

Title IX Investigations and Best Practices For Investigators & Decision-Makers

Supporting Equal Access for Students, Staff and Others



GINGO
& BAIR
LAW, LLC

Agenda

Is it Title IX?

Complaint Process

Investigation

Determination

Appeal



GINGO
& BAIR
LAW, LLC



Is it Title IX?



GINGO
& BAIR
LAW, LLC

Title IX Basics

- 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

- **Title IX Coordinator:** School employee charge with overseeing the School's compliance with Title IX.
- **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.
- **Decision-Maker:** The individual appointed by the Title IX Coordinator to make a determination of responsibility.



GINGO
& BAIR
LAW, LLC

Title IX's Reach

Includes domestic violence

Applies to internships, job training, CCP 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



**GINGO
& BAIR**
LAW, LLC

Off-Campus Reach

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.
- Currently, schools do not have jurisdiction outside of the United States.



Definition: Sexual Harassment

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*.



GINGO
& BAIR
LAW, LLC

Examples: Physical Harassment

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



GINGO
& BAIR
LAW, LLC

Definition: Verbal Harassment

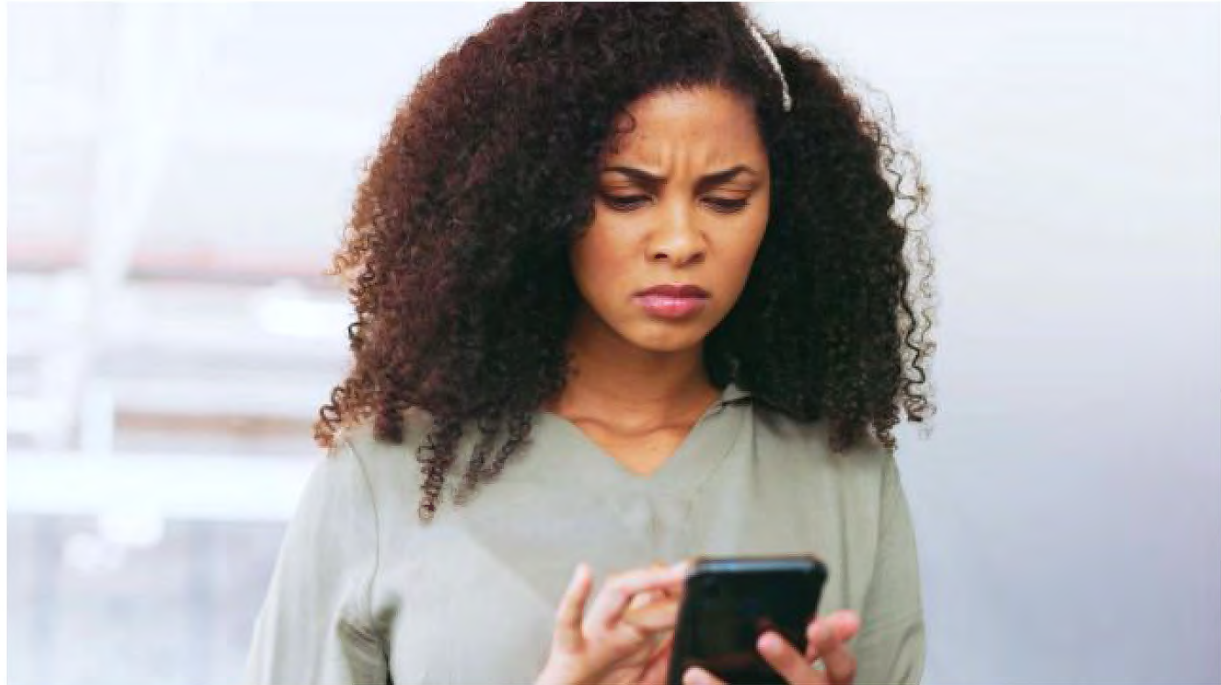
- Sexual innuendo
- Sexual profanity/name calling
- Discussion of a sexual nature
- Inquiries regarding sexual topics



GINGO
& BAIR
LAW, LLC

Examples: Visual Harassment

- Calendars/posters
- Screen savers
- Emails
- Gestures



GINGO
& BAIR
LAW, LLC

Examples: Situational Harassment



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



GINGO
& BAIR
LAW, LLC

What is Not Harassment?

- 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



GINGO
& BAIR
LAW, LLC

Domestic Violence, Dating Violence and Stalking

- **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.



GINGO
& BAIR
LAW, LLC

Retaliation

- Retaliation includes any action taken against someone because they made a complaint or participated in a Title IX investigation.
- In order for retaliation to have occurred:
 - The complainant must have engaged in a protected activity (i.e., making a complaint and/or participating in a Title IX investigation);
 - The perpetrator knew the complainant was engaging in a protected activity; and
 - The perpetrator subjected the complainant to adverse action because of the protected activity.



GINGO
& BAIR
LAW, LLC

Quiz 1

A teacher sends group of three 6th grade boys to the office for making grunting noises and sexual gestures in the hallway. Title IX?

NO

Even if the teacher's account is true, the conduct is not severe and pervasive enough to constitute sexual harassment. But consider—

- What if another boy in the class reported the conduct and said the offenders were grinding against him while making noises?
- What if another boy in the class reported the conduct and said (1) it happens every day and (2) it made him so uncomfortable that he didn't want to go to the bathroom when the class went because he was afraid these boys would be there?



GINGO
& BAIR
LAW, LLC

Quiz 2

A student with a cognitive disability develops a crush on a typical peer. The student brings the peer small gifts and seeks them out in the hall between classes. The peer reports this to administration. Title IX?

YES

At this stage, there is the possibility that the student's conduct constitutes sexual harassment.

- The respondent's intention is not relevant to the question of whether there has been harassment.
- The respondent's capacity may be a mitigating factor for the purposes of determining discipline, but it doesn't come into the analysis of whether there is a potential Title IX violation.



GINGO
& BAIR
LAW, LLC

The Complaint Process



GINGO
& BAIR
LAW, LLC

General Grievance Process

Complainant files complaint.

Coordinator discusses availability of supportive measures, and formal vs. informal process, with Complainant, and assigns investigator.

Investigator conducts investigation

Decisionmaker reviews investigatory report and issues determination of responsibility.

Appeal officer (if applicable) reviews determination of responsibility and renders final decision.



GINGO
& BAIR
LAW, LLC

Responsibility of All District Staff



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.



GINGO
& BAIR
LAW, LLC

Actual Knowledge and Deliberate Indifference

The District has a responsibility to investigate any complaint about which it has “actual knowledge,” meaning:

- A formal complaint is filed by a Complainant (or a parent/guardian on behalf of a minor child);
- A Board employee receives a report otherwise has notice of an incident of sexual harassment or allegations of sexual harassment; or
- A Board employee witnesses the misconduct.

Once on notice of a complaint, the school must act in a way that is not “deliberately indifferent” to the concern.

- The Title IX Coordinator must reach out the complainant to discuss the complaint and supportive measures.
- Response is only “deliberately indifferent” if it is “clearly unreasonable in light of the known circumstances.”

Protection in the Complaint Process

- There can be ***no guarantee*** of confidentiality in the process for the Complainant or the Respondent.
- Title IX regulations explicitly prohibit schools from imposing “gag orders” on the parties in an investigation.
- 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.



GINGO
& BAIR
LAW, LLC

Contents and Timing of a Complaint

- 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.



GINGO
& BAIR
LAW, LLC

Initial Response to Complaint

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

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?



GINGO
& BAIR
LAW, LLC

Formal Complaints

- Generally, the District is only required to investigate those complaints that are filed ***in writing*** and ***signed by the Complainant***.
- Exceptions (certified by the Coordinator):
 - Where failure to investigate would amount to “deliberate indifference”; and/or
 - Where an investigation is necessary to protect the safety of the community.
- When deciding whether to sign a Formal Complaint, the Title IX Coordinator should consider a variety of factors, including but not limited to:
 - circumstances that suggest an increased risk of repeated sexual harassment, such as the alleged Respondent’s previous history of threats;
 - whether the sexual harassment was perpetrated with a weapon;
 - the age of the student subjected to the sexual harassment; and
 - whether the school can obtain relevant evidence through other means than the complainant’s cooperation, such as from security cameras or witnesses.



GINGO
& BAIR
LAW, LLC

Dismissal of Complaints

Schools *must* dismiss a 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.
- The conduct did not occur when the Complainant was in the United States.

Schools *may* dismiss a complaint if:

- The Complainant requests to withdraw it and doing so is not clearly unreasonable.
- The Respondent's enrollment or employment ends.
- Specific circumstances prevent the district from gathering sufficient evidence to reach a decision.



GINGO
& BAIR
LAW, LLC

Interim Measures

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.

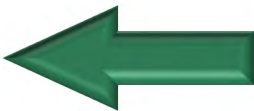
Examples include:

- 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



GINGO
& BAIR
LAW, LLC

Rights of Parties

- Identify and have the investigator consider witnesses and other evidence
- Advance notice of all interviews 
- 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
- Presumption of non-responsibility
- Right to an advisor

Quiz 3

Do or Don't?	
The Title IX Coordinator meets with Complainant and provides her with a copy of the Title IX policy, explains the formal complaint process and asks whether she would like to file a formal complaint.	✓
Before Complainant decides to submit a formal complaint, the principal calls Respondent into the office to get his version of the incident and initiates an investigation into potential school policy violations.	⊘
After Complainant submits a formal complaint, the Coordinator assigns a Title IX investigator. The Investigator gives Complainant and Respondent the Investigator's contact information and provides them each with a copy of the complaint, a copy of the Title IX Policy, and a reminder that retaliation will not be tolerated.	✓
The Title IX Coordinator asks Complainant if she would like any supportive measures put in place and tells Complainant the supportive measures are available even if she does not file a formal complaint.	✓
The Title IX Coordinator guarantees Complainant that all the information gathered during the Title IX investigation will be kept confidential and the school will prohibit Respondent and any other students from discussing the investigation.	⊘



GINGO
& BAIR
LAW, LLC

The Investigation



GINGO
& BAIR
LAW, LLC

Role of the Investigator

- Collect and summarize all evidence to allow the decision-maker to make determinations regarding:
 - Credibility
 - Reliability
 - Significance
- Operate without any conflict of interest.
- Act as an impartial investigator – not as an advocate for either party.



GINGO
& BAIR
LAW, LLC

Conducting the Investigation

**Notify parties and
witnesses of
investigation in
writing**

**Interview
Complainant
and witnesses**

**Interview
Accused and
witnesses**

**Conduct follow-up
interviews as
necessary**



**GINGO
& BAIR**
LAW, LLC

Conducting the Investigation

A green circle with a white border, containing the text "Notify parties and witnesses of investigation in writing".

Notify parties
and witnesses of
investigation in
writing

- **Written notices should be sent to both parties separately when:**
 - A formal complaint has been made.
 - **BEST PRACTICE TIP:** Although Title IX does not require schools to provide the respondent with a copy of the formal complaint, the Title IX Investigator should do so, or at least a written summary of the allegations (these are also included in the notice of allegations).
 - Parties and/or witnesses are being interview.
 - Evidence and/or draft investigation report is being circulated.
 - Final investigation report is submitted to the Decision-Maker.
- What should be included in the notices?
 - The Title IX Investigator's contact information.
 - Expectations for confidentiality (remember, you cannot guarantee confidentiality).
 - Reminder that retaliation will not be tolerated.



GINGO
& BAIR
LAW, LLC

Notice to Complainant

1

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.

2

Ask for a description of the misconduct in writing (if you don't already have it).

3

Set an expectation for confidentiality. ***Do not promise confidentiality.*** Assure you will keep information confidential to the greatest extent possible, and request they keep conversations with you confidential.

4

Notify of right to advisor and the prohibition on retaliation. Ask them to report retaliation to you if they experience it.



GINGO
& BAIR
LAW, LLC

Notice to Respondent

1

Advise that you are investigating an allegation that s/he engaged in misconduct.

2

Provide a summary of the allegations.

Best practice tip: Provide a copy of the complaint.

3

Set an expectation for full cooperation.

4

Set an expectation for confidentiality. **Do not promise confidentiality.** Assure you will keep information confidential to the greatest extent possible, and request they keep conversations with you confidential.

5

Notify of right to advisor and the prohibition on retaliation. Ask them to report retaliation to you if they experience it.



GINGO
& BAIR
LAW, LLC

Notice to Witnesses

1

Advise that the District needs their help investigating a complaint of misconduct. **Make clear they are not accused of wrongdoing.**

2

Set an expectation for confidentiality. ***Do not promise confidentiality.*** Assure you will keep information confidential to the greatest extent possible, and request they keep conversations with you confidential.

3

Provide a brief summary of allegations, to the extent the witness needs it to answer questions.

4

Notify of right to advisor and the prohibition on retaliation. Ask them to report retaliation to you if they experience it.



GINGO
& BAIR
LAW, LLC

Conducting the Investigation



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.



GINGO
& BAIR
LAW, LLC

Conducting the Investigation

- Think 5Ws – who, what, when, where and why?
 - Who did/said the conduct?
 - What was the conduct?
 - When did the conduct occur?
 - Why did the conduct happen?
- 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**

Appropriate vs. Inappropriate Questions

- The Title IX Investigator can ask the Complainant about their relationship with the Respondent.
- The Title Investigator cannot ask the Complainant about their past sexual behavior unless such information is offered to prove (a) that someone other than the Respondent is responsible for the alleged violation, or (b) consent.

Appropriate

- What was your relationship with Respondent?
- Where did the Respondent touch you?
- Were you drinking or intoxicated when the alleged conduct occurred?

Inappropriate

- How many sexual partners have you had?
- What kind of sexual acts did you engage in with the Respondent before/after the alleged incident?



GINGO
& BAIR
LAW, LLC

Avoid Unsupported Conclusions

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?



GINGO
& BAIR
LAW, LLC

Special Issues During Interviews

- 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 may 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.)



GINGO
& BAIR
LAW, LLC

Role of Advisors

- All parties are entitled to have an advisor of their choosing to assist them throughout the grievance process. The advisor may be a parent/guardian, relative, friend, attorney, or any other supporter that the party chooses to advise them who is eligible and available.
- A party's advisor is permitted to accompany the party in all meetings and interviews at which the party is entitled to be present, including intake, investigative interviews, and appeals.
- The Title IX Coordinator, the investigator, and the decision-maker shall have discretion to determine whether advisors may be permitted to present on behalf of the Complainant or Respondent in a meeting or interview (not applicable to a parent).
- Limitations placed on an advisor shall apply to the advisor(s) for all parties.
- **Advisors are prohibited from interfering with the investigation or the grievance process.**



GINGO
& BAIR
LAW, LLC

Quiz 4

Rewrite the question to make it better:

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?



GINGO
& BAIR
LAW, LLC

The Determination



GINGO
& BAIR
LAW, LLC

Investigatory Report

- Before finalizing the investigation report, the Investigator must first circulate a ***draft report*** and all the evidence gathered to the parties.
 - Both parties get a 10-day period to review the draft investigation report and all evidence, including witness and party statements, even if the evidence was not considered in the draft report.
 - Both parties may submit a written response to the draft report to the investigator, who should incorporate those responses in the final report.
- The final investigation report should:
 - Identify all allegations of sexual harassment;
 - Identify the parties and witnesses;
 - Provide a timeline of events; and
 - Fairly summarize the investigation (including party and witness statements and any other evidence gathered.)



GINGO
& BAIR
LAW, LLC

Follow-Up on Investigation Report

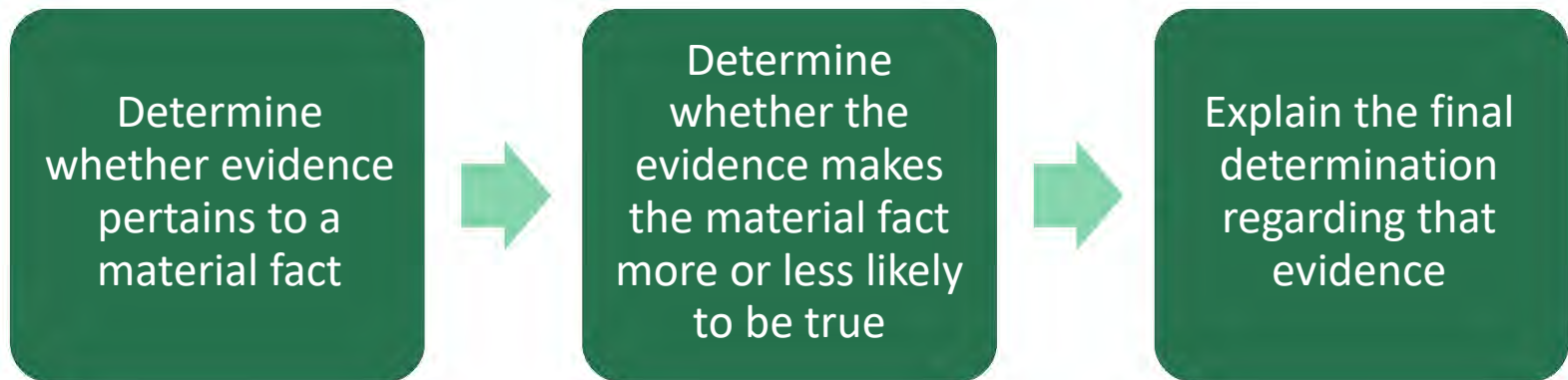
- The Decision-maker must afford both parties the opportunity to submit written questions to each other and/or witnesses.
- Parties/witnesses must respond to the questions in writing.
- **Best Practice Tip:** Decision-makers should create and communicate a schedule for the question process. For example:
 - Parties have 5 business days to submit their initial written relevant questions.
 - Receiving party and/or witness has 3 business days to submit written responses.
 - Parties have 3 business days to submit written, relevant follow-up questions.
 - Receiving party and/or witness has 1 business day to submit written response.



GINGO
& BAIR
LAW, LLC

Relevancy Determination

- The Decision-maker is responsible for determining what evidence is relevant.
- Relevant evidence is evidence pertinent to proving whether facts material to the allegations under investigation are more or less likely to be true.
- The Decision-maker must:



Preponderance of the Evidence

- Title IX uses a “preponderance of the evidence” standard.
 - That is generally considered a 50 percent or more standard. If there is more than 50 percent chance the claim is true, then the standard has been met.
 - The respondent is presumed to be “not responsible” unless a preponderance of the evidence proves otherwise.
- **Question 1:** Is it more likely than not that the conduct occurred as alleged?
- **Question 2:** If the conduct *did* occur as alleged, does it constitute sexual harassment under Board policy?



GINGO
& BAIR
LAW, LLC

Final Determination Report

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



Description of the procedural steps taken.



Findings of fact and conclusions about whether the alleged conduct occurred.



Rationale for the result as to each allegation and evidence to support the determination.



Disciplinary sanctions imposed on Respondent (if any).



Remedies provided to the Complainant (if any).



GINGO
& BAIR
LAW, LLC



Appeal Process and Final Thoughts



GINGO
& BAIR
LAW, LLC

Appeals

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

Procedural Irregularities

(The District made errors in the investigatory procedure)

Newly Discovered Evidence

(Should be evidence that could not have been discovered or produced during the investigation)

Alleged Bias of Title IX Personnel

(Applies to coordinator, investigator and decision-maker)



GINGO
& BAIR
LAW, LLC

Closing the Investigation

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.



GINGO
& BAIR
LAW, LLC

Informal Resolution Process

Schools may 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.



GINGO
& BAIR
LAW, LLC

Equitable Treatment

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

All parties must	No party may
Be permitted to present evidence.	Be required to bear the burden of proof.
Be permitted to present witnesses.	Be restricted in their ability to discuss the allegations.
Be permitted to have a supporter or adviser present at all stages of the process.	Be restricted in their ability to gather evidence.
Be provided advance notice of all interviews.	Be disciplined for sexual harassment unless/until there is a finding of responsibility against them.
Have the opportunity to review all evidence (even that which the District will not rely upon to determine responsibility).	



GINGO
& BAIR
LAW, LLC

Questions





GINGO & BAIR

LAW, LLC

Emily Spivack

Gingo & Bair Law, LLC

espivack@gingobair.com

gingobair.com