

Rise and Shine with Title IX

Managing the Title IX Process

with Laura Anthony and Katy Osborn



Disclaimers

- We are not giving you legal advice – consult with your legal counsel regarding how best to address a specific situation
- Yes, we will send a copy of the slides after this presentation to all who registered their email address when signing in
- Feel free to submit questions - We will answer them at the end as time permits
- Members of the Title IX Team (TIX Coordinator, Investigator, Informal Resolution Facilitator, Decision Maker) are required to have additional training

Additional information
available at:

Title IX Resource Center
at www.bricker.com/titleix

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What We're Talking About Today

- **Dual Role** – Principals most often come into contact with the Title IX process in two ways:
 - Building level administrator charged with handling discipline
 - Serving as a Title IX Investigator
- We are assuming you are familiar with the basics of the Title IX Grievance Process
- These materials highlight some key areas where principals come into play in the Title IX process



Considerations at the Beginning of the Process

Reporting Potential Title IX Sexual Harassment

- Under the Title IX regulations, **any District employee** who learns of potential sexual harassment **must report it to the Title IX Coordinator**
- As you know, there are many procedural steps in the Title IX grievance process that are **very different than what you're used to**
 - Including many steps that must occur **before** any investigation or questioning of parties/witnesses may occur

What This Means for Principals

- In practical terms, this may mean you have to **stop** in the middle of investigating other types of misconduct if you realize sexual harassment is potentially implicated
- If it falls under Title IX, **STOP** and report it to the Title IX Coordinator – **DON'T** continue talking to the complainant, and **DON'T** talk to witnesses or respondent
- **Not sure whether it's TIX?** The Title IX Coordinator will decide!
- Title IX Coordinator *may* appoint you as the Investigator, but you **MUST** wait until they do so before proceeding

In TIX, Discipline Must Wait Until After Process Is Complete

- Title IX regs impose an intensive and lengthy process for intake, investigation, and determination of conduct involving sexual harassment or assault
- **This entire process MUST be completed BEFORE any discipline is imposed**
- If the conduct does (or seems like it might) implicate Title IX, **STOP** and call the Title IX Coordinator **BEFORE** investigating and **BEFORE** imposing any discipline

Reminder: Conduct That Constitutes Sexual Harassment Under Title IX

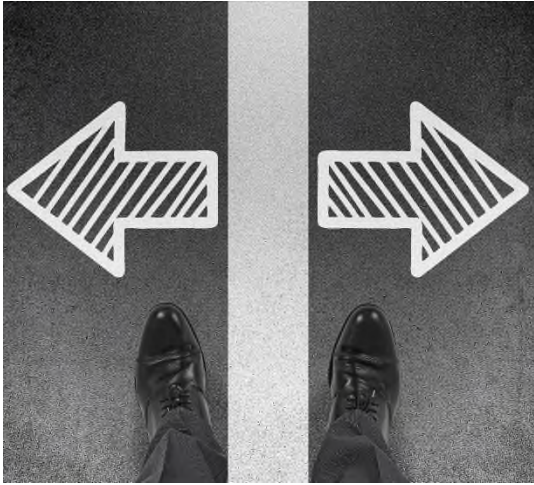
Sexual harassment means conduct on the basis of sex that satisfies one or more of the following:

- **Quid pro quo** – An employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct
- **Hostile environment** – 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 recipient's education program or activity
- **Clery crimes** – Sexual assault, dating violence, domestic violence, or stalking

Discipline of Students – §106.30(a)

- Building leaders may be comfortable investigating claims of student misconduct and issuing discipline
- But, when that misconduct involves sexual harassment under Title IX, the regulations **require leaders to respond in a very different way than they are used to**, including **holding off on imposing any discipline** until a determination is made through the Title IX process

Discipline Question 1



Question: Can the district go ahead and discipline a for other misconduct instead of following the TIX process?

Answer to Discipline Question 1

- **Answer:** No, not if the conduct is related to Title IX misconduct
- If the alleged misconduct **could** constitute Title IX sexual harassment, the formal grievance process **must** be followed

Discipline Question 2

Question: What if the principal has already investigated the matter and issued discipline to the student before it ever gets to the TIXC? Should the district redo the investigation and follow the TIX process?



Answer to Discipline Question 2

- **Answer:** The District **cannot** issue new or different discipline if it has already been served
- If discipline hasn't occurred yet, it could be held in abeyance
- Consider:
 - Provision of supportive measures
 - Consult Title IX Coordinator

Emergency Removal Under Title IX

- **Different than state law** – District can issue emergency removal under Title IX, provided that it:
 - Undertakes **individualized** safety and risk analysis
 - Determines that an **immediate threat** to **physical** health or safety of **any student/individual** arising from the allegations justifies removal
 - Provides respondent with **notice and opportunity to challenge** decision immediately
- Does not modify IDEA, Section 504, or ADA rights

When Is Emergency Removal Available Under Title IX?

- During an investigation or when no grievance is pending
- Not limited to violent offenses
- Safety and risk analysis
 - More than a generalized/speculative belief of threat
 - Based on facts, not assumptions
 - Threat must be immediate and one that justifies removal
 - Conducted by someone impartial – may need training

Challenging a Title IX Emergency Removal

- Notice and opportunity to challenge determination after removal
 - No requirement that notice be in writing, but recommended
 - Notice must describe reasons for finding a threat
 - District has discretion to establish hearing procedures and determine who conducts hearing
- **Timeline** – immediately after removal → without delay / as soon as possible given the circumstances

Discipline Question 3



Question: But what about when an employee is the respondent? Do we have to let them keep coming to work until the process is complete?

Answer to Discipline Question 3

- **Answer:** Like with students, you cannot impose discipline on employee respondents before the process is complete
- But you have other options for removing an employee respondent from the school environment during the pendency of the process that are not available with student respondents:
 - Paid administrative leave
 - Temporarily assign employee to home



Supportive Measures in Title IX – The Principal's Role

What Are Supportive Measures Under Title IX?

- **Non-disciplinary, non-punitive** individualized services offered as appropriate, as reasonably available, without fee/charge to parties
- Available before or after filing formal complaint, or where no formal complaint is filed
- **Purpose**
 - Restore or preserve equal access to education program/activity
 - Protect safety of all parties or educational environment, or deter sexual harassment

(Non-Exhaustive) Examples of Supportive Measures from the Regs

- | | |
|---|--|
| <ul style="list-style-type: none"> • Counseling • Extensions of deadlines or other course-related adjustments • Modifications of work or class schedules • Campus escort services | <ul style="list-style-type: none"> • Mutual restrictions on contact between the parties • Changes in work/housing locations • Leaves of absence • Increased security/monitoring of certain areas on campus |
|---|--|

Where Does the Principal Fit In?

- Title IX Coordinator is “responsible for coordinating effective implementation of supportive measures” to the parties
- Title IX Coordinator may need support from the principal:
 - Consulting about appropriateness/availability of requested supportive measures
 - Implementing certain types of supportive measures
 - If serving as Title IX Investigator, implementing supportive measures within the investigation process

Supportive Measures – More Requirements and Best Practices

- Must consider the complainant’s wishes
- Supportive measures may be appropriate regardless of whether the allegation has been substantiated or fully investigated because it preserves access and deters harassment
- Requirement to maintain supportive measures as confidential
- If district doesn’t provide complainant with supportive measures, it must document the reasons why this was not clearly unreasonable in light of known circumstances

Removal vs. Supportive Measure

- Consider whether the action is disciplinary or punitive
- Would it cause an unreasonable burden on the respondent?
- Fact-specific analysis
- Consider the scope of the removal (all or part of the program)

Supportive Measures Question 1

Question: Does the complainant have a veto right regarding supportive measures?



Answer to Supportive Measures Question 1

- **Answer:** No
 - Required to **consider** complainant’s wishes with respect to supportive measures
 - **Reasonableness** – According to 2021 OCR Q&A, district can provide “any other reasonably supportive measure that **does not unreasonably burden the other party’s access to education** and that serves the goals of” the Title IX policy

Supportive Measures Question 2



Question: Must a school district pay for private counseling as a supportive measure?

Answer to Supportive Measure Question 2

- **Answer:** Yes, depending on the facts of the case
 - Free counseling is an appropriate supportive measure in many Title IX cases to restore and preserve access
 - Preamble to the Title IX regulations included an average cost estimate of \$250 per provision of supportive measures, but stated: “We recognize that, in many instances, this will represent an overestimate of the actual costs borne by recipients and that, in a smaller number of instances, it will represent an **underestimate**”

Intersection of Title IX Supportive Measures and Special Ed

- Remember that students with disabilities are entitled to receive their services and accommodations across all District programs and activities – including the Title IX grievance process
- If you’re serving as the Title IX Investigator, check in with the Title IX Coordinator about any accommodations you may need to implement as you investigate
- Section 504 applies to more than just students – may need to implement disability accommodations for student’s advisors, etc.

Advisors in the Title IX Grievance Process

- Parties have the right to an advisor of their choice:
 - At investigatory interviews and other TIX grievance process meetings
 - Who may inspect and review evidence
- Advisor may be an attorney

Advisor Question 1



Question: Respondent's advisor refuses to cooperate during interview (interrupting, answering questions on respondent's behalf, unruly, loud, hostile), and investigator makes advisor leave and then continues interview – should the investigator have continued the interview?

Answer to Advisor Question 1

- **Answer:** Probably not
 - Investigator could have allowed the respondent time to arrange for a different advisor
 - If the party is a minor child, the best practice is to ensure an advisor
 - What if the advisor was the parent?

So When *Can* the District Impose Discipline in Title IX Matters?

- After the entire Title IX grievance process is completed, and respondent is found responsible for violating District policy
- If that occurs, District may issue discipline by following:
 - General education discipline procedures
 - If applicable, special education discipline procedures



General Ed Disciplinary Removals – Quick Reminders

What Must Happen Before Suspension?

Notice of Intent to Suspend

- Description of Misconduct
- Code of Conduct sections violated
- Potential for permanent exclusion, if applicable

Informal Hearing

- May occur before Principal, Asst. Principal, Supt., or designee
- Provide students with reasons for suspension and opportunity to explain behavior

Notice of Suspension

- Must be sent to parent/guardian within one school day
- Copy of notice sent to Treasurer
- Include specific reasons for suspension
- Specify beginning and ending dates
- Describe appeal rights

Expulsion

- Only the Superintendent may expel
- Due process requirements – must provide:
 - Notice of the intended expulsion
 - Opportunity to appear before the Superintendent/designee to challenge expulsion or otherwise explain student's behavior

Notice of Intended Expulsion

- Describe behavior – date, time, code of conduct sections violated
- Notify if permanent expulsion is possible
- Notify parent and student of right to a hearing to challenge the expulsion
- State time, place, and date of hearing (between 3-5 school days after notice)

Notice of Expulsion

- Must be sent within one school day
- Notice of right to appeal expulsion to the board or designee
- If expulsion is over 20 days, notify parent of agencies that can assist student
- Notify if permanent exclusion is a possibility

SAFE Act Reminder – Removal Restrictions for PK-3

- Emergency removal only for remainder of school day
- May not suspend or expel, except:
 - For very serious infractions (knife, firearm, serious physical harm, bomb threat)
 - Or, only as necessary to protect immediate health and safety of student, classmates, classroom staff, other school employees



**Special Ed Disciplinary Removals –
Quick Reminders**

Manifestation Determination

- **Manifestation Determination** – if removal would cause student to be removed from their educational placement:
 - For more than 10 **consecutive** school days?
 - Or, for more than 10 **cumulative** school days, constituting a pattern?

If No Manifestation Found

- Student may be suspended or expelled
- **Under IDEA**
 - District must provide “Day 11” services
 - Parent may challenge the manifestation determination through an expedited due process hearing procedure provided for under the IDEA
- **Under Section 504** – No obligation to provide services during removal

If Manifestation Found

- Student **can't** be suspended or expelled unless a special circumstance exception applies
- Student may be removed only by a hearing officer, court, or by parent agreement
- IEP Team required to convene

Special Circumstances Exceptions

- Removal for up to 45 days to **Interim Alternative Education Setting** permitted without regard to whether behavior is manifestation of the disability if the student, at school, on school grounds, or at a school function:
 - Carries or possesses a **weapon**
 - Knowingly possesses or uses **illegal drugs** or sells/solicits sale of **controlled substance**
 - Inflicts **serious bodily injury** upon another person

Options for Dangerous Behavior That Doesn't Meet the SBI Criteria

- Convene the IEP team to review the IEP and make modifications based on the student's behavior, including change of placement with parent consent
- Request an expedited due process hearing to change the student's placement without parental consent
- Seek an injunction from court or other relief as permitted by law to remove the student

Referring Special Ed Students to Law Enforcement

- School may report crime, but must ensure copies of the child's special education/disciplinary records are transmitted for consideration by the appropriate authorities
- Transmission of records must be in accordance with FERPA (consent, subpoena, emergency, etc.)

“Suspected Disabled” Students

- Disciplinary protections of the IDEA also apply to students who are not currently identified if the district **had knowledge** of a suspected disability before the misconduct
- Suspected disabled students maintain this protection unless:
 - Parent refuses consent for special education evaluation
 - Parent refuses special education services
 - District completes special education evaluation, finds the student not eligible, and issues prior written notice

Child Find

- **Affirmative obligation** under both the IDEA and Section 504 to **identify and evaluate** students who might be students with disabilities
- When handling disciplinary matters, district personnel should consider whether there is a pattern of behavior/misconduct that may indicate a disability



Informal Resolution

Option for Informal Resolution

- The Title IX regulations allow districts to offer an informal resolution process to resolve Title IX complaints
 - Exception: employee-on-student allegations
- The regs state: “Informal resolution may present a way to resolve sexual harassment allegations **in a less adversarial manner** than the investigation and adjudication procedures” of the formal Title IX grievance process
- Check your policy to see if IR is available in your district

Considerations and Cautions

- Must be **voluntary** for all parties – districts may not:
 - Require informal resolution as a condition of enrollment or employment
 - Pressure any party to participate
- As principal, you may play a role in implementing the terms of an agreements resulting from a Title IX Informal Resolution process

Potential Benefits of Informal Resolution

- **For the parties**
 - Parties may be more satisfied with outcomes they reach themselves
 - They can control the outcome
 - They have the ability to tailor solutions to their needs
- **For the district** – considerably less process to implement while still meeting its obligations

Bricker's Title IX Toolkit

Available for download: k12tixtoolkit.bricker.com

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Level 1

- General training for all K-12 staff

Level 2

- Title IX Coordinator/Administrator
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Now Added: **Level 3** advanced training for your K-12 Title IX Team!

- Title IX Coordinator
- Investigator
- Report Writing
- Informal Resolution Facilitator

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Thank you for attending!

Remember – additional
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