

A school hallway with orange lockers on both sides, a clock on the wall, and an information board at the end. The floor is dark and reflective.

TITLE IX TRAINING: REQUIREMENTS OF THE NEW TITLE IX REGULATIONS

Part III: For Title IX Investigators



A Webinar Presented by Sara Leon & Associates, LLC, July 29, 2020

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Part III: *Required Training for Title IX Investigators*



Title IX Training Requirements for Title IX Investigators

□ Let's Review What You Learned in **Parts One and Two** of the Training

- ✓ The definition of sexual harassment;
- ✓ Reporting requirements;
- ✓ What schools must do to support alleged victims;
- ✓ Title IX grievance procedures; and
- ✓ Requirements and roles of the Title IX Coordinator, Informal Resolution Facilitator, Investigator and Decision-Maker.

We Are Here

Title IX
Coordinator



Investigator



Decision Maker



Appeal
Officer



Informal
Resolution
Facilitator



TODAY'S TRAINING

The new regulations mandate that all individuals serving as Title IX Investigators receive appropriate training per the new regulations.





Training Requirements for Title IX Investigators

☐ What Will You Learn in this Specialized Training for Title IX Investigators?

1. Review the Parties to a Formal Complaint.
2. Review the necessary elements of the investigative process.
3. How to investigate.
4. How to create an investigative report “that fairly summarizes relevant evidence” (as described later in this section).



Review:

Who are the Parties to a Title IX Report or Formal Complaint

Complainant: person alleged to be the victim of sexual harassment. **This does not have to be the same person making the Formal Complaint.**

Respondent: person alleged to be the perpetrator of sexual harassment

Note: A parent may act on behalf of a minor student who is a Complainant or Respondent.

Review:

Necessary Elements of the Investigative Process

- ❑ The final regulations require schools to investigate and adjudicate formal complaints of sexual harassment and to give Complainants and Respondents meaningful opportunity to participate in the investigation to increase the likelihood that the district will reach an accurate, reliable determination regarding the Respondent's responsibility.

Review: The Basic Elements of a Formal Complaint Process Include:

- ☐ An objective evaluation of **inculpatory** (**favorable to Complainant**) and **exculpatory** (**favorable to Respondent**) evidence.
- ☐ A requirement that credibility may not be based on the person's status.
- ☐ The Title IX Coordinator, investigator and decisionmaker(s) must not have a conflict of interest or bias against a party.
- ☐ A presumption Respondent is not responsible until a determination is made at the conclusion of the grievance process.
- ☐ A reasonably **prompt*** time frame for the grievance process and allow for temporary delay of time frames for "good cause."
- ☐ Ensure the standard of evidence – either "**preponderance of the evidence**" (**more likely than not**) or "**clear and convincing**" (**reasonably certain**).
- ☐ Ensure burden on the District, not the parties, to gather evidence, but the District may not breach any privilege (e.g., doctor-patient) without a voluntary waiver.



Basic Elements of a Formal Complaint Process (cont'd)

- ❑ **Witnesses:** parties have equal opportunity to present witnesses.
- ❑ **Free Speech:** district cannot restrict either party from discussing the allegations or gathering evidence.
- ❑ **Advisors:** parties have the right to an advisor.
- ❑ **Written Notice:** must be given to a party whose participation is invited or expected, with sufficient details and enough time to prepare.
- ❑ **Inspection and Review of Evidence:** prior to the completion of an investigative report, *the parties must have at least 10 days to review the evidence and submit a written response.*
- ❑ **Summary of Investigation Report:** the investigator *must create an investigative report, provide copies to the parties and give the parties at least 10 days to respond in writing.*



How To Investigate Formal Complaints

Who May Serve a Title IX Investigator?

- ☐ Administrators?
- ☐ HR?
- ☐ Central Office Staff?
- ☐ Internal Security?
- ☐ In House Counsel?
- ☐ Outside Investigator?
 - Non-Attorney
 - Attorney

Remember: the Title IX **Decision Maker** may not be the Title IX Investigator.





Requirements for Title IX Investigator under the New Title IX

- ❑ An individual serving as Title IX Investigator must have completed all the training as required by the new Title IX regulations.
- ❑ **The regulations do not prohibit the Title IX Coordinator from serving as Investigator or Facilitator**, but there may be reasons to separate these roles, if possible.
- ❑ Like the Title IV Coordinator, the Investigator may not have a conflict or be biased either for or against:
 - Complainants or Respondents generally, or
 - An Individual complainant or Respondent.





The Investigator May Not Have a Conflict of Interest or Bias

Q: How can you determine whether the investigator has a conflict of interest or improper bias?





How to Determine a Conflict of Interest or Bias

- A. I've known the Respondent for years; he goes to my church and I know his family.
- B. I can't believe the Respondent would do something like that.
- C. The Complainant tends to be dramatic and exaggerate.
- D. I know this student and she has a history of lying.
- E. All the above.



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Investigation of Formal Complaints:

Remember: It is not the Investigator, but rather it is the Decision-Maker who will decide as to responsibility for Title IX purposes after the investigation.

In other words, **the Investigator is the fact gatherer.** The Decision-Maker will make the conclusions based on the facts gathered by the investigator.



The Investigator Only Investigates

Title IX
Coordinator



Investigator



Decision Maker



Appeal
Officer



Informal
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Facilitator



The Decision Maker Decides

Title IX
Coordinator



Investigator



Decision Maker



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The Investigator's Role:

- ☐ To be neutral.
- ☐ To interview witnesses.
- ☐ To gather information (e.g., written statements, documents, video, audio).
- ☐ To present information gathered to the parties and the Decision-Maker.
- ☐ **To give the parties an opportunity to review and respond to the evidence.**
- ☐ To prepare the required investigative report.
- ☐ **To provide the parties with the investigative report and an opportunity to review and respond to the investigative report.**
- ☐ To provide the investigative report to the Decision-Maker.





If You Are The Investigator:

- ☐ Be respectful of all parties (Complainant, Respondent, and the witnesses).
- ☐ Be neutral.
- ☐ Use common sense (**pay attention to signals and document them**).
- ☐ Do not tolerate retaliation and remind witnesses about anti-retaliation policy.
- ☐ Document, document, document!



Documentation

- ☐ Notes may be evidence. Write as if the Jury is reading over your shoulder.
- ☐ Do not add editorial comments.
 - ✓ “The witness seemed credible.”
 - ✓ “The complainant was nervous.”
- ☐ Only include factual observations that may be evidence.
 - ✓ “The Respondent would not look me in the eye.”
 - ✓ “The Respondent refused to tell me about previous misconduct allegations.”
- ☐ Prepare notes while information is fresh.
- ☐ Edit for accuracy and completeness.





Typical Steps of an Investigation

1. Provide Interview Notices to Complainant and Respondent.
2. Interview the Complainant.
3. Interview the Respondent.
4. Interview Witnesses.
- 5. Provide the evidence to the parties and allow at least 10 days to review and respond in writing.**
6. Prepare investigative report.

Typical Steps of an Investigation (cont'd)

7. Provide Parties a copy of the draft investigative report. Give them at least 10 days to review and respond to the investigative report in writing.
8. Provide the investigative report to the Decision-Maker.
9. A decision is made by the Decision-Maker (**note: DM must give parties opportunity to submit written questions before reaching a decision**).
10. The Decision-Maker makes findings and conclusions and takes remedial action if necessary.

Written Notice Regarding Pending Title IX Investigation

NOTICE OF SEXUAL HARASSMENT ALLEGATIONS

TO: _____, RESPONDENT

Pursuant to 34 CFR § 106.45(b)(2)(B) (relating to Title IX of the Education Amendments of 1972) and District policy FFH, please take notice a formal complaint of sexual harassment has been filed against you with the Title IX Coordinator for the school district.

I. PARTIES AND ALLEGATIONS. The parties, alleged conduct, and date and location of the incident, if known, are as follows:

The allegations in the pending investigations are that:

The parties involved in the allegations are: _____

The conduct allegedly constituting sexual harassment is:

_____.

And the alleged date and location of the incident(s) is:



Written Notice Regarding Pending Title IX Investigation

II. COMPLAINT PROCESS. All formal complaints of sexual harassment are investigated as a matter of school district policy and federal regulation. The district formal complaint process and investigation procedure is described in detail in district FFH policy and the District's Student/Parent Handbook.

Please take notice that the respondent to this complaint is presumed not responsible for the conduct. A determination regarding responsibility will not be made until the conclusion of this grievance process.

Please be advised that for purposes of this grievance process, both you and the complainant each may have an advisor of your choice, who may be, but is not required to be, an attorney. Your advisor may accompany you to any meeting or proceeding, and you or your advisor may inspect, and review evidence collected in the investigation process.

If you decide to have an advisor, please notify the Title IX Coordinator of the name and contact information of the advisor.

Please also take notice that the school district's code of conduct _____prohibits knowingly making false statements or knowingly submitting false information during the grievance process.

If the course of this investigation the district decides to investigation additional allegations about either the complainant or respondent that are not in this notice, the district will provide additional notice to the parties known of the new allegations to be investigated.

TITLE IX COORDINATOR:

_____**DATE:**_____

Method/Date of Delivery to Respondent:

cc: Complainant



1. Send Interview Notices to Complainant and Respondent

- ❑ Prior to an interview, written notices **MUST** be sent to Complainant and Respondent (and to their advisors, if any) regarding:
 - interview(s), hearing(s), or meeting(s),
 - **in which they are expected and invited to participate.**
- ❑ Notice must include:
 - Time.
 - Location.
 - Purpose.



2. Interview The Complainant

- ❑ Review Formal Complaint with the Complainant and pin down dates.
 - Who, what, where, when, why, how?
 - Any witnesses?
 - Did you confide in anyone?
 - Any threats or promises carried out by Respondent?
 - Any other complaints about Respondent?
 - **Anything else** I should know? **Any documents?**

Closing With The Complainant

- ☐ Inform the Complainant you will be speaking to the Respondent,
- ☐ Instruct the Complainant to report anything new,
- ☐ Thank the Complainant for the report,
- ☐ Tell the Complainant the District will get back to them soon (likely next to review the evidence),
- ☐ **Tell Complainant the District prohibits retaliation, and**

Closing With The Complainant (cont'd)

❑ Prepare notes:

- ✓ Best to prepare simultaneous notes.
- ✓ Review with witness/check in.
- ✓ Do not change their words.
- ✓ Only record facts.
- ✓ Make no reference to yourself in the first person. (Don't say, "I noticed the Complainant did not make eye contact." Say, "The Complainant did not make eye contact.")
- ✓ Avoid the word "evidence." You are only fact gathering.



Reluctant Complainants

- ❑ Explain the district must investigate (show policy).
- ❑ Reassure that the district will take appropriate action.
- ❑ Reassure retaliation will not be tolerated.
- ❑ Confidentiality – do not guarantee but will limit information to need-to-know basis. Keep as confidential as possible.



3. Interview The Respondent

- ❑ Do not make accusations.
 - ✓ State the concerns/allegations in the Formal Complaint.
- ❑ Do not suggest the Respondent apologize to the Complainant.
- ❑ Do not delay interviewing the Respondent.
 - ✓ Must interview most critical witnesses promptly!



Interview Questions for the Respondent

- ☐ Who, what, where, when, why, how?
 - ✓ Any witnesses?
- ☐ Was the conduct welcomed?
- ☐ Any recent or anticipated personnel actions against the Complainant?
 - ✓ If so, What ? Why?
- ☐ Could Complainant be misunderstanding?
- ☐ Why would Complainant make a false accusation?
- ☐ **Take notes.**
- ☐ **Ask the Respondent to write down what happened.**



Instructions To The Respondent

- ❑ Explain that retaliatory actions violate the law and policy.
- ❑ Explain the importance of remaining professional and avoiding statements like:
 - “I feel targeted.”
 - “I don’t want the Complainant in my class anymore.”
 - “I’m not going to meet alone with anyone anymore.”



First Amendment Rights

- ❑ For investigation under the Title IX grievance process, the District cannot instruct the Complainant or Respondent not to talk to other witnesses or not to discuss the allegations under investigation.
- ❑ However, Title IX does prohibit retaliation.
- ❑ Therefore, abuse of First Amendment rights to intimidate, threaten, or coerce for the purpose of chilling Title IX rights, is prohibited retaliation.



4. Interview Other Witnesses

- ❑ You will learn from Complainant and Respondent if there are witnesses.
- ❑ Interview only if necessary.
 - e.g., you may not need to interview if Respondent admits to allegations. However, may need to interview witnesses if witness(es) may have their own claims.



4. Interview Other Witnesses (cont'd)

- ❑ Try to start with the witnesses who knows the most.
 - Explain that a concern has been expressed– start broad.
 - Assure that the district will not retaliate against witnesses.
 - Phrase questions to give as little information as possible. (“Are you aware of anyone making offensive language in the lunchroom?”)
- ❑ **When you have sufficient information, evaluate whether further witness interviews serve a purpose.**

Remember: The standard is not perfection. The issue is whether the employer reasonably believes the allegation and acted in good faith. The issue is not truth or falsity.



Documents?

- ❑ If witnesses have documents, ask them to provide a copy (or location if the witnesses do not have them readily available).
- ❑ Ask them to report any new information.
- ❑ Remind them of the anti-retaliation policies.

Note: the documents, video and audio may reveal more witnesses that may need to be interviewed!



Are There Any Other Accusations Against Respondent?



- ☐ It is prudent to review whether similar complaints have ever been made against Respondent.
- ☐ Remember, your role is to be neutral, it is not to be hostile to the Respondent.
- ☐ Nonetheless, it is your duty to investigate and gather facts.



Review Complaint History of Complainant



- ☐ Be careful of duty to be objective and neutral. Only report any complaint history similar to or related to the complaint you are investigating.
- ☐ Remember, your role is to be neutral, it is not to be hostile to the Complainant.
- ☐ Nonetheless, it is your duty to investigate and gather facts.

Medical Information?

- ❑ When investigating a formal complaint and throughout the grievance process” the District must:

not access, consider, disclose, or otherwise use a party’s records that are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in the professional’s or paraprofessional’s capacity, unless the District obtains that party’s voluntary, written consent.



5. Give Parties Opportunity to Inspect and Review Evidence “Directly Related” to the Allegations

- ❑ Prior to the completion of the investigative report, the District:
 - ✓ **must send to each party and the party’s advisor, if any, the evidence that is directly related to the allegations to inspect and review in an electronic format or hard copy.**
 - ✓ **the parties must have at least 10 days to submit a written response, which the investigator **MUST** consider prior to completion of the investigative report.**

Purpose: to give parties equal access to the evidence obtained “directly related” to the allegations, **even if the district does not intend to rely on the information.**



“Directly Related” to the Allegations

- ☐ This is not defined.
- ☐ Encouraged to use, “plain and ordinary meaning.”
- ☐ It is up to the investigator to decide.
- ☐ Would include “inculpatory” and “exculpatory” evidence.

Example: if the investigator reviews the Respondent’s personnel file and there is nothing there related to the allegation, would not likely need to provide the entire personnel file to the Complainant.

Rule of thumb: if it is information you have gathered as part of the investigation, the parties should have an opportunity to inspect. Therefore, include notes that you reviewed Respondent’s personnel file.



“Directly Related” to the Allegations (Cont’d)

- ❑ The regulations allow the parties to meaningfully respond with arguments based on the information gathered that further each parties’ view of the case, or present additional relevant facts and witnesses that the DM should objectively evaluate.
- ❑ The right to inspect all evidence directly related to the allegations is an important procedural right for both parties.
- ❑ For example, although the district does not intend to rely on the Respondent’s personnel file, the Complainant may provide information that there is a separate investigation file, which includes similar complaints against the Respondent.



Confidential Information

- ☐ The District may permit or require the investigator to redact information that is not “directly related” to the allegations or information that is protected by privilege (e.g., medical information if the party has not given written consent).
- ☐ However, information that is confidential, sensitive or private may still be “directly related to the allegation” and thus subject to review by both parties.
- ☐ Consider non-disclosure agreements before disseminating certain information.



6. Prepare Investigative Report

- ❑ The investigator **MUST** fairly summarizes **relevant evidence** in an investigative report.



What is relevant to an investigation?

- ✓ Formal Complaint.
- ✓ Board Policy, FFH, possibly others.
- ✓ What Complainant said in his interview.
- ✓ What the Accused said in his interview.
- ✓ What witnesses said in their interview.
- ✓ Ages of Parties and Witnesses.
- ✓ Documents, Audiotapes, Recordings.
- ✓ Personnel/School file of Complainant that relate to allegations.
- ✓ Personnel/School file of Respondent that relate to allegations.



What is Relevant?

- ✗ Sexual/Disciplinary History of Complainant
- ✗ Popularity of Complainant
- ✗ Popularity of Accused
- ✗ Questions and evidence about a complainant's prior sexual history are not relevant evidence, unless exceptions are met.



Elements of an Investigative Report

- ❑ The summary report should summarize the following:
 - ✓ Employer policies/guidelines and their applicability to the investigation.
 - ✓ The incident or issues investigated, including dates.
 - ✓ Parties involved.
 - ✓ Steps taken to investigate.
 - ✓ Summary of Investigation.
- ❑ The Investigator is only required to report the facts, not make findings.
- ❑ Avoid making legal conclusions.



Sample Investigative Report

Sample Investigative Report

To: Dr. Decision Maker

From: Anna Investigator

Date:

Re: Formal Complaint of Complainant Jane Doe

Refer to Policy

Sample School District prohibits discrimination, sexual harassment, against any employee or student on the basis of sex or gender.

Acknowledge Anti-Retaliation Policy

Retaliation against anyone Involved in the complaint process is a violation of College District policy.

Short Summary of Complaint, including parties and dates

On December 20, 2020, student Jane Doe submitted a formal complaint because of a meeting on December 10, 2020, with the Athletic Joe Smith.

In the complaint, Ms. Doe alleges that Mr. Smith intentionally exposed himself to her at the meeting.

Summary of Investigation

As part of my investigation:

- I conducted interviews with student Jane Doe, and Athletic Director Joe Smith and Jane Doe's friend Abby who Jane says she told immediately after the incident. I also interviewed Jane Doe's mother who submitted the formal complaint.
- I reviewed the video recording of the time when Jane Doe entered Mr. Smith's office.
- I reviewed all documentation from HR regarding Ms. Smith and the student records of Jane Doe.



Sample Investigative Report

Investigative Report (You may want to do this chronologically and attach notes)

Interview of Complainant Jane Doe

In interviewing Ms. Jane Doe, She said she was asked by the Athletic Director not to "tell anyone," and that his exposure was an accident. She claimed that there should be video tape of her entering and exiting the Athletic Director's office on December 10, 2020. She also said she immediately reported the incident to her friend Abby and that she and Abby immediately told Jane's mother.

Interview of Respondent Athletic Director Joe Smith

In interviewing Mr. Smith. He admitted the incident occurred but said it was an accident and due to the fitting of his basketball shorts that caused the incident. He said he had never had anything like this happen in his career.

Review of Mr. Smith's Personnel File.

I checked Mr. Doe's personnel records and there were two similar complaints against him in 2017-2018 but it was determined that Mr. Doe had not violated District policy, and that the incidents were likely accidents. Both previous complaints involved Mr. Doe asking female students to come to his office after hours. I have included the prior complaints and determinations. Mr. Smith did not mention these incidents. When I re-interviewed me. He said he did not mention the previous complaints because I did not ask him about them. He then smiled and said I was vindicated from those complaints.

Interview and Written Statement from Abby

I spoke with Abby and she confirmed Jane Doe told her Joe Smith had just exposed himself to her. I asked Abby to write a statement and she submitted a detailed 3 page statement of what happened that day.

Interview of Jane Doe's Mother.

Jane Doe's mother also submitted a detailed statement.

Review of Surveillance Video from December 10, 2020

I reviewed the video and it shows Jane Doe entering Coach Smith' office at 6 p.m. and running out at 6:05. She is crying. In the video you can see Mr. Smith walking away with his gym bag. He stops and talks to a student.

I interviewed the student seen talking with AD Smith shortly after the alleged incident. The student said was not aware of any alleged incident that happened on December 10, 2020 and said Coach Smith appeared normal.

Sincerely,



7. Provide Report to Parties

- ❑ The investigator **MUST** fairly summarizes relevant evidence, and
 - ✓ **at least 10 days prior to** a hearing (if a hearing is provided) or “**other time of determination of responsibility**”, **send to each party and the party’s advisor, if any, the investigative report in an electronic format or hard copy**, for their review and written response.
 - ✓ The final regulations do not prescribe a process for the inclusion of additional information or for amending or supplementing the investigative report in light of the parties’ responses after reviewing the report.
 - ✓ Any rules or practices a District adopts must apply equally to both parties and must be mindful of the recipient’s obligation to conclude the entire grievance process within the designated time frame.

8. Provide the Investigative Report to the Decision-Maker

- ❑ The investigative report should contain relevant evidence including exculpatory and inculpatory evidence, whether obtained from the parties or other sources.
- ❑ The investigator is not prohibited from making ***recommended findings***.
- ❑ **However, the Decision-Maker is under the independent obligation to objectively evaluate relevant evidence, and this cannot simply defer to the recommendations made by the Investigator.**



9. The Decision Maker Decides

Title IX
Coordinator



Investigator



Decision Maker



Appeal
Officer



Informal
Resolution
Facilitator



10. Decision Make Takes Appropriate Disciplinary Action/Prepares Written Report of Factual Findings and Conclusions



Appendix

Attachment A	Template for Interview Notes of Complainant
Attachment B	Template for Interview Notes of Respondent



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Part III of Title IX Training (for Title IX Investigators):

What did you learn?

- ✓ You learned how to investigate.
- ✓ You learned your duty to gather information objectively and to be impartial.
- ✓ You learned how to document an investigation.
- ✓ You learned how to create an investigative report “that fairly summarizes relevant evidence.”

Questions?

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