

Title IX on the Nines: Lessons Learned from 2022

Melinda Kaufmann, Esq.
and
Gwaina Wauldon, Esq.

January 9, 2023

Top 5 Mistakes Made In Processing Title IX Complaints

Not Properly Training Your Staff

Title IX Coordinators, Deputy Title IX Coordinators, Interim Title IX Coordinators, Investigators, Decision-Makers, and any person who facilitates an informal resolution process must receive training on the following:

1. Definitions of sex discrimination and sexual harassment;
2. The scope of the District's or Institution's education program and activity;
3. How to conduct an investigation and grievance process including appeals and informal resolution processes, as applicable;
4. How to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias.

- Bias occurs when it is proven that the Title IX Coordinators, Deputy Title IX Coordinator(s), Investigator(s), and/or Decision-Maker(s) demonstrate actual bias, rather than the appearance of bias.
- Actual bias includes, but is not limited to, demonstrated personal animus against the Respondent or the Complainant and/or prejudice of the facts at issue in the investigation.
- A conflict of interest occurs when it is proven that the Title IX Coordinators, Deputy Title IX Coordinator(s), Investigator(s), and/or Decision-Maker(s) have personal, financial and/or familial interests that affected the outcome of the investigation.

- Investigators and Decision-Makers shall also receive training on:
 1. Issues of relevance to create an investigative report that fairly summarizes relevant evidence;
 2. Preponderance of evidence as burden of proof.

- Decision-Makers shall also receive training on:
 - Issues of relevance of questions and evidence, including when questions and evidence about the Complainant's sexual predisposition or prior sexual behavior are not relevant.

- Your District or Institution should also periodically provide training to **ALL EMPLOYEES** on the topic of Title IX, which shall include but not be limited to when reports of sex discrimination and/or sexual harassment **MUST** be made.

- Training materials must not rely on sex stereotypes and must promote impartial investigations and adjudications of formal complaints of sexual harassment.
- Training materials shall be made publicly available on your website.

Not Determining Up Front Whether a Complaint Falls Under Title IX

Definition of Sexual Harassment Under the Title IX Regulations

- Conduct ***on the basis of sex*** that satisfies one of the following:
 - An employee of the institution conditioning the provision of an aid, benefit, or service on the individual's participation in unwelcome sexual conduct (*quid pro quo*);
 - 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 institution's education program or activity (*hostile education environment*); **OR**
 - sexual assault, dating violence, domestic violence or stalking.

If conduct does not fall into one of these categories, it is not prohibited by Title IX (although it may be prohibited by a different policy or rule)

Definition of Sexual Harassment Under the Title IX Regulations

- Per the Regulations, Title IX only applies to conduct that occurs in a program or activity over which the institution exerts substantial control over both the respondent and the context.
- Does not apply if the conduct occurred against a person outside the United States.

Does It Fall Under Title IX?

- Did the conduct occur in a program or activity over which the institution exerts substantial control over **both** the respondent and the situation?
- Is there an allegation that an employee conditioned the provision of an aid, benefit or service on the individual's participation in unwanted sexual conduct?
- Is there an allegation of conduct on the basis of sex that was so **severe, pervasive AND objectively offensive** that it effectively denied the person equal access to the institution's education programs or activities?
- Is there an allegation of sexual assault, dating violence, domestic violence or stalking?

Does It Fall Under Title IX?

If the answer to ANY of the questions on the prior slide is YES

STOP

Title IX applies and **all of the due process requirements under Title IX must be followed.**

If the answer to ALL of the questions on the prior slide is NO

Title IX does not apply, and you can process the complaint under other applicable policies such as your non-Title IX discrimination/harassment policies or other code of conduct provisions.

- The Title IX Coordinator makes the initial determination as to whether the complaint falls within the confines of Title IX

- The complaint **MUST** be dismissed at the outset if:
 - The conduct as alleged did not occur in the institution's education programs or activities;
 - The conduct did not occur against a person in the United States; and/or
 - The conduct would not constitute sexual harassment as defined even if proved.

- The Title IX Coordinator may dismiss the formal complaint (or any of the allegations therein) if at anytime during the investigation (or hearing):
 - A Complainant notifies the Title IX Coordinator in writing that the Complainant would like to withdraw the formal complaint or any allegations therein;
 - The Respondent is no longer enrolled or employed by the institution; or
 - Specific circumstances prevent the institution from gathering evidence sufficient to reach a determination as to the formal complaint or allegations therein.

- Upon dismissal, the institution must promptly send written notice of the dismissal and reasons simultaneously to the parties.

Not Properly Identifying the Alleged Title IX Violations and/or Other Code Violations

Identification Of The Complaint

- A Title IX investigator can only investigate what is identified in the notice of allegations.
- Imprecise identification of the allegations may result in an inadequate investigation.
- If any other claims come up during the investigation, the respondent has the right to have a new notice of allegations provided so the respondent is apprised of all the accusations.
- Improperly identifying the alleged policy/Title IX violation, therefore, can delay the investigation process or result in an incomplete investigation.

Failing to Adequately Communicate and Update the Complainant and Respondent During the Grievance Process

- Failing to properly explain the Title IX process at the start.
 - Including failure to explain the provisions regarding sharing of evidence with all parties, and
 - Failing to explain how long the process is expected to take.

- Failing to adequately discuss needed/desired supportive measures.
 - Failing to follow up to ensure supportive measures are in place and are working.

- Failing to adequately update the parties on the investigation.
 - Especially to the extent that there are any unexpected delays or other changes in the process.

- It is important to document everything that occurs during a Title IX investigation.
- The Title IX Coordinator must document at a minimum:
 - Measures taken to restore or preserve equal access to the institution’s education program or activity
 - The documentation should be sufficient to show that the response was not deliberately indifferent
 - Document all supportive measures offered
 - Document which, if any, were accepted
 - If supportive measures are not provided, must document why they were not provided
- The Investigator must document all steps of the investigation.

What must be kept on file?

- The Formal Complaint.
 - Keep each investigation file for at least 7 years,
 - Including the disciplinary sanctions, if any, and
 - Including remedies and any supportive measures provided.
- Records of any appeals and the results of the appeal.
- Records of any informal resolution and the results therefrom.
- All materials used to train Title IX Coordinators, Deputy Title IX Coordinators, Investigators, Decision-Makers, and any person who facilitates an informal resolution process.
- Records of any actions, including any supportive measures, taken to address known instances of sexual harassment whether or not a formal complaint is filed.

Providing Inadequate Supportive Measures

What Are Supportive Measures?

- Supportive measures must be offered to both the Complainant and the Respondent.
- Supportive measures are meant to be non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, and without fee or charge to the Complainant or the Respondent before or after the filing of a formal complaint or where no formal complaint has been filed.
- They must be done without unreasonably burdening the other party.
- You must maintain as confidential any supportive measures provided to the parties to the extent that maintaining such confidentiality would not impair the ability of the institution to provide the supportive measures.
- The Title IX Coordinator is responsible for coordinating the effective implementation of supportive measures.

No “One Size Fits All” Approach

- Supportive measures should be individualized based on the situation.
 - Supportive measures may include counseling, extensions of deadlines or other course-related adjustments, modifications of work or class schedules, campus escort services, mutual restrictions on contact between the parties, changes in work or housing locations, leaves of absence, increased security and monitoring of certain areas of the campus, and other similar measures.

1. If you have not already done so for this year, identify your Title IX Coordinator(s), Deputy Title IX Coordinator(s), Investigator(s), Decision-Maker(s) and Appeal Decision-Makers.
2. Ensure that all personnel assigned to each of these roles is fully trained and that you have posted the training materials on your website.
3. Ensure that your entire staff is trained at a minimum on the definition of sexual harassment under Title IX, how to recognize sexual harassment, who the Title IX Coordinator is and how to report sexual harassment that they witness.
4. Ensure the Title IX Coordinator contact information is posted on your website and is up to date.
5. Ensure that your Title IX policies and procedures are up to date.

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

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.

Contact Information



Melinda B. Kaufmann

Pullman & Comley, LLC
90 State House Square
Hartford, CT 06103
Tel: 860.424.4390
Fax: 860.424.4370
Email: mkaufmann@pullcom.com



Gwaina D. Wauldon

Pullman & Comley, LLC
90 State House Square
Hartford, CT 06103
Tel: 860.424.4383
Fax: 860.424.4370
Email: gwauldon@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 | STAMFORD | WATERBURY | WESTPORT | WHITE PLAINS

www.pullcom.com