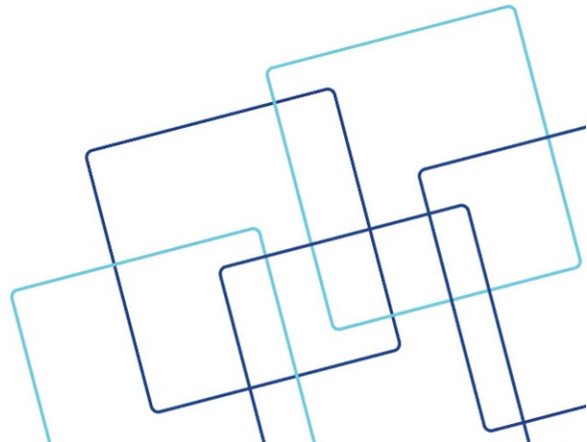
Lozano Smith
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2024 Title IX Grievance Procedures

Presented by:
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Roseville Joint Union High School District

July 25, 2024



Presenter

Carolyn L. Gemma

AT LOZANO SMITH

Carolyn L. Gemma is a Partner in Lozano Smith's Walnut Creek and Sacramento offices. She is also co-chair of the Investigations Practice Group. Ms. Gemma advises educational institutions throughout the state on all matters affecting employment, students and board governance.

Ms. Gemma is AWI (Association of Workplace Investigators) trained and has significant experience conducting prompt, thorough and effective workplace and Title IX investigations for both K-12 and higher education clients. In addition, her trauma-informed training offers clients further expertise in investigating allegations of sexual harassment, sexual assault and other forms of sexual misconduct. Ms. Gemma conducts respectful interviews of witnesses and understands how trauma has an impact on credibility determinations.



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Zee Syed is Senior Counsel in Lozano Smith's Sacramento office. She assists her public agency clients with issues related to labor and employment.

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Topics

- What's New?
- Compliance by August 1, 2024
- Concepts & Definitions
- Grievance Procedures
  - Informal Resolution
  - Formal Investigation
  - Appeals

LS

What's New?

What's new?

- Expanded Scope
  - Adds and revises definitions - more in line with CA state definitions
  - Net effect is allowing more complaints to fall within 2024 Title IX Grievance Procedures.
- More flexibility in formal investigation procedures
- Additional training requirements
- Emphasize that 2024 Title IX Grievance Procedures be used when in conflict with state law grievance procedures.

34 C.F.R. Part 106

Compliance by August 1, 2024

Date of Compliance: August 1, 2024

What does this mean?

- Board Policies/Administrative Regulations
- Annual Notices Re Discrimination/Harassment
- Trainings

Revise BP/ARs

Consider:

- Adopting new ARs re 2024 Grievance Procedures
- Keeping old AR re 2020 Grievance Procedures (*2024 Not Retroactive)
- Revising other BP/ARs to ensure appropriate references

The 2024 Regulations are NOT Retroactive

- All "Sex Discrimination" that allegedly took place **on or after August 1, 2024,** must be processed in accordance with the 2024 Title IX Grievance Procedures.

- All "Sexual Harassment" that allegedly took place **between August 14, 2020, and July 31, 2024,** must be processed in accordance with the 2020 Title IX Grievance Procedures.



Notice of Nondiscrimination

Must be posted on:

- Website
- Handbook
- Other means of notifying students/parents/employees etc.



34 C.F.R. §106.8(c)(2)

Trainings

- Annual Trainings :
  - All employees
  - Investigators, Decision-makers, Informal Resolution Officers and persons implementing supportive measures (All Supervisors)
  - Title IX Coordinators and designees (today's training)
- Required when an employee changes positions that alters duties under Title IX



34 C.F.R. § 106.8(d)

Concepts & Definitions

Sex Discrimination

Sex Discrimination

- 2024 Title IX Regulations prohibit sex discrimination, including but not limited to sex-based harassment.
- "Sex" = sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity.
- This is an expanded scope in comparison to the 2020 Title IX Regulations.

34 C.F.R. § 106.10

Sex-Based Harassment

Sex-Based Harassment

- Quid Pro Quo
  - Person authorized by the District
- Hostile Environment Harassment ("HEH")
  - Is subjectively and objectively offensive and is so severe *or* pervasive that it limits or denies a person's ability to participate in or benefit from the recipient's education program or activity
- Specific Offenses: Sexual Assault, Dating Violence, Domestic Violence, and Stalking

34 C.F.R. § 106.2

Sex-Based Harassment: Hostile Environment

Factors to consider:

- Affect on the Complainant's ability to access the district's education program or activity;
- The type, frequency, and duration of the conduct;
- The parties' ages, roles, previous interactions, and other individual factors;
- The location of the conduct and the context in which the conduct occurred; and
- Other sex-based harassment in program or activity.

34 C.F.R. § 106.2

Sex-Based Harassment: Sexual Assault

- Rape
- Sodomy (meaning forcible oral or anal sexual intercourse with a Complainant)
- Sexual Assault with an Object
- Fondling
- Incest
- Statutory Rape

34 C.F.R. § 106.2

Hypothetical

Michelle, a 7th grader, comes to you and complains that another 7th grader, Brady, keeps following her in the hallway and calling her names, such as “dyke,” and “lesbian.” Michelle is extremely upset and is requesting that she be transferred to a new school.

Is this Sex-Based Harassment?

Parental, Family or Marital Status & Pregnancy or related conditions

Definition: Parental, Family or Marital Status

Includes the following:

- Adoptive parents
- Stepparents
- Legal guardians



Definition: Pregnancy and/or related conditions

Includes the following:

- Pregnancy
- Childbirth
- Termination of pregnancy
- Lactation
- All related medical conditions and recovery



Notice of Student Pregnancy and/or related conditions

All Employees

- Provide student with Title IX Coordinator's contact information
- Inform student of the district's obligations to ensure equal access
- Maintain privacy

Title IX Coordinator

- Notice of legal rights
- Individualized, reasonable modifications
- Option of voluntary leave of absence
- Access to clean, private space for lactation
- Maintain privacy

Notice of Employee/Applicant Pregnancy and/or related conditions

Title IX Coordinator:

- Inform employee/applicant of their legal rights and district's obligations to ensure equal access
- Maintain privacy

Key Points to Consider - Students

- Reasonable modifications according to policies, practices, or procedures
  - Cannot fundamentally alter the education program or activity
  - Student can accept or decline the modifications
- Limitation on supporting documentation
- Voluntary access to a separate and comparable portion of the education program or activity
- Voluntary leaves of absence
- Lactation space
- Comparable treatment
- Certification to participate

34 C.F.R. § 106.40

Key Points to Consider - Employees



- Comparable treatment to other temporary medical conditions
- Voluntary leaves of absence
- Lactation time and space

§ 106.57

Hypothetical

Fatima, a senior at Hypo High School, is 7 months pregnant and attending all her classes each day. To best accommodate her needs, you provided Fatima with the accommodation that she can use the restroom whenever needed, as much as needed. Ms. Chen, Fatima's science teacher, thinks that Fatima is using the restroom too much and declines to allow her to use the restroom during her class.

Is this a Title IX?

Have you provided all necessary accommodations?

Hypothetical

Josefina comes to you and complains that she is always having to pump in the bathroom at the District office because there is nowhere else for her to go. You remind Josefina that there is a lactation space near the lobby but Josefina says that she cannot use it because the keypad is broken and her access code does not work?

Is this Title IX?

Have you provided all necessary accommodations?

Sex-Based Distinctions

Sex-Based Distinctions or Separation

- Recipients can impose sex-based distinctions or separation in their educational programs **if they do not impose more than a *de minimis harm*.**
- More than de minimis harm is any harm that **is genuine and objectively non-trivial**, from a reasonable person's perspective
- Prohibiting a student from participating in an education program or activity consistent with their gender identity **violates this standard** and is thus prohibited.



34 C.F.R. § 106.31(a)(2)

Sex-Based Distinctions or Separation

- Religious exemption
- Military and merchant marine educational institutions
- Social fraternities and sororities
- Housing
- Athletics **

Jurisdiction

Title IX Jurisdiction

Must address all sex discrimination occurring under the district's education **program or activity** in the United States.

Includes, but not limited to:

- Conduct that occurs in any building owned or controlled by a student org. that is officially recognized by a postsecondary institution; and,
- Conduct that is subject to the recipient's **disciplinary authority**.



34 C.F.R. § 106.11

Title IX Jurisdiction vs. Impact

Location and Effect	Is it Title IX?
Off campus conduct **with no impact on campus** and the District has no jurisdiction in policy	**No** Title IX Jurisdiction
Off campus conduct **with impact that is not a Title IX violation** (i.e., complainant is upset by seeing respondent)	**No** Title IX Jurisdiction, but District must remedy/provide supportive measures
Off campus conduct **with impact that is within Title IX** (i.e., hostile environment harassment from rumors, bullying, retaliation, etc.)	**Yes**, Title IX jurisdiction over HEH
Off campus conduct when District **has jurisdiction over off campus** conduct in policy	**Yes**, Title IX jurisdiction

Hypothetical

You are the Title IX Coordinator at a small K-8 district. Paige, a 7th grade student, comes to your office and informs you that one of her classmates, Asher, has been making "gross" comments to girls for a couple of weeks. She shows you Asher's Instagram, which is mostly pictures of guns, scantily clad women, and misogynistic language. Paige says she and her friends are very uncomfortable around Asher, and do not want to be near him.

Does this fall within 2024 Title IX Grievance Procedures?

Hypothetical

Carter is a parent who attends all of the varsity basketball games. He often gives advice to the players on their shooting form but is not a coach. Carter tells Charlie: “I will put in a good word with the coach if you make out with me.”

Does this fall within 2024 Title IX Grievance Procedures?

Hypothetical

Over the weekend, Valentina is sexually assaulted by another student at a local park. When Valentina returns to school, other students call her a "whore" and a rumor is started that she is pregnant. Valentina can't stop crying and hides in the bathroom during school and does not attend class for three days.

Does this fall within 2024 Title IX Grievance Procedures?

Hypothetical

Mohammad is walking home from school when Desiree walks up next to him, hits his buttocks, and says “you lookin’ like a whole snack!” The next day, Desiree follows Mohammad home from school yelling “damn boy, flex for me!” Mohammad tells the Principal about the incidents.

Does this fall within 2024 Title IX Grievance Procedures?

Additional Definitions

2024 Title IX Definitions (34 C.F.R. §106.2)

Complainant:

Includes person(s) other than student(s)/employee(s) who is alleged to have been subjected to conduct that could constitute sex discrimination under Title IX *at a time when that individual was participating or attempting to participate* in the district's education program or activity.

Respondent

A person who is alleged to have violated the recipient's prohibition on sex discrimination.

2024 Title IX Definitions (34 C.F.R. §106.2)

Complaint:

May be oral or written, as long as it can be objectively understood as a request for the district to investigate.

Pregnancy or Related Conditions

Pregnancy, childbirth, termination of pregnancy, or lactation; medical conditions related to pregnancy, childbirth, termination of pregnancy, or lactation; or recovery from pregnancy, childbirth, termination of pregnancy, lactation, or related medical conditions.

2024 Title IX Definitions (34 C.F.R. §106.2)

Retaliation:

Retaliation means intimidation, threats, coercion, or discrimination against any person by the district, a student, or an employee or other person authorized to provide aid, benefit, or service, for the purpose of interfering with any right or privilege secured by Title IX, or because the person has participated in any manner in a Title IX process.

Peer Retaliation:

Peer retaliation means retaliation by a student/employee against another student/employee.

2024
Title IX Grievance Procedures

Basic Requirements

Basic Requirements

- The district must respond **promptly and effectively** ***AND*** **must prevent the recurrence** of any sex discrimination and remedy its effects.
- Must treat complainants and respondents equitably.
- Title IX Coordinator, Investigators, and Decision-makers must not have conflicts of interest or bias. Must train these individuals.
- Presumption that respondent is not responsible.
- Can't discipline until grievance procedures are completed and a determination of responsibility is made.

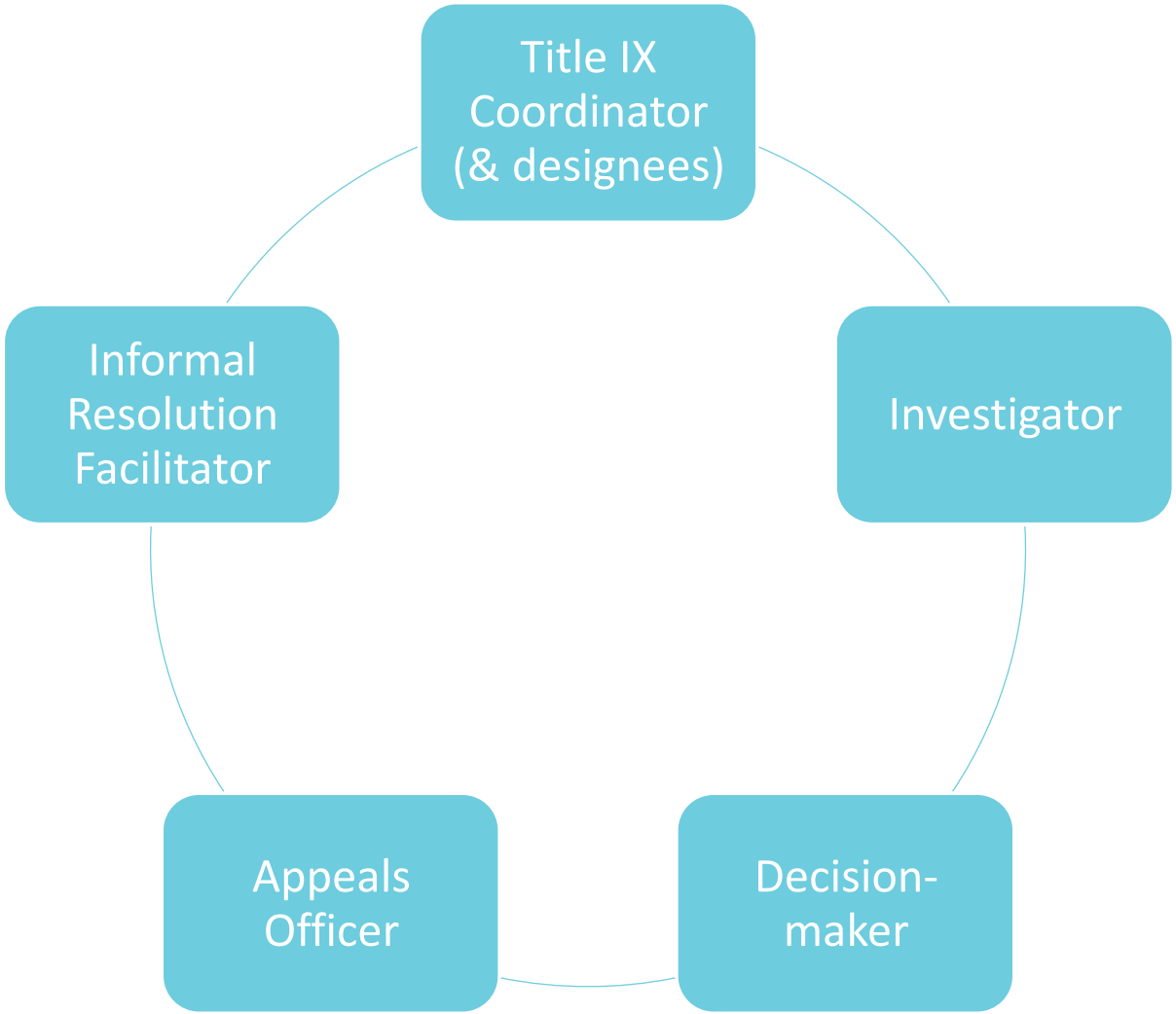
34 C.F.R. § 106.45

Basic Requirements

- Reasonably prompt timeframes for all major stages.
- Reasonable steps to protect the privacy of parties and witnesses.
- Objective evaluation of all relevant and not otherwise impermissible evidence.
- Consolidation is permitted for complaints arising out of the same facts or circumstances.

34 C.F.R. § 106.45

Title IX Team



Reporting Up

Reporting up – Nonconfidential Employees

All non-confidential employees must notify the Title IX Coordinator of conduct that could reasonably be considered sex discrimination.



34 C.F.R. § 106.44 (c)(2)

Reporting Up - Confidential Employees (**NEW)



Confidential employees **DO NOT** have to report conduct that could reasonably be considered sex discrimination.

However, must provide individual following info:

- Their status as confidential employee
- Contact info for Title IX Coordinator
- How to make a complaint
- How Title IX Coordinator can help

34 C.F.R. § 106.2

Reporting Up - Confidential Employees

Under Law

- School counselor
- Licensed psychologist
- Licensed clinical social worker
- School psychologist with credential
- Licensed marriage and family therapist (MFT)
- Licensed professional clinical counselor
- Licensed educational psychologist (Evid. Code, § 1010.5)

Designation

- Will you designate additional people?
- How Many?

Confidential Employees

- Only confidential when providing those services.
- Must specify who they are in policies.
- Must provide specific training to them about their reporting requirements.



§ 106.44(d)

Hypothetical

Jesus is a principal at Hypo High School and hears from a teacher, Mr. Snowden, that Raven was raped by Lincoln in the locker room. Jesus knows both students personally and believes that it is in the best interest of the students for Jesus to handle this internally.

If Jesus is able to handle the investigation, does Jesus need to notify the Title IX Coordinator?

Barriers to reporting

Title IX Coordinator must:

- Monitor for barriers to reporting
- Take reasonable steps to address such barriers



§ 106.44(b)

Initial Evaluation of Allegations

Considerations

Upon receipt of Complaint, evaluate the following:

1. Fall within definition of Sex Discrimination?
2. Jurisdiction? Impacts?
3. Need to investigate?
4. Complaint brought by Complainant or Title IX Coordinator?
5. Supportive Measures
6. Mandated Reports

Complaint Initiated by Title IX Coordinator – Factors to Consider

- Complainant request
- Complainant's reasonable safety concerns
- Risk of additional acts
- Severity
- Age and relationship
- Scope (i.e., pattern, ongoing acts, or impact on multiple individuals)
- Availability of evidence
- Whether the alleged sex discrimination can be stopped

§ 106.44(f)(1)(V)

Complaint Initiated by Title IX Coordinator

May Initiate If Alleges Conduct:

- Presents an imminent and serious health or safety threat
- Prevents the district from ensuring equal access on the basis of sex to its education program or activity

If Initiating, Must:

- Notify complainant prior to initiation
- Address safety concerns
  - Complainant
  - Others

§ 106.44(f)

Confidentiality

Prohibited from disclosing personally identifiable information, except:

- Prior written consent
- Disclosure to parent, guardian, or other authorized legal representative with the legal right to receive disclosures
- Carry out Title IX grievance procedure
- As required by law



34 C.F.R. §106.44(j)

Supportive Measures

Supportive Measures

- Must offer supportive measures to both Complainants and Respondents
- Parties have the right to challenge supportive measures

§ 106.44(g)

Supportive Measures

Must/May Be

- Must be designed to protect the safety of the parties or environment
- May be modified or terminated at the end of the resolution process
- May include emergency removal and administrative leave

Must NOT Be

- Must not unreasonably burden either party;
- May not be imposed for punitive or disciplinary reasons

34 C.F.R. §106.44(g) and (k)

Supportive Measures

Examples:

- Counseling
- Change of class or work schedules
- Modified lunch schedules
- No-contact orders
- Campus escort services
- Change in work locations
- Increased security/monitoring
- Extensions of deadlines or other course-related adjustments
- Independent study (must be nonpunitive/nondisciplinary)

Emergency Removal & Administrative Leave

Supportive Measures



- Parties may challenge a decision regarding their supportive measures
- Challenge heard by an impartial employee with the ability to modify or reverse the original decision

Hypothetical

A Principal from one of your middle schools calls you after school and tells you that an 8th grade student, June, came to her and told her that a 7th grade student, Cheyenne, has been making her feel uncomfortable at school. June told her that Cheyenne has been staring at her in the locker room, and that one of her friends overheard Cheyenne call her "sexy" when she was changing in the locker room. The Principal is unsure what to do and is looking to you for assistance.

Is this Title IX?

What Supportive Measures Do You Offer?

Hypothetical

Charlie, a 4th grade non-binary student, filed a Title IX complaint against two classmates for repeatedly misgendering them, and teasing them for not being "a boy or a girl."

1. What supportive measures would you offer Charlie?

2. What supportive measures would you offer the two classmates?

Students with Disabilities

MUST consult with a student's IEP/Section 504 team



Hypothetical

Isaiah, a junior, comes to you and says that he saw Dallas, a sophomore, forcibly kiss Destiny, a sophomore, several times yesterday out by the bleachers. Today, Isaiah saw Dallas following Destiny to class. Isaiah is worried about Destiny and asks for your assistance. You know that Dallas is on a Section 504 plan and Destiny is on an IEP.

Do you need to consult with Dallas' Section 504 team?

Do you need to consult with Destiny's IEP team?

Notice to Parties

Notice to the Parties

- Identify complaint/investigation process, including informal resolution process;
- Identify allegations with sufficient details;
- Include a statement that respondent is presumed not responsible and that a determination is made at the conclusion of the process;
- Explain that they may have an advisor of their choice inspect and review the evidence; and

Notice to the Parties

- Statement that retaliation is prohibited
- Parties will be provided with a report of evidence;
- Identify the district's code of conduct that prohibits knowingly making false statements or submitting false information.
- Do not restrict either party's ability to discuss the allegations under investigation.

Informal Resolution



Informal Resolution

1. Formal complaint not required
2. Not available when student alleges sex-based harassment against employee
3. Must be voluntary
4. Informal Resolution Officer cannot be Investigator or Decision-maker
5. Cannot require a part to waiver their right to an investigation/determination

Informal Resolution

- Must provide notice to both parties including:
  - Allegations,
  - Requirements of informal resolution process,
  - Right to withdraw and initiate investigation,
  - Resolution would preclude an investigation,
  - Potential terms of resolution,
  - What information the district will maintain and how the district could disclose such information



34 C.F.R. § 106.44(k)

Hypothetical

You are a Title IX Coordinator and you are investigating an allegation of sexual harassment between two employees. Both employees agree to informal resolution of the complaint.

Can you facilitate the informal resolution session?



Hypothetical

Jordan, a 12th grader, comes to you and says that Noah, an 11th grader, has been sexually harassing them for months in person and via text message. This has occurred both on campus during class and off campus after school. Jordan cannot deal with it anymore and wants it to stop. However, Jordan does not want this to be a big deal and just wants to do informal resolution quickly and get it over with.

Can you offer an informal resolution session?

Dismissals

Discretionary Dismissals

- Title IX Coordinator may dismiss when:
  - District is unable to identify the respondent after taking reasonable steps to do so
  - The respondent is no longer enrolled or employed by the District
  - The complainant voluntarily withdraws any or all allegations
  - The alleged conduct would not constitute sex discrimination, if proven



34 C.F.R. § 106.45(d)

Appeal of Dismissal

- Must still offer supportive measures to complainant (and respondent as appropriate)
- Take prompt and effective steps to ensure stop discrimination and prevent recurrence
- Must offer appeal of dismissal



34 C.F.R. § 106.45(d)

Hypothetical



The District receives an email alleging that Mr. Cromwell had a sexual relationship with a student during the summer school program at Hypo High School. You take the initial steps to evaluate the claim and decide to initiate a Title IX investigation. You provide a notice letter to Mr. Cromwell. The following day Mr. Cromwell resigns effective immediately.

Do you dismiss the complaint?

Do you take other steps?

Formal Investigation

Formal Investigation

- Adequate
- Reliable
- Impartial

Investigation Requirements

2020 Regulations

- Investigator cannot be the Decision-maker
- Provide summary of all direct evidence to parties.
- Parties have 10 days to review/respond

2024 Regulations

- Investigator and Decision-maker can be the same
- No 10-day evidence review and response requirement
- No written report requirement

Potential Investigator Models

Name of Model	Process	Options
Single Investigator	T IX Coordinator = Investigator = Decision-maker	Can have someone else sign off on decision
Single Investigator +	T IX Coordinator = Investigator → Decision-maker	Inv. makes recommended findings
Title IX Coordinator/Decision-Maker	T IX Coordinator → Investigator → T IX Coordinator/Decision-maker	Have Inv. make recommended findings
2020 Regs	T IX Coordinator → Investigator → Decision-maker	Have DM collaborate with Investigator regarding questions DM may have

Hypothetical

Example 1	Example 2	Example 3
You receive a complaint that an administrator is sexually harassing an employee.	You are a Title IX coordinator at a very small district. The District receives a complaint that a student sexually assaulted another student.	You receive a complaint that a transgender student is being harassed for their gender identity. You are close friends with the parent of the transgender student.

What investigative model do you use?

Hypothetical

Julie, a middle school student, reports to you that Bryan, an instructional aide, inappropriately touched her shoulders and chest when she went to him for homework assistance

What investigation model would be best?

Investigation Procedures

Exchange of Evidence

- Method of exchange
  - Description of access
    - If use of description, must offer access if requested
  - Report of Evidence
  - **What will the time-period be?**

Confidentiality

- District must take reasonable steps to prevent unauthorized disclosure of information obtained solely through investigation (§ 106.45(f)(4)(iii))
- Questioning the parties and witnesses to evaluate credibility by Decision-maker

Understand the Scope - Frame the Allegations

- Prepare clear and concise “yes or no” questions or statements that the investigation will answer or address.
- Do not include legal terms such as “discriminated,” “harassed,” or “retaliated.”
- Avoid ambiguous and subjective words such as “inappropriate” and “unfair.”
- Make sure all relevant claims are included in the allegations. (Or, if you excluded something, be prepared to explain why.)

Recognize Trauma-related Dissociation

- Some complainants may express fears and concerns
- Some complainants may exhibit signs of detachment and disconnection (dissociation)
- Triggering past trauma can result in severe forms of dissociation include losing time, forgetting who/where you are, going blank
- Signs of dissociation include:
  - glazed/fixed gaze
  - no eye contact
  - crying
  - confusion
  - rapid speech
  - sudden mood changes
  - flat affect
  - change in tone
  - monotonous voice
  - silence for long periods of time
  - loss of time
  - "I'm so ashamed..."
  - "This is all my fault...
  - "People won't believe me..."
  - "How can I trust anyone again..."
  - "I'm overwhelmed and afraid..."
  - "What are my parents/teachers/supervisors/friends going to think..."
- Reporting students/employees need to be heard without skepticism or judgment

Bias

Implicit Bias: An implicit bias is an unconscious bias towards or against certain groups of people

Confirmation Bias: subconscious tendency to seek and interpret information and other evidence in ways that affirm our existing beliefs, ideas, expectations, and/or hypotheses

Legal Framework

Preponderance of the Evidence



Common Challenges to Complainant's Credibility



- Incomplete, inconsistent and untrue statements
- Lack of physical resistance
- Delayed reporting

Factual Findings v. Legal Conclusions

- Focus on whether the alleged conduct occurred
- Avoid legal conclusions
- Example 1:
  - Problematic: Jerry sexually harassed Jamie
  - Best Practice: Jerry asked Jamie to the prom multiple times in person and via social media platforms
- Example 2:
  - Problematic: Mr. Jones discriminated against Emma on the basis of sex
  - Best Practice: Mr. Jones misgendered Emma on multiple occasions despite having notice of their preferred pronouns, “They/Them” on multiple occasions

Written Determination

- Evaluate all relevant and not otherwise impermissible evidence;
- Not base credibility determination on an individual's status as a complaint, respondent, or witness;
- Use preponderance of the evidence standard;
- Notify parties in writing of determination as to whether sex discrimination occurred under Title IX, including rational for the determination.

Child Pornography

Call School Resource Officer, Police Department, or Safety & Security Department right away before touching anything

Third party witness

Track chain of custody

Warning: It is a state and federal crime to possess and/or distribute child pornography. There's no exception for school administrators or investigators.

Appeals

K-12 Appeal Procedures



- Optional for determinations
- Must be offered if offered in comparable hearings

District's Board Policies and Administrative Regulations Control

Record Keeping

Record Keeping

Keep the following for 7 years:

1. A record of the informal resolution process for formal investigation procedures; and resulting outcome for all complaints of sex discrimination under Title IX;
2. Record of any actions, including supportive measures, taken in response to each notification the Title IX Coordinator or designee receives of information about conduct that reasonably may constitute sex discrimination under Title IX; and
3. All Title IX trainings materials.

Record Keeping

For complaints containing allegations of childhood sexual assault, keep the following indefinitely:

1. A record of the allegation(s);
2. A record of the investigation procedures followed;
3. A record of the written determination;
4. A record of corrective action implemented, if any;
5. A record of any appeals and outcome of the same; and
6. All training materials addressing the prohibition and investigation of childhood sexual assault.

Takeaways

Takeaways

- Doing nothing is not an option, if there is suspected harassment or discrimination you must act
- Even if conduct does not fall under Title IX, it may still need to be addressed
- 2020 regulations are still in place for conduct which occurred before August 1, 2024.
- Ask for help! Don’t go at it alone, seek help from your Title IX response team.





Questions



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