

ATIXA TRAINING

K-12 COORDINATOR: FOUNDATIONS

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PART 1

OVERVIEW OF TITLE IX

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Lesson 1

Introduction: Overview of Title IX

Title IX is a federal regulation that prohibits discrimination in education on the basis of sex and gender. As the Title IX Coordinator, you'll oversee the processes and procedures that are required to ensure that your school or district is compliant with Title IX. There are many pieces to understand, and it can be very complex. In this section, you'll begin learning the background of Title IX and about the requirements of an appropriate response. You'll also be introduced to the Office for Civil Rights and their role in Title IX Administration and get an overview of due process protections.

After completing this section, you'll be able to:

- Discuss the history and legal development of Title IX, and
- Describe the core requirements of a school or district's response to reported sexual harassment.
- Discuss the role of the Office for Civil Rights in Title IX administration, and
- Describe due process requirements under Title IX.

Title IX Overview

Passage of Title IX

Congress passed Title IX in 1972 to address a gap left by the passage of the Civil Rights Act of 1964. Title VI of the Civil Rights Act prohibited discrimination on the basis of race, color, or national origin in educational settings. Title VII of the Civil Rights Act prohibited discrimination on the basis of race, color, religion, sex, or national origin in employment. These two laws left a gap, creating a need for a new law to provide protection on the basis of sex in educational settings. Congress passed Title IX to respond to that need.

Breaking Down the Title IX Statute

Let's begin by analyzing the Title IX statute line by line. The statute reads:

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

Although the statute comprises only thirty-seven words, every word has meaning, with requirements that are constantly being shaped and interpreted by court decisions, federal regulations, and other federal guidance.

No person:

"No person" broadens the Title IX statute, making it applicable to employees, students, and other groups. The second part of this phrase, "in the United States," specifies that the harassment must take place in the United States for Title IX to apply.

On the basis of sex:

Title IX prohibits discrimination based on a person's sex and their gender. Courts have considered, in recent years, whether the phrase "on the basis of sex" should be interpreted to include sexual orientation, gender identity, and gender expression. Following a U.S. Supreme Court decision that extended protections to LGBTQIA+ individuals under Title VII, the federal government clarified that Title IX includes sexual orientation, gender identity, and gender expression, as well.

Excluded:

The next section of the statute is "excluded from participation in, be denied the benefits of, or be subjected to discrimination." For Title IX to apply, a person must suffer some sort of adverse action or impact as a result of sex discrimination or harassment.

Education Program:

The Title IX statute applies to all federal funding recipients, extending to all recipient education programs and activities. It does not matter whether a particular program received federal funding. Any federal funding to a school or district means Title IX applies to all programs or activities, including employment.

Early Regulations and Case Law

Congress passed Title IX near the end of the civil rights era. Within a few years of passage, the rights secured by Title IX rapidly evolved through federal regulation and the federal courts. Beginning in 1975, the federal government started issuing regulations defining the 37-word Title IX statute, first through the Department of Health, Education, and Welfare, then through the newly created Department of Education's Office for Civil Rights. Throughout the next 20 years, federal courts outlined the right to sue under Title IX, the applicability of Title IX to employment contexts, and whether sexual harassment constitutes sex discrimination under Title IX.

Timeline of Title IX

1972 – Congress passes Title IX toward the end of the civil rights era.

1975 – The federal government publishes the first Title IX regulations.

1979 – New federal guidelines address sex equity in athletics.

1979 – Federal courts begin defining Title IX protections.

- In *Cannon v. University of Chicago*, the Supreme Court determines that students have the right to bring suit under Title IX.

1980 – The newly formed U.S. Department of Education's Office for Civil Rights (OCR) assumes responsibility for enforcing Title IX.

1982 – The Supreme Court decides *North Haven Board of Education v. Bell*, holding that Title IX covers employment discrimination on the basis of sex.

1992 – The Supreme Court holds in *Franklin v. Gwinnett County Public Schools* that sexual harassment can constitute a form of sex discrimination under Title IX.

Scope of Title IX

Title IX's scope – meaning the full picture of the behaviors and circumstances covered by Title IX – derive from the relevant court decisions, federal regulations, and guidance from OCR. Those behaviors and circumstances break into two broad categories: discrimination and harassment.

Discrimination

Discrimination is broken down into two categories. The first is sex or gender discrimination, or preferences expressed in decisions to allow or deny participation on the basis of a person's sex. The second category considers equity issues in a school's program. For example: Title IX requires that schools provide balanced, equitable participation opportunities, such as in athletic programs or academic enrichment programs for students, so that participation is not precluded for a person on the basis of their sex.

Harassment

The harassment prong addresses interpersonal behaviors in a school's program. Harassment is broken into three broad categories – quid pro quo harassment, sexual harassment, and retaliation.

Significant Cases

Case Introduction: Alida Gebser

In 1998, the Supreme Court decided *Gebser v. Lago Vista Independent School District*, delivering an important opinion analyzing when a school or district has actual notice of reported sexual harassment.

Alida Gebser was an 8th grade student participating in a book discussion group led by a high school teacher, Frank Waldrop. During the book discussion, Waldrop made sexually suggestive comments, resulting in other students' parents voicing concerns. The principal met with Waldrop, who apologized and stated it would never happen again. The principal further advised Waldrop to cease any inappropriate behavior. During the same timeframe, Waldrop had focused his attention on Alida, who enrolled in the high school upon completing eighth grade. Waldrop engaged in grooming behaviors, and at one point visited Alida at home under the pretense of giving her a book. While visiting her home, Waldrop kissed and fondled her.*

Throughout the remainder of the year, Waldrop and Alida had sexual intercourse on several occasions, often during class time, though never on school property. Alida was conflicted about what to do and did not report anything to school officials or her parents. Several months later, a police officer discovered Waldrop and Alida engaging in sexual intercourse in a car near the school but off campus. Waldrop was arrested and the school district terminated his contract. Waldrop lost his teaching license. The Gebser family sued the school under Title IX, claiming that the school district should have additional liability for the sexual harassment that Alida experienced.

*Grooming: A predatory act of an adult taking manipulative steps to put a child into a position that makes them more isolated, dependent, likely to trust, and more vulnerable to abusive behavior.

Gebser Analysis

Remember that Alida didn't tell her parents or school officials what was going on. As such, the Supreme Court now had to question whether the school had adequate notice of the harassment and how the school responded once it had that notice.

The Gebser court set forth a three-part standard to define school or district liability under Title IX:

- An official of the school or district must have had "actual notice" of the harassment.
- The official must have authority to "institute corrective measures" to address the harassment; and
- The official must have "failed to adequately respond" to the harassment and, in failing to respond, must have acted with "deliberate indifference."

Adequate Notice

The Court held that under these facts, the school did not have actual notice of the harassment. Alida had not told her parents or the school about the inappropriate behavior. Additionally, the prior complaints about Waldrop's inappropriate comments in the book group did not constitute adequate notice of the specific sexual relationship with Alida. The three-part Gebser standard continues to guide our legal analysis of "actual notice" and a school or district's responsibility to respond to reported sexual harassment.

Case Study: Davis v. Monroe County BOE

A year after Gebser, the Supreme Court decided Davis v. Monroe County Board of Education, providing an answer to the question left open in Gebser, which is: "what does it mean to properly respond?" Additionally, the Court addressed whether the Gebser standard applies to student-on-student harassment in addition to the type of employee-on-student harassment present in Gebser.

LaShonda Davis was a 5th grade student who suffered from persistent sexual advances from a male classmate. He attempted to touch her breasts and genital area and made vulgar statements about wanting to engage in sexual activity with her. She promptly reported the incidents to her teacher and her parents notified the school principal. Little disciplinary action was taken. The harassment occurred for many months. The classmate continued to engage in sexually suggestive comments and behaviors, along with physical harassment.

All incidents were reported to teachers or administrators either by LaShonda or her parents. When LaShonda's parents realized that their daughter's grades were suffering, she was unable to concentrate on her studies, and had written a suicide note, they finally decided to take the matter to local law enforcement. The Davis family eventually reported the incidents to law enforcement because they believed the school was unwilling to take any effective action. For example, LaShonda had requested to change her classroom seat, but the school refused to do so for several months.

Davis Analysis

The Court held that the Gebser standard applied to student-on-student harassment. When a school has

notice of student-on-student harassment, it must adequately respond. Applying the *Gebser* standard, the Supreme Court said that a school or district is liable under Title IX when it has actual notice of the harassment and then responds in a way that is deliberately indifferent to the harassment.

Adding to the *Gebser* standard, the Supreme Court held that Title IX is intended to apply to the most severe forms of sexual harassment and will apply when the harassment is “severe, pervasive, and objectively offensive.” Moreover, the school’s indifference must be “systemic.” Finally, the Supreme Court held that “deliberate indifference” occurs when a response is “clearly unreasonable in light of known circumstances.”

Davis Standard

Under these facts, when a school failed to stop the harassment, prevent its recurrence, and remedy the effects of the harassment, LasShonda Davis’s school could be determined to be deliberately indifferent. Ultimately, the Court found for the Davis family. Despite being decided over 20 years ago, the *Gebser* and *Davis* standards continue to be the governing framework by which courts evaluate a school district’s response to known harassment.

The IX Commandments

Title IX regulations can be complex. ATIXA’s IX Commandments can help you understand key concepts and requirements under Title IX. The IX Commandments include concepts from case law, OCR guidance, and lessons taken from decades of Title IX practice.

Investigation

To start, investigations must be thorough. A thorough investigation gathers all necessary information in a neutral and impartial manner to help fully understand the allegations and relevant facts. As a Title IX Coordinator, you have the responsibility to oversee investigations. Your goal is to ensure that the focus is on gathering relevant evidence from credible and reliable sources. In some circumstances, you may also serve as an investigator, depending on your school or district’s policy.

Resolution

A prompt resolution process is a requirement of Title IX. The process should also be effective in stopping the harassment, preventing its recurrence, and remedying any effects of the harassment. Lastly, the process should be fair, reasonable and equitable for the parties.

Remedy

The final commandments address the remedies, or outcomes, resulting from the process. The school or district must act:

- Reasonably in its efforts to stop discrimination
- Reasonably in its efforts to prevent recurrence, and
- Equitably to remedy the effects.

The Office for Civil Rights (OCR) & Title IX

The Office for Civil Rights (OCR)

In addition to the federal courts, the U.S. Department of Education's Office for Civil Rights, or OCR, also enforces Title IX. As such, an individual has two routes to pursue a Title IX claim. First, a student, parent, or guardian may sue for monetary damages or court intervention. Their second option is to file an administrative complaint with OCR. As the Title IX Coordinator, you will likely receive notice of the complaint from OCR, along with your superintendent.

OCR Administrative Action

OCR initiates administrative action, sometimes based on a complaint from a student or parent/guardian. When OCR investigates, the process often concludes with a voluntary agreement between OCR and the school district. Generally, the agreement outlines efforts to improve investigation procedures, train personnel, update policies and procedures, and other remedial efforts designed to improve the school or district's compliance with Title IX.

Please note: Employees may file a complaint with the Equal Employment Opportunity Commission, or EEOC.

Responding to OCR Complaints

When an individual files an OCR complaint and OCR decides to begin its administrative review process, Title IX Coordinators may be the first point of contact for OCR. Superintendents may also be notified if OCR is considering opening an investigation or beginning compliance reviews in your school or district.

Although OCR investigations tend to be infrequent, you should be prepared for them and understand how to respond if you receive correspondence from OCR. In general, you should be prompt and responsive to OCR requests. Your legal counsel will likely be a necessary collaborator to help you understand OCR's requirements and your obligations. OCR investigations often include gathering data and documents from school records and OCR investigators conducting interviews with relevant school officials.

Compliance and Technical Assistance

OCR provides support to Title IX Coordinators, schools, and districts by supporting large-scale initiatives that focus on broader compliance issues. For example, OCR has been focused on sexual assault in K-12 public schools or on the specific impact of harassing behavior on individuals with disabilities. Additionally, OCR offers technical assistance through the OPEN Center to help stakeholders, students, and parents or guardians understand how to best apply Title IX in their school.

OPEN Center stands for Outreach, Prevention, Education, and Non-Discrimination Center.

Regulatory Documents from OCR

OCR has issued a variety of regulatory and guidance documents since the Gebser and Davis decisions. OCR may issue regulations, "Dear Colleague Letters", or Q&A documents to provide answers to the most pressing questions facing Title IX administrators. While not all these documents are still in effect, the Department of Education is currently working through the rulemaking process to replace the 2020 Title IX regulations with new regulations, so OCR will likely be adding to this list within the next few years.

- 2001: OCR Revised Sexual Harassment Guidance **RESCINDED**
- 2003: Dear Colleague Letter on Title IX and Free Speech
- 2010: Dear Colleague Letter on Harassment and Bullying
- 2011: Dear Colleague Letter; Sexual Violence **RESCINDED**

- 2013: Dear Colleague Letter on Pregnant and Parenting Students
- 2014: 2014 Q&A on Title IX and Sexual Violence **RESCINDED**
- 2015: Dear Colleague Letter on the Role of Title IX Coordinators
Title IX Resource Guide **RESCINDED**
- 2016: Dear Colleague Letter on Transgender Students **RESCINDED**
- 2017: Q&A on Campus Sexual Misconduct **RESCINDED**
- 2020: Q&A of Civil Rights and School Reopening in the COVID-19 Environment
2020 Title IX Regulations & Amendments to the Title IX Regulations
- 2021: Notice of Interpretation: Enforcement of Title IX
- OCR interprets Title IX to prohibit discrimination based on sexual orientation and gender identity following *Bostock v. Clayton County*.
- Q&A on the Title IX Regulations on Sexual Harassment
Supporting Intersex Students

Due Process Overview

Case Study: *Goss v. Lopez*

Most public school administrators understand that students are entitled to a certain amount of due process as part of the school's conduct or disciplinary system. In 1975, the Supreme Court detailed due process rights in the K-12 context in the case of *Goss v. Lopez*. In this case, nine high school students were suspended for 10 days for non-academic misconduct.

Because K-12 education is a fundamental right, the Supreme Court held that the suspended students were entitled to some elements of due process. When it's possible a student may face separation from the school, the requirements for due process can be increasingly formal.

To receive a fair process, the parties must have:

- Written notice of the charges
- The ability to review and respond to the evidence, and
- An opportunity to be heard by the decision-maker.

Core Concepts from *Goss v. Lopez*

Hearings are generally informal and can happen without legal counsel, cross-examination of witnesses, or even the presence of witnesses. However, when there's the potential for suspension beyond 10 days or expulsion, the school or district is required to provide formal procedures to protect due process rights. In many ways, *Goss v. Lopez* laid the groundwork for the due process requirements that are echoed in the current Title IX regulations.

Please note: *Goss* focused on protections for students, but employees may have similar protections stemming from other federal, state law, and district policy or bargaining agreements.

Due Process & Title IX Regulations

Due process requirements are a pivotal component of the current Title IX regulations. As the Title IX Coordinator, you'll need to understand due process issues and ensure that your school or district's

policy meets the due process expectations that have been established by federal and state law and regulations. This includes Title IX regulations.

Important Due Process Points to Consider:

- A consistent standard of evidence.
- Detailed notice of allegations.
- Opportunity to review and respond to the investigation report.
- Opportunity to be heard by a neutral Decision-maker.
- Opportunity for parties to indirectly ask questions of each other and witnesses.
- Advisor of choice, including attorneys.
- Separation of duties, protection against, bias, and conflicts of interest.
- Unbiased and sufficient training.
- Publicly posted training materials.

Conclusion

You've reached the end of Overview of Title IX. After completing this section, you should now be able to:

- Discuss the history and legal development of Title IX, and
- Describe the core requirements of a school or district's response to reported sexual harassment.
- Discuss the role of the Office for Civil Rights in Title IX administration, and
- Describe the process requirements in Title IX.

Lesson 2

Activity: Defining Equality, Equity, Justice and Agency

After completing this section, you will be able to:

- Discuss the history and legal development of Title IX, and
- Describe the core requirements of a school or district's response to reported sexual harassment.
- Discuss the role of the Office for Civil Rights in Title IX administration, and
- Describe due process requirements under Title IX.

Defining EEJA

Throughout your training, you'll hear references to equality equity, justice, and agency to describe processes that are compliant with the Title IX regulations. Let's compare the differences between these four concepts. Take time to consider how these ideas fit into your Title IX program as you review the concepts.

Review the pictures and descriptions to learn more about each concept.

Equality



Equality is a common goal of many processes. While treating parties equally is required in some areas of Title IX regulations, the image shown depicts some of the potential pitfalls in trying to treat all parties equally. Additionally, some aspects of Title IX compliance mandate equity, which may be different than equality. In your role as the Title IX Coordinator, understanding the difference is important.

Equity



Equity looks at the whole picture and the circumstances impacting each person individually. The image shows the individuals standing on a sloping ground. Although all individuals receiving equal treatment, the sloping ground makes the treatment inequitable, since some individuals may require more boxes than others to achieve the same outcome. An equity-based framework acknowledges that there may be systemic barriers that impact individuals differently, which require targeted support or solutions for those impacted.

Justice



Justice takes the concept of equitable treatment further by requiring us to eliminate the structural or systemic barrier entirely. In the image, the barrier that was preventing the individuals from seeing is now gone. With justice, all individuals can participate without the need for targeted support or accommodations.

Agency



Cultivating a sense of agency creates a system in which individuals know that access is their right.

Insights from an Expert: Equality, Equity, Justice, & Agency

Tanyka Barber, M.H.S., J.D., Partner, TNG & ATIXA Advisory Board Member



I love talking through these concepts with Title IX Coordinators because these concepts really are fundamental to the job that you do, as a Title IX Coordinator as it relates to ensuring sex- and gender-based compliance throughout your entire district. And so, the graphics you've probably seen, some form of these graphics before, but these graphics are really helpful, and you're beginning to think about some of the concepts and the way in which you approach your role as a Title IX Coordinator. Often times we tend to think that we need to approach our work from an equality perspective where we treat everyone the same. And in this graphic, you have three individuals that we'll refer to students who are trying to access a baseball game or your education programs or activities. But in the graphic, you'll see that there is a barrier with that fence that's prohibiting them from being able to access that baseball game.

So, if you approach your work from an equality perspective, you're going to treat all of those students the same. And in the graph, did you see that we gave all of those students one box? So, we're treating them the same. We're not doing anything different for the students, so we're all giving them one box to help them overcome that barrier to participation. But you'll see that that is not as effective when we treat everyone the same because we are not doing that individualized assessment to see what it is that each individual truly needs in order to overcome that barrier.

So that's equity and that's the lens that we really want you to begin to think about approaching your work from, because you're looking at each individual independently to do that assessment to see what it is that they need, taking the full individual into account. In the graphic, you'll see that each of the students here are not starting on the same level playing field, and that can be due to external factors to your school or your district, and internal factors. So some things such as race, religion, disability, socioeconomic status, the neighborhood that people live in, these are all types of factors that are external to your school environment, but do impact how your students and your employees show up in the school building every day.

And there are also some internal factors that you may have a little more control over, but we need to realize that each of our students, each of our employees are impacted by these factors and they experience these factors differently. So doing that individualized assessment, taking into account those factors, will help you be able to identify what each particular individual needs in order to help them overcome the barriers to participation and access in your education programs or activities. So, in the graphic, you'll see that we gave that first student one box because they were starting in a higher playing field, OK? Whereas that second student got two boxes and that third student got three boxes because we took into account their circumstances, their environment, those external and internal factors that come to bear for individuals.

And so that's at a minimum, that's the perspective that you want to approach your work from as a Title IX Coordinator when you're thinking about those sex- or gender-based discrimination or harassment issues that may exist within your school community. And you want to also begin to think beyond that, particularly as a Title IX Coordinator, because you do have that compliance role to think about what are

the systemic barriers within your school environment that prevent people from being able to access and practice space and your education programs and activities. So, in the graphic, you see the barrier was the fence. And so being able to identify what those systemic issues are and the root causes of sex-and gender-based discrimination and harassment that may occur within your schools will help you get to that justice perspective where you're eliminating the barrier in the first place so that now people can freely participate in your education programs or activities.

Ideally, we want to begin to still think beyond just identifying those systemic barriers. You've removed those barriers. But now I have to empower individuals. So, empower your students, empower your employees to know that those barriers are removed and that they can freely participate and show up every day as their true selves. So that's agency, where you have removed the barriers, but you have also empowered individuals to know that they have a right and the ability to freely show up and participate in your education programs or activities. So that is the ideal and what we want to be working toward as Title IX Coordinators, beginning with an equity perspective, shifting it to identifying those systemic barriers and then empowering your school community to be able to freely access and participate in your education and programs and activities.

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PART 2

TITLE IX ROLES & RESPONSIBILITIES

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Title IX Roles & Responsibilities

As the Title IX Coordinator in your school or district, you're responsible for overseeing and complying with the Title IX process. This includes assigning and training members of the Title IX team and addressing issues of bias and conflict of interest. This section outlines the roles and responsibilities of the individuals involved in the Title IX process and provides an overview of the formal grievance process. This section also includes a discussion of bias and conflict of interest in the Title IX process.

After completing this section, you will be able to:

- Describe the roles and responsibilities of members of a Title IX team.
- Identify potential bias and conflict of interest issues, and
- Describe the structure of the formal grievance process.

The Formal Grievance Process

Title IX Grievance Process

In your role as the Title IX Coordinator, it's important to understand how each piece of the process fits into the larger picture. The grievance process begins with an incident that results in a report or complaint, followed by an initial assessment, investigation, decision-making, and possibly an appeal.

Report/Complaint: A report or formal complaint alleging a policy violation is the first step in the process.

Initial Assessment: The Title IX Coordinator conducts an initial assessment to determine whether there is jurisdiction under Title IX, and if so, the scope of the response to the allegation(s).

Formal Investigation: An Investigator conducts a neutral and impartial investigation by gathering relevant evidence. The Investigator drafts a comprehensive report after completing their investigation.

Determination: The Decision-maker considers relevant evidence from the report and the hearing (if applicable) and determines whether the respondent violated policy.

Appeal: The parties may submit an appeal of the determination. The Appeal Decision-maker makes a final determination.

Title IX Coordinator Oversight

During the Grievance Process, you will have a variety of responsibilities.

- Monitoring existing supportive measures and implement new measures as requested or appropriate.
 - Supportive measures are non-disciplinary, non-punitive, and individualized measures used to restore or preserve equal access.
- Appointment, coordinator, oversight, and supervision of Investigators and investigations.
- Assisting Investigators in developing strategy and timeline planning.
- Facilitating and sending notice to the parties.
- Ensuring compliance with published policies and procedures.
- Organizing and scheduling any hearing or any other decision-making step in the process if there is no hearing.
- Coordinating and communicating with any local law enforcement.

- Retaining records of all activities related to the formal grievance process.

Additional Considerations

You may consult on process and answer any process-related questions from parties, witnesses, Investigators, Decision-makers, or Advisors. Although others may be carrying out the primary tasks of investigating and rendering a decision on whether a policy violation occurred, it's still important that you remain up to date on the case.

Title IX Roles & Responsibilities

Title IX Roles

There are several phases of the Title IX grievance process. Within each phase, various members of the Title IX team play a role in ensuring an equitable, fair, and prompt resolution. In most schools and districts, Title IX responsibilities are taken on by existing employees who are either based in individual schools, such as assistant principals or principals, or by district-level employees. You appoint individuals to the Title IX team and are responsible for ensuring they are trained. When recruiting, consider who has the necessary skills and time to do the work.

Key Roles in the Process

The roles in the Title IX process include:

- Title IX Coordinator
- Investigator
- Decision-maker
- Appeals Decision-maker
- Informal Resolution Facilitator, and
- Advisor

These individuals participate in different phases of the process, though some roles, like the Advisor, may participate in multiple phases.

Title IX Coordinator

As the Title IX Coordinator, you are the employee tasked with overseeing the school or district's entire compliance efforts under Title IX. The Title IX Coordinator is often a district-level employee but can be school-based. Ideally, you'd report to the Superintendent, but there can be a dotted-line supervisory relationship with the Superintendent, too. However, wherever you fall within the organizational structure, you must have a high degree of autonomy and independence to carry out your responsibilities.

You receive reports and complaints of incidents of harassment and discrimination, conduct the initial assessment, implement supportive measures, and manage the informal and formal resolution processes. Here are some additional responsibilities of a Title IX Coordinator:

- Training oversight
- Creating and implementing policy and process
- Prevention and remediation of all sex/gender-based discrimination and harassment
- Serving as the point person for government inquiries
- May serve as Investigator

- Supervising investigations and other staff involved in the formal resolution process
- Compliance with final sanctions
- Coordinating the appeal process
- Coordinating the overlap of other student and employee grievance processes
- Navigating First Amendment and academic freedom protections
- Prevention and remediation of retaliation
- ADA/504/IDEA disability compliance oversight
- Athletics and other program equity
- Recordkeeping

Investigator

As the Title IX Coordinator, you assign a person or a pair of people to investigate allegations in a formal complaint. The Investigator will conduct a neutral investigation, gather evidence, and draft an investigation report. They do not decide whether a policy violation has occurred. An Investigator must be properly trained prior to serving.

It's important to note that as the Title IX Coordinator, you may also serve as an Investigator.

Decision-maker

The Decision-maker is a person or panel who determines whether the respondent violated school or district policy. Their decision is based on reviewing the investigation report and a hearing if the school's policy requires it. For K-12 schools, hearings are optional, and most schools choose not to hold hearings. However, hearings are required for long-term suspension or expulsion cases.

The Decision-maker will provide a thorough written determination letter to the parties that outlines the rationale for the decision. Under the federal Title IX regulation, you are not permitted to serve as Decision-maker.

Informal Resolution Facilitator

Title IX regulations permit informal resolution in some circumstances if the parties agree to participate. Additionally, you must determine whether the circumstances are appropriate for informal resolution. For example, informal resolution may not be appropriate in cases involving a sexual assault or in cases where a party has experienced some form of trauma.

Informal resolution options may include a mediated conversation, restorative practices, or other informal options. The Informal Resolution Facilitator must be trained in effectively conducting alternate resolution practices.

As the Title IX Coordinator, you may serve as a Facilitator.

Appeal Decision-maker

The Appeal Decision-maker may be an individual or a panel. This role determines whether the party filed the appeal before the deadline. They'll also decide whether the party identified an appropriate reason for appeal. Your policy should list the reasons parties may appeal a decision, which should include those required by the regulations.

Under the regulations, appropriate reasons for appeal include:

- Procedural irregularity that affected the outcome of the matter,
- Newly discovered evidence that could affect the outcome of the matter, or
- Presence of a conflict of interest or bias that affected the outcome of the matter.

Schools may offer additional reasons for appeal as long as they apply equally to all parties.

Appeal Decision-maker Considerations

The Appeal Decision-maker will review written submissions from parties, review the investigation report, and review other information from the hearing, if one occurred. They may need to speak with the investigators, original Decision-maker, the parties, or the witnesses.

The review of the case is ultimately limited to the reasons identified in the appeal. The Appeal Decision-maker will send a written determination letter outlining the rationale for their decision.

Advisor

While schools and districts may not offer the option for Advisors in other processes, the Title IX regulations require parties to have the option for an Advisor. Advisors are selected by the parties to assist them throughout the process, which includes attending meetings, interviews, and any hearings. Advisors have an active role in several phases of the process and are an important part of ensuring due process and equity.

A party may choose their Advisor, who may be anyone, including an attorney. If they're not already serving formally as the Advisor, a parent or guardian may be present for meetings or interviews in addition to an Advisor.

Restrictions on Advisors

Your school or district policy may restrict participation of Advisors, but restrictions must apply equally to all parties' Advisors. For example, a Title IX policy may restrict the ability of an Advisor to directly address Investigators during an interview or may set behavioral standards.

There is no requirement for the school or district to provide an Advisor for parties in K-12 settings. There is no requirement to train Advisors, either, though you may wish to do so.

Required Training

The Title IX team comprises many roles that are filled by individuals across the school or district. The Title IX regulations outline training requirements to ensure Title IX team members are properly skilled and knowledgeable to carry out their assigned roles. Title IX Coordinators, Investigators, Decision-makers, Appeal Decision-makers, and Informal Resolution Facilitators need specialized training. You may also choose to train Advisors, though that is optional for K-12 schools and districts.

Specialized Training: If you decide to use an external person for these roles, they must be adequately trained, too.

Required Training Topics

The Title IX regulations list the required topics for training. Review this list of topics in which your Title IX team should be trained. You may elect to train your Title IX team on additional topics, especially training for role-specific skills.

- Definition of sexual harassment.
- Scope of the recipient's education program or activity.

- How to conduct an investigation and grievance process, including hearings, appeals, and informal resolution processes, as applicable.
- How to serve impartially, including avoiding prejudgment of the facts at issue, conflicts of interest, and bias.
- Issues of relevance pertaining to questions and evidence, including the categorical exceptions to relevance.
- How to create an investigation report that fairly summarizes relevant evidence.
- Technology used at live hearings, if applicable.

Training Materials

Training materials must not rely on sex stereotypes and should promote impartiality. It will be important to properly assess your training materials. Training materials in which all case study respondents are boys may be problematic, for example. Similarly, training materials that cross the line from informational to advocacy may not be considered impartial. You will need to keep these considerations in mind when creating your own training or contracting with an external trainer.

Like other Title IX records, all training materials must be maintained for seven years, with the most recent materials posted on the school or district's website.

Issues of Bias & Conflicts of Interest

Bias & Conflicts of Interest

Bias involves any prejudice or unfair preference that improperly influences an investigation. A conflict of interest exists when you're unable to remain truly neutral due to some other interest. This may occur due to the position you hold, prior interaction with the parties or their parents or guardians, or other circumstances that may impact neutrality.

If a party or advisor believes that an Investigator has exhibited some form of bias or conflict of interest, your district policy should afford the right to appeal the outcome of the case; this right is required under the Title IX regulations.

Examples of Conflict of Interest and Bias

When serving in a Title IX role, the Title IX regulations require that individuals do not have a conflict of interest with the parties or serve with any bias.

- Serving in more than one role in the process. The Title IX Coordinator regulations prohibit individuals from serving in multiple roles in the process, with few exceptions.
 - Example: An Investigator cannot serve as an Appeal Decision-maker.
- A school or district's legal counsel participating in the Title IX process. Consult legal counsel as needed, but legal counsel cannot serve as an Investigator, Decision-maker, or in any other defined roles.
- Decision-makers who are poorly trained or who do not act impartially.
 - Example: Decision-makers must approach their role without assumptions or preconceived notions about the parties based on gender or any other personal characteristics.
- Training materials that rely upon sex stereotypes.

Pre-Existing Relationships

Simply knowing a student or an employee is usually not enough to create a conflict of interest unless objectivity is compromised in some way. Previously disciplining a student or employee is also not necessarily sufficient to create a conflict of interest. If you have any questions about whether a conflict of interest or bias exist, work with your legal counsel.

Insights from an Expert: Bias & Conflict of Interest

Kim Pacelli, M.Ed, J.D., Partner, TNG & ATIXA Advisory Board Member



A common question that we get when dealing with issues of bias and conflict of interest is what to do when either the Title IX Coordinator, the Investigator, the Decision-maker, the appellate Decision-maker, when any of the folks who play roles in our Title IX system, what do we do when they already know a student, or they already know a colleague who's going through a Title IX process? The bottom-line rule is that just knowing someone is not necessarily a conflict of interest or does not necessarily create issues of bias in our system.

Our schools are often small. They are close communities, and the types of individuals and administrators who are going to serve roles in the Title IX system often will have relationships with students or families or colleagues. So just knowing someone in and of itself is not enough to create a conflict of interest. What the Investigator or the Decision-maker needs to do is ask themselves, are they able to actually be impartial in the case?

I tend to think of this as a little bit of a sliding scale. If I've just encountered someone before for a minor disciplinary matter, then I am probably able to be impartial and therefore do not need to recuse myself. There's no issue of bias or conflict of interest. If I've been involved previously in a major disciplinary incident, then maybe I do need to question for myself whether I'm able to be impartial in the matter, and whenever the member of our Title IX team, whatever the role does, has questions about their own ability to be impartial then the best practice is, of course, to remove themselves, right.

The last thing to think about is the appearance of a conflict of interest or the idea that a student or a colleague or a family may request that someone not serve as the investigator or not serve as the Decision-maker because of a prior disciplinary incident. There, as Title IX Coordinator, you and the professional really need to use your judgment. You often evaluate whether there are other individuals who are potentially able to play that role. At the end of the day, it really comes down to the Title IX Coordinator to use their judgment about whether to appoint a different person to play the particular role.

Conclusion

You've reached the end of Title IX Roles & Responsibilities. After completing this section, you should now be able to:

- Describe the structure of the formal grievance process.
 - Describe the roles and responsibilities of members of a Title IX team, and
 - Identify potential bias and conflict of interest issues.
-

PART 3

JURISDICTION UNDER TITLE IX

NOT FOR DISTRIBUTION

Lesson 1

K-12 Coordinator: Determining Jurisdiction

Before moving forward with the Title IX process, you must determine whether a complaint falls under the jurisdiction of Title IX or whether it should be dismissed and addressed under another student or employee conduct policy. In this section, you'll learn about the requirements for Title IX jurisdiction.

After completing this section, you will be able to:

- Explain jurisdiction under Title IX, and
- Describe the elements of determining jurisdiction.

Title IX Jurisdiction

As Title IX Coordinator, you will receive reports of sexual harassment. When a student, parent or guardian, or employee files a formal complaint requesting an investigation, you must first determine whether the allegations fall within Title IX jurisdiction. If the allegations fall within Title IX, then the school or district must follow the Title IX process. However, if the allegations fall outside Title IX, then the school or district has flexibility to address the behavior under their usual student conduct or employee conduct process.

Elements of Jurisdiction

Title IX requires you to analyze whether a report falls within Title IX jurisdiction. When considering jurisdiction, focus on the following elements:

- Who is the Complainant?
- Who is the Respondent?
- Did the conduct occur in the context of a school's education program or activity? and
- Does the conduct, as alleged, match one or more of the definitions of sexual harassment under Title IX?

Let's start by discussing the first element of jurisdiction, the complainant.

Who is the Complainant?

For Title IX to apply, the Complainant must be a person who is participating (a student or an employee) or attempting to participate in an educational program or activity. This means the Complainant must be a student or employee, but Title IX adopts a broad definition of "attempting to participate." As a result, applicants for employment, future students, or alumni trying to participate in programming may all meet this definition.

However, former students and employees may not be complainants. If you receive a report from a former student or employee, you may have an interest in speaking with them to learn more, but you're not under an obligation to respond under Title IX.

Who is the Respondent?

For the Respondent, you'll need to determine whether they're an individual over whom the school or district exercises some degree of control. Ask yourself, does the school or district have authority to take disciplinary or remedial action against the Respondent? Sometimes a school may lack disciplinary authority, such as when a student is sexually harassed by another student attending school in another district or if an employee resigns before a school is able to fully investigate.

If the Respondent is a third-party vendor, guest, or former student or employee, you may need to talk with your general counsel to clarify your methods to address and remedy the behavior. You may not be obligated to use your Title IX process for third parties.

Control Over the Context

For Title IX to apply, the school or district must have control over the context where the reported harassment occurred. Ask yourself, did the conduct occur within the context of the school or district's education program or activities? One clear-cut area of analysis to consider is where the conduct occurred. Did the harassment occur:

- At a location, event, or in a circumstance over which the school exercised substantial control?
- On property being used by a school-sponsored program or event?
 - Renting a facility to host prom is an example of a school-sponsored event.
- On property owned or controlled by an organization recognized by the school?

Keep in mind, there can be circumstances where the school or district controls the context, even when incidents do not occur on school property.

What about conduct outside of the United States?

Title IX jurisdiction does not apply when conduct occurred outside the United States, even if it occurred on a school-sponsored trip.

Context: School Technology

Control over the context is not just a question of physical location. A common circumstance in K-12 settings involves harassment that occurs using school technology. Does the school or district control the context of the harassment if school-sponsored technology was involved, such as school-issued devices or networks?

To consider whether the behavior may qualify as "in-school" or "out-of-school" ask yourself the following questions:

- Does the incident involve harassment in school during the school day, even if it is involving personal devices and commercial networks?
- Are school-sponsored devices involved?
- Are school networks and other infrastructure involved?

If the answer to any of these questions is "yes", then a school may have control over the context of the behavior and would need to move forward with a Title IX process.

Insight from an Expert: School Technology

Tanyka Barber, M.H.S., J.D., Partner, TNG & ATIXA Advisory Board Member



When we're talking about the use of technology and whether or not you have Title IX jurisdiction, the same rules apply. So you still have to ask yourself, do I have control over the harasser? And do I have control over the context of that harassment? That first box is typically easier to check off, whether that person is typically your current student or your current employee who is using that technology, to engage in sexual harassment or sex-based discrimination.

The second question is usually where you have to probe a little further and get some more details in terms of whether you have control over the context when someone uses technology to engage in sexual harassment. That could be the use of social media to harass someone. That could be text messages over using someone's phone to text message. That could be sending some messages in the virtual learning environment, whether it's in a chat, or in zoom, or Google Meets, whatever kind of virtual learning environment you're using. But typically, these types of cases, particularly in the K-12 arena, will arise through the use of social media. So you'll have to ascertain whether or not you have control over the context of that behavior.

A couple of things you'll want to think about what device was used to engage in that behavior. We've recently seen a lot of schools and districts issue school-issued devices to students, whether that's a laptop or a tablet, while you engage in virtual learning. So, if a student were to use those school-issued devices to engage in this behavior, you have control over that context. If that behavior occurred in your virtual learning space, again, if I'm using the chat function to harass one of my classmates during a virtual learning, or if I'm engaged in texting them during the virtual learning timeframe, then you have control over that context.

You'll also want to look at the times I talk about if I'm engaging in that behavior during a virtual learning session, then that's during the school day, that's during school hours. Then you would have control over that context. If I'm using my personal device, but I'm using the school or the district's network to transmit these text messages or to transmit these social media posts, then you have control over that context. So those are a couple of things you'll want to think about. What device is being used? The time that that behavior is happening. Is it happening over your virtual learning space or during your virtual learning time and whatever kind of platform you're using? Am I using the school-issued Wi-Fi network to engage in this behavior? Those are typically the factors that will allow you to have control over that context, such that Title IX would apply.

Now, if I were to be using my device on my personal time, it's my personal device. It's not a school-issued device. Maybe I'm at home after school or I'm at home over the weekend, and I'm posting harassing messages on social media, you may have control over the harasser if I'm your current student or employee, but you would not have control over that context. That happened outside of your education program or activity. It was in my private home using my personal device over the weekend. So when you think about whether or not you have jurisdiction when it comes to technology-facilitated sexual harassment, the same rules apply. You're going to ask yourself, "Do I have control over the context?" Which is the main piece you'll want to think about? And "Do I have control over that harasser?"

In-Program Effects

Even if you answered “no” to all of those questions, you should still consider whether there are in-school effects of out-of-school harassment. Title IX requires schools and districts to address “in-program effects” for out-of-school harassment, even if the response is limited to supportive measures.

If the reported incident is a combination of in-program and out-of-program conduct, the school or district has jurisdiction over the in-program conduct.

Does Conduct Constitute Sexual Harassment?

For Title IX to apply, the alleged behavior must constitute behavior that would meet one or more of the definitions of sexual harassment. The jurisdictional assessment helps us understand whether the Title IX process will apply, or whether schools may use an alternate process to address the alleged conduct violation.

Covered Programs

Finally, Title IX jurisdiction applies to all programs operated by a school or district that receives federal funding, regardless of whether the individual program in question receives or uses federal funding. This means that all of the school or district’s programs fall under Title IX jurisdiction.

Review: Elements of Jurisdiction

Review this list of all the elements of jurisdiction covered in this module. Remember, for a complaint to qualify under Title IX to apply, all of these requirements must be met.

- Who is the Complainant?
- Who is the Respondent?
- Did the conduct occur in the context of the school’s education program or activity?
- Does conduct meet one of the definitions of sexual harassment under Title IX regulations?

When evaluating these definitions for jurisdictions, the question is not whether this conduct definitely occurred, but whether the allegations could be a policy violation if proven. If so, there is jurisdiction under the Title IX regulations.

Conclusion

You’ve reached the end of Determining Jurisdiction. After completing this section, you should now be able to:

- Explain jurisdiction under Title IX, and
- Describe the elements of determining jurisdiction.

Please review our catalog of courses for additional training on this and other Title IX related topics or visit us at ATIXA.org for other Title IX resources.

Lesson 2

K-12 Coordinator: Defining Sexual Harassment

Jurisdictional analysis has many components. One is whether the alleged behavior meets one of the definitions of sexual harassment under Title IX. The regulations outline six different types of Sexual Harassment:

- Quid Pro Quo Harassment
- Hostile Environment Harassment
- Sexual Assault
- Dating Violence
- Domestic Violence
- Stalking

If the behavior meets one or more of these definitions, and all the other jurisdictional elements are present, you'll need to follow your Title IX process. This section will breakdown the definitions of each and discuss the school or district's responsibility to respond to retaliation.

After completing this section, you will be able to:

- Identify the elements and components of the different forms of sexual harassment and retaliation, and
- Summarize the district's responsibility to respond to a Title IX retaliation.

Quid Pro Quo & Hostile Environment

Defining Quid Pro Quo

Quid Pro Quo means "this for that." Quid Pro Quo sexual harassment is defined as "an employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct."

This definition applies to an employee's conduct and could include an employee harassing another employee or a student.

Important Elements of Quid Pro Quo

Quid Pro Quo complaints involve unwelcome sexual conduct or advances where the complainant may be offered an advantage or suffer a deprivation depending on how they respond. Advantages could be a promotion, earned grade, or letter of recommendation. Deprivation could mean losing out on opportunities to participate or avoiding any program or activity. Avoidance could look like a student quitting a school play because the teacher proposed exchanging sex for a better role in the play.

Defining Hostile Environment

The second type of the sexual harassment is hostile environment harassment. Hostile environment harassment is defined as:

"Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity."

Hostile environment harassment can apply to student or employee conduct. Determining whether a hostile environment exists is a fact-specific analysis. You will need to consider the totality of the circumstances.

Breaking Down the Definition

The definition of hostile environment is complex and has many parts. We will break down each part of the definition and how they relate to one another.

Unwelcome

The first element in the hostile environment analysis is unwelcomeness. The “unwelcome” analysis looks at the subjective perspective of the complainant. How did the actual Complainant feel about the incident? Was it welcome or unwelcome?

You should note that a Complainant telling the Respondent to stop is not a requirement for unwelcomeness. Additionally, unwelcomeness is implied by law if the Complainant is younger than the age of consent.

Reasonable Person

The next phase of the analysis relies on a fictional reasonable person. Unlike the unwelcome element, the reasonable person is objective, rather than subjective.

For this element, ask yourself whether a similarly situated person to the Complainant would find the behavior in question to be severe, pervasive, and objectively offensive enough to impact their access to their education or workplace. For example, consider a case involving a female fifth grade student being harassed by another student. The reasonable person analysis would ask you to consider whether the average female fifth grade student would find the conduct sufficiently severe, pervasive, and objectively offensive.

Objective Consideration

Sometimes it can be challenging to consider facts objectively instead of subjectively through our own perspective. To help you be objective, consider discussing the allegations with a Deputy Title IX Coordinator or your legal counsel to gain additional input.

Severe

The next consideration in a hostile environment analysis is whether the behavior is considered severe. There can be many ways that harassment is severe.

Defining Severe: Situations where the conduct is physical are often severe, but some forms of non-physical conduct can also be severe, especially when accompanied by threats. Some physical conduct, like sexual assault, has its own definition. If the behavior falls under another definition, not hostile environment, you will not need to do a severity analysis.

Example 1: A group of students following and taunting another student because of their sexual orientation, resulting in the group shoving the student into lockers, tripping them, and punching or kicking them.

Example 2: A student using school technology and social media to harass a student about their sexual orientation, including vicious slurs and name-calling. The harassment could include sharing lewd photos of that student on multiple occasions and name calling on social media and in person, leading to in-school gossip and harassment by other students during the day.

Pervasive

The next requirement is pervasive. Harassment that becomes persistent, widely known, or

impactful on the school setting or the Complainant meets this requirement. A single incident triggering a pervasive effect could meet this requirement, too. An example of pervasiveness could be verbal harassment that continues over the course of days or weeks. A slur directed at a student once may not meet this requirement, but repeated use of a slur towards a particular student may be pervasive.

Pervasive: Single Incidents

A single instance of harassment that is public in nature, becomes widely known at the school, or impacts the Complainant's academic performance, social reputation, or relationship among peers could have a pervasive effect, as well. For example, if a student shares a nude photo of another student with their friends, and the image travels around the school. Pervasive does not necessarily require repeated harassment.

Objectively Offensive

The last element in the hostile environment definition is whether the behavior is objectively offensive. Would a reasonable person in the Complainant's shoes be impacted or affected by this? Behavior that is frequent, severe, physically threatening, humiliating, intimidating, ridiculing, or abusive. Consider factors such as the age and relationships of the parties involved, as well as the number of persons involved.

One example of objectively offensive could be a student writing "Quincy is a prude and a virgin" on all the chalkboards in the school after Complainant refused Respondent's advances. Another example might be Respondents starting a cheer that a basketball player is "easy" during every home game.

Hostile Environment: Other Considerations

There is no bright line rule for hostile environment sexual harassment. You'll need to evaluate each situation based on the totality of the circumstances. Here are some additional considerations:

1. The impact on the Complainant's mental or emotional state.
2. Whether the conduct was directed at more than one person.
3. Whether the conduct unreasonably interfered with the Complainant's educational or work performance.
4. Whether an individual was offended by discourtesy or rudeness.
5. Whether the speech or conduct deserves academic or First Amendment protections.

Is it a Hostile Environment?

Review these scenarios to see if you can determine whether they meet the definition of a hostile environment.

A Peck on the Cheek

At a school dance, two teachers serve as chaperones. One teacher reported that the other teacher allegedly engaged in an unwelcome lingering hug and an awkward "peck on the cheek" that came very close to her mouth. This encounter happened when they greeted each other in the parking lot before the event.

Because this was an isolated incident, in this case, the lingering hug and brief kiss would not be seen as having a pervasive effect. This may not be severe either. Remember, if this would not qualify under Title IX, the behavior can still be addressed in other ways, such as informally through an employee conduct code.

A Snapchat Threat

After school one day, while waiting for practice to start, a student-athlete used Snapchat -- while on the school's wireless network -- to ask a male student to have sex with her. The male student refused. The track athlete then responded that she would rape him if he did not have sex with her. He took a screenshot and brought a complaint against her. As a result of the exchange, he is avoiding her at school and wants to drop the elective class in which they are both enrolled.

The content is sex-based, and the threat could qualify as severe and objectively offensive. Additionally, although a one-time comment is not typically pervasive, the effect arguably may be pervasive, given the impact on the male student.

Rating "Hotness"

A group of five students stand outside the cafeteria rating the "hotness" of other students as they walk by. They each write their ratings on individual small whiteboards, then hold them up for all to see. They also make comments about whether they've had sex with any of the other students. This incident is filmed and posted on TikTok and shared amongst the students.

The conduct is likely severe and pervasive and a reasonable person in the students' shoes would find this to be offensive, embarrassing, and humiliating in a typical high school setting.

Sexual Assault

Defining Sexual Assault

The next type of Title IX Sexual Harassment is sexual assault. The definition of sexual assault is defined as "any sexual act directed against a Complainant, without their consent, or instances in which the Complainant is incapable of giving consent." Sexual assault has six subparts: rape, sodomy, sexual assault with an object, fondling, statutory rape, and incest.

Rape

- Penetration, no matter how slight, of the vagina or anus with any body part
- or object,
 - or oral penetration by a sex organ of another person,
- without the consent of the Complainant,
 - including instances where they are incapable of giving consent because of age
 - or because of temporary mental
 - or physical incapacity.

Sodomy

- Oral
- or anal sexual intercourse with a Complainant,
- forcibly,
- and/or against their will;
 - or not forcibly
 - or against their will in instances in which the Complainant is incapable of giving consent because of age or because of temporary or permanent mental or physical incapacity.

Sexual Assault with an Object

- The use of an object or instrument to penetrate, however slightly,
- the genital or anal opening of the body of the Complainant
- forcibly,
 - and/or against the person's will (non-consensually);
 - or not forcibly or against the person's will in instances in which the Complainant is incapable of giving consent because of age or because of temporary or permanent mental or physical incapacity.

Fondling

- A touching of the private body parts of the Complainant (buttocks, groin, breasts),
- for the purpose of sexual gratification,
- forcibly, and/or
 - against their will (non-consensually);
 - or not forcibly or against their will in instances in which the Complainant is incapable of giving consent because of age or because of temporary or permanent mental or physical incapacity.

Fondling: Purpose Requirement

The phrase "for the purposes of sexual gratification" requires gathering evidence about a motivation for the touching. The circumstances of an incident, such as the age and maturity of the parties, would be factors in determining whether a sexualized purpose exists.

The purpose requirement is meant to separate fondling cases from inappropriate touching that may occur with younger children and inadvertent contact, such as brushing against someone's buttocks trying to move in a crowded hallway. Remember, if the conduct does not qualify as sexual assault, the conduct could still qualify as a hostile environment if it meets the criteria.

Consent

As discussed in the sexual assault definitions, consent can be an important concept in evaluating sexual assault allegations. Your district policy must include a definition of consent.

ATIXA's model definition defines consent as "knowing, voluntary, and clear permission by word or action, to engage in sexual activity." Note that incapacitated individuals are not able to give consent. Incapacity could be due to age, mental illness, disability, or caused by drugs or alcohol. Consent cannot be obtained through force or coercion, either.

ACTIVITY: SCENARIO

While skipping class, two students are hooking up in a parked car in the school parking lot. Cara and Kevin are both 18 years old. Cara told Kevin that she intended for the “hooking up” to be kissing only. As things progressed, Kevin also began to squeeze Cara’s breasts and put his hands down the back of her leggings to caress her buttocks. Cara was frozen and did not know how to respond. She managed to extract herself from the car and feigned a stomachache with the school nurse to go home for the day. Cara decided to quit the school play so she could avoid Kevin as much as possible.

Does this investigation involve allegations of touching of private parts?

Response: This answer to this question is Yes. If Cara alleges that Kevin touched her breasts and buttocks without her consent, the allegations will likely meet the definition of fondling. Any investigation would need to explore facts around consent, in addition to facts relevant to the fondling policy.

If you’re wondering how to address the fact the students skipped class, you could use your student conduct process. However, prior to disciplining students for conduct issues, you should always consider whether the situation implicates Title IX before proceeding. In this situation, you should consider resolving any Title IX claims before disciplining the students for skipping class.

Insight from an Expert: Fondling

Joe Vincent, M.L.S., Senior Supervising Consultant, TNG & ATIXA Advisory Board Member



In this particular case study, we have Cara alleging that Kevin engaged in some behavior that might implicate portions of our Title IX policy. And when we're analyzing any allegation, one of the first steps is to take a look at what's actually described and determine which provisions within the policy appear to be implicated by the conduct that's alleged. So what Cara describes here is a case where, although she and Kevin appear to have had an agreement, or at least an understanding regarding what conduct she was consenting to, and by virtue of what she consented to possibly what conduct she was not consenting to, Cara described that Kevin pushed the boundaries of her consent by contacting her breasts and her buttocks in a way that she felt like she had not consented to.

Obviously, consent is going to be an important part of the fact pattern analysis. But even before that, we can take about a half step backwards and say, which type of misconduct is implicated by what she's described. Right, and what Cara has said is that there was contact with her body. Right, and so we're inside the sexual assault descriptions of prohibited conduct. And since we don't see any implication that there was any type of penetrative conduct, we're probably looking at the fondling provision of the Title IX policy as being the one that most appropriately fits this allegation, right? And within fondling, we have a description of prohibited conduct that includes contact with various portions of the body for the purpose of sexual gratification. And so that's sort of a starting point for you as you're looking at initiating an investigation into these allegations. It's important to make sure we have adequately and clearly identified not only the policy that's in play, right, that we'll be investigating allegations of potential violations of that policy, but also within the policy which specific provisions are implicated by the allegations. And in this case, as you probably recognized, fondling is the best fit for the alleged

misconduct.

Now, beyond that, I assume that it's clear to you that this is going to be largely dependent on the investigators ability to gather evidence related to consent. And so because we're in a car, because there's likely no other witnesses, because likely this is going to become what we call one of those word versus word cases, the investigator will really need to focus in on the consent that was exchanged between Cara and Kevin contemporaneously leading up to their interaction and during the interaction itself. Now, remember, the rubric for analyzing the existence or the absence or the withdrawal of consent works through sort of a three-part process where we ask was there force applied to obtain access, where consent would be nullified by the application of physical violence or threats of violence or intimidation or coercion. And after we move past that part of the analysis, we pose a second set of questions regarding the potential for incapacity.

And I suspect if you're like me and we're looking at what Cara's alleged, there don't appear to be allegations that involve force or lack of capacity that would have rendered Cara unable to provide effective consent. And so, we're left at the bottom part of the consent analysis, sort of what we call question number three as it relates to the mutually understandable permission that exchanged between the parties contemporaneously before and during the interaction. And Cara's already given us a couple of clues, but we don't have a lot here in this very brief description. And it's going to be really on the Investigator to explore the finer details of the interaction in the communication between Cara and Kevin, to understand what mutually understandable permission was given, what mutually understandable permission was declined.

And then even when, if there's gray area there as the interaction proceeded, what sort of clues and additional or maybe even non-verbal communication led Kevin to believe he had permission to engage in those subsequent activities? And conversely, why Cara believes she had effectively foreclosed those activities and either refused to provide or withdrew or revoked consent as the interaction played out? That's just some ideas about how we're cueing this case up in terms of what policies are implicated, what sort of issues are going to rise to the surface, and how you should strategize with the Investigator as you move it into that formal investigative phase.

Defining Sexual Assault

The remaining two kinds of sexual assault involve sexual activity that may be consensual but are situations where the individuals involved cannot legally consent to sexual activity with each other: incest and statutory rape. The definitions under Title IX are designed to track with how each of these offenses are defined under state law.

Check your district policy and consult with legal counsel to identify and understand your state's laws defining statutory rape and incest.

Statutory Rape

Non-forcible sexual intercourse with a person who is below the statutory age of consent under your state's law.

Incest

Non-forcible sexual intercourse, between persons, who are prohibited from engaging in sexual activity due to familial relations, under your state's law.

Interpersonal Violence & Retaliation

Forms of Interpersonal Violence

Title IX regulations prohibit three additional types of sexual harassment that are typically thought of as forms of interpersonal violence: dating violence, domestic violence, and stalking.

Dating Violence

Dating violence is defined as violence, on the basis of sex, committed by a person who is in, or has been in, a social relationship of a romantic or intimate nature with the Complainant.

Even if the parties would not label themselves as “dating,” you should consider whether the relationship still meets the definition. Facts to consider include the length of the relationship, the type of relationship or interactions between the parties, and the frequency of interactions.

Investigating Dating Violence

Dating violence includes, but is not limited to, sexual or physical abuse. If two students were to get into a fist fight at school and they are in a dating relationship, you would consider whether the fight qualifies as dating violence. In these situations, school and district administrators must be well-trained to contact you before disciplining the fight as a student conduct issue.

Lastly, dating violence does not include domestic violence acts, so if a behavior meets the elements of domestic violence, it cannot also be dating violence.

Case Study: Dating Violence

Review this case study on dating violence involving Angelique and Robert.

An employee reports to her supervisor that a colleague, Angelique, is being physically abused by her boyfriend, Robert, a full-time employee in Facilities Management. The employee indicates that Angelique seems noticeably withdrawn lately and that Angelique recently came to work late, had red puffy eyes, and looked as though she had been crying. The employee says Angelique was walking with a limp last week, and when asked about it, told people she twisted her knee after slipping on some ice in her driveway. Later that same day, the employee said someone overheard Angelique on the phone saying, “But I’m scared of what he would do if I tried to leave him.”

According to the employee, Angelique missed a few days of work last month and returned wearing a sling. Angelique claimed that she sprained her shoulder while working in the yard. Yesterday Angelique arrived late to work and had some swelling around her eye and her lip. When asked, Angelique said she got up to use the bathroom last night in the dark and walked into the edge of her open closet door. The employee says that yesterday afternoon, Robert and Angelique got into a loud argument in the parking lot and that Angelique was crying in the bathroom afterward.

*What issues can you spot?
What are the Title IX Coordinator's next steps?*

An investigation could uncover that dating violence is happening between Robert and Angelique, who are in a social relationship of a romantic nature. The Title IX Coordinator would meet with Angelique to see if she wanted to file a formal complaint and would offer her supportive measures. The incident in the parking lot would meet the location requirements for Title IX jurisdiction, but a loud argument, by itself, would not be violence as defined under the dating violence definition.

Although some of this behavior may have occurred off-site, it is impacting Angelique's work. An Investigator would gather information about the argument in the parking lot, including whether it included violence or threats, as well as whether any other incidents of dating violence occurred at school.

Remember, if Angelique did not want to move forward with a formal investigation, or if there was no Title IX jurisdiction, you could still offer supportive measures to Angelique.

Insight from an Expert: Dating Violence

Tanyka Barber, M.H.S, J.D., Partner, TNG & ATIXA Advisory Board Member



Let's talk about some of the issues you're able to spot. This scenario clearly presents some problematic behavior that's happening between Angelique and Robert. It says that Robert is Angelique's boyfriend. We also know that they both are your employees, but this information is being reported by someone else. So, it's not Angelique who is coming forward. It's certainly not Robert who is coming forward to report some of this behavior. So, there is indications that Angelique has bruising, that she has red puffy eyes, instances where she was alleged to have been crying, talked about being scared on the phone, walking with the limp, having something on her arm. And so, there are indications that there is some potential violence that's happening between Angelique and Robert, such that it may constitute dating violence under the

definition of sexual harassment under Title IX.

Even if we have that, you also still have to think about whether you have jurisdiction. So, the two questions, do I have control over the harasser? In this case, it's Robert. And do I have control over the context of that harassment? Meaning, did it happen in your education programs or activities? You do have control over Robert because that's your employee. But think about the issues in terms of whether or not you have control over the context.

So, the scenario talks about some behaviors that are happening in the workplace, but there are also instances where the behaviors are happening outside of the work environment and that was the majority of the instances that were being reported to you were happening outside of the work environment. But you do have some downstream effects that are now impacting the work environment, particularly with Angelique showing up to work late or missing work and even having this other

employee who was not involved come forward to report this information.

So even if the conduct is happening outside of the work environment, it is still some potential impact from this scenario within the work environment. And so we always want to be mindful of addressing those downstream effects as well. And so think about what would be your next steps as a Title IX Coordinator. Again, Angelique is not the one who reported this to you. This is a third party or an uninvolved colleague who is coming forward to report this information. So think about should you talk to Angelique and if so, how to craft that conversation and that outreach, particularly in light of a situation of dating violence.

There really are some unique considerations when you're approaching a potential victim of dating violence that you'll want to take into consideration and make sure that you have adequate resources to support that individual that may be in your school or your work environment. You also want to think about whether or not you can talk to Robert. Should you talk to Robert?

Again, thinking about the nuances with dating violence issues by talking to the alleged abuser, what impact will that have on Angelique and her safety, but also her ability to work and access your education programs and activities. So you always want to be mindful of the resources. If you choose to reach out to Angelique, make sure that you have adequate resources in school and out of school that you can kind of refer Angelique to to help support her as she's navigating in the work environment. But you'll also have to make that determination about whether or not Title IX applies. And that may require you to dig a little deeper to find out additional information.

Certainly, the incident in the parking lot, you would have control over that context. But from the scenario, you see that a lot of information or incidents happened outside of the work environment, and Title IX may not apply there. So your response may be limited to more of a supportive measure for Angelique in reaching out, talking about the process to file a formal complaint if she chose to do so. But most importantly, offering those supportive measures to Angelique so that she can be successful in navigating through her work environment.

Domestic Violence

Next is domestic violence. To categorize an incident as domestic violence, the cohabitation between the respondent and the complainant must be more than just two people living together as roommates. There must be a spousal or intimate relationship.

Domestic Violence is defined as violence, on the basis of sex, committed:

- by a current or former spouse or intimate partner of the Complainant, by a person with whom the Complainant shares a child in common, or
- by a person who is cohabitating with, or has cohabitated with, the Complainant as a spouse or intimate partner, or
- by a person similarly situated to a spouse of the Complainant under your state's domestic or family violence laws, or
- by any other person against an adult or youth Complainant who is protected from that person's acts under your state's domestic or family violence laws.

Stalking

Another form of interpersonal violence is staking. Stalking is defined as engaging in a course of conduct, on the basis of sex, directed at a specific person that would cause a reasonable person to fear for the

person's safety, the safety of others, or suffer substantial emotional distress.

Course of Conduct: Two or more acts in which the respondent directly, indirectly, or through third parties,

- by any action, method, device, or means,
- follows, monitors, observes, surveils, threatens, or communicates to or about a person,
- or interferes with a person's property.

Substantial Emotional Distress

Significant mental suffering or anguish that may, but does not necessarily require, medical or other professional treatment or counseling.

Title IX Coordinator must collaborate with other school or district staff to distinguish between true stalking behavior and a person who might have poor social skills or developmental challenges that impact human interactions.

Case Study: Stalking

Review this case study on stalking and course of conduct involving Darnell and Tate.

Darnell and Tate dated for four months until Tate ended the relationship. In the past month since the breakup, Darnell has sent dozens of messages -- often Snapchats and texts -- to Tate, even after Tate asked Darnell to stop. Some of the messages have had a menacing tone to them. Tate has also seen Darnell driving past Tate's apartment several times and sitting outside of the school waiting for Tate to emerge at the end of the day. Tate left school late one night to find two tires slashed on their car.

What issues can you spot?

What are the Title IX Coordinator's next steps?

Tate describes a course of conduct, based upon their prior dating relationship, that would likely cause a reasonable person to suffer substantial emotional distress and possibly fear for their safety. The investigation would have to gather additional information about the content and circumstances of the messages, and evidence about whether Darnell was responsible for the slashed tires.

- *To make the jurisdiction assessment, you should also look at what behaviors are occurring on school property and what behaviors are outside of school jurisdiction.*

Additionally, given the severity of this situation and the destruction of property, the police would likely be involved in this situation. As a Title IX Coordinator, you will have to balance the involvement of law enforcement with your own commitment to your own reasonably prompt process. Establishing a Memorandum of Understanding with your local police department can help clarify expectations prior to any incident.

Insight from an Expert: Stalking & Course of Conduct

W. Scott Lewis, J.D., Managing Partner, TNG & Co-Founder & Advisory Board Member, ATIXA & NABITA



In this case study, we're focusing on stalking as a policy violation potentially, as well as understanding how that course of behavior could happen. The case you had with Darnell and Tate, definitely Darnell with the text messages, the showing up after school, the driving by Tate's apartment, has engaged in a course of conduct. It's not a singular act. You can't be stalked with a single act, but it has to be that course of conduct that happens over time with the menacing tone of the text messages, the showing up after class, those could all be things that cause a reasonable person, some emotional distress, in this case, the threshold is substantial emotional distress and perhaps fear for their own safety. So certainly, a reasonable person like Tate having to come out of class and see Darnell coming out of their apartment and seeing Darnell having these messages with this menacing tone all in and of themselves, that course of conduct could constitute stalking if it were proven to be so.

Add the variable of the slashed tires now, Tate comes out and the tires are slashed. That definitely would up the apprehension, the emotional distress, the fear for safety. Now we have property damage involved. So, we don't know if it was Darnell that slashed the tires. There certainly would have to be an investigation into that. But add to that the possibility of police involvement. So, Tate would know that they could go to the police to report both the stalking behaviors as well as the damage to the tires, and the investigation would want to look into that. Perhaps there's cameras in the parking lot. Perhaps there's people that saw what happened. There's a variety of things that could go on during the investigation to indicate whether or not Darnell was the one who slashed the tires.

But there's no question at all that you would have this course of behaviors that would cause a reasonable person that substantial emotional distress. Oh, my gosh. Do I have to, every time I leave, is he going to be there or is she going to be there? And now my property has been damaged. What's the next steps? There could be considered an escalation. You might want to also work with your behavior intervention or your threat assessment team to check those messages to the menacing tone. What exactly were those messages? Are we coupling that with the potential of the damage to the property, does that escalate the risk of Darnell? So, in addition to working perhaps with local P.D. or with your campus police department having an MOU, you in that situation is very, very helpful.

But we're also looking at the possibility of wanting our behavior intervention or threat assessment to have both Darnell and Tate on their radar. Does Darnell have any past behaviors that we don't know about? The intervention team would be able to dig into that, find out a little bit more and would be able to give you a good assessment of potential for harm to self or potential for harm to others.

Why do I say have Tate on that radar? Well because Tate's suffering this emotional distress. So, Tate is going to want to be connected with resources by either the Title IX office and/or by the behavior intervention or care team to make sure that Tate's being tended to as well, while this investigation is going on, before the investigation happens, and perhaps even after the investigation happens with some case management.

So, what seems like a very straightforward dating relationship breaks up, lots and lots of text messages, showing up at school, and sometimes the work can play into that as well, in some of these scenarios.

Showing up outside their home, the slashed tires. Now we've got three different entities we want to talk about that may be having to work together to find out how we're going to respond to this institutionally. You got police, got Title IX, you got probably student conduct in there somewhere. And then behavior intervention. So really four. But the Title IX and student conduct are probably tied together for the investigation. I hope this has been helpful. The situations, while they seem very straightforward can merge into complex things with a lot of moving parts really quickly.

Prohibition on Retaliation

Title IX also prohibits retaliation against a person for exercising their rights under Title IX. This applies to individuals who make a report or complaint and to others who serve as witnesses or participants in a Title IX process.

The school or district itself may not retaliate and must ensure that individuals are not retaliated against by the other party or any other individual. A school or district must effectively respond to reports of retaliation, too.

Conclusion

You've reached the end of Defining Sexual Harassment. After completing this section, you should now be able to:

- Identify the elements and components of the different forms of sexual harassment and retaliation, and
- Summarize the district's responsibility to respond to Title IX retaliation.

Lesson 3

The First Amendment & Dismissal

Before moving forward with the Title IX process, you must determine whether a complaint falls under the jurisdiction of Title IX or whether it should be dismissed and addressed under another student or employee conduct policy. In this section, you'll learn about the requirements for jurisdiction under Title IX and about mandatory and discretionary dismissal of formal complaints. This section also covers how the First Amendment intersects with Title IX.

After completing this section, you will be able to:

- Explain the requirements for Title IX jurisdiction.
- Determine whether a formal complaint should be dismissed, and
- Identify intersections of the First Amendment and Title IX.

First Amendment & Title IX

First Amendment & Title IX

Title IX work often requires you to weigh reported harassment against an individual's free speech rights. Navigating free speech concerns can be a challenging process. The Supreme Court addressed free

speech concerns in public schools in a case called *Tinker versus Des Moines Independent Community School District*. In this case, a small number of high school students wore black armbands to protest the Vietnam War.

The school district had received notice of the armband demonstration ahead of time and adopted a policy permitting suspension of students who refused to remove their armband. In the end, the district disciplined five students when they refused to remove their armbands.

Insights from an Expert: First Amendment Rights & Title IX

Kim Pacelli, M.Ed, J.D., Partner, TNG & ATIXA Advisory Board Member



I'm going to take a few minutes to talk about the tension and the nexus between our First Amendment freedoms of free speech and free expression, among others of course, in our public school settings as something that Title IX Coordinators need to navigate alongside Title IX, which of course obligates us in school settings to ensure that when harassment or discrimination are happening on the basis of sex or gender, that we are stopping harassment, preventing its recurrence and remedying the effects. So obviously these two laws, the First Amendment, on the one hand, and Title IX on the other can sometimes be in tension with each other.

Now, the Title IX regulations very clearly state that we are not supposed to abridge the First Amendment in any way in how we operationalize Title IX in our school settings. But of course, we can just naturally anticipate that one person's free speech or free expression may very well come forward to us as a report of either harassing behavior or a hostile environment for another member of our school community. So as Title IX Coordinators, we can anticipate that we're going to have to navigate this tension. It can be a really complicated and vexing area of our work. I often recommend that ATIXA members consult with us as experts or with their local legal counsel about how to proceed in some of these situations. But I want to give you just the general rules of the road, so you feel comfortable navigating these two areas of the law.

Tinker Decision

The *Tinker* case made its way to the Supreme Court, which ultimately decided that a school may not discipline a student for speech or expression unless the conduct "materially and substantially" interferes with the operation of the school or "invades the rights of others." Since the black arm bands were not disruptive, the students should not have faced discipline.

The *Tinker* standard requires that the disruption be actual and not merely based upon a hypothetical fear of disruption. Administrators may not discipline speech just because it makes others uncomfortable or is unpleasant.

Navigating First Amendment Rights

As a Title IX Coordinator, you'll be responsible for evaluating whether reported behavior falls under protected speech and expression or qualifies as harassment prohibited by policy. You should consult your general counsel in situations involving free speech concerns because Title IX practice may implicate speech often. Some unprotected speech that could directly impact your Title IX policy include:

- Incitement of disruption and breach of peace.

- Defamation.
- True threat, and
- Obscenity.

Insights from an Expert: Permitted Regulation of Speech

Kim Pacelli, M.Ed, J.D., Partner, TNG & ATIXA Advisory Board Member



The other concept I want you to have your head wrapped around is the idea that, in our school settings, we can put some restrictions on when and how members of our school community engage in speech. And I think many administrators have had to deal in recent years with school protests and other kinds of administrative decisions about students speaking during the school day, the general rules of the road, and again, as Title IX Coordinator, you're not necessarily overseeing all of this, but it can very well be the case that maybe some issue that is in your purview is getting attention among a group of students or group of employees. And there are some sort of, kind of effort at organized kind of speech and community participation in some particular issue.

Know that schools are allowed to have reasonable time, place, and manner restrictions or restrictions on the time of speech. The place, meaning to say, in some areas of the school setting might be appropriate for speech, whereas other settings, say in a classroom where the teacher is really in control of the environment, and the manner. And, just as a Title IX Coordinator, it's good for you to know that within Title IX law there are different kinds of forums that can sort of shape our understanding of what kinds of restrictions might be appropriate. You should never feel like you have to engage in any of this analysis on your own. We just want you to have these issues in the back of your mind as something that you should be aware of. And when it comes up to consult with your building principal, with your superintendent, and possibly with your legal counsel about how to proceed.

Other Free Speech Considerations

In addition to the free speech exceptions, there are a few other free speech issues that may intersect with Title IX work.

The first is academic freedom. The Supreme Court held that academic freedom protects the right to decide on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study. In most instances, academic freedom is limited to scholars engaged in subject matter-related teaching, learning, and research.

When a Complainant alleges that speech or expression created a hostile environment, determining when speech or behavior moves beyond the bounds of academic freedom may be a primary consideration for Title IX Coordinators at public schools.

Hate Speech

There is no First Amendment prohibition against hate speech. However, it could constitute either disruption under *Tinker* or it could constitute harassment under certain circumstances. Like all free speech concerns, this may be a legal question that you should discuss with legal counsel.

Regulating Hate Speech

Schools' efforts to address hate speech must avoid raising First Amendment concerns. This is challenging to do but, speech or expression that crosses over into harassment, like sex- and gender-based harassment, can be regulated by policy. For example, while it may be difficult to punish a single use of a homophobic slur, repeated use may rise to the level of sex- and gender-based harassment and a hostile environment.

However, schools do not have to wait until expression becomes harassment to intervene. Although schools may not be able to punish a student for using a slur, schools can still use it as an educational opportunity to stop the behavior before it reaches the level of harassing conduct.

Insights from an Expert: Regulating Expression

Kim Pacelli, M.Ed, J.D., Partner, TNG & ATIXA Advisory Board Member



So, as Title IX Coordinators, I always want you to have these *Tinker* rules in the back of your brain because, as you are navigating reports that come in to you or grievance processes that you are overseeing that deal with speech issues, you're going to be wanting to consider whether or not you are in a space where this *Tinker* analysis might apply. And at bottom, the *Tinker* analysis says that the school should not be disciplining students for their speech unless that speech materially or substantially interferes with the operations of the school or infringes on the rights of other individuals. So taking that standard and applying it to the black armbands that the students wore in the actual *Tinker* case, they were just wearing black armbands. There wasn't a lot of particular disruption in the school setting. Therefore, that speech was permissible.

So as Title IX Coordinators, and I promise you, your colleagues who are building principals, superintendents, apply this *Tinker* standard probably almost every day, and in their regular practice are always thinking about expression, whether it's expression that students are coming to school in terms of the clothing that they're wearing or the messaging, I should say, that's on clothing that they're wearing or discourse that they are having with each other, either in sort of face-to-face interaction or in social media that is happening inside of the schools, that jurisdiction or messaging, electronically facilitated messaging that's happening. Is the speech having the effect of substantially interfering with the school's operation or substantially infringing on the rights of other individuals in the school setting? So just kind of keeping these broad concepts in the back of your mind as a Title IX Coordinator, you never need to be an expert in First Amendment law. But you are responsible for ensuring that the work of your area, the processes that you oversee, are not infringing on individuals of free speech and First Amendment rights. And so it's just important to have this baseline understanding

Case Studies: Jurisdiction Under Title IX

Case Study: Charles & Casey

Review this case study involving Charles and Casey.

Two high school students were discussing the upcoming state election for governor after their government class explored the concepts of federalism and

voting rights. One student, Charles, argued that the incumbent governor, a woman, was not fit to hold office because her decisions had been weak, irrational, and emotional.

Charles argued that men have a natural predisposition to leadership based in evolution. Casey, the other student, told Charles he was ignorant and a chauvinist.

Casey made a report to your office, citing Charles's comments and saying she felt harassed and discriminated against.

Case Study: Is It a IX?

Review this case study on determining jurisdiction under Title IX.

A sexual assault occurred at a student's home over the weekend. By Monday morning, news of the assault had spread throughout the student body. By the time they arrived at school on Monday, other students had subjected the Complainant to harassing tweets and Snapchats.

Other students made verbal comments in the hallways, as well, like calling the Complainant a "slut" and asking if the Complainant was interested in recording a threesome for money. Recordings of the harassment appeared on social media, too, including an instance of another student grabbing the Complainant's buttocks and laughing after the Complainant ran off crying.

Insights from an Expert: Is It a IX?

Mikiba Morehead, M.A., Ed.D., Consultant, TNG



Case studies are a great way to take the information you've just learned and apply it to a set of facts. In this case study, we have a student who experienced sexual assault over the weekend outside of school but is now experiencing the effects of that assault during the school day. Standards established by the Supreme Court, and included in federal law, help us understand when Title IX applies. These standards tell us that Title IX applies, and jurisdiction is required when the school has cover over the respondent and control over the context of the harassment. In this case, we don't have information regarding the identity of the Respondent. Therefore, the school may not have control over the person responsible for the sexual assault. Additionally, we learn that the assault took place at the student's private home over the weekend. It did not occur on school property or during a school event. Therefore, the school doesn't have control over the context of the harassment, meaning the location or a situation in which the sexual assault took place. However, the case study continues into Monday, where the student is experiencing verbal harassment via social media, verbal harassment in the hallways of the school from other students, and physical harassment in the form of the instance where another student grabbed the student's butt in the hallways.

This situation is escalating. Think back to the required elements of Title IX jurisdiction and apply the facts of what is described as occurring on Monday. In light of Monday's facts, we see that the school now has

control over the Respondent, identified as the other students who are engaging in harassment towards the Complainant. And now the school has control over the context of the harassment. The behavior is taking place during school hours within hallways of school buildings, and, given that the harassment is also occurring over social media, the school's network is likely being used to facilitate sexual harassment online. The definition of sexual harassment covers in program effects of out of program misconduct even in situations where the misconduct itself is not covered. In this case, the Complainant is experiencing the effects of the out of program sexual assault in the form of harassment while at school, during the school day, when the Complainant is attempting to participate in an education program or activity. The Office of Civil Rights has established a fairly broad definition of what constitutes attempting to participate in an education program or activity. But the case study makes this idea much clearer. Here, the Complainant is attempting to attend school and engage in the learning environment.

However, the Complainant's ability to engage is being impacted by the harassment, as demonstrated by the Complainant running off crying after the incident of sexual harassment. In summary, a school may extend its jurisdiction under Title IX to address off-campus incidents when sufficient control is established, both over the harasser as well as the context in which the harassment is taking place, or when the off-campus conduct has an in-program effect that meets the federal definition of sexual harassment.

Dismissal of a Formal Complaint

Mandatory Dismissal of Formal Complaints

As part of your role, you'll need to evaluate each formal complaint and determine whether or not the alleged incident or conduct falls within Title IX jurisdiction. When it does not, the Title IX regulations require that the school or district formally dismiss the complaint.

Communicate this dismissal to all parties in writing. Although rare, parties are entitled to appeal any decision to dismiss a formal complaint using the appeal process outlined in your policy.

In situations where you dismiss a formal complaint, you'll likely address the conduct using a different school or district policy, such as a student or employee conduct policy. Additionally, you should provide supportive measures to the parties.

Discretionary Dismissal of Formal Complaints

Following a jurisdictional assessment, you also have the discretion to dismiss a formal complaint, in addition to mandatory dismissal, if:

- The Complainant notifies you in writing that they'd like to withdraw the formal complaint or any allegations;
- The Respondent is no longer enrolled or employed by the school or district; or
- Specific circumstances prevent the school or district from gathering evidence sufficient to reach a determination. For example, if no parties are willing to participate in the process, you may consider dismissal.

Notification of Dismissal

When you dismiss a complaint, notify all parties in writing and permit them to appeal the decision.

In situations where the Respondent is not yet aware of the formal complaint, sending a letter of dismissal can cause confusion. As Title IX Coordinator, you might consider how best to communicate in those circumstances and be prepared to provide support, if needed.

Not a IX?

Remember, if you determine that Title IX jurisdiction is not present, you should still address the behavior through other policies and processes, such as a student or employee conduct process.

You should still consider how you can provide support and resources to the parties. There may be actions you can take outside of Title IX to address the behavior, mitigate problems, or resolve situations.

Conclusion

You've reached the end of Jurisdiction, Dismissal, and the First Amendment. After completing this section, you should now be able to:

- Explain the requirements for Title IX jurisdiction.
 - Determine whether a formal complaint should be dismissed, and
 - Identify intersections of the First Amendment and Title IX.
-

NOT FOR DISTRIBUTION

PART 4

INITIATING THE PROCESS

NOT FOR DISTRIBUTION

Lesson 1 Notice & Formal Complaint

When is a school or district on notice of harassment? This question is important to consider when discussing notice of harassment and when the report becomes a formal complaint.

In this section, you'll learn about the difference between a report and a formal complaint. This section also discusses the school's obligation under Title IX after receiving notice of a Title IX allegation, instances where you may sign a formal complaint, and due process protections for the parties.

After completing this section, you will be able to:

- Describe the difference between a report and a formal complaint.
- Explain the Title IX obligations of a school or district after it receives notice of a Title IX allegation.
- Identify situations in which a Title IX Coordinator would sign a formal complaint, and
- Implement due process protections.

Receiving a Report of an Incident

When Does the School Have Notice?

Both Title IX case law and the Title IX regulations provide clarity about when a school or district is considered to be "on notice" that a student or employee may have experienced some form of sexual harassment. Once you or another school or district employee is told about or observes an incident, the school is considered to be on notice of the harassment. From here, you must ensure that the school or district's response is not deliberately indifferent.

Deliberate Indifference: When the recipient's response, or lack thereof, to the harassment is clearly unreasonable in light of the known circumstances.

Deliberate Indifference

The school or district's response must not be deliberately indifferent. This means that your response must not be clearly unreasonable in light of known circumstances. Follow your policies and procedures, taking steps to stop the harassment, prevent its recurrence, and remedy the effects. Make sure to document your decisions and actions for your records.

Mandated Reporting

The Title IX regulations consider a school or district to be on notice whenever an employee learns about an incident. It's very important that all your employees understand their reporting requirement, as well as how to report.

You have an obligation to effectively train your teachers, support staff, administrators, and volunteers so they can recognize when an incident or conduct issue may implicate Title IX.

- To help manage reports, larger districts may have reports go to a Deputy Title IX Coordinator.

All employees must notify you when they witness, hear about, or receive a report about an incident that could fall under Title IX. There are no confidential reporting options in K-12 settings for Title IX. Other

reporting requirements, such as those under child protection laws, could be implicated in Title IX situations.

Reporting Harassment

As the Title IX Coordinator, you must train your school or district employees to report to you if they are in doubt. If an employee receives a report and are unsure if it qualifies as Title IX, they should notify you anyway.

A report may be made in-person, over the phone, via email, or through an online reporting form. When making a report, all known details should be included, including the names of the parties, any witnesses, time of the incident, and location.

What Constitutes Notice?

There are some situations where employees may not be certain whether they have received a report of harassment. For example, if an incident comes to your attention as the result of rumor or gossip, is that a report? What should you do if bullying or harassment occurs over social media, but the identity of those involved is unclear? Is that a report?

Encourage your coworkers to always report to you. As Title IX Coordinator, part of your initial assessment will be to determine how to respond. You'll likely follow up with the impacted individual to see if they would like to make a complaint. As always, you should offer supportive measures.

- Part of your follow-up will include assessing whether the report is a Title IX allegation or falls outside of Title IX.

Anonymous Reports

Another common question is how to appropriately respond to anonymous reports. Employees should report anonymous reports to you to assess how to respond depending on the information that is provided and known. Some anonymous reports might provide sufficient information for you to follow up in some way. Other reports may not allow much direct follow-up but might provide enough information to allow some sort of remedial action.

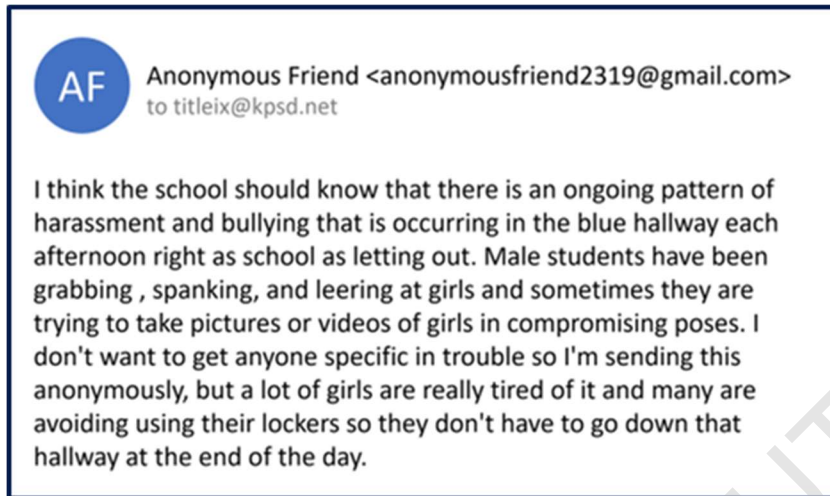
Receiving an Anonymous Report

When you receive an anonymous report, ask yourself whether you have enough facts to possibly investigate. Do you have names of one or more parties? Did the reporter provide their name for follow-up? Are the allegations specific enough to allege a Title IX violation? Is there a trend or pattern described in the report?

For example, if an anonymous report describes a problematic area of the school, like physical harassment in a bathroom or on a practice field, you could improve adult monitoring in those areas to try and address the issue.

Remember, you are always able to provide supportive or remedial measures, even if the available facts make a formal process impractical.

Example of an Anonymous Report via Email:



Initial Response/Evaluation of a Report

Initiating the Title IX Process

The process begins when a report comes to your attention. If you have enough information, you can reach out to the impacted individual to discuss the report and answer questions. Then, the individual, a parent, or a guardian will decide whether to file a formal complaint. Be aware that, as the Title IX Coordinator, you may also sign a formal complaint, too.

Additionally, you may have some individuals who elect not to proceed with a formal complaint and are interested mainly in supportive measures.

Intake Meeting

After you receive a report and make the appropriate outreach to the Complainant and their parents or guardians, the Complainant may wish to meet with you. The initial meeting is the intake meeting. During the intake meeting, you should be prepared to:

- Talk about the report if they wish to do so.
- Provide information about the Title IX process and possible next steps.
- Answer questions from the Complainant and their parent, guardian, or Advisor.
- Discuss supportive measures.

Please note: It may be helpful to develop a standard intake agenda to make sure you consistently share all of the vital information. You can also develop brochures or other materials for the parties and their parents or guardians to take with them.

Additionally, the Complainant has the right to have an Advisor at every stage of the process, including the intake meeting. If the Advisor is not able to be present, and the Complainant wants them present, you should reschedule the intake meeting.

Intake Meeting Considerations

Sometimes the impacted party will attend an intake meeting to learn about the Title IX process but have not decided whether they'd like to talk about the report or if they would like anything to happen. You should focus on providing the information they need and refrain from pushing them in one direction or another.

Supportive Measures

When a report of harassment is received, the school or district has a responsibility to respond with outreach and supportive measures to the Complainant, in addition to alerting the parent or guardian.

Supportive measures are non-disciplinary, non-punitive, individualized measures that serve to restore or preserve equal access without unreasonably burdening other parties. The measures should be tailored to protect the safety of the parties or deter sexual harassment. Supportive measures must be available to all parties throughout the process and must be provided in a neutral way.

Examples of Supportive Measures

Here are some examples of supportive measure.

- No Contact Orders
- Academic Support (deadline extension, etc.)
- Referral to counseling, medical, or other health services
- Education to the community or a section of the community
- Altering work arrangements
- Safety planning
- Safety escorts
- Transportation assistance
- Increased security and monitoring in certain areas of school
- Trespass or Be On the Lookout orders
- Emergency notifications
- Referral to Employee Assistance Program
- Visa and immigration assistance
- Altering housing situation, if applicable

If at any time you choose not to provide supportive measures the parties request, document your rationale for denying those requests

KNOWLEDGE CHECK: Supportive Measures

Q. You receive a report from a student that several members of the girls' soccer team have had their photos taken after practice without consent and then posted to a website to rank their appearances. Which of the following is an example of a supportive measure you can provide until the Title IX process is initiated and completed?

- A. Temporarily suspend the girls' soccer program until an investigation is completed.
- B. Improve adult monitoring in the area to deter others from taking photos.
- C. Suspend all the students that visited the website.

Correct answer: B.

In this scenario, suspending individual students or temporarily suspending the program prior to a determination would be considered punitive. Remember, supportive measures are supposed to be non-disciplinary and non-punitive. Improving adult monitoring meets this requirement and addresses the issue while you're determining how to address and/or resolve the report or complaint.

Additional Reporting Requirements

In addition to Title IX reporting requirements, you should be aware that school employees have other overlapping reporting requirements. This might factor into your training and awareness about where and how school employees need to report.

Under Title VII, supervisors and managers are required to report harassment or other misconduct of which they are aware or should be aware.

- Contact Human Resources for questions about Title VII.

Reporting Obligations

All employees usually have other reporting obligations under state law, such as obligations to report actual or suspected child abuse, bullying, or elder abuse. Each state has specific laws in these areas and your school or district also has reporting policies. It's important for you to understand the various reporting obligations because they may overlap with Title IX jurisdiction. It can be helpful to coordinate training efforts to simplify and streamline reporting protocols for school or district staff.

Formal Complaints

The Title IX regulations contain specific requirements for what a formal complaint must contain. A formal complaint outlines the sexual harassment allegations and requests in writing that the school investigate the allegations. The Complainant must be participating or attempting to participate in the recipient's education program or activity at the time of filing. A parent or guardian has the right to make a report or complaint on behalf of their minor child. The document or electronic submission must contain the physical or digital signature of the Complainant or their parent or guardian.

Formal Complaint Requirements

As the Title IX Coordinator, you may assist the party in completing the formal complaint. Although the formal complaint may be a standard form, any written request that contains the required elements will qualify as a formal complaint. For example, if a party sends an email with the required elements, that email can be considered a formal complaint.

ATIXA's PPTVWM Analysis

In some cases, you may determine that the school needs to move forward with an investigation and the formal Title IX grievance process, even when a Complainant or their parent or guardian do not wish to do so. To move forward, the Title IX regulations require that you be the person to sign the formal complaint in these circumstances.

ATIXA developed the acronym PPTVWM to capture the circumstances in which a Title IX Coordinator should sign a formal complaint. Consider the following PPTVWM factors:

Pattern:	Is there evidence of a pattern of behavior, either regarding a single respondent or multiple respondents? Does the Respondent have a history of violence?
Predation:	Does the alleged behavior include concerns that the Respondent acted in a predatory way?
Threat:	Is the Respondent alleged to have made threats to the Complainant or other people?
Violence:	Does the report allege physical violence?
Weapons:	Is there an allegation that a weapon was used or involved?
Minors:	The ages of the individuals involved may impact this analysis, especially if the allegations include an adult and a minor.

Please note: When these factors are present you should sign a formal complaint even if the Complainant is not a member of your school or district. This is a rare but important exception to the jurisdictional requirement that an individual be participating or attempting to participate in your school's programs.

Formal Complaint Challenges

Moving forward when a complainant or a parent or guardian does not sign the formal complaint themselves may create some challenges in completing a full and fair investigation. You should consider these challenges before deciding to sign a formal complaint.

Ask yourself:

- Will the Investigator be able to effectively gather other evidence if the Complainant will not participate in the investigation?
- Are there staff witnesses or student witnesses?
- What about physical or electronic evidence, like a video recording?

Signing a Formal Complaint as a Coordinator

If you elect to move forward with the formal complaint, you should notify the Complainant and provide supportive measures to protect them from retaliation. Ensure that the Complainant feels well-supported.

When you sign a formal complaint, you do not become the Complainant. The individual alleged to be the victim retains their rights to participate in the process, including reviewing evidence and other due process protections.

Due Process Protections

Due Process

As the Title IX Coordinator, it's important to understand due process and the protections it provides the parties in the Title IX process. Due process requires that schools follow their policies and procedures so that everyone is treated fairly, reasonably, and consistently.

The Title IX regulations place significant importance on due process protections and may be a focus for scrutiny from parties, advisors, and parents or guardians. For this reason, it's important to follow your policies and procedures closely in Title IX situations. This is a best practice to ensure due process for the parties. If your policy complies with the Title IX regulations and you follow your policy, you'll be able to meet your due process obligations.

Rights of the Parties

The Title IX regulations outline several rights the parties may exercise during the investigation process.

Witnesses

Parties have the right to present witnesses, including fact and expert witnesses, as part of telling their side of the story. You should be aware that the regulations do not provide guidance on who may serve as an expert witness.

- Fact witnesses are individuals who saw, heard, or experienced something and have relevant information to share regarding the reported incident(s).
- Expert witnesses are rare but are permissible under Title IX regulations. Their expertise would be relevant if it helps the Decision-maker to determine whether a policy violation occurred.

Evidence

Parties have the right to present inculpatory and exculpatory evidence with no restrictions to gather and present relevant evidence.

- **Inculpatory:** supports finding that the Respondent violated policy.
- **Exculpatory:** supports finding that the Respondent did not violate policy.

Allegations

There may also be no restrictions on parties discussing the allegations under investigation. This means that schools can't prohibit parties from talking to witnesses or their friends about the investigation. Although the school may want to discourage gossip and rumors, it may not restrict a party's ability to talk about the investigation. Parties must be able to have the conversations required to participate in the investigation. However, parties are not entitled to conspire or retaliate.

Advisors

Parties have the right to be accompanied by an Advisor of their choice to any meeting or proceeding. A parent or guardian may serve as an Advisor. If a parent or guardian is not the Advisor, they may still elect to accompany their minor child and be present alongside any Advisor they have selected.

- Union employees may have both an Advisor and a union representative present,

depending upon their agreement.

You should note that an Advisor may be anyone, including an attorney. You should discuss the roles of Advisors at the beginning of the process.

Notifications

Parties are also entitled to a Notice of Investigation or Allegations, or NOIA letter. This letter should be provided with sufficient time to prepare, which is usually 2-3 days.

Burden of Proof

Another important concept within due process to discuss is burden of proof. The school or district is responsible for gathering evidence related to the allegations. For this reason, the school collects evidence during the investigation and not any of the parties. As a result, the school is responsible for uncovering sufficient evidence to reach a determination about whether the Respondent violated policy.

Standards of Evidence

Standards of Evidence tell us how much evidence is needed to determine whether the respondent violated policy.

Preponderance of the Evidence

The preponderance of the evidence standard is the most common option in K-12 schools. Preponderance of evidence means that the evidence must show that it is more likely than not that the Respondent violated district policy. A common description for preponderance of the evidence is "50% plus a feather."

Clear and Convincing Evidence

The clear and convincing evidence standard is harder to define. Some systems do decide they want to require more evidence before holding someone accountable for sexual harassment, so they select clear and convincing evidence as their standard. Using the standard, the respondent is held responsible if the evidence shows that it's highly likely they violated policy.

Limitation to Standard of Evidence

The regulations place one important limitation on a district's ability to choose their own standard of evidence. The standard you chose must be the same for students and employees. If you have employee policies or union contracts that require one standard, you need to adopt the same standard for your students or work to change the employee policies or union contracts. You should consult Human Resources or your legal counsel on this issue.

Conclusion

You've reached the end of Notice & Formal Complaint. After completing this section, you should now be able to:

- Describe the difference between a report and a formal complaint.
- Explain the Title IX obligations of a school or district after it receives notice of a Title IX allegation.
- Identify situations in which a Title IX Coordinator would sign a formal complaint, and
- Implement due process protections.

Lesson 2

Initial Assessment

The Title IX Coordinator performs an initial assessment after they receive a formal complaint. In your role, you'll be responsible for determining whether the allegations fall under Title IX by reviewing the elements required for jurisdiction and determining the scope of the school or district's response. In this section, you'll review the components of the Notice of Investigation and Allegations letter and review the process for emergency removal and administrative leave. This section will also discuss informal resolution as a response to a complaint.

After completing this section, you will be able to:

- Identify the mandatory sections and statements of the Notice of Investigation and Allegations Letter.
- Explain the process for Emergency Removal for respondents, and
- Determine when informal resolution is an appropriate option.

Initial Assessment & the NOIA Letter

Initial Assessment

While responding to a report or a formal complaint, you'll also be conducting an initial assessment. At this stage, you'll be looking at the jurisdictional elements to determine if the complaint falls under Title IX.

When an allegation falls within Title IX, you'll need to follow the Title IX process. When an allegation falls outside Title IX's jurisdiction, you'll need to dismiss the complaint under the mandatory dismissal provision. You may need to refer the matter to be addressed under another policy or procedure, such as a student conduct code or an employee conduct code.

Not a IX

Additionally, if there is no Title IX jurisdiction, you must document how and why the school or district's response was not deliberately indifferent. An example of written documentation could be a memo for your case file or keeping thorough notes in your case management system.

Deliberately Indifferent: Clearly unreasonable in light of known circumstances.

Your written documentation should capture your efforts to respond to the report, why you felt your response was accurate, and why you believe you appropriately addressed the situation. You can also describe your analysis and conclusion that the report did not fall within Title IX jurisdiction.

Investigation Basis

Next, you'll need to determine the basis and scope of the investigation. Doing so will help guide the process and help the Investigator form a strategy. There are three different types of investigations:

Incident

A report that identifies an incident that alleges a violation of your Title IX policy. This investigation is limited in scope to evidence surrounding this event and the credibility of those involved.

Pattern

A report, or series of reports, suggests there is a pattern of harassment, either by one individual or several individuals.

Climate

A series of reports, the results of a climate survey, or other assessment may yield broad concerns about culture or climate in a department, school, or district. An example of this is a school that struggles to maintain male teachers amid allegations of anti-male bias or harassment by school leaders and staff.

Investigations may not clearly fall into one category or another, and you may revisit the basis for the investigation as the investigation uncovers more evidence. As you reassess the basis of the investigation, be mindful to keep the parties updated.

Written Notification

If the Complainant decides to file a formal complaint, the Title IX Coordinator will use their initial assessment to determine whether jurisdiction exists and, if it does, the scope of the investigation. Part of the initial assessment is determining whether informal resolution may be an option for the parties, too. In both circumstances, the parties are entitled to a thorough written notification of the allegations and the applicable procedures for resolving the allegations.

- In certain circumstances, you may decide to sign a formal complaint.

Notice of Investigation & Allegations Letter

ATIXA refers to this written notification as a Notice of Investigation and Allegations or NOIA letter. It always comes before a formal Title IX investigation or any informal resolution for a Title IX incident. The federal Title IX regulations contain specific requirements for what the letter must contain, which must be sent to all known parties. The letter should include:

- Identities of the parties involved in the incident, if known.
- Description of the alleged conduct.
- Date and location of the alleged conduct, if known.

Delivering the NOIA Letter

The NOIA letter should also include details outlining the Title IX process, including informal resolution options. The regulations clearly express that parties must have sufficient time to prepare a response before being interviewed. Parties should not be presented with an NOIA letter and then immediately interviewed. Schools should give parties a few days' notice and be responsive to reasonable requests for more time for parties to prepare a response.

NOIA Considerations

Additionally, the NOIA letter may be the first time the Respondent becomes aware of the allegations, so you should anticipate that the Respondent may be surprised or confused by it. Plan accordingly and be available for outreach and questions after sending the NOIA letter.

You may wish to provide the NOIA letter in person, too. However, if the Respondent receives the NOIA in person, you must ensure that the meeting does not turn into an interview.

NOIA Letter Inclusions

The Title IX regulations require that the NOIA letter include several different statements to make procedural requirements clear to all parties. Review the statements the letter should include.

1. The Respondent is presumed not responsible throughout the process. Any determination regarding whether the Respondent has violated school or district policy will be made at the conclusion of the Title IX process.
2. The parties may have an Advisor to support them throughout the process. An Advisor may be a person of their choice, without restriction. For example, Advisors may be a trusted teacher or coach, a parent or guardian, or even an attorney.
3. Parties may inspect and review evidence (i.e., witness statements, documents, video recording) prior to the completion of the investigation report.
4. You'll insert your school or district's retaliation policy here. An example of an included policy is below.

"Acts of alleged retaliation should be reported immediately to the Title IX Coordinator and will be promptly investigated.

All members of our school community are prohibited from intimidating, threatening, coercing, harassing, or discriminating against any individual for the purpose of interfering with Title IX rights or privileges, or because the individual has made a report or complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing under this Policy and procedure."

Title IX Coordinators should consider making a template NOIA letter to ensure compliance with requirements.

Sending a New NOIA Letter

Also, you may need to update the NOIA letter and resend it to the parties if new information comes to light that requires you to add new factual allegations or alleged policy violations. The fundamental due process protections require that all parties be clear about what the allegations are that are subject to investigation. You may need to send a new NOIA in the following instances:

- Respondent files a counter complaint.
 - If a Respondent files a counter complaint, you'll perform an initial assessment for this complaint to determine the scope of the response for this complaint, and to ensure that it is not being filed for retaliatory purposes. If you decide to address it inside of the same investigation, the NOIA letter should be amended and resent to the parties.
- Information comes to light during the investigation that constitutes new or different policy allegations.
- Evidence uncovered during the investigation requires adding a new party to the complaint.

KNOWLEDGE CHECK: NOIA Letter

Q. Which of the following should be included in the NOIA letter? Select all that apply.

- A. The date and location of the alleged conduct, if known.
- B. A statement that parties may inspect and review evidence only after the completion of the investigation report.
- C. The identities of the parties involved in the incident, if known.
- D. A statement that parties may have an Advisor of their choice, who may be an attorney,

Correct answer: A,C,D.

The date and location of the conduct, identities of the parties involved, and a statement that parties may have an Advisor of their choice should be included in the NOIA letter. There should also be a statement that parties may inspect and review evidence prior to the completion of the investigation report.

Emergency Removal & Administrative Leave**Is Emergency Removal Appropriate?**

In very limited circumstances, you may consider whether an emergency removal of a student Respondent is appropriate. The Title IX regulations provide a means for a school or district to remove a student Respondent if you determine that they cannot continue to safely participate in the school environment while the Title IX process is ongoing.

Emergency Removal

A school or district may use the Title IX emergency removal process to remove a student respondent on an emergency by following these steps:

- The school undertakes an individualized safety and risk analysis. If there's an existing intervention team that conducts risk assessments, you should consider using that team to conduct this analysis.
 - This process also needs to comply with ADA/504/IDEA regulations, including manifestation determinations and IEP team meetings.
 - For more information on behavioral intervention and threat assessment training, visit NABITA.org.
- The analysis must determine whether removal is justified. Assess whether an immediate threat to the physical health or safety of any student or other individual arises from the allegations of sexual harassment.
 - Mental Health concerns may not be enough on their own without some immediate threat to physical health or safety.
- The school must provide the respondent with notice of removal and an opportunity to challenge the decision.

Determination of Emergency Removal

When you are deciding whether to remove a student under the Title IX emergency removal provision, you must follow the regulatory requirements. You must not make the removal decision on your own. Consult the appropriate staff who are trained in conducting individualized safety and risk analysis.

Additionally, you should maintain thorough documentation of the emergency removal process, whether the decision is to remove or allow the student to remain in school.

Administrative Leave

For employee respondents, a school or district may place a Respondent on administrative leave during the Title IX process using their existing policies and procedures for employee administrative leave.

The regulations give schools more flexibility when using administrative leave for employees than emergency removal for students. You should coordinate with Human Resources to understand how administrative leave works in your school or district, including whether leave is paid or unpaid. There may be specific procedures for unionized employees, too.

Keep in mind that an employee may only be placed on leave while the Title IX process is ongoing.

Administrative Leave Considerations

Similar to emergency removal of students, the emphasis remains on following the appropriate process. You must adhere to the district's established processes.

Lastly, administrative leave under Title IX does not change an employee's rights under Title VII, Section 504, or the ADA. Consult with legal counsel and Human Resources during this process.

Informal Resolution

The Title IX regulations anticipate that many situations may be appropriate for resolution through informal means rather than the formal resolution process, especially in K-12 settings.

Informal resolution is an option after a formal complaint. It offers parties an opportunity to design a path to resolution outside of the investigation process. Informal resolution can take a variety of forms, from shuttle diplomacy to restorative practices. It also offers the chance for customized solutions designed by the parties themselves. Depending on the parties' goals and the school's capabilities and resources, informal resolution could result in a better experience and better outcome for the parties.

Agreeing to Informal Resolution

You play a significant role in determining whether a case is appropriate for informal resolution. Under Title IX, both the parties and the Coordinator must agree to use informal resolution.

As a part of the initial assessment phase, you should consider whether informal resolution is an appropriate option to offer to the parties. Informal resolution is prohibited in situations involving allegations that an employee harassed a student. Otherwise, informal resolution is permitted at any time after a formal complaint and prior to a final determination.

Additionally, any party may choose to withdraw from informal resolution prior to you approving the final agreement.

Providing Options

As the Title IX Coordinator, you should discuss informal resolution with the parties, including whether they are interested, their options for informal resolution, and what to expect if they participate.

- Parties should receive an NOIA before engaging in informal resolution.

The parties need to provide written consent to informal resolution, and you have the discretion to decide whether informal resolution may be used. For example, it's unlikely that you would permit an informal resolution for an incident involving threats, violence, weapons, or other aggravating factors.

Informal Resolution Considerations

There are some additional factors to help guide your thinking about whether informal resolution is appropriate.

Training and Experience: Does the informal facilitator have the appropriate training and experience? If your facilitator does not have the background to effectively facilitate resolution of the allegations, informal resolution may not be a good option.

Possibility of Resolution: Will the parties be able to come to a resolution? You should consider all facts you know and consider the totality of the circumstances, asking yourself whether an agreement is realistic.

Motivation to Resolve: Are the parties motivated to come to a resolution? You should consider the goals of the parties and whether those goals help or hinder reaching a resolution.

Complaint Complexity: Is the complexity of the formal complaint suitable for informal resolution? If there are multiple allegations, several parties, or several policies at issue, a resolution may be less likely.

Civil Parties: Are the parties civil enough to participate?

Risk Analysis: Is informal resolution appropriate given your risk analysis? If you or the parties have safety concerns, informal resolution may not be appropriate.

Time and Resources: Does the school have adequate time, resources, and staff for informal resolution?

Examples of Informal Resolution Practices

Some informal resolution possibilities include:

- Facilitated dialogue or discussion, which could involve the parties directly or using an intermediary for indirect interaction
- Conflict coaching, to help parties build skills to manage and resolve conflict with others
- Restorative practices meant to improve and repair relationships, and
- Mediation, an interactive process in which a third party helps the parties resolve conflict, possibly through negotiation.

This is not a comprehensive list. There are many creative ways to incorporate informal resolution based on the parties' desires. However, while assessing your Title IX program and process, you should determine which informal resolution options you can offer. Consider providing additional training to expand your informal resolution program.

- Everyone who serves as any form of an informal resolution facilitator under the Title IX regulations must be trained.

Informal Resolution Benefits

Regardless of the type of informal resolution, the goal ultimately remains the same: to stop, prevent,

and remedy the harassment. Informal resolution can be beneficial for several reasons. It can take less time than an investigation and offer more satisfying outcomes for the parties in some circumstances. However, if informal resolution cannot effectively stop, prevent, and remedy, it shouldn't be used, no matter the other benefits.

Documentation

Lastly, you should remember to maintain proper documentation of informal resolution efforts and any agreed upon solutions. Documentation is also helpful if the parties accuse one another of violating the agreement.

You should use the student conduct process for parties who violate the informal resolution agreement. A violation typically does not reopen the Title IX formal complaint.

Conclusion

You've reached the end of Initial Assessment. After completing this section, you should now be able to:

- Identify the mandatory sections and statements of the Notice of Investigation and Allegations Letter.
 - Explain the process for emergency removal for respondents, and
 - Determine when informal resolution is an appropriate option.
-

PART 5

OVERSEEING THE TITLE IX PROCESS

NOT FOR DISTRIBUTION

Lesson 1

Supervising the Investigation

The Title IX formal investigation process is a phase of the process that you oversee as the Title IX Coordinator. You'll provide guidance to the Investigator and ensure the process continues to move promptly. To do this, you'll need to know the steps of the investigation and understand how to classify the evidence gathered by the Investigator. This section outlines the steps of the formal investigation process and discusses different kinds of evidence.

After completing this section, you will be able to:

- List the steps of the formal investigation process, and
- Describe the difference between relevant and directly related evidence.

The Investigation Process

Assigning an Investigator

The formal investigation is the next phase in the Title IX process after a formal complaint is filed and you conduct your initial assessment. In this stage, you'll assign an Investigator to the investigation. As Title IX Coordinator, you are permitted to serve as the Investigator under Title IX regulations.

If you're assigning an Investigator, work with the Investigator to verify no conflict of interest exists. You'll need to find out whether the Investigator is able to conduct an impartial and neutral investigation. Review the parties and list of witnesses to check for any conflicts.

A conflict doesn't necessarily exist because the Investigator knows or has interacted with a party in the past. Completing these conflict checks early in the process can prevent problems later that may disrupt or delay the process.

Investigator Considerations

Additionally, consider whether the Investigator has the time and expertise for that specific investigation. In some instances, you'll have to work with the investigator to ensure that other work responsibilities are adjusted temporarily to allow them sufficient time to conduct the investigation properly.

Access to Information

As Title IX Coordinator, you should share all known information with the Investigator. If your district uses an electronic case or file management system, make sure that the Investigator has access to the case files in this system, too. The Investigator will use the information you provided to identify witnesses, schedule interviews, and collect evidence. They'll reach out to parties to schedule the interviews, follow up as necessary, and carry out other investigation duties. You should advise and support the Investigator where needed.

Please note: Providing the Investigator access to the entire system is not necessary.

Title IX Formal Investigation Process

ATIXA outlines a 10-step investigation process to comply with Title IX. Take a moment to review the steps.

- 1. Establish a basis for the investigation.**
You'll determine whether the investigation will examine a single incident, a pattern, or a climate issue.
- 2. Send Notice of Investigation and Allegation(s).**
You'll send the NOIA letter to the parties to provide notice of the investigation.
- 3. Establish the investigation strategy.**
The Investigator will review the complaint and case information to develop an investigation strategy to collect evidence, consulting you as needed.
- 4. Conduct the formal investigation.**
The Investigator implements their strategy to conduct and complete a fair, impartial, and thorough investigation.
- 5. Draft the investigation report.**
The Investigator drafts an investigation report containing all evidence relevant to the allegations.
- 6. Review draft report and evidence.**
You may review the report and evidence with legal counsel for clarity and readability before it's provided to the parties.
- 7. Provide report for inspection and review.**
The Investigator sends the investigation report to the parties and their Advisors for a period of 10 days to review and comment. Parties may offer suggestions for additional investigation, too.
- 8. Revise and finalize investigation report.**
After the Investigator reviews any comments and feedback from the parties, they determine whether additional investigation is needed to conclude the investigation, incorporate relevant feedback, and finalize the report.
- 9. Review the final report.**
The Investigator will commonly review the final report with you and legal counsel before sending the final report to the parties, their Advisors, and the Decision-maker.
- 10. Send the final report.**
The Investigator sends the final report to the parties, their Advisors, and the Decision-maker. This concludes the investigation.

This lesson will provide a brief overview of each step.

Developing an Investigation Strategy

As a Title IX Coordinator, you may be involved in helping the Investigator develop an investigation strategy. You'll be able to provide helpful context or advice based on your experiences with the parties, their Advisors, or other background information. You can also provide guidance on potential obstacles or disruptions that may impact the Investigator's planning, such as upcoming school breaks, standardized testing weeks, or school dynamics.

Potential obstacles or disruptions: If you hire an external Investigator, providing them with school-specific information is important in developing an effective investigation strategy.

Your Role During the Investigation

You'll also need to have a sense of the investigation strategy to ensure that the process is moving forward promptly. You may need to answer questions from the parties or collaborate with legal counsel or law enforcement. Maintaining an open channel about the investigation is crucial. Still, you'll want to properly train your Investigators so you can trust that they'll carry out your duties without your constant oversight. Unless you're also serving as the Investigator, you should refrain from inserting yourself into

the investigation beyond an advisory capacity.

Draft Investigation Report

Once the Investigator completes all interviews and gathers available relevant evidence, they must compile a written investigation report summarizing all relevant evidence collected during the investigation. Report sections and structure should not differ based on the Investigator or investigation. You should maintain an investigation report template to ensure consistency between investigations.

Although the regulations only require a written report summarizing the relevant evidence, ATIXA has developed a comprehensive final report template to guide Investigators and provide structure to promote consistency and quality.

- Evidence gathered through party and witness interviews. Party and witness interviews will often appear as summary statements in the investigation report.
- All relevant documentary, physical, or other evidence collected during the investigation. Examples include:
 - Text messages
 - Security camera footage
 - School computer log-in data
 - Emails
- Documentation of the Investigator's effort to conduct a thorough, prompt, and impartial investigation. This includes:
 - The process timeline starting with the formal complaint.
 - Any relevant background information.
 - The Investigator's efforts to contact witnesses to obtain evidence.

Completing the Draft Report

After completing the investigation draft report, the Investigator should meet with you to review the draft report and evidence. This review will help identify areas in which the draft report is unclear. You should bring a fresh perspective to the material to help the Investigator to address gaps, inconsistencies, or clarifications. Your big picture view also may be able to help them find areas for additional investigation, unanswered questions, or incomplete sections of the report.

Any feedback from you or legal counsel should be advisory, primarily asking questions related to relevance and writing clarity. To maintain separation of responsibilities, you should not be making substantial revisions. The Investigator is responsible for the content of the report.

10-Day Review Periods

Next, the Investigator provides the report and all directly related evidence to the parties, parents or guardians, and their Advisors for inspection and review. The regulations require this review period to be a minimum of 10 days, but do not specify whether to use calendar or business days. Be sure to clarify which you'll use based on your policy.

The parties may respond in writing to the Investigator to:

- Correct an error.
- Ask questions about the report.
- Suggest additional witnesses, or

- Submit additional information.

Party Responses

The parties are not required to respond to the draft report and evidence, but this does serve as a final opportunity for them to review the Investigator's work and participate in the investigation phase. The Investigator may request additional consultation as the parties return their feedback and commentary. Additionally, parties and Advisors may have questions as they prepare to move into the decision-making phase.

Investigation Report Feedback

Once the Investigator receives the party responses at the conclusion of the initial review period, they'll determine whether additional investigation or revisions to the report are appropriate.

Some examples of common feedback from the parties include:

- Making a correction to their summary statement. Parties occasionally will want to make corrections to their summary statement or add new information.
- Suggesting additional witnesses or follow-up questions for witnesses you have already interviewed. Parties may request that the Investigator conduct more interviews.
- Identifying additional evidence. Parties may name additional sources of evidence that may be collected by the investigator.
- Raising concerns about the report's quality, the Investigator's competency and/or perceptions of bias. Parties may criticize the Investigator or the report for several reasons, especially if the report is not favorable to them.

Addressing Requests & Feedback

The Investigator may ask the party to explain why they are making the request. For example, they might question what purpose an additional witness interview may serve or what relevant evidence could the witness provide. The Investigator will review the parties' feedback and any requests they make. Although the Investigator is not obligated to fulfill the requests of the parties, if an Investigator declines to act on a request, they should document their reasoning for you to maintain in the case file.

Finalizing the Report

If further investigation is required, the Investigator will proceed as appropriate. If no further investigation is required, the Investigator will finalize the report.

ATIXA recommends that the Investigator share the final investigation report with you and legal counsel for review prior to sharing with the parties, parents or guardians, their Advisors, and the Decision-maker. This review should focus on the clarity of the report and ensuring compliance with the district's policy. Any feedback from you or legal counsel should not be substantial.

Once the Investigator sends the final report to the parties, Advisors, and Decision-maker, the regulations require an additional 10-day review period before the Decision-maker makes a determination.

Coordinating with Law Enforcement

Title IX jurisdiction includes several behaviors that may also be crimes. Sometimes, a criminal investigation of the same incident can occur at the same time as your Title IX process – these principles also apply to child abuse investigations. As the Title IX Coordinator, it's important to know that a simultaneous criminal investigation means that your process can be delayed or suspended until the

criminal investigation is over.

Law Enforcement Considerations

The police may want you to delay your investigation so you don't interfere with their collection of evidence. A short delay to accommodate law enforcement is acceptable, but the school's investigation cannot be delayed until the conclusion of the criminal process.

One approach is to be proactive by establishing a Memorandum of Understanding, or MOU, with your local police department. An MOU outlining expectations and information sharing may help streamline and resolve any concerns. Don't wait until you have a conflict with your local police to reach out to establish expectations and a line of communication.

Insight from an Expert: Coordinating with Law Enforcement

Joe Vincent, M.L.S., Senior Supervising Consultant, TNG & ATIXA Advisory Board Member



In the course of conducting your investigation, it's not uncommon for there to be a concurrent, ongoing criminal investigation or some other sort of outside agency inquiry into the same allegations at the same circumstances that you're also investigating. Now, since this is a common issue, there are some best practices that have emerged that I just wanted to touch on with you really quickly as you figure out how to coordinate your own efforts with those of some outside agency or of a police department or any other outside efforts to understand what happened in the context of the same circumstances that you're investigating.

Typically, this is going to be a police investigation, right, a Complainant might make a report to you and then ask you to assist them in reporting the conduct to law enforcement. Or they may make their own report to law enforcement, or the case may even arise out of what started as a criminal complaint to a police department. And then you became aware of it afterwards. Regardless of the circumstances, it's important to first acknowledge that the obligation to investigate that attaches to the school is independent of any other investigation that may be going on at the same time. That is to say, if the police are investigating, that doesn't mean you don't have to. The obligation is distinct and independent.

And honestly, more to the point, the standards and the approach to a case and the outcome of that case as it's approached by a police department, let's say, is going to be very different. Right. Using different standards, a different burden of proof, different potential outcomes than the investigation that you conduct on behalf of the institution. So, we have to investigate, even if someone else is also, even if the police department is also. But that doesn't mean that we aren't going to be diplomatic in our approach to accomplishing our investigative aims as it relates to others who may be working in the same set of circumstances for a different agency or for a police department. This will really become relevant as it relates to interviewing witnesses, attempting to collect evidence, moving through different phases of the resolution process as other processes create additional or different types of burdens on the parties to participate.

They may be advised by a legal advisor, or you may be advised by the investigative unit, by the police department, that phases of your investigation will hopefully defer to or delay or work around the efforts of those other agencies or of the other process that's currently in play. So, as you might imagine, it's usually really nice to have a relationship with or at least have contact with the investigating official or

the officer that's conducting that separate investigation. It's helpful to make that contact early if you can, if you're the Coordinator and you can facilitate that contact between your Investigator and the police officer or the detective or the agency representative, that can be super helpful on the front end. It's really helpful to know what that other investigator of authority intends to do and in what timeframe they intend to do it.

Completing the Title IX Process

Additionally, criminal investigations are different from Title IX investigations. Though both investigations may examine the same underlying incident, criminal investigations have different processes, different definitions of evidence, and different laws than do Title IX investigations. As a result, police investigations or reports may not substitute for a Title IX investigation and determination. However, the Decision-maker can consider information your Investigator obtains from police, as long as it is relevant.

Evidence & Relevance

Evidence in the Title IX Process

Understanding evidence and relevance is an important component to your role as Title IX Coordinator. The Title IX regulations focus on "relevant evidence" to ensure that decision-making is well-grounded in facts. Everyone involved in the process requires some basic training in how to determine whether evidence is relevant to the investigation.

Forms of Evidence

Evidence can take a variety of forms. It could be testimonial in the form of memories that parties and witnesses share about what they saw, heard, or experienced. It could also be documentary, like emails or a video recording.

The primary consideration in collecting evidence is whether the evidence is relevant. Evidence is relevant when it directly addresses an issue in the complaint or supports credibility.

Relevant vs. Directly Related Evidence

You may recall that the Investigator must include all relevant evidence in the investigation report. In addition to the report, parties also receive all evidence that is not relevant but is nonetheless directly related to the allegations. Since the Investigator needs to know the difference between relevant evidence and directly related evidence, so do you.

Use the following picture to demonstrate the relation between the types of evidence and the allegation(s).



Relevant Evidence

The first circle is relevant evidence, which is closest to the complaint in this illustration. Evidence is relevant when it tends to prove or disprove an issue in the complaint or speaks to credibility. Relevant evidence should be in the investigation report and may be relied upon by the Decision-maker. Examples of relevant evidence include:

- A Snapchat screenshot of the alleged harassment, or
- A video recording of the cafeteria showing the alleged incident.
- A summary statement of a witness interview that confirms the Respondent's version of events.

Directly Related but Not Relevant

The second circle contains directly related, but not relevant, evidence. Directly related evidence is connected to the complaint but isn't inculpatory or exculpatory. An example of directly related evidence is a series of screenshots of text messages. The student may send you five screenshots but only two contain the harassing conduct. The other three screenshots may be considered directly related evidence because they may contain valuable context to the harassment.

Evidence in the second circle shouldn't be in the investigation report, but it should be provided in a separate, secure file when the parties receive the draft investigation report for their review. Parties may argue that directly related evidence should be considered relevant evidence, or vice versa. It's important for parties to see how the investigator categorized the evidence.

Not Relevant or Directly Related

The third circle is for evidence that is not relevant or directly related to the complaint. This evidence should be maintained in records but disregarded. Parties may make the case that relevant or directly related evidence should be in this circle, but the parties don't see the evidence in this circle.

Determinations of Relevancy

The Decision-maker alone ultimately determines whether a piece of evidence is relevant and whether to rely upon it when making a decision. However, you must understand these concepts to properly oversee the work of the Investigator and Decision-maker and provide guidance from time to time.

Under the regulations, when it comes to considering evidence, the concept of relevance is broad. Additionally, the parties have the right to dispute the relevance of any piece of evidence and make their argument to the Decision-maker, who will make the relevance determination.

Relevance Exceptions

Though the parties have no restrictions on gathering relevant evidence, there are some categories of evidence that are never relevant. First, evidence of Complainant's sexual predisposition is never relevant. Evidence of the Complainant's prior sexual behavior is not relevant except in two specific instances.

Exception #1

The Complainant's prior sexual behavior is not relevant unless the evidence is offered to prove that someone other than Respondent committed the conduct alleged.

Exception #2

The Complainant's prior sexual behavior is not relevant unless the evidence concerns specific incidents of the Complainant's prior sexual behavior, with respect to Respondent, and the evidence is offered to prove consent. An example of this type of evidence would be the Respondent's statement reporting that Complainant and Respondent routinely engaged in consensual sexual activity in the past, and some of the nonverbal cues that were used to give consent in the past are relevant to determine whether consent was present in the subsequent encounter.

You should note that evidence of the Complainant's sexual predisposition is not relevant even if they introduce the behavior themselves. Also, this restriction does not apply to the Respondent's prior sexual behavior or predisposition, so long as the evidence is relevant.

Evidence Subject to Privilege

In addition to prohibiting evidence on sexual predisposition, there are a few types of evidence that the regulations prohibit access to without permission from the appropriate party. The Investigator must obtain written permission to include records made or maintained by a:

- Physician;
- Psychiatrist; or
- Psychologist

Examples of those records include:

- Sexual Assault Nurse Examiner (SANE) report
- Therapist records and
- Medical information.

Conclusion

You've reached the end of Supervising the Investigation. After completing this section, you should now be able to:

- List the steps of the formal investigation process, and

- Describe the difference between relevant and directly related evidence.

Please review our catalog of courses for additional training on this and other Title IX related topics or visit us at ATIXA.org for other Title IX resources.

Lesson 2

After the Investigation

As Title IX Coordinator, you'll provide oversight through all phases of the process where members of your Title IX team are working to complete their part. You'll need to understand how these phases of the process work to provide your guidance and oversight, and to keep the process moving in order to adhere to Title IX regulations.

This section delves into another part of the formal grievance process - the decision-making phase. You will learn about how a Decision-maker considers evidence and documents their decision, as well as sanctioning, and appeals.

After completing this section, you will be able to:

- Describe how a Decision-maker determines and documents their decision.
- Describe the sanctioning process, and
- Describe the appeal process and grounds for appeal.

Making a Determination

Making a Determination

After the Investigator concludes the investigation and sends the final report to the parties and the Decision-maker, the Title IX process enters the decision-making phase.

The Title IX regulations require schools or districts to have an independent Decision-maker review the evidence and determine whether a policy violation occurred. Although schools and districts are free to utilize a single Decision-maker or a panel, the Decision-maker may not be the Title IX Coordinator or the Investigator. The regulations require a separation of responsibilities. They also require schools or districts to provide a fresh set of eyes to review relevant evidence and make the determination of whether the Respondent violated policy.

As Title IX Coordinator, you oversee the decision-making process to ensure compliance with policy and procedures. Like the investigation process, you serve in an advisory capacity only.

- In some instances, the Decision-maker may need to coordinate with disciplinary procedures for special education students.

The Final Investigation Report

The Decision-maker will receive the final investigation report at the same time as parties and advisors, even if there was no hearing. Once the report is received, the Decision-maker should identify a specific day they intend to make a final determination.

The date of determination, or the hearing date, must be at least 10 days after the final report was sent to the Decision-maker, parties, and advisors. This second 10-day period allows the parties and advisors to prepare for how they want to participate in the decision-making phase.

- The parties could waive the 10-day period if they desire the decision be made more quickly.

During this 10-day period, the parties may submit questions in writing to the Decision-maker for their consideration. Parties may ask relevant questions, including questions of credibility. The Decision-maker may ask questions, too, but should avoid reinvestigating the matter.

- The Decision-maker must give the parties the opportunity to submit written, relevant questions to ask witnesses or any party. They must then provide the parties with any answers to their questions and permit additional follow-up questions.

The Decision-Maker's Role

The Decision-maker may also ask questions to parties or witnesses, but Decision-makers should be cautious to avoid asking questions to satisfy a curiosity or in pursuit of a “gotcha” moment. The Decision-maker’s role is neutral and impartial. You should ensure the Decision-maker is well trained to understand their role, its boundaries, and its limitations.

Asking Relevant Questions

Parties may have the option to ask limited follow-up questions, each of which is subject to a relevancy determination. The Decision-maker will decide whether the parties’ questions seek relevant information. If the Decision-maker determines a question is not relevant, they may reject or reword the question. Decision-makers must provide a written rationale to the party posing the question for rejecting or rewording a question. The Decision-maker may also ask the party why they think the question is relevant.

Live Hearings

Although the regulations give K-12 schools and districts discretion about whether to hold live hearings, many K-12 schools have opted not to hold live hearings for all Title IX cases. Be consistent; avoid holding hearings on a case-by-case basis. However, live hearings may be required for Title IX cases involving expulsion, suspensions beyond 10 days, and some employee discipline.

Discuss with your legal counsel to determine your hearing obligations and how they impact or intersect with Title IX.

Sanctioning

Sanctioning

If a Decision-maker finds that the Respondent violated school or district policy, the Decision-maker will move to the sanctioning phase. Title IX requires schools and districts to implement sanctions that will

stop the behavior, prevent the harassment from recurring, and remedy the effects of the harassment. As the Title IX Coordinator overseeing the process, it's your responsibility to ensure that the Decision-maker understands the duty to stop, prevent, and remedy.

Sanction Considerations

Sanctions must be reasonable and proportionate to the severity of the behavior. The Decision-maker may consider prior misconduct and look to precedent in past cases to promote consistency. In these circumstances, your advisory capacity will be especially helpful. The Decision-maker may not be aware of past cases or precedent in sanctioning, but you will, and you'll be able to advise the Decision-maker. However, keep in mind that determining sanctions is not a part of your role.

- The Decision-maker does not learn about prior misconduct until after they've made a decision about whether the Respondent violated policy to avoid the risk of bias in the case.

Additional Considerations

Additionally, aggravating or mitigating factors, like attitude and remorse, may be considered. However, the Decision-maker still has the obligation to stop, prevent, and remedy, even when the Respondent is apologetic. Although the regulations permit educational sanctions, safety should be the primary consideration. Remedies or sanctions should also be adapted to ensure that the Complainant regains access to the educational program or activity.

Common Sanctions

Remember, sanctions must be reasonable and proportionate to the severity of the behavior. Review the list of common sanctions for each group below.

Student	Employee
Written warning Detention Loss of privileges Counseling No contact orders Limited access to school activities Service hours Online education Alcohol & drug assessment and counseling Alternative placement In-school or out-of-school suspension Expulsion Probation Withhold diploma Revocation of diploma	Written warning Probation Performance improvement process Training or education Counseling Loss of privileges Reduction in pay Loss of annual raise Loss of supervisory or oversight responsibilities Paid or unpaid leave Suspension Termination Enhanced supervision, observation, or review Probation Denial of pay increase Demotion Transfer assignment Delay of tenure track Restriction of stipend or research funds Restriction of professional development fund

Written Determination

The Decision-maker is required to issue a written determination regarding the findings and, if applicable, the assigned sanctions and remedies.

As the Title IX Coordinator, you may help the Decision-maker with this process because this letter is much more detailed than you may find in other types of hearings. However, the Decision-maker is responsible for drafting the substance of the document.

Components of a Written Determination

Under Title IX regulations, the written determination must be delivered to the parties at the same time. This differs from the typical treatment of disciplinary information under FERPA, but the U.S. Department of Education interprets the Title IX rules to be consistent with FERPA. As such, FERPA concerns should not override your Title IX obligations to provide the written determination to all parties in the process.

The written determination should include:

- The applicable sections of the policy.
- A description of procedural steps taken.
- A statement of and rationale for the Decision-maker's finding for each specific allegation.
- Any sanctions imposed on the respondent.
- Whether the school or district will provide remedies, designed to restore or preserve access to the educational program or activity, to the complaint.
- Procedures and bases for appeal.

Coordinating the Appeal Process

The Appeal Process

The opportunity to appeal becomes available once the written determination letter is sent to all the parties. Schools and districts must offer the appeal process to all parties, not just the respondent.

The right to appeal must be clearly communicated to parties in the written determination letter. The written determination letter should describe the process to appeal, the timeline for requesting an appeal, and the opportunity to respond to an appeal. As a best practice, allow one level of appeal with a defined window of time to request the appeal.

Please note: The Appeal Decision-maker may not be the Title IX Coordinator, the Investigator, or the original Decision-maker. Like the original Decision-maker, a single trained person or a panel may decide the appeal.

Grounds for Appeal

Title IX specifies that your school or district policy must offer the following grounds for appeal:

- A procedural irregularity that affected the outcome of the matter;
- New evidence that was not reasonably available at the time of the determination of responsibility or dismissal, if the new evidence could have affected the outcome; and
- The Title IX Coordinator, Investigator, or Decision-maker have a conflict of interest or bias against Complainants or Respondents, or the individual Complainant or Respondent, that

affected the outcome of the matter.

Your policy may add other grounds for appeal as long as they're offered equitably to all parties. The appeal is limited to the grounds identified in the appeal. It is not a rehearing of the case. Ensure you've trained your Appeal Decision-maker to understand the limited scope of appeals.

Notification & Determination

When a party submits an appeal within the time limit and identifies the appropriate ground, the Appeal Decision-maker must notify the other parties and permit them to submit a written response.

The Appeal Decision-maker will then consider the appeal and determine the appropriate resolution. For example, if there was an error in the investigation or bias by an Investigator, they may order a new investigation with a new Investigator. Another example would be the Appeal Decision-maker ordering the original Decision-maker to amend sanctions because the original sanctions and remedies were not going to effective.

Finality of Determination

If no party files an appeal, the determination and any sanctions or remedies are final on the date the appeal window expires.

If a party files an appeal, the determination and any sanctions or remedies are final when the Appeal Decision-maker sends written notice of the appeal results.

The appeal decision is final.

Post-Process Responsibilities

As the Title IX Coordinator you'll ultimately be responsible for ensuring that the parties comply with sanctions and remedies. If you're not responsible for implementing sanctions yourself, you must provide oversight to those district employees who implement sanctions. Review the following list of your post-process responsibilities.

<p>Remedies</p> <p>Implement remedies to the Complainant and the community, as appropriate. Part of implementing remedies is ensuring that they preserve or restore access to education programs or activities. You may need to check in with the Complainant, their parents or guardians, their teachers, guidance counselors, or their building principal to ensure remedies are working properly.</p>
<p>Sanctions</p> <p>Implement sanctions or disciplinary action, as needed. Sanctions may be complex or multi-faceted and may require you to advise the staff member responsible for implementation.</p>
<p>Retaliation</p> <p>Monitor for retaliation and respond immediately to allegations of retaliation. Inform parties of your district's prohibition on retaliation and ensure they know how report it. Take time to review the behaviors that may constitute retaliation.</p>
<p>Policies and Procedures</p> <p>Review policies, procedures, and practices regularly to ensure they are compliant and effective. Make improvements and apply what you've learned from overseeing the formal grievance process. Investigators and Decision-makers may have feedback to improve the process, too.</p>
<p>Case Materials</p> <p>Maintain all case materials in a central location you can access. Other administrators should not have access to case materials, in most instances. You may consider creating a document at the end of the process that summarizes how the school or district's response was not deliberately indifferent.</p>

Post-Process Considerations

Taking the time to reflect and assess at the end of the process may help you improve it. Review your process for areas of improvement to strengthen compliance and implement effective practices

Conclusion

You've reached the end of After the Investigation. After completing this section, you should now be able to:

- Describe how a Decision-maker determines and documents their decision.
 - Describe the sanctioning process, and
 - Describe the appeal process and grounds for appeal.
-

PART 6

**GENERAL TITLE IX COMPLIANCE
OVERSIGHT**

NOT FOR DISTRIBUTION

Lesson 1

General Title IX Compliance Oversight

The Title IX process requires that the Title IX Coordinator ensures compliance with the regulations. This section will outline the additional compliance responsibilities, the requirements for recordkeeping and documentation, and the intersection of Title IX with FERPA and with Title VII.

After completing this section, you will be able to:

- Describe additional compliance responsibilities beyond the formal investigation process.
- Describe recordkeeping and documentation requirements, and
- Explain Title IX intersections with FERPA and Title VII.

General Title IX Compliance Oversight

Compliance Responsibilities

Although overseeing the formal resolution process is a significant part of your responsibilities, you will have additional compliance responsibilities. On a continuing basis, you should be reviewing and assessing your Title IX program. Conducting regular debriefings with your Investigators and Decision-makers can be very effective at identifying opportunities and challenges within your formal process.

Review this list of questions to consider:

- How are investigations and final determinations going?
- Where are you observing challenges with your process?
- What can you do to improve the experience for the parties, advisors, witnesses, and staff?
- What are trends you are seeing in your Title IX complaints?
- Are there observable patterns of behavior that may be addressed proactively through programming or education?
- Are there any signs of patterns or culture issues that may merit an investigation or inquiry?
- What are trends in your sanctioning?
- Are your sanctions consistent?
- What can you learn from cases in the past?
 - Parents, guardians, and/or advisors can be useful in identifying pain points in the process.
- Are resolutions reasonably prompt or is the process taking too long?

Ensuring Compliance

Policies and procedures will need ongoing attention to ensure compliance, especially in a constantly changing regulatory environment. Title IX is governed by federal law and regulation, but there may be state statutes and recent court decisions impacting your policies and procedures as well. Title IX may also interact with other federal and state laws regarding privacy, disability accommodations, and child abuse. Changes in those laws may impact your process, too.

Additional Compliance Responsibilities

Developing a compliance checklist may help you to stay up to date on these responsibilities. You will need to complete certain tasks as the Title IX Coordinator in your school or district. Review this checklist

of items to help you stay up to date on your responsibilities.

- Invest time and attention in training material, ensuring that the necessary individuals are properly and regularly trained.
- Fulfill your annual obligations to distribute a non-discrimination notice, policy, and other materials.
- Review and maintain website materials, including publishing training materials on your website.
- Provide oversight for the school or district’s athletic programs.
 - There are a number of Title IX regulations and OCR resolutions impacting equity in athletic programs.
- Monitor for other sex- or gender-based issues that may arise in other parts of the school or district’s education program or activity.

Recordkeeping & Documentation

You provide the oversight for all recordkeeping and record maintenance. Certain records need to be created, retained, and available for at least seven years. Those records include:

- Sexual harassment investigation records, including responsibility determination, the rationale, disciplinary sanctions imposed, and any remedies including measures, taken to preserve or restore access to education programs or activities.
- Any appeal and its related results.
- Any informal resolution documentation.
- Any documentation related to supportive measures.
- Documentation about each formal complaint with a description of how the district’s response was not deliberately indifferent

You should consult with your general counsel to find out if there are longer retention policies under your school or district policy or state law.

Investigation File

As the Title IX Coordinator providing oversight for the resolution process, you’ll need to consider your recordkeeping responsibilities. You can adopt practices that make your recordkeeping more efficient and effective. ATIXA recommends that you maintain and create specific items for your investigation file.

Maintain	Create
<ul style="list-style-type: none"> • A copy of the policies and procedures. <ul style="list-style-type: none"> ○ Policies are frequently updated, so you should save the policy you used in each specific complaint. • A copy of the NOIA letter(s). • A file for each party and witness in an electronic case management database, including: • Interview transcripts or summaries. • Additional evidence provided by the individual and any authentication efforts. 	<ul style="list-style-type: none"> • A witness flowchart to track individuals and the issues each witness addressed. • Incident timelines to catalog and understand when different actions or events took place, as well as their relationship to one another. • A process timeline, noting any process delays and justifications for delays, including law enforcement-related delays. • A contact log of all contact you had with the parties and witnesses in an investigation.

Title IX & FERPA

A common issue arising for Title IX Coordinators in K-12 settings is the intersection of Title IX and FERPA, which is the federal student records privacy law. Students, families, and administrators may have a general understanding about the privacy of students and the limits FERPA mandates.

However, Title IX regulations require a high degree of transparency for parties in an investigation, which can surprise families and students, including witnesses. You should be prepared to be upfront about what is and what's not protected by FERPA in an investigation. This may ultimately result in parties or witnesses feeling less comfortable participating in an investigation with the knowledge that their names and evidence will be known to the parties.

FERPA: Family Educational Rights and Privacy Act

Access to Records

Under Title IX, all parties have the right to access Title IX documentation related to the investigation report and all evidence directly related to the allegations. Since some of those records may include information about other students, namely witness statements or video footage including additional students, you should anticipate questions and concerns regarding privacy.

An important point to note is that student witnesses do not have the same rights as the parties to review the investigation report and the evidence that is gathered during the investigation. Witnesses may only view the specific information directly related to them.

Student Record Considerations

Parties have the right to review the investigation file in its entirety. You may redact names but you will need to provide the parties with a key so they know the identities of the parties.

Consent for Records

The Department of Education recommends obtaining consent of the parents or guardians of other students involved in the process, as their student's information may be disclosed during the course of the process. This is not required but is a best practice. As mentioned previously, this may result in some student witnesses refusing to participate in the investigation.

Title IX & Title VII

Another federal law that frequently intersects with Title IX is Title VII. Title VII prohibits discrimination on the basis of race, color, religion, sex, or national origin in employment. This federal law can intersect with Title IX in instances of sex- or gender-based harassment or discrimination involving school or district employees.

Your employees may be able to use both Title VII and Title IX to pursue resolution for sex- or gender-based misconduct. Your general counsel can help you understand more about the intersection of Title VII and Title IX as it relates to your specific school or district.

Key Differences

There are key differences between Title VII and Title IX that you should understand as a Title IX Coordinator. You may notice that the federal oversight agency is different, with the Equal Employment Opportunity Commission overseeing Title VII claims instead of OCR.

Additionally, Title VII has fewer equity-based guarantees for the Complainant and has fewer requirements governing timeframe. Title VII complaints are often resolved more quickly than Title IX complaints because Title VII has fewer process-oriented requirements.

Using the Title IX Process

While both laws may apply to a set of allegations made by an employee, the primary takeaway is that the school or district must use its Title IX process for sexual harassment allegations that fall under Title IX jurisdiction, even when Title VII might also apply. Federal regulations and federal courts are clear that the due process protections within Title IX process are required for behavior that falls under Title IX, even if the employee seeks to press a Title VII claim with the EEOC.

You should collaborate with legal counsel and Human Resources to ensure the process and expectations are clear for overlapping Title VII and Title IX allegations.

Conclusion

You've reached the end this section. After completing this section, you should now be able to:

- Describe additional compliance responsibilities beyond the Title IX grievance process.
- Describe recordkeeping and documentation requirements.
- Explain Title IX's intersections with FERPA and with Title VII.