Title IX Training

for Coordinators, Investigators, and Decision Makers

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SAXTON & STUMP®
LAWYERS AND CONSULTANTS

A DIFFERENT APPROACH

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Introduction

What is Title IX?

Title IX of the Education Amendments of 1972

- "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."

Tennessee v. Cardona (2024)

- "**On the basis of sex**" means "that recipients of federal funds under Title IX may not treat a person worse than another similarly-situated individual on the basis of the person's sex, i.e., **male or female**."

Brief History of Title IX

- Title IX of the Education Amendments of 1972 was passed on June 23, 1972. In the two years preceding the passing of Title IX, debates about discrimination against women and education were raging in Congress, especially regarding the quality of athletic opportunities available to women compared to their male counterparts. Over time, the scope of Title IX has expanded to include sexual misconduct that occurs in a district's educational programs or activities.
- At its conception, Title IX was designed to prevent discrimination against women in educational institutions, including in scholastic athletics. However, it's important to remember that at the core of the legislation -
- **Title IX applies to both boys and girls (students), men and women (employees)**

The Pennsylvania Human Relations Act

- Title IX regulations codify protections nationwide for public school students and employees from discrimination based on their sexual orientation and gender identity (including transgender status). However, even if an injunction is placed on these regulations, Pennsylvania state law still protects the rights of these students and employees.
- In December of 2022, Pennsylvania issued new regulations under the Pennsylvania Human Relations Act providing legal protections for transgender individuals. The regulations open the door for the Pennsylvania Human Relations Commission to consider and adjudicate claims that a student has been denied opportunities in a school by reason of their gender identity.

The Pennsylvania Human Relations Act

- "Sex" is a protected class is undefined under the PHRA. Pennsylvania courts have consistently held that the PHRA is to be interpreted consistently with federal anti-discrimination law.
- § 41.206. Sex discrimination.
- The term ''sex'' as used in the PHRA includes all of the following:
  - Pregnancy.
  - Sex assigned at birth.
  - Gender, including a person's gender identity or gender expression.
  - Affectional or sexual orientation, including heterosexuality, homosexuality, bisexuality and asexuality.
  - Differences of sex development, variations of sex characteristics or other intersex characteristics.

What Does Title IX Cover?

- Admission and Recruitment
- Education Programs or Activities
- Employment in Education Programs or Activities
- Athletics
- Sexual Harassment

Who Does Title IX Protect?

The final rule protects all students and employees from all discrimination on the basis of sex.

- "At the time of filing a formal complaint, a complainant must be participating in or attempting to participate in the education program or activity of the recipient with which the formal complaint is filed." 34 C.F.R. §106.30.

Who Enforces Title IX?

The U.S. Department of Education, Office of Civil Rights (OCR)

- The Office for Civil Rights (OCR) is responsible for enforcing:
  - **Title IX of the Education Amendments Act of 1972** (prohibits discrimination on the basis of sex);
  - **Title VI of the Civil Rights Act of 1964** (prohibits discrimination on the basis of race, color, and national origin);
  - **Section 504 of the Rehabilitation Act of 1973** (prohibits discrimination on the basis of handicap);
  - **Age Discrimination Act of 1975** (prohibits discrimination on the basis of age);
  - **Americans with Disabilities Act of 1990** (prohibits discrimination on the basis of disability).

Who Enforces Title IX?

The U.S. Department of Education, Office of Civil Rights (OCR)

- OCR enforces Title IX by investigating complaints, conducting compliance reviews, and providing technical assistance. An institution found to violate Title IX (or any of the regulations enforced by OCR) has the opportunity to remedy the violation voluntarily. OCR is required by federal law to seek a voluntary resolution.
- If an institution refuses to remedy the violation, then OCR may pursue one of two courses of action: initiate administrative procedures to terminate federal funding to the institution; or refer the case to the U.S. Department of Justice to pursue enforcement in federal court.

What Does OCR Look For?

Complaints alleging a violation of Title IX

- At the conclusion of an investigation, OCR will determine, with regard to each allegation, whether:
  - There is insufficient evidence to support a conclusion that the recipient failed to comply with the law, or
  - A preponderance of the evidence supports a conclusion that the recipient failed to comply with the law.

What does Title IX Require?

- Designation of Title IX Coordinator
- Dissemination of Policy
- Adoption of Grievance Procedures
- Training Requirements
- Records Retention

Designation of Title IX Coordinator

- Each recipient must designate and authorize at least one employee to coordinate its efforts to comply with its responsibilities under this part, which employee must be referred to as the "Title IX Coordinator."
- Deputy Title IX Coordinators may be identified to assist the Title IX Coordinator in ensuring the school district's compliance with Title IX.
- The district must make the name or title, office address, electronic mail address, and telephone number of the employee designated as the Title IX Coordinator widely available (on website, in handbooks, notices, policies, etc.)
  - **Practice tip:** create a generic email address for the Title IX Coordinator (ex. TitleIX@SchoolDistrict.org). This helps ensure the contact information posted remains correct and no reports fall through the cracks if there is a transition at the Title IX Coordinator position

Dissemination of Policy

- The school must **adopt, publish, and implement a policy** stating that the recipient does not discriminate on the basis of sex and prohibits sex discrimination in any education program or activity that it operates, as required by Title IX and the regulations, including in admission and employment.
- **Notice must be posted prominently on the school's website, in each handbook, catalog, announcement, bulletin, and application form.**
- The school must provide notice of nondiscrimination to students, employees, applicants, Unions, and other listed persons, with specific components including how to locate the recipient's nondiscrimination policy and grievance procures and to report conduct that may constitute sex discrimination.
- *34 C.F.R. §106.8(b)-(c)*

Adoption of Grievance Procedures

PSBA Title IX Policy

- Current Title IX policy and process are found in:
  - Board Policy 103 (Discrimination/Title IX Sexual Harassment Affecting Students)
  - Board Policy 104 (Discrimination/Title IX Sexual Harassment Affecting Staff)
- Updates to Policies 103 and 104 include updates to definitions and provisions pertaining to:
  - The Pennsylvania Human Rights Act regulatory changes, effective August 2023
  - Title IX's protections when women are pregnant, either as a student (103) or as an employee (104)
  - Investigatory obligations outside of Title IX

Related Title IX Policies

- Related Policies:
  - 103.1: Nondiscrimination – Qualified Students with Disabilities
  - 234: Pregnant/Parenting/Married Students
  - 247: Hazing
  - 249: Bullying/Cyberbullying
  - 252: Dating Violence (Optional Policy)
  - 317.1: Educator Misconduct
  - 336: Personal Necessity Leave
  - 339: Uncompensated Leave
  - 824: Maintaining Professional Adult/Student Boundaries.

Training Requirements

Title IX Coordinators, Investigators, Decision Makers, Informal Resolution Mediators must receive training on:

- The definition of sexual harassment;
- The scope of the recipient's education program or activity;
- How to conduct an investigation and grievance process including hearings, appeals, and informal resolution processes, as applicable;
- How to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias;
- Technology to be used at a live hearing;
- Issues of relevance of questions and evidence, including when questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant; and
- Issues of relevance to create an investigative report that fairly summarizes relevant evidence.

Requirement to Make Training Materials Public

- "All materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process. A recipient must make these training materials publicly available on its website, or if the recipient does not maintain a website the recipient must make these materials available upon request for inspection by members of the public."
- 34 C.F.R. § 106.45(b)(10)(i)(D)

Records Retention

- A district must maintain for a period of **seven (7) years** records of—
  - A. Each sexual harassment investigation including any determination regarding responsibility, any disciplinary sanctions imposed on the respondent, and any remedies provided to the complainant designed to restore or preserve equal access to the recipient's education program or activity;
  - B. Any appeal and the result therefrom;
  - C. Any informal resolution and the result therefrom; and
  - D. All materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process. A recipient must make these training materials publicly available on its website, or if the recipient does not maintain a website the recipient must make these materials available upon request for inspection by members of the public.
  - E. Records of any actions, including any supportive measures, taken in response to a report or formal complaint of sexual harassment.

Title IX: Roles

Important Definitions

- 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."
    - "At the time of filing a formal complaint, a complainant must be participating in or attempting to participate in the education program or activity of the recipient with which the formal complaint is filed."
    - The Formal Complaint must include the complainant's physical or digital signature
    - The complaint can be made by the alleged victim, guardian, or Title IX Coordinator.
- *34 C.F.R. §106.30*

Important Definitions

- Complainant
  - Complainant means any individual who is alleged to be the victim of conduct that could constitute sexual harassment.
- Respondent
  - Respondent means an individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment.

Who is involved in the Title IX Process?

- Title IX Coordinator
- Title IX Investigator
- Decision Maker
- Appellate Decision Maker
- Informal Resolution Mediator
- Complainant: an individual who is alleged to be the victim of conduct that could constitute sexual harassment.
- Respondent: an individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment.

Preliminary Tasks: Appointing Deputy Title IX Coordinators and Assigning Roles

- **First, a District should determine how many Title IX Coordinators are appropriate for its school community.** Smaller Districts may choose to appoint just one Coordinator for all complaints. Larger Districts may choose to have a Title IX Coordinator assigned to student matters, another for employee matters, and perhaps another for athletic issues. If a District chooses to have more than one Title IX Coordinator, one employee should be designated as the Title IX Coordinator and others should be designated as Deputy Title IX Coordinators who report to the Coordinator. We also recommend establishing this structure early, making the names and contact information for all available on the District's website, and making sure all Coordinators are fully trained.
- **Second, a District should assign individuals to the roles of investigator, decision-maker, mediator, and appellate decision-maker.** You may have a small bank of individuals prepared to serve in these roles. We recommend all individuals receive training on investigator and decision-maker if the District wishes to take advantage of the simplified process under the new regulations.

Title IX Coordinator

The Title IX Coordinator **oversees compliance efforts and investigate any complaints of sex discrimination**. Districts must designate a professional employee as the Title IX coordinator to oversee compliance efforts and investigate any complaints of sex discrimination. All students, employees and parents/guardians must be notified of the name, office address, and telephone number of the designated Title IX Coordinator.

- **Primary Responsibilities of the Title IX Coordinator:**
  - Develop a working knowledge of the federal Title IX law and its implementation regulations. Keep informed of current developments and legal and judicial decisions related to Title IX.
  - Be informed about state laws, regulations, and policies on related/overlapping issues, such as bullying, harassment, and child abuse.
  - Have a working knowledge of federal and state laws (such as ADA, Section 504, IDEA, PHRA) prohibiting discrimination against all protected classes and assist persons in addressing alleged grievances.
  - Manage the Title IX Grievance Procedure from start to finish, ensuring persons in each role have received the adequate training.
  - Direct grievants, as necessary and applicable, to other grievance procedures for complaints that do not fall under Title IX regulatory procedures.
  - Make sure the school community has easy access to the District's policies related to Title IX.
  - Communicate with parents/guardians during incidences which could result in a formal Title IX complaint.
  - If relevant to your District, manage the Deputy Title IX Coordinators.

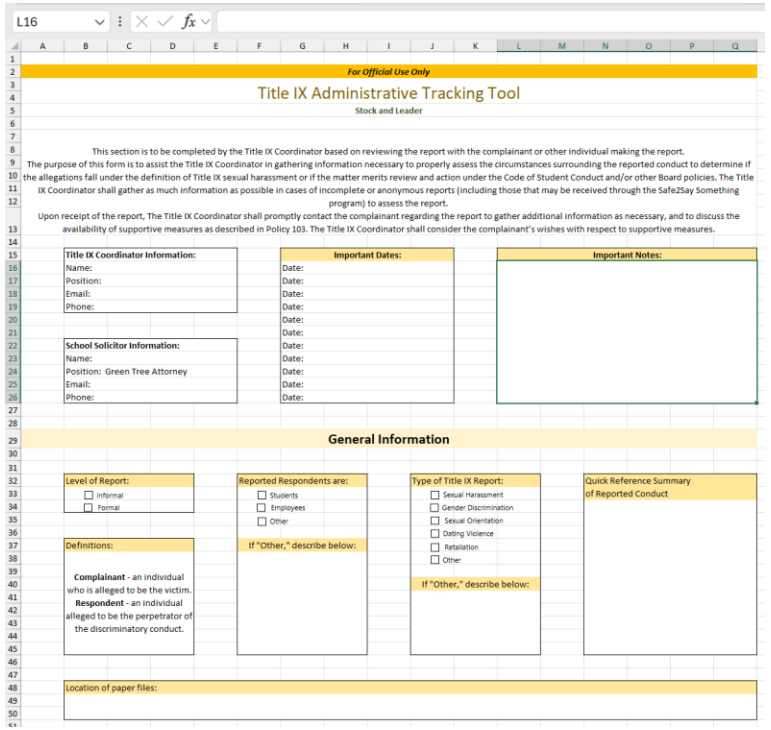
Title IX Coordinator: Dismissal of Title IX Formal Complaints

- The Title IX Coordinator shall dismiss a Formal Complaint under Title IX if none of the allegations, if true, would meet the definition and parameters of Title IX sexual harassment within the District's jurisdiction.
- The Title IX Coordinator may dismiss a Formal Complaint under Title IX if:

1. A complainant provides written notification of withdrawal of any allegations or of the Formal Complaint.
2. The respondent is no longer enrolled or employed by the District in a district program or activity.
3. Specific circumstances prevent the District from gathering evidence sufficient to reach a determination as to the Formal Complaint or allegations.

Title IX Coordinator: Establishing a System of Organization and Tracking

- Title IX issues can get messy. A Title IX Coordinator is responsible for keeping all the details and moving parts organized and easily accessible.
- Your system of organization should include:
  - Complainant Information
  - Respondent Information
  - Reported conduct
  - Outside reports
  - Witness information / testimony
  - Timeline of Incident based on info derived from the investigation
  - Communications tracking / meeting notes
  - Evidence Organization List
  - Title IX Analysis
  - Conclusive Action



For Official Use Only

Title IX Administrative Tracking Tool

Stock and Leader

This section is to be completed by the Title IX Coordinator based on reviewing the report with the complainant or other individual making the report.
The purpose of this form is to assist the Title IX Coordinator in gathering information necessary to properly assess the circumstances surrounding the reported conduct to determine if the allegations fall under the definition of Title IX sexual harassment or if the matter merits review and action under the Code of Student Conduct and/or other Board policies. The Title IX Coordinator shall gather as much information as possible in cases of incomplete or anonymous reports (including those that may be received through the Safe2Say Something program) to assess the report.
Upon receipt of the report, The Title IX Coordinator shall promptly contact the complainant regarding the report to gather additional information as necessary, and to discuss the availability of supportive measures as described in Policy 103. The Title IX Coordinator shall consider the complainant's wishes with respect to supportive measures.

Title IX Coordinator Information:
Name:
Position:
Email:
Phone:

School Solicitor Information:
Name:
Position: Green Tree Attorney
Email:
Phone:

Important Dates:
Date:

Important Notes:

General Information

Level of Report:
Informal
Formal

Reported Respondents are:
Students
Employees
Other
If "Other," describe below:

Type of Title IX Report:
Sexual Harassment
Gender Discrimination
Sexual Orientation
Dating Violence
Retaliation
Other
If "Other," describe below:

Quick Reference Summary of Reported Conduct

Definitions:
Complainant - an individual who is alleged to be the victim.
Respondent - an individual alleged to be the perpetrator of the discriminatory conduct.

Location of paper files:

Saxton & Stump has a template Title IX Administrative Tracking Tool.

Title IX Coordinator: Record Keeping

- Good Organization Helps Fulfill Recordkeeping Obligations.
  - The Title IX Coordinator:
    - is responsible for maintaining all required records;
    - is responsible for ensuring training materials are publicly available on the website;
    - should develop a process for required recordkeeping and include a list of all properly trained investigators and decision-makers.

Title IX Investigator

- The Investigator bears the burden of **gathering evidence** in order to:
  1. Determine if the sexual harassment allegations meet Title IX standards, and
  2. Provide the Decision-Maker with evidence with which to base the written determination of responsibility at the end of the grievance procedure.
- The Investigator is responsible for conducting interviews with all parties and witnesses, sharing investigative evidence with all parties for their review, and writing the investigative report. ***The investigative report cannot / does not recommend a determination for the Decision-Maker.***
- The Investigator cannot have a conflict of interest with, or bias for or against any member in the proceedings.

Decision Maker

- The Decision-Maker is effectively the **judge of Title IX cases**.
- Decision Maker:
  - Preside over hearings, if applicable;
  - Monitor the questioning and cross-examination process and identify irrelevant questions;
  - Weigh the evidence to determine if it meets the school's standard of sexual harassment allegations; and
  - Produce a written statement to both parties describing the outcome.

Decision Maker

- Conduct an objective evaluation of all relevant evidence – including both inculpatory and exculpatory evidence.
  - Inculpatory evidence: Evidence that shows/tends to show a respondent did violate Title IX.
  - Exculpatory evidence: Evidence that shows/tends to show a respondent did not violate Title IX.
- Afford each party the opportunity to submit written relevant questions that a party wants asked of any party or witness, provide each party with the answers, and allow for additional, yet limited, follow up questions for each party.
- Make a judgment call regarding whether questions are relevant and explain the reasoning for excluding questions.
- Weigh the evidence and make judgment calls on credibility.
- Determine if a Respondent is responsible.
- Draft a written determination.

Standards of Evidence

- Districts may choose which standard of evidence they would like to apply to all Title IX complaints for students and employees:
  - Preponderance of the evidence standard: A fact is more likely than not to be true.
  - Clear and convincing evidence standard: A fact is highly probable to be true.
- "State whether the standard of evidence to be used to determine responsibility is the preponderance of the evidence standard or the clear and convincing evidence standard, apply the same standard of evidence for formal complaints against students as for formal complaints against employees, including faculty, and apply the same standard of evidence to all formal complaints of sexual harassment"
- *34 C.F.R. § 106.45(b)(1)(vii)*

Informal Resolution Mediator

- Informal Resolution is a voluntary process where the parties agree to the resolution of a Formal Title IX Complaint.
- All informal resolution discussions must be facilitated by a Mediator.
- As they facilitate the informal resolution, the Mediator's role is to:
  - Ensure an equitable and fair process.
  - Serve as a "neutral" facilitator.
  - Allow each party to feel empowered and heard.
  - Encourage and guide meaningful dialogue between the parties towards an amicable resolution.
  - Help uncover the parties' underlying needs and interests.
  - Serve with impartiality: be free from prejudgment of the facts at issue, conflicts of interest, and bias.
- The mediator has no authority to render a resolution - only the parties do.

Title IX Grievance Procedures

Important Definitions

- 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."
    - "At the time of filing a formal complaint, a complainant must be participating in or attempting to participate in the education program or activity of the recipient with which the formal complaint is filed."
    - The Formal Complaint must include the complainant's physical or digital signature
    - The complaint can be made by the alleged victim, guardian, or Title IX Coordinator.
- *34 C.F.R. §106.30*

Scope of Education Programs or Activities

Program or Activity

- "[A] local educational agency (as defined in 20 U.S.C. 8801), system of vocational education, or other school system; […]" 34 C.F.R. § 106.1(h)(2)(ii)
- This will include:
  - All activities of a district
  - All activities of a vocational educational program
  - Curriculum
  - Resources
  - Academic opportunities
  - Extra-curricular opportunities
  - Athletics
  - Activities
  - Travel, if it is an activity of the district

The Obligation to Act and Timeliness

- When are a school's obligations to act under Title IX triggered?
  - A school with actual knowledge of sexual harassment in its education program or activity must respond promptly in a manner that is not deliberately indifferent.
  - A school is deliberately indifferent only if its response to sexual harassment is clearly unreasonable in light of the known circumstances.

Knowledge by Employees / the District

- Actual Knowledge
  - “Actual knowledge means notice of sexual harassment or allegations of sexual harassment to a recipient's Title IX Coordinator or any official of the recipient who has authority to institute corrective measures on behalf of the recipient, or to any employee of an elementary and secondary school.”
  - The school must require all employees who are not confidential employees to notify the Title IX Coordinator when the employee has information about conduct that reasonably may constitute sexual harassment and/or sex discrimination

Jurisdiction

- Schools have jurisdiction over sexual harassment and/or sex discrimination occurring under their education program or activity in the U.S., including conduct that is subject to the school's disciplinary authority.

The Definition of Sexual Harassment

- **Sexual harassment** means conduct on the basis of sex that satisfies one or more of the following:
  1. An employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual'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 recipient'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).
- *34 C.F.R. § 106.30*

The Definition of Sexual Harassment

Sexual Assault

- 20 U.S.C. 1092(f)(6)(A)(v)
  - "(v) The term "sexual assault" means an offense classified as a forcible or nonforcible sex offense under the uniform crime reporting system of the Federal Bureau of Investigation."
- FBI Website
  - "The FBI's Uniform Crime Reporting (UCR) Program defines sexual assault as any sexual act against another person without their consent, including when the victim is unable to consent. This includes fondling, which is touching someone's private parts for sexual gratification without their consent. The UCR Program also counts rape, attempted rape, and assault with intent to rape as one offense per victim, regardless of age."

Supportive Measures

- Non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, and without fee or charge to the complainant or the respondent before or after the filing of a formal complaint or where no formal complaint has been filed. Such measures are designed to restore or preserve equal access to the recipient's education program or activity without unreasonably burdening the other party, including measures designed to protect the safety of all parties or the recipient's educational environment, or deter sexual harassment.

Supportive Measures

- Supportive Measures may include:
  - counseling,
  - extensions of deadlines or other course-related adjustments,
  - modifications of work or class schedules,
  - campus escort services,
  - mutual restrictions on contact between the parties,
  - changes in work or housing locations,
  - leaves of absence,
  - increased security and monitoring of certain areas of the campus, and
  - other similar measures.
- The Title IX Coordinator is responsible for coordinating the effective implementation of supportive measures.

Supportive Measures

- The recipient must maintain as confidential any supportive measures provided to the complainant or respondent, to the extent that maintaining such confidentiality would not impair the ability of the recipient to provide the supportive measures. In other words, the regulations prohibit disclosures about supportive measures to persons other than to whom the supportive measures apply.

Emergency Removal

- The school (i.e. Title IX Coordinator) must undertake an individualized safety and risk analysis and determine that a student respondent poses an immediate threat to the physical health or safety of any student or other individual arising from the allegations of sexual harassment justifies removal.
- The Respondent must be provided with notice and an opportunity to challenge the decision immediately following the removal.
- Emergency Removal:
  - Is meant to be a last possible resort;
  - Is generally rare;
  - Should be well documented (how was this conclusion reached?);
  - Should be executed with the information needed to facilitate a challenge to the action.

Administrative Leave

- The school may place a non-student employee respondent on administrative leave during the pendency of a grievance process.
- All applicable Collective Bargaining Agreement (“CBA”) provisions must be followed when placing an employee on administrative leave.

Discipline

- “A recipient's response must treat complainants and respondents equitably by offering supportive measures to a complainant, and by following a grievance process before the imposition of any disciplinary sanctions or other actions that are not supportive measures, against a respondent.”

  34 C.F.R. §106.44(a)

- “[A recipient shall] describe the range of possible disciplinary sanctions and remedies or list the possible disciplinary sanctions and remedies that the recipient may implement following any determination of responsibility.”

  34 C.F.R. §106.45(1)(vi)

Discipline

- Key Takeaways:
  - A District may not impose discipline on a respondent until a determination has been reached regarding the allegation of sexual harassment.
  - Instead, a District should offer supportive measures.
  - Supportive measures may not be punitive.
  - Supportive measures may not deprive a student access to the educational environment or benefit of service.
- Discipline Considerations for Students with Special Education Needs:
  - A manifestation determination is still needed in Title IX procedures.
  - The regulations require that for students with established special education needs, the IEP or Section 504 team be involved in the grievance procedure.
  - Student information must be protected under the privacy provisions of the IDEA.

Confidentiality Requirements

- The general rule is that the district must keep confidential the identity of any person who has reported sexual harassment, or who has been reported to be a perpetrator of sexual harassment.
  - There are three **exception**s:
    1. If disclosure is permitted under FERPA;
    2. If disclosure is required by law; or
    3. **If disclosure is necessary to carry out the purposes of Title IX and its regulations, including to conduct a grievance process**.
- "The recipient must keep confidential the identity of any individual who has made a report or complaint of sex discrimination, including any individual who has made a report or filed a formal complaint of sexual harassment, any complainant, any individual who has been reported to be the perpetrator of sex discrimination, any respondent, and any witness, except as may be permitted by the FERPA statute or FERPA regulations, or as required by law […]." *34 C.F.R. § 106.71*

Confidentiality Requirements

- Title IX Confidentiality Requirements Mirror FERPA
  - The investigator should make every effort to protect the identity of the witnesses and other students involved, especially if the student receives special education services.
- Privileged Information (Not Relevant or Admissible)
  - The following is evidence that cannot be collected by the Investigator (nor can the Investigator ask questions about the following):
    - Evidence that is protected under a privilege or confidentiality,
    - Records made or maintained by a physician, psychologist, or other recognized professional in connection with treatment, and
    - Evidence relating to the complainant's sexual interests or prior sexual conduct.
- 34 C.F.R. § 106.45(b)(7)

Retaliation Prohibited

Retaliation is prohibited at all stages of the Title IX grievance procedure and following its conclusion.

- "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 or complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing under this part."

What Constitutes Retaliation?

- "Intimidation, threats, coercion, or discrimination, including charges against an individual for code of conduct violations that do not involve sex discrimination or sexual harassment, but arise out of the same facts or circumstances as a report or complaint of sex discrimination, or a report or formal complaint of sexual harassment, for the purpose of interfering with any right or privilege secured by title IX or this part, constitutes retaliation."

34 C.F.R. §106.71(a)

Timelines

- Districts must provide "**reasonably prompt time** frames for conclusion of the grievance process, including reasonably prompt time frames for filing and resolving appeals and informal resolution processes if the recipient offers informal resolution processes…"

Title IX Procedure Overview and Timeline

- PSBA Policy 103 or 104
  - Step 1: Report to the Title IX Coordinator
    - District staff who become aware of bullying, hazing, harassment or other discrimination affecting a student or staff member shall ***promptly*** report it to the Building Administrator.

Title IX Procedure Overview and Timeline

- PSBA Policy 103 or 104
  - Step 2: Title IX Coordinator Communicates with Complainant
    - The Title IX Coordinator shall promptly contact the complainant and complainant's parent(s)/legal guardian(s) regarding the report to gather additional information as necessary, and to discuss the availability of supportive measures.

Title IX Procedure Overview and Timeline

- PSBA Policy 103 or 104
  - Step 3: Title IX Coordinator Determines Applicable Policy/Grievance Procedure
    - The Title IX Coordinator shall initially assess whether the reported conduct:
      - Meets the definition of Title IX sexual harassment.
      - Occurred in a district program or activity under the control of the district and against a person in the United States.
      - Involves other Board policies or the Code of Student Conduct.
      - Indicates, based on an individualized safety and risk analysis, that there is an immediate threat to the physical health or safety of an individual.
      - Involves a student identified as a student with a disability under the Individuals with Disabilities Education Act or Section 504 of the Rehabilitation Act.

Title IX Procedure Overview and Timeline

- PSBA Policy 103 or 104
  - Step 3: Title IX Coordinator Determines Applicable Policy, cont.
    - If the result of the initial assessment determines that none of the allegations fall within the scope of Title IX sexual harassment, but the matter merits review and possible action under the Code of Student Conduct or other Board policies, then the Title IX Coordinator shall redirect the report to the appropriate administrator to address these allegations.

Title IX Procedure Overview and Timeline

- PSBA Policy 103 or 104
  - Step 3: Title IX Coordinator Determines Applicable Policy, cont.
    - If the result of the initial assessment determines that the allegations may constitute Title IX sexual harassment, the Title IX Coordinator shall promptly explain to the complainant the process for filing a formal complaint and to inform the complainant of the continued availability of supportive measures with or without filing a formal complaint.

Title IX Procedure Overview and Timeline

- PSBA Policy 103 or 104
  - Step 4: If a Formal Complaint is filed
    - Upon receipt of a Formal Complaint, the Title IX Coordinator shall provide written notice to all parties, and the parents/guardians of known parties, where applicable.
    - When meeting with parties, offer supportive measures.

Title IX Procedure Overview and Timeline

- PSBA Policy 103 or 104
  - Step 5: Formally Identify the Persons in Each Role
    - The Title IX Coordinator appoints an investigator, decision maker, and appellate decision maker for the entire matter. The Title IX Coordinator cannot serve in any of these roles.
    - Communicate to whomever is identified to serve in each role.
    - Persons appointed for each role must have been trained on how to serve in this role.

Title IX Procedure Overview and Timeline

- PSBA Policy 103 or 104
  - Step 6: Investigation
    - The designated investigator shall work with the Title IX Coordinator to assess the scope of the investigations, who needs to be interviewed, and what records or evidence may be relevant to the investigation.

Title IX Procedure Overview and Timeline

- PSBA Policy 103 or 104
  - Step 7: Investigative Report **(10 days)**
    - The investigator shall draft an investigative report that fairly summarizes relevant evidence.
    - The investigator shall provide the investigative report to all parties and to the designated decision maker.
    - Prior to the completion of the investigative report, the investigator shall:
      1. Send to each party and the party's advisor, if any, the evidence subject to inspection and review in electronic or hard copy format.
      2. Provide the parties at least ten (10) school days following the receipt of the evidence to submit a written response
      3. Consider the written response prior to finalizing the investigative report.

Title IX Procedure Overview and Timeline

- PSBA Policy 103
  - Step 8: Written Determination and District Action **(10 days)**
    - A written determination of responsibility must not be finalized less than ten (10) days after the investigator completes the investigative report and provides it to all parties.
    - Before the decision-maker reaches a determination regarding responsibility, the decision-maker shall afford each party the opportunity to submit written, relevant questions that a party wants to be asked of any party or witness, shall provide each party with the answers, and shall allow for additional, limited follow-up questions from each party.

Equal Access to Evidence

- Parties are entitled to an **equal opportunity to access** the relevant and not otherwise impermissible evidence or an accurate description of this evidence.
- "Provide both parties *an **equal opportunity to inspect and review** any evidence obtained as part of the investigation that is directly related to the allegations raised in a formal complaint*, including the evidence upon which the recipient does not intend to rely in reaching a determination regarding responsibility and inculpatory or exculpatory evidence whether obtained from a party or other source, so that each party can meaningfully respond to the evidence *prior to conclusion of the investigation*."
- *34 C.F.R. § 106.45(5)(iv)*

Equal Opportunity to Respond to Evidence

- Parties are entitled to an **equal opportunity to respond** to the evidence before the final investigation report is made.
- "Prior to completion of the investigative report, the recipient must send to each party and the party's advisor, if any, the evidence subject to inspection and review in an electronic format or a hard copy, and *the parties must have at least 10 days to submit a written response, which the investigator will consider prior to completion of the investigative report."*
- *34 C.F.R. § 106.45(5)(iv)*

Title IX Procedure Overview and Timeline

PSBA Policy 103 or 104

- Step 9: Appeal Process
  - Districts must offer both parties the right to appeal a determination of responsibility and the right to appeal the district's dismissal of a Title IX Formal Complaint or any allegation in the Title IX Formal Complaint.
  - Written notice of a party's appeal shall be submitted to the Title IX Coordinator within [five or ten] **school** days after the date of the written determination. Notice of appeal shall include a brief statement describing the basis for the appeal.
  - The designated appeal authority will issue a written decision setting forth the respects, if any, in which the written determination is modified and the rationale for the results within [five or ten] **school** days.

Appeal

Permissible Reasons for Appeal

- Three (3) reasons a party can file an appeal:
  1. A procedural irregularly that affected the outcome of the matter.
  2. New evidence that could affect the outcome that was not reasonably available at the time of the decision to dismiss or determination of responsibility was made.
  3. The Title IX Coordinator, investigator(s), or decision-maker(s) had a conflict of interest or bias for or against the individual complainant or respondent or for or against complainants or respondents generally that affected the outcome of the mater.

How to Conduct a Title IX Investigation

SAXTON & STUMP

Investigating the Title IX Issue

- Big “I” Investigation:
  - The Investigator is tasked with conducting the “Big ‘I’ Investigation,” which requires that they gather evidence the decision maker will use to determine if allegations meet Title IX standards for sexual harassment.
- Investigations Could Include:
  - Interviewing and collecting the statement of the Complainant
  - Interviewing and collecting the statement of the Respondent
  - Interviewing and collecting statements from staff and student witnesses
  - Collecting outside reports (if law enforcement is involved)
  - Requesting and collecting digital or video evidence
  - Develop as detailed a timeline of the incident as possible, supported by facts gathered
  - Follow up on all leads, especially if not initially identified as a person of importance

Investigating the Title IX Issue

- Maintain Neutrality
  - The investigator should conduct the investigation at every step from a neutral position. This includes using neutral language, providing each party's position equal effort and consideration, following up on claims by each party, and more.
- Equal Treatment of Parties
  - Throughout the investigative process, the Investigator should ensure that parties have equal opportunities at every step to:
    - Inspect and review evidence,
    - Invite their respective advisors to the interviews, and
    - Present witnesses and evidence.

Confidentiality must be maintained throughout the process.

Potential Responses to Trauma

- It's important to remember that you may be interreacting with students or employees who are demonstrating responses to trauma. It's important to handle this with care.
  - Delayed reporting
  - Difficulty remembering specifics
  - Trouble self-regulating
  - Reluctant reporting
  - Remaining in a relationship with the Respondent
  - Failing to identify the accused
  - The alleged victim thinks they are to blame and somehow they welcomed the behavior
  - Justifying the rationale of the incident

Advisors or Support Persons for Parties

Provide Equal Access to Advisors and Support to All Parties

- The investigator must provide parties the same opportunity to be accompanied by the advisor of their choice.
    - The Investigator is allowed to limit participation of advisor in process.
    - If an Investigator limits participation of an advisor for one party, s/he must apply such limitations equally to all parties.
- 34 C.F.R. § 106.45(b)(5)(iv)

Investigation Techniques

Initial Review

- Review the notes and information collected by the Title IX Coordinator
- Review Notices to the Complainant and Respondent
- Review the Policy/Code of Conduct
- Define the Scope of Investigation:
  - What elements do you think will be disputed?
  - What elements will be agreed upon?
  - Are there any holes in your understanding of the incidents that you need to fill?

Begin your Organization

- How are you going to keep track of all the files of evidence?
- Take into account that evidence files could be written, email, audio, video, etc.
- How are you going to keep track of the timeline of events?
- If there is a criminal investigation, work with law enforcement to collect and preserve evidence.

Investigation Techniques

Begin your Witness List

- Who should be included?
- Who should not be included?
- In what order should the witnesses be interviewed?
- Do you need to follow up with some witnesses?

Craft Questions for Each Witness

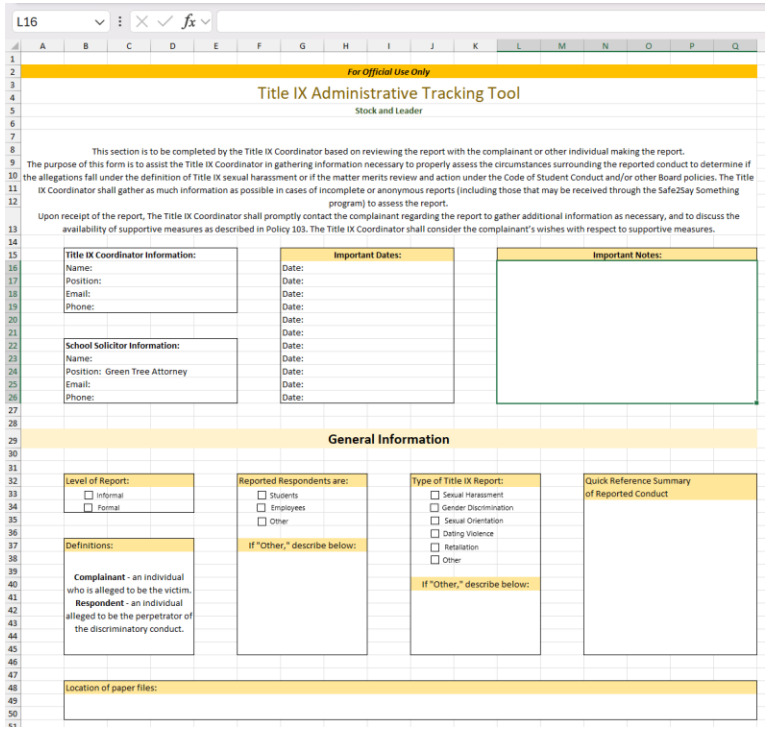
- Refer to the applicable policy and code of conduct
- Consider what information the witness is likely to have related to each element of the policy requirements
- Consider what information the witness is likely to have related to each element of the Title IX requirements
- Consider what information the witness is likely to have that may assist the decision-maker in determining credibility
- Be flexible!

Investigation Techniques

- Organize What You'll Need for the Interview
  - What should you have with you?
    - Intake Report
    - Written notice with allegations
    - Investigation log
    - Investigation notes cover sheet
    - Pre-prepared questions
    - Evidence you may need to reference or show witness
    - Policy or Handbook

Title IX Coordinator: Establishing a System of Organization and Tracking

- A system of organization should include:
  - Complainant Information
  - Respondent Information
  - Reported conduct
  - Outside reports
  - Witness information / testimony
  - Timeline of Incident based on info derived from the investigation
  - Communications tracking / meeting notes
  - Evidence Organization List
  - Title IX Analysis
  - Conclusive Action



For Official Use Only

Title IX Administrative Tracking Tool

Stock and Leader

This section is to be completed by the Title IX Coordinator based on reviewing the report with the complainant or other individual making the report.
The purpose of this form is to assist the Title IX Coordinator in gathering information necessary to properly assess the circumstances surrounding the reported conduct to determine if the allegations fall under the definition of Title IX sexual harassment or if the matter merits review and action under the Code of Student Conduct and/or other Board policies. The Title IX Coordinator shall gather as much information as possible in cases of incomplete or anonymous reports (including those that may be received through the Safe2Say Something program) to assess the report.
Upon receipt of the report, The Title IX Coordinator shall promptly contact the complainant regarding the report to gather additional information as necessary, and to discuss the availability of supportive measures as described in Policy 103. The Title IX Coordinator shall consider the complainant's wishes with respect to supportive measures.

Title IX Coordinator Information:
Name:
Position:
Email:
Phone:

School Solicitor Information:
Name:
Position: Green Tree Attorney
Email:
Phone:

Important Dates:
Date:

Important Notes:

General Information

Level of Report:
Informal
Formal

Reported Respondents are:
Students
Employees
Other
If "Other," describe below:

Type of Title IX Report:
Sexual Harassment
Gender Discrimination
Sexual Orientation
Dating Violence
Retaliation
Other
If "Other," describe below:

Quick Reference Summary of Reported Conduct

Definitions:
Complainant - an individual who is alleged to be the victim.
Respondent - an individual alleged to be the perpetrator of the discriminatory conduct.

Location of paper files:

Saxton & Stump has a template Title IX Administrative Tracking Tool.

Investigation Techniques

- Begin the Interview Broadly
  - Begin a shared monologue about the incident.
    - What happened earlier that day before the incident?
    - What happened regarding the incident?
    - What happened next?
  - Ask the witness to “freeze” on certain moments to dive into details:
    - What could you see? Feel? Smell? Taste? Hear?
    - Where was the other person? How were they positioned?
    - Where were you? How were you positioned?
    - What did you say to the other person?
    - What did they say to you?
    - Describe other person’s tone, demeanor, body language.

Investigation Techniques

- Ask Follow Up Questions
  - Re-Review your notes. Do you have any areas of confusion or was anything ambiguous?
  - Re-Review the elements of each charge. Did you miss something?
    - Have you elicited all of the information this witness might have about each element?
    - Do you understand how the witness obtained the information they shared?
- Ask Questions to Test Credibility
    - Gather facts to assist decision-maker
    - Ask questions to test memory
    - Identify where the witness may corroborate or contradict their testimony, or other witnesses, and physical evidence
    - Be sensitive to potential trauma experienced by witnesses

Evaluating Credibility of a Witness

To assess the credibility of the witness, evaluate the following:

- The internal consistency of their testimony, and possible self-contradiction
- Whether what they're saying is true according to the facts
- The history / reputation / character of the witness
- Their motivation to lie
- Any relation of the witness to the respondent or complainant
- Any other conflicts of interest
- Whether the person is testifying without duress
- Whether the person makes statements against self-interest
- Whether the other witness testimony supports this witness' testimony
- The witness's proximity to the alleged event in time and place
- Any cognitive impairments
- The language ability of the witness, the use of words within the ability of the witness
- Correct orientation as to time / place / circumstance
- Differences and similarities to previous testimony
- Rote or repeated nature of testimony to other witness's testimony (which may speak to preparation, advice, or coercion by a third party)

Investigation Techniques

- Closing the Interview
  - Request copies of all evidence potentially available to the witness.
  - Discuss confidentiality, but do not prohibit a party from discussing allegations.
  - Inform the witness of next steps in the process.
  - Give them full information about how to reach you.
  - Invite them to reach out if they have anything further they remember or would like to say.
  - Thank them for their time.
- (Immediately) After the Witness Leaves
  - Update the Investigation log, or whatever you're using to keep organized.
  - Review notes in full and make corrections and clarifications where needed.
  - Update witness list.
  - Update list of evidence to be obtained.
  - Write down questions to ask other witnesses based on what you learned.
  - Consider whether there are additional allegations you need to bring to the attention of the Title IX Coordinator.

How to Serve Impartially

How to Serve Impartially

The Title IX regulations require that any individual designated by a recipient as a Title IX Coordinator, investigator, decision-maker, or any person designated by a recipient to facilitate an informal resolution process, receive training on "how to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias."

Impartiality

Impartiality is defined as not supporting any of the sides involved in an argument. The regulations and commentary to the regulations indicate that Title IX considers "impartiality" to be the avoidance of:

- prejudgment of the facts at issue,
- conflicts of interest, and
- bias.

How to Serve Impartially

Prejudgment of the Facts

Prejudgment of the facts can be defined as:

- To judge beforehand without possessing adequate facts, or to judge prematurely without sufficient reflection or investigation.

Coordinators, Investigators and Decision-Makers should not immediately assume they know what happened in a case, despite “signs” that suggest one side or the other is telling the truth.

Prejudgment often occurs when investigators and decision-makers adhere to sex-based stereotypes about males and females. Decisions should be made based on individual facts, not stereotypical notions of what males and females do or do not do. Additionally, Prejudgment often occurs when allegations involve sexual conduct, sexual history, drugs, and/or alcohol use.

How to Serve Impartially

Conflict of Interest

Conflict of interest can be defined as:

- When a personal or private interest (e.g. family, friendship, financial, social, etc.) compromises one's judgement, decisions, or actions.

Coordinators, Investigators and decision-makers may run into issues of conflict of interest when their personal interests or relationships conflict with their ability to act in a neutral manner with regard to a complaint against a faculty member, staff member or student. A conflict of interest arises when an individual working on a particular Title IX matter is prevented from being impartial.

How to Serve Impartially

Bias

Bias can be defined as:

- A tendency, inclination, or prejudice toward or against something or someone.

Biases are often based on stereotypes, rather than actual knowledge of an individual or circumstance. Biases are cognitive shortcuts that can result in prejudgments that lead to rash decisions or discriminatory practices.

Writing the Investigative Report

Writing the Investigative Report

The Final Report is a fair summary and presentation of all relevant evidence.

34 C.F.R. § 106.45(b)(5)(vii)

- In general, the Final Report should:
  - Evidence fairness
  - Be factual
  - Proceed chronologically
  - Include a well-labeled appendix for important evidence
- The Final Report will be what the Decision-Maker uses to issue a final determination.

Writing the Investigative Report

Before You Begin Writing: Consider Your Organization

- How are you going to organize your report?
- Potential organization strategies for the Final Report:
  - Chronological
  - By topic or by allegation (chronological within each topic or allegation)
  - By chronology of how the information came into the investigation
  - By witness statement
- Organize Your Evidence:
  - Organize the pieces of evidence in chronological order or in an order that makes sense for the Final Report
  - Number the pages of the evidence packet
  - Label each piece of evidence (for example: “1,” “2,” “2(a),” “2(b)”)
  - Make an appendix table of contents if the evidence is extensive

Writing the Investigative Report

Part I: Short Summary of the Complaint and Party Information

- Summarize the nature of the complaint.
- Describe all the individuals involved.
  - Complainant
  - Respondent
  - Investigator
  - Witnesses

Writing the Investigative Report

Part II: Introduction of Basic Preliminary Information

- Description of charges
- How did the complaint make its way to an investigation?
- Witnesses Interviewed
- Witnesses Not Interviewed (and why)
- The procedure followed, step-by-step
- Any procedural anomalies that need explained?
- Explain your organization structure:

  Example:

  “The information in this report is a summary of the facts as agreed upon by the parties and the witnesses. Where there is a difference in the accounts, it is noted in the report. For the sake of clarity, the report is organized chronologically and by subject matter when appropriate.”

Writing the Investigative Report

Part III: Summary of the Undisputed and Disputed Information

- Recount the undisputed facts.
  - Series of numbered sentences
- Recount the disputed facts.
  - Series of numbered sentences
- Make sure you have facts for each element of each charge.

Part IV: A Statement Regarding Relevant Evidence

- Example: “All relevant information gathered during the course of the investigation has been included in this report.”
- Identify if you thought something was irrelevant if you included it anyway. Include a note for the Decision-Maker, and reference the evidence label to draw their attention to it.

Issues of Relevance

- The District must ensure that "all relevant questions and evidence are admitted and considered (though *varying weight or credibility may of course be given to particular evidence by the decision-maker).*" *The rules of evidence do not apply, and a District may NOT exclude relevant evidence.*

What is Relevance?

- The Preamble to the regulations indicates that it may include: evidence that is "probative of any material fact concerning the allegations […] evidence pertinent to proving whether facts material to the allegations under investigation are more or less likely to be true (i.e., on what is relevant)."

In Layman's Terms, Please?

- The easy way to understand it is by asking yourself:

Does this [question I'm asking / topic I'm introducing / evidence I'm evaluating] move the dial under the standard of evidence?

Issues of Relevance

- Questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant, unless:
  - Such questions and evidence about the complainant's prior sexual behavior are offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or
  - If the questions and evidence concern specific incidents of the complainant's prior behavior with respect to the respondent and are offered to prove consent.

Writing the Investigative Report

Part V: Alleged Policy Violation

- Provide the definition of prohibited conduct alleged from applicable Policy
- Provide the related definitions as appropriate (e.g. consent, incapacitation) or any code of conduct included if done together
- Include the text of the policy or code of conduct verbatim, in entirety

Part VI: Alleged Policy Violation

- This is the bulk of your Final Report
- Follow the organization structure you chose
- Factually summarize all relevant evidence
- Include citations to the evidence in parenthesis (Example: “Student A called the teacher. (Evidence 2, p. 13).”)

Thank you!

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