

Title IX

Training for Casa Grande Union High
School District's Title IX Coordinator,
Investigators and Decision makers

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Special thanks to Cathleen Dooley of ASU
who generously shared her work on Title
IX for this presentation.

Why are we here?

- USDOE issued new rules amending Title IX regulations that went into effect on August 14, 2020.
- Rules create a framework for equitable and consistent process for sexual harassment complaints to ensure equal access to educational program and activity and the District has adopted new policies to comply with Rules.
- There is pending litigation and the Biden administration has committed to holding hearings on these rules.

Rules now include...

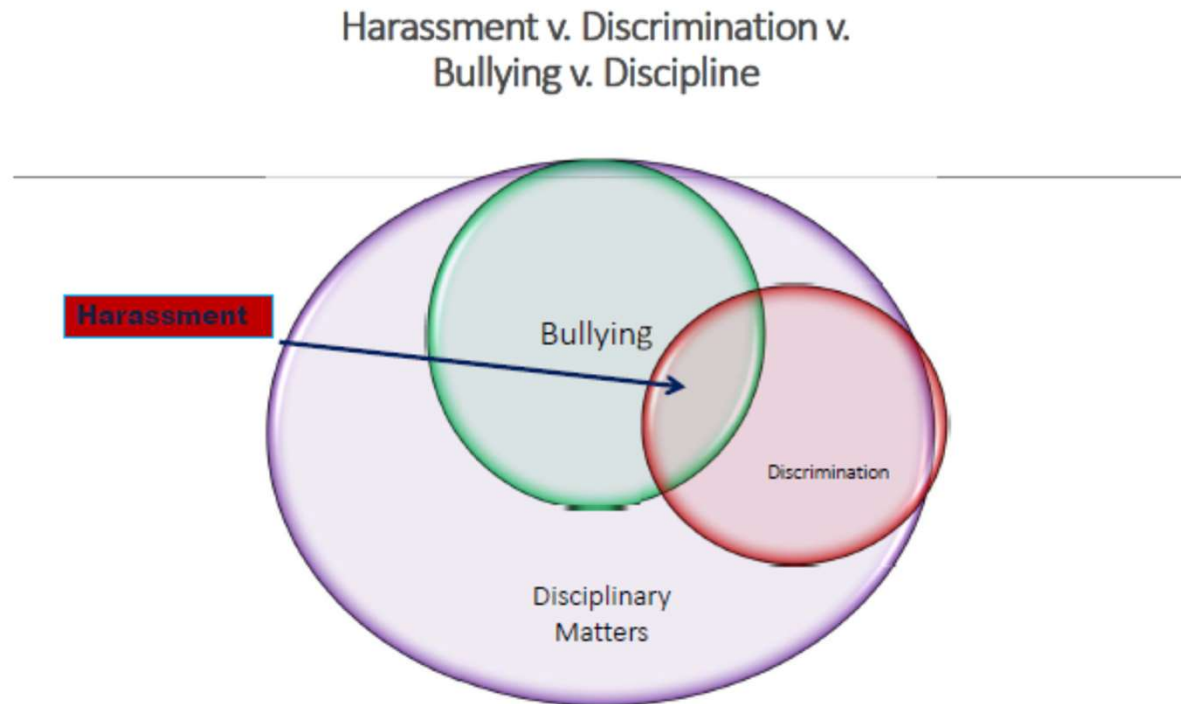
- Recordkeeping & training requirements are expanded
- Notice of sexual harassment to any employee requires notice to Title IX Coordinator
- Decision maker must make a written decision regarding responsibility, remedies and discipline
- Rights of all parties are explicitly defined
- Only a Victim or the Title IX Coordinator can file a Formal Complaint
- Investigation must follow grievance procedure adopted by district—Policy ACA/ACAA

Title IX Obligation of the District

It is a violation of Title IX when a District it has ***actual knowledge*** of an allegation of sexual harassment experienced by an ***individual in the educational program/activity*** and the District acts with ***deliberate indifference*** to that notice.

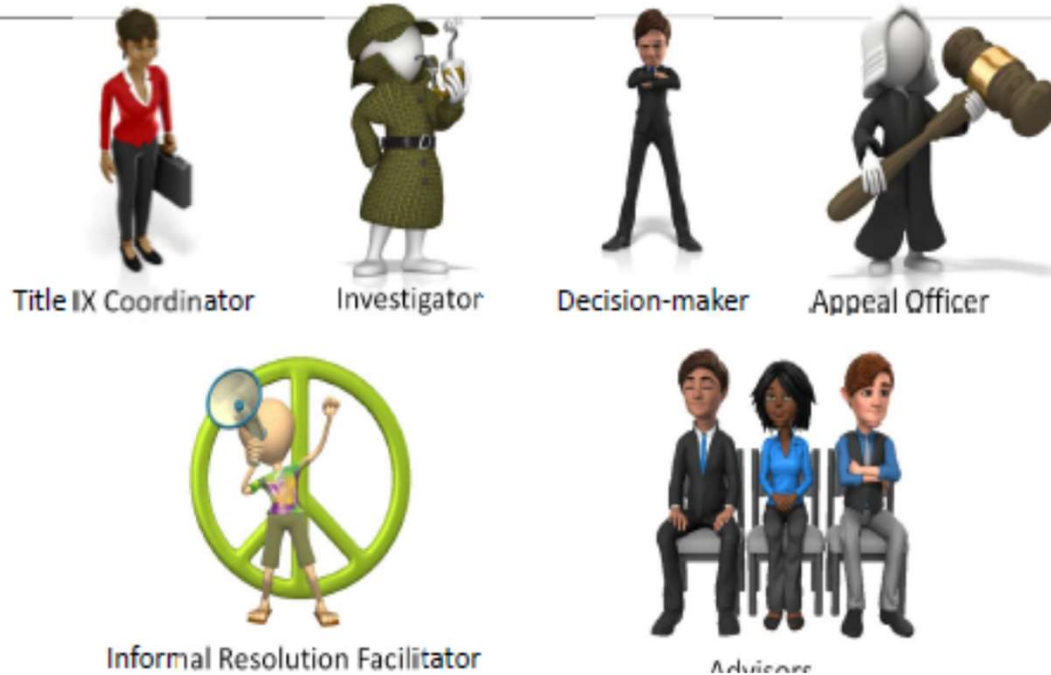
Follow your investigation procedures to avoid an OCR complaint.

Title IX issues—overlap of misconduct



**Graphic taken from a NSBA
presentation on Title IX, 10-21-
20**

Many Players on the Title IX Team



**Reproduced from Title IX NSBA/COSA
presentation on 10-21-20.**

Title IX parties

- **Complainant** is alleged victim-person filing complaint. Even if Title IX Coordinator files formal complaint, complainant is still alleged victim.
- **Respondent** is the alleged responsible person, person against whom conduct is alleged.

What is Sexual Harassment?

Conduct on the basis of sex that meets one or more of the following:

1. Quid pro quo

2. Hostile Environment

3. Criminal acts related to sexual assault and domestic violence

Sexual Harassment: Type 1

Conduct is considered “*quid pro quo*” harassment when it requires the provision of sexual conduct in exchange for a benefit to which the victim is otherwise entitled.

The existence of a quid pro quo in and of itself denies access to the educational program or activity to the victim.

Hostile Environment: Type 2

Requires determination by a reasonable person in complainant's position that:

unwelcome conduct is that it effectively denies a person so severe, pervasive **and** objectively offensive equal access to a District's education program or activity

This type of sexual harassment is crafted to protect a person's 1st Amendment rights to express an opinion or engage in certain conduct.

Sexual Harassment: Type 3

Violent Offenses of a criminal nature including sexual assault, dating violence, domestic violence, stalking

Like Type 1, this conduct is automatically a denial of equal access

Sexual Assault

An offense classified as a forcible or nonforcible sex offense under the uniform crime reporting system of the Federal Bureau of Investigation.

20 U.S.C. 1092(f)(6)(A)(v)

Stalking

Engaging in a course of conduct directed at a specific person that would cause a reasonable person to:

- A. Fear for his or her safety or the safety of others; or
- B. Suffer substantial emotional distress

34 U.S.C. 12291(a)(30)

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 and where the existence of such a relationship shall be determined based on a consideration of the following factors:

- 1) the length of the relationship;
- 2) the type of relationship;
- 3) the frequency of interaction between the persons involved in the relationship

34 U.S.C. 12291(a)(10)

Domestic Violence

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 grant monies, 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.

34 U.S.C. 12291(a)(8)

Education Program or Activity

This term is **broadly defined** and includes:

Any location, event, or circumstance over which the District exhibits **substantial control over both the alleged harasser and the context in which the harassment occurred**

Think about away sports games, after school programs

What is Actual Knowledge of Harassment?

Title IX obligations are triggered with a report to **ANY** District employee and should be reported to the Title IX Coordinator in writing.

All District employees should be trained on the definition of sexual harassment and who to report incidents.

What happens when District has actual knowledge of potential sexual harassment

Title IX Coordinator must PROMPTLY contact every potential Complainant to engage in an interactive process about

- Available supportive measures even if no complaint is filed
- The process for filing a formal complaint

Title IX process delays other discipline processes

Supportive Measures

Supportive measures are non-disciplinary, non-punitive, individualized services, offered as appropriate and without charge to a Complainant or a Respondent at any time.

Goal is to restore equal access to educational program or activity

Supportive Measures

If the District did not provide a Complainant with supportive measures, then the District must document the reasons why such a response was not clearly unreasonable in light of the known circumstances.

Examples

- Counseling
- Schedule Change
- Deadline extension
- Restore party to equal access to educational program/activity

Hypotheticals 1 and 2

YOU HAVE RECEIVED A
FORMAL COMPLAINT—NOW
WHAT? FOLLOW NEWLY-
ADOPTED ACAAA AND ACAAA-R

Title IX Coordinator has initial responsibility before investigation starts

- Issue written notice to parties of formal complaint
- Make Decision on Mandatory and Permissive Dismissal with notice to the Parties
- Make Decision on Emergency Removal/Administrative Leave

Due Process Principles—Written Notice of Complaint

- Presumption that Respondent is not responsible until Decision is made
- Reasonably prompt investigation and decision (60 or 90 Days)
- Description or list of possible discipline or other remedies
- Preponderance of the evidence (more likely true than not) is used when making a decision on the allegation
- Appeal procedures
- Range of supportive measures available to both parties

Due Process Requirements—newly adopted ACAA and ACAA-R

- Objectively evaluate all evidence, including allowing the Respondent to prepare a written response before any initial interview.
- The parties do not have to respond/participate in interview and no inference may be made regarding the choice.
- Ensure there is no conflict of interest or bias for the investigator and decision maker to serve impartially without regard to sex of individuals involved or issues raised in the complaint.

Informal Resolution

- **After a formal complaint filed, option provided in written notice to both parties.**
- **Not** allowed for a complaint alleging an employee harassed a student
- Meditated by trained person
- **Allowed** at any time during formal complaint process if:
 - Both parties have been provided written notice of their rights
 - Both parties written voluntary consent is obtained

Emergency Removal/Administrative Leave

- Permitted based on individual risk and safety review to protect a student from immediate threat to health or safety.
- Must provide written notice and opportunity to appeal—show basis for removal.
- Removal still requires compliance with other policies related to student discipline, special ed.
- Does not preclude placement of employee on Admin. leave

Mandatory Dismissal of Formal Complaints—

- Dismissal requires prompt written notice to all parties + reason for dismissal and appeal rights by any party.
- A formal complaint **must** be dismissed if:
 - The complaint does not state an allegation of sexual harassment, even if all facts are found to be true
 - The alleged sexual harassment did not occur in a District program or activity
 - The sexual harassment did not occur against a person in the United States

Other policies may apply to conduct even if it is not a Title IX problem.

Permissive Dismissal

A formal complaint may be dismissed if:

- Complainant notifies the Title IX Coordinator that s/he wants to withdraw the complaint
- If the Respondent's employment or enrollment with the District ends—resignation.
- If circumstances, such as several years between the conduct and the complaint or a Complainant's refusal to cooperate, prevents the gathering of evidence sufficient to render a determination

Written Notice Requirements after Formal Complaint is Received

- Use the templates
- Notice of the District's grievance process, including any informal resolution process
- Notice of allegations, with enough detail to allow a response (names of parties, conduct alleged, date and location of conduct if known)
- Notice of Parties' rights to have an attorney or non-attorney advisor inspect and review, comment and provide evidence

Written Notice Requirements after Formal Complaint is Received

- A statement that the Respondent is presumed not responsible for conduct and that a determination will not be made until the conclusion of the grievance process; and
- Notice of any provisions in the code of conduct that prohibit knowingly making false statements or providing false evidence during the grievance process
- School has ongoing duty to disclose additional allegations if new allegations arise during the course of the investigation.

HOW TO CONDUCT AN INVESTIGATION

Title IX Investigations are different.

- Length
- Complicated process
- This process must be used for every potential sexual harassment case—do not dismiss conduct as kids being kids. (Davis v. Monroe County was 5th graders)
- Use the checklist and forms

No Conflict of Interest

- Investigator must be impartial and not have a conflict of interest or bias. . .
 - Against the specific Complainant or Respondent or
 - Against Complainants or Respondents in general (i.e. investigator was accused of similar conduct)
- If investigator has a conflict of interest, notify the Title IX Coordinator immediately and assign a new investigator

Investigators must

- Meet the timeline set out in the District's policy
- If there is a temporary delay for good cause, provide written notice to both parties explaining the reason for the delay

**List of reasons
that may create
a good cause
delay in
completion:**

- Concurrent law enforcement activity
- Witness availability
- A pandemic-related reason (illness, unavailability)
- District breaks
- Absence of a party
- Availability of a party's advisor
- Need for language assistance or ADA accommodations

Investigation Basics

- District has the obligation to gather evidence BUT...
- No restrictions are placed on the rights of the parties to discuss allegations or gather/present evidence to the investigator including facts or experts. There is no requirement that the parties maintain confidentiality about the situation.
- No surprise interviews!! Both parties should be provided with written notice of their interview with sufficient time allowed to prepare. Other witnesses receive similar notices.
- You may not require a party to provide evidence (documentary or verbal) that would be legally protected under legally privileged relationships.

Investigating the Complaint

Both parties must have equal opportunity to present witnesses and evidence

- Interview both parties after providing notice
- Ask both parties to provide any documents they think are relevant
- Ask both parties who else they think you should talk to and then interview the witnesses identified by the parties

Investigating the Complaint

- Do not restrict either party's ability to discuss the allegations or gather and present evidence
- You may bring a note taker to interviews but that person must maintain confidentiality.

Where do you start?

- Investigator should review the notice of formal complaint to understand the allegations. Review the definition of sexual harassment.
- Create a draft witness list (understanding the parties can suggest additional witnesses).
- Identify evidence and create an evidence log.
 - Physical items
 - Electronic evidence.

Interview Best Practices

- Bring copies of any evidence you will ask about during interview with you.
- Interview questions
 - Open ended and tied to the allegations.
 - Review the definition of sexual harassment when drafting questions.
 - Dive into the details (who, what, when, where why).
 - Take your time in interviews. Allow the party to take a break if needed.
 - Review your notes before ending the interview.
 - Conduct another interview if necessary if questions arise during investigation (we do this all the time, two or three times if necessary).

Consideration of Evidence by Investigator and Decision Maker

- Direct Evidence—personally seen or heard. “I saw Maggie at the party.”
- Circumstantial evidence—what someone doesn’t see or hear; requires one to draw a conclusion. “I only saw Emily and Sarah at the party.”
- Inculpatory evidence-implicates guilt, showing the respondent did engage in the alleged behavior
- Exculpatory evidence—exonerates guilt, showing that respondent did NOT engage in alleged behavior

Relevance

Relevant evidence is all evidence that is related to the incident in question and goes to prove or disprove the allegations under investigation.

- Step 1: Review the evidence being offered
- Step 2: Consider the allegations being made.
- Step 3: Does the evidence being offered have the potential to prove/explain or disprove one or all of the allegations being made?

Relevance (continued)

- During the Investigation period, both relevant and irrelevant evidence is turned over to the parties.
- If evidence is determined irrelevant, the Title IX Investigator must provide a valid reason for their evaluation and annotate it in the investigative report.
- Only **relevant** evidence is submitted to the Decision-maker and parties.

Hypotheticals 3 and 4

Investigation is transparent

All evidence is collected and provided to the parties and any advisor by sending it in an electronic or hard copy format and allowing 10 days to submit a written response before circulating an investigative report.

May redact documents if needed. They get to see who said what.

May use a non-disclosure agreement to avoid third party disclosure of educational records.

Written Investigation Report

- Be sure to consider the written responses to the evidence that was provided by the parties when finalizing the written investigative report
- Written report summarizes all procedural steps and evidence collected and received
- **Report does not determine responsibility but can include investigator's observations, i.e. witness would not make eye contact or answered all questions "no."**

Decision on Responsibility— Administrative Review by Decision Maker

Practice tips regarding Decision

- Use checklists and templates
- Decision maker must be different from investigator or Title IX coordinator involved in the formal complaint.
- Decision maker must be impartial and have no conflicts of interest/bias

Q& A by the parties

After the written investigation report is provided and
BEFORE a determination of responsibility is made:

- a) Both parties must be given the opportunity to submit relevant written questions that he/she wants asked of any party or witness
- b) Must provide each party with the answers, AND
- c) Allow for limited follow up questions from the parties with a deadline to respond.

Written Questions

- Decision Maker makes determinations on relevance of questions.
- If a question is excluded by the decision maker, the decision maker must explain why the question is not relevant
- Complainant's sexual history or predisposition is NOT RELEVANT unless:
 - offered to establish that someone else committed the acts complained of
 - Offered to establish consent with the specific respondent

Basic Premises: Decision Makers

- Objectively evaluate all available evidence and determine what weight to give it.
- Weigh the evidence using a preponderance of the evidence standard--The evidence must show that its *more likely than not* that the respondent is responsible for the alleged conduct.
- And the alleged conduct is Title IX sexual harassment.

Making the Decision

Using the preponderance of evidence standard to review the evidence, issue a written determination that includes the following:

- List of the allegations
- Description of the procedural steps taken from receipt of the formal complaint through determination (include dates of notices, interviews, etc.) including description of standard of review
- Findings of fact that support the determination

Making the Decision

- Statement of and rationale for the determination as to each allegation, including:
 - Determination of responsibility including details about why conclusion for each allegation is rendered
 - Any disciplinary sanctions for respondent—can be punitive if respondent is responsible.
 - Remedies should restore or preserve equal access to the educational program or activity will be provided to complainant
- Include procedures and information regarding the permissible reasons for appeal

3 Grounds for appeal must be offered

- Procedural deficiencies
- Newly discovered evidence
- Bias or conflict of interest by investigator or decision maker
- Other grounds may be offered so long as they are done so on an equal basis.
- Decision maker on appeal is a different person from underlying matter.

Appeal Officer

Appeal officer is different from other participants in complaint.

No biases or conflicts of interest

Parties are notified of appeal and given opportunity to respond

Appeal officer reviews underlying decision to ensure it meets standards for decisions (preponderance of the evidence, procedural requirements, no bias/conflict)

Issues a written decision including reasoning for decision that that is simultaneously given to both parties. Decision is now final. Parties can complaint to USDOE's Office for Civil Rights.

Title VII vs. Title IX

Title VII

Creates an individual cause of action for an employee against public and private employers for discrimination generally.

EEOC/Arizona Civil Rights Division is fact finder.

Remedies are usually monetary.

Policy ACA

Title IX

District is obligated as a recipient of federal funds to follow process for sexual harassment for complaints of students and employees.

District conducts investigation.

Remedies are non-monetary to restore parties to equal access.

Policy ACAA

Records Retention

7 year retention period

May want to centralize record retention—tracking system.

Documents the basis for the District's conclusion that its response was not deliberately indifferent and measures were designed to restore or preserve equal access to the District's education program or activity

Useful Title IX resources

USDOE YouTube Channel:

<https://www.youtube.com/watch?v=i-BCnhUsJ4s>

Maricopa Community College District Resources

<https://district.maricopa.edu/consumer-information/title-ix>