



KINGSLEYBOGARD

ATTORNEYS

TITLE IX COMPLAINT PROCEDURES AND INVESTIGATION BEST PRACTICES

PRESENTED BY

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Introductions



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Title IX Training

The District must train ALL employees on:

- The type of conduct that is covered by Title IX (the definition of sex based discrimination)
- The obligation to provide contact information for the Title IX Officer
- The steps the District must take to respond to sex based discrimination



Road Map

1. What is Title IX?
2. How Title IX is Changing
3. Standard for Title IX Complaints
4. Jurisdiction
5. The Four Roles
 - a) Coordinator
 - b) Investigator
 - c) Decision Maker
 - d) Appellate Decision Maker



Title IX Overview

What is Title IX?

- Federal law prohibiting sex discrimination in education (sex stereotypes, sex characteristics, pregnancy and related conditions, sexual orientation and gender identity)
- Districts must train employees and have procedures in place to identify, investigate and address sex discrimination.



How Title IX is Changing

- On April 19, 2024, the U.S. Department of Education released its final rule amending the 2020 regulations governing Title IX.
- There are significant changes between the 2020 regulations and the 2024 regulations.
- The new regulations take effect August 1, 2024.



2020 Title IX Regulations – Sexual Harassment

For purposes of Title IX, “sexual harassment” is any of the following:

- *Quid pro quo.* When an employee conditions a benefit, service, aid, etc. on participation in unwelcome sexual conduct.
- *Hostile Environment.* Unwelcome sexual conduct that is so severe, pervasive, and objectively offensive that it denies a person equal access to District educational program/activity.
- *Sexual assault.*



2020 Title IX Regulations – Hostile Environment

- “Hostile environment” harassment is *by far* the most common type of sexual harassment to arise with students, so that is what we will focus on today.
- Rules make it more difficult to establish these allegations (“and” not “or”).
- But “more difficult” *does not* mean impossible.



2024 Title IX Regulations – Sex Discrimination

- Applies to all sex discrimination
 - Discrimination on the basis of sex includes sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity.



2024 Title IX Regulations – Sex Based Harassment

- Sex-based harassment is a form of sex discrimination
 - *Quid pro quo* - An employee, agent, or other person authorized by the recipient to provide an aid, benefit, or service under the District's education program or activity explicitly or impliedly conditioning the provision of such an aid, benefit, or service on a person's participation in unwelcome sexual conduct;
 - *Hostile environment* - Unwelcome sex-based conduct that, based on the totality of the circumstances, 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 District's education program or activity
 - is a fact-specific inquiry
 - *Specific offenses*
 - Sexual assault
 - Dating violence
 - Domestic violence
 - Stalking

(34 C.F.R. §106.2)



2020 Title IX Regulations – Notice/Knowledge

- Under the rules, Districts must respond to sexual harassment when it has “actual knowledge” of the harassment allegations. “Actual knowledge” is provided through:
 - Submission of complaint
 - Other circumstances demonstrating that any employee of the District knew/should have known of the allegations



2024 Title IX Regulations - Knowledge

- Districts must respond promptly and effectively when it has knowledge of conduct that reasonably may constitute sex discrimination
- And must promptly address sex discrimination



2020 Title IX Regulations – Jurisdiction

- Not all sexual harassment falls under Title IX. Instead, only harassment that:
 - Occurs in the U.S.
 - In an educational program or activity in which the District exercises control over:
 - The “harasser” (respondent)
 - The circumstances in which the harassment allegedly occurs
 - The victim was participating in the District’s educational program/activity at the time harassment occurred.



2024 Title IX Regulations – Jurisdiction

- Sex discrimination that occurs:
 - In a District education program or activity
(Note: Including conduct that is subject to the District disciplinary authority)
 - In the U.S.
- Sex-based hostile environment
 - In a District education program or activity
 - Even if some conduct contributing to the hostile environment occurred outside the education program or activating or outside the U.S.



Title IX – Don't Get Fancy

- Even though the definitions are technical, don't get "cute."
- Always take sex discrimination/sex-based harassment allegations seriously, even if you don't think the allegations qualify for a response under Title IX.
 - Could still qualify as Uniform Complaint (more on this later)
 - You may not know all the facts
- Consequences of non-compliance can be severe.
- If there's a question, contact legal.



Title IX – The Four Key Roles

- The Title IX process is handled by four roles:
 - Coordinator
 - Investigator
 - Decision Maker
 - Appellate Decision Maker
- 2020 Rule - Roles must be filled by *different people with no* conflicts of interest or bias
- 2024 Rule – Decision Maker **MAY** be the same person as coordinator or investigator
 - None can have a conflict of interest or bias



Title IX – What is my role?

If you are not one of the Four Main Roles – you are a **non-confidential employee** and you **MUST** notify the Title IX Coordinator if you have information about conduct that reasonably may constitute sex discrimination.

(New Title IX Regulations differentiate between Non-Confidential and Confidential Employees)



Title IX – Coordinator

- The Coordinator is the “MC” of the Title IX process
 - Complaint intake/filing
 - Supportive measures
 - Emergency removals
- District’s designated coordinator is:
Dena Kapsalis
Director of Student Services



Title IX – Coordinator – Intake/Filing

- Coordinator is responsible for intake and filing of complaints
- 2020 Rule - Complaint must *always* be submitted in writing, although you can assist complainants with disabilities
- 2024 Rule – Complaint can be an oral or written request



Title IX – Coordinator Hypothetical

You are the Title IX Coordinator...

Sbraya, a senior high school student, comes into your office and tells you that another student, Steven, sexually assaulted her in the bathroom that morning. You encourage her to file a Title IX Complaint. But Sbraya refuses because she doesn't want to ruin her senior year.

What is the next step?



2024 Title IX Regulations – Coordinator

- Coordinator is no longer required to file a complaint
- Coordinator **MAY** file a complaint if after considering a list of factors the Coordinator determines that:
 - the conduct presents an imminent and serious threat to the health or safety of the complainant or other person, or
 - that the conduct prevents the District from ensuring equal access on the basis of sex

(Note: 2020 Regulations mandated complaint filing in certain circumstances)



Title IX – Coordinator

- Coordinator has many other responsibilities
 - Notice of complaint filing
 - Supportive measures
 - Emergency removals
 - Informal resolution
 - Barriers to reporting



2020 Title IX Regulations – Coordinator

- When a formal complaint is filed, must provide written notice to both parties
- Notice must include many things such as:
 - Summary of complaint process
 - Statement that respondent is “innocent until proven guilty”
 - Right to an advisor
- Check AR 4119.12/5145.71 for details



2024 Title IX Regulations – Coordinator

- Notice to parties
- Notice must include:
 - Grievance procedures and informal resolution process
 - Sufficient information to allow parties to respond to allegations
 - Identities of the parties involved, the conduct, date(s), and location(s)
 - Statement that retaliation is prohibited
 - Statement that parties are entitled to equal opportunity to access the relevant, permissible evidence or description of evidence



2020 Title IX Regulations – Coordinator

- Upon receipt of a *report* (not complaint) of sexual harassment, must offer supportive measures
- Must be *non-punitive* (e.g., no discipline)
- Examples:
 - Schedule changes
 - No contact orders
 - Leaves of absence
 - Counseling



2024 Title IX Regulations – Coordinator

- Offer Supportive measures to complainant
- Offer supportive measure to respondent if grievance procedures initiated or informal resolution process offered
- Must be *non-punitive*



Title IX – Coordinator

- The Coordinator may also require the respondent's emergency removal
- For complaints against employees, employee may be placed on paid admin leave as normal



Title IX – Coordinator

- For complaints against students, emergency removals are more complicated
- Must conduct an “individualized safety and risk analysis”
 - 2020 Rule – Student must pose *immediate* danger to *physical* health or safety of another person
 - 2024 Rule – Student must pose an *imminent and serious threat* to the health or safety of another person
 - Process is undefined, but removal should be based on more than just the allegations
 - Also subject to appeal
 - Special education students retain rights



Title IX – Coordinator

- Coordinator *may* also offer informal resolution
 - Never required to offer
 - Parties never required to participate
 - Parties can withdraw
- If parties choose to participate, must provide consent
 - No longer has to be written
- Not appropriate in every case
- Note: Facilitator of informal resolution process cannot be same as Investigator or Decision Maker



Title IX – Investigator

- Investigations form the foundation of the complaint process
- Are the most important thing to get “right”
- Investigations will be scrutinized heavily by both parties



Title IX – Investigator

- It is *extremely* important that the Investigator (and the Decision Maker) are *neutral*
- The investigator is gathering facts and making credibility determinations
 - Not trying to prove anything
 - Not trying to help the parties get along
 - Not trying to reach what you feel is a “fair” result, or any particular result at all



Title IX – Investigator

- Also, it is vitally important not to prejudge the issue
 - The allegations may seem egregious or far fetched
 - You may feel the complainant is overreacting or that the respondent is a terrible criminal
 - But the complaint is just allegations—after investigating the allegations the facts are very likely to be more complicated



Title IX – Investigator

- Conflicts of interest or bias, the investigator and the Decision Maker, need to be avoided at all costs
- Conflicts/bias might include:
 - Personal connection to a party or party's family member(s)
 - Emotional impact of allegations
 - Strong feelings about a particular party
 - Anything that could undermine neutrality



Title IX – Investigator

- Investigator is responsible for gathering relevant evidence regarding the complaint
- Evidence can be almost anything:
 - Witness testimony/statements
 - Documents
 - Videos
 - Photographs
 - Text messages
- Relevant – related to the allegations of sex discrimination under investigation
 - Evidence is relevant when it may aid a Decision Maker in determining whether the alleged sex discrimination occurred.
 - Questions are relevant if they seek evidence that may aid in showing whether the alleged sex discrimination occurred

(34 C.F.R. § 106.2)



Title IX – Investigator

- In most situations, we recommend that the fact gathering process proceed like this:
 1. Obtain as much evidence as you can in advance of any witness interviews.
 2. Meet with the Complainant first to get a sense of the allegations and ask relevant questions regarding the complaint or evidence you gathered. During the interview, be sure to ask the complainant to provide any supporting evidence or evidence you feel is relevant to your investigation.
 3. Interview other relevant witnesses *other than* the Respondent. Again, ask for copies of supporting evidence, if available.
 4. Finally, interview the Respondent, incorporating the evidence you have already gathered into your questioning. Ask for copies of supporting evidence.
 5. Schedule follow-up interviews if necessary.



Title IX – Investigator

- While every investigation is different, there are some general tips for questioning as well:
 - Start with the easy questions!
 - Ask the basics (who, what, where, when)
 - Be neutral
 - Don't use "leading" questions if avoidable
 - Ask "why?"
 - Have a "flow"
 - *Always* ask:
 - Anything missed?
 - Any documents/evidence?
 - Any witnesses you think I should talk to?



Title IX – Investigator

- Properly documenting an investigation is often just as important as gathering evidence. Your investigation is only as good as its “record.”
 - Take real-time notes on any witness interaction, especially interviews
 - Don't rely on written statements if possible
 - Record credibility determinations
 - Have a witness present



2020 Title IX Regulations – Investigator

- Once you have gathered all relevant evidence, you must create a draft investigative report
 - The report must contain a copy of all evidence gathered during the investigation
 - Witness testimony and credibility determinations may be summarized
- Draft report must be forwarded to the parties at least ten days prior to submission to Decision Maker
- Parties must be permitted to review and issue a response to draft report
- After considering parties' feedback, draft report may be finalized and forwarded to the Decision Maker



2024 Title IX Regulations – Investigator

- No longer have to do a formal investigative report
- Must provide equal opportunity for the parties to present fact witnesses and evidence
- Review evidence and determine what is relevant and what is impermissible
- Provide each party with an equal opportunity to access relevant evidence in the following manner:
 - Provide equal opportunity to access either the relevant evidence or an accurate description of the evidence
 - If a description of the evidence is provided, the parties must be provided with an equal opportunity to access the relevant evidence upon request of any party
 - Provide a reasonable opportunity to respond to the evidence or description of the evidence
 - Take reasonable steps to prevent and address parties unauthorized disclosure of information and evidence obtained solely through the grievance procedures

(34 C.F.R. § 106.45(f))



Title IX – Decision Maker

- The next step in the process is the Decision Maker, who decides whether sex discrimination occurred
- 2020 Rule - Before reaching a decision, the Decision Maker must give each party an opportunity to submit written questions to any party or witness, and permit limited follow-up questions
- 2024 Rule – THIS STEP IS NO LONGER REQUIRED



2024 Title IX Regulations – Decision Maker

- **Assessing Credibility**
 - Provide a process that allows Decision Maker to question parties and witnesses to assess credibility to the extent credibility is in dispute and relevant to evaluating the allegations



Title IX – Decision Maker

- Decision must be based on a “preponderance of the evidence standard”
 - Fancy term for “more likely than not” or the “weight of the evidence”
- In other words, allegation against respondent may be upheld if the evidence shows it is more likely than not to be true



2020 Title IX Regulations – Decision Maker

- The Decision Maker then issues a written decision. The decision must:
 1. Identify all allegations potentially constituting sexual harassment
 2. Describe the procedural steps taken from receipt of the complaint through the written decision, including identifying witnesses, investigation methodology, and notifications provided to the parties
 3. Issue findings of fact supporting the decision
 4. Conclude whether the respondent's behavior violated the District's code of conduct
 5. State the rationale as to each allegation of sexual harassment, as well as any sanctions to be imposed on the respondent and what remedies will be provided to the complainant
 6. Describe the complainant and respondent's right to appeal and applicable procedures



2024 Title IX Regulations – Decision Maker

- Notify Parties in writing of determination of whether sex discrimination occurred
 - Include:
 - Rationale for the determination
 - Procedures and permissible bases for appeal
- If determination that sex discrimination occurred, as appropriate, Coordinator coordinates:
 - provision and implementation of remedies
 - disciplinary sanctions
 - Take other appropriate prompt and effective steps to ensure sex discrimination does not continue or recur



2020 Title IX Regulations – Appellate Decision Maker

- Either party may appeal the decision within ten days for any of the following reasons:
 1. Procedural irregularity affecting the outcome
 2. New material evidence that was unavailable previously
 3. Alleged conflict of interest or bias affecting the outcome



2024 Title IX Regulations – Appellate Decision Maker

- When a complaint is dismissed, the parties may appeal the decision for any of the following reasons:
 1. Procedural irregularity affecting the outcome
 2. New, material evidence that was unavailable previously
 3. Alleged conflict of interest or bias affecting the outcome
- Offer an appeal process that is at least the same as that offered in comparable proceedings



2020 Title IX Regulations – Appellate Decision Maker

- If an appeal is filed, the Appellate Decision Maker must:
 1. Notify the other parties in writing that an appeal has been filed
 2. Give both parties the opportunity to submit a written statement in support of or challenging the outcome of the original decision
 3. Issue a written decision within 20 days deciding the appeal and the reasons therefore



2024 Title IX Regulations – Appellate Decision Maker

- For appealed dismissed complaints the Appellate Decision Maker must:
 - Notify parties of appeal and allegations if not previously provided
 - Give parties a reasonable and equal opportunity to make a statement in support of or challenging the outcome
 - Notify parties of the result and rationale
- For other appeals, the District must offer an appeal process that is at least the same as that offered in comparable proceedings



TITLE IX – Key Takeaways

- District must provide protection from sex-based discrimination
 - District must take prompt and effective action to end any sex discrimination & prevent its recurrence
 - District must have policies & procedures in place to address sex-based discrimination
- (See Board Policy/Administrative Regulation 1312.3, 4119.12, 5145.71)
- **YOU MUST** report any conduct that you reasonably believe could constitute sex discrimination





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HYPOTHETICAL SITUATIONS & QUESTIONS???

