

Title IX Training:

IMPORTANT BACKGROUND FOR FACILITATORS OF INFORMAL RESOLUTIONS OF FORMAL COMPLAINTS OF TITLE IX SEXUAL HARASSMENT

(MODULE 3, PART 1 OF 2)

© 2020 Wisconsin Association of School Boards, Inc
and Boardman & Clark LLP

1

Overview

Title IX is a federal law that prohibits sex discrimination (including sexual harassment) in a school district's education programs, activities, and operations. It protects students, employees, and other persons.

New U.S. Department of Education regulations have changed the way that school districts must respond to allegations of **sexual harassment**. The changes place a premium on a school district's ability to:

1. Recognize possible incidents, reports, and complaints of conduct that could constitute sexual harassment under Title IX; and
2. Implement a response that complies with Title IX, other applicable laws, and district policy.

When there is a documented **formal complaint** that alleges Title IX sexual harassment, the federal regulations require the school district to resolve the matter through a "**grievance process**," which can involve either very formal investigation, decision-making, and appeal steps, or an "**informal resolution process**." If the local grievance process allows for informal resolution, that is where the role of a **facilitator** comes in.

2

Overview

At the end of this part of the training module, you should be able to answer the following questions about sexual harassment under Title IX:

- ▶ How does Title IX uniquely define sexual harassment?
- ▶ What is the scope of an "education program or activity" under Title IX, including for purposes of an allegation of Title IX sexual harassment?
- ▶ What is the role of the district's Title IX Coordinator(s)?
- ▶ What obligations does a school district have to respond to actual knowledge of possible Title IX sexual harassment?
 - ▶ What are "supportive measures" under Title IX?
 - ▶ How does Title IX restrict a school district's ability to impose disciplinary consequences for sexual harassment?
 - ▶ What are the main elements of a "grievance process" that is used to respond to formal complaints of Title IX sexual harassment?
- ▶ What do the Title IX regulations require in terms of fairness to the parties and avoiding conflicts of interest and bias?

3

Title IX: The big picture

- ▶ Title IX is a federal law that prohibits the school district from unlawfully discriminating against any person on the basis of sex in any **education program or activity** that the district operates.
- ▶ Title IX extends to protect students, employees, and other persons from prohibited **sex discrimination**, including **sexual harassment**.
 - ▶ Examples of "sex discrimination" covered by Title IX that are **not** a type of "sexual harassment":
 - ▶ Providing inferior opportunities, facilities or funding for school-sponsored athletics, based on sex.
 - ▶ Refusing to consider a qualified female applicant for a custodial/maintenance position.
- ▶ Title IX is one of several different laws that prohibit sex discrimination (including sexual harassment) in schools.
- ▶ Conduct that constitutes unlawful sexual harassment will also violate school district policies and may be expressly identified in student codes of conduct and/or employee handbooks.

4

Why did Title IX start to receive renewed attention in 2020?

- ▶ The U.S. Department of Education, which is responsible for the administration and enforcement of Title IX, issued new regulations under Title IX that took effect on August 14, 2020. The Title IX regulations have the force of law.
- ▶ Examples of some of the significant changes made by the 2020 amendments to the Title IX regulations include the following:
 - ▶ The new regulations create a **definition of sexual harassment** that is unique to Title IX.
 - ▶ The new regulations change the way that **school districts are required to respond to alleged Title IX sexual harassment**, including changing the procedures that school districts will use to investigate and make decisions about such allegations.
 - ▶ The new regulations are intended to promote **equitable treatment** and to protect the rights of **both** alleged victims of Title IX sexual harassment, as well as alleged perpetrators of Title IX sexual harassment.

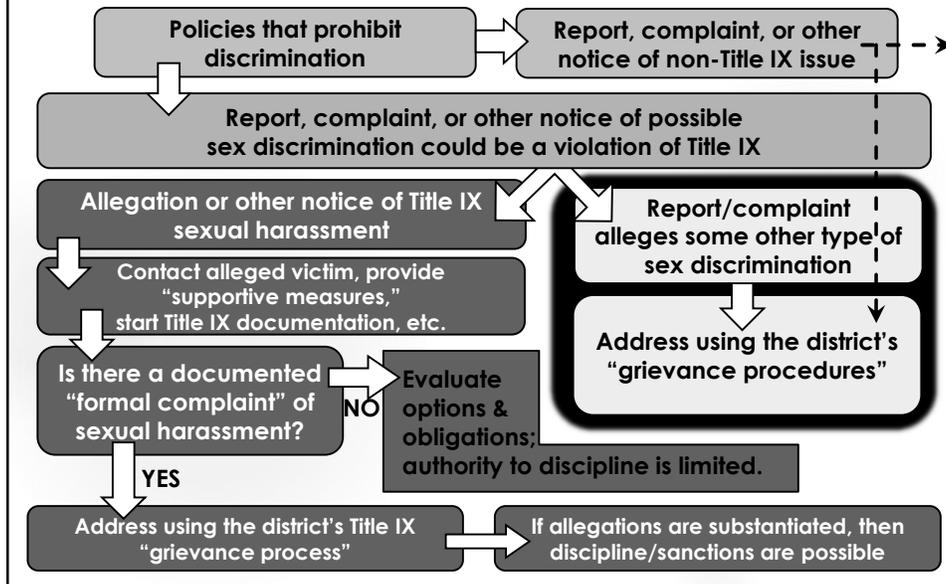
5

Every school district has at least one Title IX Coordinator

- ▶ Every school district must designate **at least one employee** to coordinate the district's efforts to comply with its responsibilities under Title IX and the Title IX regulations. The employee must be referred to as the "**Title IX Coordinator**."
- ▶ A Title IX Coordinator's responsibilities include:
 - ▶ Addressing questions that students, parents, employees, and others may have about the application of Title IX to the school district.
 - ▶ Receiving reports and complaints of possible sex discrimination, including any reports or documented **formal complaints** of sexual harassment.
 - ▶ Playing an active and important role in the district's response to reports, complaints, or other notices of Title IX sexual harassment.
- ▶ Every school district employee should be able to immediately identify the district's Title IX Coordinator(s). Facilitators of informal resolutions will likely have regular interaction with the school district's Title IX Coordinator.

6

The Title IX regulations: An (over) simplification ...



7

How does Title IX define sexual harassment?

Under Title IX, sexual harassment means conduct **on the basis of sex** that occurs in any **education program or activity** of the school district and that also satisfies **one or more** of the following:

1. 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;
2. An employee of the district has conditioned the provision of an aid, benefit, or service of the district on an individual's participation in unwelcome sexual conduct; **OR**
3. The conduct is any of the following:
 - a. "sexual assault," as defined in 20 U.S.C. 1092(f)(6)(A)(v);
 - b. "stalking," as defined in 34 U.S.C. 12291(a)(30);
 - c. "dating violence," as defined in 34 U.S.C. 12291(a)(10); **or**
 - d. "domestic violence," as defined in 34 U.S.C. 12291(a)(8).

8

What is the scope of a school district's "education program or activity"?

- ▶ Title IX generally takes a broad view of the term "education program or activity" in a manner that encompasses all aspects of school district operations, including district employment.
- ▶ Specifically with respect to sexual harassment, the Title IX regulations indicate that "education program or activity" includes locations, events, or circumstances in the United States over which the school district exercised substantial control over both:
 1. the alleged perpetrator of the conduct; and
 2. the context in which the relevant conduct occurs.
- ▶ Interpretation: There has to be a nexus, or connection, to the school district's scope of authority to establish and enforce conduct rules/expectations for the situation. The scope is **not** limited to school district property and would also **not** be strictly limited to school hours or to an employee's work hours.

9

How does Title IX define sexual harassment?

Under Title IX, sexual harassment means conduct **on the basis of sex** that occurs in any **education program or activity** of the school district and that also satisfies **one or more** of the following:

1. 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;
2. An employee of the district has conditioned the provision of an aid, benefit, or service of the district on an individual's participation in unwelcome sexual conduct; **OR**
3. The conduct is any of the following:
 - a. "sexual assault," as defined in 20 U.S.C. 1092(f)(6)(A)(v);
 - b. "stalking," as defined in 34 U.S.C. 12291(a)(30);
 - c. "dating violence," as defined in 34 U.S.C. 12291(a)(10); **or**
 - d. "domestic violence," as defined in 34 U.S.C. 12291(a)(8).

10

What is the significance of Title IX's unique definition of sexual harassment?

- ▶ A school district is required to implement a full **Title IX response** to allegations of sexual harassment only when the allegations reflect conduct that, if proven, could constitute a violation of Title IX's definition of sexual harassment.
- ▶ Particularly with respect to allegations that someone's conduct has created an unlawful "hostile environment," the Title IX definition of sexual harassment generally requires conduct that is **somewhat** more serious/substantial than is required under other legal standards. In other words, it can **sometimes** be harder to allege and prove a "hostile environment" claim under Title IX than under other legal standards.
- ▶ Title IX's focus on relatively more serious conduct means that some reports or allegations of possible sexual harassment will be processed under the district's Title IX procedures, and some will not. When Title IX does **not** apply, the district may still assess the conduct and process the report under other legal standards and/or under the district's own policies or rules.

11

The comparatively narrow definition of "hostile environment" sexual harassment under Title IX (students)

Conduct Expectations in Local Policies and Handbooks

Ch. PI 9 (Wis. Admin. Code)

Behavior towards pupils based, in whole or in part, on sex ... [or] sexual orientation ... which substantially interferes with a pupil's school performance **or** creates an intimidating, hostile **or** offensive school environment

Title IX:

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

12

What is the significance of Title IX's unique definition of sexual harassment?

- ▶ Title IX requires a screening process for allegations of sexual harassment:
 - ▶ Facilitators of informal resolutions within a Title IX grievance process will only be involved where there are allegations that, if proven, could plausibly constitute sexual harassment **as defined by Title IX**.
 - ▶ If the allegations presented in a formal complaint, even if proven, would not constitute sexual harassment under Title IX, then the complaint must be dismissed *for purposes of Title IX and the Title IX grievance process*.
 - ▶ Allegations dismissed for purposes of Title IX may still be addressed as potential *non-Title IX sexual harassment*, or as some other violation of a school district's rules and conduct expectations.
- ▶ To the extent a person is a victim of sexual harassment, or is accused of alleged sexual harassment, it is important for that person to know that special rights and procedures apply when the allegations assert a possible violation of Title IX.

13

What is the significance of Title IX's unique definition of sexual harassment?

- ▶ Title IX's focus on relatively more serious conduct has direct implications for the extent to which using an informal resolution process (and having any role for a facilitator) will be:
 - ▶ Desirable/practical from the perspective of **the school district**. (Will the district even offer informal resolution?)
 - ▶ Desirable from the perspective of **the parties**. (The alleged victim and the alleged perpetrator of the sexual harassment must voluntarily consent to attempting an informal resolution.)
 - ▶ Lawful.
- ▶ Through policy or through guidelines developed to implement a policy, a school district could significantly restrict the types of sexual harassment allegations for which the district may consider offering informal resolution processes.

14

How is the district required to respond to “actual knowledge” of sexual harassment under Title IX?

- ▶ For any individual who is alleged to be the **victim** of conduct that could constitute sexual harassment under Title IX (i.e., a Title IX “**complainant**”), the district is required to take steps such as the following:
 - ▶ The Title IX Coordinator must promptly contact the complainant to discuss the availability of “**supportive measures**.”
 - ▶ The Title IX Coordinator must inform the complainant of the option of filing a formal complaint and explain the process for filing a **formal complaint**. (A formal complaint needs to take the form of a document or electronic submission and must meet other requirements.)
 - ▶ The district must offer appropriate “**supportive measures**” regardless of whether the complainant files a formal complaint.
 - ▶ If the complainant files a **formal complaint** of Title IX sexual harassment, then the school district must investigate the allegations using its written Title IX “**grievance process**.”

15

What are “supportive measures”?

- ▶ “**Supportive measures**” are 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. The purpose of supportive measures is to restore or preserve equal access to the district’s education program or activity without unreasonably burdening the other party. Two possible examples are (1) modifications to work or class schedules, and (2) issuing mutual a “no contact” directive.
- ▶ The Title IX Coordinator is responsible for coordinating the effective implementation of supportive measures.
- ▶ It will normally be important for a facilitator of an informal resolution process to be aware of the supportive measures that have been offered and implemented. Some supportive measures might be continued, ended, or modified as part of a resolution.

16

How is the district required to respond to “actual knowledge” of sexual harassment under Title IX?

- ▶ For any individual who has been **reported to be the perpetrator** of conduct that could constitute sexual harassment under Title IX (i.e., a Title IX “**respondent**”), the district's obligations include the following:
 - ▶ The district must ensure that any “supportive measures” do not unreasonably burden any party.
 - ▶ Before the district imposes any disciplinary sanctions against a respondent, the district must follow the district's formal Title IX **grievance process** and make a determination of responsibility.
 - ▶ The district must apply 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 Title IX regulations make limited allowances for certain “**emergency removals**” of a respondent and for the use of administrative leave for a respondent who is an employee.

17

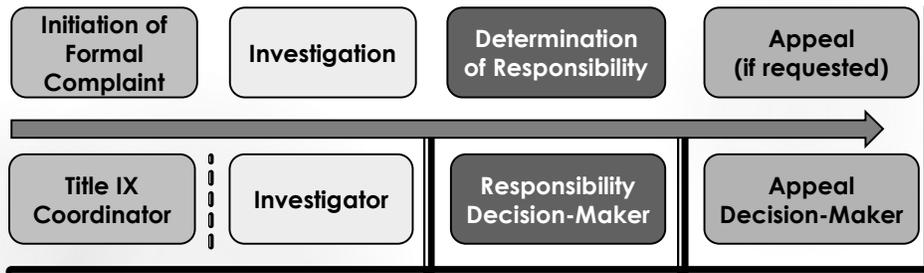
What are **formal complaints** of sexual harassment under Title IX?

A “formal complaint” is a **document filed by a complainant or signed by the Title IX Coordinator** alleging sexual harassment against a respondent and requesting that the district investigate the allegation(s) of sexual harassment.

- ▶ As used in the definition, the phrase “document filed by a complainant” means a document or electronic submission (such as by electronic mail) that contains the complainant's physical or digital signature, or otherwise indicates that the complainant is the person filing the formal complaint.
- ▶ At the time of filing a formal complaint, the complainant must be participating in or attempting to participate in the relevant education program or activity of the district.
- ▶ The authority of the Title IX Coordinator to “sign” a formal complaint *on behalf of the district* is available for situations where a complainant is not eligible to file the complaint and for certain situations where the complainant is unwilling to file a formal complaint.

18

Steps and roles in the **grievance process** for formal complaints of Title IX sexual harassment



- The investigator, responsibility decision-maker, and appeal decision-maker must all be **different** people.
- The Title IX Coordinator may not serve as any type of decision-maker, but may be an investigator.

19

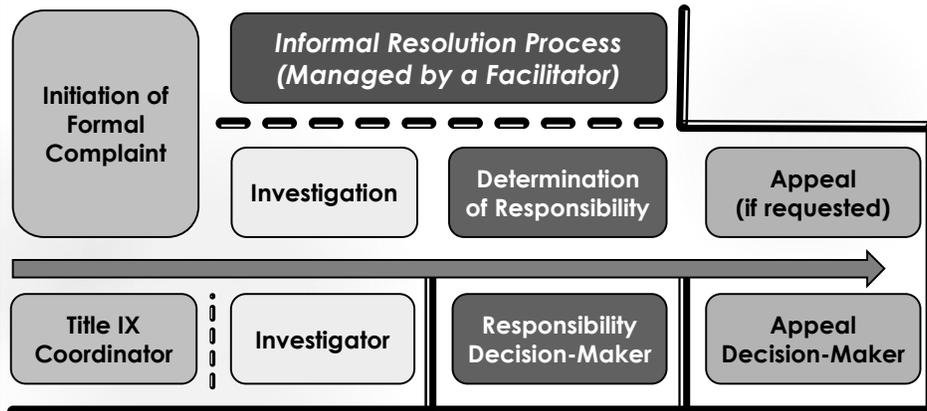
How different is the Title IX “grievance process” from a school district’s typical pre-disciplinary investigation?

Very different! A few examples:

- ▶ The person who determines whether a respondent is responsible for misconduct must be someone other than the person who conducted the investigation to develop the relevant facts/evidence. Both of these individuals must have completed training that is mandated by Title IX.
- ▶ Certain written notices must be provided to the parties, including notice of the formal complaint and advance written notice of any investigative interview.
- ▶ At the close of the investigation, the investigator will have to provide the parties with a copy of **all** material evidence gathered during the investigation and provide the parties with an opportunity to respond to the evidence.
- ▶ Before the matter is addressed by the “decision-maker,” the investigator must prepare a highly-structured investigative report that must be provided to the parties for comment.
- ▶ Before making a decision, the decision-maker must offer the parties an opportunity to identify questions for the other party or for a witness.

20

Steps and roles in the **grievance process** for formal complaints of Title IX sexual harassment



- **Questions:** Can a Title IX Coordinator serve as a facilitator? Can a facilitator perform any of the other roles in the same complaint case?

21

Some highlights of the facilitated informal resolution process

- ▶ Under the regulations, an informal resolution process is any process, such as mediation, that attempts to resolve a formal complaint of Title IX sexual harassment and that does **not** involve a full investigation and adjudication under the school district's grievance process.
- ▶ Informal resolution may not be offered unless a formal complaint has been filed. After a formal complaint has been filed, informal resolution may be offered any time prior to reaching a determination regarding responsibility under the steps of the grievance process.
- ▶ The parties must provide their voluntary, written consent to participate in informal resolution. A party may withdraw from the informal resolution process at any time prior to agreeing to a resolution.
- ▶ Informal resolution may **NOT** be offered to resolve allegations that an employee sexually harassed a student.
- ▶ The person who facilitates the informal resolution process must be trained as required by the Title IX regulations.

22

A facilitator must have detailed knowledge of the local Title IX grievance process

- ▶ Before commencing any informal resolution process (and, ideally, before agreeing to serve as a facilitator in any complaint case), a facilitator should obtain and carefully read the applicable grievance process. It will cover many important items, including:
 - ▶ Timelines/deadlines applicable to informal resolution processes.
 - ▶ Potential local restrictions, rules, or guidelines that relate specifically to the informal resolution process and the role and authority of a facilitator.
 - ▶ The standard of proof that the school district applies to allegations of Title IX sexual harassment under its grievance process.
- ▶ The grievance process will reiterate important mandates found in the Title IX regulations, including the 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.
- ▶ Contact the applicable school district's Title IX Coordinator with any questions about that district's written grievance process or your role as a facilitator.

23

The Title IX regulations require facilitators (and all other roles defined in the grievance process) to serve **impartially**

- ▶ Facilitators must avoid any prejudgment of the facts at issue.
- ▶ To the extent applicable to the process and allegations, facilitators:
 - ▶ Must engage in an objective analysis of relevant evidence.
 - ▶ Must not judge credibility based on a person's status as a complainant, respondent, or witness.
- ▶ Facilitators must avoid conflicts of interest.
 - ▶ Conflicts could arise, for example, due to (1) involvement in an incident that forms the basis of the allegations; (2) familial or close personal relationships, or other significant prior history, with any of the parties; or (3) certain supervisor-subordinate relationships.
 - ▶ A person assigned or being considered as a facilitator should self-disclose any potential conflict that may not be readily apparent and allow the district to determine if the potential conflict is relevant to performing the role.

24

The Title IX regulations require facilitators (and all other roles defined in the grievance process) to serve **impartially**

- ▶ Facilitators must avoid bias, including:
 - ▶ Bias for or against complainants or respondents, generally; and
 - ▶ Bias for or against any individual complainant or respondent.
- ▶ Consistent with the basic requirements of any Title IX grievance process, the facilitator must treat complainants and respondents **equitably** during the attempt to reach an informal resolution. For example, if the facilitator permits one party to provide a witness statement or other evidence, the facilitator is likely required to provide an equivalent opportunity to all other parties.
- ▶ Facilitators are expected to avoid applying any sex-based stereotypes to their analysis of the matter.
- ▶ If an issue with bias or any conflict of interest arises during the informal resolution process, bring the issue to the attention of the Title IX Coordinator or District Administrator.

25

Sexual harassment incidents can overlap with other important issues and responsibilities

Examples:

- ▶ Some sexual harassment scenarios involving students who are minors can also constitute **child abuse** (or suspected child abuse) that is subject to mandatory reporting to appropriate authorities.
- ▶ Some sexual harassment scenarios can involve a **threat of school violence** that is subject to mandatory reporting to law enforcement.
- ▶ Some sexual harassment scenarios may involve a need to consider whether an administrator needs to make a **report of educator misconduct** to DPI (i.e., for purposes of a licensing-related investigation).

26

What else is there to know about Title IX?

Facilitators are expected to adhere to the relevant Title IX **confidentiality requirements**, including the following:

- ▶ With limited exceptions (such as to the extent disclosure is necessary to comply with and carry out the purpose of Title IX and its regulations), Title IX requires the district to keep confidential the identity of any individual who makes a report or complaint of sex discrimination, any alleged victim of sexual harassment, any person who has been reported to be the perpetrator of sex discrimination (including sexual harassment) and any witness.
Note: This does **not** prevent **intra-district** disclosure of such information based on legitimate educational or supervisory/managerial interests.
- ▶ The school district 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 district to provide the supportive measures.

27

What else is there to know about Title IX?

Title IX (similar to several other anti-discrimination laws) prohibits **retaliation**.

- ▶ It is unlawful for either the school district or any other person to intimidate, threaten, coerce, or discriminate against any individual:
 - ▶ For the purpose of interfering with any right or privilege secured by Title IX or the Title IX regulations, or
 - ▶ Because the individual has made a report or complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing under the Title IX regulations.
- ▶ The restrictions against retaliatory conduct extend to **any person**—not just to persons who are assigned to act on behalf of the district.
- ▶ The district will accept and process reports of Title IX retaliation using the grievance procedures that the district has established for general complaints of sex discrimination under Title IX.

28

Some next steps...

- ▶ **Participate in Part 2 of this training module in order to complete the module.**
- ▶ If you are employed by a school district, read through the written policies and procedures that your district has revised in light of the 2020 Title IX regulations, paying special attention to:
 - ▶ The procedures the district has established for reporting discrimination/harassment and for filing a formal complaint of Title IX sexual harassment.
 - ▶ The district's "grievance procedures" for responding to reports or complaints of unlawful discrimination (including sex discrimination).
 - ▶ The district's "grievance process" for investigating and resolving documented formal complaints of Title IX sexual harassment.
- ▶ If you would like additional general information about sexual harassment under the 2020 Title IX regulations, the school district that is providing you with this training has access to additional Title IX training resources that you may review.

29

© 2020 Wisconsin Association of School Boards, Inc and Boardman & Clark LLP

These training materials, including the comments of all speakers who present the materials, do not constitute legal advice and should not be relied upon or used as legal advice. The materials present information and commentary to facilitate a general understanding of the topics that are addressed but are not necessarily an exhaustive treatment of any legal or policy issues. If a school district requires legal advice regarding any topic, issue, situation or incident, the advice should be obtained from the school district's designated legal counsel.

30