

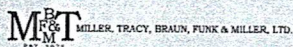
UNDERSTANDING AND IMPLEMENTING THE NEW TITLE IX REGULATIONS

Day 1 of 2

November 5, 2020

WELCOME!

- We will begin the workshop at 1:30pm.
- I will be taking questions throughout the workshop via the Chat Box – and I will also be posting the links to the handouts and materials in the Chat Box once we begin.
- Participants must complete both Sessions to complete the required training.

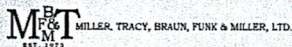


© Brandon K. Wright

1

UNDERSTANDING AND IMPLEMENTING THE NEW TITLE IX REGULATIONS

ROLES, RESPONSIBILITIES, AND LEGAL COMPLIANCE



© Brandon K. Wright

2

SEXUAL HARASSMENT

■ *What does Title IX really mean?*



It isn't just sports...

MT
MILLER, TRACY, BRAUN, FUNK & MILLER, LTD.
EST. 1973

© Brandon K. Wright

3

TITLE IX

SEXUAL HARASSMENT, HISTORY OF TITLE IX, AND
RECENT LITIGATION

MT
MILLER, TRACY, BRAUN, FUNK & MILLER, LTD.
EST. 1973

© Brandon K. Wright

4

TITLE IX

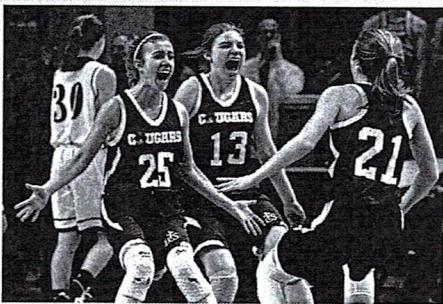
- Title IX Regulations (Published May 6, 2020; Effective August 14, 2020) regarding sex discrimination, sexual harassment, and sexual assault.
 - Both Employee and Student Complaints

MT MILLER, TRACY, BRAUN, FUNK & MILLER, LTD.
EST. 1973

©BKW/DJB. All rights reserved

SEXUAL HARASSMENT

■ ***What does Title IX really mean?***



It isn't just sports...

© Brandon K. Wright

MT MILLER, TRACY, BRAUN, FUNK & MILLER, LTD.
EST. 1973

SEXUAL HARASSMENT

Title IX of the Education Amendments of 1972 protects people from discrimination based on sex in education programs or activities that receive Federal financial assistance. 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.



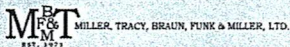
© Brandon K. Wright

7

SEXUAL HARASSMENT

#MeToo

The national movement to highlight sexual harassment, abuse, and misconduct.



© Brandon K. Wright

8

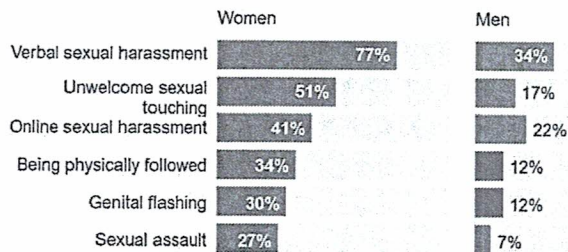
SEXUAL HARASSMENT

- A 2018 Survey demonstrated that 81% of women and 43% of men had experienced some form of sexual harassment, including 38% of women who have experienced sexual harassment in the workplace.

SEXUAL HARASSMENT

What Happened, and to Whom

Percent who say they have experienced:



SEXUAL HARASSMENT

- ❖ Nearly 50% of grade 7-12 students reported experiencing sexual harassment since 2011.
- ❖ Yet, OCR noted in 2014 that 67% of school districts had zero records of allegations of sexual harassment.

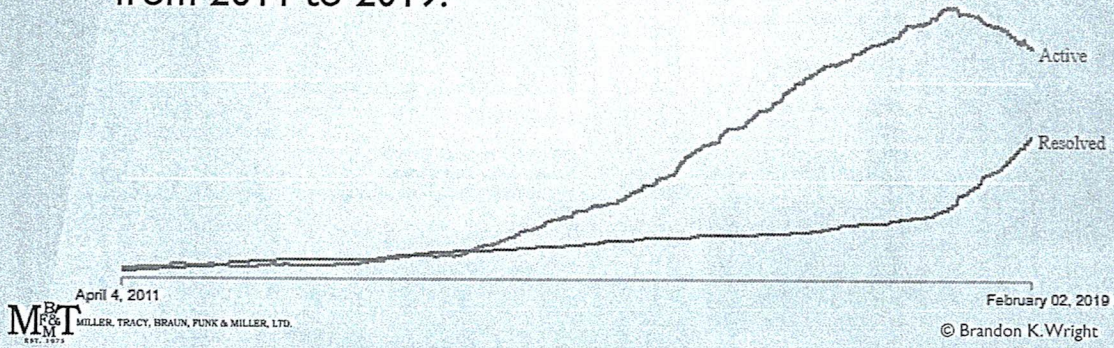
SEXUAL HARASSMENT

Why people don't report....

- | | |
|---|---|
| <ul style="list-style-type: none"> ▪ Fear of retaliation ▪ Fear of humiliation ▪ Fear of being labeled a trouble-maker ▪ Advised: Ignore it and it will go away ▪ Denial: You're overreacting ▪ Told they should be flattered by it | <ul style="list-style-type: none"> ▪ Blamed for victim's own behavior ▪ Fear of being ostracized ▪ Fear of reaction of spouse, significant other, or friends ▪ Fear of career damage ▪ Unaware of rights |
|---|---|

SEXUAL HARASSMENT

Increase in Ed Department Open Title IX Investigations from 2011 to 2019:



SEXUAL HARASSMENT

K-12 Title IX sexual harassment is an emerging trend.

Colleges and universities have struggled with enforcing the Title IX requirements over the last decade.

What lessons can we learn?

TITLE IX IN THE #METOO ERA

MT
MILLER, TRACY, BRAUN, FUNK & MILLER, LTD.
EST. 1975

© Brandon K. Wright

15

LITIGATION RELATED TO TITLE IX INVESTIGATIONS

- *Doe v. Oberlin College (6th Cir. 2020)*:
- John Doe sued Oberlin College under Title IX after being expelled for sexual assault, and when his Title IX claim was dismissed by the trial court, he appealed to the Sixth Circuit. The Sixth Circuit reversed the trial court, holding that, “for any number of reasons,” Mr. Doe had adequately pled that his expulsion was due to unlawful gender discrimination.
- **The investigative procedure was unfair because the investigator was also the decision maker.**

MT
MILLER, TRACY, BRAUN, FUNK & MILLER, LTD.
EST. 1975

© Brandon K. Wright

16

LITIGATION RELATED TO TITLE IX INVESTIGATIONS

- *Doe v. Purdue University* (7th Cir. 2019):
- After finding John Doe guilty of sexual violence against Jane Doe, Purdue University suspended him for an academic year and imposed conditions on his readmission. As a result of that decision, John was expelled from the Navy ROTC program, which terminated both his ROTC scholarship and plan to pursue a career in the Navy.
- **Procedures denied a fair process.**

LITIGATION RELATED TO TITLE IX INVESTIGATIONS

- *Doe v. Purdue University* (7th Cir. 2019):
- John sued the university and several of its officials, asserting two basic claims. First, he argued that they had violated the Fourteenth Amendment by using constitutionally flawed procedures to determine his guilt or innocence. Second, he argued that Purdue had violated Title IX by imposing a punishment infected by sex bias. The 7th Circuit held that John adequately alleged violations of both the Fourteenth Amendment and Title IX.
- **There were sufficient allegations of gender bias for John to proceed with his claims.**

LEGAL FRAMEWORK

- “The *Gebser/Davis* framework is the appropriate starting point for ensuring that the Department’s Title IX regulations recognize the conditions under which a school’s response to sexual harassment violates Title IX. Whether the available remedy is money damages (in private litigation) or termination of Federal financial assistance (in administrative enforcement), the Department’s regulations must acknowledge that when a school itself commits sex discrimination, the school has violated Title IX.”

LEGAL FRAMEWORK

- The regulations build on and modify the framework set out in Supreme Court decisions, *Gebser v. Lago Vista Independent School District* (1998) and *Davis v. Monroe County Board of Education* (1999), which together establish a three-part framework for analyzing when a school’s response to sexual harassment indicates that the school itself engaged in intentional discrimination (the “*Gebser/Davis* framework”).
- **Specifically, the *Gebser/Davis* framework considers:**
 - (1) the definition of actionable sexual harassment;
 - (2) the school’s “actual knowledge” of such harassment; and
 - (3) the school’s “deliberate indifference” to the report of harassment.

THE BALANCING ACT

- The Title IX regulations require school districts to balance the rights of students/employees who are victims of sexual harassment (to stop, prevent, and remedy the effects of harassment), with the rights of accused students/employees to ensure a fair process.

DUE PROCESS

- Due process concerns prompted these Title IX regulations, so it is important to note on a very basic level, due process requires:
 - Notice
 - Opportunity to present evidence
 - Opportunity to hear evidence against (and to cross-examine it)
 - Opportunity for representation
 - Requirement for unbiased decision to be based upon the record of evidence

PRESS POLICY UPDATES

- PRESS released policy updates on August 7, including:
- *New 2:265 – Title IX Sexual Harassment Grievance Procedure*
- *New 2:265-API – Title IX Sexual Harassment Response*
- *New 2:265-AP2 – Formal Complaint Grievance Process*
- *New 2:265-E1 – Title IX Glossary*
- *Updates to 2:260, 5:20, 7:20*

23

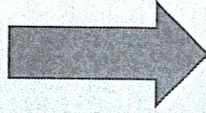
TERMS USED IN REGULATIONS

- Respondent = Accused
- Complainant = Victim/Accuser
- Recipient = School receiving federal funds

24

TERMS USED IN REGULATIONS

- Actual Knowledge
- Formal Complaint
- Supportive Measures
- Informal Resolution
- Complaint Grievance Process



Much, much more on these as we proceed...

TITLE IX

OVERVIEW OF THE ROLES OF TITLE IX PERSONNEL

TITLE IX PERSONNEL

- Title IX Coordinator
- Investigator(s)
- Initial Decision-Maker
- Appellate Decision-Maker
- Informal Resolution Facilitator

TITLE IX PERSONNEL

- **Title IX Coordinator**
- The Title IX Coordinator is the individual designated by the school district to coordinate compliance with Title IX, including overseeing all sex discrimination complaints and identifying and addressing any patterns or systematic problems that arise during the review of such complaints.

TITLE IX PERSONNEL

Title IX Coordinator is also responsible for:

- determining whether the complaint allegations are prohibited sexual misconduct, sexual assault, sexual violence, or stalking;
- appointing an investigator to conduct a formal investigation;
- ensuring reports and complaints are handled properly in a prompt and timely manner;
- informing students, employees, and witnesses of their rights during a formal investigation and what supportive measures are available to them;
- confirming that all parties have been notified of the investigation's conclusion and the right to, and procedures for, an appeal, if applicable;
- maintaining information and documentation related to the investigation in a secure manner.

TITLE IX PERSONNEL

The Investigator is the person that conducts the investigation once a formal complaint is filed.

- Conducts impartial interviews of the complainant, respondent, witnesses and other interested parties.
- Ensures the burden of proof is on the school and not the parties.
- Collects evidence such as, but not limited to, statements, documents, text messages, chats, video, audio and photographs.
- Prior to completion of the investigative report, sends to the Complainant, the Respondents and the Advisors the evidence collected so that they can inspect, review and provide comments.
- Prepares a written investigative report fairly summarizing the relevant evidence.
- Sends the investigative report to the Complainant, Respondent and the Decision-Maker.

TITLE IX PERSONNEL

- **Initial Decision-Maker**
- The Title IX Decision-Maker reviews the investigation report, provides parties with the opportunity to submit written questions to witnesses, and makes a determination and written decision of responsibility, remedies and discipline (if applicable).

31

TITLE IX PERSONNEL

- Under PRESS 2:265-AP2:
- “The Superintendent or designee acts as the **Initial Decision-Maker** for all Formal Title IX Sexual Harassment Complaints, unless it involves allegations against the Superintendent or designee or against a Board Member. In such cases, an outside consultant, e.g., an attorney or retired school administrator, acts as the Initial Decision-Maker.”

32

TITLE IX PERSONNEL

- **Appellate Decision-Maker**
- When an appeal is filed, the Appellate Decision-Maker reviews the investigation report, reviews the initial decision, and makes a determination and written decision of responsibility, remedies and discipline (if applicable).

33

TITLE IX PERSONNEL

- Under PRESS 2:265-AP2:
- **Appellate Decision-Maker** – An individual or group, e.g., a Board-appointed appeal examiner or the Board, which reviews an appeal of the Initial Decision-Maker's determination regarding responsibility or a dismissal of a Formal Title IX Sexual Harassment Complaint. The Appellate Decision-Maker cannot be the same person as the Initial Decision-Maker, the Investigator, or the Title IX Coordinator. The Appellate Decision-Maker must be free from conflicts of interest or bias against complainants and respondents generally or against an individual Complainant or Respondent, and must be trained to serve impartially.

34

TITLE IX PERSONNEL

- **Informal Resolution Facilitator**
- When the parties voluntarily agree in writing to participate in informal resolution, the facilitator works to resolve the allegations without the need for a full investigation and decision.

35

TITLE IX PERSONNEL

- **Deciding which role for which individual –**
- Can the Title IX Coordinator be an investigator?
 - *Yes, but not on a complaint where they facilitated informal resolution or have a conflict of interest.*
- Can the Title IX Coordinator be the Initial or Appellate Decision-Maker?
 - *No, and the Title IX Coordinator should be the subordinate of the decision-maker, and never the other way around.*

36

TITLE IX PERSONNEL

- **Deciding which role for which individual –**
- Can the Investigator facilitate informal resolution?
 - *No, not on the same complaint or where there may be a conflict of interest.*
- Can the Investigator be the Initial or Appellate Decision-Maker?
 - *No, and the Investigator must be the subordinate of the decision-maker, and never the other way around.*

TITLE IX PERSONNEL

- **Deciding which role for which individual –**
- Can the Decision-Maker facilitate informal resolution?
 - *No, not on the same complaint or where there may be a conflict of interest.*
- Can the Decision-Maker assist with the investigation?
 - *No, that is the separate responsibility of the Investigator.*

TITLE IX PERSONNEL

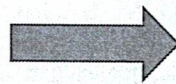
- **Deciding which role for which individual –**
- Who should be the Appellate Decision-Maker?
 - *Will your board be prepared and trained?*



More on appeals procedures later...


TITLE IX PERSONNEL

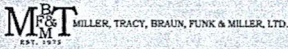
- Title IX Coordinator
- Investigator(s)
- Initial Decision-Maker
- Appellate Decision-Maker
- Informal Resolution Facilitator



**Who will fill these
roles in your
school district?**


TITLE IX PERSONNEL IN A LARGE DISTRICT SETTING

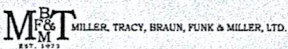
- Title IX Coordinator → Principal or Assistant Supt
- Investigator(s) → Principal, AP or Assistant Supt
- Initial Decision-Maker → Superintendent 
- Appellate Decision-Maker → AP or AS not serving as investigator
- Informal Resolution Facilitator → Principal



©BKW/DJB. All rights reserved

TITLE IX PERSONNEL IN A SMALL DISTRICT SETTING

- Title IX Coordinator → Probably Principal
- Investigator(s) → Probably Principal
- Initial Decision-Maker → Superintendent
- Appellate Decision-Maker → Trained Board, Retired Administrator, or Neighboring District Administrator
- Informal Resolution Facilitator → 



©BKW/DJB. All rights reserved

TITLE IX COORDINATOR

- The Title IX Coordinator is responsible for the overall coordination of compliance by the school district.

43

TITLE IX COORDINATOR

- Contact information for Title IX Coordinator (which includes: name or title, office address, e-mail address, and telephone number) must be provided to students, employees, applicants for admission and employment, parents or legal guardians of elementary and secondary school students, all unions.

44

TITLE IX COORDINATOR

- Contact information for Title IX Coordinator must also be prominently displayed on the school website.
- Schools should also publish the materials used to train Title IX Coordinators, investigators, decision-makers, and persons who facilitate informal resolutions on the school's website or be prepared to make materials available upon request for inspection by members of the public.
 - Be aware of this when hiring outside consultants for this training—the school will need to secure permission from the consultant to publish the training materials.

TITLE IX COORDINATOR

- Receives reports and formal complaints of Title IX Sexual Harassment.

TITLE IX COORDINATOR

- May initiate an investigation under their own signature without a formal complaint from the Complainant.

TITLE IX COORDINATOR

- Provides information to the Complainant and/or Respondent about the process.

TITLE IX COORDINATOR

- Evaluates requests for confidentiality and/or requests by Complainant to not to proceed with an investigation.

TITLE IX COORDINATOR

- Makes determination as to whether an allegation or complaint should be dismissed prior to investigation.

TITLE IX COORDINATOR

- Initiates and ensures that all formal complaints are investigated and adjudicated.

51

TITLE IX COORDINATOR

- Offers the Complainant and the Respondent the possibility of an informal resolution process (when applicable).

52

TITLE IX COORDINATOR

- Responsible for the effective implementation of supportive measures (in all cases) and remedies (after grievance process and determination by decision-maker).
 - “The Title IX Coordinator must serve as the point of contact for the affected students to ensure that the supportive measures are effectively implemented so that the burden of navigating paperwork or other administrative requirements within the recipient/school’s own system does not fall on the student receiving the supportive measures”.

53

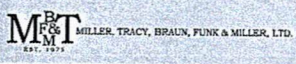
TITLE IX COORDINATOR

- **Document:** If a recipient/school does not provide a complainant with supportive measures, then they **must document the reasons why** such a response was not clearly unreasonable in light of the known circumstances. Thus, if a Title IX Coordinator determines that a particular supportive measure was not appropriate even though requested by a Complainant, the recipient must document why the recipient’s response to the complainant was not deliberately indifferent.

54

TITLE IX COORDINATOR

- Determines if emergency removal or administrative leave is appropriate.



©BKW/DJB, All rights reserved

55

TITLE IX COORDINATOR

- Ensures that the required written notifications are sent to the Complainant and the Respondent.



©BKW/DJB, All rights reserved

56

TITLE IX COORDINATOR

- Must receive Title IX training and ensure that Investigators, Decision-makers, and Facilitators of Informal Resolution receive Title IX training.
 - Maintain documentation of training

57

TITLE IX COORDINATOR



A recipient must maintain for a period of **seven years** records of –

- Each sexual harassment investigation including any determination regarding responsibility and any audio or audiovisual recording or transcript . . . , any disciplinary sanctions imposed on the respondent, and any remedies provided to the complainant . . . ;
- Any appeal and the result therefrom;
- Any informal resolution and the result therefrom; and
- All materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process. A recipient must make these training materials publicly available on its website, or if the recipient does not maintain a website the recipient must make these materials available upon request for inspection by members of the public.

58

TITLE IX COORDINATOR

- The Title IX Coordinator may also be an investigator, in certain cases.

TITLE IX PERSONNEL

- **Deciding which role for which individual –**
- Can the Title IX Coordinator be an investigator?
 - *Yes, but not on a complaint where they facilitated informal resolution or have a conflict of interest.*
- Can the Title IX Coordinator be the Initial or Appellate Decision-Maker?
 - *No, and the Title IX Coordinator should be the subordinate of the decision-maker, and never the other way around.*

TITLE IX

PREVENTION AND RESPONSE

61

PREVENTION AND RESPONSE

- Without question, the most important solution to issues of sexual harassment is to make efforts to prevent it from happening in the first place.
- *Is there such a thing as a good sexual harassment training?*

62

PREVENTION AND RESPONSE

- Age-appropriate content related to sexual abuse awareness, teen dating violence, and student social/emotional development.
- Training for all school staff.
- Notification (as noted below) of policy and Title Coordinator contact information.

PREVENTION AND RESPONSE

PA 101-418 (Effective January 1, 2020):

Sec. 10-20.69. *Policy on sexual harassment.* Each school district must create, maintain, and implement an age-appropriate policy on sexual harassment that must be posted on the school district's website and, if applicable, any other area where policies, rules, and standards of conduct are currently posted in each school and must also be included in the school district's student code of conduct handbook.

PREVENTION AND RESPONSE

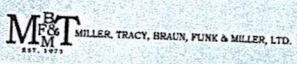
One in seven teens report that they are sending sexts, and one in four are receiving sexts, according to a study of over 110,000 teens from around the world published in February 2018, in *JAMA Pediatrics*.



© Brandon K. Wright

PREVENTION AND RESPONSE

www.thatnotcool.com



© Brandon K. Wright

PREVENTION AND RESPONSE

C.R. v. Eugene Sch. Dist. 4J, 835 F.3d 1142, 1145 (9th Cir. 2016), cert. denied, 137 S. Ct. 2117 (2017):

“Because the harassment happened in such close proximity to the school, administrators could reasonably expect the harassment’s effects to spill over into the school environment. Simply seeing their harassers in the hallway could well be disruptive for affected students. Similarly, a student who is routinely subject to harassment while walking home from school may be distracted during school hours by the prospect of the impending harassment. A student’s ability to focus during the day could be impaired by intrusive worries about whether she or he would once again face uncomfortable and sexually intimidating comments immediately after school lets out...”

67

PREVENTION AND RESPONSE

- K-12 schools must respond whenever ANY employee has notice of sexual harassment, including allegations of sexual harassment.
- The notice can come from the complainant themselves as well as any third party, including parents and guardians.

68

PREVENTION AND RESPONSE

- A person may make a report to the Title IX Coordinator, Nondiscrimination Coordinator, Building Principal, Assistant Building Principal, Dean of Students, a Complaint Manager, or **any employee with whom the person is comfortable speaking**. A person who wishes to make a report may choose to report to a person of the same gender.
- School employees shall respond to incidents of sexual harassment by **promptly making or forwarding the report to the Title IX Coordinator**. An employee who fails to promptly make or forward a report may be disciplined, up to and including discharge.
- Using “or any employee with whom the Complainant is comfortable speaking” ensures Title IX compliance because Title IX deems “any employee” of an elementary or secondary school who has notice of sexual harassment or allegations of sexual harassment to have **actual knowledge**. Therefore, a report to any employee triggers a district’s duty to respond.

SEXUAL HARASSMENT

SB75, now PA-101-221, created multiple new requirements related to sexual harassment, the key provisions affecting school districts, include:

- Creates the Workplace Transparency Act:
 - Limits employment agreements from restricting employees from reporting allegedly unlawful practices.

SEXUAL HARASSMENT

SB75, now PA-101-221, created multiple new requirements related to sexual harassment, the key provisions affecting school districts, include:

- Extends the Illinois Human Rights Act to protect actual or perceived characteristics; extends the concept of working environment beyond physical location; adds an explicit definition of “harassment”; and makes harassment of employees and non-employees a civil rights violation (articulates standard regarding an “awareness of” and “failure to respond”).

SEXUAL HARASSMENT

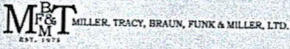
SB75, now PA-101-221, created multiple new requirements related to sexual harassment, the key provisions affecting school districts, include:

- *"Harassment" means any unwelcome conduct on the basis of an individual's actual or perceived race, color, religion, national origin, ancestry, age, sex, marital status, order of protection status, disability, military status, sexual orientation, pregnancy, unfavorable discharge from military service, or citizenship status that has the purpose or effect of substantially interfering with the individual's work performance or creating an intimidating, hostile, or offensive working environment. For purposes of this definition, the phrase "working environment" is not limited to a physical location an employee is assigned to perform his or her duties.*

SEXUAL HARASSMENT

SB75, now PA-101-221, created multiple new requirements related to sexual harassment, the key provisions affecting school districts, include:

- Creates new requirements for mandatory training:
 - The Act requires the Illinois Department of Human Rights to adopt a new model sexual harassment prevention training program; requires all employers must use the model or establish a training program that equals or exceeds the minimum standards provided by the model; and employers are subject to civil penalties for violations.
 - The Act provides for civil penalties to be assessed against employers for failure to provide mandatory training or mandatory disclosures, to be assessed following an opportunity to comply with an Order to Show Cause, with penalties in escalating amounts from \$500 to \$5,000 per offense.

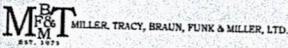


© Brandon K. Wright

SEXUAL HARASSMENT

SB75, now PA-101-221, created multiple new requirements related to sexual harassment, the key provisions affecting school districts, include:

- Creates the Sexual Harassment Victim Representation Act (for Unions) to prohibit dual representation. The intent of the Act is to require unions to designate separate union representatives for an alleged victim and an alleged perpetrator who is a “member of the same union” as the victim.



© Brandon K. Wright

SEXUAL HARASSMENT

SB75, now PA-101-221, created multiple new requirements related to sexual harassment, the key provisions affecting school districts, include:

- Amends the Victims' Economic Security and Safety Act (VESSA) to add "gender violence" as grounds for VESSA protection and leave; also updates list of 'electronic communication' to include online platforms and social networks; and defines gender violence.

PREVENTION AND RESPONSE

- Every employer in the State of Illinois is required to provide employees with annual sexual harassment prevention training that complies with section 2-109 of the Illinois Human Rights Act ("IHRA").
- All employees regardless of their status (i.e. short-term, part-time, or intern) must be trained.
- If an employer has an independent contractor working on-site with the employer's staff, the independent contractor should receive sexual harassment prevention training.

PREVENTION AND RESPONSE

1. Develop, implement and regularly communicate the employer's sexual harassment policy.
2. Provide training for administrators, employees, and students on sexual harassment prevention.
3. Ensure clear communication on how to report incidents of sexual harassment or conduct of a sexual nature.

PREVENTION AND RESPONSE

4. Administrators should monitor their environment to ensure the school is free of sexual harassment – both employee and student.
5. Administrators must lead by example and model appropriate conduct – refrain from engaging in conduct of a sexual nature.

PREVENTION AND RESPONSE

6. Administrators should conduct a sexual harassment climate check throughout the year -discuss the topic at a team or staff meeting, in-service day or as part of structured communication.

7. Ensure that all school employees (all means all) are aware of what to do when they have knowledge of an allegation of sexual harassment.

MANDATED REPORTER

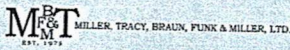
- Don't overlook the potential mandated report to DCFS and/or law enforcement in many of these situations!
 - If there is suspected abuse or neglect \implies DCFS
 - If there is criminal activity \implies law enforcement

PREVENTION AND RESPONSE

Effective August 14, 2020, every school that has a website must post important information about the school's Title IX policies and procedures on their website.

The new Title IX regulations specifically require schools to post on their websites:

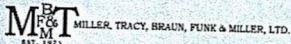
1. The contact information for the school's Title IX Coordinator(s)
2. The school's non-discrimination policy
3. All training materials used to train the school's Title IX personnel



© Brandon K. Wright

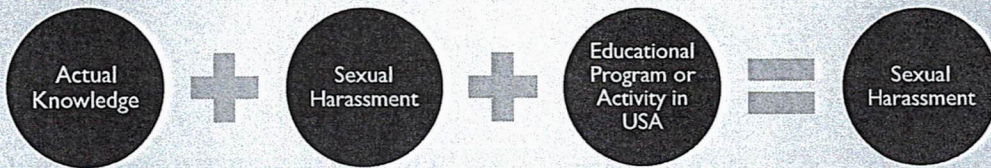
TITLE IX

THE DEFINITION OF SEXUAL HARASSMENT AND THE SCOPE OF EDUCATIONAL PROGRAMS AND ACTIVITIES



© Brandon K. Wright

WHAT IS SEXUAL HARASSMENT?



- All of these elements must be present for the Title IX Regulations to apply. Let's talk about each of them...

SEXUAL HARASSMENT

Educational
Program or
Activity in
USA

Within the USA?

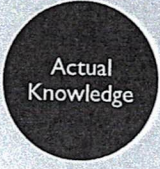


WHAT IS ACTUAL KNOWLEDGE?



- “Actual knowledge means notice of sexual harassment or allegations of sexual harassment to a recipient’s **Title IX Coordinator** or any official of the recipient who has the **authority to institute corrective measures** on behalf of the recipient”

WHAT IS ACTUAL KNOWLEDGE?



- **Per PRESS: Actual Knowledge** – Notice of sexual harassment or allegations of sexual harassment to any District employee or to the District’s Title IX Coordinator. Assumption of knowledge based solely on the District’s status as an employer or other presumption under law does not constitute actual knowledge. This standard is not met when the only official of the District with actual knowledge is the Respondent. *Notice* as used here includes, but is not limited to, a report or complaint of sexual harassment to the Title IX Coordinator in person, by mail, by telephone, or by email using the contact information listed for the Title IX Coordinator, or by any other means that results in the Title IX Coordinator receiving the person’s verbal or written report.

WHAT IS SEXUAL HARASSMENT?



- Any instance of *quid pro quo* harassment by a school employee;
- Any unwelcome conduct that a reasonable person would find so severe, pervasive, AND objectively offensive that it denies a person equal educational access;
- Any instance of sexual assault (Clery Act), dating violence, domestic violence, or stalking (defined by VAWA).

WHAT IS SEXUAL HARASSMENT?



- Any instance of *quid pro quo* harassment by a school employee:
- PRESS 2:265:
“A District employee conditions the provision of an aid, benefit, or service on an individual’s participation in unwelcome sexual conduct.”

WHAT IS SEXUAL HARASSMENT?



- Any unwelcome conduct that a reasonable person would find so severe, pervasive, AND objectively offensive that it denies a person equal educational access:
- PRESS 2:265:
“Examples of sexual harassment include, but are not limited to, touching, crude jokes or pictures, discussions of sexual experiences, teasing related to sexual characteristics, spreading rumors related to a person’s alleged sexual activities, rape, sexual battery, sexual abuse, and sexual coercion.”

SEXUAL HARASSMENT



What is “unwelcome”?

- Put yourself in the position of the alleged harasser and ask:
 - Would you want your behavior to appear on the evening news?
 - Is there a difference in status or power between the two?
 - Would you behave the same way if a family member were standing next to you?
 - Would you want someone else to act this way toward your spouse or significant other?

SEXUAL HARASSMENT OCCURRING IN A SCHOOL'S "EDUCATION PROGRAM OR ACTIVITY"

- Title IX applies to persons in the United States with respect to education programs or activities that receive Federal financial assistance.
- "Program or activity" includes locations, events, or circumstances over which the school exercised substantial control over both the respondent and the context in which the sexual harassment occurred.

91

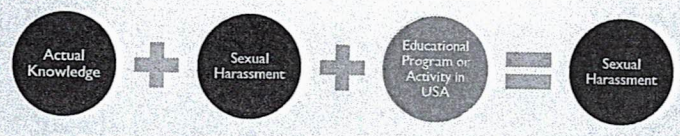
SEXUAL HARASSMENT OCCURRING IN A SCHOOL'S "EDUCATION PROGRAM OR ACTIVITY"

- "Substantial control" → while factors "such as whether the recipient funded, promoted, or sponsored the event or circumstance where the alleged harassment occurred ... may be helpful or useful for recipients to consider ... to determine the scope of a recipient's program or activity, no single factor is determinative."
- "a recipient's Title IX obligations extend to incidents of sexual harassment that occur off campus if any of three conditions are met:
 - the off-campus incident occurs as part of the recipient's 'operations' pursuant to 20 U.S.C. 1687 and 34 CFR 106.2(h);
 - the recipient exercised substantial control over the respondent and the context of alleged sexual harassment that occurred off campus pursuant to § 106.44(a);

92

SEXUAL HARASSMENT

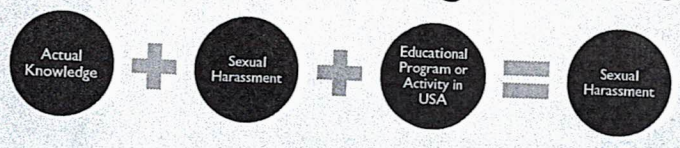
A high school girl reports to a teacher that her ex-boyfriend is spreading rumors about her sexual activity on social media.



Is this a Title IX issue?

SEXUAL HARASSMENT

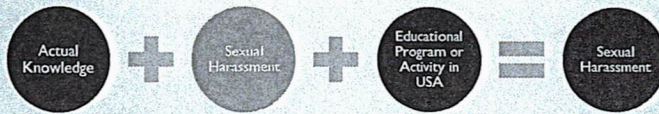
A high school girl reports to a teacher that her ex-boyfriend is spreading rumors about her sexual activity on social media, and other students are teasing her at school about it.



Is this a Title IX issue?

SEXUAL HARASSMENT

A male student has an iPhone case with a photo of a bikini model on it, which makes other students uncomfortable.



Is this a Title IX issue?

SEXUAL HARASSMENT

A girl goes on a date after a school basketball game off-campus/after-hours with a male high school classmate and reports to the guidance counselor that she was touched in an unwelcome manner.



Is this a Title IX issue?

SEXUAL HARASSMENT

*A girl goes on a date after a school basketball game off-campus/after-hours with a male high school classmate and reports to the guidance counselor that she was touched in an unwelcome manner, **and she is now uncomfortable in class with him.***



Is this a Title IX issue?



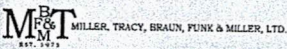
© Brandon K. Wright

SEXUAL HARASSMENT

A 15 year-old girl agrees to meet up with a 19-year-old in the bathroom to have sex.



Is this a Title IX issue?



© Brandon K. Wright

SEXUAL HARASSMENT

*A 15 year-old girl agrees to meet up with a 19-year-old in the bathroom to have sex, **and the male student has done this to 2 other girls and the school knows about the prior instances?***



Is this a Title IX issue?

SEXUAL HARASSMENT

A student reports to a teacher that two other students (both age 16) are engaged in sexual activity in a storage room at school. The teacher stops the activity, and when both students reports that the activity was “consensual”, the teacher warns them to never do it again at school.



Is this a Title IX issue? AK + SH + EP + US?

SEXUAL HARASSMENT

A transgender student is complaining to the guidance counselor about teasing and social media comments about their desire to use a particular restroom.



Is this a Title IX issue?

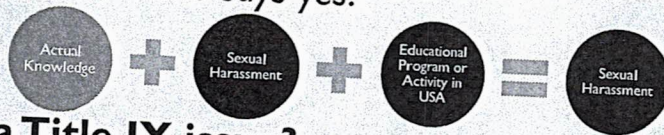
M&T MILLER, TRACY, BRAUN, FUNK & MILLER, LTD.
EST. 1973

© Brandon K. Wright

101

SEXUAL HARASSMENT

A male bus driver asks a female bus driver on a date. She says no. He brings her flowers and asks again the next day. She says no. He corners her in the break room before the morning route to ask her why she won't date him and won't let her leave until she says yes.



Is this a Title IX issue?

M&T MILLER, TRACY, BRAUN, FUNK & MILLER, LTD.
EST. 1973

© Brandon K. Wright

102

SEXUAL HARASSMENT

A well-loved teacher frequently comments on how pretty his female students look. A female student (his “helper” who comes to his room during fourth period class to grade papers) and her mother bring you text messages that the teacher has been sending to the student (not sexual in nature).



Is this a Title IX issue?

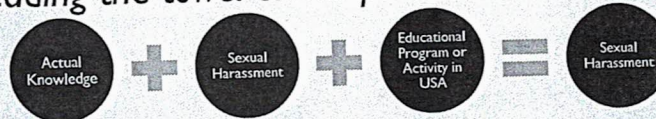


© Brandon K. Wright

103

SEXUAL HARASSMENT

You're a custodian in the school district. While working in the boys' locker room one evening, you overhear a student complaining to his friend about the annual “hazing ritual” that happens in the locker room. The student tells his friends that he's “dreading the towel on his privates...”



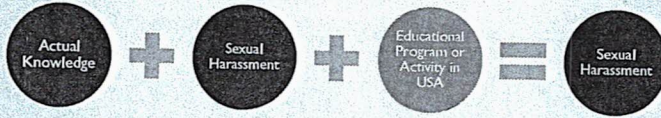
Is this a Title IX issue?



© Brandon K. Wright

104

WHAT IS SEXUAL HARASSMENT?



- All of these elements must be present for the Title IX Regulations to apply.
- If it does not meet the Title IX threshold, it does not mean we ignore it or don't deal with it.

TITLE IX

NOTICE OF A COMPLAINT AND SUPPORTIVE MEASURES

NOTICE

- K-12 schools must respond whenever ANY employee has notice of sexual harassment, including allegations of sexual harassment.
- The notice can come from the complainant themselves as well as any third party, including parents and guardians.

NOTICE

- A person may make a report to the Title IX Coordinator, Nondiscrimination Coordinator, Building Principal, Assistant Building Principal, Dean of Students, a Complaint Manager, or any employee with whom the person is comfortable speaking. A person who wishes to make a report may choose to report to a person of the same gender.
- **School employees shall respond to incidents of sexual harassment by promptly making or forwarding the report to the Title IX Coordinator. An employee who fails to promptly make or forward a report may be disciplined, up to and including discharge.**
- Using “or any employee with whom the Complainant is comfortable speaking” ensures Title IX compliance because Title IX deems “any employee” of an elementary or secondary school who has notice of sexual harassment or allegations of sexual harassment to have *actual knowledge*. Therefore, a report to any employee triggers a district’s duty to respond. 34 C.F.R. §106.30.

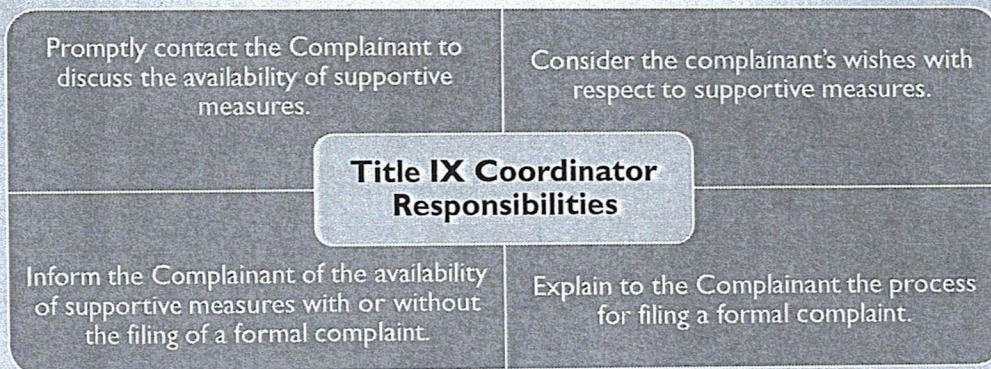
RESPONSE REQUIREMENT STANDARD

- Schools must respond promptly to Title IX sexual harassment in a manner that is not deliberately indifferent, which means “a response that is not clearly unreasonable in light of the known circumstances.”
 - PRESS Procedure indicates 90 school business days (a significant change from prior 30 school day time frame)

RESPONSE REQUIREMENTS

- Schools must offer supportive measures to the complainant.
- Title IX Coordinator must promptly contact the complainant confidentially to discuss supportive measures whether the complainant chooses to file a formal complaint or not and must explain the process for filing a formal complaint.

FIRST STEPS



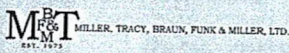
SUPPORTIVE MEASURES



- Supportive measures are individualized services provided that are **non-punitive, non-disciplinary, and not unreasonably burdensome to the other party** while designed to ensure equal educational access, protect safety, or deter sexual harassment.
- A school's selection of supportive measures and remedies will be evaluated based on what is not clearly unreasonable in light of the known circumstances.

SUPPORTIVE MEASURES

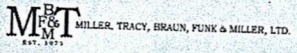
- Examples in PRESS:
 - The District may provide
 - counseling,
 - extensions of deadlines or other course-related adjustments,
 - modifications of work or class schedules,
 - campus escort services,
 - mutual restrictions on contact between the parties,
 - changes in work locations,
 - leaves of absence,
 - increased security and monitoring of certain areas of the campus, and
 - other similar measures to Complainants and/or Respondents.



© Brandon K. Wright

COMPLAINANT CHOICE

- A complainant's wishes with respect to whether the school investigates (choosing not to file a formal complaint) should be respected unless the Title IX Coordinator determines that signing a formal complaint to initiate an investigation over the wishes of the complainant is not clearly unreasonable in light of the known circumstances.
 - If the Title IX Coordinator decides to sign a formal complaint against the wishes of a complainant, the school needs to document the reasons why that decision was not clearly unreasonable and how the recipient believes that it met its responsibility to provide that complainant with a non-deliberately indifferent response.



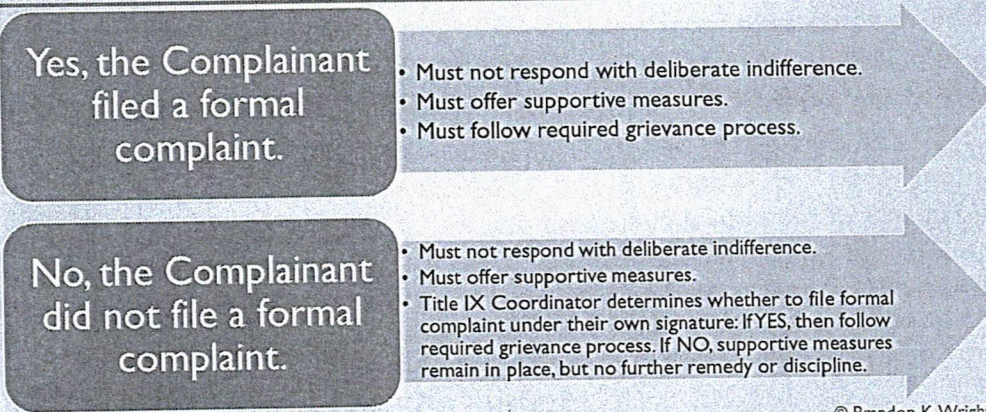
© Brandon K. Wright

TITLE IX COORDINATOR CHOICE



- There are some circumstances when a Title IX Coordinator signing a formal complaint under their own signature is very clearly not unreasonable in light of the known circumstances:
 - DCFS involvement
 - Law enforcement involvement
 - Serious teacher on student allegations

COMPLAINANT CHOICE



EMERGENCY REMOVAL OF RESPONDENT (STUDENT)

- Before removing a Respondent-student on an emergency basis, conducts an individualized safety and risk analysis to determine whether removal is justified by an immediate threat to the physical health or safety of any student or other individual arising from the sexual harassment allegations. See 4:190-AP2, *Threat Assessment Team (TAT)*.
- If the Respondent-student is removed on an emergency basis:
 - Provides the Respondent-student with written notice and an opportunity to challenge the decision immediately following the removal; and
 - Follows requirements set forth in 105 ILCS 5/10-22.6.

EMERGENCY REMOVAL OF RESPONDENT (EMPLOYEE)

- If the Respondent is identified and is a non-student employee, the Title IX Coordinator (in conjunction with Human Resources personnel, to the extent permitted to avoid bias or conflict of interest with the decision-maker), considers whether the Respondent-employee should be placed on administrative leave in accordance with 34 C.F.R. §106.44(d), relevant District policies and procedures, and any applicable collective bargaining agreements.

DISMISSING FORMAL COMPLAINTS

- If the allegations in the formal complaint do not meet the definition of sexual harassment or did not occur in the school's education program or the activity was not against a person in the United States, the school must dismiss the allegations under Title IX, but the school can still address the allegations in any manner appropriate under the school's own code of conduct.
- At the time of filing a formal complaint, a complainant must be participating in or attempting to participate in the education program or activity of the school with which the formal complaint is filed.
 - Graduates?

DISMISSING FORMAL COMPLAINTS

- Schools have the discretion to dismiss a formal complaint or allegations therein if the complainant informs the Title IX Coordinator in writing that the complainant desires to withdraw the formal complaint or allegations therein.
- Schools also have the discretion to dismiss if the respondent is no longer enrolled or employed by the school or if specific circumstances prevent the school from gathering sufficient evidence to reach a determination.
- **A school must give the parties written notice of a dismissal (mandatory or discretionary) and the reasons for the dismissal.**

DISMISSING FORMAL COMPLAINTS

Mandatory –must dismiss if the conduct alleged in the formal complaint:

- 1. Would not constitute sexual harassment as defined even if proved,
- 2. Did not occur in the school's education program or activity, or
- 3. Did not occur against a person in the United States

Permissive –may dismiss at any time if:

- 1. The 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; or
- 3. Specific circumstances prevent the school from gathering evidence sufficient to reach a determination as to the formal complaint or allegations therein.

Upon dismissal, school must promptly and simultaneously send written notice of the dismissal and reason(s) for the dismissal to the parties.

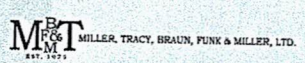


© Brandon K. Wright

NEXT STEPS

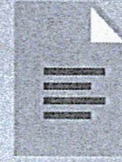
Is the conduct within the scope of Title IX?

- 1. If no, the Title IX regulations do not apply and the school can dismiss the complaint.
- 2. If yes, the school must respond in a manner that is not deliberately indifferent.
 - By providing supportive measures in all cases.
 - And, if a formal complaint was filed, by following the specific grievance process requirements.



© Brandon K. Wright

NEXT STEPS



- A school must investigate the allegations in any formal complaint and send written notice to both the complainant and respondent of the allegations upon receipt of a formal complaint.
- Schools must send written notice of any investigative interviews, meetings, or hearings.

123

TITLE IX

THE INVESTIGATION

124

WHO SHOULD INVESTIGATE? AND OTHER PRE- INVESTIGATION CONSIDERATIONS

- The investigator, as already mentioned, needs to have adequate training to conduct the investigation and should be free of bias or conflicts of interest.
 - Title IX Coordinator = Dispatch when you call 911
 - Investigator = Detective investigating the case
 - Decision-maker = Judge

INVESTIGATOR

- The Investigator is the person that conducts the investigation once a formal complaint is filed.
- Conducts interviews of the complainant, respondent, witnesses and other interested parties.
 - Collects evidence such as, but not limited to, statements, documents, text messages, chats, video, audio and photographs.
 - Prior to completion of the investigative report, sends to the Complainant, the Respondents and the Advisors the evidence collected so that they can inspect, review and provide comments.
 - Prepares a written investigative report fairly summarizing the relevant evidence.
 - Sends the investigative report to the Complainant, Respondent and the Decision-Maker.

INVESTIGATION

- Ensure that the burden of proof and burden of gathering evidence rest on the District and not the parties involved.

127

INVESTIGATION

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

128

INVESTIGATION

- Provide the parties the same opportunities to have others present during any grievance proceeding, including the opportunity to be accompanied to any related meeting or proceeding by the advisor of their choice (who may, but is not required to, be an attorney).

129

INVESTIGATION

- Understand and use trauma-informed investigations and questioning:
 1. Understand the impact of trauma on a neurobiological, physical, and emotional level.
 2. Promote safety and support. – *Supportive measures!*
 3. Know positive ways to respond that avoid retraumatization.
 4. Provide choice with a goal of empowerment: “What can you tell me about what happened?” “Can you tell me more?” “Can you help me understand?”

130

INVESTIGATION

- Considerations: Potential Responses to Trauma
 - Delayed reporting
 - Difficulty remembering specifics (could also be due to drugs/alcohol)
 - Reluctant reporting
 - Remaining in a relationship or living arrangement with the respondent
 - Being calm and composed after an assault
 - Failing to identify the accused

131

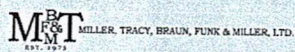
INVESTIGATION

- Do **not** assume that because there are signs of trauma that the respondent caused the trauma and violated the policy.
- Do **not** assume that because there are no signs of trauma nothing bad happened.

132

INVESTIGATION

- Provide both of the parties with an equal opportunity to inspect and review any evidence obtained during the investigation that is directly related to the Formal Title IX Sexual Harassment Complaint’s allegations (including evidence the District does not intend to rely on in reaching a determination regarding responsibility, and inculpatory or exculpatory evidence).



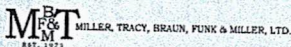
© Brandon K. Wright

133

INVESTIGATION



- Prior to the completion of the investigative report, 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 and provide each party with 10 school business days to submit a written response.



© Brandon K. Wright

134

INVESTIGATION



- Upon receipt of a party's written response to the evidence, review the response and send a copy to the other party in an electronic format or a hard copy.

135

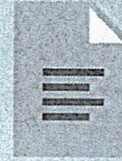
INVESTIGATION



- Prepare an investigative report summarizing all relevant evidence.
- Send to each party and the party's advisor, if any, the investigative report in an electronic format or hard copy, for their review and written response (at least 10 days before the decision).

136

INVESTIGATION



• **Investigative Report should include:**

- Basic description of charges
- How did the complaint make its way to an investigation?
- Witnesses interviewed
- Witnesses not interviewed (and why)
- Any procedural anomalies that need explained?

INVESTIGATION

• **Investigative Report should include:**

- Applicable Policy Provisions
 - Definition of prohibited conduct alleged
 - Related definitions as appropriate
 - Include verbatim, in entirety (handbook, contract, etc.)

INVESTIGATION

- **Investigative Report should be arranged in a manner that is not difficult to read:**
 - Ways to arrange:
 - Chronologically
 - By witness summary
 - By allegation/topic

INVESTIGATION

- Include the evidence you don't intend to rely on (must include all evidence "related to" the allegations, not just information relied upon).
- Include inculpatory or exculpatory evidence whether obtained from a party or other source.
- **Purpose:** allow each party to meaningfully respond to the evidence prior to conclusion of the investigation.

INVESTIGATION

- Include screenshots and other reference material directly in summary when possible.
- Don't paraphrase a document when you can use direct quotes.

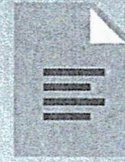
141

INVESTIGATION

- Maintain a non-judgmental tone.
- Stay away from charged words of advocacy:
 - *Clearly/obviously*
 - *Innocent/guilty*
 - *Victim/perpetrator*
- Watch your adjectives and adverbs – unless they are in a quote.

142

INVESTIGATION



- At the conclusion of the investigation, send to the Initial Decision-Maker in an electronic format or hard copy:
 - ✓ The Formal Title IX Sexual Harassment Complaint;
 - ✓ All evidence gathered during the investigation that is directly related to the Formal Title IX Sexual Harassment Complaint's allegations (including evidence the District does not intend to rely on in reaching a determination regarding responsibility, and inculpatory or exculpatory evidence); and
 - ✓ The investigative report.

143

INVESTIGATION

- The key reminders for the Investigator:
 - Do not assume the truth of the allegations or the guilt/responsibility of an individual prior to the completion of the investigation.
 - Conduct the investigation in a manner that is (and appears) fair and impartial.
 - Follow applicable District Policies and Administrative Procedures.
 - Treat those involved with dignity and respect.
 - The goal of the Investigator is to determine what happened – not to merely confirm pre-existing suspicions.

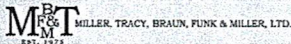
144

UNDERSTANDING AND IMPLEMENTING THE NEW TITLE IX REGULATIONS

Day 1 of 2

November 5, 2020

- We will reconvene tomorrow at 1:30pm.
- Participants must complete both Sessions to complete the required training.



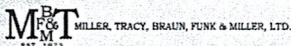
© Brandon K. Wright

145

Miller, Tracy, Braun, Funk & Miller, Ltd.
 316 S. Charter Street
 Monticello, Illinois 61856
 (217)-762-9416

www.millertracy.com

bwright@millertracy.com
[twitter@bwright_mtb_fm](https://twitter.com/bwright_mtb_fm)



© Brandon K. Wright

146

UNDERSTANDING AND IMPLEMENTING THE NEW TITLE IX REGULATIONS

Day 2 of 2

November 6, 2020

WELCOME BACK!

- We will begin the workshop at 1:30pm.
- I will be taking questions throughout the workshop via the Chat Box – and I will also be posting the links to the handouts and materials in the Chat Box once we begin.
- Participants must complete both Sessions to complete the required training.

1

UNDERSTANDING AND IMPLEMENTING THE NEW TITLE IX REGULATIONS

ROLES, RESPONSIBILITIES, AND LEGAL COMPLIANCE

2

TITLE IX

THE DECISION

3

INVESTIGATION



- After the school has sent the investigative report to the parties but before reaching a determination regarding responsibility, the decision-maker(s) must afford each party the opportunity to submit written, relevant questions that a party wants asked of any party or witness, provide each party with the answers, and allow for additional, limited follow-up questions from each party.

4

SUBMITTED QUESTIONS



- Decision-makers **must** explain their reasons for excluding any irrelevant proposed questions.

5

GRIEVANCE PROCESS

- An objective evaluation of all relevant evidence, inculpatory and exculpatory is required for the grievance process.
- Credibility determinations based upon a person's status as complainant, respondent, or witness must be avoided.
- There must be 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.

6

GRIEVANCE PROCESS

- The grievance process should include reasonably prompt time frames for conclusion of the grievance process, including appeals and informal resolutions, with allowance for short-term, good cause delays or extensions of the time frame.

7

GRIEVANCE PROCESS



- A school must notify the complainant of the range, list, or possible remedies that a school may provide.
- A school must notify the respondent of the disciplinary sanctions a school might impose on the respondent following a finding of responsibility.
- A school's grievance process must state whether the school has chosen to use the preponderance of the evidence standard ~~or the clear and convincing evidence standard~~ for all formal complaints of sexual harassment (including those where employees are respondents).

8

GRIEVANCE PROCESS

- Preponderance of the evidence is one type of evidentiary standard used in a burden of proof analysis. Under the preponderance standard, the burden of proof is met when the party with the burden convinces the fact finder that there is a greater than 50% chance that the claim is true.

GRIEVANCE PROCESS

- The grievance process must describe the school's appeal procedures.
- The grievance process must not use, rely on, or seek disclosure of information protected under a legally recognized privilege, unless the person holding such privilege has waived it.
- Any provisions, rules, or practices other than those required by the Final Rule that a school adopts as part of its grievance process for handling formal complains of sexual harassment, must apply equally to both parties.

THE DECISION



- The decision-maker (who cannot be the same person as the Title IX Coordinator or the investigator) must issue a written determination regarding:
 - Responsibility with findings of fact,
 - Conclusions about whether the alleged conduct occurred,
 - Rationale for the result as to each allegation,
 - Any disciplinary sanctions imposed on the respondent, and
 - Whether remedies will be provided to the complainant.
- The written determination must be sent simultaneously to the parties along with information about how to file an appeal.

DISCIPLINE

- Discipline may only follow an investigation and a finding of responsibility.

REMEDIES

- Remedies are required to be provided to a complainant when a respondent is found responsible. The remedies must be designed to maintain the complainant’s equal access to education and may include the same individualized services described as supportive measures.
- Remedies after a finding of fault may be disciplinary, punitive, and may burden the respondent.

MAKING CREDIBILITY DETERMINATIONS



- The Decision-Maker must make written findings as to credibility of witnesses.
- The Decision-Maker must give the testimony and information of each party or witness the degree of importance they reasonably believe it is entitled to receive.

MAKING CREDIBILITY DETERMINATIONS

- The Decision-Maker makes credibility determinations based upon:
 - Statements by any other witnesses to the alleged incident.
 - Evidence about the relative credibility of the complainant/respondent:
 - The level of detail and consistency of each person’s account should be compared in an attempt to determine who is telling the truth.
 - Is corroborative evidence lacking where it should logically exist?

MAKING CREDIBILITY DETERMINATIONS

- The Decision-Maker makes credibility determinations based upon:
 - Evidence of the complainant’s reaction or behavior after the alleged harassment
 - Were there witnesses who saw that the complainant was upset?
 - Changes in behaviors? Work-related? School? Concerns from friends and family? Avoiding certain places?
 - May not manifest until later

MAKING CREDIBILITY DETERMINATIONS

- The Decision-Maker makes credibility determinations based upon:
 - Evidence about whether the complainant filed the complaint or took other action to protest the conduct soon after the alleged incident occurred.
 - **But:** failure to immediately complain may merely reflect a fear of retaliation, a fear that the complainant may not be believed, etc. rather than that the alleged harassment did not occur

17

MAKING CREDIBILITY DETERMINATIONS

- The Decision-Maker makes credibility determinations based upon:
 - Other contemporaneous evidence:
 - Did the complainant write about the conduct and reaction to it soon after it occurred (e.g. in a diary, email, blog, social media post)?
 - Did the student tell others (friends, parents) about the conduct and their reaction soon after it occurred?

18

THE DECISION

- Because the written decision must include findings of fact, along with rationale for the decision, it cannot be generic or non-specific.
 - Details in the written decision are what will prevent and ease questions of the decision’s validity.

THE DECISION



Outline each allegation investigated, relevant facts, the Decision-Maker’s analysis of the facts, and the conclusion(s) reached.

THE DECISION

- Keep an open mind until all evidence has been heard.
- Don't come to any judgment, opinion, conclusion or belief about any aspect of this matter until you've reviewed or heard all of the evidence AND consider only the relevant evidence.

21

THE DECISION

- The Decision-Maker must render a sound, reasoned decision on every charge.
- The Decision-Maker must determine the facts in this case based only on the information presented.

22

THE DECISION

- The Decision-Maker must determine what evidence to believe, the importance of the evidence, and the conclusions to draw from that evidence.
- The Decision-Maker should not be swayed by prejudice, sympathy, or a personal view that you may have of the claim or any party.

23

THE DECISION

- The quality of evidence is not determined by the volume of evidence or the number of witnesses or exhibits.
- It is the **weight** of the evidence, or its **strength** in tending to prove the issue at stake that is important.
- You must evaluate the evidence as a whole based on your own judgment.

24

THE DECISION

- Look to all the evidence in total, make judgments about weight and credibility, and then determine whether or not the burden has been met.
 - Include the burden in the final written decision.
 - “The preponderance of the evidence has been met because...”

THE DECISION

- Don't consider the potential impact of your decision on either party when determining if the charges have been proven.
 - Impact will be a consideration in the remedies phase. Impact is not a consideration in the responsibilities phase.
- Focus only on the charge or charges brought in the case and whether the evidence presented to you is sufficient to persuade you that the respondent is responsible for the charges.

REMEDIES

- When considering remedies, the focus is on whether the remedies will be effective to:
 - Stop the harassment from occurring
 - Prevent future harassment
 - Remedy effects on victim

TITLE IX

HOW TO SERVE IMPARTIALLY, CONFLICTS OF INTEREST,
AND BIAS

TITLE IX PERSONNEL

- Title IX Personnel includes the Coordinator, investigators, decision-makers, and people who facilitate any informal resolution process.
 - All personnel are required to be “free from conflicts of interest or bias against complainants or respondents.”

TITLE IX PERSONNEL TRAINING



- Training of Title IX personnel must include training on:
 - the definition of sexual harassment in the Final Rule,
 - the scope of the school's education program or activity,
 - how to conduct an investigation and grievance process including hearings, appeals, and informal resolution processes, as applicable,
 - and how to serve impartially, including by avoiding prejudice of the facts at issue, conflicts of interest, and bias.
- Schools must ensure that decision-makers receive training on any technology to be used at a live hearing, if applicable.

IMPARTIALITY

Impartiality is integral to the Title IX formal grievance process.

- Serving impartially includes avoiding the following:
 - Prejudgment of the facts at issue
 - Conflicts of interest
 - Bias
- But what do each of these things mean (and how do you avoid them)?

31

IMPARTIALITY

Prejudgment refers to passing judgment prematurely or without sufficient reflection or investigation. For example:

A Complainant was crying while making a sexual harassment report. You conclude that because the Complainant was crying when describing the conduct at issue, the Complainant must be telling the truth and the Respondent must be responsible for the actions alleged.

Neither Complainants reporting sexual harassment, nor Respondents defending against allegations of sexual harassment, should be met with prejudgment throughout the Title IX process.

32

IMPARTIALITY

Prejudgment often occurs when allegations involve sexual conduct, sexual history, drugs, and/or alcohol use. Examples of prejudging the facts:

- *The Complainant was drinking at the time of the incident so the investigator presumes his/her recollection of an event is not accurate.*
- *The Respondent and Complainant were in a consensual relationship previously so the Title IX coordinator assumes consent to particular conduct was given.*

33

IMPARTIALITY

Sex stereotypes also often lead to prejudgment – for example:

- *Men are sexually aggressive and/or likely to perpetrate sexual assault.*
- *Women have regret about sexual experiences and are likely lying about sexual assault.*
- *Men cannot be sexually assaulted.*
- *Women complaining about sex harassment are just jumping on the "#MeToo" bandwagon*

34

IMPARTIALITY

How do you avoid prejudging facts?

- ✓ Keep an open mind throughout the investigation process.
- ✓ Wait to hear all of the facts (there are two or more) sides to every story.
- ✓ Seek out additional facts and/or witnesses if you feel yourself jumping to conclusions – facts matter, assumptions do not!

35

IMPARTIALITY

Ms. Jones is an investigator who conducts Title IX investigations for the school district. Ms. Jones frequently makes statements to her colleagues regarding how provocatively female students on campus dress and that they are “asking” for others to catcall and give them attention. In the case at hand, a female Complainant, who was wearing a crop top during class, reported that her lab partner made sexually harassing comments to her during a lab.

- In terms of prejudgment of the facts, would you be concerned about Ms. Jones impartiality?

36

IMPARTIALITY

- The decision-maker(s) should not be the subordinates of the Title IX Coordinator.
 - This stems from a concern about pressure to accept investigator recommendations because of the inherent authority of the employment relationship.

37

IMPARTIALITY

- A “conflict of interest” occurs if, within a particular decision-making context, an individual is subject to two coexisting interests that are in direct conflict with each other and the decision-making process is disrupted or compromised in a manner that affects the integrity or the reliability of the outcomes.

38

IMPARTIALITY

- Conflict of interests may arise from family, friendships, employment relationships, financial investments, or other social factors.
 - Let's discuss if the following potential conflicts may affect impartiality:

IMPARTIALITY

- *The Title IX Coordinator is close family friends with a Complainant's parents.*
- *The Investigator and Respondent attend the same church.*
- *The Decision-Maker is on the Board of the local SAFE (Sexual Assault and Family Emergencies) Board of Directors.*
- *The Investigator shares news articles on their personal social media with their own commentary that women lie for attention about sexual assault.*

IMPARTIALITY

- An **actual** conflict of interest is a direct conflict between one's official duties and responsibilities, and a competing personal interest or obligation.
- A **perceived** conflict of interest is a situation where it could reasonably be perceived that a competing interest could improperly influence the performance of one's official duties and responsibilities.
- A **potential** conflict of interest arises where a personal interest or obligation could conflict with one's official duties and responsibilities in the future.

41

IMPARTIALITY

- **Actual Conflict:** *The Title IX Decision-maker's daughter is the Respondent in a sexual assault case.*
- **Perceived Conflict:** *The Title IX investigator previously had a relationship with the family member of the Respondent.*
- **Potential Conflict:** *The Title IX Coordinator and Complainant co-chair a community organization and socialize outside of work on occasion.*

42

IMPARTIALITY

- A **bias** is a tendency, inclination, or prejudice toward/against someone.
 - Biases are often based on stereotypes, rather than actual knowledge of an individual or a particular circumstance.
 - They are frequently based on a person's gender, race, or sexual orientation.
- In effect, biases are “shortcuts” our mind makes that can result in prejudgments, which lead to improper decisions or potentially discriminatory practices.

43

IMPARTIALITY

- Examples of Bias:
 - *When talking with Title IX Complainants, the Title IX Coordinator begins each initial meeting by asking who the Respondent is and what “he” did to the Complainant (assuming the Respondent is a male).*
 - *A Title IX Decision-maker finds a Respondent in a case more credible than a Complainant because the Respondent speaks “perfect English” while the Complainant, who only knows English as a second language, does not.*

44

IMPARTIALITY

- Ways to combat bias:
 - Pay attention to your language
 - Avoid generalizations
 - Question your thinking and challenge your assumptions
 - Listen!

45

IMPARTIALITY

- Understanding bias is particularly important in the Title IX context because:
 - Most evidence is circumstantial rather than direct
 - There are social stigmas associated with sex, alcohol, and drugs
 - Improper sex-based bias is prevalent and prevents reliable outcomes
 - There are also potential biases related to economic status, gender, race/ethnicity, and academic standing

46

IMPARTIALITY

- Illinois “Sample” Jury Instructions:
- *It is your duty to resolve this case by determining the facts based on the evidence and following the law. Your decision must not be based upon speculation, prejudice, or sympathy. Each party should receive your same fair consideration.*

IMPARTIALITY

- Illinois “Sample” Jury Instructions:
- *Facts may be proven by evidence or reasonable inferences drawn from the evidence. Evidence consists of the testimony of witnesses you will hear and of exhibits you will read. You should consider all the evidence without regard to which party produced it. You may use common sense gained from your experiences in life, in evaluating what you see and hear during the investigation.*

IMPARTIALITY

- Illinois “Sample” Jury Instructions:
- *In evaluating the credibility of a witness, you may consider that witness' ability and opportunity to observe, memory, manner, interest, bias, qualifications, experience, and any previous inconsistent statement or act by the witness concerning an issue important to the case.*

IMPARTIALITY

- Illinois “Sample” Jury Instructions:
- *You should not do any independent investigation or research on any subject relating to the case. What you may see or hear outside the investigation is not evidence.*

IMPARTIALITY

- Treat all informal reports of sexual harassment equally, regardless of the form of the report or the demographics of the Complainant or Respondent.
- Make no assumptions about the allegations based on the demographics of the Complainant or Respondent.
- Offer supportive measures to Complainants and Respondents equally.

51

IMPARTIALITY

- Keep an open mind and actively listen to all the facts presented.
- View all relevant evidence objectively.
- Remember that each case is unique.

52

IMPARTIALITY

John, a Title IX Coordinator, is a self-professed feminist, a former victim advocate, and regularly blogs about issues of sexual assault. His Twitter bio includes the phrase "Believe all women." He has supported organizations that work to prevent sexual assault for years.

• Issue?



IMPARTIALITY

Betty is an assistant principal who conducts informal resolution for parties that elect it under the formal grievance process. Betty also serves as the school's athletic director, and was previously the school's volleyball coach for 15 years. Betty remains an active fundraiser and supporter of the volleyball team. A student (who is a current volleyball player) made a formal complaint alleging that a classmate (the high school starting quarterback with a major scholarship) sexually harassed them in the school library while completing work on a group assignment. The two elect informal resolution.



TITLE IX

ISSUES OF EVIDENCE, RELEVANCE AND OTHER PROTECTIONS

TITLE IX PERSONNEL TRAINING

Training of Title IX personnel must include training on:

- the definition of sexual harassment in the Final Rule,
- the scope of the school's education program or activity,
- how to conduct an investigation and grievance process including hearings, appeals, and informal resolution processes, as applicable,
- and how to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias.

TITLE IX PERSONNEL TRAINING

- The regulations require an objective evaluation of all relevant evidence – including both inculpatory and exculpatory evidence – and provide that credibility determinations may not be based on a person’s status as a complainant, respondent, or witness.

EVIDENCE

**Related-to
vs.
Relevant**

Related-to

Investigator must collect all evidence that is related to the allegations whether or not relevant (excluding evidence subject to privilege, medical records)

Relevant

Relevant evidence is all evidence related to, except that which is protected under the rape shield provisions (and not otherwise privileged, medical records)

RELEVANCE

- **Federal Rule of Evidence No. 401 - Test for Relevant Evidence.**
- Evidence is relevant if:
 - **(a)** it has any tendency to make a fact more or less probable than it would be without the evidence; and
 - **(b)** the fact is of consequence in determining the action.

RELEVANCE

- The relevance standard is pretty easy to meet.
- It just asks if whether the “evidence” is likely to make the allegation more or less true. While there are other concerns, like whether it might be privileged or hearsay, nearly everything that actually relates to allegation is relevant.

HEARSAY

- **Avoid hearsay**

- What does the witness “know” vs what do they have firsthand knowledge of?
- Focus on firsthand information
- What did the witness see or hear?
- If the witness has secondhand information, allow them to present it, but determine who they received it from (because you may need to go talk to the person they heard it from and use the person they heard it from as the witness.)
 - Including social media

RAPE SHIELD PROTECTIONS

- A school’s decision-makers and investigators must receive training on issues of evidentiary relevance, including how to apply the rape shield protections provided only for complainants.

RAPE SHIELD PROTECTIONS

- Rape shield laws deem questions and evidence about a complainant’s prior sexual behavior irrelevant unless offered to prove that someone other than the respondent committed the alleged misconduct or offered to prove consent.
- Illinois courts have held that a defendant’s right to confrontation doesn’t include a right to present irrelevant evidence such as the victim’s reputation and sexual acts with other people.

RAPE SHIELD PROTECTIONS

Questions and evidence about the Complainant’s prior sexual behavior are **NOT RELEVANT**, unless offered to prove

- “Mistaken Identity”: that someone other than the respondent committed the conduct alleged by the complainant, or
- Consent: concern specific incidents of the complainant’s *prior* sexual behavior with respect to the respondent and are offered to prove consent.
- Note that questions about a Complainant’s predisposition are never allowed, they are not subject to the exception.

PRIVILEGED EVIDENCE

Investigations cannot require, allow, rely upon, or otherwise use questions or evidence that constitute, or seek disclosure of, information protected under a legally recognized privilege, unless the person holding such privilege has waived the privilege in writing.

- Patient-doctor
- Attorney-client
- Spousal communication privilege

PRIVILEGED EVIDENCE

Treatment records from doctor, psychologist, or any other health or mental health provider may not be used without prior written consent of the party.

EVIDENCE GATHERING

- The burden of gathering evidence and the burden of proof is on the school, not the parties.
- Schools must provide equal opportunity for the parties to present fact and expert witnesses and other inculpatory and exculpatory evidence.
- Parties must have the same opportunity to select an advisor of the party's choice who may be, but need not be, an attorney.
- Schools must not restrict the ability of the parties to discuss the allegations or gather evidence (e.g., no "gag orders").
 - Could prevent parties from finding witnesses and could cause First Amendment issues

EVIDENCE GATHERING

- Evidence is likely to include physical documents, electronic records, witness statements, and interviews with witnesses.
- Testimony is evidence, and is oftentimes the most important evidence.

WITNESS STATEMENTS

- General Guidelines:
 - Witnesses should be instructed to be as specific as possible about dates, times, locations, and events, but should ***never*** be given prompts or suggestions regarding wording.

WITNESS STATEMENTS

- General Guidelines:
 - Witness statements must be legible.
 - Allowing the witness to type their statement may be preferable in certain cases.
 - Statements should be signed and dated by the witness.

WITNESS STATEMENTS

- **General Guidelines:**
 - Ideally, witness statements should be given as close to the event in question as possible.
 - The time duration between the event in question and the witness statement should be noted in the investigation notes.

WITNESS STATEMENTS

- **General Guidelines:**
 - The investigator should note when and where the statement was given and who was present.
 - The investigator should note whether witnesses had an opportunity to discuss events among themselves before giving statements.

WITNESS STATEMENTS

- Witnesses should be allowed to supplement or change their statement upon request.
- Copies of both the “before” and “after” versions of the statement should be maintained.
- Supplementation and/or changes to a witness statement may require additional investigation.

WITNESS STATEMENTS

- When witnesses use only first names, last names, or nicknames, the investigator should question the witness and document in writing the full names of each individual.
- Using a copy of the witness statement to document additional information may be helpful.

WITNESS STATEMENTS

- When witnesses uses slang or describes events in a manner in which the meaning is not readily apparent, the investigator should question the witness and document in writing the meaning of slang in question
- Using a copy of the witness statement to document additional information may be helpful.

WITNESS STATEMENTS

- When witness statements must be redacted, the investigator must take care to preserve an unredacted original.
- When multiple names must be redacted from the same statement, an individual specific “placeholder” or “code” should be inserted for clarity.

WITNESS STATEMENTS

- Example (Statement of Student A):
 - “I was walking to class with XXXX when XXXX and XXXX started yelling at us. XXXX then punched XXXX.”
 - “I was walking to class with B when C and D started yelling at us. C then punched B.”

WITNESS STATEMENTS

- When multiple witness statements reference the same event, the redaction codes should be standardized across all statements.
 - This means, B should be used across all statements to mean the same person.

WITNESS STATEMENTS

- Gender specific pronouns may need to be redacted and replaced with “he/she” or use the person’s “code” like “A’s friend” instead of “her friend”.
- If redaction makes witness statements illegible, consider typing the statement.
- Typing witness statements may also be necessary if there are concerns regarding disclosing witness handwriting.

WITNESS STATEMENTS

- If witness statements are typed, they should be reproduced verbatim.
 - Include profanity
 - Include misspelling
 - include poor grammar

WITNESS STATEMENTS

- Witness statements are NOT a substitute for a thorough investigation, interview, and/or detailed investigation notes.
- Witness statements may not be admissible in every setting and/or may require specific information to be included in the record (such as a legitimate concern of retaliation) before they can be used.

81

CONDUCTING INTERVIEWS

- Consider who should be present during interview:
 - Note taker? –would not necessarily require Title IX training
 - Additional trained investigator?
 - Social worker/counselor? –trauma informed
 - Be very careful to not stack the table with “authority” that may overwhelm or frighten witnesses
- Consider whether additional individuals must or should be included in the interview (parents or union representation).

82

CONDUCTING INTERVIEWS

- Conduct interviews as soon as possible after the event in question
- If time permits, draft or outline questions in advance.
 - Consider having a set of prepared questions that you'll always ask ready at all times. You can then add the situation specific questions to it more quickly.
 - See *PRESS Policy 520-AP for Sample Questions*
- If available, and if time permits, review security footage before the interview.

CONDUCTING INTERVIEWS

Sample of general questioning:

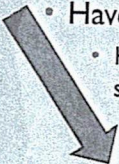
- What happened?
- When did it happen?
- Where did it happen?
- If a witness, do you know what is alleged to have happened? – If so, where were you when it happened?
- If a witness, do you know the respondent and complainant? – If so, how long have you known them and how would you describe them (friend, acquaintance)?
- Have you talked to others about what happened? Who and when?
- Did you write down what happened? (diary [video or otherwise], notes, blog)
- Have you posted or seen anything posted on social media about this incident?

CONDUCTING INTERVIEWS

- Interview the complaining party first.
- Interview each participant, victim and/or witness separately.
- Approach each interview individually.
 - Start from the beginning each time.
 - Do not assume facts disclosed in previous interviews.

CONDUCTING INTERVIEWS

- Do not disclose information obtained in separate interviews.
 - If disclosure is necessary, disclose as little as possible.
 - Start with broad questions and move to specific questions.
- Have you ever sexually harassed anyone?
 - Have you had conversations with anyone in your class that could be considered sexual harassment?
 - What occurred in Spanish class last week?
 - What did you say in Spanish class last week to Becky? (here is when disclosure becomes necessary)



CONDUCTING INTERVIEWS

- Avoid making assumptions
- Ask follow-up questions
- Slow and deliberate questions produce better information
- Avoid being accusatory
- Avoid anything that resembles an interview or interrogation from a TV drama.

87

CONDUCTING INTERVIEWS

- Know and respect the difference between an interview and a search
- Students are subject to 4th Amendment protection from unreasonable searches.
 - Asking to see photos on phone is a search
 - Asking to see notebook is a search

88

CONDUCTING INTERVIEWS

- Take notes
- Take Notes
- TAKE NOTES
- **TAKE NOTES!!!!**

CONDUCTING INTERVIEWS

- Write your interview summaries in narrative form so you can easily include them in the report.
- Be consistent in terminology – clarity is key.
- Be clear as to the source of information – compare:
 - “Bob stated that this happened.”
 - ~~“This happened.”~~

CONDUCTING INTERVIEWS

- **Structure of an Interview Summary:**
- Who, when, where, via what medium?
- Did they have an advisor?
- Did you discuss your role? Their role?
- Did you discuss the prohibition on retaliation?

CONDUCTING INTERVIEWS

- **Structure of an Interview Summary:**
- **Background:**
 - How does this person connect with the parties and witnesses?
 - Age, year in school?
 - Length of employment, position?

CONDUCTING INTERVIEWS

- **Structure of an Interview Summary:**
- Summary of Facts and Evidence
 - Details
 - Direct quotes where possible
 - Include inculpatory and exculpatory information

CREDIBILITY

- Credibility is the process of weighing the accuracy and veracity of evidence. To assess credibility, evaluate the source, content, and plausibility of what is offered in light of other evidence.

CREDIBILITY

- A decision can still be made that an incident occurred when the evidence of the allegation(s) is credible, even if there were no witnesses to the incident. Put another way, **a preponderance can be established simply because you believe one party and not the other based on the assessment of the credibility of the parties and the evidence provided.**

CREDIBILITY

- Credibility is best established through corroboration, which is provided through sufficient independent evidence to support the facts at issue.
- Corroboration is not merely a second witness who agrees with the first witness, because for instance, they could be lying to support each other. Rather, it is evidentiary support for what a witness contends after evaluating source, content, and plausibility.

CREDIBILITY

- The behavior continued after the responding party was informed that the behavior was unwelcome. If established, this would add credibility to the reporting party's account as corroborative.

CREDIBILITY

- Major inconsistencies in testimony would likely detract from credibility. Minor inconsistencies usually would not detract from credibility, and may even be the result of trauma. Even lying is not a 100 percent credibility killer. We all lie. The job of investigators, as noted earlier, is to determine why someone is lying, or what the lie is about. Lying about alcohol consumption to avoid an alcohol violation does not prove or disprove an underlying interpersonal violence allegation.

CREDIBILITY

- A delay in reporting harassment does not detract from credibility. Individuals may delay reporting over fear of retaliation, because they don't know or trust the policy, over fear of being blamed for causing the harassment or incident, not due to a lack of understanding that it was harassment, etc.

CREDIBILITY

- Changes in the behavior of a reporting party after an incident might add to credibility. For example, after being harassed, the reporting party cried, was upset, avoided class (or meetings, or certain areas), their academic performance deteriorated, etc.

CREDIBILITY

- However the absence of such changes does not mean that the allegation is not credible, only that the individual who complained perhaps has been affected differently, less intensely than others might, or does not express emotions openly.

101

CREDIBILITY

- Documents such as diaries, texts, emails, calendar entries, journals, notes, or letters describing the incident(s) can add to credibility, but can also be manufactured after the fact. The adage, "Trust, but verify," applies, especially in the age of www.iphonefaketext.com.

102

CREDIBILITY

- Telling other people about the incident may add to credibility, but if the accounts provided to others vary meaningfully, that can also undermine credibility or help investigators to identify that a trauma response is in play.
- Other similar allegations about a responding party can add to credibility of the allegation.

103

CREDIBILITY

- The fact that a relationship was at one time or in some aspects consensual does not detract from credibility, nor is it a defense against a subsequent charge of sexual harassment. Consensual relationships can be followed by sexual harassment when one person tries to end the relationship and the other person tries to intimidate the former partner into staying in the relationship. People can be assaulted after consensual sexual acts, or engage in consensual sexual acts after having been assaulted.

104

CREDIBILITY

- The fact that the person who made the allegation(s) did not tell the alleged harasser that the behavior was offensive does not affect credibility. Many people are fearful of doing so.
- Additionally, there is no obligation for the reporting party to inform the responding party that behavior is offensive.

105

CREDIBILITY

- Explanations of why the harassment occurred do not add to credibility. People who have sexually harassed others often acknowledge their behavior but explain and defend it in ways that do not justify their actions.
- To the contrary, such excuses should be seen as admissions of having engaged in sexually harassing behaviors.

106

CREDIBILITY

The following do not add or detract from the credibility of the responding party because they are **irrelevant**:

- Character witnesses. (“He is such a good guy; I know he would never do that.”)
- Popularity with staff and other students. (“Everybody likes him; I just don’t believe he would do that.”)
- No history of past problems. (“She’s never been in trouble before.”)
- Academic performance. (“But she’s a really good student. Her teachers really like her.”)

CREDIBILITY

The following do not add or detract from credibility of the reporting party:

- Clothing. (“Just look at what she was wearing.”) Clothing does not cause sexual harassment, nor do they give anyone permission to touch someone or make sexual remarks.
- Appearance. (“She is so pretty; no wonder he did it,” or “She is so unattractive! I don’t believe anyone would do that to her.”)
- Flirting behavior. (“He’s always flirting with the boys. What did he expect?”)
- Males as victims. (“He should have realized she meant it as a compliment.”)
- Sexual orientation of victims (“Listen, he came out and told everyone. He should have expected that people would act like this.”)

CONFIDENTIALITY

Schools must keep confidential the identity of any individual

- Who has made a report or filed a complaint
- Who has been reported as a perpetrator
- Who has been a witness

Exceptions

- FERPA
- Legal obligations
 - Mandated reporter
 - Contacting law enforcement
- Carry out the purposes of these regulations
 - Disclosure of identities may be necessary to carry out Title IX investigation

CONFIDENTIALITY

- [Letter to Soukup, 115 LRP 18668 \(FPCO 02/09/15\)](#)
- According to the Family Policy Compliance Office, FERPA does not conflict with Title IX's "notice of outcome" requirements outlined in a *Dear Colleague Letter* reported at 111 LRP 23852 (OCR 04/04/11). It concluded that a California district's proposed discrimination procedures, which obligated it to disclose certain information to parents regarding the outcome of its harassment investigations, did not violate FERPA's confidentiality provisions. While FERPA generally prohibits a district from disclosing students' personally identifiable information to third parties without parental consent, there's an exception to this rule in cases involving unlawful discriminatory harassment. A district may inform the parents of a harassment victim of the disciplinary sanction imposed on the perpetrators of the harassment when that sanction directly relates to the victim, such as an order that the harasser stay away from the harassed student.

CONFIDENTIALITY

- Letter to Anonymous, 20 FAB 7 (FCPO 2016).
- FCPO advised a district to consider informing all appropriate district officials of FERPA's consent requirements as they pertain to information about bullying incidents at school. Generally, they should avoid answering a parent's question about another student at school when the information sought could be part of the student's education records. Here, a principal allegedly disclosed protected information about a student's involvement in a bullying incident when talking to the parent of another student on the phone. The principal could have avoided the alleged violation by declining to respond to questions regarding another students' educational records.

TITLE IX

REVIEW OF THE GRIEVANCE PROCESS

GRIEVANCE PROCESS-NOTIFICATION REQUIREMENTS



- A school must investigate the allegations in any formal complaint and send written notice to both the complainant and respondent of the allegations upon receipt of a formal complaint.
- Schools must send written notice of any investigative interviews, meetings, or hearings.

113

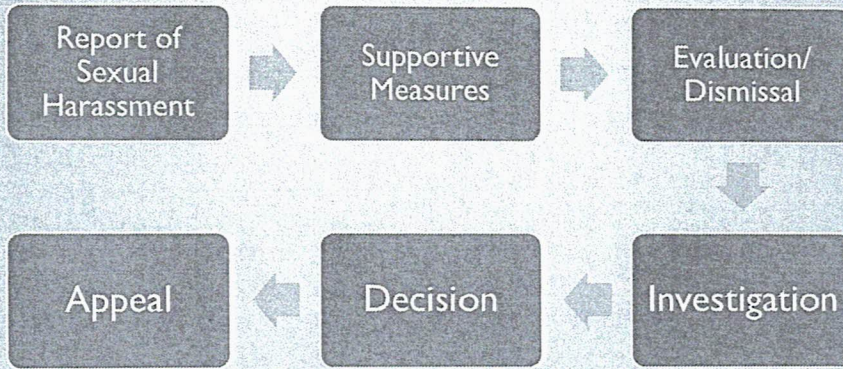
GRIEVANCE PROCESS-NOTIFICATION REQUIREMENTS



- Schools must send the parties, and their advisors, evidence directly related to the allegations, in electronic format or hard copy, with at least 10 days for the parties to inspect, review, and respond to the evidence.
- Schools must send the parties, and their advisors, an investigative report that fairly summarizes relevant evidence, in electronic format or hard copy, with at least 10 days for the parties to respond.

114

THE GRIEVANCE PROCESS

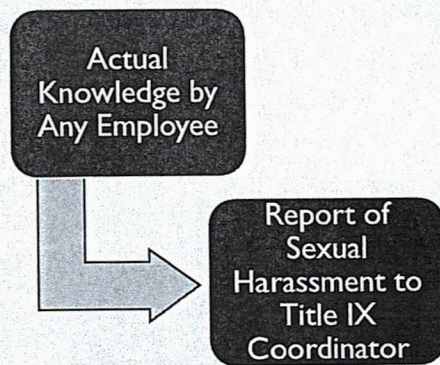


MT MILLER, TRACY, BRAUN, FUNK & MILLER, LTD.
EST. 1973

© Brandon K. Wright

115

THE GRIEVANCE PROCESS

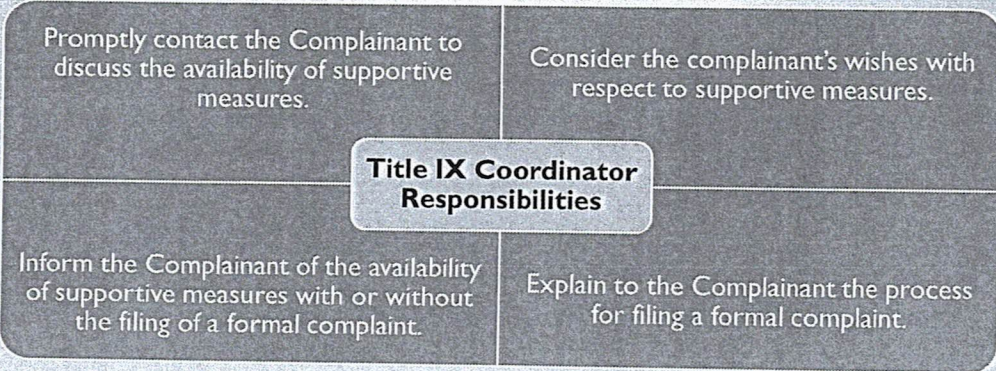


MT MILLER, TRACY, BRAUN, FUNK & MILLER, LTD.
EST. 1973

© Brandon K. Wright

116

THE GRIEVANCE PROCESS



MT MILLER, TRACY, BRAUN, PUNK & MILLER, LTD.
EST. 1974

© Brandon K. Wright

117

THE GRIEVANCE PROCESS

Yes, the Complainant filed a formal complaint.

- Must not respond with deliberate indifference.
- Must offer supportive measures.
- Must follow required grievance process.

No, the Complainant did not file a formal complaint.

- Must not respond with deliberate indifference.
- Must offer supportive measures.
- Title IX Coordinator determines whether to file formal complaint under their own signature: If YES, then follow required grievance process. If NO, supportive measures remain in place, but no further remedy or discipline.

MT MILLER, TRACY, BRAUN, PUNK & MILLER, LTD.
EST. 1974

© Brandon K. Wright

118

THE GRIEVANCE PROCESS

Actual Knowledge + Sexual Harassment + Educational Program or Activity in USA = Sexual Harassment

- ✓ If any are not present, complaint must be dismissed.
- ✓ Consider other available basis for dismissal.

MT MILLER, TRACY, BRAUN, FUNK & MILLER, LTD. EST. 1973

© Brandon K. Wright

119

THE GRIEVANCE PROCESS

Investigator collects evidence from all parties.

Investigator provides both parties with copy of evidence and investigative summary, with 10 days to consider.

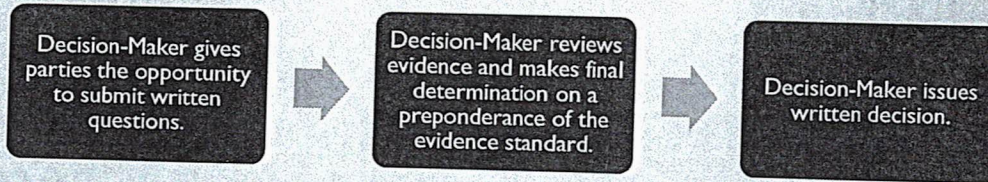
Investigator provides report to Decision-Maker.

MT MILLER, TRACY, BRAUN, FUNK & MILLER, LTD. EST. 1973

© Brandon K. Wright

120

THE GRIEVANCE PROCESS

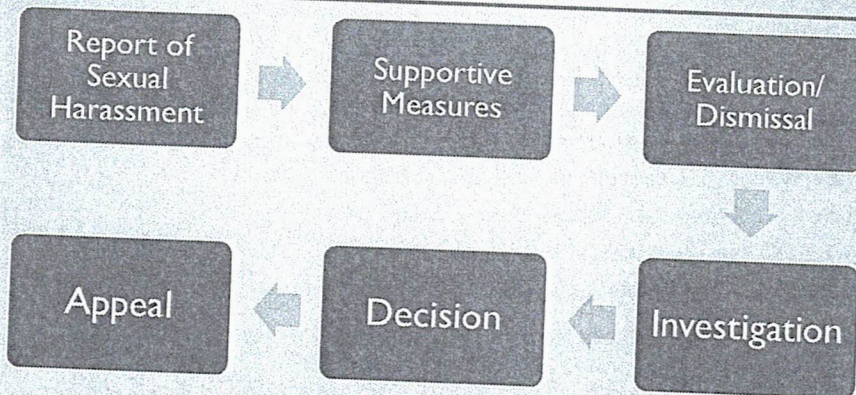


MT MILLER, TRACY, BRAUN, FUNK & MILLER, LTD.
EST. 1973

© Brandon K.Wright

121

THE GRIEVANCE PROCESS



MT MILLER, TRACY, BRAUN, FUNK & MILLER, LTD.
EST. 1973

© Brandon K.Wright

122

TITLE IX

APPEALS PROCEDURE

123

APPEALS



- The school must offer both parties an appeal from a determination regarding responsibility.
- The school must also offer both parties an appeal if the school dismisses a formal complaint or any allegations therein, as well as the following bases:
 - Procedural irregularity that affected the outcome of the matter,
 - Newly discovered evidence that could affect the outcome of the matter, and/or
 - Title IX personnel had a conflict of interest or bias, that affect the outcome of the matter.
- A school may offer an appeal equally to both parties on additional bases as well.

124

APPEALS

- PRESS procedures provide for 10 school business days after receiving the Initial Decision-Maker's written determination to make a written request to appeal. The written appeal is made to the Title IX Coordinator.

APPEALS



- Upon receiving an appeal, the Title IX Coordinator must:
 - Notify the other party in writing of the appeal.
 - Provide both parties 5 school business days to submit a written statement in support of, or challenging, the outcome.
 - Forward these materials to the Appellate Decision-Maker.

APPEALS

- Who should the Appellate Decision-Maker be?
- *If it is the Board of Education...*
 - Aligns with Uniform Grievance Procedure
 - Must have required training
 - Concerns about impartiality in other related hearings (i.e., student disciplinary hearing, employee discipline/dismissal)

127

APPEALS

- Who should the Appellate Decision-Maker be?
- *If it is not the Board of Education...*
 - Outside consultant or attorney?
 - Retired administrator?
 - Trained administrator from neighboring school district?
 - Other appellate officer?

128

APPEALS



- Within 30 school business days, the Appellate Decision-Maker will affirm, reverse, or amend the initial decision.
- Appellate Decision-Maker issues a written decision on the appeal transmitted to both parties simultaneously.
- Written decision must include rationale for the result.

APPEALS

A Written Determination becomes “final” only after:

- The time period to file an appeal has expired, or
- If a party does file an appeal, after the appeal decision has been sent to the parties.

TITLE IX

INFORMAL RESOLUTION OF COMPLAINTS

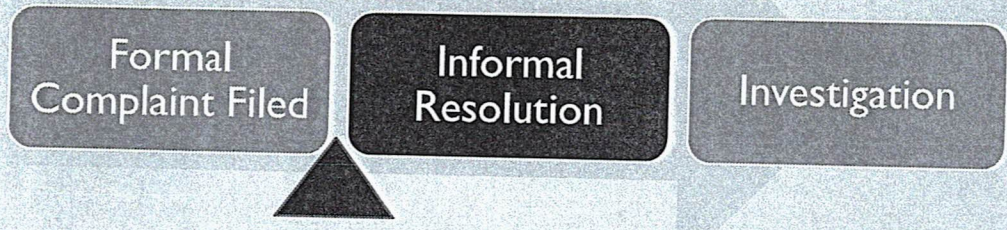
131

INFORMAL RESOLUTION

- Informal resolution may not be used unless a formal complaint has been filed.

132

INFORMAL RESOLUTION



MT MILLER, TRACY, BRAUN, FUNK & MILLER, LTD.
EST. 1975

© Brandon K. Wright

133

INFORMAL RESOLUTION

- Informal resolution may not be used to resolve an allegation that an employee or staff member sexually harassed a student.

MT MILLER, TRACY, BRAUN, FUNK & MILLER, LTD.
EST. 1975

© Brandon K. Wright

134

INFORMAL RESOLUTION



- A school has the discretion to choose to offer and facilitate informal resolution options, such as mediation or restorative justice, as long as both parties give voluntary, informed, written consent to attempt informal resolution.

INFORMAL RESOLUTION LIMITS

- A school may not require for admission, enrollment, or employment, waiver of the right to a formal investigation and adjudication of formal complaints of sexual harassment.

INFORMAL RESOLUTION

- If parties agree to participate in an informal resolution process, either may withdraw from the process at any time and resume the grievance process through the formal complaint process as long as it is prior to agreeing to a resolution.

137

INFORMAL RESOLUTION

Initial Consideration: Meeting Separately?

- When issues are very emotional, as they often are in Title IX disputes, keeping parties separate during the facilitating may be the best way for the parties to move forward.
- “Shuttle Diplomacy”

138

INFORMAL RESOLUTION

- (1) Separate the People and the Issues.
 - Understand the other's experiences
 - Identify misconceptions
 - Allow for the communication of emotions
- (2) Focus on interests. - "Your position is something you have decided upon. Your interests are what caused you to so decide." - Parties need to share interests with one another
- (3) Generate options to address interests.

INFORMAL RESOLUTION

Resolution agreements:

- If the parties reach a resolution, **document the terms**.
- Have both parties review the terms.
- Have both parties **sign** the agreement

INFORMAL RESOLUTION

If not resolved, then the case returns to the formal investigation track.

TITLE IX

PUTTING IT TOGETHER AND PUTTING IT IN PRACTICE:
NEXT STEPS

RECORD-KEEPING

- Schools are required to retain all records regarding a Title IX proceeding for seven years (starting at the date of creation), including proceedings where there was a finding of “no responsibility” or the formal complaint or allegations therein were dismissed.

RETALIATION

- Retaliation is expressly prohibited.
- Individuals may not be charged with code of conduct violations that arise out of the same facts or circumstances as a report or formal complaint of sexual harassment for the purpose of interfering with any right or privilege secured by Title IX.

RETALIATION

- The exercise of rights protected under the First Amendment **by a party** does not constitute retaliation.
 - A party has the right to discuss the allegations under investigation and a right to gather and present evidence.
 - “[A] recipient should not, under the guise of confidentiality concerns, impose prior restraints on students’ and employees’ ability to discuss the allegations under investigation, for example with a parent, friend, or other source of emotional support, or with an advocacy organization.
 - A party’s right to publish articles and essays criticizing the handling of the Title IX investigation or approach to Title IX is protected, as long as it is consistent with the First Amendment.

RETALIATION

- The **school** must keep confidential the identity of complainants, respondents, and witnesses, except as permitted by FERPA, required by law, or as necessary to carry out a Title IX proceeding.

RETALIATION

- A code of conduct charge for an individual making a materially false statement in bad faith in the course of a Title IX grievance proceeding does not constitute retaliation.
- A determination regarding responsibility, alone, is not sufficient to conclude that any party made a bad faith, materially false statement.

RETALIATION EXAMPLES

- Conduction violation charges arising from same circumstances of sexual harassment for **the purpose of deterring the Title IX complaint** are retaliation
 - An alcohol consumption conduct violation if respondent does not admit to the sexual harassment claim
 - A physical violence conduct violation for the complainant who tried to fight off aggressor if they don't withdraw their Title IX complaint
 - Any non-compliance violation for not participating in the grievance process
 - A conduct violation for sexual activity on school grounds

TITLE IX

- Definition of sexual harassment and the scope and application of Title IX is significantly narrowed under the new regulations. The formal grievance process is triggered only upon the filing of a formal complaint and only if within the strict definition, scope and jurisdiction of the rule.

TITLE IX

- The school carries the burden of proof and a respondent is presumed not responsible until application of the grievance process and a determination of responsibility.

TITLE IX

- **District Obligations:**

- Update district policies
- Address complainant and provide supportive measures
- Mandatory reporting
- Informal resolution
- Investigation
- Formal grievance process: - Notice - Report - Decision - Appeal

151

TITLE IX

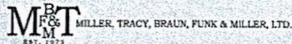
- **Employee Obligations:**

- Know who the District Title IX Coordinator is (their information will be posted on the school's website)
- Recognize a potential Title IX violation
- Report any potential Title IX violation to the Title IX Coordinator immediately upon receiving notice of it
- Review the district's anti-discrimination and anti-harassment policies as soon as they are updated
- Recognize responsibility to report any acts of retaliation
- Understand supportive measures you may need to help implement

152

TITLE IX

- Title IX Regulations (Published May 6, 2020; Effective August 14, 2020) regarding sex discrimination, sexual harassment, and sexual assault.
 - Adopt PRESS Policy (and Procedures) ASAP
 - Handbooks – *any need to update, particularly contact info?*
 - Title IX Coordinator + Publish Contact Info
 - Grievance and Complaint Investigation Procedures
 - Both Employee and Student Complaints
 - **TRAINING, TRAINING, TRAINING**

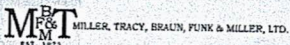


© Brandon K. Wright

Miller, Tracy, Braun, Funk & Miller, Ltd.
 316 S. Charter Street
 Monticello, Illinois 61856
 (217)-762-9416

www.millertracy.com

bwright@millertracy.com
[twitter@bwright_mtbfm](https://twitter.com/bwright_mtbfm)



© Brandon K. Wright