



DANNIS WOLIVER KELLEY

Attorneys at Law

Fundamental Title IX Training: Decision-Makers

San José Unified School District
November 6, 2023

Chelsea A. Tibbs
DANNIS WOLIVER KELLEY

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DWK 9227767

Objectives

- 1. Understand the LEA's obligations in responding to actual knowledge of sexual harassment
- 2. Recognize a formal complaint
- 3. Decision-maker to understand and be able to implement their role in the formal complaint process from start to finish:
 - Notice and Opportunity for Advisor
 - Investigation
 - Opportunity to Inspect Evidence
 - Written Decision of Responsibility
 - Opportunity to Ask Questions
 - Appeal
 - Record Keeping Obligations
- 4. Have tools and techniques to serve impartially and without bias

What is Title IX?

“No person in the United States shall, on the basis of sex, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.” (United States Congress, June 23, 1972.)

2020 Title IX Overhaul

- 2018 Notice of Proposed Rulemaking (NPRM)
- NPRM closed for public comments on February 29, 2019.
- Final Rule issued on May 6, 2020.
 - Codified in the Code of Federal Regulations, Part 106.
- The Final Rule became effective on August 14, 2020.

Impending 2023 Overhaul

- Proposed changes announced in June 2022
- Expected October 2023, likely 2024
- Will change much of how we process Title IX cases when final
- In the meantime, the 2020 revision is the law, failure to follow can result in liability

New Regs Require a New/Revised Policy

- All LEAs should review and update their Title IX policies to reflect the new Title IX grievance process
- The 2023 update will also likely require a policy revise

Designating A Title IX Coordinator

- Requirement to designate and authorize an employee as the “Title IX Coordinator” and
- Notify all students and employees of
 - (1) name;
 - (2) office address;
 - (3) email address; and
 - (4) telephone number of the Title IX Coordinator.
- This designation must also be “prominently displayed” on the LEA’s website

Other Title IX Team Roles

- Investigator
- Decision-maker
- Decision-maker on appeal
- Facilitator of informal resolution



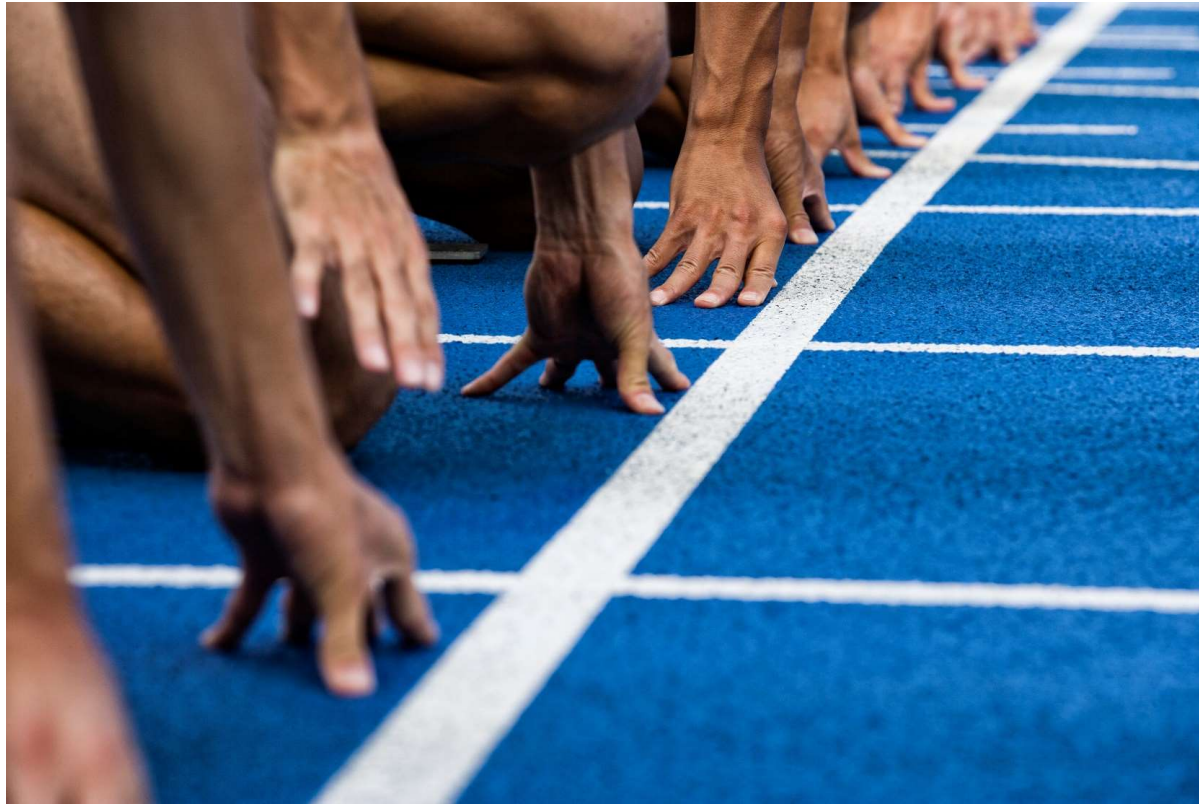
Decision-Maker Role

- Reviews Final Investigative Report with “fresh eyes” to see if information is missing or incomplete
- Facilitates relevant written questions & “cross-examination” from parties for parties and witnesses; must be trained on issues of relevance
- Reviews all evidence, identifies the disputed issues, and weighs the evidence
- Makes conclusions about whether alleged conduct occurred and determines responsibility
- Prepares written determination with findings of fact, policy conclusions, and rationale for the result as to each allegation
- If applicable, recommends sanctions for Respondent and remedies for Complainant
- Provides written determination and appeal rights to the parties/advisors simultaneously

Obligation to Respond

- “A recipient with actual knowledge of sexual harassment in an education program or activity of the recipient against a person in the United States, must respond promptly in a manner that is not deliberately indifferent. A recipient is deliberately indifferent only if its response to sexual harassment is clearly unreasonable in light of the known circumstances.” (34 C.F.R. § 106.44, *emphasis added*.)

What Happens Before the Decision?



Definition: Actual Knowledge

- Who can have actual knowledge?
 - Title IX Coordinator
 - “[A]ny official of the recipient who has the authority to institute corrective measures”; OR
 - **Any Employee of an elementary and secondary school**
- Reports or observations can constitute actual knowledge
- Actual knowledge triggers further action in the form of supportive measures and information regarding how to file a formal complaint

Supportive Measures

- Non-disciplinary, non-punitive, and individualized
- Designed to restore or preserve equal access to the educational program or activity without unreasonably burdening the other party
- Designed to protect the safety of all parties or the educational environment
- Title IX Coordinator is responsible for coordinating the implementation of the supportive measure(s)

Who Can File a Formal Complaint?

- Complainant is defined as:
 - an individual who is alleged to be the victim of conduct that could constitute sexual harassment
 - Complainants must be participating in or attempting to participate in the education program or activity of the LEA within which the formal complaint is filed
- Employees, not just students, may be complainants under Title IX (*North Haven Bd. of Educ. v. Bell*, 102 S.Ct. 1912 (1982).)
- Parents/legal guardians can file a formal complaint on behalf of their child, but they are not considered a “complainant.”

Formal Complaint

- Document or electronic submission that contains complainant's physical or electronic signature, or otherwise indicates that the complainant is the one submitting the complaint
- Filed in person, by mail, or by electronic mail
- Alleging sexual harassment against a respondent
- Requesting that the LEA investigate the allegation of sexual harassment
- Can be signed by Title IX Coordinator

Title IX Definition: Sexual Harassment

- Sexual harassment is defined as
 - (1) any quid pro quo harassment by a LEA's employee;
 - (2) "any unwelcome conduct that a reasonable person would find so severe, pervasive, **and** objectively offensive" that it "**denies**" a person equal educational access;
 - (3) sexual assault;
 - (4) dating violence;
 - (5) domestic violence; or
 - (6) stalking



Severe, Pervasive, and Objectively Offensive

- Severe
- Pervasive
- Objectively offensive

Title IX Jurisdiction?

- Alleged conduct must have occurred in a LEA's "education program or activity"
- Includes locations, events, or circumstances which the school exercises substantial control over both the respondent and the context in which the sexual harassment occurred

Preliminary Response Summarized:

- When you become aware of conduct that might amount to sexual harassment under either CA law or Title IX you should:
 1. Meet with alleged victim (and parent if minor student)
 - a) Offer supportive measures
 - b) Discuss their rights under Title IX (point them to the policy)
 - c) Gather some additional facts about the allegations if necessary
 2. Document!
 3. Determine if you need to alert law enforcement

Concurrent Law Enforcement Involvement

- When you should involve law enforcement
 - Assault, weapons, controlled substances per Ed. Code 48902
 - Potential criminal conduct (i.e., child pornography, rape, sexual assault)
- Normal Mandated Reporter obligations
 - Otherwise, involving law enforcement is discretionary
- Involving law enforcement does NOT relieve the District of its obligation to move forward with its own processes.

Mandatory Dismissals

- LEAs must dismiss a formal complaint of sexual harassment, for purposes of Title IX, when the alleged conduct:
 1. would not constitute sexual harassment under the new definition
 2. did not occur in the LEA's education program or activity
 3. the alleged conduct did not occur against a person in the United States.

Discretionary Dismissals

- The LEA *may* dismiss a formal complaint or any allegations therein if at any time during the investigation:
 - The complainant notifies the Title IX Coordinator in writing that they would like to withdraw the formal complaint or any allegation therein; or
 - The respondent is not enrolled or employed by the LEA; or
 - Specific circumstances exist to prevent the LEA from gathering of evidence to reach a determination as to the formal complaint or allegations therein.
- Written notice required for all dismissals.

Do NOT Stop There!

- Even if you determine Title IX is NOT triggered and the complaint should be dismissed, do NOT stop there!
- Consider whether the alleged conduct may otherwise violate District policy or employee/student conduct standards.
 - Complaint Procedures –
 - 0410 BP Nondiscrimination in District Programs and Activities
 - 1312.1 BP/AR Complaints Concerning District Employees
 - 1312.3 BP/AR Uniform Complaint Procedures
 - 5145.3 BP/AR Nondiscrimination/Harassment

CA Definition of Sexual Harassment

- Education Code 212.5

“Sexual harassment” means unwelcome sexual advances, requests for sexual favors, and other verbal, visual, or physical conduct of a sexual nature, made by someone from or in the work or educational setting, under any of the following conditions:

- (a) Submission to the conduct is explicitly or implicitly made a term or a condition of an individual’s employment, academic status, or progress.
- (b) Submission to, or rejection of, the conduct by the individual is used as the basis of employment or academic decisions affecting the individual.
- (c) The conduct has the purpose or effect of having a negative impact upon the individual’s work or academic performance, or of creating an intimidating, hostile, or offensive work or educational environment.
- (d) Submission to, or rejection of, the conduct by the individual is used as the basis for any decision affecting the individual regarding benefits and services, honors, programs, or activities available at or through the educational institution.

Title IX - Option for Informal Resolution

- Optional
- LEAs cannot offer this when an employee is alleged to have sexually harassed a student



Option for Informal Resolution (cont'd)

Requirements:

- Provide the parties with written notice disclosing the sexual harassment allegations;
- Provide requirements of an informal resolution process;
- Provide any consequences that may result from participating in the informal resolution process; and
- Obtain the parties' voluntary, written consent to the informal resolution process.

“Presumption of Innocence”

- The Title IX regulations demand that LEAs apply a presumption that the respondent is not responsible during the grievance process (often called a “presumption of innocence”).
- Essentially, the school bears the burden of proof and the standard of evidence is applied correctly.

Emergency Removal

- Can remove a respondent on an emergency basis if the LEA:
 - does an individualized safety and risk analysis;
 - determines that an immediate threat to the physical health or safety of any student or other individual arising from the allegations of sexual harassment justifies removal;
 - and provides the respondent with notice and an opportunity to challenge the decision immediately following the removal

Emergency Measures

- The LEAs should not impose discipline on a student respondent without first complying the formal Title IX grievance process, which includes notice and opportunity to obtain an advisor.
 - (34 C.F.R. § 106.45(b)(5).)
- Consider how this might conflict with an LEA's mandatory discipline obligations.

Timeline for Response

- “Reasonably prompt”
- No set requirement in the regulations, other than to have “reasonably prompt timeframes” for the conclusion of the process designated in your procedures
- Timeline starts from notice, not from the incident itself
- Goal is to avoid undue delay
 - Document delays!

Time to Investigate

- Actual Knowledge + Formal Complaint + Sexual Harassment + Educational Program or Activity + in United States = INVESTIGATION and/or informal resolution



Title IX Investigations

- Now With More Due Process Than Ever!
 - Notice
 - Two-Step Evidence Inspection Process:
 - Step 1: Inspection and Review of Evidence before investigation report finalized
 - Step 2: Obligation to give parties the opportunity to submit questions after report is finalized but before a determination of responsibility is made
 - Live hearing option
 - Written determination

Notice

- Title IX Coordinator must send written notice of the allegations to both parties upon receiving a formal complaint.
- What must be in the written notice?
 - grievance process
 - sufficient details of the allegation(s)
 - advisor
 - false statement or false information

Opportunity to Obtain an Advisor

- “Provide the parties with the same opportunities to have others present during the grievance proceeding, including the opportunity to be accompanied to any related meeting or proceeding by the advisor of their choice, who may be, but is not required to be an attorney.”
- May limit the advisor’s participation

Promises of Confidentiality?

- Because of the due process requirements in the new regulations, LEAs should not promise total confidentiality
- Reports cannot be confidential
- Information given by all witnesses may be shared with the parties

Opportunity to Inspect Evidence

- Parties must be given at least ten (10) days to review all evidence gathered by the investigator, including both inculpatory and exculpatory evidence, that is **directly related** to the allegations raised in the formal complaint.
- Timing – before the investigator issues the investigative report

What Information Must Be Shared?

- “Directly related to the allegations”
- “Directly related” vs. relevant
 - Broad scope
- Even if it will not be relied upon in the determination
- Redaction allowed if it is not “directly related”

How to Share the Information?

- Preamble suggests the Department wants this done in hard copy or digital form rather than at the District office
- Can do this in a manner that prevents dissemination
 - For example, require parties to sign non-disclosure agreement

FERPA Implications

- If there is a conflict between FERPA and Title IX, Title IX governs
- Student information may be redacted if it is not directly related to the allegations
 - The Department cautions not to redact more than necessary
- Maintain a “privilege log” and allow parties to dispute whether it is directly related

Investigator's Relevancy Assessment

- The importance of the relevance standard at the phase
- Include relevant evidence in the investigative report whether it is “inculpatory or exculpatory.”
- The Department recognized the cost and burden this puts on the LEA

Handoff to the Decision-maker

- At least ten (10) days prior to the determination of responsibility, send the report to each party and the party's advisors in electronic format or hard copy, for their review and written response.
- Handoff to Decision-maker



Review & Plan

- Read Final Investigative Report and Review Attachments
 - Take notes, and create a list of questions (if any)
- Calendar timelines to accommodate these phases:
 - Process to ask questions of Parties and exchange written “cross examination” questions between Parties or from the Parties to witnesses
 - Decision-Maker analyzes the evidence, writes the decision, and Title IX Coordinator, administrator or legal advisor reviews for thoroughness and readability
 - Deliver written decision to the Complainant, Respondent, Advisors (if any), and Title IX Coordinator with notice of appeal rights
- Plan and Schedule the Process with the Parties
 - If needed, seek help from Title IX Coordinator to schedule and plan logistics

Opportunity to Submit Questions

- Second window of 10-day period
- The decision-maker(s) must afford each party the opportunity to submit written, relevant questions that a party wants to be asked of any party or witness and provide each party with the answers, and allow for additional, limited follow-up questions from each party
 - The opportunity for the parties to seek information that may shed light on someone's credibility
 - The opportunity for the Decision-Maker to ask questions and observe the credibility of Complainant, Respondent and witnesses, since the Decision-Maker did not conduct the investigation

Another Relevancy Assessment

- “Ordinary meaning of relevance should be understood and applied”
- Not allowed: “sexual predisposition” or prior sexual behaviors
- Unless, “questions or evidence are offered to show that someone other than the respondent committed the alleged conduct, or if the questions or evidence about a complainant’s specific incidents of sexual behavior are offered to prove consent to the alleged behavior”

Facilitate Questions Between Parties and/or Witnesses

- Requirements for Questions
 - Questions must be relevant
 - Questions and evidence about the Complainant’s sexual predisposition or prior sexual behavior are not relevant
 - Unless such questions and evidence about Complainant’s prior sexual behavior are offered to prove that someone other than the Respondent committed the conduct alleged by the Complainant; or
 - The questions and evidence concern specific incidents of Complainant’s prior sexual behavior with respect to the Respondent and are offered to prove consent.
 - You must explain any decision to exclude a party’s question as irrelevant

Definition of Relevance

- Having significant and demonstrable bearing on the matter at hand
- Affording evidence tending to prove or disprove the matter at issue or under discussion
- Synonyms: applicable, material, pertinent (Merriam-Webster)

Discussion: Best Practices



- LEAs have the ability to control this process
- The parties should understand that these questions are not coming from the investigator or the District.
- Other considerations
 - Clarity of questions
 - Avoid argumentative questions

Determination of Responsibility



Making the Determination of Responsibility

- Decision-maker reviews:
 - the investigative report
 - additional information from the question exchange stage
- Then makes factual findings and determinations of responsibility using preselected standard of evidence

Standards of Evidence

- Preponderance of the Evidence
 - More likely than not true.
 - Feather test.
- Clear and Convincing
 - Highly probable that it is true.



What to Include in Determination

- Outline

- Introduction

1. Allegations potentially constituting sexual harassment
2. Procedural steps taken
3. Findings of fact
4. Conclusions regarding respondents conduct
5. Disciplinary sanctions, if applicable
6. Appeal rights

General Tips for Writing Determination

- Use templates/outlines
- Opening sentences
- Keep sentences simple – three-line rule
- Make effective use of tables, bullets and charts
- Active voice
- Neutral language
- Consistency in tense
- Buddy system for proofing (legal?)

Component I. Allegations

- Example:
 - Complainant alleges that Respondent engaged in the following conduct:
 - 1. The creation of a hostile environment in the form of unwelcome physical and verbal sexual harassment, in violation of Board Policy and Administrative Regulation 5145.71;
 - 2. Sexual assault in the form of unwelcome and nonconsensual physical touching, in violation of Board Policy and Administrative Regulation 5145.71;
 - 3. Dating violence on the basis of sex, in violation of Board Policy and Administrative Regulation 5145.71;
 - 4. Stalking on the basis of sex, in violation of Board Policy and Administrative Regulation 5145.71.

Component II. Procedural Steps

- This is a great place to use charts/tables
- Hopefully can copy and paste from the Investigation Report
 - Includes dates and type of “filing” (i.e., complaint, offers of supportive measures, notice of allegations)
 - Includes dates of interviews and documents in investigation report
- A good place to explain any delays

Component III. Findings of Fact

- Make a factual finding regarding every material allegation in the complaint
 - Sustained or not sustained
- Sample language: “The complainant’s allegation that [insert allegation] is sustained/not sustained. The investigator finds by [a preponderance of the evidence OR clear and convincing evidence] that...”

Making Factual Findings

- Make a factual finding regarding every material allegation in the complaint
 - Sustained or not sustained
- Sample language: “The complainant’s allegation that [insert allegation] is sustained/not sustained. The investigator finds by [a preponderance of the evidence OR clear and convincing evidence] that...”

Assessing Credibility

- Credibility factors to consider:
 - Corroboration/Lack of corroboration
 - Consistent/Lack of Consistency
 - Knowledge or opportunity to observe
 - Inherent plausibility
 - Motive to falsify
 - Consistent past conduct

Component IV. Conclusions re. Conduct

- The decision-maker must then apply the factual findings to the applicable “code of conduct” or other relevant policies and procedures to determine responsibility.

Conclusions Regarding the “Code of Conduct”

■ Example:

- For the reasons set forth above, I make the following determinations with respect to the Complainants’ allegations:
 - 1. I find that **Respondent is responsible for a violation of Title IX** as set forth in District Administrative Regulation 5145.71. I find that Respondent’s conduct comprises sexual harassment under 34 C.F.R. §106.30(a) as it meets the definition of sexual assault, stalking, and 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 District’s education program or activity.
 - 2. I find that **Respondent has not committed sexual assault**, and has not engaged in unwelcome conduct that is determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the District’s education program or activity.

Component V. Applicable Sanctions

■ Example:

Based on the determinations reached in this Decision, I recommend that the following remedies be implemented:

1. The District should offer Complaint any supportive measures the District deems appropriate in light of the findings and conclusions set forth in this Decision, including, for instance, counseling.
2. Any stay away agreements previously imposed on Respondent should remain in place through at least the end of the school year.
3. I recommend that the District impose some formal discipline on Respondent, in order to make it clear to him that his behavior violated the District's code of conduct, and to deter further violations by Respondent or others. The discipline need not be limited to addressing the specific Title IX violations found here. Any discipline should be done in accordance with all procedural rules and timelines imposed by the Education Code and/or the Individuals with Disabilities Education Act.

Component VI. Appeal Rights

- Example:
 - This Decision constitutes the District’s written determination of responsibility with respect to the Complainants’ allegations of sexual harassment against Respondent under Title IX.
 - The parties’ right to appeal from this Decision is set forth in Administrative Regulation 5145.71 (“Title IX Sexual Harassment Complaint Procedures”), and is also explained below.
 - Excerpt from policy

Appeals

- Two stages where appeals rights kick in:
 1. determinations of responsibility
 2. dismissals of formal complaints.
- Decision-maker on appeal should be different from the decision-maker and Title IX Coordinator

Basis for Appeal

- A procedural irregularity that affected the outcome of the matter;
- New evidence that was not reasonably available at the time of the determination of responsibility or dismissal was made, that could affect the outcome of the matter; and
- The Title IX Coordinator, investigator or decision-maker had a conflict of interest or bias for or against the complainants or respondents generally or the individual complainant or respondent that affected the outcome of the matter.

How to Handle Appeals

- The LEA notifies the other party in writing;
- The LEA gives both parties a reasonable, equal opportunity to submit a written statement in support of, or challenging, the determination of responsibility or dismissal;
- The LEA reviews the written statements and issues a written decision describing the result of the appeal and rationale; and
- The outcome of the appeal must be provided in writing simultaneously to both parties

Record-Keeping

- LEAs must maintain the following records for seven (7) years:
 - Each sexual harassment investigation including any determination of responsibility, any disciplinary sanctions imposed on the respondent, and any remedies provided to the complainant designed to restore or preserve equal access to the LEA's education program or activity
 - Any appeal and the result therefrom
 - Any informal resolution and the result therefrom
 - All materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process.

How to Serve Impartially

- Impartiality is a legal requirement
- Practice fundamental fairness to both parties
- Avoid bias

Understanding Bias

- Preconceived judgment or opinion without just grounds and based on insufficient knowledge
- Can be conscious or unconscious
- Biases, or stereotypes, are beliefs that most members of a group have some characteristic.
- Examples:
 - women are nurturing
 - teachers drink a lot of coffee

Types of Bias

- **Explicit Bias:** An explicit stereotype is the kind that you deliberately think about and report
- **Implicit Bias:** An implicit bias is one that is relatively inaccessible to conscious awareness and/or control
- **Confirmation Bias:** The tendency to seek out, favor or interpret information in a manner that confirms previously held beliefs
- **Priming:** The unconscious influence of external information on what we expect to be an independent decision

Implicit Association Test

- <https://implicit.harvard.edu/implicit/Study?tid=-1>



Tips for Eliminating Bias

- Avoid early hypotheses and recognize all possible outcomes.
- Obtain and consider all relevant information.
- Ask open-ended questions.
- Give the parties a meaningful opportunity to be heard and respond.
- Avoid making findings until all the evidence is gathered, including the question and answer phase.

Questions



Thank you!



Chelsea A. Tibbs
Sacramento
(916) 978-4040
ctibbs@DWKesq.com