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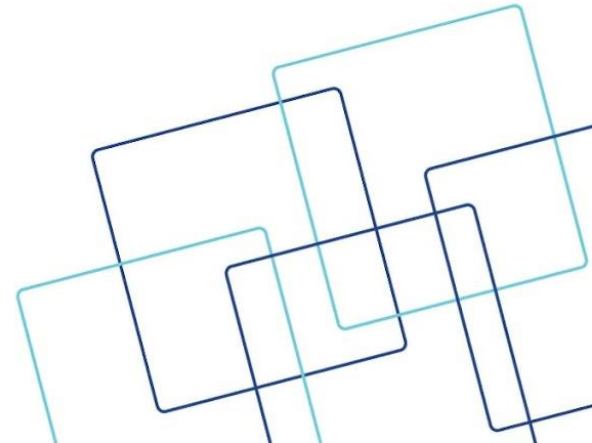
Implementing the New Title IX Regulations

Presented by: Stephanie M. White

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SHASTA COUNTY OFFICE OF EDUCATION

September 18, 2020



Presenter 1

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AT LOZANO SMITH

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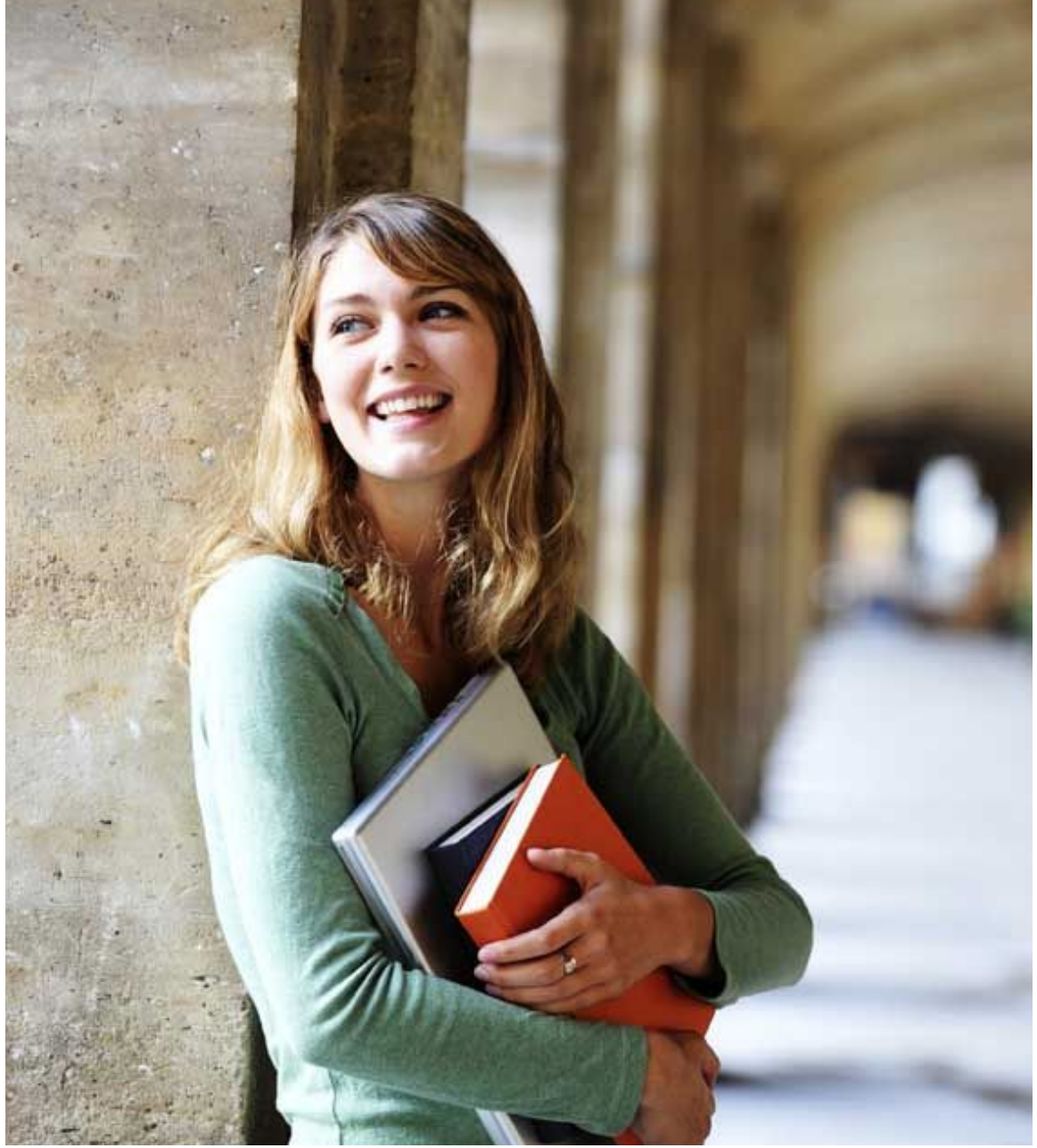


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Jonathan E. Berry-Smith is an associate in Lozano Smith's Walnut Creek Office. His practice is focused on the student, labor and employment and governance aspects of education law. He is experienced in researching California statutes and case law, and advises school district administrators on all aspects of education law. He reviews and revises documents used throughout the employee discipline process, such as charge packets, notices of administrative leave, and collective bargaining grievance responses. He participates in the review of charter school petitions, inter-district attendance transfer requests, and student expulsion appeals.

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What We Will Cover

- Title IX and the New Regulations
- The Roles and Responsibilities of District Administrators and Employees
- Training, Notice and Posting Requirements
- 10 Steps for an Effective Title IX Investigation

Title IX and the New Regulations

The Plain Language of Title IX

denied the benefits of, or be subjected to discrimin

20 U.S.C. § 1681 *et seq.*

What Does Title IX Cover?

1. Education Programs or Activities
2. Sports
3. Employment
4. Equal Access to Facilities
5. Admissions and Recruitment
6. **Sexual Harassment***

(34 C.F.R. Part 106)

*New regulations that have the full force and effect of law



Why Title IX is Important - Potential Impact of Sexual Misconduct on Students and Employees



- Shame, humiliation, stress, anxiety, depression, loss of sleep
- Impaired learning/poor work performance
- Absenteeism/turnover
- Culture of discrimination
- Civil liability (monetary damages, attorney fees)
- Negative media attention and public outcry
- OCR Resolution Agreement
- Loss of federal funds

What's New Under the Title IX Regulations?

1. The definition of "sexual harassment"
2. "Actual knowledge" for notice
3. Procedural requirements for due process
4. "Deliberate indifference" standard:

> *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.*

What Hasn't Changed Under Title IX?

- Duty to identify and promptly investigate and address allegations of sexual harassment
- Duty to adopt and publish clear policies on how to file complaints and how complaints will be promptly addressed
- Notice to parties of the initiation of the investigation and the outcome of investigation and appeal rights
- Duty to prevent recurrence and remedy effects
- Obligation to have a Title IX Coordinator

New Definitions

Complainant

- An individual who is alleged to be the ***victim of the conduct*** that could constitute sexual harassment

Respondent

- An individual who has been reported to be the ***perpetrator of conduct*** that could constitute sexual harassment

Formal Complaint

- A document filed by a ***complainant*** or signed by the ***Title IX Coordinator*** alleging sexual harassment against a respondent, and requesting that the district investigate the allegation

Actual Knowledge (K-12)

- When ***any employee*** has notice of sexual harassment or allegations of sexual harassment

New Definitions – Sexual Harassment

Sexual Harassment is conduct on the basis of sex that satisfies one or more of the following:

1. An ***employee*** conditioning the provision of an aid, benefit, or service of the district on the complainant's participation in unwelcome sexual conduct;
2. 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; or
3. "***Sexual assault***" as defined in 20 U.S.C. 1092(f)(6)(A)(v), "***dating violence***" as defined in 34 U.S.C. 12291(a)(10), "***domestic violence***" as defined in 34 U.S.C. 12291(a)(8), or "***stalking***" as defined in 34 U.S.C. 12291(a)(30).

New Definitions – Sexual Harassment (1 of 3)

Sexual assault:

- Actual or intentional physical sexual acts against a person ***without consent*** that may include:
  - Rape, rape and seduction, sodomy, lewd and lascivious acts, oral copulation, sexual penetration, sexual battery, and sexual assault.
- "No consent" may include:
  - Force, duress, violence, fear of immediate harm, inability to consent (including statutory rape).

(20 U.S.C. 1092(f)(6)(A)(v).)

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.

(34 U.S.C. 12291(a)(10).)

New Definitions – Sexual Harassment (2 of 3)

Domestic violence:

- Felony or misdemeanor crimes of violence committed by:
  - A current or former spouse or intimate partner of the complainant,
  - A person with whom the complainant shares a child in common,
  - A person who is cohabitating with or has cohabitated with the complainant as a spouse or intimate partner,
  - A person similarly situated to a spouse of the complainant under the domestic or family violence laws of the jurisdiction receiving grant monies, or
  - Any other person against an adult or youth victim who is protected from that person's acts under the domestic or family violence laws.

(34 U.S.C. 12291(a)(8).)

New Definitions – Sexual Harassment (3 of 3)

Stalking:

- Engaging in a 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.



(34 U.S.C. 12291(a)(30).)

Title IX Jurisdiction

Allegations of sexual harassment fall under Title IX when:

- The conduct occurs against a person ***in the United States***;
- The conduct occurs in an education program or activity over which the district exercised ***substantial control*** over both:
  1) the ***respondent*** and
  2) the ***context*** in which the sexual harassment occurs; and
- The complainant was ***participating/attempting to participate in*** the educational program or activity at the time the complaint was filed.

The New Regulations Are NOT Retroactive



- The new regulations do NOT apply to any alleged sexual harassment that occurred prior to August 14, 2020
- The Federal Rule governs how schools must respond to sexual harassment that allegedly occurs ON or AFTER August 14, 2020

The Roles and Responsibilities of District Administrators and Employees

Responsibilities of the Title IX Coordinator:

- Provides or coordinates Title IX trainings and preventative measures
- Offers supportive measures to complainant and respondent
- Explains the complaint/grievance process to the complainant
- Receives all complaints and oversees the complaint/grievance or informal resolution process
- May sometimes investigate complaints, but is never the decision-maker
- Determines mandatory and discretionary dismissals
- Evaluates corrective actions
- Addresses patterns or problems

Responsibilities of the Investigator:

- Administers a fair investigation of formal complaints
  - Interviews parties and witnesses
  - Reviews evidence
  - Provides parties the opportunity to inspect, review, and respond to all evidence gathered, and considers their responses
  - Creates an investigative report that summarizes relevant evidence
- Does not make a determination of responsibility
- Must be trained
- Must be impartial, unbiased, and free of any conflicts of interest

Responsibilities of the Decision-Maker:

- Reviews the investigation report, but does not investigate
- Gives parties the opportunity to submit written relevant questions for the other party/witnesses, and asks those questions they deem relevant or provides an explanation as to why a question was deemed irrelevant
- Makes a determination about responsibility
- Prepares the written determination that is issued to each party
- May recommend sanctions and/or corrective actions

Responsibilities of the Informal Resolution Officer:

- Facilitates the informal resolution process
- Trained, unbiased, and without conflict
- May be the Title IX Coordinator or another unbiased party
- Verifies a complaint meets the criteria for informal resolution, and that the parties have given voluntary, written consent
- Ensures the parties know their rights, including their right to withdraw at any time prior to a resolution being reached

Responsibilities of the Appeals Officer:

- Evaluates any appeal request made by the complainant or respondent
- Makes a decision on the appeal and issues a written decision to each party that states the decision and rationale
- Must be unbiased and without conflict
- Cannot be the Title IX Coordinator, investigator, or decision-maker

Responsibilities of All Employees:



- All employees must report to the Title IX Coordinator, and/or any additional designated individuals (school site administrators), any known claims of potential sexual harassment.
- This does not change any mandated reporter duties for “reasonable suspicion” of child abuse or neglect.

Training, Notice and Posting Requirements

Training Requirements for the Title IX Team

- The ***definition of sexual harassment*** in § 106.30,
- The scope of the ***education program or activity***,
- The ***complaint/grievance process,*** including how to conduct an investigation and all resolution options,
- How to serve ***impartially,***
- Any ***technology*** that will be used, and
- Determining issues of ***relevancy***.

*Training materials must not rely on sex stereotypes and must promote impartial investigations and adjudications of formal complaints.

Title IX Notice/Posting Requirements

- Notice of Title IX rights must be given to all employees, students, and applicants
- Must be posted in a ***prominent*** location on the district's ***website***, and in each ***handbook*** or catalogue that it makes available to persons entitled to notification
- Training materials must be posted online – 7 years

Title IX Notices Must Include:

- Contact information for the Title IX Coordinator.
- A statement that the district does not discriminate on the basis of sex in the education program or activity that it operates, including in employment, and that it is required by Title IX and specifically Section 106.8(b) not to discriminate in such a manner.
- That inquiries about the application of Title IX and Section 106(b) may be referred to the Title IX Coordinator, to the Assistant Secretary of Education, or both.
- The complaint/grievance procedures and process, including:
  - how to report or file a complaint of sex discrimination,
  - how to report or file a complaint of sexual harassment, and
  - how the district will respond.

Title IX Policies

Complaint/grievance procedures must:

- Provide for the prompt and equitable resolution of student and employee complaints alleging any action that would be prohibited under Title IX, and
- Comply with the requirements of Section 106.45.



Title IX Policies Must (Per Section 106.45):

- Treat complainants and respondents equitably
- Require an objective evaluation of all relevant evidence
- Require that any individual involved as Title IX Coordinator, investigator, decision-maker, or informal resolution officer not have a conflict of interest or bias for or against complainants or respondents
- Include a presumption that the respondent is not responsible for the alleged conduct until a determination regarding responsibility is made at the conclusion of the grievance process
- Include reasonably prompt time frames for conclusion of the complaint/grievance process

Title IX Policies Must (Per Section 106.45) (Continued):

- Describe the range of possible disciplinary sanctions and remedies or list the possible disciplinary sanctions and remedies that the district may implement following any determination of responsibility
- State the standard of evidence to be used to determine responsibility (i.e., preponderance of the evidence standard)
- Describe appeal procedures
- Describe supportive measures available to both parties
- Protect information protected under a legally recognized privilege (unless there is a wavier)

Retaliation Prohibitions

- Retaliation is prohibited against anyone who has attempted to participate in the Title IX process.
- The district cannot use the student conduct process as a way to avoid the Title IX complaint/grievance process.
- Retaliation complaints must be filed under the same complaint/grievance process.
- The district must keep the identities of all involved parties confidential, unless disclosure is required by law or necessary to carry out Title IX proceedings.
- Exercising a First Amendment right is not retaliation.
- Charging an individual with making a false statement in bad faith during a Title IX process is not retaliation.

10 Steps for an Effective Title IX Investigation

10 Steps for Effective Title IX Investigations

Step 1

Receiving and Assessing Complaints



Video


[Inaudible. No dialogue captured of teacher or female student.
Separate, unrelated student discussions occur in background.]

Group Activity

On Friday, January 6th, around 11:15 a.m., you (Vice Principal) are in your office answering some emails, and Calvin (a male junior) comes into your office and shows you this video. Calvin said he recorded the video yesterday in Mr. Smith's fourth period class.

Group Activity 1

1. What actions might you consider taking right away?

2. Do you ask Calvin anything else?

3. What can you tell Calvin about how you will be handling the situation?

Receiving a Complaint



- Notify the Title IX Coordinator
- Assess whether a CPS report should be filed (continue to reassess)
- Title IX Coordinator should promptly schedule a meeting with the victim

Contact the Victim/Complainant

- Conduct initial discussion with complainant/victim to better understand the complaint and if it rises to the level of sexual harassment under Title IX
- Discuss options for supportive measures
- Explain options for filing a formal complaint with the district
- Discuss the district's policy that prohibits retaliation

Group Activity 2

1. Have any obligations under Title IX been triggered?
2. Does Calvin's report constitute a formal complaint? What if he puts it in writing?
3. What if the victim or her parents request that the district "do nothing"?
4. Would it make a difference if this incident involved two employees, or parties of the same-sex?

Do You Have a "Formal" Title IX Complaint?

- *Formal Complaint:* Document filed by a complainant (who is also the victim or the victim's parent/guardian) or signed by the Title IX Coordinator alleging sexual harassment against a respondent and requesting that the recipient investigate the allegation.

- If no formal complaint is filed by the complainant, the Title IX Coordinator should assess whether to independently initiate a complaint based on a threat to safety.

Test 1: If the Alleged Conduct is True, Does it Rise to the Level of Sexual Harassment Under Title IX?

- Any ***employee*** conditioning the provision of an aid, benefit, or service on an individual's participation in unwelcome sexual conduct;
- Any unwelcome conduct that a reasonable person would find so ***severe, pervasive, and objectively offensive*** that it denies a person equal education access; OR
- Any instance of sexual assault, dating violence, domestic violence or stalking.

***If the answer is no, you must dismiss the complaint or allegations therein. If yes, move to test 2.**

Test 2: Is there Title IX Jurisdiction Over the Conduct?

1. Education Program or Activity
   a) If the school exercises substantial control over the respondent; and
   b) The school exercises substantial control over the context in which the sexual harassment occurred.
2. Must be within the United States.
3. At the time of filing a formal complaint, complainant must be participating/attempting to participate in the educational program.

***If the answer is no, <u>you must dismiss the complaint or allegations therein</u>.**

Discretionary Dismissals

Districts *MAY* dismiss a formal complaint, or any allegations therein if:

- A complainant notifies the Title IX Coordinator in writing that they would like to withdraw the formal complaint or any allegations therein;
- The respondent is no longer enrolled or employed by the district; or
- Specific circumstances prevent the district from gathering evidence sufficient to reach a determination as to the formal complaint or allegations therein.

Dismissals (Mandatory and Discretionary)

- The decision to dismiss a complaint should be made in consultation with the Title IX Coordinator.
- Notice of dismissal must be issued to both parties in writing.
- Parties must be informed of their right to appeal the dismissal on the basis of:
  1. Procedural irregularity;
  2. New evidence that was not reasonably available earlier; or
  3. Involved personnel had a conflict of interest or bias.

10 Steps for Effective Title IX Investigations

Step 2

Supportive Measures



Supportive Measures

"Non-disciplinary, non-punitive individualized services offered […] to the complainant or respondent before and after the filing of a formal complaint or where no formal complaint has been filed."

- Designed to restore or preserve equal access to the educational program without unreasonably burdening either party.
- Should be determined on a case-by-case basis
- Cannot be retaliatory

Supportive Measures (Continued)

Examples:

- Counseling
- Medical services
- Academic support (e.g., extension of deadlines or other course adjustments)
- No-contact orders
- Increased security
- Changed schedules (e.g., modification of work or class schedule)
- Leaves of absence (employees)
- Emergency removals in compliance with Title IX

Emergency Removals (Students)

Districts are prohibited from disciplining a student for alleged sexual harassment until a full Title IX investigation has been completed.

EXCEPTION: An Emergency Removal

- Respondent must be an immediate threat to the physical health or safety of any student or individual;
- The immediate threat must arise from the allegations of sexual harassment;
- Respondent is provided with notice and an opportunity to challenge the decision immediately after removal.

***Note: There are no restrictions for placing an employee on paid administrative leave.**

10 Steps for Effective Title IX Investigations

Step 3

Initiate an Investigation into the Formal Complaint or Engage in Informal Resolution Process



Policies and Procedures for Investigating Title IX Complaints

- BP/AR 4119.11 – Sexual Harassment (Employee)
- AR 4119.12* – Title IX Sexual Harassment Complaint Procedures (Employee)
- BP/AR 5145.7 – Sexual Harassment (Students)
- AR 5145.71* – Title IX Sexual Harassment Complaint Procedures (Student)

*New policies proposed by CSBA.

Investigation Timelines



- Title IX - “reasonably prompt time frame”
- District policies – 60 days for Uniform Complaints

Send Written Notice of the Investigation

1. Identify investigation process, including informal resolution process;
2. Identify allegations with sufficient details;
3. Include a statement that respondent is presumed not responsible and that a determination is made at the conclusion of the process;
4. Explain that they may have an advisor of their choice inspect and review the evidence; and
5. Identify the district's code of conduct that prohibits knowingly making false statements or submitting false information.
6. Do not restrict either party's ability to discuss the allegations under investigation.

Informal Resolution

- Informal resolution is a process that does not involve a full investigation and adjudication.
- It can only be offered when:
  - A formal complaint is filed;
  - The school district has sent a written notice about the allegations and the informal resolution process;
  - A written determination has not yet been made; and
- Both parties have provided voluntary, written consent to the process.
- Either party can withdraw from the informal resolution process at any time, and should be notified of this right.
- Cannot be used for allegations where an employee is alleged to have sexually harassed a student.

10 Steps for Effective Title IX Investigations

Step 4

Gather, Review, and Preserve Evidence; Conduct Witness Interviews



Title IX Evidence Requirements

- District has the burden of gathering evidence.
- District cannot access or use a party's medical, psychological or other similar records unless they obtain the party's voluntary, written consent.
- District cannot restrict parties from discussing allegations or gathering and presenting relevant evidence.
- District must provide an opportunity for parties to present fact and expert witnesses and other exculpatory or inculpatory evidence.

Party/Witness Interviews

- Start with an outline of questions, but be flexible!
- Use the outline as more of a roadmap for issues you need to touch on with each witness.
- If there are a series of incidents, consider a linear roadmap.
- Keep in mind big picture goals.
- At the end, ask: Is there anything else?

Trauma-Informed Approach

- Do not victim-blame.
- Choose a comfortable setting that is not triggering.
- Build rapport.
- Ask difficult questions with care – explain why you're asking the question.
- Allow the witness to speak freely and then ask follow up questions.

Interview Questions

- “Did you tell anyone about what happened to you?”
- “Tell me how that made you feel.”
- “Did you ever feel like this before?”
- “What was your thought process at that time?”
- “I’m asking you this to try to understand…”

Common Questions and Issues

- What if the complainant/victim want their identity to be kept confidential?
- What if the respondent refuses to answer any questions?
- What if the witness refuses to be interviewed or wants their identity to remain confidential?
- Do all witnesses get a union representative or support person?
- What if the police are investigating?

10 Steps for Effective Title IX Investigations

Review of Evidence by the Parties



Meaningful Access to Information

*Both parties must have an opportunity to inspect and review evidence



Review of Evidence By the Parties

- Send the parties any evidence directly related to the allegations raised in the formal complaint
  - Includes evidence the district does not intend to rely on in reaching its decision regarding responsibility
  - Use of a draft investigation report or report of evidence
- Must be done prior to the completion of the investigation report
- Parties should be given at least 10 days to respond to the evidence, which must be considered by the investigator

*The investigator should work with the Title IX Coordinator to securely transmit the evidence to the parties, and to assess whether redactions may be appropriate.

10 Steps for Effective Title IX Investigations

Step 6

Prepare the Investigation Report



Investigation Report

- The final investigation report should be prepared by the investigator and must summarize relevant evidence
- Parties must be offered the opportunity to provide a written response to the investigation report
- Must be sent to the parties at least 10 days before a written determination regarding responsibility is issued by the decision-maker.

Investigation Report (Recommended Content)

- Identify the date the investigation commenced
- Identify the investigator
- Identify supportive measures offered to and accepted by the parties
- Summary of the investigation process
- Identify the legal standard of review applied to the review of evidence/applicable policies
- Identify number of/identity of witnesses
- Summary of evidence – documents and witness statements

10 Steps for Effective Title IX Investigations

Step 7

Decision-Maker Makes a Determination



Submission of Written Questions

- The decision-maker must allow parties the opportunity to submit written, relevant questions that they want to ask any other party or witness
- Once the parties are provided with the answers, they are permitted to submit additional, limited follow-up questions from each party
- Decision-maker determines relevancy, or explains why questions were deemed irrelevant
- Complainant's sexual history is irrelevant unless offered to prove someone else committed the conduct or for proof of consent

Written Determination Regarding Responsibility – Issued by the Decision-Maker

- **Identification of the allegations** potentially constituting sexual harassment
- **A description of the procedural steps** taken from formal complaint through the determination of responsibility.
- **Findings of Fact** supporting the determination.
- **Conclusions** regarding the application of the recipient's code of conduct to the facts.

Written Determination Regarding Responsibility – Issued by the Decision-Maker (Cont.)

- **Rationale** for each finding and conclusion, including a **determination of responsibility** for each allegation.
- Statement of **potential disciplinary sanctions.**
- **Appeal rights.**

10 Steps for Effective Title IX Investigations

Step 8

Appeal Rights



Appeal Rights for Both Parties at the District

Parties may appeal the written determination on the following bases:

1. Procedural irregularity;
2. New evidence that was not reasonably available earlier;
3. Title IX personnel had a conflict of interest or bias.

*Students/employees may also be afforded the right to file a complaint or an appeal with federal and/or state agencies (e.g., OCR, CDE, DFEH, EEOC).

10 Steps for Effective Title IX Investigations

Step 9

Recordkeeping Requirements



Recordkeeping – Records Must Be Maintained for 7 Years

Formal Title IX Complaints:

- Any investigation of sexual harassment, including determinations regarding responsibility, recordings or transcripts of involved hearings, disciplinary sanctions imposed on the respondent, and remedies provided to the complainant
- Any appeal and the result therefrom
- Any informal resolution and the result therefrom

Recordkeeping – Records Must Be Maintained for 7 Years (Continued)

Actual Knowledge But No Formal Title IX Complaint:

- Documentation of all actions, including any supportive measures implemented to demonstrate the response was not deliberately indifferent. Particular detail should be included if supportive measures are not offered to a complainant

Training Materials:

- All training materials for Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process

10 Steps for Effective Title IX Investigations

Step 10

Reflect



Loose Ends

- Is a Commission on Teacher Credentialing (CTC) report required?
- Have all mandated reporter duties been satisfied if child abuse or neglect is at issue?
- What can be learned? Any evidence of a systemic issue?
- Would staff benefit from further training?
- Be proactive.

Questions



For more information, questions and comments about the presentation, please feel free to contact:

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