



DANNIS WOLIVER KELLEY

Attorneys at Law

Fundamental Training for Title IX Teams: Compliance Officers, Investigators, Decision-makers and Facilitators of Informal Resolution

January 14, 2021

Jennifer Choi and Chelsea Tibbs

This training is provided for educational, compliance and loss-prevention purposes only, and absent the express prior agreement of DWK, does not create or establish an attorney-client relationship.
The training is not itself intended to convey or constitute legal advice for particular issues or circumstances. Contact a DWK attorney for answers to specific questions.

Housekeeping

- Attendees will receive materials, including a training manual and this PowerPoint via email after this training.
- On your dropdown menu, there is a Chat box. Feel free to ask questions there or email emcpeters@dwkesq.com.
- We will be monitoring the questions as they come in and may answer some questions during the webinar. Time allowing, we will address any questions we haven't yet gotten to.
- We will take a short break around the halfway point.

Objectives

- 1. Understand the LEA's obligations in responding to actual knowledge of sexual harassment
- 2. Recognize a formal complaint
- 3. Have each Title IX team member understand and be able to implement each of their roles in the formal complaint process from start to finish:
 - Notice and Opportunity for Adviser
 - Investigation
 - Opportunity to Inspect Evidence
 - Draft factual findings
 - Opportunity to Ask Questions
 - Written Decision of Responsibility
 - Appeal
 - Record Keeping Obligations
- 4. Have tools and techniques to serve impartially and without bias

What is Title IX?

“No person in the United States shall, on the basis of sex, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”
(United States Congress, June 23, 1972.)

2020 Title IX Overhaul

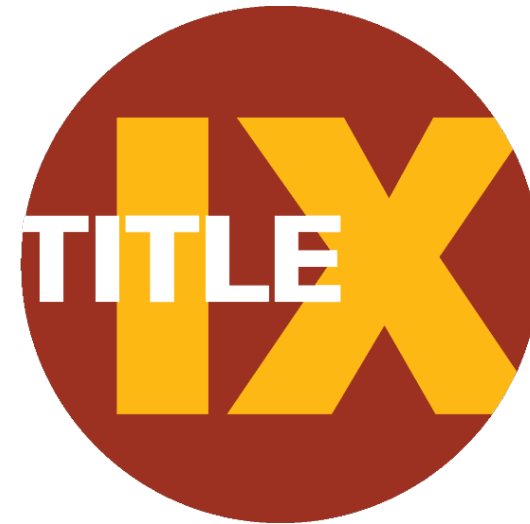
- 2018 Notice of Proposed Rulemaking (NPRM)
- NPRM closed for public comments on February 29, 2019.
- Final Rule issued on May 6, 2020.
 - Codified in the Code of Federal Regulations, Part 106.
- The Final Rule became effective on August 14, 2020.

Designating A Title IX Coordinator

- Requirement to designate and authorize an employee as the “Title IX Coordinator” and
- Notify all students and employees of
 - (1) name;
 - (2) office address;
 - (3) email address; and
 - (4) telephone number of the Title IX Coordinator.
- This designation must also be “prominently displayed” on the LEA’s website

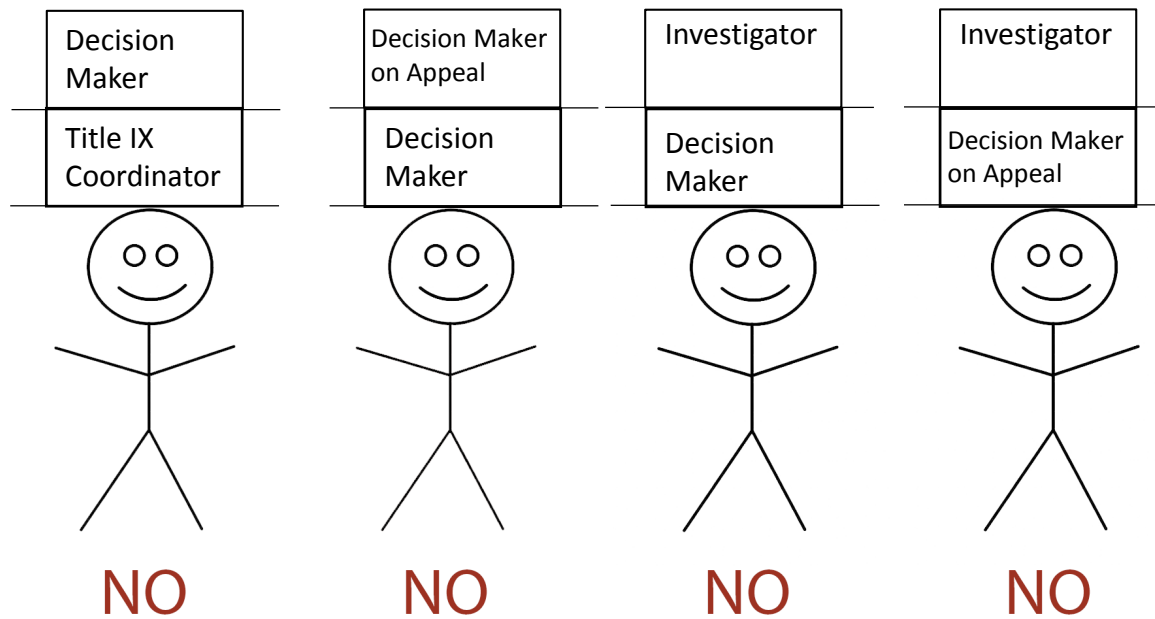
Other Title IX Team Roles

- Investigator
- Decision-maker
- Decision-maker on appeal
- Facilitator of informal resolution



Who Can Wear What Hats?

NOT OKAY 



Case Study

- On January 11, 2021, during Harry's synchronous instruction in drama class, held over Zoom, a male student, Draco, recites the sexually explicit lyrics to the Cardi B song, which references oral sex. He then calls Harry out by name and says, "Yea, that'll never happen for you, Harry the Fairy!"
- At the end of class, Mr. Lupin assigns the class to work in groups to make a skit for their asynchronous learning.
- That night, the group, made up of Harry, Draco, Hermione, Ron, and Ginny meet on Zoom to work on the assignment. Draco sends a series of photos of partially nude female classmates to Harry individually in the Zoom chat function. Harry did not take screenshots of the photos.

Obligation to Respond

“A recipient with actual knowledge of sexual harassment in an education program or activity of the recipient against a person in the United States, must respond promptly in a manner that is not deliberately indifferent. A recipient is deliberately indifferent only if its response to sexual harassment is clearly unreasonable in light of the known circumstances.” (34 C.F.R. § 106.44, *emphasis added*.)

Definition: Actual Knowledge

- Who can have actual knowledge?
 - Title IX Coordinator
 - “[A]ny official of the recipient who has the authority to institute corrective measures”; OR
 - **Any Employee of an elementary and secondary school**
- Reports or observations can constitute actual knowledge
- Actual knowledge triggers further action in the form of supportive measures and information regarding how to file a formal complaint

Case Study: Check for Understanding

- Mr. Lupin heard what Draco said to Harry in Zoom class.
- What actions, if any, should Mr. Lupin have taken?

Supportive Measures

- Non-disciplinary, non-punitive, and individualized
- Designed to restore or preserve equal access to the educational program or activity without unreasonably burdening the other party
- Designed to protect the safety of all parties or the educational environment
- Title IX Coordinator is responsible for coordinating the implementation of the supportive measure(s)

Case Study: Check for Understanding

- When Mr. Lupin reports the incident to the Title IX Coordinator, what should the Title IX Coordinator do?

Case Study: Check for Understanding

- The Title IX Coordinator talks with Harry and discusses supportive measures. Harry refuses. They also discuss the process for filing a formal complaint. Harry refuses to do so.
- How should the Title IX Coordinator respond?

Who Can File a Formal Complaint?

- Complainant is defined as:
 - an individual who is alleged to be the victim of conduct that could constitute sexual harassment
 - Complainants must be participating in or attempting to participate in the education program or activity of the LEA within which the formal complaint is filed
- Employees, not just students, may be complainants under Title IX (*North Haven Bd. of Educ. v. Bell*, 102 S.Ct. 1912 (1982).)
- Parents/legal guardians can file a formal complaint on behalf of their child, but they are not considered a “complainant.”

Formal Complaint

- Document or electronic submission that contains complainant's physical or electronic signature, or otherwise indicates that the complainant is the one submitting the complaint
- Filed in person, by mail, or by electronic mail
- Alleging sexual harassment against a respondent
- Requesting that the LEA investigate the allegation of sexual harassment
- Can be signed by Title IX Coordinator

Definition: Sexual Harassment

- Sexual harassment is defined as
 - (1) any quid pro quo harassment by a LEA's employee;
 - (2) "any unwelcome conduct that a reasonable person would find so severe, pervasive, and objectively offensive" that it "denies" a person equal educational access;
 - (3) sexual assault;
 - (4) dating violence;
 - (5) domestic violence; or
 - (6) stalking



Severe, Pervasive, and Objectively Offensive

- Severe
- Pervasive
- Objectively offensive

School's Education Program or Activity

- Alleged conduct must have occurred in a LEA's "education program or activity"
- Includes locations, events, or circumstances which the school exercises substantial control over both the respondent and the context in which the sexual harassment occurred

Case Study: Check for Understanding

- Molly sees Harry crying after class. Harry tells her what's been going on (the comment in class and the pictures sent to the group). Molly sends the following email to Mr. Lupin:

Dear Mr. Lupin,

My son Harry told me he was very upset because another boy, Draco, has been bullying him in drama class. How could you let this happen without telling me? I expect the school will be doing something about this. Please let me know what your plan of action will be immediately.

-Molly

Case Study: Check for Understanding

- Mr. Lupin forwards the email to the Title IX Coordinator.
- How should the Title IX Coordinator proceed?

Case Study: Check for Understanding

- After speaking with the Title IX Coordinator, Molly files a written, signed complaint that complies with the required formalities. She describes the allegations in detail.
- Is Molly now the complainant?
- Does the conduct in the allegations meet the definition of sexual harassment?

Mandatory Dismissals

- LEAs must dismiss a formal complaint of sexual harassment, for purposes of Title IX, when the alleged conduct:
 1. would not constitute sexual harassment under the new definition
 2. did not occur in the LEA's education program or activity
 3. the alleged conduct did not occur against a person in the United States.

Discretionary Dismissals

- The LEA *may* dismiss a formal complaint or any allegations therein if at any time during the investigation:
 - The complainant notifies the Title IX Coordinator in writing that they would like to withdraw the formal complaint or any allegation therein; or
 - The respondent is not enrolled or employed by the LEA; or
 - Specific circumstances exist to prevent the LEA from gathering of evidence to reach a determination as to the formal complaint or allegations therein.
- Written notice required for all dismissals.

Case Study: Check for Understanding

- What if Molly had only known about the first comment on Zoom, and not the second incident where Draco sent suggestive pictures? Would that change the analysis?

Option for Informal Resolution

- Optional
- LEAs cannot offer this when an employee is alleged to have sexually harassed a student



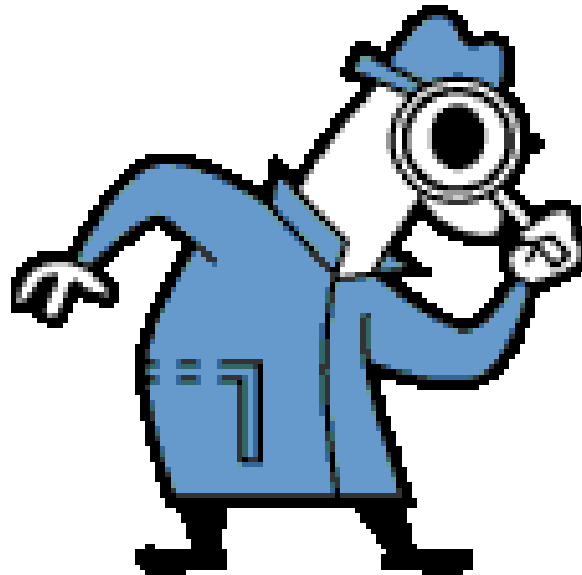
Option for Informal Resolution (cont'd)

Requirements:

- Provide the parties with written notice disclosing the sexual harassment allegations;
- Provide requirements of an informal resolution process;
- Provide any consequences that may result from participating in the informal resolution process; and
- Obtain the parties' voluntary, written consent to the informal resolution process.

Time to Investigate

Actual Knowledge + Formal Complaint + Sexual Harassment + Educational Program or Activity + in United States = INVESTIGATION and/or informal resolution



Title IX Investigations

- Now With More Due Process Than Ever!
 - Notice
 - Two-Step Evidence Inspection Process:
 - Step 1: Inspection and Review of Evidence before investigation report finalized
 - Step 2: Obligation to give parties the opportunity to submit questions after report is finalized but before a determination of responsibility is made
 - Live hearing option
 - Written determination

Notice

- Title IX Coordinator must send written notice of the allegations to both parties upon receiving a formal complaint.
- What must be in the written notice?
 - grievance process
 - sufficient details of the allegation(s)
 - advisor
 - false statement or false information

Opportunity to Obtain an Advisor

- “Provide the parties with the same opportunities to have others present during the grievance proceeding, including the opportunity to be accompanied to any related meeting or proceeding by the advisor of their choice, who may be, but is not required to be an attorney.”
- May limit the advisor’s participation

Promises of Confidentiality?

- Because of the due process requirements in the new regulations, LEAs should not promise total confidentiality
- Reports cannot be confidential
- Information given by all witnesses may be shared with the parties

Case Study: Check For Understanding

- Draco's father informs the school that he has hired an attorney. He insists all communications go through the attorney. Soon after, the Title IX Coordinator reaches out to schedule an interview with Draco. The attorney insists that the interview take place at her office. She also demands that she be given a list of all witnesses so she personally can depose them.
- How should the Title IX Coordinator respond?

Emergency Measures

- The LEAs should not impose discipline on a student respondent without first complying the formal Title IX grievance process, which includes notice and opportunity to obtain an advisor.
 - (34 C.F.R. § 106.45(b)(5).)
- Consider how this might conflict with an LEA's mandatory discipline obligations.

Emergency Removal

- Can remove a respondent on an emergency basis if the LEA:
 - does an individualized safety and risk analysis;
 - 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 provides the respondent with notice and an opportunity to challenge the decision immediately following the removal

Case Study: Check for Understanding

- Let's change the facts for a moment. In this alternative situation, the good news is Harry's group was working in person because we have a COVID vaccine and we are all back on campus. The bad news is, during the group work, Draco violently attacks and gropes Harry.
- Molly presents this information in a formal complaint to the Title IX Coordinator.
- Can the school suspend Draco?

Planning the Investigation

- Create an investigation plan. This is a living document.
- Consider including:
 - (1) date Formal Complaint was received;
 - (2) involved parties and witnesses;
 - (3) Title IX Team roles;
 - (4) scope of investigation;
 - (5) relevant policies;
 - (6) communication log

Determine Investigation Scope

- Led by the formal complaint and your policies
- In consultation with the Title IX Coordinator
- Be detailed in writing the allegations
 - Specific with actions and time frames: who, where, when?

Plan to Gather Evidence

- Sequence of interviews:
 - Generally start with complainant, then witnesses, then respondent.
 - Be okay with circling back to witnesses if need be.
- Consider how to communicate/invite witnesses
- Consider location (privacy, confidentiality and comfort)
- Have a consistent note-taking method

What Kind of Evidence?

- Documents
- Photos
- Social media posts

Let's Take a Quick Break

WELCOME BACK!

Interviewing Techniques

- Questions designed to elicit all the information needed for the decision-maker to make a determination of responsibility regarding each allegation
- The “funnel method”
- Silence is golden
- Reflect and ensure you covered everything
 - “Is there anything else I should be aware of?”

Trauma Informed Interviewing

- Definitions of trauma:
 - A deeply distressing or disturbing experience. (Oxford Dictionary)
 - An emotional response to a terrible event like an accident, rape or natural disaster. (American Psychological Association)

Broad Types of Trauma

- (1) threat to life or limb;
- (2) severe physical harm or injury, including sexual assault;
- (3) receipt of intentional harm or injury;
- (4) exposure to the grotesque;
- (5) violent, sudden loss of a loved one;
- (6) witnessing or learning of violence to a loved one;
- (7) learning of exposure to a noxious agent; and
- (8) causing the death of severe harm to another.

(Wilson & Sigman, 2000.)

Impact of Trauma

- Immediately after the event, shock and denial are typical.
- Longer term reactions include unpredictable emotions, flashbacks, strained relationships and even physical symptoms like headaches or nausea.
- For students, experiencing traumatic stress can severely impact their ability to learn, remember, or manage their emotions and behavior

Trauma in Title IX Investigations

- In a Title IX investigation interview, the signs of trauma can manifest as memory loss, lack of focus or inconsistent versions of the same story.

How to be Trauma-Informed

- Be aware of how trauma alters how people see the world
- Shift your mindset from “What is wrong with you?” to “What happened to you?”

What Does a Trauma Informed Title IX Employee Do?

- Build relationships!
- Foster trust
 - Be communicative
 - Be transparent
 - Be reliable
- Give choice and agency
- Know signs of trauma and consider them

Practical Tips for Trauma-Informed Interviewing

- Hold the interview in a comfortable, confidential and neutral place.
- Empower by letting the party choose the time and date of interview and where to sit in the room.
- Offer water. Have tissues handy.
- Ask open-ended questions. For example, “What else happened?” instead of “What happened next?” Other good phrases: “Tell me more about that.” Or “What do you remember about that?”
- Keep interviews under 1.5 hours. Be willing to circle back if you need to stop or run out of time.

Empathy Without Bias?

- Yes, it is possible!
- Acknowledge pain, not facts
 - “I understand this is a painful process.” Or “I can see this is hard for you to talk about.”
- Avoid statements that would indicate you have come to a conclusion about what occurred

Opportunity to Inspect Evidence

- Significant change in Final Rule – uncharted waters
- Parties must be given at least ten (10) days to review all evidence gathered by the investigator, including both inculpatory and exculpatory evidence, that is **directly related** to the allegations raised in the formal complaint.
- Timing – before the investigator issues the investigative report

What Information Must Be Shared?

- “Directly related to the allegations”
- “Directly related” vs. relevant
 - Broad scope
- Even if it will not be relied upon in the determination
- Redaction allowed if it is not “directly related”

How to Share the Information?

- Preamble suggests the Department wants this done in hard copy or digital form rather than at the District office
- Can do this in a manner that prevents dissemination
 - For example, require parties to sign non-disclosure agreement

Case Study: Check for Understanding

- Investigator interviews Ron, who explains that Draco has been texting him lewd texts all summer. Ron gives the investigator screen shots of the texts, but asks that the investigator not tell Draco that he showed the texts or he would “never live it down.”
- How should the investigator respond?

FERPA Implications

- If there is a conflict between FERPA and Title IX, Title IX governs
- Student information may be redacted if it is not directly related to the allegations
 - The Department cautions not to redact more than necessary
- Maintain a “privilege log” and allow parties to dispute whether it is directly related

Case Study: Check for Understanding

- The investigator discovers that Mr. Lupin had recorded his lesson. Student faces and names are visible.
 - Must the investigator share this recording with the parties?
- The investigator reviewed the cum files of both Harry and Draco and discovered that Draco had no history of discipline but that Harry was disciplined for tagging a locker in 9th grade.
 - Must the investigator share Harry's cum file with the parties?

Writing the Investigative Report

- Purpose of the report is to “summarize the relevant evidence” for the decision-maker to make a determination of responsibility.
 - Who performed the investigation
 - When the respondent received notice of the allegations
 - Which witnesses and parties were interviewed and when
 - Summaries of witness testimony
 - What locations were visited during the investigation
 - All types of evidence reviewed

Investigator's Relevancy Assessment

- The importance of the relevance standard at the phase
- Include relevant evidence in the investigative report whether it is “inculpatory or exculpatory.”
- The Department recognized the cost and burden this puts on the LEA

Case Study: Summary of Evidence

- Summary of Evidence
 - Recording of Zoom class
 - Screenshots of text messages from Draco to Ron from the summer
 - Harry and Draco's cum files
 - Witness statements
 - Harry: Gave a verbal account that is consistent with the written complaint signed by Molly.
 - Draco: Admitted to making the comment in Mr. Lupin's drama class but denied that he sent suggestive pictures to anyone, ever.

Case Study: Summary of Evidence (Cont.)

- Mr. Lupin: Described Harry as a poor student who failed to memorize his lines. Confirmed he heard Draco's comment and found it offensive and mean. He also stated he thought Harry and Draco "never got along."
- Ginny, Ron and Hermione: Confirmed they heard the comment in class and found it offensive.
 - Ron stated Draco sent him suggestive pictures over the summer.
 - Ginny said she hates Draco because he "broke Hermione's heart" last year.
 - Hermione stated that she spoke to Harry after their group project and he sounded distressed. He didn't say why but said that Draco was "being awful again" and "ruining Harry's life."
- What should the investigator include/exclude in the investigative report?

Handoff to the Decision-maker

- At least ten (10) days prior to the determination of responsibility, send the report to each party and the party's advisors in electronic format or hard copy, for their review and written response.



Opportunity to Submit Questions

- Second window of 10-day period
- The decision-maker(s) must afford each party the opportunity to submit written, relevant questions that a party wants to be asked of any party or witness and provide each party with the answers, and allow for additional, limited follow-up questions from each party

Another Relevancy Assessment

- “Ordinary meaning of relevance should be understood and applied”
- Not allowed: “sexual predisposition” or prior sexual behaviors
- Unless, “questions or evidence are offered to show that someone other than the respondent committed the alleged conduct, or if the questions or evidence about a complainant’s specific incidents of sexual behavior are offered to prove consent to the alleged behavior”

Case Study: Check for Understanding

- Harry poses the following questions to Draco:
 - Where did you attend middle school?
 - Is it true you have three older brothers?
 - Did you date Hermione your freshman year?
 - Did you break up with Hermione because you wanted to go further, and she didn't?
- Draco poses the following questions to Harry:
 - You have joked about Cardi B. songs with me before. Is this true?
 - Why did you rat me out?
- Ginny testified that she had seen Draco say lewd things to Harry before in math class. Draco sends the following questions for Ginny:
 - Is it true you cheated you on a math exam?
 - Is it true you told Hermione that you hate Draco?
- Ginny refuses to answer any of the questions from Draco.

Discussion: Best Practices

- LEAs have the ability to control this process
- The parties should understand that these questions are not coming from the investigator or the District.
- Other considerations?



Making a Determination of Responsibility

- Decision-maker reviews:
 - the investigative report
 - additional information from the question exchange stage
- Then makes factual findings and determinations of responsibility using preselected standard of evidence

Standards of Evidence

- Preponderance of the Evidence
 - More likely than not true. Feather test.
- Clear and Convincing
 - Highly probable that it is true.

EVIDENCE

What to Include in Determination

- Allegations potentially constituting sexual harassment
- Procedural steps taken
- Findings of fact
- Conclusions regarding respondents conduct
- Disciplinary sanctions, if applicable
- Appeal rights

Making Factual Findings

- Make a factual finding regarding every material allegation in the complaint
 - Sustained or not sustained
- Sample language: “The complainant’s allegation that [insert allegation] is sustained/not sustained. The investigator finds by [a preponderance of the evidence OR clear and convincing evidence] that...”

Assessing Credibility

- Credibility factors to consider:
 - Corroboration/Lack of corroboration
 - Consistent/Lack of Consistency
 - Knowledge or opportunity to observe
 - Inherent plausibility
 - Motive to falsify
 - Consistent past conduct

Case Study: Try Your Hand at Factual Findings

- Harry's allegation that Draco recited sexually explicit lyrics then directed a derogatory insult at him in Mr. Lupin's Zoom drama class is sustained. Notably, Draco admitted to making the comment and Zoom video footage corroborated Harry's account. While Draco stated the comment was a joke, four witnesses who were present at the time, gave consistent accounts that the comment was mean-spirited and offensive.
- Harry's allegation that Draco sent him suggestive pictures in the Zoom chat is sustained. Although Draco denied that he did so, the preponderance of the evidence weighs against his denial. Specifically, Ron gave a credible account that Draco sent him substantially similar photos over the summer. Further, Hermione stated that she spoke to Harry shortly after their Zoom group meeting and he sounded upset, which weighed in favor of Harry's complaint.

Conclusions Regarding the “Code of Conduct”

- The decision-maker must then apply the factual findings to the applicable “code of conduct” or other relevant policies and procedures to determine responsibility.

Tips for Report Writing

- Build and use a template
- Write as you go, don't wait until all interviews are complete
- Use the active voice
- Use headings, bullet points and tables as necessary

Appeals

- Two stages where appeals rights kick in:
 1. determinations of responsibility
 2. dismissals of formal complaints.
- Decision-maker on appeal should be different from the decision-maker and Title IX Coordinator

Basis for Appeal

- A procedural irregularity that affected the outcome of the matter;
- New evidence that was not reasonably available at the time of the determination of responsibility or dismissal 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 the complainants or respondents generally or the individual complainant or respondent that affected the outcome of the matter.

How to Handle Appeals

- The LEA notifies the other party in writing;
- The LEA gives both parties a reasonable, equal opportunity to submit a written statement in support of, or challenging, the determination of responsibility or dismissal;
- The LEA reviews the written statements and issues a written decision describing the result of the appeal and rationale; and
- The outcome of the appeal must be provided in writing simultaneously to both parties

Case Study: Check for Understanding

- The decision-maker made a finding of responsibility that, by preponderance of the evidence, Draco's conduct violated the District's sexual harassment policy.
- Draco submits an appeal, arguing that the decision-maker only gave him 8 days to submit questions for the parties, instead of 10. This, in fact, is true and all of the parties had been given 8 days, not 10.

Record-Keeping

- LEAs must maintain the following records for seven (7) years:
 - Each sexual harassment investigation including any determination of responsibility, any disciplinary sanctions imposed on the respondent, and any remedies provided to the complainant designed to restore or preserve equal access to the LEA's education program or activity
 - Any appeal and the result therefrom
 - Any informal resolution and the result therefrom
 - All materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process.

How to Serve Impartially

- Impartiality is a legal requirement
- Practice fundamental fairness to both parties
- Avoid bias

Understanding Bias

- Preconceived judgment or opinion without just grounds and based on insufficient knowledge
- Can be conscious or unconscious
- Biases, or stereotypes, are beliefs that most members of a group have some characteristic.
- Examples:
 - women are nurturing
 - teachers drink a lot of coffee

Types of Bias

- **Explicit Bias:** An explicit stereotype is the kind that you deliberately think about and report
- **Implicit Bias:** An implicit bias is one that is relatively inaccessible to conscious awareness and/or control
- **Confirmation Bias:** The tendency to seek out, favor or interpret information in a manner that confirms previously held beliefs
- **Priming:** The unconscious influence of external information on what we expect to be an independent decision

Implicit Association Test

- <https://implicit.harvard.edu/implicit/Study?tid=-1>



Tips for Eliminating Bias

- Avoid early hypotheses and recognize all possible outcomes.
- Obtain and consider all relevant information.
- Ask open-ended questions.
- Give the parties a meaningful opportunity to be heard and respond.
- Avoid making findings until all the evidence is gathered, including the question and answer phase.

Questions





DANNIS WOLIVER KELLEY

Attorneys at Law

SAN FRANCISCO

LONG BEACH

SAN DIEGO

SAN RAFAEL

CHICO

SACRAMENTO

SAN LUIS OBISPO

www.DWKesq.com



Jennifer Choi
Attorney
San Francisco
(415) 247-5654
jchoi@dwkesq.com



Chelsea Tibbs
Attorney
Sacramento
(916) 970-2016
ctibbs@dwkesq.com

A large, stylized, handwritten-style 'Thank you' in black ink, set against a light gray circular background.