K-12 Title IX Coordinator Supplemental Training

A deeper-dive into the Title IX Coordinator role and responsibilities, and a review of common issues

This training is a supplemental training, and does not meet all of your training requirements as Title IX Coordinator under Title IX.

Grievance Procedure for Sexual Harassment Formal Complaints

1. Report
2. Supportive measures and information on formal complaint
3. Formal complaint
4. Written notice to parties
5. Investigation
6. Inspection and review of evidence
7. Investigative report with review and written response
8. Question and Answer period
9. Written determination
10. Appeal on certain bases
11. Notice of appeal and opportunity to respond
12. Final written decision on appeal

Definition of "Sexual Harassment"

- Conduct **on the basis of sex** that satisfies one or more of the following:
  - (1) An employee of the school conditioning the provision of an aid, benefit, or service of the school on an individual's participation in unwelcome sexual conduct (quid pro quo sexual harassment);
  - (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 under Clery Act)

Title IX Coordinator Responsibilities

- Designations of Title IX team
- Posting notices, contact info, and training docs
- Notice to school community
- Confirm training completion
- Actual knowledge responsibilities
- Review policies and procedures
- Review form documents
- Timely review/handle reports
- Keep documentation

Title IX Coordinator Responsibilities Cont.

- Be available/accessible for reports
- Determine what Policy/Procedure to apply
- Provide details on grievance process and formal complaints
- Discuss availability of and coordinate effective implementation of supportive Measures
- Consider signing formal complaint if not filed by Complainant
- Provide Notices to Respondent and Complainant
- Consider Dismissal

Title IX Coordinator Responsibilities Cont.

- Consider removal/admin leave
- Informal Resolution process
- Ensure grievance process (as applicable) is followed and all notices provided
- Coordinate the effective implementation of any remedies

Title IX Coordinator *MAY* also

- Coordinate notices, party inspection and review of evidence and investigative report
- Coordinate appeal process
- Perform investigation

General To-Do's…

Title IX Designations

- Who will be the Initial Decision-Maker?
- Who will facilitate Informal Disputes?
- Who will be the Investigator?
- Who will handle Appeals?

Posting

- Notices
- Contact Information
- Training Documents

(UPDATE AS NECESSARY)

Notice to School Community

- You should also put required Title IX language, and the actual grievance procedure policy, in each handbook or catalog that you make available to applicants for admission and employment, students, parents or legal guardians of school students, employees, and all unions or professional organizations holding collective bargaining or professional agreements with the school.

Confirm Training Completion

- Ensure that Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process, receive training on:
  - the definition of sexual harassment,
  - the scope of the recipient's education program or activity,
  - how to conduct an investigation and grievance process including hearings, appeals, and informal resolution processes, as applicable, and
  - how to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias.

- Ensure that decision-makers receive training on:
  - any technology to be used at a live hearing (if applicable), and
  - on 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.
- Ensure that investigators receive training on:
  - issues of relevance to create an investigative report that fairly summarizes relevant evidence

Actual Knowledge Responsibilities

- Train ALL staff on what is ACTUAL KNOWLEDGE
- =Notice of sexual harassment or allegations of sexual harassment **to:**
  - The Title IX Coordinator, OR
  - Any official of the recipient who has authority to institute corrective measures on behalf of the recipient, OR
  - **Any employee of an elementary and secondary school**
- **NOTICE IS NOT JUST A REPORT TO THE TITLE IX COORDINATOR**
- REQUIRE that staff report any notice of sexual harassment or allegations of sexual harassment SAME DAY

Review Form Documents

- Form documents for responding to Title IX reports and complaints will assist in responding promptly.
- Remember, Complainants DO NOT have to file or sign formal complaints.

- Examples:
  - Form for formal complaint of sexual harassment
  - Notices to Respondent and Complainants of formal complaint of sexual harassment
  - Notice regarding Informal Resolution Process, if any
  - Notice of evidence and opportunity to respond
  - Notice of Investigative Report and opportunity to respond
  - Written questions request
  - Notice regarding determination of responsibility and ability to appeal
  - Notice that appeal has been filed and ability to provide written statement

Timely Review/Handle Reports

- The school must respond PROMPTLY in a manner that is not deliberately indifferent
- Grievance process MUST include reasonably prompt time frames for conclusion
- Review grievance process to ensure that there are reasonably prompt time-frames for response
- For each report, CALENDAR RESPONSE DEADLINES (maintain confidentiality).
- If you must miss a deadline for good cause, PROVIDE WRITTEN NOTICE
  - Include reasons for the action

Keep Documentation

- Make sure the school has a process in place and a retention procedure for keeping Title IX records
- Maintain for a period of seven years
- Essentially ALL Title IX records
  - Records regarding EACH sexual harassment investigation
    - Determination of responsibility
    - Any recordings or transcript from any hearing, if applicable
    - Disciplinary sanctions
    - Remedies provided
  - Records regarding any appeal and result
  - Records regarding nay information resolution and result
  - All materials used to train (also put on website)

- ALSO records of any actions in response to actual knowledge of sexual harassment, including any supportive measures, taken in response to a report or formal complaint of sexual harassment.
- DOCUMENT the basis for the conclusion that the school's response was not deliberately indifferent, and document that the school has taken measures designed to restore or preserve equal access to the recipient's education program or activity.
- If you do not provide a complainant with supportive measures, then you must DOCUMENT the reasons why such a response was not clearly unreasonable in light of the known circumstances.

Be available/Accessible

- "Any person may report sex discrimination, including sexual harassment (whether or not the person reporting is the person alleged to be the victim of conduct that could constitute sex discrimination or sexual harassment), **in person, by mail, by telephone, or by electronic mail, using the contact information listed for the Title IX Coordinator, or by any other means that results in the Title IX Coordinator receiving the person's verbal or written report.** Such a report may be made **at any time (including during non-business hours)** by using the telephone number or electronic mail address, or by mail to the office address, listed for the Title IX Coordinator."

Determine What Policy/Procedure to Apply

- Addressed by Title IX or code of conduct/staff policies?
- Sexual harassment?
- Otherwise sex discrimination?
- Within the educational program or activity?
- Against a person in the US?

Provide Details on Grievance Process and Formal Complaints

- § 106.44 Recipient's response to sexual harassment (a) . . . "The Title IX Coordinator must **promptly contact the complainant to** discuss the availability of supportive measures as defined in § 106.30, consider the complainant's wishes with respect to supportive measures, inform the complainant of the availability of supportive measures with or without the filing of a formal complaint, and **explain to the complainant the process for filing a formal complaint**."
- Have a meeting
- Provide a copy of the grievance policy
- Document conversations in writing for school records

Discuss Availability of and Coordinate Effective Implementation of Supportive Measures

- § 106.44 Recipient's response to sexual harassment (a) . . . "The Title IX Coordinator **must promptly contact the complainant to discuss the availability of supportive measures** as defined in § 106.30, **consider the complainant's wishes with respect to supportive measures, inform the complainant of the availability of supportive measures with or without the filing of a formal complaint**, and explain to the complainant the process for filing a formal complaint."
- DOCUMENT interactions regarding supportive measures and rationale for offering or rejecting any requests, as well as which ones provided.
- § 106.30 Definitions. *Supportive Measures* . . . **"The Title IX Coordinator is responsible for coordinating the effective implementation of supportive measures."**
  - Remain as point of contact
  - Follow-up
  - Keep confidential—to the extent would not impair the ability to provide

- Non-disciplinary
- Non-punitive
- Individualized services offered as appropriate, as reasonably available, and without fee or charge to the complainant or the respondent
- Offered before or after the filing of a formal complaint or where no formal complaint has been filed.
- Restore or preserve equal access to the recipient's education program or activity without unreasonably burdening the other party

Examples:

- 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

Filing of Formal Complaint

- § 106.30 Definitions. . . . "*Formal complaint* means a document filed by a complainant **or signed by the Title IX Coordinator** alleging sexual harassment against a respondent and requesting that the recipient investigate the allegation of sexual harassment. . . . Where the Title IX Coordinator signs a formal complaint, the Title IX Coordinator is not a complainant or otherwise a party under this part or under § 106.45, and must comply with the requirements of this part, including § 106.45(b)(1)(iii)."
- If Complainant does not file a formal complaint, consider option of signing a formal complaint as Title IX Coordinator.
- Discretion
- Must still remain free from conflicts of interest and bias, and must still be impartial
- Not then considered the complainant

Respondent (and Complainant) Notice

- Provide required written notices to both Complainant and Respondent (review policy and regs for required components of notice)
- Offer meeting
- Discuss grievance policy and process
- Discuss supportive measures with Respondent as well
- Inform of advisor right
- Inform of Informal Resolution, if available

Consider Dismissal

- If a formal complaint is filed, the school must investigate the allegations within it
- Mandatory Dismissal
  - Within the scope of the educational program or activity?
    - locations, events, or circumstances over which the recipient exercised substantial control over both the respondent and the context in which the sexual harassment occurs
  - Outside the US?
  - Sexual harassment definition?
- Permissive Dismissal
  - Respondent still a student or employed by the school?
  - Does Complainant want to withdraw?
  - Any other specific circumstances preventing the school from gathering evidence sufficient to reach a determination?
- Consider throughout and promptly send written notice and reason(s)

Consider Removal

- Title IX Coordinator responsibility?
- Need to direct to appropriate individual for review/consideration?
- Ensure that individualized safety and risk analysis occurs
- Need determination of an immediate threat to the physical health or safety of any student or other individual arising from the allegations of sexual harassment to justify removal.
- Ensure that proper notice and opportunity to challenge the decision immediately following the removal is provided to respondent.
- Follow IDEA and ADA, as applicable!

Consider Administrative Leave for Employee

- “during the pendency of a grievance process”
- Title IX Coordinator responsibility?
- Need to direct to appropriate individual for review/consideration?
- Follow Section 504 and ADA, as applicable!

Informal Resolution Process

- Not required to offer an informal resolution process—review your policy
- ONLY AFTER A FORMAL COMPLAINT IS FILED
- No definition
  - "such as mediation that does not involve a full investigation and adjudication"
  - "may encompass a broad range of conflict resolution strategies, including, but not limited to, arbitration, mediation, or restorative justice"
  - "free to craft or not craft an informal resolution process"
- Still needs to include reasonably prompt time frame
- Cannot require waiver of the right to an investigation and adjudication of formal complaints of sexual harassment
- **Cannot require participation**
- Cannot be used for allegations that an employee sexually harassed a student
- **PROVIDE WRITTEN NOTICE**

Ensure Grievance Process (as applicable) Is Followed and All Notices Provided

- § 106.8 (a) "*Designation of coordinator.* Each recipient must designate and authorize at least one employee to coordinate its efforts to comply with its responsibilities under this part, which employee must be referred to as the 'Title IX Coordinator.'"
- BE FAMILIAR WITH YOUR POLICY
- Refer back to policy
- Make sure all written notices timely provided
- Assist decision-makers with correspondence to parties as necessary

Coordinate the Effective Implementation of Any Remedies

- Once there is a determination of responsibility, **the Title IX Coordinator "is responsible for effective implementation of any remedies.**"
- Remedies are designed to restore or preserve equal access to the recipient's education program or activity
- Decision-maker must include a statement in their Determination of Responsibility of whether remedies will be provided by the school to the complainant.

The Coordinator MAY also…

Coordinate Notices, and/or Party Inspection and Review of Evidence and Investigative Report

- Parties have the right to written notice of the date, time, location, participants, and purpose of all hearings (when applicable), investigative interviews, or other meetings, with sufficient time to prepare.
- Parties have the right to review evidence obtained as part of the investigation so that they can respond prior to the conclusion of the investigation
- Parties have the right to be sent all evidence prior to conclusion of the investigative report and have 10 days to respond
- Parties have the right to review the investigative report 10 days prior to decision being issued, and may respond to the investigative report
- **THE TITLE IX COORDINATOR CAN COORDINATE THE FOREGOING**

Coordinate Appeal Process

- Can coordinate and assist with:
  - offering both parties an appeal from the determination regarding responsibility
  - notifying the other party in writing when an appeal is filed
  - implementing appeal procedures equally for both parties
  - allowing both parties a reasonable, equal opportunity to submit a written statement in support of, or challenging, the outcome
  - providing the written decision on appeal simultaneously to both parties

Perform Investigation

- May be the Title IX Coordinator, may be someone else designated
- Be neutral
- Stay open
- No prejudgments
- No bias
- No conflict of interest
- Don’t rely on sex stereotypes
- Don’t make assumptions
- Gather the facts

- Burden of gathering evidence is on the school
- Allow parties equal opportunity to present evidence and present witnesses
- Don’t restrict the ability of either party to discuss the allegations
- Allow each party to have an advisor present
- Provide requisite notice and allow time to prepare for interviews and meetings
- Allow parties (and advisors if any) to inspect/review evidence (that is directly related to the allegations) and respond
- Send parties (and advisors if any) the evidence prior to completion of the investigative report and give 10 days to respond
- Consider responses
- Send parties (and advisors if any) the investigative report 10 days before any determination of responsibility
- Remember, you are not the decision-maker

- Do not require, allow, rely upon, or otherwise use questions or evidence that constitute or seek disclosure of, information protected under a legally recognized privilege, unless the person holding such privilege has waived the privilege
- Do not access, consider, disclose, or otherwise use a party's records that are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in the professional's or paraprofessional's capacity, or assisting in that capacity, and which are made and maintained in connection with the provision of treatment to the party, unless the school obtains that party's voluntary, written consent to do so for a grievance process under this section (or their parent's if not an eligible student as defined in 34 CFR 99.3)

- Interview
  - Determine witness list and in what order to interview
  - Craft questions in advance of interview, subject to addition/change
  - Have relevant evidence and policies/handbooks with you during interview
  - Ask open-ended questions, then more detailed as necessary to clarify
  - Keep detailed notes with exact quotes if possible
  - Explain that there can be no retaliation
  - Use complainant and respondent when referring to parties
  - Be sensitive; consider how you word your questions carefully
  - Ask for copies of documents/evidence mentioned
  - Notify of next steps and follow-up as necessary

- Investigative report
  - Be detailed/specific
  - Use polices/procedures
  - Use direct quotes when possible
  - Provide background
  - Include allegations
  - State who was interviewed and when
  - Fairly summarize relevant evidence—cite to the record, attach exhibits
  - Remember privilege
  - Remember presumption that the respondent is not responsible for the alleged conduct
  - Pass it on to the parties for review/response, if any (give 10 days) before finalizing

- Confidentiality
  - “The recipient must keep confidential the identity of any individual who has made a report or complaint of sex discrimination, including any individual who has made a report or filed a formal complaint of sexual harassment, any complainant, any individual who has been reported to be the perpetrator of sex discrimination, any respondent, and any witness, except as may be permitted by the FERPA statute, 20 U.S.C. 1232g, or FERPA regulations, 34 CFR part 99, or as required by law, or to carry out the purposes of 34 CFR part 106, including the conduct of any investigation, hearing, or judicial proceeding arising thereunder.”
  - “The recipient must maintain as confidential any supportive measures provided to the complainant or respondent, to the extent that maintaining such confidentiality would not impair the ability of the recipient to provide the supportive measures. “

Common Issues

Common Issue #1
Investigation is not complete

- The school cannot restrict either party's ability to discuss the allegations or gather and present evidence, HOWEVER . . .
- **The burden of proof sufficient to reach a determination regarding responsibility, rests on the school.**
- The burden of proof is on school to conduct investigation, interview witnesses, gather evidence.
- Objective is truth-seeking mission.
- The thoroughness of the investigation is critical to the school's ability to determine whether or not misconduct or harassment occurred and which type of disciplinary action, if any, is necessary
- Failure to carry out an adequate investigation may contribute to potential liability for the district.

Common Issue #2
Not including all directly related evidence for party review

- Prior to completion of investigative report, school must provide both parties an equal opportunity to inspect and review any evidence obtained as part of the investigation that is directly related to the allegations raised in a formal complaint, including the evidence upon which the school does not intend to rely in reaching a determination regarding responsibility and inculpatory or exculpatory evidence whether obtained from a party or other source, so that each party can meaningfully respond to the evidence prior to conclusion of the investigation.
- **Do not pick and choose what you include** in your draft investigative report. The parties have the right to see all evidence that is directly related.

Common Issue #3
Proper notices are not given

- Prior to beginning the investigation, you have to provide notices to the parties with certain required information (this includes notice to the alleged perpetrator of the harassment).
- Notice of any meeting or interview of the parties has to:
  - Be in writing
  - Give time to prepare
  - State who will be present
- If you are not meeting timelines within the policy, you have to provide notice to the parties with the reason.

Common Issue #4
10-day periods are not met

- There are TWO 10-day periods within the policy for party review
  1. 10 days to review the evidence directly related to the allegations prior to completion of the investigative report; AND
  2. 10 days to review the final investigative report and provide written response prior to the issuance of the determination regarding responsibility

- The question and answer period can occur during the second 10-day review period.
- Do not send the *final* investigative report to the decision-maker or the parties until after 10 days have passed for the parties to review the evidence

Common Issue #5
Information is being shared outside of need-to-know

- The recipient must keep confidential the identity of any individual who has made a report or complaint of sex discrimination, including any individual who has made a report or filed a formal complaint of sexual harassment, any complainant, any individual who has been reported to be the perpetrator of sex discrimination, any respondent, and any witness, except as may be permitted by [FERPA], or as required by law, or to carry out the purposes of [Title IX], including the conduct of any investigation, hearing, or judicial proceeding arising thereunder.

Common Issue #5
Information is being shared outside of need-to-know (cont'd)

- When multiple administrators or staff members are cc'd on decisions or notices, you may be breaching confidentiality
- The more who know, the more who you may be opening up to retaliation claims
- The individuals who receive the determination regarding responsibility should be those who need to know to implement remedies or discipline.

Common Issue #6
Performing investigation and applying discipline before Title IX process

- The fact that the Title IX grievance procedure applies should be determined prior to the start of an investigation.
- An investigation cannot start until a formal complaint is filed and notices are sent to the parties.
- Discipline cannot be imposed until the grievance process is complete.
- You can still emergency remove (after doing an analysis and determining that an immediate threat to the physical health or safety of any student or other individual arising from the allegations of sexual harassment justifies removal, and following your emergency removal procedures).
- You can still place on admin leave (after consulting with HR) in certain circumstances.

Common Issue #7
When to initiate formal complaint against the wishes of the Complainant

- The Title IX Coordinator can file a formal complaint to start an investigation when the Complainant does not want to file a formal complaint.
- Determination needs to be documented in writing.
- Often occurs with allegations of sexual harassment pertaining to staff members as the alleged perpetrators, because you cannot perform an investigation without a formal complaint, and you'll need to look into such allegations.
- Also occurs with allegations of sexual harassment pertaining to students when the alleged conduct if true would be subject to discipline. You cannot discipline without following the grievance procedure.

Common Issue #8
Missed timelines

Per your policy:

- Upon receiving a report of sexual harassment, the Title IX Coordinator shall promptly contact the complainant to discuss . . .
- Create an investigative report within thirty (30) business days of receipt of a formal complaint that fairly summarizes relevant evidence
- Before reaching a determination regarding responsibility, the decision-maker(s) must afford each party five (5) business days to submit written, relevant questions . . .
- The decision-maker(s) must issue a written determination regarding responsibility within twenty-five (25) business days of receiving the investigative report.
- Any such informal resolution process should not exceed ten (10) business days.

Lawyerly Disclaimer . . .

- These training materials are informational in nature and should not be construed as legal advice and are not provided to address specific grievance situations.
- Consult with your legal counsel as necessary to address specific Title IX report and grievance situations and investigations.
- Or email your school law attorney, or Adam Schira or Chelsea Canaday at:
- aschira@dickinsonwright.com
- ccanaday@dickinsonwright.com