

Stock and Leader
ATTORNEYS AT LAW
When Decisions Matter

Title IX Coordinator Training
October 20th and 27th



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Agenda

- General overview Title IX and definition of sexual harassment
- Overview of the Title IX Coordinator's Role
- Grievance Process
- Jurisdictional Issues
- District's Education Program or Activity
- Supportive Measures
- Bias and Impartiality
- After the Decision
- Handling Appeals
- Employee Concerns

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Introduction to Title IX

- **Title IX of the Education Amendments of 1972 (Title IX) is a federal civil rights law that prohibits discrimination on the basis of sex in federally funded education programs and activities.**
 - It has been more than 45 years since enactment of Title IX.
 - Title IX states in part:
 - *"No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance...."*

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Definitions Throughout

- Recipient = School District
- Complainant = Alleged Victim of Sexual Harassment
- Respondent = Alleged Perpetrator of Sexual Harassment
- Title IX Coordinator = ???
- Title IX Investigator = Person authorized to conduct an investigation into the allegations
- Title IX Decision-Maker = Person reviewing evidence and determining responsibility

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Definitions Throughout

- What does "Sex" Mean?
 - Biological Sex
 - Gender
 - Sex Stereotyping
 - Sexual Orientation
 - Gender Identity
- 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 recipient investigate the allegation of sexual harassment"

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Review of District Obligations

- List of District Policies to Update – 103/104/247/249/317.1/824
 - 103 – Nondiscrimination in School and Classroom Practices
 - 104 – Nondiscrimination in Employment and Contract Practices
 - 247 – Hazing
 - 249 – Bullying/ Cyberbullying
 - 317.1 – Educator Misconduct
 - 824 – Maintaining Professional Adult/Student Boundaries
- Address complainant and provide supportive measures
- Mandatory reporting
- In limited circumstances, offer an Informal Resolution
- Investigation
- Formal grievance process: notice, report, decision, appeal

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Title IX Team

- Title IX Coordinator
- Title IX Investigator
- Title IX Decision-Maker

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Title IX Coordinator

- Who can be a Title IX Coordinator
- How one becomes the Title IX Coordinator
- Role of the Title IX Coordinator

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The Role of a Title IX Coordinator

- Ensure all Title IX Team Members have been trained appropriately
- Responsible for receiving reports of conduct that could constitute sex discrimination or harassment
- Responsible for receiving formal complaints – signed by complainant
- **Respond to formal complaints in a manner that is not deliberately indifferent**
- Immediately offer supportive measures to Complainant
- Ensure the grievance process is being followed

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Why do I need to know these things, especially right now?

- On August 14, 2020, new regulations to Title IX became effective – new regulations require Title IX Coordinators to be trained in specific areas.

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What actions constitute “Sex Discrimination” under Title IX?

- Treating one person **differently** from another based on that person’s sex/gender in determining whether such person satisfies any requirement or condition for the provision of such aid, benefit, or service;
- Providing **different** aid, benefits, or services or provide aid, benefits, or services in a different manner;
- Denying any person any such aid, benefit, or service;
- Subjecting any person to separate or **different** rules of behavior, sanctions, or other treatment

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New definitions of Sexual Harassment

- Sexual harassment means conduct on the basis of sex that justifies one of more of the following: Quid Pro Quo, Hostile Environment, or Clery crimes.
- **Quid Pro Quo** – An employee of the school district conditioning the provision of an aid, benefit, or service of the school district on an individual’s participation in unwelcome sexual conduct;
- **Hostile Environment** – Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denied a person equal access to the recipient’s education program or activity; or
- **Clery Crimes** – Sexual assault, dating violence, domestic violence, or stalking.

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Jurisdiction

- Under the new Title IX regulations, if the District does not have jurisdiction it must dismiss the Title IX complaint
- This does not, however, preclude supportive measures or other Code of Conduct violations
- What is the District’s “education program or activity” and why is it important to know?

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The Scope of District’s “Education Program or Activity”

- Why is the scope important?
- Which incidents are under the District’s jurisdiction?
 - All incidents of Sexual Harassment occurring *on-campus*;
 - All incidents of Sexual Harassment occurring *off-campus* if either of the two following conditions are met:
 - Off-campus incident occurs as part of the recipient’s “operations;” or
 - If the recipient exercised substantial control over the Respondent and the context of the alleged Sexual Harassment that occurred off-campus.

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Hypothetical #1

- Facts: Mary (a student) alleges that Mr. Gary (a teacher) had sexual relations with her at his house last Sunday.

Please respond to the poll.
Your answers are anonymous.

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Hypothetical #2

- Facts: Mary (a student) alleges that Mr. Gary (a teacher) has made repeated remarks to her in the classroom of a sexual nature. In addition, Mary alleges that Mr. Gary told her, after class, that if she performs sexual acts for him, she will pass Chemistry.

Please respond to the poll.
Your answers are anonymous.

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Mandatory Dismissals

The Decision-Maker shall dismiss a formal complaint when, at any point in the investigation, it is determined that even if the facts, as alleged, occurred:

- The conduct would not rise to the definition of Sexual Harassment;
- The conduct did not occur in the recipient's education program or activity; or
- The conduct did not occur against a person in the United States.

Upon dismissal, the recipient must notify the Complainant and Respondent simultaneously.

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Discretionary Dismissals

- The Decision-Maker may dismiss a formal complaint when, at any point in the investigation:
 - It is determined that the respondent is no longer enrolled as a student or employed as an employee;
 - There are special circumstances which prevent the recipient from gathering evidence sufficient to reach a determination as to the formal complaint or allegations.
- The Title IX Coordinator may dismiss a formal complaint if the Complainant notifies the Title IX Coordinator, in writing, that the Complainant would like to withdraw the formal complaint or any allegations therein.
- Upon dismissal, the recipient must notify the Complainant and Respondent simultaneously.

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Hypothetical #3

Mary (student) files a formal complaint against Bobby (student) with the Title IX Coordinator. Mary alleges that Bobby told Mary's boyfriend, David (student), that Mary has slept with the entire baseball team and the David broke up with Mary because of it.

Please respond to the poll.
Your answers are anonymous.

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Hypothetical #4

Bobby (student) files a formal complaint against Mary (student) with the Title IX Coordinator. Bobby alleges that Mary groped him in PE.

Please respond to the poll.
Your answers are anonymous.

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Hypothetical #5

Bobby (student) files a formal complaint against Mary (student) with the Title IX Coordinator. Bobby alleges that Mary groped him in PE. After the investigation begins, Bobby explains that he wants to formally withdraw his complaint and does so in writing.

Please respond to the poll.
Your answers are anonymous.

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Retaliation Prohibited

“No recipient or other person may intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by Title IX or this part, or because the individual has made a report, complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing under this part...”

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Filing a Formal Complaint

- A Complainant must sign the complaint;
- Title IX Coordinator may sign a formal complaint after receiving allegations;
 - Must remain free from conflicts of interest and bias, and must serve impartially
 - Is not acting as Complainant – does not participate in the investigation and does not submit questions on behalf of the Complainant.

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Recordkeeping

- Title IX Coordinator is responsible for maintaining required records;
- Title IX Coordinator is responsible for ensuring training materials are publicly posted on the website;
- Title IX Coordinator should develop a process for required recordkeeping – to include keeping a list of all properly trained investigators and decision-makers

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Grievance Procedures - General Requirements

- Treat complainants/ respondents equitably; no sanctions until process complete
- No conflict of interest or bias; trained staff
- Presumption that respondent is not responsible
- Reasonably prompt timeframes
- Range of possible sanctions/remedies

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Overview of the Grievance Process

1. Title IX Coordinator promptly contact Complainant and institute supportive measures if applicable – this could occur before a formal complaint is filed;
2. Title IX Coordinator explains the process to file a formal complaint and the grievance process that will follow;
3. Title IX Coordinator authorizes an investigation; and
4. Title IX Coordinator provides notice to Complainant and Respondent.

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Overview of the Grievance Process

5. Title IX Coordinator offers both the Complainant and Respondent voluntary informal resolution, if applicable
6. Title IX Investigator begins an investigation;
7. Title IX investigator concludes investigation and provides all evidence to Complainant and Respondent and allows each party the opportunity to submit more evidence or provide statements relative to the evidence; and
8. Title IX Investigator drafts an Investigative Report and submits the report to both parties, simultaneously, and to the Title IX Decision-Maker.

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Overview of the Grievance Process

9. Title IX Decision-Maker reviews the evidence and allows both parties to submit relevant questions to either party or witness;
10. Title IX Decision-Maker provides answers to questions, if applicable;
11. Title IX Decision-Maker drafts a Decision regarding responsibility and providing appeal rights; and
12. Appeal Decision-Maker drafts a Decision regarding responsibility if applicable.

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Consolidation of Formal Complaints

- Title IX Coordinator may consolidate formal complaints as to:
- Allegations of sexual harassment against more than one Respondent, or by more than one Complainant against one or more respondents, or by one party against the other party, where the allegations of sexual harassment arise out of the same facts or circumstances.

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Voluntary Informal Resolution

- Title IX Coordinator may need to schedule, facilitate, and participate in a voluntary informal resolution, such as mediation between the parties;
- Specific notice provisions must be provided to the Complainant and Respondent
- Not appropriate to resolve allegations between a student and employee

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Break

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How to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias

- Title IX Coordinator chooses the Investigator and Decision-Maker
- Being impartial is greatly aided by not prejudging facts
- Avoid prejudging the facts
- Conflicts of interest
- Bias—Implicit Bias
- Not relying on sex stereotypes

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Hypothetical #6

Who may be impartial?

Answer Choices:

- Superintendent--Respondent was expelled last year and the Investigator is the Superintendent who investigated the expulsion incident and asked the Board to expel respondent for one year
- Band Director—Complainant is in the band and the Investigator is the Band director
- Coach—Respondent is a football player and the Investigator is the Cheer Coach
- None

Please respond to the poll.
Your answers are anonymous.

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Hypothetical #7

Which, if any, of the investigators would need to recuse themselves?

Answer Choices:

- Superintendent—Respondent was expelled last year and the Investigator is the Superintendent that investigated the expulsion incident and asked the Board to expel for one year
- Band Director—Complainant is in the band and the Investigator is the Band director
- Cheer Coach—Respondent is a football player and the Investigator is the Cheer Coach
- None

Please respond to the poll.
Your answers are anonymous.

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Hypothetical #8

Which, if any, scenario poses a conflict of interest?

- Respondent was expelled last year and the Investigator is the Superintendent that investigated the expulsion incident and asked the Board to expel for one year
- Complainant is in the band and the Investigator is the Band director
- Respondent is a high school teacher and the brother of the Superintendent. Investigator is the High School Principal
- The School Board is authorized to sit as the appellate decision-maker in a case where the Respondent is a daughter to one Board member
- None

Please respond to the poll.
Your answers are anonymous.

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Important Considerations: Potential Responses to Trauma

- Delayed reporting
- Difficulty remembering specifics
- Reluctant reporting
- Remaining in a relationship with the respondent
- Failing to identify the accused
- The alleged victim thinks s/he is to blame and somehow s/he welcomed the unwanted behavior

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Notice of Allegations to Respondent

- Must include sufficient details known at the time, and with sufficient time to prepare a response before any initial interview.
- Sufficient details include:
 - Identities of the parties, if known;
 - Conduct allegedly constituting sexual harassment;
 - Date/Location of alleged incident, if known.
- Must include a statement that the Respondent is presumed not responsible for the alleged conduct and that a determination regarding responsibility is made at the conclusion of the grievance process.
- Must include a statement that both parties may have an advisor of their choice, who may be, but is not required to be, an attorney, and may inspect and review evidence.
- Must inform the parties if the recipient has a provision in the code of conduct that prohibits knowingly making false statements or knowingly submitting false information during the grievance process.
- Needs to be supplemented if new allegations are to be investigated

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Implementing Supportive Measures

- Title IX Coordinator “is responsible for coordinating effective implementation of supportive measures” to the parties
- What are supportive measures?
- When are they implemented?
- How are they implemented?
- What is their purpose?

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Supportive Measures

- Requirement to maintain as confidential any supportive measure provided;
- Requirement to create and maintain records, for a period of seven years, regarding any actions taken in response to report or formal complaint of sexual harassment includes supportive measures;
- If receipt does not provide Complainant with supportive measures, it must document the reason why this was not clearly unreasonable in light of known circumstances.

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Emergency Removal of Students

- Recipient can issue emergency removals of students from the recipient’s education program or activity, provided that it:
 - Undertakes an individualized safety and risk analysis;
 - Determines that an immediate threat to the physical health or safety of any student/individual arising from the allegations justifies removal; and
 - Provides Respondent with notice and opportunity to challenge decision immediately.
- Emergency removals cannot be used to modify any rights under the IDEA, Section 504, or Americans with Disabilities Act.

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“Emergency Removal” (Administrative Leave) of Employees

- Recipient may place any employee on paid administrative leave during the course of an investigation – subject to CBAs and Board Policies.

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Determination and After

- Title IX Coordinator (unless done so by the Decision-Maker) will need to disseminate the written determination to the parties simultaneously;
- Title IX Coordinator is responsible for effective implementation of any remedies;

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Opportunity to Appeal

- The Appellate Decision-Maker cannot be the Initial Decision-Maker, Title IX Coordinator, or Investigator;
- The Appellate Decision-Maker must be trained in the same manner as the Initial Decision-Maker;

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Bases for Appeal

- Procedural irregularity that affected the outcome of the matter;
- New evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter;
- The Title IX Coordinator/Investigator/Decision-Maker(s) had a conflict of interest or bias for or against Complainant(s) or Respondent(s) generally, or the individual Complainant(s) or Respondent(s) that affected the outcome;
- Any additional bases that is offered equally to both the Respondent and Complainant (for example, the sanction).

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Appellate Procedure

- Offer the appeal to both parties;
- Let both parties know when an appeal has been filed;
- Give both parties a reasonable and equal opportunity to submit a written statement in support of or challenging the appealed decision;
- Issue a written determination *describing the result of the appeal and the rationale for the result*;
- Provide the written decision simultaneously to both parties.

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Intersection between Title VII and Title IX

- Employees have the same rights as Students under Title IX
- Employees also have rights under Title VII
- Title VII: “severe OR pervasive” vs. Title IX: “severe, pervasive AND objectively offensive”
- Title VII does not require 10 days to review evidence and 10 days to respond to report

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Hypothetical #9

Mary tells Ms. Mabel, her favorite teacher, that Mr. Gary has made uncomfortable statements to her in class, and likes to touch her shoulder. Mary is so uncomfortable that she wants to know if she is allowed to drop Mr. Gary's class and switch her schedule around, she can move into Ms. Mabel's class (the only other offering). Ms. Mabel informs you, the Title IX Coordinator of everything that has occurred.

You call Mary into your office to discuss sexual harassment. Mary is adamant that she doesn't want to file a formal complaint, she just wants to switch her schedule around.

Please respond to the poll.
Your answers are anonymous.

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Hypothetical #10

Mary tells Ms. Mabel, her favorite teacher, that Mr. Gary has made uncomfortable statements to her in class, and likes to touch her shoulder. Mary is so uncomfortable that she wants to know if she is allowed to drop Mr. Gary's class and switch her schedule around, she can move into Ms. Mabel's class (the only other offering). Ms. Mabel informs you, the Title IX Coordinator of everything that has occurred.

You call Mary into your office to discuss sexual harassment. Mary is adamant that she doesn't want to file a formal complaint, she just wants to switch her schedule around.

Please respond to the poll.
Your answers are anonymous.

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Hypothetical #11

Same facts.

Mary tells Ms. Mabel, her favorite teacher, that Mr. Gary has made uncomfortable statements to her in class, and likes to touch her shoulder. Mary is so uncomfortable that she wants to know if she is allowed to drop Mr. Gary's class and switch her schedule around, she can move into Ms. Mabel's class (the only other offering). Ms. Mabel informs you, the Title IX Coordinator of everything that has occurred.

You call Mary into your office to discuss sexual harassment. Mary is adamant that she doesn't want to file a formal complaint, she just wants to switch her schedule around.

Please respond to the poll.

Your answers are anonymous.

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Hypothetical #12

Same facts – except, you know that there have been other allegations made against Mr. Gary over the years.

Please respond to the poll.

Your answers are anonymous.

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Hypothetical #13

Same facts – except, you elect to sign the complaint and authorize an investigation. After providing notice to both Mary and Mr. Gary, Mary informs you that she is worried that Mr. Gary will “poison” the other teachers against her (because he has been Teacher of the Year for the past 10 years and is beloved by everyone). Mary is also worried that there will be retaliation from her peers. Lastly, Mary is worried that Mr. Gary will be angry with her and embarrass her in front of everyone.

Please respond to the poll.

Your answers are anonymous.

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