SQUIRE PATTON BOGGS

Title IX Investigations and Best Practices For Compliance Staff

Supporting Equal Access for Students, Staff and Others

Title IX Basics

SQUIRE PATTON BOGGS

- Title IX prohibits discrimination based on sex in any educational program receiving federal funding.
- Covers *all* programs at the educational institution.
- Covers students, employees and many third parties.
- Note that some courts and agencies have read “sex” to include sexual orientation and gender identity.
- “Sex” also includes pregnancy.

Key Participants

SQUIRE PATTON BOGGS

- Complainant: Alleged victim.
- Respondent: Alleged perpetrator.
- Reporter: Individual who makes the original report of a potential violation.
- Witness: Individual, other than the complainant and respondent, who provides information to the investigator and/or hearing officer.
- Investigator: Member of the Title IX compliance office who investigates the complaint.
- Hearing Officer: Individual who presides over a live hearing under Title IX.

Title IX Prohibitions

SQUIRE PATTON BOGGS

- **Disparate Treatment:** Treating someone differently based on their sex.
  - Decision-maker was aware of the complainant's sex and took action *at least in part* based on sex.
  - Does not require bad motives on the part of the decision-maker.
- **Disparate Impact:** Applying a facially-neutral policy that has a different impact on one sex over the other.
  - Facially-neutral policy had a disproportionate adverse impact based on sex.
  - There was no substantial legitimate justification for the policy.
- **Retaliation:** Taking an action against someone because they made a complaint or participated in a Title IX investigation.
  - Complainant engaged in protected activity and the actor knew about it.
  - The actor subjected the complainant to adverse action because of the protected activity.

Title IX's Reach

SQUIRE PATTON BOGGS

Includes domestic violence situations

Applies to internships, job training, CPP and other programs

Applies to third parties who are participating in or attempting to participate in school programs or activities

Applies to things that happen off campus but tie back to campus

Applies to all interactions between faculty/staff and students

Off-Campus Reach

SQUIRE PATTON BOGGS

Title IX applies to all school “operations,” whether on campus or off.

- If the activity occurred in one of the following settings, it occurred as part of the school’s “operations”:
  - Where the school exercised substantial control over the respondent and the context of the alleged harassment; or
  - At an off-campus building owned or controlled by a student group officially recognized by the school.
- The District’s digital platforms are also part of the District’s operations and are subject to Title IX.

Definition: Sexual Harassment

SQUIRE PATTON BOGGS

Unwanted sexual conduct (sexual advances, requests for sexual favors, other verbal, physical or visual conduct) when:

- Submission to the conduct is made (or threatened to be made) a ***term or condition of employment or education***; or
- Submission to or rejection of such conduct is used (or threatened to be used) as a ***basis for academic or employment decisions***; or
- The conduct is so ***severe, pervasive and objectively offensive*** that it substantially interferes with the individual's academic or professional performance, ***effectively denying them equal access***; or
- The conduct constitutes ***sexual assault, dating violence, domestic violence or stalking***.

Examples: Physical Harassment

SQUIRE PATTON BOGGS

- Unwanted advances/touching
- Invasion of personal space
- Elevator eyes
- “Fatal attraction” type of pursuits

Examples: Verbal Harassment

SQUIRE PATTON BOGGS

- Sexual innuendo
- Sexual profanity/name calling
- Discussion of a sexual nature
- Inquiries regarding sexual topics

Examples: Visual Harassment

SQUIRE PATTON BOGGS

- Calendars/posters
- Screen savers
- Emails
- Gestures

Examples: Situational Harassment

SQUIRE PATTON BOGGS

- Meeting sites that exclude based on gender, race or other protected class.
- Group entertainment of a sexual nature.
- Inappropriate conduct during social activities.

What is Not Harassment?

SQUIRE PATTON BOGGS

- Change in assignment
- Negative evaluations or grades based on performance
- Supervisor or instructor directives related to the job/course
- Criticism of job performance or classwork
- Discipline consistent with employee handbooks or the student code of conduct
- Disagreements with supervisors, co-workers, instructors or other students

Domestic Violence, Dating Violence and Stalking

SQUIRE PATTON BOGGS

- **Domestic Violence:** Crimes of violence committed by a current or former intimate partner of a victim or by any other person against a victim who is protected from that person under Ohio's domestic or family violence laws.

- **Dating Violence:** Violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the victim (where the existence of such a relationship is determined by length, type and frequency of interactions).

- **Stalking:** Course of conduct directed at a specific person that would cause a reasonable person to fear for their safety or the safety of others or suffer substantial emotional distress.

Responsibility of All District Staff

SQUIRE PATTON BOGGS

Take **ALL** complaints or rumors of inappropriate behavior seriously.

Maintain confidentiality. Only discuss with those who have a NEED to know.

Document and aid with investigation after reporting.

Follow up with all parties and maintain a compliant work/educational environment.

Actual Knowledge

SQUIRE PATTON BOGGS

The District has a responsibility to investigate any complaint about which it has "actual knowledge," meaning notice of the allegations is provided to:

- The Title IX Coordinator;
- An official of the District who has authority to institute corrective measures on behalf of the District; or
- Any employee of an elementary or secondary school.

Making a Complaint

SQUIRE PATTON BOGGS

- Report any allegation of a Title IX violation to the Title IX coordinator.
  - Under Title IX and District policy, ***all*** faculty and staff have an obligation to report alleged violations of Title IX.
  - Students should be encouraged to report but are not required to do so.
- Title IX Coordinator: Name and contact information must be listed on the District's website and in the Title IX policy.
- The District must notify all employees, unions, applicants for employment, students and parents/guardians of the Coordinator's contact information.

Protection in the Complaint Process

SQUIRE PATTON BOGGS

- There can be ***no guarantee*** of confidentiality in the process for the Complainant or the Respondent.

- All parties involved (complainant, accused and witnesses) should be:
  - Asked to keep the information confidential (though not formally required to).
  - Told the District will keep their information as confidential as possible.

Contents and Timing of a Complaint

SQUIRE PATTON BOGGS

- There is no required timeline for filing a complaint, but the sooner it is filed, the easier it is to investigate and respond.

- Complaints should include:
  - Date(s) and time(s) of the alleged conduct;
  - Names of all individuals involved (including potential witnesses);
  - Description of what happened; and
  - Contact information for the complainant.

What is the Goal of the Investigation?

SQUIRE PATTON BOGGS

- Comply with legal obligation and reduce risk of legal exposure
- Deter employees and students from engaging in similar conduct
- Communicate the District's support for appropriate workplace and student conduct
- Demonstrate the District's response commensurate with seriousness of complaint
- Address and resolve complaint
- Determine the facts and document them

Initial Response to Complaint

SQUIRE PATTON BOGGS

The Title IX Coordinator (or their designee) ***must***:

- Contact the complainant to discuss supportive measures.
- Consider what the complainant wants with regard to supportive measures.
- Make clear to the complainant that supportive measures are available regardless of whether they file a formal complaint.
- Explain the process for filing a formal complaint.

Reporting Involving Minors

SQUIRE PATTON BOGGS

Avoid singling them out; same policies apply

Does anything need to be reported as suspected abuse?

Is there a need to report the incident to parents? When?

Formal Complaints

SQUIRE PATTON BOGGS

- Generally, the District is only required to investigate those complaints that are filed ***in writing*** and ***signed by the Complainant***.
- Exceptions:
  - Where failure to investigate would amount to “deliberate indifference”; and/or
  - Where an investigation is necessary to protect the safety of the community.

Dismissal of Complaints

SQUIRE PATTON BOGGS

- Schools ***must*** dismiss a Title IX complaint if
  - The alleged conduct does not constitute sexual harassment, even if true;
  - The conduct did not occur in the school's program or activity; or
  - The conduct did not occur when the Complainant was in the United States.

- Schools ***may*** dismiss a Title IX complaint if:
  - The Complainant requests to withdraw and doing so is not clearly unreasonable;
  - The Respondent's enrollment or employment ends; or
  - Specific circumstances prevent the district from gathering sufficient evidence to reach a decision.

Interim Measures

SQUIRE PATTON BOGGS

Supportive Services: Individualized services reasonably available that are non-punitive, non-disciplinary and not unreasonably burdensome to another, while designed to ensure equal educational access, protect safety and/or deter sexual harassment.

Examples include:

- Separating the parties or placing limitations on contact between the parties
- Making alternative class-placement or workplace arrangements
- Providing counseling and related supports
- Extensions of deadlines
- Leaves of absence

Rights of Parties

SQUIRE PATTON BOGGS

- Identify and have the investigator consider witnesses and other evidence.
- Access to all information the investigator considers.
- Access to review statements or evidence provided by the other party.
- Access to review and comment on information the investigator develops.

Role of the Investigator

SQUIRE PATTON BOGGS

- Review and analyze all evidence and make determinations regarding:
  - Credibility
  - Reliability
  - Significance
- Operate without any conflict of interest.
- Act as an impartial investigator – not as an advocate for either party.
- Make a recommendation regarding responsibility.

Conducting the Investigation

SQUIRE PATTON BOGGS

Conducting the Investigation

SQUIRE PATTON BOGGS

Notify parties and witnesses of investigation in writing

- Questions to answer:
  - Is it more likely than not that the alleged behavior occurred?
  - If so, does the behavior constitute sexual misconduct under the District's Title IX policy?

This is the **preponderance of the evidence** standard.

Notifying the Complainant

SQUIRE PATTON BOGGS

- Advise that the investigation has begun: Thank them for bringing the conduct to the District's attention and confirm the District takes these issues seriously.
- Ask Complainant for a description of the misconduct in writing (if you don't already have it).
- Set an expectation for confidentiality.
  - ***Do not promise*** confidentiality. Assure Complainant you will keep information confidential to the greatest extent possible, and request that they keep conversations with you confidential.
- Ensure Complainant there will be no retaliation for making a good-faith complaint.
  - Ask Complainant to contact you immediately if they experience retaliation.

Notifying the Respondent

SQUIRE PATTON BOGGS

- Advise that you are investigating an allegation that s/he engaged in misconduct.
- Provide a summary of the allegations.
- Set an expectation for full cooperation.
- Set an expectation for confidentiality.
  - ***Do not promise*** confidentiality. Assure Respondent you will keep information confidential to the greatest extent possible, and request that they keep conversations with you confidential.
- Caution against retaliating against Complainant and/or witnesses.

Notifying Witnesses

SQUIRE PATTON BOGGS

- Advise that the District needs their help investigating a complaint of misconduct.
- Assure witnesses the complaint is not directed at them and does not relate to their conduct.
- Set an expectation for confidentiality.
  - ***Do not promise*** confidentiality. Assure witnesses you will keep information confidential to the greatest extent possible, and request that they keep conversations with you confidential.
- Provide brief summary of allegations.
- Assure witnesses retaliation for their cooperation will not be tolerated and ask them to report to you immediately if they experience retaliation.

Conducting the Investigation

SQUIRE PATTON BOGGS

The Investigator should:

- Conduct interviews in private.
- Consider the credibility of interviewees.
- Focus on facts and avoid unsupported conclusions.
- Take thorough notes.

The Investigator should not:

- Promise confidentiality (but should set an expectation that the interviewee keep the discussion confidential).
- Prevent witnesses from leaving.
- Characterize alleged misconduct.

Avoid Characterizing Conduct

SQUIRE PATTON BOGGS

Q. Do you think that his behavior towards [redacted] is worse than his behavior toward other people, or is he just a bad guy or just a mean guy and she's a little thin skinned? I'm just trying to understand what the dynamic is.

Q. Are there any other men that you recall him bullying or at least behaving in that same sort of, I don't want to say harassing, but just giving somebody a hard way to go?

Avoid Characterizing Conduct

SQUIRE PATTON BOGGS

Q. Is she boastful, though, or are they just perceiving that because they are haters? Is she just being boastful?

Q. Does she speak to them in a demeaning and disrespectful way?

Avoid Unsupported Conclusions

SQUIRE PATTON BOGGS

Q. But in terms of I've heard it's a little bit of a Peyton Place over there, a lot of drama.

Q. Was that an isolated incident in terms of maybe an inappropriate remark from somebody?

A. Yeah. It was isolated.

Q. Have you had male officers hitting on you constantly?

Conducting the Investigation

SQUIRE PATTON BOGGS

- Think 5Ws – who, what, when, where and why?
- In general, just keep asking people to explain further.
- Summarize as you go, and again at the end.
- Empathize but don’t take sides.

Conduct follow-up interviews as necessary

Special Issues During Interviews

SQUIRE PATTON BOGGS

- Emotional complainant or accused: Sympathize but don't take sides.
- Complainant refuses interview:
  - If still employed/enrolled, try to compassionately persuade to participate.
  - If no longer employed/enrolled, document efforts to obtain cooperation and let them know the investigation will not go forward without their input.
- Respondent refuses interview:
  - If still employed/enrolled, advise that refusal to participate may result in discipline as the investigation will proceed without their input.
  - If no longer employed/enrolled, document efforts to obtain cooperation and inform that investigation may go forward without their input. For former employees, inform them conclusions will be placed in their personnel file.
- Respondent categorically denies allegations:
  - Document credibility of interviewees – that will be key.
  - If interviewees contradict each other, pay attention to objective evidence (i.e. email, physical evidence, etc.)

Live Hearings

SQUIRE PATTON BOGGS

The 2020 Title IX regulations require colleges and universities to include live hearings as part of their investigatory process. **This is optional for K-12 schools.**

If a school includes hearings in its policy, those hearings must include the following components:

- All participants must be able to hear and see each other (even if virtually).
- The school must keep a verbatim record.
- The school must provide a representative to any unrepresented party.
- Each party must be permitted to cross-examine the other.

Investigatory Report

SQUIRE PATTON BOGGS

In lieu of live hearings, K-12 schools must send the investigator's report to both parties **before making a determination as to responsibility**.

The report should include:

- Findings of fact
- Conclusions about whether the alleged conduct occurred
- Rationale for the result as to each allegation

After the parties receive the investigatory report:

- Parties may send written questions to each other and/or witnesses.
- The school must provide the parties with the written answers to the questions, and allow follow-up questions as necessary.

Final Determination Report

SQUIRE PATTON BOGGS

At the conclusion of the investigation and written questioning process, the decision-maker must issue a report containing the following:

- Findings of fact
- Conclusions about whether the alleged conduct occurred
- Rationale for the result as to each allegation
- Disciplinary sanctions imposed on Respondent (if any)
- Remedies provided to the Complainant (if any)

Appeal Procedures

SQUIRE PATTON BOGGS

Either party may appeal the decision-maker's findings and conclusions for any of the following reasons:

- Procedural irregularities
- Newly discovered evidence
- Alleged bias of Title IX personnel

Resolving the Complaint

SQUIRE PATTON BOGGS

Share with the Complainant:

If Misconduct Is Confirmed

Advise Complainant and inform that corrective action has been taken

If Misconduct Is NOT Confirmed

Advise Complainant that there was insufficient evidence to corroborate complaint

Share with the Respondent:

If Misconduct Is Confirmed

Advise Respondent and inform what corrective action will be taken. If corrective action is less than termination/expulsion:

- Advise Respondent that retaliation will not be tolerated
- Advise Respondent that future misconduct risks termination/expulsion

If Misconduct Is NOT Confirmed

Advise Respondent that there was insufficient evidence to corroborate complaint

- Counsel Respondent – go over policy at issue and advise on how to avoid problem in the future
- Advise Respondent that no retaliation will be tolerated

Following Up

SQUIRE PATTON BOGGS

Preserve documentation!

- Keep investigation file together in a secure location. (Do not keep it in personnel files.)
- Any documentation of disciplinary action should go in the appropriate personnel or student file.

Follow Up with the Respondent

Monitor behavior of Accused to ensure no further misconduct or retaliation against Complainant or witnesses.

Follow Up with the Complainant

Periodically follow up with Complainant to ensure that misconduct is not ongoing and that no retaliation is occurring.

Document that follow-up occurred.

Informal Resolution Process

SQUIRE PATTON BOGGS

Schools may now offer informal resolution options under Title IX.

- Options include mediation or restorative justice.
- Both parties must give ***voluntary, informed, written consent*** to using the informal process and any party may revoke their consent at any time, triggering the formal investigatory process.
- Schools may only offer the informal process after a formal written complaint has been filed.
- The informal resolution process may not be used where the allegations are that an employee sexually harassed a student.

Example 1

SQUIRE PATTON BOGGS

One of your intervention specialists is assigned to provide home instruction for a student. The teacher comes back from her first home visit and tells you that the father in the family told her she was “hot” and squeezed her butt when she walked by him. **Is this a Title IX issue?**

Example 2

SQUIRE PATTON BOGGS

A female student comes to you and reports that one of the football coaches has said he will only work with male athletes. **Is this a Title IX issue?**

Example 3

SQUIRE PATTON BOGGS

The school is having some sidewalks replaced, so there are concrete crews on campus. A secretary reports to you that three of the crew members catcalled her as she walked past them to work in the morning. **Is this a Title IX issue?**

Example 4

SQUIRE PATTON BOGGS

One Monday, one of your employees comes to you and confides that while he was at a party with colleagues on Saturday, he had a few drinks and fell asleep. When he woke up, one of his coworkers was on top of him. He ran out of the room, but now he's afraid to be around the coworker. **Is this a Title IX issue?**

When Should You Report?

SQUIRE PATTON BOGGS

Everyone has the responsibility to report situations of misconduct and/or harassment

- Think critically through situations first
- Distinguish between what really needs to be reported and what doesn't
  - When is it attention-seeking?
  - When is someone just looking for guidance on interacting with someone?
  - When is it an academic issue rather than sexual harassment?

Example 5

A student comes to you every morning to complain about how her boyfriend, who is also a student, didn't call her last night. **Is this a Title IX issue?**

Example 6

SQUIRE PATTON BOGGS

A student comes to you and confides that they really aren't getting along with their partner on a project in one of their classes. Apparently the partner spends the whole class period texting and checking Snapchat, instead of working.

Is this a Title IX issue?

Example 7

One of your students comes to you and reports that her friend, also a District student, was sexually assaulted but does not want to report. She names her friend.

Are you required to investigate?

Example 8

When you begin work at the District, a colleague warns you to watch out for another employee because she harasses people. **Are you required to report?**

Equitable Treatment

SQUIRE PATTON BOGGS

Throughout the grievance process, schools must ensure all parties receive equal treatment, including:

- Both must be permitted to present evidence and witnesses.
- Both must be permitted to have a supporter or adviser present throughout all stages of the process.
- Both must have the opportunity to review ***all*** evidence (even that which the District will not rely upon to determine responsibility).
- Neither may be required to bear the burden of proof.
- Neither may be restricted in their ability to discuss the allegations.
- Neither may be restricted in their ability to gather evidence.

Quiz 1

SQUIRE PATTON BOGGS

Who must the District inform of its Title IX policy and Coordinator(s)' contact information?

A. All students and employees

B. All students, parents, employees, unions, and applicants for enrollment or employment

C. All parents and employee union leaders

D. All staff

Quiz 2

SQUIRE PATTON BOGGS

Should you reassure a complainant that their case will be handled completely confidentially?

A. Yes

B. No

Quiz 3

SQUIRE PATTON BOGGS

Which is/are part of the definition of "sexual harassment" under Title IX?

A. Conduct that conditions the provision of an aid, benefit or service on an individual's participation in sexual conduct.

B. Conduct that is so severe, pervasive *and* objectively offensive that it denies equal access.

C. Conduct that is so severe, pervasive *or* objectively offensive that it denies equal access.

D. A and B.

E. A and C.

Quiz 4

SQUIRE PATTON BOGGS

True or False: A complaint under Title IX must be made within 10 days of the incident, otherwise, it cannot be investigated.

A. True

B. False

Quiz 5

SQUIRE PATTON BOGGS

True or False: Any sex discrimination that impacts a District student is a Title IX concern.

A. True

B. False

Quiz 6

SQUIRE PATTON BOGGS

What questions must the Title IX investigator answer in the course of their investigation?

A. Did the behavior alleged happen beyond a reasonable doubt and, if so, was a crime committed?

B. Is it more likely than not that the behavior happened and, if so, did it constitute sexual misconduct?

C. Did the behavior alleged happen beyond a reasonable doubt and, if so, did it violate Title IX?

Quiz 7

SQUIRE PATTON BOGGS

Who may submit questions and feedback on the investigator's report?

A. Witnesses and the school principal

B. The Complainant, Respondent and witnesses

C. The Complainant's parent

D. The Complainant and Respondent

Quiz 8

SQUIRE PATTON BOGGS

Who is entitled to know the outcome of an investigation under Title IX?

A. The complainant and the respondent

B. The complainant and the staff member who reports the complaint

C. The complainant, the respondent and all witnesses interviewed

D. No one

Quiz 9

SQUIRE PATTON BOGGS

What is the Title IX Coordinator's role?

A. To advocate for victims.

B. To investigate formal Title IX complaints.

C. To oversee the District's compliance with Title IX.

D. All of the above.

SQUIRE PATTON BOGGS

Title IX Investigations and Best Practices For Compliance Staff

Supporting Equal Access for Students, Staff and Others