

Title IX Training
Jennifer E. Gornall, Esq., Neal R. Devlin, Esq., and Julia M. Herzing, Esq.
September 2020

TITLE IX TRAINING
September 14, 15 & 16, 2020

presented by
Jennifer E. Gornall, Esq., Julia M. Herzing, Esq. and Neal R. Devlin, Esq.
Knox McLaughlin Gornall & Sennett, P.C.
Copyright © 2020 Knox McLaughlin Gornall & Sennett, P.C.



TITLE IX TRAINING
PART I

presented by
Jennifer E. Gornall, Esq., Julia M. Herzing, Esq. and Neal R. Devlin, Esq.
Knox McLaughlin Gornall & Sennett, P.C.
Copyright © 2020 Knox McLaughlin Gornall & Sennett, P.C.



INTRODUCTION



Speakers

- Jennifer E. Gornall, Esq.
- Julia M. Herzing, Esq.
- Neal R. Devlin, Esq.



Title IX Training
Jennifer E. Gornall, Esq., Neal R. Devlin, Esq., and Julia M. Herzing, Esq.
September 2020

Training Overview

PART I / DAY 1

- Title IX Overview
 - Historical Context
 - New Regulations
 - Training Requirements
- Title IX Sexual Harassment
- Title IX Compliance
 - Underlying Intent of Regulations
 - Roles of Title IX Appointees
- Reporting and Responding to Sexual Harassment
 - Jurisdictional Issues
 - Initial Response to Report

PART II / DAY 2

- District Initial Response to Report
- Formal Complaint
- Informal Resolution Process
- Grievance Process
- Investigation
- Investigative Report
- Impartiality / Conflicts of Interest
- Evidence / Relevance

PART III / DAY 3

- Formal Title IX Complaint
 - Signed by Complainant vs. Title IX Coordinator
- Emergency Removals
- Technology
- Confidentiality
- Recordkeeping
- Hypotheticals
 - Student-to-student sexual harassment
 - Co-worker sexual harassment

5



TITLE IX OVERVIEW



Title IX – the Law

Title IX of the Education Amendments of 1972 provides the following:

- No person in the United States shall, on the basis of sex, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.

20 U.S.C. §1681(a).

7



Evolution of Title IX

- Title IX has evolved since its original enactment.
- Note the original statutory language makes no reference to prohibiting “sexual harassment.”
- The 1990s was a pivotal time for the development of “sexual harassment” theory pursuant to three seminal cases by the United States Supreme Court:

8



Evolution of Title IX

- Franklin v. Gwinnett County Schools (1992) – SCOTUS first recognizes that “sexual harassment” constituted “sex discrimination” and that a student-victim has the private right to sue and collect money damages for sexual harassment.

9



Evolution of Title IX

- Gebser v. Lago Vista Indep. Sch. Dist. (1998) – SCOTUS holds a school district itself can be liable for money damages under Title IX for teacher-on-student sexual harassment if:
 - (a) an employee with the “authority to address the alleged discrimination and to institute corrective measures;”
 - (b) has “actual notice” of misconduct of the teacher; and
 - (c) is “deliberately indifferent” to the teacher’s misconduct.
- Gebser established the premise that school districts can be held liable under Title IX when there “is an official decision by the recipient not to remedy the violation.”

10



Evolution of Title IX

- Davis v. Monroe (1999) – SCOTUS holds a school district can be liable for money damages under Title IX for student-on-student sexual harassment if:
 - (a) the Gebser standards of actual notice and deliberate indifference are met and further defines “deliberate indifference” as “clearly unreasonable in light of the known circumstances;”
 - (b) the school has substantial control over the context in which the harassment occurs and over the harasser; and

11



Evolution of Title IX

- (c) the conduct is “sexual harassment,” which is “so severe, pervasive *and* objectively offensive” that it “effectively bar[red] the victim’s access to an educational opportunity or benefit.”
- **NOTE:** SCOTUS did *not* adopt the Title VII definition of sexual harassment (“severe, persistent or pervasive”) for Title IX purposes.

12



Office of Civil Rights Guidance

- **Battle of Presidential Administrations:**
 - 2001 OCR Sexual Harassment Guidance – created a higher standard than established by SCOTUS.
 - Instituted a “knew or reasonably should have known” standard instead of actual notice.
 - Allows sexual harassment to simply “deny or limit” a student’s ability to participate in or receive services or opportunities, a lower standard than the “severe, pervasive and objectively offensive” to the extent they “effectively deny” access to the opportunities and services offered by the school district.
 - Required school districts to “eliminate the hostile environment and prevent its recurrence.”

13



Office of Civil Rights Guidance

- April 4, 2011 OCR “Dear Colleague Letter” – among other things, lowered the standard to determine responsibility for allegations of sexual harassment. Resulted in many accused students asserting denial of fair and due process.
- September 2017 – OCR rescinds 2011 DCL and announces new rulemaking (e.g., process for updated Title IX regulations).

14



Office of Civil Rights Guidance

- November 2018 – OCR issued proposed new regulations for notice and comment. US Department of Education received over 124,000 comments.
- May 2020 – new Title IX regulations issued, effective date August 14, 2020.

15



SEXUAL HARASSMENT



Overview: What is “Harassment”?

- Harassment is a form of unlawful discrimination in that it is characteristic-based treatment that adversely affects the workplace.
- School districts have a legal duty to take steps reasonably calculated to prevent and stop harassment, including having anti-harassment policies, providing training to employees, and addressing complaints.
- Any acceptance or perceived tolerance of harassment presents significant risk to school districts under state and federal laws, including Title IX.

17



What is “Harassment”?

- Harassment can include actions, words, jokes, or comments based on or because of an individual’s protected characteristic(s).
- Harassment also can include passive acts, such as alienating someone through omission or withholding necessary information or assistance.

18



What is “Title IX Sexual Harassment”?

“Title IX Sexual Harassment” means conduct on the basis of sex that satisfies one or more of the following:

1. A school employee conditioning the provision of an aid, benefit, or service on an individual's participation in unwelcome sexual conduct (i.e. *quid pro quo* harassment); or
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 school's education program or activity; or
3. Sexual assault, dating violence, domestic violence, or stalking (as defined by the Clery Act and Violence Against Women Act)

34 C.F.R. §106.30 (Definitions)

Title IX Sexual Harassment First Prong: Quid Pro Quo Harassment

- A school employee conditioning the provision of an aid, benefit, or service on a student's participation in unwelcome sexual conduct
 - “Making educational benefits or opportunities contingent on a person's participation in unwelcome conduct on the basis of sex strikes at the heart of Title IX's mandate that education programs and activities remain free from sex discrimination.”

[OCR Final Rule, 85 FR 30026, 30148 \(5/19/2020\)](#)

Title IX Sexual Harassment First Prong: Quid Pro Quo Harassment

- Applies whether the “bargain” was express or implied.
- Need not be “severe or pervasive”
 - “Abuse of authority in the form of even a single instance of *quid pro quo* harassment is inherently offensive and serious enough to jeopardize equal educational access.”

[OCR Final Rule, 85 FR 30026, 30148 \(5/19/2020\)](#)

Title IX Sexual Harassment Second Prong: Hostile Environment

- 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 school’s education program or activity

Title IX Sexual Harassment Second Prong: Hostile Environment

- Schools should be aware of the different “hostile environment” standards under Title VII and Title IX.
 - Title VII of the Civil Rights Act of 1964
(Title VII) prohibits employment discrimination based on race, color, religion, sex, or national origin.
 - Title IX of the Education Amendments of 1972
(Title IX) prohibits discrimination on the basis of sex, including sexual harassment, in education programs and activities. Applies to public and private education institutions that receive any federal funds.

23



Title IX vs. Title VII

- **Title VII**
 - Sexual harassment is illegal if it creates an environment that is hostile or intimidating or if it interferes with a person’s work performance.
 - Must be both subjectively and objectively offensive.
 - The Supreme Court has said that, in order for this type of harassment to violate **Title VII**, it must be “**sufficiently severe or pervasive** to alter the conditions of [the victim’s] employment and create an abusive working environment.”

24



Title IX vs. Title VII

- **Title IX Sexual Harassment:**
 - 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 school’s education program or activity

25



Title IX Sexual Harassment Second Prong: Hostile Environment

- **“Severe, pervasive, and objectively offensive”**
 - Differs from the Title VII “severe *or* pervasive” standard.
 - Adopts the *Davis* standard for sexual harassment under Title IX.
 - “[S]chools are unlike the adult workplace and ... children may regularly interact in a manner that would be unacceptable among adults... The Department does not wish to apply the same definition of actionable sexual harassment under Title VII to Title IX because such an application would equate workplaces with educational environments.”

[OCR Final Rule, 85 FR 30025, p. 30037 \(5/19/2020\)](#)

26



Title IX Sexual Harassment Second Prong: Hostile Environment

▪ Objectively Offensive

- “[A] plaintiff must establish sexual harassment of students that is so severe, pervasive, and **objectively offensive**, and that so undermines and detracts from the victims’ educational experience, that the victim-students are effectively denied equal access to an institution’s resources and opportunities.” *Davis v. Monroe*
- Reasonable Person Standard
 - Does the conduct create an environment that a **reasonable person** would find hostile or abusive?”
 - “[T]he objective severity of harassment should be judged from the perspective of a reasonable person in the plaintiff’s position, **considering all the circumstances**.” *Oncala v. Sundower Offshore Services, Inc.*, 523 U.S. 75 (1998)

27



Title IX Sexual Harassment Third Prong: Sexual Assault, Etc.

▪ Sexual Assault

- An offense that meets the definition of rape, fondling, incest, or statutory rape as defined in the FBI’s Uniform Crime Reporting System

▪ 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.
- Dating violence includes, but is not limited to, sexual or physical abuse or the threat of such abuse.

28



Sexual Assault, Dating Violence, Domestic Violence, or Stalking

- Domestic Violence
 - A felony or misdemeanor crime of violence committed by:
 - A current or former spouse or intimate partner of the victim;
 - A person with whom the victim shares a child;
 - A person who is cohabitating with, or has cohabitated with, the victim as a spouse or intimate partner;
 - A person similarly situated to a spouse of the victim; or
 - Any other person against an adult or youth victim who is protected from that person's acts under local domestic or family violence laws.
- Stalking
 - A course of conduct directed at a specific person that would cause a reasonable person to fear for the person's safety or the safety of others or suffer substantial emotional distress.

29



RETALIATION



Retaliation Prohibited

- No recipient or other person may intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by Title IX ... or 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 [Title IX].

34 C.F.R. §106.71(a)

31



Retaliation

- Retaliation based on the exercise of rights under Title IX is prohibited.
- Filing 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 sexual harassment for the purpose of interfering with any right or privilege secured by Title IX, constitutes retaliation.
- Complaints alleging retaliation may be filed according to the grievance procedures for sexual harassment.

32



Retaliation

- Specific circumstances
 - The exercise of rights protected under the First Amendment does not constitute “retaliation.”
 - Charging an individual with a code of conduct violation for making a materially false statement in bad faith does not constitute “retaliation.”
 - Note, however, that a determination regarding responsibility, alone, is not sufficient to conclude that any party made a materially false statement in bad faith.

33



Compliance with Title IX Mandates



Underlying Intent of New Regulations: a Balance of Interests

- The new regulations attempt to ensure a fair process for both the complainant (alleged victim) and respondent (alleged perpetrator).
 - Complainants are assured every report of sexual misconduct will be taken seriously, that they have the ability to trigger the use of a fair and unbiased grievance process through the filing of a “formal complaint,” and that they will have prompt access to supportive measures regardless of whether they pursue the formal process.
 - Respondents are also entitled to supportive measures and are assured they will not be subjected to discipline for any alleged Title IX violation unless they are found responsible after the implementation of a fair and unbiased grievance process.

35



Underlying Intent of New Regulations: a Balance of Interests

- School districts are held accountable for failure to respond equitably and promptly to sexual misconduct reports.
 - School districts are only liable under Title IX if the school district is “deliberately indifferent” (e.g., responds in a “clearly unreasonable” manner) to “actual knowledge” of sexual harassment. §106.44(a).
 - Remember Gebser’s premise: that school districts can be held liable under Title IX when there “is an official decision by the recipient *not* to remedy the violation.”
 - It would be highly unlikely for a school district’s response to be deemed “clearly unreasonable” if it provides supportive measures to the complainant and respondent, properly trains its employees, and implements and follows a Title IX compliant grievance process.

36



Underlying Intent of New Regulations: a Balance of Interests

- OCR “will not deem a [district’s] determination regarding responsibility to be evidence of deliberate indifference by the [district], or otherwise evidence of discrimination under Title IX by the [district], solely because [OCR] would have reached a different determination based on an independent weighing of the evidence.” 34 C.F.R. §106.44(b)(2).

37



Compliance with Title IX Mandates

- Designation of a Title IX Coordinator.
 - Must “prominently display” Title IX Coordinator’s name/title, office address, email address and telephone number on district’s website.
- Notification to applicants, students, employees, parents, guardians, unions, etc., that the school district does not discriminate on the basis of sex, which policy must be prominently displayed on the district’s website.

38



Compliance with Title IX Mandates

- Publication of a Title IX compliant policy which establishes grievance procedures that provide for the prompt and equitable resolution of student and employee complaints.
- Ensure all employees of school district are trained to identify sexual harassment and understand they have a duty to report it to the Title IX Coordinator or building level Title IX designee.

39



Compliance with Title IX Mandates

- Ensure Title IX Coordinators, investigators, decision-makers and informal resolution facilitators receive training on the following topics:
 - Definition of Title IX sexual harassment
 - The scope of the school district’s “education program or activity”
 - How to conduct an investigation and grievance process including hearings, appeals and informal resolution processes
 - 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
 - Issues of relevance to allow decision-makers to create an investigative report that fairly summarizes the relevant evidence
 - All training materials must not rely on sex stereotypes and must promote impartial investigations and adjudications of formal complaints of sexual harassment

40



Compliance with Title IX Mandates

- NOTE: All training materials used to train the Title IX officials must be posted on the District's publicly accessible website.
§106.45(b)(10)(i)(D).
- Failure to do any of the above would likely support a finding that the school district's response to a report of sexual harassment is clearly unreasonable (or deliberately indifferent).

41



Roles of Title IX Appointees

- The new Title IX regulations create very specific roles for those individuals involved in the investigation and grievance process who are responsible for implementing the Title IX due process protections and grievance process.
 - Who is appointed to fulfill what role depends on the size and the make-up of individual school districts.
 - Note that individuals who have received comprehensive Title IX training can act in more than one role
 - It is advisable to appoint multiple individuals to fill multiple roles to enable the school district to avoid conflicts of interest and/or bias.

42



Roles of Title IX Appointees

TITLE IX COORDINATOR

- Has the main responsibility for ensuring district compliance with Title IX regulations.
- Must be authorized to coordinate compliance efforts.
- School districts can appoint more than one Title IX Coordinator.
- Must identify name/title, office address, email address and telephone number on website and in all handbooks and policies.
- CAN be an investigator but CANNOT be an initial or appeal decision-maker.
- Our recommendation is for the Title IX Coordinator NOT to be the Superintendent, if possible, so the Superintendent can act in the role of appeal decision-maker.

43



Title IX Coordinator Duties

- Upon the district's receipt of a report of sexual harassment, must promptly contact the complainant (alleged victim of Title IX sexual harassment) to discuss the availability of "supportive measures" with or without the filing of a formal complaint and explain the process for filing a formal complaint.
- Must consider the complainant's wishes regarding supportive measures.
- Must offer supportive measures to the respondent (alleged perpetrator of Title IX sexual harassment).
- Responsibility for coordinating the effective implementation of supportive measures.

44



Title IX Coordinator Duties

- Must ensure the school district treats complainants and respondents “equitably.” With regard to the respondent, this means the Title IX Coordinator must ensure the school district follows a Title IX compliant grievance process before the imposition of any sanctions other actions that are not supportive measures against the respondent.
- Has the ability to initiate the Title IX formal complaint process even if the complainant decides not to proceed with a formal complaint.
- Is responsible for the effective implementation of any remedies.

45



Roles of Title IX Appointees

INVESTIGATOR

- May be the Title IX Coordinator, if necessary, but we recommend keeping those roles separate.
- School districts should have more than one investigator.
- Must receive training on how to conduct an investigation and on issues of relevance to create an “investigative report” that fairly summarizes the evidence.
- Depending on the size of the school district, Assistant Principals or Building Principals would be good choices as investigators.
- Strongly recommend the use of Human Resource Director in cases involving employees.

46



Roles of Title IX Appointees

INITIAL DECISION-MAKER

- May NOT be the Title IX Coordinator nor the investigator. Possibly the Building Principal or central Administrative employee.
- Is responsible for reviewing the “investigative report.”
- Is responsible for sending the investigative report to the complainant and respondent and allow for the exchange of relevant questions.
- Must draft a “written determination regarding responsibility.”
- Must ensure s/he is free from conflicts of interest and bias.

47



Roles of Title IX Appointees

APPEAL DECISION-MAKER

- May NOT be the Title IX Coordinator, the investigator nor the initial decision-maker.
 - It makes the most sense for the Superintendent to be the Appeal Decision-Maker.
 - We do not recommend using your Solicitor as the Appeal Decision-Maker because it would preclude counsel’s involvement in the process leading up to that point.
 - School boards likely will not have had appropriate Title IX training to act in role of Appeal Decision-Maker.
 - If your Superintendent is the Title IX Coordinator – consider using a Superintendent from a neighboring school district who has had Title IX training as the Appeal Decision-Maker.

48



Appeal Decision-Maker, cont.

- Is responsible for giving both parties a reasonable, equal opportunity to submit written statements in support of or challenging the outcome articulated in the initial decision.
- Must issue a written decision describing the result of the appeal and the rationale for the result.
- Must ensure s/he is free from conflicts of interest and bias.

49



Roles of Title IX Appointees

INFORMAL RESOLUTION FACILITATOR

- Must be free from conflicts of interest, bias and trained to be impartial.
- Must have completed the Title IX training.
- Should be adept at facilitating or mediating between students.
- Consider utilizing Assistant Principals, Principal, Guidance Counselors and Mental Health Specialists for this role.

50



Reporting and Responding to Sexual Harassment



When Must a School Respond to Title IX Sexual Harassment?

- If any employee of the school district has “actual knowledge” of “sexual harassment” in an “education program or activity” against “a person in the United States” the district must respond promptly and in a manner that is not deliberately indifferent.



When Must a School Respond to Title IX Sexual Harassment?

- When any employee in the K-12 setting has “actual knowledge” of sexual harassment.
- An employee would have “actual knowledge” of sexual harassment if s/he “has notice of sexual harassment or allegations of sexual harassment.”
Examples of notice include:

53



When Must a School Respond to Title IX Sexual Harassment?

- If the employee observed or witnessed sexual harassment
- If the employee is told that sexual harassment has occurred by the complainant, the complainant’s parents or another 3rd party
- If the employee receives a voice mail or an email or any other written or verbal complaint alleging sexual harassment has occurred
- NOTE: the school district does not have “actual knowledge” if the only official of the school district with actual knowledge is the respondent (the alleged perpetrator).
- NOTE: Imputation of knowledge based solely on vicarious liability or constructive notice is insufficient to constitute actual knowledge. 34 C.F.R. §106.30(a). In other words, the broader old OCR standard of “knew or should have known” is no longer applicable.

54



When Must a School Respond to Title IX Sexual Harassment?

When the reported incident occurred “against a person in the United States.” §106.44(a)

- This is a “jurisdictional” issue.
- If the incident occurs on a school field trip to Canada, Title IX is not implicated.
- But, remember, school district must analyze whether other laws and/or other provisions of your Student Code of Conduct would apply.

55



When Must a School Respond to Title IX Sexual Harassment?

When the harassment occurred in an “education program or activity” of the school district. §106.44(a), §106.30, §106.45

- Title IX Coordinator must analyze whether the reported incident occurred in the context of an education program or activity which includes “locations, events or circumstances over which the school district exercised substantial control over both the respondent and the context in which the sexual harassment occurred.”

56



When Must a School Respond to Title IX Sexual Harassment?

- On property or locations either owned or leased or rented by the school district.
- During school-sponsored events, such as athletic events or field trips, even if they occur off school property (but inside the United States).
- Computer/internet networks or computer hardware/software owned or operated or used by the school district in the course of its educational services or programs.
- Area of ambiguity: off campus behavior/impact of privately-owned technology. Again, remember, even if Title IX does not apply, analyze the application of other laws and school district policies to the behavior at issue.

57



TITLE IX TRAINING

PART II

presented by
Jennifer E. Gornall, Esq., Julia M. Herzing, Esq. and Neal R. Devlin, Esq.
Knox McLaughlin Gornall & Sennett, P.C.
Copyright © 2020 Knox McLaughlin Gornall & Sennett, P.C.



Reporting Sexual Harassment: Who, How and When?



Reporting Sexual Harassment: Who?

- **Who?** Any person may report sex discrimination:
 - the harassed student or employee (complainant)
 - the complainant's parent
 - a 3rd party



Reporting Sexual Harassment: How?

- **How?** Reports can be made many ways:
 - In person
 - By mail, telephone or email using the contact information to the Title IX Coordinator
 - By any means that results in the Title IX Coordinator receiving the person's report (e.g., all employees must be trained to notify the Title IX Coordinator of reports they have received or actual knowledge they have attained)

61



Reporting Sexual Harassment: When?

- **When?** Reports can be made at any time:
 - through use of the telephone number, email address or mail to the Title IX Coordinator
 - School districts must ensure individuals have the capability to make complaints at any time

62



Response to Report of Sexual Harassment

- One of the most unique procedural differences imposed by the new regulations is that school districts must engage in a bifurcated response when they receive a report of sexual harassment:
 - Initial response after actual knowledge of a “report”
 - Response after the filing of a “formal complaint”

63



Initial Response to Report of Sexual Harassment

- When a school district receives report of sexual harassment, the Title IX Coordinator must make contact with both the complainant and the respondent. School district must treat complainants and respondents “equitably.”
34 C.F.R. §106.44(a), .30(a)
- The Title IX Coordinator must promptly do the following – even if a formal complaint is not filed:

64



Initial Response to Report of Sexual Harassment

For the complainant:

- Offer “supportive measures.”
- Explain supportive measures are available even without the filing of a formal complaint.
- Consider the complainant’s wishes with respect to supportive measures.
- Explain the process for filing a formal complaint.

For the respondent:

- Offer supportive measures.
- Follow the Title IX grievance process before disciplining or sanctioning respondent (subject to “emergency removal” provisions discussed below)

65



Initial Response to Report of Sexual Harassment: Supportive Measures



What Are “Supportive Measures”?

34 C.F.R. §106.30(a)

- Non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, and without fee or charge to the complainant or respondent before or after the filing of a formal complaint or where no formal complaint has been filed.
- Supportive measures are designed to restore or preserve equal access to the school district’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.

67



What Are “Supportive Measures”?

- Supportive measures may include the following:
 - 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
 - Other similar measures

68



What Are “Supportive Measures”?

- School district 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 school district to provide the supportive measures.”
- Title IX Coordinator is responsible for coordinating the effective implementation of supportive measures.
- Title IX Coordinator should document:
 - that supportive measures were offered
 - if supportive measures were not given, why that result or response is not “clearly unreasonable in light of the known circumstances”
 - if supportive measures requested by the complainant were not granted, indicate why the refusal was not “clearly unreasonable in light of the known circumstances”

69



Title IX Investigation: Report Through Appeal



Begins With a Report of Sexual Harassment

- Review who can make a report
- Review who can receive a report
- PSBA Reporting Form

71



Report Form

**DISCRIMINATION/SEXUAL HARASSMENT/BULLYING/
HAZING/DATING VIOLENCE/RETALIATION
REPORT FORM**

The Board declares it to be the policy of this district to provide a safe, positive learning and working environment that is free from bullying, hazing, dating violence, sexual harassment and other discrimination, and retaliation. If you have experienced, or if you have knowledge of, any such actions, we encourage you to complete this form. The Title IX Coordinator will be happy to support you by answering any questions about the report form, reviewing the report form for completion and assisting as necessary with completion of the report. The Title IX Coordinator's contact information is:

Position:

Address:

Email: _____

Phone Number: _____

72



Title IX Training
Jennifer E. Gornall, Esq., Neal R. Devlin, Esq., and Julia M. Herzing, Esq.
September 2020

Retaliation Prohibited

The district, its employees and others are prohibited from intimidating, threatening, coercing, or discriminating against you for filing this report. Please contact the Title IX Coordinator immediately if you believe retaliation has occurred.

Confidentiality

Confidentiality of all parties, witnesses, the allegations and the filing of a report shall be handled in accordance with applicable law, regulations, Board policy, procedures, and the district's legal and investigative obligations. The school will take all reasonable steps to investigate and respond to the report, consistent with a request for confidentiality as long as doing so does not preclude the school from responding effectively to the report. If you have any questions regarding how the information contained in this report may be used, please discuss them with the Title IX Coordinator prior to filing the report. Once this report is filed, the district has an obligation to investigate the information provided.

Note: For purposes of Title IX sexual harassment, this Report Form serves initially as an informal report, not a formal complaint of Sexual Harassment under Title IX.

I. Information About the Person Making This Report:

Name: _____

Address: _____

Phone Number: _____

School Building: _____

I am a:

- Student Parent/Guardian Employee Volunteer Visitor
 Other _____ (please explain relationship to the district)

If you are not the victim of the reported conduct, please identify the alleged victim:

Name: _____

The alleged victim is: Your Child Another Student A District Employee

Other: _____ (please explain relationship to the alleged victim)

Title IX Training
Jennifer E. Gornall, Esq., Neal R. Devlin, Esq., and Julia M. Herzing, Esq.
September 2020

II. Information About the Person(s) You Believe is/are Responsible for the Bullying, Hazing, Harassing or Other Discrimination You are Reporting

What is/are the name(s) of the individual(s) you believe is/are responsible for the conduct you are reporting?

Name(s):

The reported individual(s) is/are:

- Student(s) Employee(s)
- Other _____ (please explain relationship to the district)

75



III. Description of the Conduct You are Reporting

In your own words, please do your best to describe the conduct you are reporting as clearly as possible. Please attach additional pages if necessary:

When did the reported conduct occur? (Please provide the specific date(s) and time(s) if possible):

Where did the reported conduct take place?

Please provide the name(s) of any person(s) who was/were present, even if for only part of the time.

Please provide the name(s) of any other person(s) that may have knowledge or related information surrounding the reported conduct.

Have you reported this conduct to any other individual prior to giving this report?

- Yes No

If yes, who did you tell about it?

If you are the victim of the reported conduct, how has this affected you? _____

76



Title IX Training
Jennifer E. Gornall, Esq., Neal R. Devlin, Esq., and Julia M. Herzing, Esq.
September 2020


I affirm that the information reported above is true to the best of my knowledge, information and belief.

Signature of Person Making the Report

Date

Received By

Date




77

FOR OFFICIAL USE ONLY

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 and Attachment 3. The Title IX Coordinator shall consider the complainant's wishes with respect to supportive measures.



78

Title IX Training
Jennifer E. Gornall, Esq., Neal R. Devlin, Esq., and Julia M. Herzing, Esq.
September 2020

I. Reporter Information:

Name: _____

Address: _____

Phone Number: _____

School Building: _____

Reporter is a:

Student Parent/Guardian Employee Volunteer Visitor


Other _____ (please explain relationship to the district)

If the reporter is not the victim of the reported conduct, please identify the alleged victim:

Name: _____

The alleged victim is: Reporter's Child Another Student Another Employee

Other: _____ (please explain relationship to the alleged victim)

79 

II. Respondent Information

Please state the name(s) of the individual(s) believed to have conducted the reported violation:

Name(s): _____


The reported respondent(s) is/are:

Student(s) Employee(s)

Other _____ (please explain relationship to the district)

III. Level of Report:

Informal Formal (see additional information below on Title IX formal complaints)

80 

Title IX Training
Jennifer E. Gornall, Esq., Neal R. Devlin, Esq., and Julia M. Herzing, Esq.
September 2020


IV. Type of Report:

Title IX Sexual Harassment Discrimination Retaliation Bullying

Hazing Dating Violence Other _____

Nature of the Report (check all that apply):

<input type="checkbox"/> Race	<input type="checkbox"/> Age
<input type="checkbox"/> Color	<input type="checkbox"/> Creed
<input type="checkbox"/> Religion	<input type="checkbox"/> Sex
<input type="checkbox"/> Sexual Orientation	<input type="checkbox"/> Sexual Harassment (Title IX)
<input type="checkbox"/> National Origin	<input type="checkbox"/> Ancestry
<input type="checkbox"/> Marital Status	<input type="checkbox"/> Pregnancy
<input type="checkbox"/> Handicap/Disability	<input type="checkbox"/> Bullying
<input type="checkbox"/> Hazing	<input type="checkbox"/> Dating Violence

81 

V. Reported Conduct


Describe the reported conduct below, including specific actions, dates, times, locations and any other details necessary to properly assess the reported incident(s).

How often did the conduct occur?

Is it being repeated? Yes No

Do the circumstances involve a student identified as a student with a disability under the Individuals with Disabilities Education Act or Section 504 of the Rehabilitation Act? If yes, contact the Director of Special Education.

How has the conduct affected the alleged victim's ability to fully participate in the school's academic, programs, activities or school employment?


82 

Title IX Training
Jennifer E. Gornall, Esq., Neal R. Devlin, Esq., and Julia M. Herzing, Esq.
September 2020

What is the alleged victim's relationship with the alleged respondent?

Insert names, descriptions, and/or contact information of individuals believed to have observed the conduct or who otherwise may have knowledge of the conduct and/or related circumstances.

Additional observations or evidence including pictures, texts, emails, video or other information submitted to the Title IX Coordinator.

83 

VI. Safety Concerns

Are there safety concerns that may require Emergency Removal of or Administrative Leave for a respondent? (This requires an individualized safety and risk analysis as to whether there is an immediate threat to the physical health or safety of a student or other individual.)

No.


Yes, please describe:

VII. Other Reports

Has the conduct been reported to the police or any other agency?

No

Yes Date reported: _____ Agency: _____

84 

Title IX Training
Jennifer E. Gornall, Esq., Neal R. Devlin, Esq., and Julia M. Herzing, Esq.
September 2020

VIII. Identification of Policies Implicated by Reported Conduct

Check all that apply:

- Policy 103. Discrimination/Title IX Sexual Harassment Affecting Students
- Policy 104. Discrimination/Title IX Sexual Harassment Affecting Staff
- Policy 247. Hazing
- Policy 249. Bullying
- Policy 252. Dating Violence
- Other

To meet the definition of Title IX sexual harassment, the conduct must have taken place during a district education program or activity involving a person in the United States. An **education program or activity** includes the locations, events or circumstances over which the district exercises substantial control over both the respondent and the context in which the sexual harassment occurs. Title IX applies to all of a district's education programs or activities, whether such programs or activities occur on-campus or off-campus.

Did the incident occur during a during a school program or activity involving a person in the United States?

- Yes
- No

85



To meet the definition of Title IX sexual harassment, the conduct needs to satisfy one or more of the following (please check all that apply):

- A district employee conditioning the provision of an aid, benefit, or district service on an individual's participation in unwelcome sexual conduct, commonly referred to as quid pro quo sexual harassment.
- Unwelcome conduct determined by a reasonable person to be so severe, pervasive and objectively offensive that it effectively denies a person equal access to a district education program or activity.
- Sexual assault, dating violence, domestic violence or stalking.

86



Title IX Training
Jennifer E. Gornall, Esq., Neal R. Devlin, Esq., and Julia M. Herzing, Esq.
September 2020

Dating violence means violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the victim and where the existence of such a relationship is determined by the following factors:

- Length of relationship.
- Type of relationship.
- Frequency of interaction between the persons involved in the relationship.

Domestic violence includes felony or misdemeanor crimes of violence committed by a current or former spouse or intimate partner of the victim, by a person with whom the victim shares a child in common, by a person who is cohabitating with or has cohabitated with the victim as a spouse or intimate partner, by a person similarly situated to a spouse of the victim under the domestic or family violence laws of the jurisdiction receiving federal funding, or by any other person against an adult or youth victim who is protected from that person's acts under the domestic or family violence laws of the jurisdiction.

87



Sexual assault means a sexual offense under a state or federal law that is classified as a forcible or nonforcible sex offense under the uniform crime reporting system of the Federal Bureau of Investigation.

Stalking means stalking on the basis of sex, for example when the stalker desires to date a victim. Stalking means to engage in a course of conduct directed at a specific person that would cause a reasonable person to either:

1. Fear for their safety or the safety of others.
2. Suffer substantial emotional distress.

88



Title IX Training
Jennifer E. Gornall, Esq., Neal R. Devlin, Esq., and Julia M. Herzing, Esq.
September 2020

IX. Recommended Course of Action

After consultation with the complainant and consideration of the reported information, the Title IX Coordinator directs the report to proceed under the provisions of (check all that apply):

- No further action at this time. Reason:

- Policy 247. Hazing
- Policy 249. Bullying
- Policy 252. Dating Violence
- Other

- Policy 103 Discrimination/Title IX Sexual Harassment Affecting Students: Attachment 2 Discrimination Complaint Procedures
- Policy 104 Discrimination/Title IX Sexual Harassment Affecting Staff: Attachment 2 Discrimination Complaint Procedures
- Policy 103. Discrimination/Title IX Sexual Harassment Affecting Students: Attachment 3 Title IX Sexual Harassment Procedures and Grievance Process for Formal Complaints
- Policy 104. Discrimination/Title IX Sexual Harassment Affecting Staff: Attachment 3 Title IX Sexual Harassment Procedures and Grievance Process for Formal Complaints

X. Title IX Information to Complainant

What supportive measures were discussed with the complainant, and what were the complainant's wishes with respect to supportive measures?

Upon designating a course of action under Title IX sexual harassment, the Title IX Coordinator will omply:

1. Explain to the complainant the process for filing a formal complaint.

Title IX Training
Jennifer E. Gornall, Esq., Neal R. Devlin, Esq., and Julia M. Herzing, Esq.
September 2020

2. Inform the complainant of the continued availability of supportive measures with or without the filing of a formal complaint.

3. The Title IX Coordinator shall contact a student complainant's parents/guardians and provide them with information regarding the report and Title IX sexual harassment procedures and grievance process for formal complaints.

If the complainant/reporter, school staff or others with professional knowledge relating to the complainant's health and well-being indicate that notifying the parents/guardians could cause serious harm to the health or well-being of the complainant or other person(s), the Title IX Coordinator will determine, in consultation with such individuals and upon advice of legal counsel, whether to withhold or delay notification of the report from the complainant's parents/guardians.

4. Determine what supportive measures may be offered to the respondent.

5. Determine whether the complainant wishes this report to be treated as a formal complaint.

91



XI. Title IX Coordinator Signature

I recommend the above course of action based on my consultation with the complainant and the information available at this time.

Title IX Coordinator: _____

Date:

XII. Title IX Formal Complaint Action

The Title IX Coordinator shall have the complainant check the appropriate box and sign and date below to indicate whether or not the complainant wishes to have this form serve as a formal complaint pursuant to Title IX.

I would like my report to be treated as a formal complaint pursuant to Title IX.

Yes No

Complainant's Signature: _____

Date:

92



Title IX Training
Jennifer E. Gornall, Esq., Neal R. Devlin, Esq., and Julia M. Herzing, Esq.
September 2020

If the complainant does not wish this report to be treated as a formal complaint pursuant to Title IX, the Title IX Coordinator must assess whether actions limited to supportive measures are a sufficient response to alleged behavior, or whether a formal complaint process is necessary to investigate and address the situation adequately. If the facts as contained in this Report, if presumed as true, could meet the definition of Title IX sexual harassment, the Title IX Coordinator must proceed with the filing of a formal complaint unless the Title IX Coordinator determines that circumstances exist to support a finding it is not clearly unreasonable to refrain from initiating the formal complaint process. The Title IX Coordinator may consult with the school solicitor and other district officials in making this decision.

As Title IX Coordinator, I have determined that, notwithstanding the complainant's preference, it is necessary to proceed with the Grievance Process for Formal Complaints for the following reasons:

Therefore, I am signing this form for the purpose of serving as the formal complaint initiating that process:

Title IX Coordinator's Signature:

Date:

© 2020 PSBA

93



Stage One: Pre-Formal Complaint

- Title IX Coordinator receives and reviews report
- Contact made promptly with Complainant, if known, and/or Parent/legal guardian, if known, to discuss:
 - Confidentiality
 - Supportive Measures (with or without a formal complaint)
 - Explain the formal complaint process, including the grievance procedure
 - This is not an investigatory interview

94



Title IX Training
Jennifer E. Gornall, Esq., Neal R. Devlin, Esq., and Julia M. Herzing, Esq.
September 2020

- Documenting all steps is key
 - Providing written summary of information discussed with Complainant
 - Internal notes reflecting dates and times of contact and decisions on supportive measures and confidentiality
 - This is a key component of Title IX Coordinator’s role
- Decision on Formal Complaint
 - If Complainant wishes to move forward with a formal complaint, then that Complaint goes to the Title IX Coordinator.
 - Title IX Coordinator must conduct the jurisdictional analysis to determine if the grievance process will begin.

95



Informal Resolution

- A school **may**, but is not required to, offer the parties an “**informal resolution**” to resolve a complaint when:
 - A formal complaint has been filed;
 - The school determines that an informal resolution would be appropriate under the circumstances; and
 - Both parties provide fully informed written consent for informal resolution.

96



Informal Resolution

- A school may **not** :
 - Initiate or offer informal resolution of a Title IX sexual harassment report prior to the issuance of a formal complaint.
 - Require either the complainant or the respondent to waive the right to an investigation or adjudication of a formal complaint or to participate in an informal resolution process.
 - Offer or facilitate informal resolution to resolve allegations that an employee sexually harassed a student.

97



Informal Resolution Process

- At any time after a formal complaint is issued, but before a determination is reached, a school may facilitate an informal resolution process, such as mediation, by:
 - Providing written notice to the parties disclosing:
 - The allegations involved;
 - The requirements of the informal resolution process, including the circumstances under which it would preclude a party from resuming a formal complaint; and
 - The consequences of participating in the informal resolution process, including the records that will be maintained or could be shared.
 - Obtaining the parties' voluntary, written consent.

98



Stage Two: Grievance Process

The Grievance Process is the procedure used to investigate and make a final determination relating to the formal complaint. It is essential that the process be fair to complainants, but providing an efficient method to address claims of sexual harassment, and to respondents, by providing a fair process in which they are presumed not responsible until a final determination is made.

Requirements of grievance process:

- Treat complainants and respondents equitably
- Require an objective evaluation of all relevant evidence – this includes inculpatory and exculpatory evidence

- Require that credibility determinations may not be based on a person's status as complainant, respondent, or witness.
 - Making credibility determinations involves
 - Unbiased observation of witness's demeanor
 - Considering of internal and external inconsistencies
 - Witness's opportunity to observe and provide the information they are giving
 - Witness's bias or motive.
- Require that no one filling a required role (Coordinator, Investigator, Decision-Maker, Facilitator) have any conflict of interest.

Title IX Training
Jennifer E. Gornall, Esq., Neal R. Devlin, Esq., and Julia M. Herzing, Esq.
September 2020

- Require that all individuals filling the relevant roles have training
- Include a presumption that the respondent is not responsible for the alleged conduct until a determination regarding responsibility is made at the conclusion of the process
- Establish reasonably prompt time frames for the conclusion of the process
- Describe the range of possible disciplinary actions

101



- Establish the standard of evidence to be used.
 - “Clear and Convincing Evidence”
 - “concluding that a fact is highly probable to be true”
- OR**
- “Preponderance of the Evidence”
- “a fact is more likely true than not”

- We are recommending the use of a “preponderance of the evidence” standard, which is the standard generally used in other school based decision making processes (e.g. expulsion hearings).

102



Title IX Training
Jennifer E. Gornall, Esq., Neal R. Devlin, Esq., and Julia M. Herzing, Esq.
September 2020

- Identify and describe the procedures that will be followed including investigation, decision making process and appeals – include the permissible bases for an appeal
- Describe the range of supportive measures available to complainants and respondents
- Not permit the use of questions or evidence that constitute or seek disclosure of information protected by a legally recognized privilege, unless the person holding that privilege has waived it.

103



Stage Two: Notice to Parties and Title IX Coordinator's Continuing Role

Upon the filing of a formal complaint, the Title IX Coordinator must give all parties written notice, which must include

- Notice of the grievance process – We will be providing a form written notice.
- Identity of the parties, if known
- The conduct that allegedly constitutes sexual harassment
- The date and location of the incident, if known
- A statement that the respondent is presumed not responsible for the alleged conduct and that determination of responsibility is made at the conclusion of the grievance process

104



Title IX Training
Jennifer E. Gornall, Esq., Neal R. Devlin, Esq., and Julia M. Herzing, Esq.
September 2020

- The parties' right to have any advisor of their choosing, who may be, but is not required to be, an attorney
- The parties may inspect and review evidence gathered
- Inform the parties of any provision of the schools code/policies that prohibit knowingly making false statements or knowingly submitting false information during the grievance process.

105



- In addition to the written notice, the Title IX Coordinator should promptly notify Respondent and Respondent's Parents of the filing of the Complaint and;
 - Discuss availability of supportive measures
 - Discuss Grievance Process
 - Discuss any no contact orders
 - This meeting is not in lieu of the formal written notice and is not an investigatory interview.

106



Title IX Training
Jennifer E. Gornall, Esq., Neal R. Devlin, Esq., and Julia M. Herzing, Esq.
September 2020

The Title IX Coordinator will then turn the investigation over to the Title IX Investigator, however, the Title IX Coordinator stays involved in the process:

- Regular contact with Complainant and Respondent regarding the status of the process and supportive measures
- Transmitting the investigative report, responses to that report, the determination and any appeal decisions to the parties
- Staying available to the parties for questions
- Ultimately implementing any remedies designed to restore or preserve the complainant's equal access to education programming and activities.
- Preserve all materials related to the investigation, determination and appeal for a minimum of 7 years.

107



Stage Two: Investigation

Once the Title IX Coordinator issues the notice of complaint, the Title IX Investigator begins the investigation

The Investigation

- The burden to gather evidence and of proof rests on the school, not on either party
 - The school is not simply an arbiter of the issue, it must actively investigate and develop a record of all relevant evidence upon which a decision can then be made. This is different than traditional investigations.
- Title IX Investigator must provide equal opportunity for parties to present/identify witnesses
 - Follow up on all identified witnesses who may have relevant evidence

108



Title IX Training
Jennifer E. Gornall, Esq., Neal R. Devlin, Esq., and Julia M. Herzing, Esq.
September 2020

- Must allow the parties to have an advisor of their choosing present at any interviews or meetings
- Must provide advance written notice of any meetings or interviews so that the party has sufficient time to prepare.
- Medical Records
- Privileged Information

109



Investigation Techniques

- Open ended questioning (“What happened?” vs. “Isn’t it true that _____ happened?”)
- Asking follow-up questions to seek to get a complete understanding of the relevant facts and information.
- Questions designed to uncover other evidence (“Who else saw that?”, “Has anyone else discussed this incident with you?” etc.)
- Take detailed and objective notes. Avoid extraneous commentary.
- Pursuing all inquiries that may lead to relevant information, but avoiding questions that will necessarily invite the introduction of irrelevant or inadmissible evidence.

110



Potential Dismissal of Complaint

- During the Investigation, events can develop that require dismissal of the Complaint:
 - A determination that the alleged conduct would not meet Title IX’s jurisdictional requirements:
 - Events occurred outside of United States
 - Conduct did not involve educational program or activity
 - Conduct as alleged does not rise to Title IX’s definition of sexual harassment.

111



- The Investigation can also lead to developments that allow, but do not require, dismissal:
 - The Complainant withdraws, in writing, his or her Formal Complaint
 - The Respondent is no longer enrolled in or employed by the District
 - Specific circumstances prevent the recipient from gathering evidence sufficient to reach a determination

112



The Transmission of Evidence

The Title IX Investigator must provide both parties an equal opportunity to inspect and review any evidence obtained as part of the investigation that is related (not necessarily relevant) to the allegations raised in the formal complaint

- This includes evidence that the investigator does not intend to rely upon.
- This includes both inculpatory and exculpatory evidence.
- The parties must be given at least 10 days to review and provide a written response to this evidence prior to the completion of the investigative report.
- The Title IX Investigator must consider the parties' responses prior to finalizing the investigative report.

113



Stage Two: The Investigative Report

The culmination of the investigator's work is the creation of an investigative report. That report must include a fair summary of all relevant evidence.

We also recommend that the report:

- Provide detailed summaries of all relevant interviews
- Provide detailed summaries of all relevant documentary or other tangible evidence
- For any credibility determinations made by the investigator, an explanation of the basis of such determination that cannot be related to the witnesses status as a complainant, respondent or witness.

114



Title IX Training
Jennifer E. Gornall, Esq., Neal R. Devlin, Esq., and Julia M. Herzing, Esq.
September 2020

- We will be providing a form Investigative Report that can be used.
- The investigative report is then sent to the parties a minimum of 10 days before any decision will be made for their review and written response.

115



Stage Three: Determination Regarding Responsibility

- Once the investigative report is complete, it is provided to each party for their review and any written response they wish to make. It is also provided to the Initial Decision Maker, who must also have available to him or her all evidence that was subject to the parties inspection and review.

116



Title IX Training
Jennifer E. Gornall, Esq., Neal R. Devlin, Esq., and Julia M. Herzing, Esq.
September 2020

- The Initial Decision Maker then must:
 - Provide the parties with a reasonable period of time to submit written, relevant questions that they would like to have asked of any party or witness.
 - Provide all parties with the responses to any such questions, and the opportunity for the parties to submit limited, follow-up questions.
 - If the Initial Decision Maker decides to exclude a proposed question as not relevant or otherwise inadmissible, he or she must explain to the party proposing the question that decision.

117



Once the written questioning is complete, the Initial Decision Maker then makes a determination regarding responsibility through a written determination that must be simultaneously provided to the parties and must include:

- An identification of the allegations potentially constituting sexual harassment
- A detailed description of the procedural steps followed from receipt of the formal complaint through determination, this includes
 - All notifications of the parties
 - All interviews that were conducted
 - Any site visits that occurred
 - And a description of the methods used to gather evidence

118



Title IX Training
Jennifer E. Gornall, Esq., Neal R. Devlin, Esq., and Julia M. Herzing, Esq.
September 2020

- Findings of fact supporting the determination
- Conclusions regarding the application of the school's code of conduct to the facts
- A statement of, and rationale for, the results as to each allegations, including determination of responsibility, disciplinary sanctions imposed, and whether remedies designed to restore or preserve equal access to the education program will be provided to the complainant
- The procedures for an appeal.
- We will be providing a form Determination.

119



Stage Four: Appeal

Either party must be permitted the opportunity to appeal a Determination on at least the following bases:

- A procedural irregularity that affected the outcome of the matter
- New evidence that was not reasonably available at the time of the determination regarding responsibility or dismissal, and that could affect the outcome of the matter.
- That the Title IX Coordinator, Investigator, or Initial Decision-Maker had a conflict of interest or bias for or against complainants or respondents generally, or the individual complainant or respondent that affected the outcome of the matter.

120



Title IX Training
Jennifer E. Gornall, Esq., Neal R. Devlin, Esq., and Julia M. Herzing, Esq.
September 2020

The appeal process must include the following:

- Notifying the other party, in writing, when an appeal is filed
- Ensure that the appeal decision maker is not the same person as the Title IX Coordinator, Investigator, or Initial Decision-Maker.
- Give both parties a reasonable and equal opportunity to submit a written statement in support of, or challenging, the outcome
- Issue a written decision, simultaneously to both parties, describing the result of the appeal and the rationale for the result.
- We will be providing a form appellate decision.

121



Impartiality and Conflicts of Interest

Impartiality is deeply embedded in the United States System of Justice – the Sixth Amendment to the US Constitution provides a criminal defendant the right to “an impartial jury.”

Key Elements of Impartiality

- Preventing Sympathy, prejudice, fear or public opinion to influence a decision.
- Reviewing all of the evidence before reaching a decision
- Giving due regard to the positions of all parties and considering those positions when arriving at a decision.

122



Title IX Training
Jennifer E. Gornall, Esq., Neal R. Devlin, Esq., and Julia M. Herzing, Esq.
September 2020

Conflicts of Interest arise when one could obtain a personal or unrelated benefit from actions or decisions made in an official or neutral capacity.

- Tobacco studies of the 1980s
- Pete Rose

123



Avoiding Conflicts of Interest, or the appearance of them, is critical in Title IX investigations. The following issues should be considered when determining individuals who are appointed to the relevant roles:

- Does the person have any relationship with either party (e.g. current or former teacher, coach, advisor).
- Does the person have any relationship with either party's family.
- Does the individual have any history related to the alleged conduct (e.g. former victim or respondent, involvement in any aspect of the facts related to the allegations)
- Has any party or other individual raised a concern regarding conflict of interest.

The evaluation of conflict of interest must be on-going and regularly reviewed as the investigation proceeds.

124



Relevance



Relevance

“(1) Basic requirements for grievance process. A recipient's grievance process must—

... (ii) Require an objective evaluation of all relevant evidence—including both inculpatory and exculpatory evidence—and provide that credibility determinations may not be based on a person's status as a complainant, respondent, or witness;” § 106.45 Grievance process for formal complaints of sexual harassment., 34 C.F.R. § 106.45(b)(1)(ii)



Title IX Training
Jennifer E. Gornall, Esq., Neal R. Devlin, Esq., and Julia M. Herzing, Esq.
September 2020

“The final regulations do not define relevance, and the ordinary meaning of the word should be understood and applied.” p.811, n. 1018

- **Federal Rule of Evidence 401:**
 - **Evidence is relevant if:**
 - (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and
 - (b) the fact is of consequence in determining the action.
- **Merriam-Webster’s Dictionary defines “relevant” as**
 - **1a: having significant and demonstrable bearing on the matter at hand**
 - **b: affording evidence tending to prove or disprove the matter at issue or under discussion**

127



Only Exceptions:

- Rape Shield
- Evidence protected by a legally recognized privilege, unless the person holding the privilege has waived the privilege

Decision maker must explain why something is deemed irrelevant

- “The decision-maker(s) must explain to the party proposing the questions any decision to exclude a question as not relevant.” § 106.45 Grievance process for formal complaints of sexual harassment., 34 C.F.R. § 106.45(b)(6)(ii).
- Relevance determination can provide a basis for appeal

128



Rape Shield

“With or without a hearing, 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 [1] to prove that someone other than the respondent committed the conduct alleged by the complainant, or [2] if the questions and evidence concern specific incidents of the complainant's prior sexual behavior with respect to the respondent and are offered to prove consent.”
34 C.F.R. § 106.45(b)(6)(ii).

129



Rape Shield

Complainant's "sexual predisposition"

- **Never relevant**

Complainant's "prior sexual behavior"

- **ONLY Relevant if**
 - 1. offered to prove that someone besides the respondent committed the alleged sexual harassment**
 - 2. evidence of prior sexual behavior between complainant and respondent if offered to prove consent**

130



Application to Complainants

The Rape Shield language only applies to Complainants, not Respondents.

- Evidence of a Respondent’s sexual predisposition or prior sexual behavior is admissible if relevant.

131



Consent

Regulations and guidance do not provide a definition for “consent” but state that a District can select a definition of “consent”

- “Affirmative consent” vs. “implied consent”
 - Recipient can use their state’s definition of consent. Pennsylvania does not have a clear definition of consent.

132



Example: Pennsylvania

Pennsylvania does not specifically define “consent” but uses the following definitions in criminal statutes:

[A] person commits a felony of the first degree when the person engages in sexual intercourse with a complainant:

- (1) By forcible compulsion;
- (2) By threat of forcible compulsion that would prevent resistance by a person of reasonable resolution;
- (3) Who is unconscious or where the person knows that the complainant is unaware that the sexual intercourse is occurring;

133



(4) Where the person has substantially impaired the complainant's power to appraise or control his or her conduct by administering or employing, without the knowledge of the complainant, drugs, intoxicants or other means for the purpose of preventing resistance; or

(5) Who suffers from a mental disability which renders the complainant incapable of consent. 18 Pa.C.S.A. § 3121.

134



Title IX Training
Jennifer E. Gornall, Esq., Neal R. Devlin, Esq., and Julia M. Herzing, Esq.
September 2020

- “Forcible compulsion” is defined as “compulsion by use of physical, intellectual, moral, emotional or psychological force, either express or implied. The term includes, but is not limited to, compulsion resulting in another person's death, whether the death occurred before, during or after sexual intercourse.” 18 Pa.C.S.A. § 3101.
- Further, resistance is not required. The alleged victim need not resist the actor in prosecutions under this chapter: Provided, however, that nothing in this section shall be construed to prohibit a defendant from introducing evidence that the alleged victim consented to the conduct in question. 18 Pa.C.S.A. § 3107
- <https://apps.rainn.org/policy/policy-crime-definitions-export.cfm?state=pennsylvania&group=9>

135



Example: Canada

Canada uses the following definition of “consent”:

“Subsection 273.1(1) defines consent as the voluntary agreement of the complainant to engage in the sexual activity in question. Conduct short of a voluntary agreement to engage in sexual activity does not constitute consent as a matter of law.”

“[S]pecific situations where there is no consent in law; no consent is obtained:

- where the agreement is expressed by the words or conduct of a person other than the complainant
- where the complainant is incapable of consenting to the activity

136



Title IX Training
Jennifer E. Gornall, Esq., Neal R. Devlin, Esq., and Julia M. Herzing, Esq.
September 2020

- where the accused induces the complainant to engage in the activity by abusing a position of trust, power or authority
- where the complainant expresses, by words or conduct, a lack of agreement to engage in the activity, or
- where the complainant, having consented to engage in sexual activity, expresses, by words or conduct, a lack of agreement to continue to engage in the activity.”

137



Example: Model Penal Code

The Model Penal Code as approved by the American Law Institute provides the following definition for “consent”:

(3) “Consent”

(a) “Consent” means a person’s behavior, including words and conduct— both action and inaction—that communicates the person’s willingness to engage in a specific act of sexual penetration or sexual contact.

...

138



Title IX Training
Jennifer E. Gornall, Esq., Neal R. Devlin, Esq., and Julia M. Herzing, Esq.
September 2020

(c) Consent may be express, or it may be inferred from a person's behavior. Neither verbal nor physical resistance is required to establish the absence of consent; the person's behavior must be assessed in the context of all the circumstances to determine whether the person has consented.

(d) Consent may be revoked any time before or during the act of sexual penetration or sexual contact, by behavior communicating that the person is no longer willing. A clear verbal refusal—such as “No,” “Stop,” or “Don't”—suffices to establish the lack of consent. A clear verbal refusal also suffices to withdraw previously communicated willingness in the absence of subsequent behavior that communicates willingness before the sexual act occurs.

139



TITLE IX TRAINING

PART III

presented by

Jennifer E. Gornall, Esq., Julia M. Herzing, Esq. and Neal R. Devlin, Esq.
Knox McLaughlin Gornall & Sennett, P.C.

Copyright © 2020 Knox McLaughlin Gornall & Sennett, P.C.



Formal Title IX Complaint – Signed by Complainant vs. Title IX Coordinator?

- Formal complaints alleging Title IX sexual harassment can be signed by a complainant or by the Title IX Coordinator. 34 C.F.R. §106.30(a).
- A signature by either triggers the initiation of the Title IX grievance process, including written notice to the respondent.
- Difficult issue: When should a Title IX Coordinator ignore a complainant’s desire not to proceed with the Title IX grievance process and sign the formal complaint despite the complainant’s wishes otherwise?

141



Formal Title IX Complaint – Signed by Complainant vs. Title IX Coordinator?

- Title IX Coordinator must engage in an analysis of whether the school district’s failure to proceed with the Title IX grievance process is “clearly unreasonable in light of known circumstances.”
- Should consider *why* the complainant does not want to proceed. Wants to retain confidentiality? Fears retaliation? Is recanting on facts initially reported?
- Should analyze whether the district’s failure to proceed with the Title IX investigation and grievance process precludes the district from pursuing disciplinary sanctions against the respondent for inappropriate behavior that the district believes should be addressed if found to be true.
- Should analyze whether the failure to proceed with the Title IX investigation and grievance process leaves the district uncertain as to whether there is an ongoing threat to the health or safety of other students or individuals?

142



EMERGENCY REMOVALS



Emergency Removal Process

Even though school districts are precluded from imposing any “disciplinary sanctions” on respondents before the completion of the grievance process, school districts are authorized to remove a respondent from the school district’s education program or activity on an emergency basis if:

- The school district undertakes an individualized safety and risk analysis; and
- As a result of that analysis, the school district determines that an immediate threat to the physical health or safety of any students or other individual arising from the allegations of sexual harassment justifies removal; and



Emergency Removal Process

- The school district provides the respondent with notice and an opportunity to challenge the decision immediately following the removal.
 - We recommend utilizing the informal hearing process outlined in 22 Pa. Code §12.8(c) to comply with this mandate. You already use this procedure when you suspend students for more than three consecutive days.

145



Emergency Removal Process

ISSUE: While the Title IX regulations, at 34 C.F.R. §106.44(c), authorize the emergency removal of the respondent under certain circumstances, Pennsylvania law precludes school districts from excluding students from school for more than ten consecutive days unless they provide that student with due process, including an expulsion hearing before the school board. Expulsion hearings are inherently “disciplinary” in nature, but engaging that process is the only way to effectuate the Title IX authorized emergency removal process.

146



Emergency Removal Process & Interplay with State Disciplinary Due Process Requirements

In an effort to effectuate Title IX's emergency removal provisions with underlying state law requirements regarding student removal from school, we inserted detailed procedures into PSBA's Policy 103, Attachment 3 pertaining to how to respond when/if the Title IX Coordinator believes emergency removal of the respondent is necessary, summarized below. *This suggested procedure is subject to change upon receipt of future guidance from OCR or future judicial rulings.*

Summary of Procedure:

- If possible, the district should refrain from pursuing disciplinary action pursuant to the Student Code of Conduct until such time the Title IX grievance process has concluded.

147



Emergency Removal Process & Interplay with State Disciplinary Due Process Requirements

- If, after having taken an individualized safety and risk analysis, the district and Title IX Coordinator determine that supportive measures and other non-punitive actions *voluntarily agreed to* by the parties (mutual no contact agreements; agreeing to participate in virtual education options offered by the district, etc.) do not alleviate the immediate threat to the physical health or safety of individuals, then the district should take the following steps:

148



Removal Steps:

- If the duration of the emergency removal is between 1 – 10 school days, the school district should ensure the respondent is provided with the level of due process outlined in 22 Pa. Code §12.8(c) pertaining to “informal hearings.”
 - At the informal hearing, the school district should provide the respondent an opportunity to challenge the determination that his/her emergency removal is necessary to address an immediate threat to the physical health or safety of any student/individual arising from the allegations of Title IX sexual harassment.

149



Removal Steps, cont.

- If the duration of the emergency removal shall exceed ten consecutive schools days:
 - The district shall provide the respondent with the opportunity to participate in an “informal hearing” as set forth in 22 Pa. Code §12.8(c).
 - At the informal hearing, the school district shall provide the respondent an opportunity to challenge the determination that his/her emergency removal is necessary to address an immediate threat to the physical health or safety of any student/individual arising from the allegations of Title IX sexual harassment.
 - At this informal hearing the school district should also address the underlying Student Code of Conduct violations for which the student is being referred to the Board for an expulsion hearing.

150



Removal Steps, cont.

- If after the informal hearing the district believes evidence exists to justify a referral for expulsion (e.g., removal from school for more than ten consecutive days), the district shall comply with the district’s expulsion policy and the due process procedures outlined in 22 Pa. Code §12.8(b).
- At the expulsion hearing held pursuant to 22 Pa. Code §12.8(b):
 - The Board shall make a determination of whether the student shall be expelled for Student Code of Conduct violations.

151



Removal Steps, cont.

- At the “consequence” stage of the expulsion hearing, presuming the Board determines the student has violated provisions of the Student Code of Conduct justifying expulsion, the Board should be informed there is a pending Title IX grievance procedure involving the respondent and that the student be expelled for a period of time necessary to avoid identified health and safety risks associated with the alleged Title IX violation.
- The Board’s written adjudication of expulsion should address the pending Title IX process and the impact of the outcome of the Title IX process on a student’s emergency removal status.

152



Removal Steps, cont.

- The Board should be informed that the expulsion hearing will be re-convened at the conclusion of the Title IX grievance process to determine what appropriate disciplinary consequences, if any, should be imposed on the student/respondent pursuant to the outcome of the Title IX grievance process and/or the Student Code of Conduct violations which were the subject of the underlying expulsion hearing.

153



Removal Steps – Special Education

- If the respondent is an identified student with a disability, or thought to be disabled, the Title IX Coordinator should contact the Director of Special Education to coordinate the required actions in accordance with Board policy.
- The district must comply with applicable law pertaining to the discipline or change of placement of a student with a disability where applicable, pursuant to the Individuals with Disabilities Education Act, Section 504 of the Rehabilitation Act and the Americans with Disabilities Act.

154



Employee Removals: Administrative Leave

- When the respondent is a **non-student employee**, a school may place the employee on **administrative leave** pending the outcome of the grievance process.
 - A school need not identify an immediate threat similar to the “emergency removal” provision for students.

155



TECHNOLOGY



Technology

- Live Hearing vs. Written Exchange of Evidence

157



CONFIDENTIALITY



Confidentiality

- Anonymously reports
 - The final regulations do not prohibit anonymous reporting.
 - Notice conveyed by an anonymous report may convey actual knowledge and trigger a response obligation.

159



Confidentiality

- Schools must keep confidential the identities of any:
 - Complainants or other individuals who have made a report or complaint of sex discrimination;
 - Respondents or any individuals who has been reported to be the perpetrator of sex discrimination; and
 - Witnesses.
- Confidentiality will not apply when disclosure is permitted by FERPA or is otherwise required by law or to carry out a Title IX sexual harassment investigation, hearing, or judicial proceeding

34 C.F.R. §106.71

160



Confidentiality

- A “complainant” (i.e. the alleged victim of sexual harassment) cannot remain anonymous if a formal complaint is filed.
- The final regulations require a school to send written notice of the allegations to **both** parties upon receipt of a formal complaint. 34 C.F.R. §106.45(b)(2)
 - This applies irrespective of whether the formal complaint is signed by the complainant or by the Title IX Coordinator.
 - If the complainant’s identity is known it must be disclosed in the written notice of allegations.

161



Confidentiality

- Schools may not impose “gag rules” on participants in investigations:
 - Exercise of First Amendment rights is not “retaliation”
 - “A recipient should not, under the guise of confidentiality concerns, impose prior restraints on students’ and employees’ ability to discuss the allegations under investigation, for example with a parent, friend, or other source of emotional support, or with an advocacy organization.”
 - Parties must also be free to discuss allegations in order to “gather and present evidence.”

162



RECORDKEEPING



Recordkeeping

- The following must be maintained for a period of seven (7) years:
 - Records of each Title IX sexual harassment investigation, including:
 - Any determinations regarding responsibility;
 - Any audio or audiovisual recording or transcript;
 - Any disciplinary sanctions imposed on the respondent; and
 - Any remedies provided to the complainant.
 - Records of any appeals;
 - Records of informal resolutions; and
 - All materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process.



Training Materials

- Training materials must also be published on a publicly accessible website or, if one is not maintained, must be made available for inspection by members of the public upon request.

165



Recordkeeping

- Recipients also are required to **create and maintain** for a period of seven (7) years:
 - Records of any actions taken in response to a **report or formal complaint** of Title IX sexual harassment.
 - Records should include documentation of supportive measures offered to the complainant.
 - If no supportive measures are offered, recipient must document the reasons why such a response was not clearly unreasonable in light of the known circumstances.
 - Documentation of the basis for concluding that the recipient's response was not deliberately indifferent.

166



Hypotheticals



Hypothetical One

- Student-on-student sexual harassment at school-sponsored event
 - Jurisdictional analysis
 - Process
 - Supportive Measures
 - Relevance/Rape Shield Considerations



Hypothetical Two

- Co-worker sexual harassment
 - Process
 - Title IX sexual harassment vs. Title VII or employee work rules
 - Relevance
 - Employee Discipline Implications – Union and Non-Union

169



Thank You!

Jennifer E. Gornall, Esq.
jgornall@kmgslaw.com

Julia M. Herzing, Esq.
jherzing@kmgslaw.com

Neal R. Devlin, Esq.
ndevlin@kmgslaw.com

Aurora L. Hardin, Esq.
ahardin@kmgslaw.com

(814) 459-2800
www.kmgslaw.com

170



Disclaimer

These materials should not be considered as, or as a substitute for, legal advice and they are not intended nor do they create an attorney-client relationship. Because the materials included here are general, they may not apply to your individual legal or factual circumstances. You should not take (or refrain from taking) any action based on the information you obtain from these materials without first obtaining professional counsel. The views expressed do not necessarily reflect those of the firm, its lawyers, or clients.

171



Copyright Notice

Copyright © 2020
Knox McLaughlin Gornall & Sennett, P.C.

All materials contained here are protected by United States copyright law and may not be reproduced, distributed, transmitted, displayed, published or broadcast without the prior written permission of Knox McLaughlin Gornall & Sennett, P.C.

172

