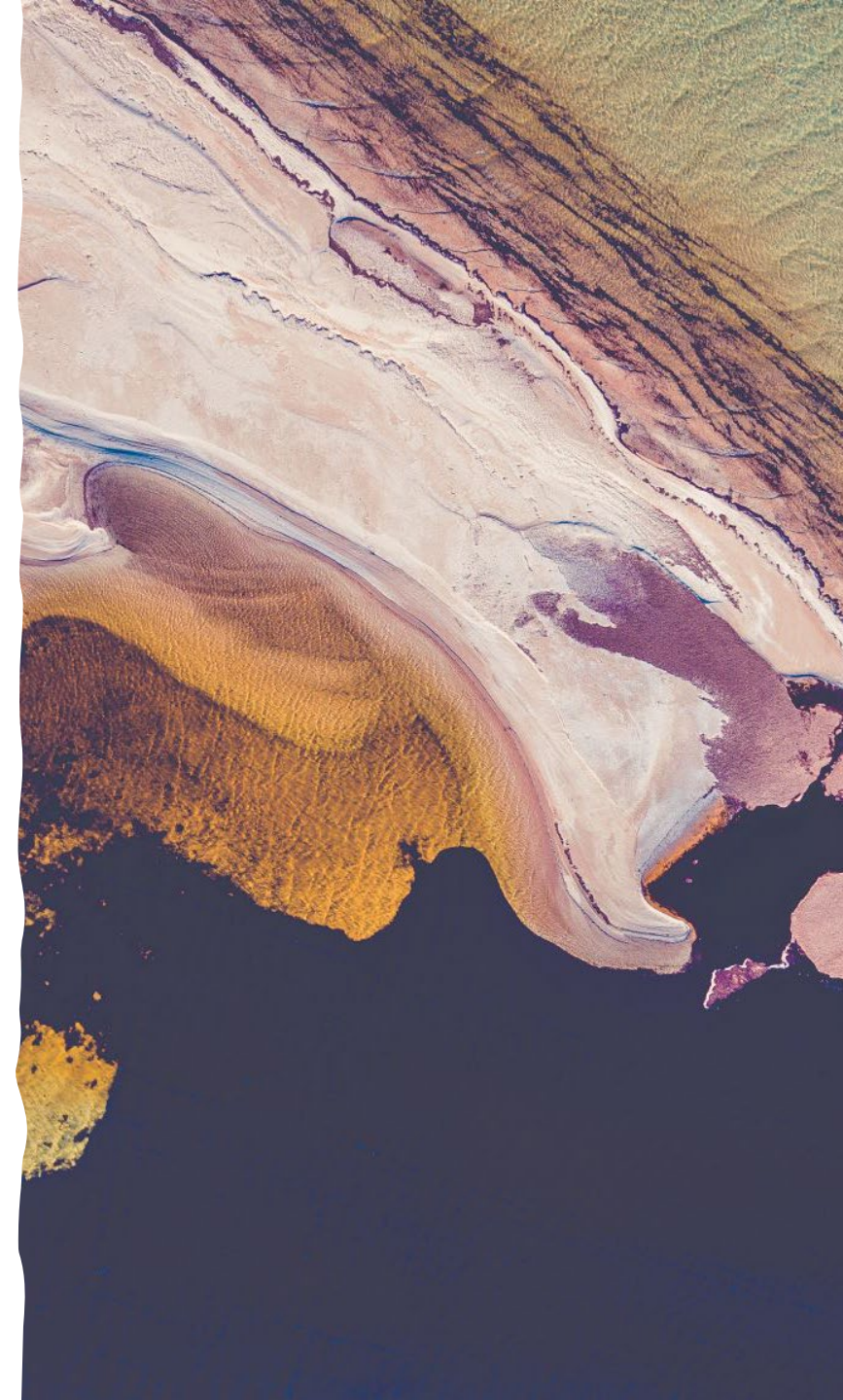


TITLE IX

SEXUAL HARASSMENT AND DISCRIMINATION IN K-12 SCHOOLS



Brian J. Taylor, Esquire
King, Spry, Herman, Freund & Faul, LLC
One West Broad Street, Ste. 700
Bethlehem, PA 18018
(610) 332-0390





Introductions

Brian J. Taylor, J.D. is Senior Counsel with KingSpry. He is a graduate of Franklin Marshall College, Temple University School of Law and the Wharton School of Business. He has served as trial counsel, Assistant Solicitor, general counsel and investigator with numerous school districts, charter schools, colleges and universities. For the past 16 years he has also served as an Adjunct Professor of Law at Widener University.

AGENDA FOR TODAY'S PROGRAM

Part I

The History Behind Sexual
Harassment as a Legal Doctrine

Part II

A Deep Analysis Into the
Regulations: The Grievance Process

Part III

Investigations

Part IV

The Adjudication and Application
(Recent Developments)

PART I

The History Behind Sexual Harassment as a
Legal Concept and Basis for Legal Liability

What is Title IX?

Title IX of the Education Amendments of 1972 is a **federal civil rights law** which prohibits discrimination on the basis of sex in all federally-funded educational institutions

Title IX applies to basically **all K-12 schools and postsecondary educational institutions** which receive any kind of federal financial assistance



Sidenote: Evolution of the Law

Example 1: Rape/assault

- **Common Law Definition – Rape**
 - - 5 Elements
- **Modern Statutes – Sexual assault**
 - - Expanded

Example 2: Harassment

- **Harris v. Forklift Systems**
 - - Qualifying injury

History of Civil Rights Laws

- 1950's – Brown v. Board of Education: Equality in public school education
- 1960's – Title VII: Race, religion, sex & color in employment
- 1970's – Gap filler: Title IX – Education Institutions
- 1970's – 1980's: Athletic Statute
Focus – scholarships, championships and funding
- 1980's – 1990's: Three Prong Test
Proportional number of both sexes and evidence of effort
- 2000's: Broader range of activities and incorporation of Title VII theories and definitions
- 2011: Obama Administration publishes “Dear Colleague” letter (non-binding guidance)
- 2020: Trump Era Regs – 124,000 comments (controversial and currently under review).

EVOLUTION OF CIVIL RIGHTS LAW

Title VI – Prohibits discrimination on the basis of race, color or national origin in any program receiving federal funds or assistance.

Title VII – Prohibits discrimination in terms and conditions of employment based on race, color, national origin, sex and religion. Must have 15 employees. Does not cover education.

GAP FILLER

Title IX - Applies to "recipients of federal financial assistances," including Public schools; Colleges and Universities.

1975: First Set of Regulations Under Title IX:

No mention of sexual harassment. No Title IX regulations until 2020 have addressed sexual harassment. Rule and comment rulemaking – 2,033 pages of interpretation.

What Is Title IX?

Title IX states:

- *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. (28 U.S.C.A. §1681)*

❖ **Exceptions – Military and private religious schools**



KEY RULINGS

- Title IX applies only to programs not schools. Grove City. (1980's)
- Immunity from monetary suits. Scanlon. (1980's)
- A private right of action will lie in where district had actual notice and was indifferent to the teacher's conduct. Gebser. (1997)

KEY RULINGS

- A plaintiff can recover monetary damages and harassment is a form of discrimination. Franklin v. Gwinnet. (1992).
- A private action may lie against a school under Title IX in cases of student-on-student harassment, where the funding recipient acts with deliberate indifference and the harassment is so severe that it effectively bars the victim's access to an educational opportunity or benefit. Davis. (1999)

KEY RULINGS

- An employer violates Title VII, which makes it unlawful to discriminate against an individual "because of the individual's sex, by firing an individual for being homosexual or being a transgender person. Bostock. (2020)
- ❖ Limitation – Does not apply in an educational context.

Two Paths of Enforcing Title IX



Judicially – In Court

- Lawsuit in federal court against educational institution.
- Plaintiff must show that a school official had actual knowledge and was deliberately indifferent.
- Challenge: Fee shifting
- **The goal: money damages**

Administratively - Agency

- By reporting to the Office for Civil Rights (OCR), subsidiary of DOE
- Where OCR/DOJ conducts compliance review.
- Challenge: Burdensome compliance
- **The goal: systemic change**



THE STANDARD OF LIABILITY (For the institution)

A School Entity with actual knowledge of sexual harassment in an education program or activity of the School Entity against a person in the United States, must respond promptly in a manner that is not deliberately indifferent.

ANALYZING
THE
REGULATIONS

PART II

KEY DIRECTIVES/GOALS

- [1] promptly respond to individuals who are alleged to be victims of sexual harassment by
- [2] offering supportive measures that;
- [3] follow a fair grievance process to resolve sexual harassment allegations
 - [a] when a complainant requests an investigation or
 - [b] a Title IX Coordinator
- [4] and provides remedies to victims of sexual harassment.

ROLES AND RESPONSIBILITIES

1. Title IX Coordinator
2. Investigator
3. Informal Facilitator
4. First-level Decisionmaker
5. Appeal Decisionmaker

TRAINING

The school must ensure that Title IX Coordinators, investigators, decision-makers, and facilitators, receive training on:

- the definition of sexual harassment,
- the scope of the school's education program or activity,
- how to conduct an investigation and the grievance process

School must ensure that decision-makers receive training on technology, relevance and serve impartially.

The 2020 rules do not offer guidance as to how much training is required, i.e. no specific time period, required credits, continuing education mandate.



THE FORMAL GRIEVANCE PROCESS - REQUIREMENTS

Requires:

[1] objective evaluation of all relevant evidence including both:

[a] inculpatory and

[b] exculpatory evidence; and

[2] credibility determinations may not be based on a person's status as a:

[a] complainant

[b] respondent

[c] witness

Updated Terminology

- The new Regulations use the words:
 - “Complainant”
 - “Respondent”
 - “Determination of responsibility”
- Goals:
 - Decriminalize the process
 - Revictimizing the parties
 - Presumption of guilt/innocence
 - Distinguish the Rules from Obama Era guidance



BIAS OR CONFLICT OF INTEREST

Requires that any individual designated by a school as a Title IX Coordinator, investigator, decision-maker, or a facilitator, not have a bias or conflict of interest for or against complainants or respondents generally or an individual complainant or respondent.



THE GRIEVANCE PROCESS – PRESUMPTION OF INNOCENCE



The grievance process must include a presumption that the respondent is not responsible for the alleged conduct until a determination regarding responsibility is made at the conclusion of the grievance process.



THE GRIEVANCE PROCESS - TIMING

- The process must initiate and proceed in a timely manner
- The process may allow temporary delays with:
 - Written notice to the complainant and the respondent of the delay or extension and the reasons for the action. Good cause may include considerations such as the absence of a party, a party's advisor, or a witness ; concurrent law enforcement activity; or the need for language assistance or accommodation of disabilities.

Complainant

- The alleged “victim”
- Must be participating in, or attempting to participate in, the school’s education program or activity, in the United States, at the time of the alleged sexual harassment
- A Title IX lawsuit is a lawsuit alleging that the educational institution is liable
- Complainant can be employee, staff or student

CONTACTING THE COMPLAINANT

The Title IX Coordinator must promptly contact the complainant to:

- (1) discuss the availability of supportive measures;
- (2) consider the complainant's wishes with respect to supportive measures;
- (3) inform the complainant of the availability of supportive measures with or without the filing of a formal complaint; and
- (4) explain to the complainant the process for filing a formal complaint.

Respondent

- The alleged “accused” or “perpetrator”
- “In locations, events, or circumstances where the school has substantial control over the harasser and substantial control over the context in which the harassment occurs”
- If the respondent leaves school, graduates, resigns, or otherwise leaves, Title IX does not apply
- Respondent can be employee, staff or student

INFORMAL RESOLUTION (Mediation or Restorative Justice)

1. Schools may not require any party to participate in informal resolution process.
2. Both parties must voluntarily agree
3. Schools cannot require anyone to waive the minimum rights;
4. Schools may not offer an informal resolution process unless a formal complaint is filed.
5. Informal resolution not allowable when an employee allegedly harassed a student.
6. Parties may switch between the two paths at any time before the resolution of the complaint

Significant Change in Definition

A New Definition of Sexual Harassment:

(1) An employee of the **recipient** conditioning the provision of an aid, benefit, or service of the school on an individual's participation in unwelcome sexual conduct; also called *quid pro quo* harassment. (Single incident sufficient)


(2) Unwelcome conduct determined by a reasonable person to be **so severe, pervasive, and objectively offensive** that it **effectively denies a person equal access to the school's education program or activity**; or

(3) Sexual assault, dating violence, domestic violence, or stalking. (Single incident sufficient)

A large green circle on the left side of the slide, partially cut off by the edge.

ACTUAL KNOWLEDGE

Notice to any of the following constitutes notice to the school:

1. Title IX Coordinator;
 2. Any official of the school who has authority to institute corrective measures on behalf of the school; or
 3. Any employee of an elementary and secondary school, including custodians, bus drivers, cafeteria workers, etc.
 4. Who can report: student, parent, employee, friend, witness or anonymous.
 5. Duties of reporters: Mandatory Reporters under Pennsylvania Law have specific responsibilities, i.e. Childline.
- 
- Four teal-colored curved lines of varying lengths and orientations, arranged in a roughly circular pattern in the bottom right corner of the slide.

FORMAL COMPLAINT

- Formal complaint means:
 - (1) a document filed by a complainant or signed by the Title IX Coordinator;
 - (2) alleging sexual harassment against a respondent; and
 - (3) requesting that the school investigate the allegation of sexual harassment.

❖ *See Attachment A*

An illustration on the left side of the slide shows two hands. The top hand is holding a white document with a red horizontal line. The bottom hand is holding a yellow pencil and writing on a purple spiral-bound notepad. The background of the illustration is a light blue circle.

FILING OF THE FORMAL COMPLAINT

A formal complaint may be filed with the Title IX Coordinator in person, by mail, or by electronic mail, by using the contact information required to be listed for the Title IX Coordinator under § 106.S(a), and by any additional method designated by the school.

When there is a
formal
complaint:

1. Notify insurance broker/agent or district Solicitor of a possible claim
2. Implement litigation hold procedures
3. Offer supportive measures immediately
4. Begin investigation
5. Practice tip: Take similar steps even if there is no formal complaint

SUPPORTIVE MEASURES MEANS:

- [1] non disciplinary;
- [2] non-punitive;
- [3] individualized services offered;
- [4] as appropriate, as reasonably available, and without fee or charge
- [5] to the complainant or the respondent before or after the filing of a formal complaint or where no formal complaint has been filed.



GOAL OF SUPPORTIVE MEASURES

Supportive measures are designed to:

- [1] restore or preserve equal access to the school's education program or activity without unreasonably burdening the other party, including measures designed;
- [2] protect the safety of all parties or the school's educational environment; or
- [3] deter sexual harassment.

EXAMPLES OF SUPPORTIVE MEASURES

- [1] counseling;
- [2] extensions of deadlines or other course-related adjustments;
- [3] modifications of work or class schedules;
- [4] campus escort services;
- [5] mutual restrictions on contact between the parties;
- [6] changes in work ... locations;
- [7] leaves of absence;
- [8] increased security; and
- [9] monitoring of certain areas of the campus, and other similar measures.

SUPPORTIVE MEASURES



The school must maintain as confidential any supportive measures provided to the complainant or respondent, to the extent that maintaining such confidentiality would not impair the ability of the school to provide the supportive measures.



OTHER PRELIMINARY MEASURES

- Special Education programming must continue

- School Code 12.6 – Expulsions and suspensions must have hearings

- Paid leave pending investigation for employees including Garrity Warnings and Weingarten Rights if they are interviewed.

INITIAL RESPONSE

With or without a formal complaint , school must do the following:

1. Promptly respond;
2. Title IX Coordinator must promptly contact complainant ;
3. Must not be "deliberately indifferent ";
4. Must treat complainant and respondents equitably by offering supportive measures to complainant, respondent and witnesses;
5. Must follow grievance process when formal complaint is filed.
6. Options: Code of Conduct violation

AUTHORIZED ACTIONS

"Emergency Removal": This is allowed: "provided that the [school]:

- (1) undertakes an individualized safety and risk analysis;
- (2) determines that an immediate threat to the physical health or safety of any student or other individual arising from the allegations of sexual harassment justifies removal; and
- (3) provides the respondent with notice and an opportunity to challenge the decision immediately following the removal.

THE REGULATIONS: THE GRIEVANCE PROCESS – NOTICE OF ALLEGATIONS

Upon receipt of a "formal complaint, "School must provide the following written notice to the complaint and respondent(s) who are known:

1. Notice of grievance process;
2. Notice of informal resolution process (if an option);
3. Notice of the allegations potentially constituting sexual harassment "including sufficient details known at the time."

THE GRIEVANCE PROCESS – NOTICE OF ALLEGATIONS

The written notice must inform the parties that:

1. They may have an advisor of their choice, who may be, but is not required to be, an attorney.
2. They may inspect and review evidence.
3. Prohibition against knowingly making false statements.
4. Respondent is presumed not responsible for the alleged conduct.
5. That a determination regarding responsibility is made at the conclusion of the grievance process.



THE GRIEVANCE PROCESS AMENDED NOTICE OF ALLEGATIONS

If, in the course of an investigation, the school decides to investigate allegations about the complainant or respondent that are not included in the original notice, the school must provide notice of the additional allegations to the parties whose identities are known.

MANDATORY DISMISSAL OF COMPLAINT

Complaint must be dismissed:

1. If the conduct alleged in the formal complaint would not constitute sexual harassment even if proved.
2. Did not occur in the school's education program or activity.
3. Did not occur against a person in the United States.
4. Dismissal of a formal complaint does not preclude action under another provision of the school's code of conduct.

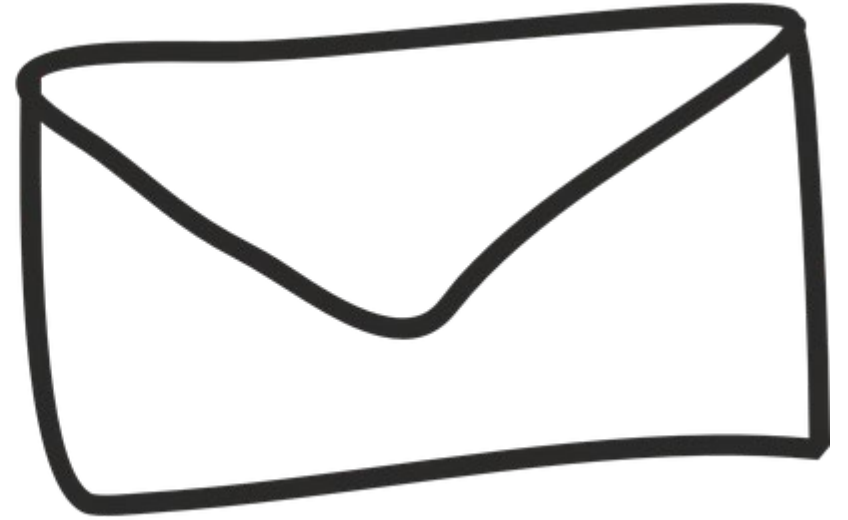
PERMISSIVE DISMISSAL OF COMPLAINT

A complaint may be dismissed if:

1. A complainant notifies the Title IX Coordinator in writing that the complainant would like to withdraw the formal complaint or any allegations therein.
2. The respondent is no longer enrolled or employed by the school.
3. Specific circumstances prevent the school from gathering evidence sufficient to reach a determination as to the formal complaint or allegations therein.

THE GRIEVANCE PROCESS: DISMISSAL

Upon a dismissal, the school must promptly send a written notice of the dismissal and reasons therefor simultaneously to the parties.





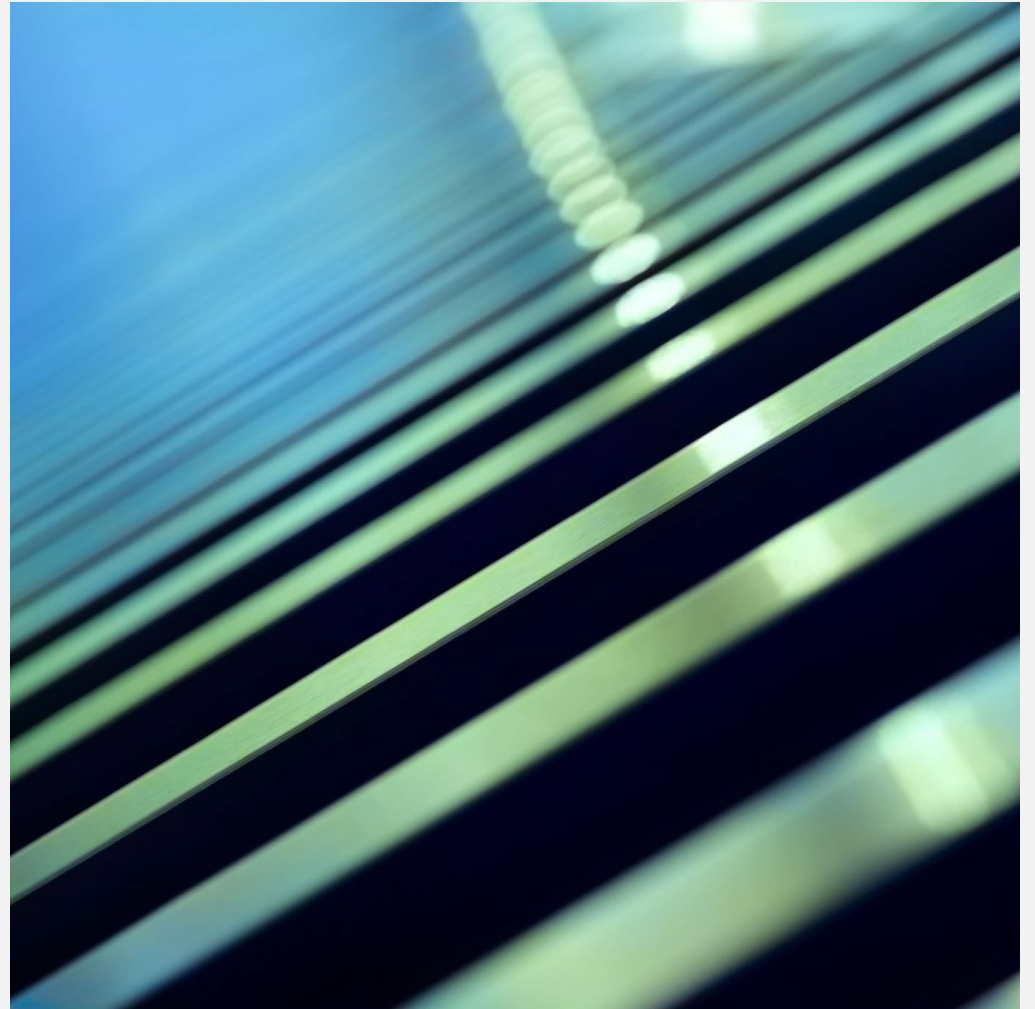
PART III: Investigation

EFFECT OF CRIMINAL PROCEEDINGS ON INVESTIGATION

Does not relieve school of its duties under Title IX - you must investigate promptly, decide promptly, provide supportive measures promptly, and take appropriate action based on decision.

Decision of police is not determinative of whether there was unlawful harassment, unless there is guilty plea or verdict of an offense whose elements establish "sexual harassment".

May have to coordinate with law enforcement including release of the report and evidence. i.e. subpoena



STANDARD OF REVIEW

State whether the standard of evidence to be used to determine responsibility is the:

[a] preponderance of the evidence standard or the

[b] clear and convincing evidence standard, apply the same standard throughout the process

Note: Should be stated clearly in the policy





THE INVESTIGATION

1. The burden of proof and burden of gathering evidence rests on the school.

2. The school cannot use a party's medical records developed for treatment purposes without consent of party, or party's parent if party is under 18.

THE INVESTIGATION

Provide an equal opportunity for the parties to present witnesses, including fact and expert witnesses, and other inculpatory and exculpatory evidence;

Do not restrict the ability of either party to discuss the allegations under investigation or to gather and present relevant evidence; i.e. no gag orders.

NATURE OF EVIDENCE

- Rules of evidence do not apply
 - I.e., hearsay allowed
- Relevance
 - Establishing a fact is more or less likely
- Material
 - If the fact affects the outcome
- Exculpatory and Inculpatory
 - Supports liability or responsibility



Interview Considerations

- Note: Have a witness/2nd note-taker present (ID themselves)
Students – mindful of their age and emotional fragility
- Recording – some Title IX Institution's Audio or Zoom records
- Remember, in PA recording without permission is prohibited
- Do not preconceive guilt/innocence
- Try to avoid yes/no questions to elicit as much information as possible
- Start the interview with questions about background
- Stay factual
- Stay non-judgmental
- Confidentiality-do not promise – only reveal to those who need to know
- Begin by explaining the process and the expectation of honesty and completeness
- Complainant first, otherwise management, administration, teacher or counselor
- Review Interview if necessary
- Explain that retaliation is prohibited



Statements

- Specialized questioners for minors, i.e. counselors
- Employees – Weingarten and Garrity
- Signatures
- Consistency, i.e. impeachment



QUESTIONS TO ASK COMPLAINANT

- What happened?
- Who committed the alleged misconduct?
- When did it occur and is it still going on?
- Where did it occur?
- How often did it occur?
- How did it affect you?
- Was anyone else present?
- Does anyone else have relevant information?
- Did anyone see you immediately after the incident(s)?
- Did you tell anyone about it?



QUESTIONING THE ACCUSED

- Outline the issues; the disputed and undisputed facts
- Draft a preliminary list of questions
- Do not begin with hostile questions
- Start with “broad” questions and use follow-up questions as needed
- Ask who, what, where, when, why and how
- Ask open-ended questions; avoid compound questions
- Do not put words into the interviewee’s/accused’s mouth – don’t lead
- Save unfriendly or embarrassing questions until the end of the interview
- Review your understanding of what you have been told
- Ask for any other information or documentation that might help
- Include exculpatory evidence as well – (otherwise malicious prosecution claim is a possibility)
- Generally, no right to an attorney present



QUESTIONS TO ASK WITNESSES

- What did you observe?
- Who was present or may have observed?
- What did that person say or do?
- What did you say or do?
- Did you tell anyone?
- Do you know of any similar incidents?
- Do you know of any other leads, such as documents and witnesses?
- Is there anything you think I should know?

WITNESS CREDIBILITY CONSIDERATIONS

- Plausibility?
 - Does the story make sense? Is it believable? Logical? Consistent?
 - What is the witness's source (direct or second-hand knowledge)?
 - Did the witness give detail? What was the witness's reaction if asked to provide detail?
- Corroboration?
 - Is there witness testimony such as eyewitness or people who discussed the incident around the time it is alleged to have occurred?
 - Is there physical evidence? Document ASAP
- Contradictions?
 - Did the witnesses own statements contradict each other?
- Motive to lie? Potential for bias, look for remarkably consistent language
- Past record?
- Demeanor?
 - Was there an emotional reaction?
- No single factor is determinative



ITEMS/RECORDS REVIEW

- Policies
- Emails
- Text, photos, memos
- Performance Evaluations
- Written warnings – disciplinary records
- Personnel file
- Electronic records/data, including phone logs or viewing history
- Attendance records
- Notes of any other source



Other Evidence

- Site visits
- Documents, i.e. notes
- Online/social media
- Physical evidence, i.e. photos, videos
- Other evidence, i.e. rape test kits
- Subpoenas – third parties

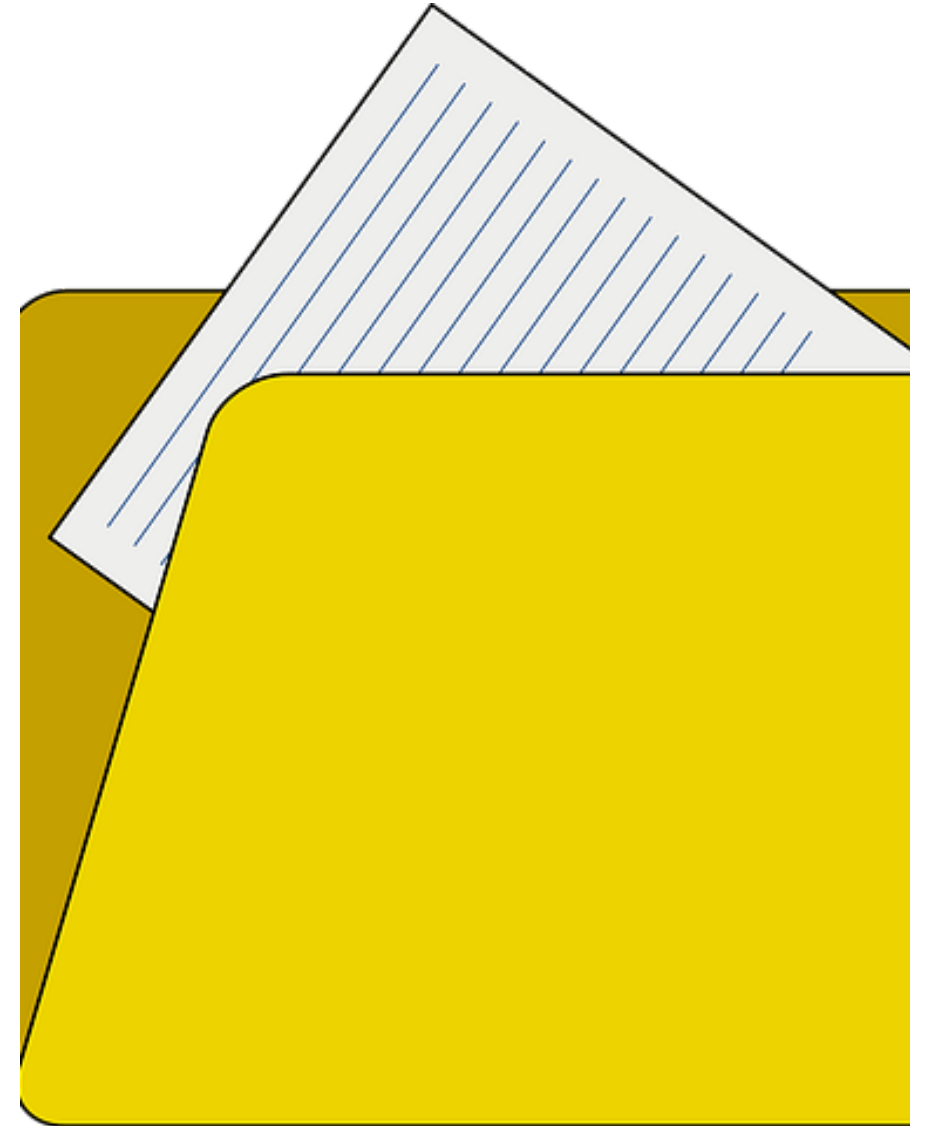
THE INVESTIGATION – FINDINGS OF FACT

Provide both parties an equal opportunity to inspect and review any evidence obtained as part of the investigation that is directly related to the allegations raised in a formal complaint, evidence upon which the School Entity does not intend to rely and inculpatory; or exculpatory evidence whether obtained from a party or other source.



THE INVESTIGATION EVIDENCE REVIEW

1. Prior to completion of the investigative report, the school must send to each party and the party's advisor, if any, the evidence subject to inspection and review in an electronic format or a hard copy.
2. The parties must have at least 10 days to submit a written response.
3. The investigator must consider the response(s) prior to the completion of the investigative report.





THE GRIEVANCE PROCESS – INVESTIGATION - REPORT

1. Prepare an investigative report that fairly summarizes relevant evidence; and
2. At least 10 days prior to a hearing (if a hearing is required under this section or otherwise provided) or other time of determination regarding responsibility, send to each party and the party's advisor, if any, the investigative report in an electronic format or a hard copy, for their review and written response.



Sample Details of Investigative Report



- Date of complaint and who reported.
- Do you have the signed complaint forms?
- Date of the incident(s) that were investigated.
- Why was the investigation started and what was being investigated?
- Who was performing the investigation?
- When did the investigation begin?
- Summary of parties' reports.
- Summary of witnesses' reports.
- What documents were gathered?
- Where were the evidence/documents found?
- What policy/procedure was applied?
- Who were the witnesses?
- What facts were gathered from parties/witnesses?
- Summary of factual evidence .

THE INVESTIGATION EVIDENCE – ACCESS TO THE REPORT

The School Entity **must make all such evidence subject to the parties' inspection and review** available at any hearing to give each party equal opportunity to refer to such evidence during the hearing, including for purposes for cross-examination.

PART IV
ADJUDICATION
AND
APPLICATION



THE GRIEVANCE PROCESS – INVESTIGATION – INDEPENDENT DECISION-MAKER

- A written determination must be issued after the investigative report is finalized
- Written determination must be by the "decision-maker"
- Decision-maker and "due process"
- Decision-maker may not be the Title IX Coordinator or the Investigator.



LIVE HEARING

or the Alternative

- Schools have the discretion to include a "live hearing" as part of the grievance process.
- This is different than the School Board or arbitration "live hearing" under law or collective bargaining agreement.
- Numerous rules apply to live hearings, including training regarding technology used at the hearing.
- Testimony of parties and witnesses.
- Mostly at higher educational institutions.

THE GRIEVANCE PROCESS – FINAL REPORT

Must include:

1. Allegations potentially constituting sexual harassment
2. Description of the procedural steps from receipt of formal complaint to written determination, including:
 - a) Notifications to parties
 - b) Interviews
 - c) Site visits
 - d) Methods used to gather evidence
 - e) Hearings held.





THE GRIEVANCE PROCESS – FINAL REPORT (Cont'd)

MUST INCLUDE:



3. Findings of fact supporting determination;
4. Conclusions regarding the application of Code of Conduct to facts;
5. The rationale for each allegation, including determination of responsibility disciplinary sanctions and whether remedies will be provided to victim to restore or preserve equal access;
6. Procedures for appeal;
7. Timeline for appeal;
8. Bases for appeal by complainant and respondent.

The Written Determination must be provided to the parties simultaneously.



THE
GRIEVANCE
PROCESS –
THE APPEAL



School Entity must offer both parties an appeal from:

1. A determination regarding responsibility;
2. Dismissal of a formal complaint or any allegation in a formal complaint.

THE GRIEVANCE PROCESS – BASES OF APPEAL

The following bases for an appeal are required:

1. Procedural irregularity that affected the outcome of the matter.
2. New evidence that was not reasonably available at the time the determination.
3. Title IX Coordinator, investigator(s), or decision-maker(s) had a conflict of interest or bias for or against complainants or respondents generally or the parties specifically.

THE GRIEVANCE PROCESS – THE APPEAL

When an appeal is filed, school must:

1. Notify the other party in writing and implement appeal procedures equally for both parties.
2. Assign a new decision-maker.
3. Give both parties a reasonable, equal opportunity to submit a written statement in support of, or challenging, the outcome.
4. Issue a written decision describing the result of the appeal and the rationale for the result.
5. Provide the written decision simultaneously to both parties.

DISCIPLINARY SANCTIONS

The range of possible disciplinary sanctions and remedies or list the possible disciplinary sanctions and remedies that the school may implement following any determination of responsibility.



RECORDKEEPING



Must maintain for minimum of 7 years the following:

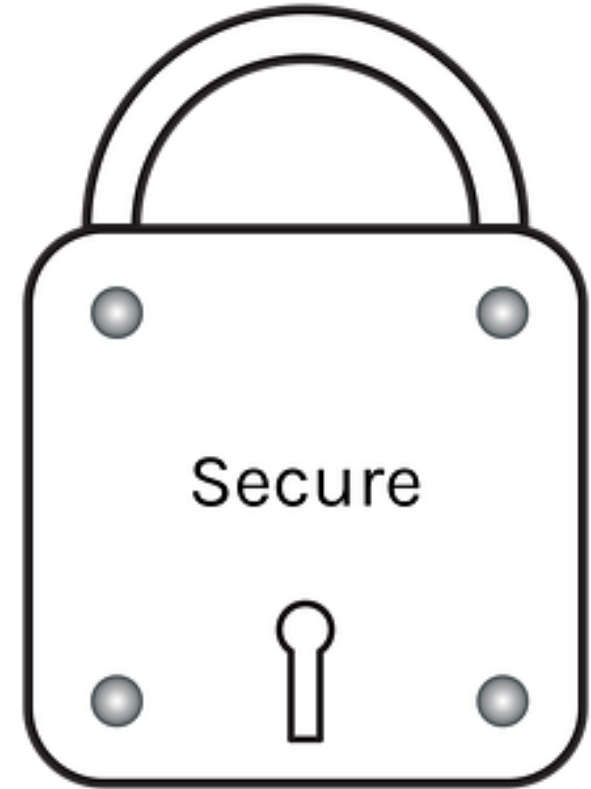
1. Each sexual harassment investigation, including
 - a) Determinations;
 - b) Recordings and transcripts;
 - c) Disciplinary sanctions;
 - d) Remedies;
 - e) Appeals;

RECORDKEEPING (cont'd)

2. For each response to known sexual harassment, school must create records of actions, including supporting measures
 - a) Basis for conclusion that response was not deliberately indifferent
 - b) Measures designed to restore and preserve equal access
 - c) Reasons why complainant was not provided with supportive measures.

SCHOOLS MUST KEEP CONFIDENTIAL:

1. Identity of any individual who has made a report or complaint of sex discrimination;
2. Any complainant;
3. Any individual who has been reported to be the perpetrator;
4. Any respondent; and
5. Any witness.





EXCEPTIONS TO CONFIDENTIALITY

Disclosure can be made under the following circumstances:

1. As permitted by the FERPA;
2. As required by law; and
3. To carry out the purposes of 34 CFR, Part 106, including conducting an investigation, hearing, or judicial proceeding.

RETALIATION PROHIBITED - GENERALLY

No school or other person may intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by Title IX or the new Title IX Regulations



RETALIATION PROHIBITIONS

Schools may not retaliate against an individual who:

1. Made a report or complaint;
2. Testified;
3. Assisted or participated in an investigation, proceeding or hearing;
4. Refused to participate in an investigation, proceeding or hearing under the Regulations.



APPLICATION (RECENT DEVELOPMENTS)

- NCAA – Allows transgender athletes to participate on the sports team of their choice in a sport by sport approach as decided by governing body of that sport (1/19/22)
- PIAA – Leaves decision as to the school’s principal where a student’s gender is questioning or uncertain. (1/29/22)
- Nationwide – 6 states outright ban and 3 require surgery
- FINA, swimming’s world governing body voted on 6/18/22 to ban participation of transgender athletes in elite women’s competition. The new policy took effect two days later and only allows transgender athletes who have “completed” a transition by age 12.



Pennsylvania Law

- Act 110 – Section 1318:
K-12 public schools are required to remove, transfer or reassign students who are adjudicated delinquent or convicted of sexual assault when the offending student and victim are enrolled in same school. (1321)
- ❖ Final practice tip: Revise and update policies periodically

June 23, 2022 Biden Administration Title IX Notice of Proposed Rulemaking

- Recipient can use single investigator model.
- Must use Preponderance of the Evidence unless clear and convincing evidence is used in all other comparable proceedings.
- Explicitly includes sexual orientation, gender identity, pregnancy and parental status.
- Hostile environment condition is severe or pervasive instead of severe and pervasive.
- Must address the hostile environment that occurs outside the recipients' education program or activity outside the U.S.
- Any employee (at K-12 recipient) who is not a confidential employee would be obligated to notify the Title IX Coordinator.
- Complainant is protected in their right to file even when they have chosen to leave the recipient's education program or activity.
- May offer an informal resolution even where no formal complaint has been filed.
- Hearings would be optional at post-secondary school.
- Arrival date: 6-12 months.

QUESTIONS?



Brian J. Taylor, Esquire
King, Spry, Herman, Freund & Faul, LLC
One West Broad Street, Ste. 700
Bethlehem, PA 18018
(610) 332-0390

