

Title IX Investigator Training

Bridgeport Public Schools

Attorney Melinda B. Kaufmann

May 8, 2024

Goals of Today's Presentation?

- Understand the district's obligation to address sex discrimination in the district's programs and activities
- Identify and explore what types of conduct constitute sexual harassment under Title IX as it currently exists and under the new regulations that go into effect on August 1, 2024
- Learn the applicable notification and information requirements
- Learn how to serve impartially and how to recognize and avoid prejudgment of the facts, conflicts of interest and bias
- Learn about the Role of the Title IX Coordinator, Investigator and Decision-Maker in the Title IX Grievance Process
- Learn how to conduct Title IX compliant investigations

Some Statistics

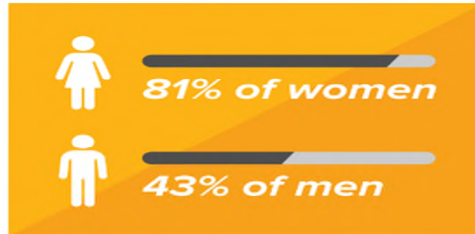
Learn more on our [Questions and Answers](#) page.



One in five women in the United States experienced completed or attempted rape during their lifetime. [SOURCE](#)



Nearly a quarter (24.8%) of men in the U.S. experienced some form of contact sexual violence in their lifetime. [SOURCE](#)



Nationwide, 81% of women and 43% of men reported experiencing some form of sexual harassment and/or assault in their lifetime. [SOURCE](#)



One in three female victims of completed or attempted rape experienced it for the first time between the ages of 11 and 17. [SOURCE](#)



About one in four male victims of completed or attempted rape first experienced it between the ages of 11 and 17. [SOURCE](#)



It is estimated that 734,630 people were raped (including threatened, attempted, or completed rape) in the U.S. in 2018. [SOURCE](#)

[Sexual Assault Statistics | National Sexual Violence Resource Center \(NSVRC\)](#)

Some Statistics on Sexual Harassment in Schools

According to the National Women's Law Center:

About 1 in 2 students in grades 7-12 are sexually harassed in any given school year.

More than 1 in 5 girls ages 14-18 have been kissed or touched without their consent.

More than 60% of college students experience sexual harassment, and 1 in 4 women, 1 in 4 transgender or gender-nonconforming students, and 1 in 15 men are sexually assaulted during college.

<https://nwlc.org/resources/let-her-learn-toolkit-sexual-harassment/>

BACKGROUND

What Is Title IX?

Title IX of the Education Amendments of 1972 (20 U.S.C. §§ 1681 *et seq*)

“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 education program or activity receiving Federal financial assistance.”
Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681 *et seq.* [“Title IX”].

Who is Protected by Title IX?

- Students
- Staff
- U.S. citizens and non-U.S. citizens
- Men and Women
- Under the 2024 regulations: Other non-students and non-employees who are attempting to access the district's programs and activities
- Does not matter if the alleged harasser is the same or different sex than the alleged victim

- In May 2020, the Office of Civil Rights published new regulations regarding sexual harassment under Title IX
- These regulations went into effect on August 14, 2020
- Highly proscriptive as to what conduct is considered to be sexual harassment under Title IX and how complaints must be processed
- The new regulations were issued, and go into effect on August 1, 2024
- Several lawsuits have already been filed across the country challenging the new regulations

- Throughout these slides, the “old regulations” will be referred to as the 2020 Regulations and the “new regulations” will be referred to as the 2024 Regulations.
- Where differences occur, 2020 will be in blue and 2024 will be in green.

Which Regulations Apply

- For conduct that occurred on or after August 1, 2024, must follow the new regulations, *regardless of when the incident is reported*
- For conduct that occurred before August 1, 2024, must apply the old regulations, *regardless of when the incident is reported*

Overarching Theme of 2024 Regulations

- Remove barriers to reporting sexual harassment and sex discrimination
- Broadens the definition of sexual harassment
- Aligns the grievances processes for complaints of sexual harassment and sexual discrimination
- Broadens the district's authority to include some conduct that occurs off campus but has an in-school effect
- Provides much more flexibility to the district in how to investigate complaints

2020 Regulations

- Title IX only applies to conduct that occurs in a program or activity over which the district exerts substantial control over both the respondent and the context.
- Does not apply if the conduct occurred against a person outside the U.S.

2024 Regulations

- Conduct that occurs under a recipient's education program or activity,
- Conduct that is subject to the recipient's disciplinary authority, and/or
- Sex-based hostile environment under its education program or activity even when some conduct alleged to be contributing to the hostile environment occurred outside the recipient's education program or activity or outside the U.S.

Who can file a complaint?

For sexual harassment complaints:

- A complainant
- A parent, guardian, or other authorized legal representative with the legal right to act on behalf of a complainant
- The Title IX Coordinator

For non-harassment based sex discrimination

- Anyone who observes or becomes aware of potential discrimination may submit a complaint if they are (1) a student, (2) an employee or (3) a person who is participating or attempting to participate in the district's education program or activity at the time of the alleged sex discrimination
- Includes, e.g., allegations of failure to make reasonable modifications for pregnancy, allegations that district's policies or procedures are discriminatory, claims of retaliation

2020

- Conduct an impartial, unbiased investigation
- Draft an investigation report

2024

- Conduct an impartial, unbiased investigation
- Depending on your district's policy
 - Collect and organize evidence and/or
 - Draft an investigation report (depending on District policy)
 - May also be assigned to be the decision-maker

DEFINITIONS

COMPLAINANT

2020

- Student/employee who is alleged to have been subject to sexual harassment
- Must be someone who is currently accessing and/or attempting to access the District's programs and/or activities

2024

- A student or employee who is alleged to have been subjected to conduct that could constitute sex discrimination under Title IX or the regulations
 - Under the 2024 regulations, a Complainant need not be a current student/employee as long as the alleged actions happened when the individual was a student/employee
- A person other than a student or employee who is alleged to have been subjected to conduct that could constitute sex discrimination under Title IX or the regulations who was participating or attempting to participate in the district's education program or activity at the time of the alleged sex discrimination.

RESPONDENT

Individual alleged to have violated the district's prohibition on sex discrimination

- Intimidation, threats, coercion, or discrimination against any person by the district, a student, an employee or any other person authorized by the district to provide aid, benefit or service under the district's education program or activity
- For the purposes of interfering with any right or privilege secured by Title IX or the regulations; OR
- Because the person has reported information, made a complaint, testified, assisted or participated or refused to participate in any manner in an investigation, proceeding or hearing under this part, including the informal resolution process
- Claims of retaliation are investigated the same way as any other complaints of sex discrimination under Title IX and the regulations

Retaliations for filing a complaint, being a witness, etc. is strictly prohibited under either version and the regulations and a complaint of retaliation is investigated the same as any other complaint of sex-based discrimination

- **Title IX Coordinator**

- Employee who will coordinate the district's efforts to comply with its responsibilities under Title IX

- **Investigator**

- If possible, should not be the Title IX Coordinator

- **Decision-maker**

- Must not be the Title IX Coordinator or the Investigator

- **Appeal Decision-maker**

- Must not be the Title IX Coordinator, Investigator or Decision-maker

Under the 2024 regulations, the Title IX Coordinator, Investigator and Decision-Maker do not need to be separate people

- Whether these roles are separated will be based on the district's new policy once it is implemented

- Biological sex
- Sex stereotypes
- Sex characteristics
- Pregnancy or related conditions
- Sexual orientation
- Gender identity
- The regulations specifically state that: **“Adopting a policy or engaging in a practice that prevents a person from participating in an education program or activity consistent with a person’s gender identity *subjects a person to more than de minimis harm on the basis of sex.*”**

Sexual Harassment 2020 Regulations

- Conduct on the basis of sex that satisfies one of the following:
 - An employee of the district conditioning the provision of an aid, benefit, or service on the individual's participation in unwelcome sexual conduct;
 - 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 district's education program or activity; or
 - sexual assault, dating violence, domestic violence or stalking.

Sex Based Harassment 2024 Regulations

- Sexual harassment and harassment on the basis of sex, that is
 - *Quid Pro Quo Harassment* – An employee, agent, or other person authorized by the district to provide aid, benefit or service under the district’s education program or activity, explicitly or impliedly conditioning provision of such aid, benefit, or service on a person’s participation in unwelcome sexual conduct;
 - *Hostile Environment Harassment* – Unwelcome, sex-based conduct that, based on the totality of the circumstances, is subjectively and objectively offensive and is so severe **OR** pervasive that it limits or denies a person’s ability to participate in or benefit from the recipient’s education program or activity.
 - Specific offenses: Sexual assault, dating violence, domestic violence, stalking.

Hostile Environment Harassment Considerations - 2024

- Fact specific inquiry including consideration of:
 - The degree to which the conduct affected the complainant’s ability to access the district’s education program or activity;
 - The type, frequency, and duration of the conduct;
 - The parties’ ages, roles within the district’s education program or activity, previous interactions, and other factors about each party that might be relevant to evaluating the effect of the conduct;
 - The location of the conduct and the context in which the conduct occurred;
 - Other sex-based harassment in the district’s education program or activity.

- Sexual Assault - an offense classified as a forcible or nonforcible sex offense under the uniform crime reporting system of the Federal Bureau of Investigation as set forth in 20 USC §1092(f)(6)(A)(v).
 - Includes: (1) Rape, (2) Fondling, (3) Incest, and (4) Statutory rape

- Dating Violence – means violence committed by a person
 - (a) who has been in a social relationship of a romantic or intimate nature with the victim, and
 - (b) where the existence of such relationship shall be determined based on consideration of the following factors (i) the length of the relationship, (ii) the type of relationship, and (iii) the frequency of interaction between the persons involved in the relationship as set forth in 34 U.S.C. §12291(a)(10).

May include things such as sexual or physical abuse or the threat of such abuse

- Domestic Violence – felony or misdemeanor crimes committed by a person who:
 - Is a current or former spouse or intimate partner of the victim under the family or domestic violence rules of the state, or a person similarly situated to a spouse;
 - Is cohabitating, or has cohabitated, with the victim as a spouse or intimate partner;
 - Shares a child in common with the victim, OR
 - Commits acts against a youth or adult victim who is protected from those acts under the family or domestic violence laws of the state
- Stalking - means engaging in a course of conduct directed at a specific person that would cause a reasonable person to
 - (a) fear for his or her safety or the safety of others, or
 - (b) suffer substantial emotional distress

Hypothetical #1

- A female student who is a member of the school's robotics club files a complaint alleging that the male members of the club require the females to carry all the equipment from the storage room, set up the room before the meeting, clean up after the meeting and requires a female member to take notes at each meeting.

- Is this an allegation of sex discrimination?
- If so, what type of discrimination?
 - Quid pro quo
 - Hostile environment
 - Sexual Assault
 - Domestic Violence
 - Dating Violence
 - Stalking

Hypothetical #2

- Susie is struggling in her honor's geometry class. She alleges that her teacher, Mr. Jones, has repeatedly made comments to her that are sexual in nature both in class and when he speaks to her in the hallway. She alleges that Mr. Jones told her that if she performs sexual acts for him, she will pass geometry with a B.

- Is this an allegation of sex discrimination?
- If so, what type of discrimination?
 - Quid pro quo
 - Hostile environment
 - Sexual Assault
 - Domestic Violence
 - Dating Violence
 - Stalking

-

2020

- “A document filed by a complainant or signed by the Title IX Coordinator alleging sexual harassment against a respondent and requesting that the recipient investigate the allegations of sexual harassment.”

2024

- “An oral or written request to the recipient that objectively can be understood as a request for the recipient to investigate and make a determination about alleged discrimination under Title IX or this part.”

- “[M]eans related to the allegations of sex discrimination under investigation as part of the grievance procedures”
- Questions are relevant when they seek evidence that may aid in showing whether the alleged sex discrimination occurred
- Evidence is relevant when it may aid a decision-maker in determining whether the alleged sex discrimination occurred

Consent

- Neither set of regulations contains a definition of consent. This is left up to the individual school districts to define in their policies.

Pregnancy or Related Condition

1. Pregnancy, childbirth, termination of pregnancy, or lactation;
2. Medical conditions related to pregnancy, childbirth, termination of pregnancy, or lactation, OR
3. Recovery from pregnancy, childbirth, termination of pregnancy, lactation, or related medical conditions.

- Employees are required to notify the Title IX Coordinator when the employee has information about conduct that reasonably may constitute sex discrimination
- The new regulations allow a school district to designate confidential employees who are not required to report, but are still required to give the student/employee the Title IX coordinator's contact information
 - NOTE – even if designated confidential for Title IX, these individuals are still mandatory reporters

Grievance Process Basics

Underlying principles for grievance process - 2020

- Equitable:
 - Complainants and respondents must be treated **equitably**
- Impartial:
 - The Title IX Coordinator, investigator, decision-maker, and informal resolution facilitator (where applicable) cannot have a **conflict of interest** or **bias** for or against complainants or respondents generally, or an individual complainant or respondent
- Thorough:
 - Must **objectively** evaluate all **relevant evidence** (both inculpatory and exculpatory)
- Prompt:
 - Grievance process must include **reasonably prompt time frame** for conclusion

Underlying principles for grievance process 2024

- Same grievance process for sex discrimination complaints and sexual harassment complaints
- Recipient must provide an adequate, reliable and impartial investigation
- The burden remains on the district to investigate and gather sufficient relevant evidence
- Provide an equal opportunity for the parties to
 - Provide fact witnesses and inculpatory and exculpatory relevant evidence
 - Provide access to relevant evidence (no longer references “related evidence”)
 - Provide the parties with a reasonable opportunity to respond to the evidence

- 2024 Regulations require the district to establish timeframes for each major section of the grievance process
 - Includes at a minimum (1) evaluation of whether to dismiss or investigate the complaint, (2) investigation, (3) determination, and (4) appeal, if any is available.
- These timelines may be extended for good cause and must be reasonable.
- The parties must be notified of any extension and the reason for it.
- 2020 regulations require the district to have an overall timeframe for completing the investigation which may be extended for good cause.

- Presumption of non-responsibility:
 - Must have a **presumption that respondent is not responsible** for the alleged conduct until a determination regarding responsibility is made at the conclusion of the grievance process.
- Standard of evidence:
 - “Preponderance of the evidence” standard.
- Burden is on the district:
 - Is not the obligation of the complainant to prove discrimination occurred or for the respondent to prove it did not.

New Confidentiality Rules - 2024

- The district is required to take reasonable steps to prevent and address the parties' unauthorized disclosure of information and evidence obtained solely through the grievance procedure
 - This could include discipline for students/employees who violate the confidentiality rules
- Parties should be informed of this in writing
- Cannot restrict party from obtaining and presenting evidence, speaking to witnesses and/or consulting with family members, confidential resources or advisors or otherwise preparing for or participating in the grievance process

NOTE – in the 2020 Regulations, the district is cannot prohibit a party from discussing the matter

IMPARTIALITY

Avoiding Bias, Conflict of Interest, and
Prejudgment of Facts

Avoiding Bias, Conflict of Interest, and Prejudgment of Facts

- Investigators and decision-makers (as well as Title IX Coordinators, informal resolution facilitators, and appeals officers) must:
 - Be free from **conflict of interest**,
 - Be free from **bias**, and
 - Be trained to serve impartially and **without prejudging facts**.

- The regulations make clear that at each stage, the school employee must not be biased.
 - Bias may be as to categories (i.e. do not rely on sex stereotypes)
 - e.g., a belief that because evidence shows that female students are often subjected to sexual harassment that it is more likely that the female student is telling the truth
 - Bias as to the specific individual
 - The more you know about complainant and/or respondent the more you are likely to believe that they behaved in keeping with how you perceive them
 - e.g., – respondent is an honor student so he could not have engaged in the alleged acts
 - complainant has a reputation for going out with a lot of different boys at school so she is not believable
 - Pressure from outside
 - Is respondent the star of the school play that is about to open?
 - Is respondent the star of the school's football team?

- Bias can be
 - Conscious or unconscious
 - Positive or negative
 - Based on societal norms or your own cultural perspective

- Things that are **not** automatic conflicts of interest
 - Just because you know the student/employee does not mean there is a conflict of interest
 - Just because you have disciplined the student/employee in the past does not equate to a conflict of interest

- Conflicts of interest
 - Wearing too many hats in the process
 - Title IX Coordinators who are also acting as Investigators must take care not to let the roles bleed into one another
 - A relationship with one of the parties that goes beyond the school setting
 - Friendship with students' parents
 - Coaching a student on a sports team

Avoiding Prejudgment of Facts

- Keep an open mind
- Each case is unique and different
- Your job is to collect all the evidence. Beware not to unconsciously look for evidence that supports your initial beliefs of the matter

Bias/Conflict of Interest Hypothetical #3

- Mr. Brooks is the assistant principal at Top High School. He has been in that position for the past three years. As part of his job, he is responsible for issuing student discipline that can be issued within the school such as detentions and suspensions. He also acts as the investigator for Title IX complaints at the school.
- John Jones and Susie Smith are two students at Top High School. John Jones is a senior and has a long disciplinary record. He served a short expulsion for bringing marijuana into school when he was a sophomore and has served various detentions and suspensions for things such as insubordination, using profanity at school and has served one ten-day suspension for fighting. Mr. Brooks has issued all of those disciplines to John Jones.

Bias/Conflict of Interest Hypothetical #4

- Susie Smith is an honor roll student. She has never served a detention or a suspension.
- John Jones has filed a sexual harassment complaint alleging that Susie Smith has been spreading sexually charged rumors about him at school. He claims that Susie asked him out and when he turned her down, she was very upset. He believes that she is spreading the rumors because he refused to go to the school dance with her.
- Can Mr. Brooks serve as the investigator in this matter?
- Should Mr. Brooks serve as the investigator in this matter?

Bias/Conflict of Interest Hypothetical #5

- James Bucks is a local business man who has provided a lot of money to the school including providing the funding for the lights for the school's sports field. His name is displayed prominently on the fence around the school's football field. His son is currently the quarterback of the football team and the team is likely headed to the state championship. Sally files a Title IX complaint against Jeff Bucks (Mr. Bucks' son) claiming that he attempted to sexually assault her under the stairwell at school.
- The school's social worker is the Title IX Coordinator and the Assistant Principal is the investigator. The Principal serves as the decision-maker.

Are there any conflicts of interest and/or biases to be concerned about?

RELEVANCE DETERMINATIONS

- District must **objectively** evaluate all **relevant evidence** (both inculpatory and exculpatory).
 - Recipient must ensure that “all relevant questions and evidence are admitted and considered (though varying weight or credibility may of course be given to particular evidence by the decisionmaker).”
- What is relevant?
 - Includes evidence that is “probative of any material fact concerning the allegations.”
 - Includes “evidence pertinent to proving whether facts material to the allegations under investigation are more or less likely to be true (i.e., on what is relevant)”.
- The Rules of Evidence do NOT apply (i.e. – hearsay may become part of the investigation record).

- Medical treatment records:
 - Cannot access, consider, disclose, or otherwise use a party's records that are made or maintained by a physician, psychiatrist, psychologist, or other professional, and which are made/maintained in connection with the provision of treatment of the party, unless obtain voluntary written consent.

- Legally privileged information:
 - A recipient's grievance process cannot require, allow, rely upon, or otherwise use evidence or questions that constitute, or seek disclosure of, information protected under a legally recognized privilege (under state or federal law), unless the person holding such privilege has waived the privilege.
 - Evidence provided to an employee who the district has designated as a confidential employee.

- Complainant's sexual behavior (Rape Shield Protections):
 - Evidence about complainant's prior sexual history must be excluded unless such evidence/questions:
 - Are offered to prove that someone other than respondent committed the conduct, or
 - If the evidence/questions concern specific incidents of complainant's prior sexual behavior with respect to respondent and are offered to provide consent.
 - Evidence of prior consensual sexual conduct between complainant and respondent does not by itself demonstrate or imply complainant's consent for the alleged sex-based harassment or preclude determination that sex-based harassment occurred.
 - Note: Rape shield protections do **not** apply to respondents.
 - “[E]vidence of a pattern of inappropriate behavior by an alleged harasser must be judged for relevance as any other evidence must be.”

Relevance Hypothetical #6

You are assigned to investigate a complaint filed by Mr. and Mrs. Jones that their daughter's sixth grade teacher, Mrs. Smith, showed an inappropriate movie in class that had a scene where two of the characters were engaged in kissing and starting to undress before the scene cut away. Mr. and Mrs. Jones filed a formal complaint alleging that their daughter was highly embarrassed and she does not want to go back to the class because during the movie and afterward she heard many of the other students make inappropriate sexual statements. The Smiths also allege that other students have started making inappropriate sexual statements directly to their daughter at school because they know it upsets her.

What evidence might be relevant?

Relevance Hypothetical #7a

- Susan and John were dating last year. They broke up over the summer. Susan files a formal Title IX complaint alleging that on four separate occasions John has made inappropriate comments to her in the hallway and she frequently sees John standing outside her English classroom when it is over and then he follows her to the lunchroom. She says he has asked her out several times and one time when they were alone in the stairwell, he grabbed her around the waist and tried to kiss her but she managed to get away from him.
- What information might be relevant?

- In the above-referenced hypothetical, John insists that you include in your investigation report (or collection of evidence) the fact that Susie has gone out with four different football players in the past year and was often publicly seen kissing them at school.
 - Can this be included as part of the evidence?
- What if John requests that the evidence include his statement that Susie and he frequently had sex while they were dating?

Relevancy Hypothetical #8a

- Johnnie alleges that Sarah touched him inappropriately. During his interview, Johnnie says that this occurred during his second period math class. Is the following evidence relevant?
 - Johnnie’s class schedule?
 - Sarah’s class schedule?
 - Johnnie’s IEP?
 - Sarah’s IEP?
 - Classroom seating charts?
 - The math teacher’s personnel file?
 - Johnnie’s disciplinary records?
 - Sarah’s disciplinary records?

Relevancy Hypothetical #8b

- Are the following questions relevant?
 - Sarah wants you to ask Johnnie whether she was in math class the day he alleges she inappropriately touched him.
 - Sarah alleges that she could not have inappropriately touched Johnnie that day because she was not in math class that day. Johnnie wants you to ask Sarah if she often skips math class.
 - Johnnie’s witness and classmate George told the investigator that he saw Sarah inappropriately touch Johnnie during class. Sarah wants you to ask George whether he and Johnnie have been best friends since kindergarten.
 - Sarah wants you to ask Johnnie how many other students at school he has filed sexual harassment complaints against.

The Investigation

Brief Review: How Did We Get Here?

- A formal complaint has been filed by a Complainant (or their parent/guardian) or the Title IX Coordinator
- The Title IX Coordinator has:
 - Provided the Complainant and Respondent (and parents) with notice of the allegations;
 - Determined the complaint falls within Title IX;
 - Engaged in a risk assessment;
 - Regarding whether there is an immediate threat to the physical health or safety of a student or other individual arising from the allegations that would justify removal of Respondent from school; determined if report should be made to DCF and/or police;
 - Offered supportive measures and determined if any would be put in place;
 - Discussed with Complainant (and parents) the grievance process and the option of informal resolution.
- If the investigator is not the Title IX Coordinator, the Title IX Coordinator has provided all information in his/her possession regarding the complaint to the assigned investigator.

- Now what?

2020

- Must provide complainant and respondent with the same opportunities to have others present during any grievance proceeding, including the opportunity to be accompanied to any interview or related meeting or proceeding by the advisor or their choice.
- Who can be an advisor?
 - Advisor may be an attorney but need not be.
- Cannot limit the choice or presence of advisor for either party in any meeting or grievance proceeding.
- May establish restrictions regarding extent to which advisor may participate in the proceedings, as long as applies *equally* to both parties.

2024

- No advisors at the K-12 Level (unless allowed by district policy).
- Parents can essentially act as “advisor” during the grievance process.

2020 - Regulations

- Provide written notice to individuals who you intend to interview (including complainant, respondent, and witnesses) which must contain the following information:
 - Date,
 - Time,
 - Location,
 - Participants, and
 - Purpose of interview.
- Must provide sufficient time for the individual to prepare to participate.

2024

- Does not include a requirement to provide written notice of interviews.

- In conducting an investigation, you must be aware of the potential trauma responses victims display
- Some examples:
 - Delayed reporting
 - Difficulty remembering specifics of the event
 - Reluctance to report/reluctance to have the complaint investigated
 - Remaining in a relationship with the respondent after the alleged harassment
 - The victim thinking he/she is to blame for what happened or that he/she somehow welcomed the behavior

- Who is the investigator?
 - The investigator may be internal or external, may also be the Title IX Coordinator (although not recommended) - 2020
 - The investigator may be the same person as the Title IX Coordinator and the Decision-Maker - 2024
- Role of Investigator:
 - Gather and organize relevant evidence directly related to the allegations (both inculpatory and exculpatory)
 - District must ensure that “all relevant questions and evidence are admitted and considered (though varying weight or credibility may of course be given to particular evidence by the decision-maker)”

- The investigation is the process of actively gathering information to determine if a violation of Title IX has occurred.
- The investigation must be:
 - Equitable/Fair
 - Impartial
 - Thorough
 - Prompt
 - Reliable
- All of the grievance process basics described previously apply.

- Role of Investigator:
 - Gather and organize relevant evidence directly related to the allegations (both inculpatory and exculpatory).
 - District must ensure that “all relevant questions and evidence are admitted and considered (though varying weight or credibility may of course be given to particular evidence by the decision-maker).”
- Must provide equal opportunities to parties throughout investigation:
 - Must provide an equal opportunity for the parties to present witnesses (including fact and expert witnesses) and other inculpatory and exculpatory evidence.
- Discussing Allegations:
 - Cannot restrict the ability of either party to discuss the allegations under investigation or to gather and present relevant evidence.
- Burden of proof and burden of gathering evidence is not on complainant or respondent.

- Ensure the burden remains on the district
- Provide an equal opportunity for the parties to present fact witnesses and other inculpatory and exculpatory evidence that are relevant and not otherwise impermissible
- Review all evidence gathered through the investigation and determine what evidence is relevant and what evidence is impermissible regardless of relevance
- Provide each party with an equal opportunity to access all the evidence that is relevant and not otherwise impermissible
- May provide either access to the evidence OR a description of the evidence. If provides description, must provide access upon request of a party
- Provide a reasonable opportunity to respond to the evidence

Typical Order of Investigation

1. Review all relevant school policies and procedures as well as any relevant state and federal statutes. Ensure that you follow all policies and procedures throughout the investigation.
 - a. Make sure you review the district's sexual harassment policies and procedures before starting the investigation.
 - b. Make sure you know which policy and procedures apply (2020 or 2024)
 - i. If it occurs prior to August 1, 2024, use old policy
 - ii. If it occurs on or after August 1, 2024, use new policy
2. Review the written complaint (if there is one)
 - a. Review all information you received from the Title IX Coordinator
3. Make an investigation plan
 - a. Set up an investigation log to keep track of what you do when

Typical Order of Investigation

4. Review any relevant portions of the student/staff files of complainant and respondent
5. Interview complainant and any other alleged victims
6. Interview witnesses identified by complainant, as necessary
 - It is your job to decide who is likely to have relevant information

Typical Order of Investigation

7. Interview of any other witnesses identified
8. Interview respondent
9. Interview any witnesses identified by respondent
10. Review notes
11. Determine if there is any other evidence that you need to collect
12. Follow up on any inconsistencies
 - You may need to re-interview parties or some witnesses based on what you have learned

- Carefully prepare a list of questions in advance for each interview.
- Be prepared to revise questions as you learn more from the party or witness during the interview.
- Select a neutral, comfortable setting for the interview(s).

- Introduce yourself and explain your role.
- Develop a rapport.
- Explain why they are being interviewed.
- Explain retaliation policy.
- Ask if they have any questions.

- In general, ask **open-ended** (vs. close-ended) questions.
 - i.e., who, what, how, etc.
- Ask questions **one at a time**.
- Avoid multiple choice questions.
- Avoid jumping from one line of questioning to another.
- Avoid suggesting the answer in your question.
- Avoid questions that are not relevant.

Interview Basics – Active Listening

- Remain attentive and carefully listen to everything being said.
- Watch for non-verbal behaviors.
- If you have two investigators together, avoid whispering between investigators unless absolutely necessary.
- Never accuse an interviewee.
- Never argue with an interviewee.
- It is okay to take a break if either you or the interviewee need it.

- Don't guide the interview unless necessary, allow complainant to narrate without interruption.
- Use trauma-informed interview techniques.
 - Trauma impacts everyone differently;
 - Don't rush complainant, let them go at their own pace;
 - Victims of trauma can often recount vivid sensory details so if you are asking about something traumatic, asking about whether there was a specific scent they recall, etc. might assist them in better recall.
- Speak carefully and accurately.
 - Avoid words that imply consent.
 - Do not victim blame.

- Things to ask include, but are not limited to:
 - What occurred?
 - Was anyone else present?
 - Did you tell anyone about what happened?
 - How did the alleged harassment affect you or your school experience?
 - Are there any other students, teachers or staff who may have relevant information?
 - Do you have any notes, emails, text messages, WhatsApp messages, SnapChats, or any other relevant physical evidence?

- Some suggested questions to ask:
 - What did you observe/see/hear?
 - Relationship with the parties?
 - What, if anything, did complainant tell you about the incident?
 - Describe respondent's behavior toward complainant?
 - Are you aware of respondent doing anything similar in the past?
 - Do you know of anyone else who may have relevant information?

- Things to ask include, but are not limited to:
 - What occurred?
 - Was anyone else present?
 - Are there any other students, teachers or staff who may have relevant information?
 - Do you have any notes, emails, text messages, WhatsApp messages, SnapChats, or any other relevant physical evidence?
-

- Some phrases to use if the interviewee stops in the middle of their explanation:
 - “Tell me more about that”
 - “Please continue your description”
- Go from more open-ended general questions to asking more specific details.
 - Phrases like “Can you help me understand what you meant by”
 - “You said _____, can you give me more detail”
- If things are still unclear, you can work your way to more specific questions
 - “Where were you when this happened?”
 - “Was anyone else present?”
 - “What did Susan say to you?”

- At the end, always ask if there are any witnesses you should talk to and whether there is any evidence they think you need.
- Request copies of evidence potentially available.
- Always ask if they have any questions.
- Discuss confidentiality:
 - 2020 Regulations
 - You can direct a non-party witness that they must maintain confidentiality.
 - You CANNOT prohibit a party from discussing allegations.
 - 2024 Regulations
 - You should direct each party/witness that they must keep anything they learn during the grievance process confidential and explain any consequences for revealing confidential information
 - This should be done in writing and should also be reiterated at the end of each interview
- If you are interviewing a party, explain the next steps.

- Document interview.
- How this is done may depend on the age (or other factors such as language or disability) of the interviewee.
 - May write up a summary of the relevant information shared in the interview and have the witnesses sign or acknowledge the accuracy via email (or in person),
 - To the extent the witness makes any changes to the statement, it should be done in a red-lined version so you have a record of what was changed
 - May keep a record of the questions asked and the relevant answers, or
 - May record the interviews if the district's policy allows that.

- Review all the evidence and information gathered to date.
- Update witness list and evidence list.
- Write down follow up questions for others if you need additional information.
- Consider whether additional allegations were raised that must be brought to Title IX Coordinator's attention.
- Consider whether there is additional evidence that you need to collect.

- Investigator may need to gather evidence other than statements from parties and witnesses.
- Some evidence may be identified by the parties or witnesses, and the investigator may identify other evidence.
 - Follow up with individuals regarding evidence mentioned in interviews.
- Examples of possible evidence:
 - Video recordings
 - Copies of text messages and voicemail messages
 - Copies of phone bills
 - Posts on social media
 - Medical records (only allowed with signed permission)
 - Police reports
 - Photographs, video recordings, video surveillance
 - Diaries/journals

- What is credibility?
 - The accuracy and reliability of information.
 - You are assessing the credibility of the information, not necessarily the credibility of the person interviewed.
- In assessing credibility, consider:
 - Consistency/Corroboration
 - Plausibility.
 - Credibility determinations may **not** be based on an individual's status as a complainant, respondent, or witness.
 - Credibility determinations should be based on the information gathered through the investigation and not on any outside knowledge of the individual.

- Preponderance of the evidence: It is “more likely than not” that the district’s Title IX policy was violated.
 - More likely than not to be true
 - More probable than not
 - 51% or greater probability to be true

2020 Parties' Opportunity to Review Evidence and Respond

- Prior to completion of investigative report, must provide complainant and respondent (and advisors) equal opportunity to inspect and review any evidence that is directly related to the allegations (even if you do not expect the decision-maker to rely on it).
 - Electronic or paper copy.
 - Includes evidence upon which the district does not intend to rely in reaching a determination regarding responsibility.
 - Includes inculpatory and exculpatory evidence, from all sources.
- Parties must have at least 10 days to submit a written response.
- The investigator must consider the written responses prior to completion of investigative report.
- May conduct follow-up investigation if necessary based on response to the evidence or new evidence produced.

2024 Parties' Opportunity to Review Evidence and Respond

- Depending on Board policy – must either give parties a description of the evidence or provide access to review the evidence.
 - If a description is given, upon request of either party they then have a right to review the evidence.
 - If providing a description, it can be given orally or in writing.
 - NOTE – if only an oral description is given, it must be documented in some manner to comply with the requirement to keep a record.
- *Nothing requires the parties to be given a physical or electronic copy of the description and/or the actual evidence.*
 - (i.e. all they are entitled to is review the evidence/report, not take a copy of it with them)*
- Complainant and respondent must be given a reasonable opportunity to respond to the evidence or the accurate description of the evidence.

- A written investigation report is **required** under the **2020 regulations** and is **optional** (depending on Board policy) under the **2024 regulations**.
- Prior to writing report, consider:
 - Comments from the parties.
 - Any additional evidence provided by the parties.
 - Has all evidence been examined?
 - Have all leads been exhausted?
 - Is there anyone else you should talk to or any other evidence you want to try and get based on comments from the parties or your own review of the file?

- Investigative report must fairly summarize all relevant evidence.
 - Summarize the facts.
 - Both undisputed and disputed.
 - Can make credibility determinations.
 - Do not make any determinations on whether the conduct occurred or whether the conduct violated school policy.

Investigative Report Content 2020 Regulations

- Information to include in investigative report:
 - Introductory information:
 - Identify those involved (complainant, respondent, witnesses, investigator)
 - Date filed
 - Name of person and office that received allegations
 - Background:
 - History of relationship between parties
 - Other details surrounding allegations
 - List specific allegations.
 - Description of alleged policy violations.
 - Include definition of prohibited conduct from policy.
 - Witnesses interviewed:
 - Any witnesses identified but not interviewed and why
 - Procedures followed (and any abnormalities and why).
 - Statement regarding relevant evidence:
 - E.g., “All relevant information gathered during the course of the investigation has been included in this report.”
 - Summary of the evidence (witness statements, documents, etc.)
 - Is often helpful to provide a summary of those facts that are not disputed and those that are disputed

- Appendices to report may include:
 - Summaries/transcripts of interviews/signed witness statements
 - Documents/physical evidence
 - Timeline of incident if the matter is complicated
 - Timeline of investigation
 - Witness list
 - Diagrams

2020 Regulations

- Must send complainant and respondent (and any advisors) the investigative report, at least 10 days prior to the decision-maker issuing their report.
 - Electronic or hardcopy.
- Complainant and respondent must have opportunity to review and respond to the investigation report prior to the decision being issued.

- Parties (including complainant, respondent, and witnesses) have the right to elect not to participate in the investigation.
- The school cannot retaliate against a witness (even complainant or respondent) for refusing to participate.
- If a witness or party refuses to participate, this should be noted in the investigation report.
- The decision-maker then will make their decision based on what information he/she actually has.

Hypothetical #9

Jerry Johnson is a freshman boy. He is small for his age. His favorite color is pink and he tends to wear pink shirts a lot to school. Due to a medical condition, his voice is very high pitched. Jerry decides to try out for the boys' soccer team but does not make it. After that, the boys on the soccer team make fun of him. They call him "girlie boy" and tell him that he should try out for the girl's soccer team next year. Although Jerry was an A student in middle school and started out the year with good grades, most of his grades are now C's and D's. Jerry also has a number of unexcused absences. Jerry used to be part of the afterschool robotics club, but he stopped going to those meetings and goes home right after school every day.

Jerry's parents file a Title IX Complaint and request an investigation.

Who would you want to interview?

What physical evidence would you want to access?

Hypothetical #10

- Susie Smith is a sixth grade student at Noname Middle School. She and her parents inform the assistant principal at her school that on the school bus home yesterday, John Jones, an eighth grade student, sat in the seat next to her. John Jones is much bigger than her. She said that he kept trying to put his hands on her leg under her skirt and tried to put his hand down her shirt. She was too afraid of him to tell him to stop. They were sitting in the back of the bus and she is not sure if the bus driver saw anything. She was crying by the time she got to her stop. The bus driver did not say anything to her when she got off the bus. She is the third stop on the bus and she knows there were some other kids on the bus, but she is not sure who they are. Janet Jones lives next door to her and shares the same bus stop.

Create a plan for how you would conduct the investigation.

Parental, Family or Marital Status; Pregnancy or Related Conditions

- Prohibits a district from adopting or implementing any policy, practice, or procedure concerning a student's current, potential, or past parental, family or marital status that treats students differently on the basis of sex.
- Prohibits discrimination on the basis of current, potential, or past pregnancy or related conditions.
 - Still allows a pregnant student to voluntarily participate in a separate program or activity that is comparable to the program/activity provided to non-pregnant students
- Requires employees who know of student pregnancy to provide the student with the Title IX Coordinator's contact information.
- Must not require supporting documentation for the need for the reasonable modification except in limited situations.
- Must treat pregnancy and related conditions similar to other temporary medical conditions.

Pregnant Students – Reasonable Modifications

- A pregnant student is entitled to “reasonable modification” to the district’s policies, practices or procedures as necessary to prevent sex discrimination and ensure equal access.
 - Must consult with the student
 - A modification that would fundamentally alter the nature of the education program or activity is not considered reasonable
 - The student has the discretion to accept or deny each reasonable modification offered
- Districts must provide lactation space which:
 - Must be a space other than a bathroom
 - Must be clean
 - Must be shielded from view
 - Must be free from intrusion of others
 - May be used by student for expressing breast milk or breastfeeding as needed

Other applicable laws and policies

- In some cases other statutes/policies, such as bullying/cyberbullying may also apply
- If the underlying alleged conduct would require mandatory reporting to DCF, make sure it has already been reported or make the report yourself if necessary

Decision-makers A Brief Overview

- Who can be the decision-maker?

- Someone able to use independent judgment and be free from conflicts of interest and bias.
- Can be an individual or a panel.
- Can be internal or external.
- 2020 Regulations - Cannot be the Title IX Coordinator or investigator.
- 2024 Regulations – May be the same person as the Title IX Coordinator or investigator depending on Board policy

- What is the role of the decision-maker?

- Determine whether respondent has violated the district's Title IX policy and if a violation has been found what discipline should be issued (if that discipline is within the decision-maker's authority).
- Any discipline must comply with state statute regarding student discipline, collective bargaining agreements and the IDEA/Section 504

The “Paper Hearing” Process

- With or without a hearing, after the recipient has sent the investigative report to the parties and before making a determination regarding responsibility, the decision-maker must:
 - Provide complainant and respondent the opportunity to submit written, relevant questions that they want asked of any party or witness,
 - Provide each party with the answers, and
 - Allow for additional, limited follow-up questions from each party.
 - Decision-maker must explain to the party proposing the question any decision to exclude it as not relevant.

Questioning Parties and Witnesses 2024 Regulations

- Does away with the requirement to conduct a paper hearing.
- The district must provide a process that enables the decision-maker to question parties and witnesses to adequately assess a party's or witness's credibility to the extent that credibility is both in dispute and relevant to evaluating one or more allegations of sex discrimination.
 - NOTE – if the investigator and the decision-maker are the same person, this section is generally satisfied by the investigator's interviews

- The decision-maker must objectively evaluate all **relevant** evidence.
 - Inculpatory and exculpatory.
- The decision-maker will also evaluate **credibility**.
- The decision-maker may consider and assign different weight to different pieces of (relevant and credible) evidence.

The Written Determination – 2020 Regulations

- Written determination must include:
 - Identification of the **allegations** potentially constituting sexual harassment;
 - A description of the **procedural steps** taken from the receipt of the formal complaint through the determination, including any notifications to the parties, interviews with parties and witnesses, site visits, methods used to gather other evidence, and hearings held.
 - **Findings of fact** supporting the determination.
 - **Conclusions** regarding the application of the recipient's code of conduct to the facts.
 - A, including **statement of, and rationale for, the result as to each allegation**:
 - A determination regarding responsibility,
 - Any disciplinary sanctions the recipient imposes on respondent, and
 - Whether remedies designed to restore or preserve equal access to the recipient's education program or activity will be provided to complainant.
 - The recipient's procedures and permissible bases for complainant and respondent to **appeal**.

The Written Determination – 2020 Regulations

- The recipient must provide the written decision to complainant and respondent.
- The determination becomes final either:
 - If an appeal is filed - on the date the recipient provides the parties with the written determination of the result of the appeal.
 - If an appeal is not filed – the date on which an appeal would no longer be considered timely.

Written Determination – 2024 Regulations

- The parties must be notified in writing of the determination whether sex discrimination occurred including the rationale for such determinations
- The parties must be informed of the process for appeal – if any is allowed under the district’s policies
- NOTE – the new regulations require that if sex discrimination is found, the district must coordinate the imposition of any disciplinary sanctions on a respondent, “***including notification to the complainant of any such disciplinary sanctions***” and require the Title IX Coordinator to take other appropriate prompt and effective steps to ensure that sex discrimination does not continue or recur

- Sanctions: Disciplinary measures imposed on respondent.
 - Examples for students: Detention, suspension, expulsion, etc.
 - Examples for employees: Recommendation for termination, suspension, demotion, non-renewal, etc.
- Remedies: Measures provided to complainant; designed to restore or preserve equal access to the district's education program or activity.
 - E.g.: No-contact order, class changes, etc.
- Note: The grievance process must describe the range of (or list) possible disciplinary sanctions and remedies.

Hypothetical #10

- You receive a Title IX complaint from Jessica.
- She tells you that she dated Kevin last year but they broke up over the summer. Sometime during the summer, Kevin physically attacked her in her bedroom but that nothing sexual happened. She complained that at school he always seemed to be around when she was in the hallways and that on at least two occasions he had physically pushed her. She said that on one occasion her friend Sarah was present when Kevin called her a bitch and pushed her. On another occasion, she said that Kevin's friend Jim was present when he grabbed her while she was walking down the hallway and pulled her toward him and tried to kiss her.
- Jessica says that recently Kevin's cousin, Rachel, has been giving her menacing looks and often calls her inappropriate names when she walks by. She does not know if anyone has ever heard this.
- Jessica and her parents have requested a Title IX investigation.

MISCELLANEOUS PROVISIONS

- 20 U.S.C. §1232g(b) prohibits the release of a student's education records, or personally identifiable information contained therein, other than directory information unless one of the exceptions applies or there is signed permission
 - There is no exception in the rule to allow the release of confidential education records of a student who has filed a sexual harassment complaint against another student or school employee
 - There is no exception to the rule to allow release of confidential discipline records for a student who is found to be responsible for sexual harassment in a K-12 school
 - FERPA exception that allows release of the name of a perpetrator of a sexual offense and the discipline does NOT apply in the K-12 setting. See 20 U.S.C. sec. 1232g(b)(6)

Title IX Regulations and Conflicts - FERPA

- The preamble to the 2024 regulations state that:

“To the extent that FERPA would require the withholding or redaction of personally identifiable information in education records, for the purposes of Title IX the Department takes the position that principles of due process and fundamental fairness require the disclosure of unredacted evidence and information to the parties that is relevant to the allegations and not otherwise impermissible.”

“Accordingly, the constitutional override justifies this disclosure, even if the disclosure is not consistent with FERPA.”

In order to protect the confidentiality of the information, the district may choose to require a confidentiality and/or nondisclosure agreement before releasing information to the other party, but the district cannot condition the initiation of a grievance process on signing such a document.

Title IX Regulations and Conflicts – IDEA

- Similar to FERPA, evidence that may be reviewed by the investigator and/or decision-maker could include special education records of either complainant or respondent
 - The mandate to release all evidence reviewed during the investigation to the parties would appear to violate the IDEA’s confidentiality mandates
- Nothing within the new regulations appears to override the IDEA’s confidentiality requirements
- NOTE – the 2024 Regulations require the Title IX to Coordinate with at least one member of the PPT team and/or 504 team if either the complainant or respondent is a student with a disability who has an IEP and/or 504 plan.

2020 Regulations

- Both complainant and respondent **must** be provided an opportunity to appeal from a determination regarding responsibility on the following bases:
 - Procedural irregularity that affected the outcome of the matter;
 - New evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter; and
 - The Title IX Coordinator, investigator, or decision-maker had a conflict of interest or bias for or against complainants or respondents generally or the individual complainant or respondent.

2024 Regulations

- No appeal process is required unless the district provides an appeal process for other claims of discrimination.
- Recipient **may** offer an appeal equally to both parties on additional bases.

- Whenever there is an appeal, the recipient must:
 - Notify the other party in writing when appeal is filed; and
 - Implement appeal procedures equally for both parties; and
 - Give complainant and respondent a reasonable, equal opportunity to submit a written statement in support of, or challenging, the result;
 - Issue a written decision describing the result of the appeal and rationale for the result; and
 - Provide the written decision simultaneously for both parties.
- While appeal is pending:
 - Supportive measures remain available to restore or preserve either party's equal access to education.
 - Respondent [should] enjoy the presumption of non-responsibility until final determination after appeal.

- The district can always offer an informal resolution process for issues between students or between employees.
- If either complainant or respondent wants to pursue the informal resolution process, find out if the other party is willing to voluntarily engage in the informal resolution process as well.
- If so, identify an impartial, neutral, trained individual to serve as the informal resolution facilitator.
 - Notify the parties of the name/information about the facilitator to see if either party has a basis as to why the person selected cannot be fair and impartial or is biased.
- Important note: Informal resolution process is NOT available for complaints that an employee harassed a student.

- Prior to initiating the informal resolution process, the district must provide the parties with a written notice disclosing:
 - The allegations,
 - The requirements of the informal process including circumstances under which it would preclude a party from resuming the formal complaint process from the same allegations,
 - Any party has the right to withdraw from the informal resolution process at any time, and
 - Any consequences from engaging in the informal resolution process including whether records from it will be maintained and/or shared in the formal complaint process.

- Records must be kept for at least seven years:
- Documentation of informal resolution process and/or grievance process
- Action taken to address each notification of sex discrimination
- All training materials
 - Under the 2024 regulations they must be maintained and shared upon request

Monthly webinar covering a Title IX Topic

- **May 9, 2024** — [Register Here](#)
- **June 10, 2024** — [Register Here](#)

- *Education Law Notes* Blog:

<https://www.pullcom.com/education-law-notes>

- Alerts, commentary, and insights from the attorneys of Pullman & Comley's School Law practice on federal and Connecticut law as it pertains to educational institutions

- *Working Together* Blog:

<https://www.pullcom.com/working-together>

- Alerts, commentary, and insights from the attorneys of Pullman & Comley's Labor, Employment Law and Employee Benefits practice on such workplace topics as labor and employment law, counseling and training, litigation, union issues, as well as employee benefits and ERISA matters.

- Title IX on the Nines Series Dates and Registration Links:

<https://www.pullcom.com/newsroom-events-Title-IX-on-the-Nines-Webinar-Series>

Email us with questions and suggestions on topics of interest for future webinars at TitleIXonTheNines@pullcom.com.



Melinda B. Kaufmann

Tel: 860.424.4390

Email: mkaufmann@pullcom.com



These slides are intended for educational and informational purposes only. Readers are advised to seek appropriate professional consultation before acting on any matters in this update. These slides may be considered attorney advertising. Prior results do not guarantee a similar outcome.

BRIDGEPORT | HARTFORD | SPRINGFIELD | WAKEFIELD | WATERBURY | WESTPORT | WHITE PLAINS

www.pullcom.com