict of interest or bias against either party, generally or individually, that affected the investigation

Relevant Chronology

- Date of Formal Complaint
- Date investigation initiated
- Date Complainant(s) and Respondent(s) were notified of interviews
- Date evidence submitted to parties/advisors for review
- Date each party's response was due and whether response received
- Date investigation report submitted to Decision-Maker

Nature of Allegations

- Describe each allegation, including date, time, place, and nature of the incident(s)
- Additional allegations?
 - If not in original notice to parties and investigator decides to investigate those allegations, identify date notice of additional allegations was given and describe the additional allegations
 - If the additional allegations won't be investigated, state basis for decision

Title IX Sexual Harassment Comprehensive Training

Fact Finding Activities

- Summarize Complainant's and Respondent's interview, noting date and who attended
- Identify any other contacts with Complainant, Respondent, or their advisors, noting date, contact method, purpose
- Summarize all other witness interviews, noting date and who attended
- Identify and describe any relevant evidence, including who submitted it or how obtained
- Describe any other fact-finding activities (e.g., site visits, record review, or video review)

Findings of Fact

Investigator may:

- Make specific findings of fact for review by the Decision-Maker
 - Make credibility determinations
- But**, may not make the determination of responsibility

Final Tips

- Report must fairly summarize relevant evidence
- Use witness quotes, specific dates, times, and locations in the report when possible
- Check for correct spelling of names
- Cite applicable Board policies, code of conduct provisions, RSC Sections
- Ensure report is clear, concise, and complete
- Assume either party may release report

Transmittal of Final Report

- Investigator should send (electronic or hard copy) investigation report to the parties and any advisors for review and response unless your policy provides a different process
- Report also should be sent to:
 - Title IX Coordinator
 - Decision-Maker
- Receipt of the report by the parties starts the Decision-Maker's timelines

Questions?

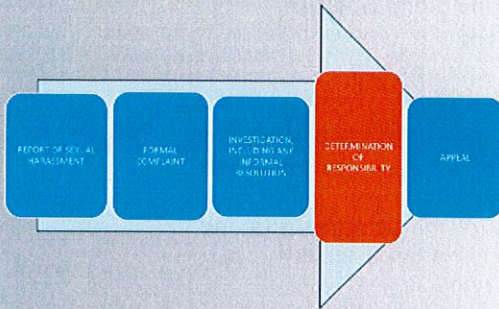


Determination of Responsibility



Title IX Sexual Harassment Comprehensive Training

Title IX Grievance Process



Decision-Maker's Role

- Has independent obligation to:
 - Evaluate relevance of available evidence including evidence summarized in investigation report, and
 - Consider all relevant evidence
- Make determination of responsibility

Right to Submit Questions

After the parties receive the investigation report but before the Decision-Maker makes the responsibility determination, the Decision-Maker must:

- Allow each party **the opportunity** to submit written, relevant questions for any party or witness to answer;
- Provide each party the answers to the questions; and
- Allow for limited follow-up questions from each party
- Explain to party submitting question basis for excluding any questions

Complainant's Sexual History

Questions and evidence about Complainant's sexual predisposition or prior sexual behavior **are not relevant** unless:

- Offered to prove that someone other than the Respondent committed the alleged misconduct; or
- 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.

Assessing Relevance

- Not defined in the regulations; use ordinary meaning of the word
- Relevant – does it deal with the issue of concern? Does the evidence impact the facts?
- Duplicative or repetitive questions may be excluded as not relevant
- BUT relevancy does not determine weight, credibility, or persuasiveness
- Weigh evidence based on credibility and other circumstances

Consider Witness Credibility

- Monitor consistency
- Consider corroboration either from other witnesses or physical evidence
- Consider whether there is a motivation to lie
- Previous consent does not imply future consent

Title IX Sexual Harassment Comprehensive Training

Evidence Standard

- Decision-Maker makes finding(s) based on policy's standard of evidence or proof
 - District may select the standard, but must use same standard for *all* Title IX sexual harassment investigations
 - Recommend: "preponderance of evidence"
 - More likely than not
 - >50%

Determination of Responsibility

Must be in writing and address:

- Allegations
- Procedural steps taken
- Findings of fact
- Student code of conduct implications
- Conclusion for each allegation and rationale
- Disciplinary sanctions imposed and whether remedies provided
- Appeal rights

Disciplinary Sanctions

- Determination of Responsibility letter must include any disciplinary action taken against the Respondent
- Sanctions should be consistent with applicable codes of conduct, policies, law
- If Board approval is required for discipline (e.g., tenure hearing, expulsion hearing), the Determination of Responsibility will include a recommendation that the Superintendent prepare and present tenure charges, or that an appropriate Administrator prepare and present a recommendation for long-term suspension or expulsion, to the Board

Remedies

- Determination of responsibility must include *whether* Complainant will receive remedial measures
- Title IX Coordinator should directly communicate with Complainant about specifics
- Remedies should be designed to restore and preserve equal access to the District's education program or activity

Remedy Examples

- Provide escort to ensure that the Complainant and Respondent can safely work or attend classes and school activities
- Offer parties school-based counseling
- Provide parties with academic support
- Rearrange course or work schedules to minimize contact between Complainant and Respondent
- Move Complainant's or Respondent's locker or work space
- Issue "no contact" directive between Complainant and Respondent

Remember!

- Available to more than just Complainant
- Also consider systemic remedies, such as training
- For students with disabilities, convene IEP or Section 504 meetings as necessary

Title IX Sexual Harassment Comprehensive Training

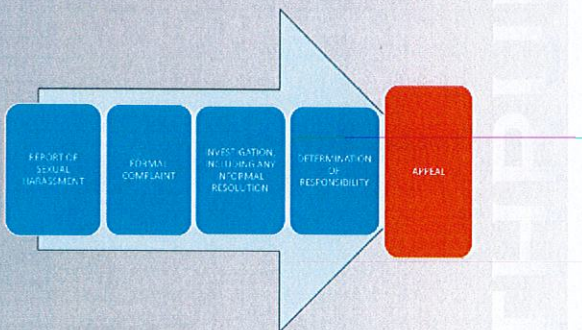
Final Reminders

- Determination of responsibility should:
 - Provide evidence-based rationales
 - Be clear and precise
 - Be nearly identical for both Complainant and Respondent
 - Sent to parties simultaneously
- Title IX Coordinator is responsible for effective implementation of any remedies

How to Process Appeals



Title IX Grievance Process



Appeal Bases

1. Procedural irregularity that affected the outcome;
2. New evidence that was not reasonably available at the time of the determination and could affect the outcome;
3. Title IX Coordinator, Investigator, or Decision-Maker had a conflict of interest that affected the outcome

Schools can create additional bases for appeal- check your policy!

General Considerations

- Both parties may appeal a determination of responsibility
- Check your policy for time frames to file and decide appeal
- Appeals Officer cannot be same person as Title IX Coordinator, Investigator, Informal Resolution Facilitator, or Decision-Maker, and must not have a conflict or bias

Appeal Process

- Determination of responsibility or dismissal includes parties' appeal rights
- Party submits appeal to Appeals Officer or Title IX Coordinator as applicable
- Appeals Officer provides written notice to both parties that appeal filed
- Parties may submit written statement to Appeals Officer in support of, or challenging, determination
- Appeals Officer issues written decision to parties simultaneously

Title IX Sexual Harassment Comprehensive Training

Retaliation



Retaliation Prohibited

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.

34 CFR 106.71(a)

Clarifying the Definition

- Retaliation includes threats, intimidation, coercion against person who makes a report, files a Formal Complaint, participates in, or refuses to participate in a Title IX proceeding
- Exercise of First Amendment rights does not constitute retaliation prohibited by Title IX
- Charges for "collateral misconduct" may be retaliation (e.g., charging Complainant with underage drinking to interfere with Complainant reporting sexual harassment)

Student Privacy



Confidentiality

- Schools must keep confidential the identity of reporter, person who files Formal Complaint, and the parties and witnesses except as permitted or required by law or to carry out any provision of Title IX
- Supportive measures must also be kept confidential

Confidentiality of Evidence

"Recipients may require parties and advisors to refrain from disseminating the evidence (for instance, by requiring parties and advisors to sign a non-disclosure agreement that permits review and use of the evidence only for purposes of the Title IX grievance process), thus providing recipients with discretion as to how to provide evidence to the parties that directly relates to the allegations raised in the formal complaint."

85 Fed Reg 30297-30298 (May 19, 2020)

Title IX Sexual Harassment Comprehensive Training

Title IX Sexual Harassment Comprehensive Training



Caution

- These slides reflect general legal standards for the related presentation and are not intended as legal advice for specific situations. Future legal developments may affect these topics.
- This document may not be reproduced or redistributed, in whole or in part, without the express written permission of Thrun Law Firm, P.C.

Training Certification

- This training is intended to satisfy the training requirements for Title IX Coordinators, Investigators, Decision-Makers, Informal Resolution Facilitators, and Appeals Officers.
- Review of these slides without the synchronous training may not satisfy training requirements.
- These training materials must be posted on your District's website.

Agenda

- Legal Landscape
- Overview of New Regulations
- Reporting Sexual Harassment
- Supportive Measures
- Respondent Removal
- How to Conduct a Grievance Process
- Informal Resolution Process
- How to Conduct an Investigation
- How to Write an Investigation Report
- Determination of Responsibility
 - Relevancy
 - Evidentiary Standards
- Hearings
- How to Process Appeals
- Student Privacy

Legal Landscape



Fluid Situation

- New regulations effective 8/14/20
- OCR Q&A issued 9/4/20
- OCR issued 2 Q&As on 1/15/21
- Biden administration changes
 - Executive Orders
 - DOJ Memo
- Public hearings held in June 2021
- OCR Q&A issued 7/20/21

Title IX Sexual Harassment Comprehensive Training

Next Steps

- New or revised OCR guidance on Title IX regulations very likely
- NPRM expected May 2022
- Stay tuned!



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 . . ."*

20 USC 1681

Broad Application

- Academics
- Extracurricular activities
- Athletics
- All school programs and activities, on school transportation, and in school-sponsored programs

Scope of New Regulations

- Went into effect August 14, 2020
- Do not apply to sexual harassment that allegedly occurred before effective date
- Address sexual harassment as subset of sex-based discrimination
- Apply to staff-to-staff, staff-to-student, student-to-staff, and student-to-student sexual harassment occurring **against persons in the U.S.**

Retroactivity

"With respect to sexual harassment that allegedly occurred prior to August 14, 2020, OCR will judge the school's Title IX compliance against the Title IX statute and the Title IX regulations in place at the time that the alleged sexual harassment occurred. In other words, the Rule governs how schools must respond to sexual harassment that allegedly occurs on or after August 14, 2020."

OCR, Question and Answers Regarding the Department's Final Title IX Rule, September 4, 2020

Key Changes

- **All** staff have reporting obligation
- "Single investigator" model eliminated
- Grievance process now includes specific required steps
- Respondent presumed not responsible until responsibility determination is made
- New policy, training, documentation, and record retention requirements
- Due process and constitutional protections emphasized

Title IX Sexual Harassment Comprehensive Training

Title IX Timeline

- 1972 – Title IX enacted
- 1974 – Dept. of Health, Education, & Welfare issues regulations
- 1992 – SCOTUS: student right to money damages for sexual harassment
- 1997 – OCR: schools must respond to sexual harassment allegations
- 1998 – SCOTUS: employee-to-student liability only if deliberate indifference following actual notice
- 1999 – SCOTUS: narrow definition of student-to-student sexual harassment
- 2020 – New Title IX regulations

Gebser v Lago Vista Ind Sch Dist (US, 1998)

Schools may be liable for money damages for **employee-to-student** sexual harassment if a school official who has authority to institute corrective action:

- Has actual notice of the employee's misconduct; and
- Is deliberately indifferent to the employee's misconduct, i.e. school made "an official decision...not to remedy the violation"

Davis v Monroe Cnty Bd of Ed (US,1999)

Schools may be liable for money damages for **student-to-student** sexual harassment if:

- School official who has authority to institute corrective action has actual notice of the misconduct and is deliberately indifferent to the misconduct;
- School has substantial control over both the harasser and "context" where the harassment occurs; and
- Harasser's conduct is "so severe, pervasive, and objectively offensive" that it "effectively denies equal access to an institution's resources or opportunities."

OCR 2001 Guidance

Unwelcome conduct determined by a reasonable person to be so severe, pervasive, **or** persistent, and to **interfere with or limit** a student's ability to participate in or benefit from school services, activities, or opportunities.

Overview of New Regulations



New Terminology

- Alleged Victim → **Complainant**
- Alleged Perpetrator/Alleged Harasser → **Respondent**
- Complaint, Investigation, and Resolution → **Grievance Process**
- Educational Institution → **Recipient**
- Interim Measures → **Supportive Measures**

Title IX Sexual Harassment Comprehensive Training

Key Title IX Roles

- Title IX Coordinator: oversees school's Title IX compliance and is a school employee
- Investigator: Conducts investigation and issues investigation report
- Decision-Maker: Makes determination of responsibility
- Appeals Officer: Hears appeals
- Informal Resolution Facilitator: assists parties in reaching informal resolution, if applicable
- Investigator, Informal Resolution Facilitator, Decision-Maker, and Appeals Officer must be different persons and appropriately trained
- Title IX Coordinator may also serve as investigator or IRF

Impartiality is Key

- Persons serving in key roles must not have a conflict of interest or bias for or against:
 - Complainants and respondents generally, or
 - An individual complainant or respondent
- Prejudgment of the facts at issue must be avoided

Constitutional Concerns

Regulations emphasize protecting parties' constitutional rights:

- 1st Amendment (Freedom of Speech)
 - Exercising right doesn't constitute retaliation
 - Attempts to suppress free speech by school is not appropriate
- 5th Amendment (Due Process)
- 14th Amendment (Equal Protection)

Due Process Concerns

- Title IX can't be interpreted in a manner that denies any person due process
- Respondent presumed not responsible until determination made
- Grievance process must be "adequate, fair, and reliable" and "consistent with constitutional due process guarantees and conceptions of fundamental fairness"
- Due process is "critical part" of Title IX grievance process

What is Sexual Harassment?

Conduct **on the basis** of sex that satisfies one or more of the following:

- Employee *quid pro quo*;
- Sexual assault, dating violence, domestic violence, stalking (definitions from Violence Against Women Act); and
- Hostile environment (new stricter definition)

Quid Pro Quo

- Recipient's *employee* conditioning an aid, service, or benefit of the recipient on an individual's participation in unwelcome sexual conduct.
- **New:** only applicable to employee Respondents; not applicable to Respondent volunteer, student, etc.

Title IX Sexual Harassment Comprehensive Training

Sexual Violence Definitions

- "Sexual assault": an offense classified as a forcible or nonforcible sex offense under the uniform crime reporting system of the Federal Bureau of Investigation.
- "Dating violence": violence committed by a person who is or has been in a romantic or intimate relationship with the Complainant. The existence of such a relationship is based on a consideration of the length of the relationship, the type of relationship, and the frequency of interaction between the persons involved in the relationship.

Sexual Violence - Cont'd

- "Domestic violence": felony or misdemeanor crimes of violence committed by a current or former spouse or intimate partner of the Complainant, person with whom the Complainant shares a child, person who is cohabitating with or has cohabitated with the Complainant as a spouse or intimate partner, person similarly situated to a spouse of the Complainant under the domestic or family violence laws of Michigan; or any other person against an adult or youth Complainant who is protected from that person's acts under the domestic or family violence laws of Michigan.
- "Stalking": engaging in a course of conduct directed at a specific person that would cause a reasonable person to (1) fear for the person's safety or the safety of others; or (2) suffer substantial emotional distress.

Consent

- Term not defined in regulations
- District must define term in its policy
- How does your policy define consent?
 - Consider absence or negation of consent, and capacity to consent
- Persons in key Title IX roles must know how to apply your consent definition consistently, impartially, and in accordance with policy

Hostile Environment

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

Hostile Environment

Unwelcome conduct determined by a reasonable person to be:

Old Definition
Severe, pervasive, or **persistent**, and to **interfere with or limit** a student's **ability to participate** in or benefit from school services, activities, or opportunities.

New Definition
To be so severe, pervasive, and **objectively offensive** that it **effectively denies** a person's **equal access** to the recipient's education program or activity.

Denial of Equal Access

- Reactions to sexual harassment vary and should be assessed from perspective of a reasonable person in Complainant's position
- Denial may include skipping class to avoid harasser, grade decline, difficulty concentrating in class
- No concrete injury required
- Complainant need not drop out of school, fail a class, have a panic attack, or otherwise reach "breaking point"

OCR, Question and Answers Regarding the Department's Final Title IX Rule, September 4, 2020

Title IX Sexual Harassment Comprehensive Training

“Education Program or Activity”

“Includes locations, events or circumstances over which the recipient exercised substantial control over both the respondent and the context in which the harassment occurs...”

34 CFR 106.44(a)

Scope of Education Program or Activity

Consider:

- Location of conduct?
- Relationship to school or school activity?
- Involvement of student, employee, volunteer, contractor?
- Policy/handbook language?
- If no jurisdiction under Title IX, may have jurisdiction to address alleged misconduct under another policy, rule, or law

Off-Campus Sexual Harassment

- Case-by-case analysis
- Investigate if school doesn't know where misconduct occurred?
- Not during school activity? Consider effects of off-campus conduct at school!
- Consider applicable codes of conduct and Revised School Code provisions

Staff/Student Conduct

- Sexual conduct between a District employee and a student is **always** prohibited
- Consent is irrelevant
- Criminal charges may result
- CPS referral may be required

Deliberate Indifference

- Schools must not be **deliberately indifferent** to sexual harassment
- Deliberate Indifference = failure to respond **reasonably** in light of known circumstances
- School must respond in **reasonably prompt** time frame
- Take complaints seriously. Report and address behavior that may be sexual harassment; do not hope it will “just go away.”

Questions?

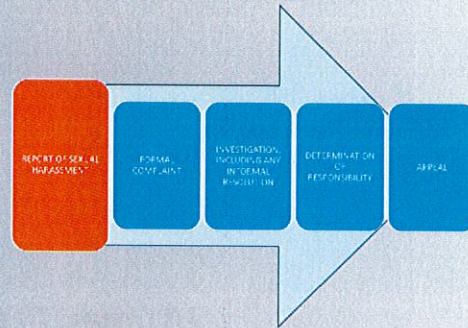


Title IX Sexual Harassment Comprehensive Training

Reporting Sexual Harassment Under Title IX



Title IX Grievance Process



Making a Report

- Any person can make a sexual harassment report
- Reports can be made verbally, in writing, or electronically at any time to any school employee or the Title IX Coordinator
- Anonymous reports are permissible
- Report of sexual harassment ≠ Formal Complaint

Actual Knowledge

- School's obligation to respond to sexual harassment is triggered when it has "actual knowledge"
- "Actual knowledge" means notice of sexual harassment or allegations of sexual harassment to school's Title IX Coordinator **or any school employee**

Employee Reporting Obligation

- Check your policy for employee reporting steps and timelines!
- TLF Policy requires any District employee who receives a report of sexual harassment or has actual knowledge of sexual harassment to convey that information to the Title IX Coordinator **by the end of the next business day.**
- If you see something, say something!
- Noncompliance = discipline

Responding to Report

- Title IX Coordinator must, upon receipt of report:
 - Contact Complainant (alleged victim) to discuss "supportive measures"
 - Inform Complainant of "supportive measures" available
 - Explain process for filing Formal Complaint
- Failure to do the above = deliberate indifference

Title IX Sexual Harassment Comprehensive Training

Supportive Measures



Supportive Measures

- Must be non-disciplinary, non-punitive, and individualized
- Offered as appropriate, as reasonably available, and without fee or charge to parties
- Available before, during, and after Formal Complaint is filed, or when no Formal Complaint is filed
- Designed to restore or preserve equal access to education program or activity without "unreasonably" burdening other party

Examples

- Counseling
- Work/class schedule changes
- Extensions of deadlines
- Increased supervision or escorts
- Mutual no-contact order
- **But**, school may not impose discipline or other actions that are not supportive measures against Respondent before completing the grievance process

Offering Supportive Measures

- No "one size fits all"
- Must be offered whether Complainant files Formal Complaint or not
- Modify, as necessary, to avoid deliberate indifference
- Document whether supportive measures were offered and which were taken, and retain documentation
- Keep confidential to extent possible except as may be required by law
- Coordinated by Title IX Coordinator

TLF Supportive Measures Form

This form must be completed by the Title IX Coordinator

Documentation of Supportive Measures

1. Supportive measures offered to Complainant include description and date:

2. Supportive measures offered to Respondent include description and date:

3. Supportive measures reported by either party:

Respondent Removal



Title IX Sexual Harassment Comprehensive Training

General Rule

Disciplinary sanctions may **not** be imposed against respondents before grievance process concludes except:

- Employee Respondents may be placed on nondisciplinary administrative leave pending completion of grievance process
- Student Respondents may be removed from school programs or activities on emergency basis only

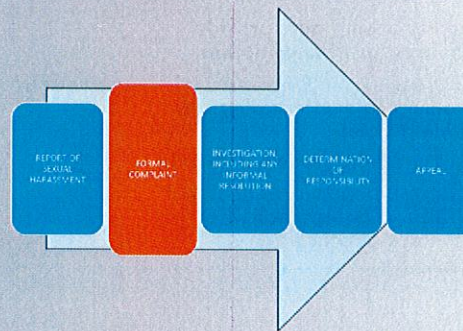
Student Emergency Removal

- Before removing student, school officials must:
 - Conduct individualized safety and risk analysis;
 - Determine that an immediate threat to **physical** health or safety of students or staff justifies removal; and
 - Provide removed student notice and opportunity to challenge removal immediately after being removed
- Consider IDEA and Section 504 requirements governing disciplinary removals of students with disabilities

How to Conduct a Grievance Process



Title IX Grievance Process



Formal Complaint

A document filed and signed by a complainant or signed by Title IX Coordinator alleging sexual harassment against a Respondent and requesting that District investigate the sexual harassment allegation.

34 CFR §106.3

Complainant's Status

- Complainant must be participating in or attempting to participate in school's education program or activity at the time the Complainant files a Formal Complaint
- But, nothing in the regulations prohibits a Title IX Coordinator from signing a Formal Complaint when the Complainant is not currently participating or attempting to participate in the school's programs

Title IX Sexual Harassment Comprehensive Training

Key Question

Is it clearly unreasonable in light of the known circumstances for the Title IX Coordinator to sign or not sign a Formal Complaint?



TLF Formal Complaint Form

TITLE IX SEXUAL HARASSMENT FORMAL COMPLAINT FORM

This form is to be completed by:

Complainant Title IX Coordinator

Complainant Name _____
Address _____
Phone _____ Email _____

If the Complainant is a student
School Building Attending _____ Grade _____ Birthdate _____

If the Complainant is an employee
Job Title _____ Building _____

Reporter's Name if different than Complainant _____
Relationship to Complainant _____
Reporter Address _____ Reporter Phone _____ Reporter Email _____

1. Complete the alleged incident of the District's Title IX Sexual Harassment Policy that you are requesting the District investigate. Please be specific. Describe the specific incidents and identify the individuals and potential witnesses involved. Do not be so sketchy any evidence you believe is relevant. Attach additional pages if needed.

Notice to Parties

Upon receipt of Formal Complaint, provide written notice to the parties (if known) that includes:

- Notice of grievance process, including any informal resolution process
- Notice of allegations (with sufficient details)
- Statement that Respondent is presumed not responsible and that a determination of responsibility is made at conclusion of grievance process

Notice to Parties- Cont'd

- Right to have advisor of their choice, including an attorney
- Right to inspect and review evidence
- Notice of any code of conduct provision that prohibits knowingly making false statements or submitting false information

If, during the investigation, it is determined that additional allegations will be investigated, notice of additional allegations must be sent to the parties

Consolidation of Complaints

If there are multiple Formal Complaints alleging the same facts or against the same Respondent, the Formal Complaints may be consolidated to streamline the grievance process

Bifurcation of the Investigation

- New regulations *only* apply to Title IX sexual harassment
- If a report or Formal Complaint includes allegations implicating other harassment/discrimination policies, you can bifurcate the investigation
- BUT Title IX sexual harassment must be investigated pursuant to the new regulations

Title IX Sexual Harassment Comprehensive Training

Formal Complaint Dismissal

Mandatory

Must be dismissed if allegations, if proven:

- Would not constitute sexual harassment under new definition;
- Did not occur in recipient's (school) program or activity; or
- Did not occur against a person in the U.S.

Permissive

May be dismissed if:

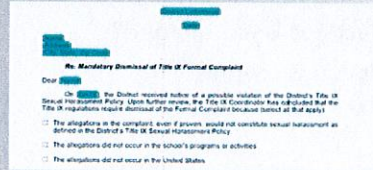
- Complainant requests withdrawal;
- Respondent's enrollment or employment ends; or
- Specific circumstances prevent the school from gathering evidence sufficient to reach a determination (e.g., Complainant not cooperating with investigation, many years between alleged misconduct and complaint filing)

REMEMBER: Even if complaint is dismissed under Title IX, school may address complaint under another policy or code of conduct provision in some circumstances.

Dismissal Notice

Prompt, simultaneous written notice to both parties that includes:

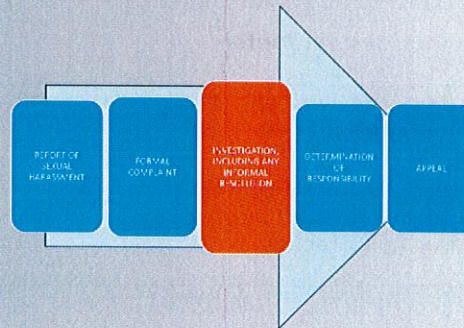
- Reasons for mandatory or discretionary dismissal, and
- Right to appeal



Questions?



Title IX Grievance Process



Informal Resolution Process



What is Informal Resolution?

- After Formal Complaint is filed but before determination of responsibility is made, school may offer parties the opportunity to informally resolve the complaint without a full investigation
- May encompass a broad range of conflict resolution strategies, including, but not limited to, arbitration, mediation, or restorative justice -- direct interaction between the parties is not required
- Not available for Formal Complaints alleging an employee sexually harassed a student

Title IX Sexual Harassment Comprehensive Training

School's Discretion

- School is not required to offer informal resolution
- If offered, school has discretion to determine what process will be used
- Consider:
 - What conduct has been alleged?
 - What resolution is sought?

Voluntary Process

- Neither party should be pressured to participate
- Schools cannot require parties to participate or otherwise waive their right to an investigation and adjudication of the Formal Complaint
- Parties may withdraw from the informal resolution process and resume the investigation at any time before resolution is reached

Notice and Consent Required

Title IX Coordinator or Investigator must:

- Provide both parties written notice of their informal resolution rights; and
- Obtain written, voluntary consent from both parties to enter into the informal resolution process.

Informal Resolution Notice

The written notice must include:

- Allegations being investigated;
- Informal resolution requirements, including when informal resolution would preclude resuming a formal complaint arising from same allegations;
- Right to withdraw from informal resolution and resume the grievance process; and
- Any consequences resulting from participating in the informal resolution process, including the records that will be maintained or could be shared.

How to Conduct a Title IX Investigation



General Considerations

- School has burden of proof and burden to "gather evidence sufficient to reach a determination of responsibility"
- Parties must be treated equally
- Standard of evidence must be same for all complaints (employee and student)
- Reasonably prompt timeline
- Respondent presumed not responsible
- Consult your policy for specific procedures!

Title IX Sexual Harassment Comprehensive Training

Law Enforcement Involvement

- Does *not* relieve school of Title IX obligation to investigate
- Do *not* use police involvement as excuse not to investigate
- Do *not* wait for criminal conclusion
- Can **briefly** delay Title IX investigation for concurrent criminal investigation

OCR: Law Enforcement

"Police investigations may be useful for fact-gathering; but because the standards for criminal investigations are different, police investigations or reports are not determinative of whether sexual harassment or violence violates Title IX. Conduct may constitute unlawful sexual harassment under Title IX even if the police do not have sufficient evidence of a criminal violation."

LaPorte Comm Sch Corp (OCR, 2015)

Delays and Time Extensions

- Temporary delays for "good cause" are permitted with written notice to parties
- "Good cause" examples:
 - Complexity of the investigation
 - Concurrent law enforcement investigation with time-dependent release of evidence
 - Absence of parties or witnesses
 - Need to provide accommodations for party or witness with a disability
- **Delays for administrative convenience is not "good cause"**

Advisors

- Parties may be accompanied by an advisor of their choice in any meeting or grievance process proceeding
- Advisors can be parents, staff members, attorneys, friends, or other persons -- the party is in the best position to decide who serves in this role
- School may not restrict who serves as advisor

General Investigation Tips

- Create investigation plan based on what you know from Formal Complaint
- Interview Complainant first to gather more information about the allegations
- Use information from Complainant's interview to determine who to interview next and what evidence to secure
- Conduct site visits, if applicable
- Secure evidence (physical, documentary, electronic, *i.e.*, video, digital, social media)
- Usually interview Respondent last

Notice of Interviews

- Must provide date/time/location, participants, and purpose of all hearings (if any), investigative interviews, and meetings, to party whose participation is invited or expected, in writing
- Notice must be given a sufficient time in advance so that a party may prepare for interview

Title IX Sexual Harassment Comprehensive Training

Establish Ground Rules

- May set ground rules for interviews so long as rules apply equally to both parties
- Examples:
 - Be honest and forthright
 - Abusive, disruptive behavior or language will not be tolerated
 - Advisor may not interrupt the interview but will be given an opportunity to provide additional information at end of interview
- Cannot restrict parties from discussing allegations or gathering/presenting relevant evidence

Interview Tips

- Establish rapport
- Explain allegations, as appropriate
- Ask simple, straightforward questions
- Ask awareness of applicable policies, rules, codes of conduct
- Ask who else may have useful information and whether there is anything you didn't ask that interviewee thinks you should know
- Re-interview parties or witnesses if needed
- Be cognizant of bias or conflicts of interest!

CAUTION: Photos and Videos of Students

- If allegation involves sexting or other photos or videos of students that could possibly be considered child pornography, **CALL LAW ENFORCEMENT**
- Do not view, save, copy, disseminate, handle or maintain photos and videos of students that could be considered child pornography
- Legal exposure for employee & school

Do's and Don'ts

- **DO:** Give parties equal opportunity to present witnesses, evidence
- **DON'T:** Use questions or evidence that constitute, or seek disclosure of, legally-privileged information
- **DON'T:** access, consider, disclose, or otherwise use a party's medical records, including mental health records without voluntary, written consent to do so

Notice of Additional Allegations

- If investigation reveals additional allegations not in original notice to parties and investigator decides to investigate those allegations, must provide notice of additional allegations to both parties
- Additional notice must:
 - Identify date notice of the additional allegations given to the parties, and
 - Describe additional allegations
- If additional allegations are made or discovered and will **not** be investigated, investigator must state basis for decision not to investigate in investigation report

Evidence Review

- Before the investigation report is completed, the investigator must send (in electronic or hard copy) the parties and their advisors all evidence obtained in the investigation so that they can respond to the evidence before the investigator finalizes the report
- Parties must be given **at least 10 days** to submit a written response to the evidence
- Investigator must consider any responses received before completing the report

Title IX Sexual Harassment Comprehensive Training

What Evidence?

- **ALL** evidence, including:
 - Evidence upon which the District does not intend to rely in reaching a determination regarding responsibility; and
 - Inculpatory or exculpatory evidence obtained from any source.
- Consider reminder to parties that redisclosure of evidence outside of Title IX grievance process is prohibited

What to Include in an Investigation Report



Parties' Information

- Name of Party
- Name of advisor (if any)
- If student: age, grade level, and building
- If employee: job title and building

Investigator's Information

- Investigator name and title
- Training verification
- Statement that investigator does not have conflict of interest or bias against either party, generally or individually, that affected the investigation

Relevant Chronology

- Date of Formal Complaint
- Date investigation initiated
- Date Complainant(s) and Respondent(s) were notified of interviews
- Date evidence submitted to parties/advisors for review
- Date each party's response was due and whether response received
- Date investigation report submitted to Decision-Maker

Nature of Allegations

- Describe each allegation, including date, time, place, and nature of the incident(s)
- Additional allegations?
 - If not in original notice to parties and investigator decides to investigate those allegations, identify date notice of additional allegations was given and describe the additional allegations
 - If the additional allegations won't be investigated, state basis for decision

Title IX Sexual Harassment Comprehensive Training

Fact Finding Activities

- Summarize Complainant's and Respondent's interview, noting date and who attended
- Identify any other contacts with Complainant, Respondent, or their advisors, noting date, contact method, purpose
- Summarize all other witness interviews, noting date and who attended
- Identify and describe any relevant evidence, including who submitted it or how obtained
- Describe any other fact-finding activities (e.g., site visits, record review, or video review)

Findings of Fact

Investigator may:

- Make specific findings of fact for review by the Decision-Maker
 - Make credibility determinations
- But**, may not make the determination of responsibility

Final Tips

- Report must fairly summarize relevant evidence
- Use witness quotes, specific dates, times, and locations in the report when possible
- Check for correct spelling of names
- Cite applicable Board policies, code of conduct provisions, RSC Sections
- Ensure report is clear, concise, and complete
- Assume either party may release report

Transmittal of Final Report

- Investigator should send (electronic or hard copy) investigation report to the parties and any advisors for review and response unless your policy provides a different process
- Report also should be sent to:
 - Title IX Coordinator
 - Decision-Maker
- Receipt of the report by the parties starts the Decision-Maker's timelines

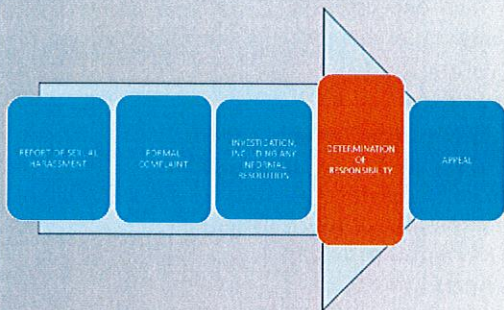
Questions?

Determination of Responsibility



Title IX Sexual Harassment Comprehensive Training

Title IX Grievance Process



Decision-Maker's Role

- Has independent obligation to:
 - Evaluate relevance of available evidence including evidence summarized in investigation report, and
 - Consider all relevant evidence
- Make determination of responsibility

Right to Submit Questions

After the parties receive the investigation report but before the Decision-Maker makes the responsibility determination, the Decision-Maker must:

- Allow each party **the opportunity** to submit written, relevant questions for any party or witness to answer;
- Provide each party the answers to the questions; and
- Allow for limited follow-up questions from each party
- Explain to party submitting question basis for excluding any questions

Complainant's Sexual History

Questions and evidence about Complainant's sexual predisposition or prior sexual behavior **are not relevant** unless:

- Offered to prove that someone other than the Respondent committed the alleged misconduct; or
- 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.

Assessing Relevance

- Not defined in the regulations; use ordinary meaning of the word
- Relevant – does it deal with the issue of concern? Does the evidence impact the facts?
- Duplicative or repetitive questions may be excluded as not relevant
- BUT relevancy does not determine weight, credibility, or persuasiveness
- Weigh evidence based on credibility and other circumstances

Consider Witness Credibility

- Monitor consistency
- Consider corroboration either from other witnesses or physical evidence
- Consider whether there is a motivation to lie
- Previous consent does not imply future consent

Title IX Sexual Harassment Comprehensive Training

Evidence Standard

- Decision-Maker makes finding(s) based on policy's standard of evidence or proof
 - District may select the standard, but must use same standard for *all* Title IX sexual harassment investigations
 - Recommend: "preponderance of evidence"
 - More likely than not
 - >50%

Determination of Responsibility

Must be in writing and address:

- Allegations
- Procedural steps taken
- Findings of fact
- Student code of conduct implications
- Conclusion for each allegation and rationale
- Disciplinary sanctions imposed and whether remedies provided
- Appeal rights

Disciplinary Sanctions

- Determination of Responsibility letter must include any disciplinary action taken against the Respondent
- Sanctions should be consistent with applicable codes of conduct, policies, law
- If Board approval is required for discipline (e.g., tenure hearing, expulsion hearing), the Determination of Responsibility will include a recommendation that the Superintendent prepare and present tenure charges, or that an appropriate Administrator prepare and present a recommendation for long-term suspension or expulsion, to the Board

Remedies

- Determination of responsibility must include *whether* Complainant will receive remedial measures
- Title IX Coordinator should directly communicate with Complainant about specifics
- Remedies should be designed to restore and preserve equal access to the District's education program or activity

Remedy Examples

- Provide escort to ensure that the Complainant and Respondent can safely work or attend classes and school activities
- Offer parties school-based counseling
- Provide parties with academic support
- Rearrange course or work schedules to minimize contact between Complainant and Respondent
- Move Complainant's or Respondent's locker or work space
- Issue "no contact" directive between Complainant and Respondent

Remember!

- Available to more than just Complainant
- Also consider systemic remedies, such as training
- For students with disabilities, convene IEP or Section 504 meetings as necessary

Title IX Sexual Harassment Comprehensive Training

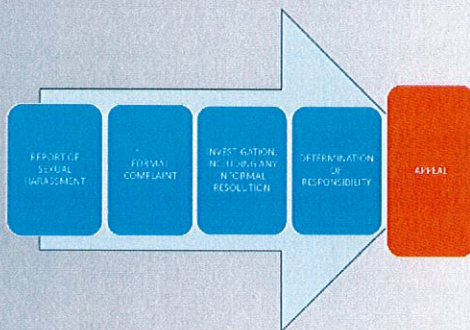
Final Reminders

- Determination of responsibility should:
 - Provide evidence-based rationales
 - Be clear and precise
 - Be nearly identical for both Complainant and Respondent
 - Sent to parties simultaneously
- Title IX Coordinator is responsible for effective implementation of any remedies

How to Process Appeals



Title IX Grievance Process



Appeal Bases

1. Procedural irregularity that affected the outcome;
2. New evidence that was not reasonably available at the time of the determination and could affect the outcome;
3. Title IX Coordinator, Investigator, or Decision-Maker had a conflict of interest that affected the outcome

Schools can create additional bases for appeal- check your policy!

General Considerations

- Both parties may appeal a determination of responsibility
- Check your policy for time frames to file and decide appeal
- Appeals Officer cannot be same person as Title IX Coordinator, Investigator, Informal Resolution Facilitator, or Decision-Maker, and must not have a conflict or bias

Appeal Process

- Determination of responsibility or dismissal includes parties' appeal rights
- Party submits appeal to Appeals Officer or Title IX Coordinator as applicable
- Appeals Officer provides written notice to both parties that appeal filed
- Parties may submit written statement to Appeals Officer in support of, or challenging, determination
- Appeals Officer issues written decision to parties simultaneously

Title IX Sexual Harassment Comprehensive Training

Retaliation



Retaliation Prohibited

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.

34 CFR 106.71(a)

Clarifying the Definition

- Retaliation includes threats, intimidation, coercion against person who makes a report, files a Formal Complaint, participates in, or refuses to participate in a Title IX proceeding
- Exercise of First Amendment rights does not constitute retaliation prohibited by Title IX
- Charges for "collateral misconduct" may be retaliation (e.g., charging Complainant with underage drinking to interfere with Complainant reporting sexual harassment)

Student Privacy



Confidentiality

- Schools must keep confidential the identity of reporter, person who files Formal Complaint, and the parties and witnesses except as permitted or required by law or to carry out any provision of Title IX
- Supportive measures must also be kept confidential

Confidentiality of Evidence

"Recipients may require parties and advisors to refrain from disseminating the evidence (for instance, by requiring parties and advisors to sign a non-disclosure agreement that permits review and use of the evidence only for purposes of the Title IX grievance process), thus providing recipients with discretion as to how to provide evidence to the parties that directly relates to the allegations raised in the formal complaint."

85 Fed Reg 30297-30298 (May 19, 2020)

Title IX Sexual Harassment Comprehensive Training

Record Keeping

- Records relating to Title IX reports must be maintained for at least seven years
 - Applies to investigation records, disciplinary sanctions, remedies, appeals, and records of any action taken (i.e. supportive measures)
- Must retain any materials used to train Title IX Coordinators, Investigators, Decision-Makers, Appeals Officers, and Informal Resolution Facilitator
 - This PowerPoint!

Hearings



Hearings

- Live hearing and cross-examination **NOT** required for K-12 (unless your policy provides otherwise)
- Hearing is opportunity for parties to tell their side of the story through witness testimony, documentation, recordings, video, audio, photos, and any other relevant evidence

Hearing Location

- Create space for all parties to view testimony and evidence equally
- Ensure student privacy
- At request of either party, hearing must occur with parties in separate rooms with use of technology so all can see and hear live testimony
- If using any technology, this training is **not sufficient**
 - Get training from IT Director or other person on use of technology
 - Post those training materials on website

Opening the Hearing

- Introduction of Decision-Maker, parties, advisors and anyone else present
- Decision-Maker describes previous steps of grievance process (notice provided to parties, opportunity to review evidence etc.)
- Describe allegations
- Explain evidentiary standard
- Both parties have opportunity to present testimony and evidence
- No strict rules of evidence, but Decision-Maker determines relevancy of testimony and evidence
- Statement that Decision-Maker has no bias or conflict of interest and can be impartial

Hearing Format

- District determines hearing format
- Typical hearing format includes:
 - Opening statements
 - Presentation of evidence by Complainant, with cross examination
 - Presentation of evidence by Respondent, with cross examination
 - Rebuttal, if any
 - Closing statements

Title IX Sexual Harassment Comprehensive Training

Hearing Rules

- Each party's advisor must be permitted to ask the other party and witnesses relevant questions and follow-up questions
 - Including questions challenging credibility
 - Questions related to Complainant's prior sexual history are not relevant except in *very limited* circumstances

Hearing Rules – cont'd

- Cross examination must be conducted directly, orally, and in real time by party's advisor and never by party personally
- Decision-Maker/Hearing Officer determines relevance and must explain decision to exclude any question

Questions?



#TeamThrun Title IX Attorneys

Rob Dietzel



Michele Eaddy



Tim Gardner



Meg Hockett



Roy Henley



Jessie McNamara



Cristina Patzelt



Jennifer Starlin



Erin Walz



THRUN

LAW FIRM, P.C.

CELEBRATING 75 YEARS

@THRUNLAW

