

TITLE IX INVESTIGATOR TRAINING



BERKELEY COUNTY SCHOOLS – NOVEMBER 2, 2021

Today we will discuss:

History of Title IX

The scope of Title IX related to educational program or activity

Berkeley County Title IX Policy and Procedures

Definitions of sexual harassment and other terms

Role of the Investigator how to serve impartially

Bias and Conflict of Interest

The Investigative Process

Inculpatory and Exculpatory Evidence

Issues of relevance

What Happens Next?

Title IX:
20 U. S. C.
Section
1681

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.

(37 little words . . .)

New Title IX Regulations

- Released informally by the United States Department of Education on May 6, 2020 (34 CFR Part 106)
- Effective August 14, 2020
- Does NOT apply retroactively
- Requires training for Title IX Coordinators, Investigators, Decision-makers, Appellate Decision-makers, and Facilitators of informal resolution processes

Educational Program or Activity Defined: 34 CFR 106.44

- Locations, events, or circumstances where the school exercises substantial control over:
 - The Respondent
 - The context in which the alleged sexual harassment or discrimination occurs
 - **THIS INCLUDES ANY BUILDINGS OWNED OR CONTROLLED BY THE SCHOOL OR BY A STUDENT ORGANIZATION THAT IS OFFICIALLY RECOGNIZED BY THE SCHOOL**

Berkeley County Title IX Policies

Effective August 14, 2020

Berkeley County Title IX Policies

- Policy JGH - <https://www.berkeleycountyschools.org/site/handlers/filedownload.ashx?moduleinstanceid=19180&dataid=40759&FileName=Title%20IX%20Grievance%20Procedures%202021.pdf>
- Prohibits sexual harassment
- Defines sexual harassment
- Provides a process that ensures a prompt and equitable resolutions to complaints based on sex discrimination, including sexual harassment
- Requires training for Title IX Coordinators; **Investigators**; and Decision Makers

Berkeley County Title IX Policies

- Must train personnel to avoid bias and conflicts of interest
 - First step in avoiding bias and conflict of interest is to establish policies and procedures that are fair and equitable
- Training must include:
 - Definition of sexual harassment
 - Scope of recipient's education program or activity
 - How to conduct investigations and the grievance process
 - How to serve impartially

Violence Against Women Act (VAWA) and CLERY ACT

- "Sexual assault" - 20 U. S. C. 1092 (f)(6)(A)(v)
"Dating violence" - 34 U.S.C. 1229 (a)(10),
"Domestic violence"- 34 U.S.C. 12291(a)(8)
"Stalking"-34 U.S.C.12291(a)(30)
- Sexual Assault means an offense classified as a forcible or nonforcible sex offense under the uniform crime reporting system of the FBI
- Includes any sexual act against another person without their consent, including rape, sodomy, sexual assault with an object, fondling, incest, and statutory rape

ACTUAL KNOWLEDGE

A school district has ***actual knowledge*** when ***any*** employee knows of sexual harassment.

An employee knows of sexual harassment when they have observed it or have heard about it.

Notice to a Title IX Coordinator or to an official with authority to institute corrective measures is actual knowledge.

When a school district with actual knowledge of sexual harassment in its education program or activity refuses to respond to sexual harassment or a report of sexual harassment, such a refusal is clearly unreasonable under § 106.44(a) and constitutes a violation of the final regulations.

SUPPORTIVE MEASURES

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

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

The Title IX Coordinator is responsible for coordinating the effective implementation of ***supportive measures***.

Responsibilities of Investigators

- During the grievance process the investigator must:
 - Gather and review all evidence
 - Follow any leads
 - Interview witnesses and parties
 - Provide each party the ability to present evidence
 - Notify the Title IX Coordinator of any new allegations discovered during the course of the investigation
 - Draft an investigation report

How to serve your role impartially

All Title IX Coordinators, Investigators ,and Decision-makers must be impartial and free from bias

The Importance of Impartiality

- An impartial process before unbiased officials promotes accurate, reliable outcomes, which effectuate the purpose of Title IX to provide individuals with effective protection from discriminatory practices.
 - 85 Fed. Reg. 30054.

What does it mean to be impartial?

Any individual designated as:

- Title IX Coordinator
- Investigator
- Decision-maker
- Appellate Officer
- Facilitator of an informal resolution process

Must not have a:

- Conflict of interest or bias
- for or against
- Complainants or Respondents generally or an individual Complainant or Respondent

What is impermissible bias?

- Impermissible bias is making a decision based on the characteristics of the parties, rather than based on the facts.
- This includes treating a party differently on the basis of the party's sex or stereotypes about how men or women behave with respect to sexual violence
- It also includes blaming, ignoring, or punishing a party due to stereotypes about the party

Be Transparent!

- If you are asked to serve as an investigator or Decision-maker for a matter, BE TRANSPARENT!
- **Notify the Title IX Coordinator immediately to disclose:**
 - Any prior professional experiences and affiliations
 - Explain why you believe you may or may not have a conflict
 - If substantive, consider disclosing to the parties and providing the the opportunity to object.

If at any time you feel that you have a conflict of interest, and are incapable of acting in an impartial manner, notify the Title IX Coordinator immediately and step down from your role in that particular grievance process.

Avoiding Prejudgment of the Facts

DO's	DON'Ts
Base all decisions on individualized facts, and not on stereotypical notions of what "men" and "women" do or do not do.	Pass judgment on the allegations presented by either party or witnesses.
Avoid any and all stereotypes.	"Believe" one party over the other.
Approach the allegations of both parties with neutrality	Jump to any conclusions without fully investigating the allegations and gathering all of the relevant facts and evidence from all parties involved.
Treat both parties equally and provide an equal opportunity to present evidence, witnesses, and their versions of the story.	

The Grievance Process

What is the “Grievance Process”?

- A school district’s response must treat complainants and respondents equitably by offering supportive measures as defined in § 106.30 to a complainant, and by following a grievance process that complies with § 106.45 before the imposition of any disciplinary sanctions or other actions that are not supportive measures as defined in § 106.30, against a respondent.
- A school district’s “grievance process” = its Title IX policy and procedures
- DO NOT confuse “grievance process” with filing something with the grievance board; a citizen’s complaint or any other process where we file a “grievance.”

Grievance Process continued...

- YOU ARE REQUIRED TO OBJECTIVELY EVALUATE ALL RELEVANT EVIDENCE- INCLUDING BOTH INCULPATORY AND EXCULPATORY EVIDENCE.
- ALL PARTIES MUST BE TREATED EQUALLY. AT. ALL. TIMES!

INVESTIGATING FORMAL COMPLAINTS

- Ensure that the burden of proof and the burden of gathering evidence rests on the school district and not on the parties.
- The school district cannot access, consider, disclose, or otherwise use a party's records that are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in the professional's or paraprofessional's capacity, or assisting in that capacity, and which are made and maintained in connection with the provision of treatment to the party, unless the school district obtains that party's voluntary, written consent to do so.
- If a party is not an "eligible student," as defined in 34 CFR 99.3, then the school district must obtain the voluntary, written consent of a "parent," as defined in 34 CFR 99.3)
- Provide an equal opportunity for the parties to present witnesses, including fact and expert witnesses, and other inculpatory and exculpatory evidence.

INVESTIGATING FORMAL COMPLAINTS

- Not restrict the ability of either party to discuss the allegations under investigation or to gather and present relevant evidence;
- Provide the parties with the same opportunities to have others present during the process, including the opportunity to be accompanied to any related meeting or proceeding by the advisor of their choice, who may be, but is not required to be, an attorney, and not limit the choice or presence of advisor for either the complainant or respondent; however, the school district may establish restrictions regarding the extent to which the advisor may participate in the proceedings, as long as the restrictions apply equally to both parties;
- Provide, to a party whose participation is invited or expected, written notice of the date, time, location, participants, and purpose of all hearings, investigative interviews, or other meetings, with sufficient time for the party to prepare to participate;
- Provide both parties an equal opportunity to inspect and review any evidence obtained as part of the investigation that is directly related to the allegations raised in a formal complaint, including the evidence upon which the school district does not intend to rely in reaching a determination regarding responsibility and inculpatory or exculpatory evidence whether obtained from a party or other source, so that each party can meaningfully respond to the evidence prior to conclusion of the investigation.

Investigation Timeframe

- The District will endeavor to complete investigations within sixty (60) days of the date on which the formal complaint was received; however, the District's primary objective is a thorough and equitable investigation and grievance process.
- The District shall coordinate its investigation and grievance process with any other ongoing criminal investigation of the incident, if any. The District may determine whether to delay its investigation pending the conclusion of a criminal investigation or for criminal proceedings to begin. If the fact-finding portion of the investigation is suspended due to the existence of a criminal investigation, the District's investigation shall resume promptly once law enforcement officials have completed their evidence gathering state of the criminal investigation.
- In the event of a temporary delay of the process or the limited extension of time frames for good cause, the Title IX Coordinator shall provide written notice to both the Complainant and the Respondent notifying them of the delay or extension and providing the reason for the action.

Preparing for an Investigation

Planning

Setting the state for interviews

Questioning during the interview

Evidentiary issues for the report

Report Drafting

Planning an Investigation

- Review:
 - Formal complaint, Notice of Allegations, Any statements, Berkeley County Title IX Policy
 - Student/Employee files
- Identify
 - Elements of the alleged conduct
- Outline
 - Witness order (be flexible)
 - Proposed questions (be flexible)
 - Investigation deadlines
- At this stage, you are focused on reviewing the allegations, confirming there are no conflicts, and preparing your investigation plan.

Before Any Interviews Begin...

- Both parties must be provided with a WRITTEN explanation of the allegations with “sufficient details known at the time and with sufficient time to prepare a response before any initial interview.”
- Allow parties to supplement their interview with a written statement.
- If additional allegations are found during the investigation, or if the nature of the allegations change, notify the Title IX Coordinator immediately!
 - A new Notice of Allegation will be prepared and given to the Respondent detailing the new allegations.

Setting the Stage

- Greet witness
- Introduce yourself as a neutral investigator
- Maintain good eye contact, be approachable
- Try to calm their nerves, small talk helps
- Inform them that you will be taking notes; if you record the interview and obtain consent.
 - Turn recorder on and state for the record the date, who is present in the room and that the individual has given you permission to record.
 - Remember to ALWAYS give advanced written notice to any person you intend to interview.

Questioning -

The goal is to collect all facts necessary for the Decision-maker to reach their decision

- Be prepared with an outline, but don't get stuck to it.
- Do not read it verbatim
- Be intentional and unbiased in your questions
- Ask open questions, avoid yes or no
- Start from the beginning (i.e.: What is your position? How long have you been employed...)
- Clarify unclear or confusing statements
- Don't be afraid to revisit statements if necessary
- Address holes in statements
- Document any refusals in your notes
- Follow-up on evasive answers
- Ask if they have any documents that they think would be helpful
- If they reference texts, emails, always ask for copies
- Watch facial expressions and body language

Watch what
you say...

- You can be empathetic in tone, but always remain neutral and impartial.
 - Tell me more about...
 - Help me understand...
 - What do you recall about...
 - Have you ever heard...
 - What was your response when...

Interview Notes

- Type up your interview notes into an interview summary.
- Try to prepare all interview summaries within 24 hours so that you can ensure you remember all details accurately.
- Make sure that your notes do not include determinations about responsibility.
- Identify on all notes the date of the interview and who was present.
- Each interview should include: hard copy of written notes, typed interview summary and recording of interview, if any, and any additional written statement provided by interviewee.

IMPORTANT TIMELINES:

- **10 DAYS BEFORE THE INVESTIGATION REPORT IS PREPARED...**
- The investigator must send to each party and their advisors, if any, the evidence collected during the course of the investigation for their inspection and review in either an electronic format or hard copy.
- The parties have 10 days to review and submit a written response, which the investigator will consider prior to completion of the investigative report.
- This evidence will be available for both parties to review and reference during the decision-making phase of the grievance process.

IMPORTANT TIMELINES:

- The investigator must send to each party and their advisors, if any, the investigative report in an electronic format or hard copy.
- The parties have 10 days to review and submit a written response, which the investigator will consider prior to completion of the investigative report.
- So **10 days** prior to issuing the investigation report the parties get to respond to the evidence and **10 days** prior to a hearing parties get to review and respond in writing to the investigation report.

The Investigation Report

- Summary of Allegations
- Policy provisions potentially implicated
- Timeline of investigative process
- Description of procedural steps taken
- Relevant evidence (Exhibit List, Documents Reviewed)
- Witnesses Interviewed
- Summary of information obtained during investigation
- Parties' required responses after the 10 day review periods

Do not include a determination of responsibility!

The Decision

How the Decision-making process works without a hearing

Standard of Evidence: PREPONDERANCE OF THE EVIDENCE

Whether it is more likely than not that the Respondent committed the alleged sexual harassment.



The Decision-making Process

- Elementary and secondary schools are free to conduct grievance proceedings without any type of hearing, including a live hearing.
- Berkeley County's Title IX grievance process does not include a live hearing.
- The policy provides that each party will have 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.
- These questions will be submitted to the Decision-maker to review and approve for relevancy before being given to the other party or witness to respond.
 - If a question is determined by the Decision-maker to be not relevant, the Decision-maker must provide the rationale for their decision in writing.

Decision-making process continued



EACH PARTY WILL BE PROVIDED WITH A COPY OF THE ANSWERS GIVEN AND ALLOWED ADDITIONAL TIME, FOR LIMITED FOLLOW-UP QUESTIONS.



ONCE THIS PROCESS IS COMPLETED, THE DECISION-MAKER WILL MAKE A DECISION AND PROVIDE A STATEMENT OF, AND RATIONALE FOR, THE RESULT AS TO EACH ALLEGATION.

Relevancy

- Evidence pertinent to proving whether facts material to the allegation are more or less likely to be true and that do not relate to complainant's sexual predisposition or prior sexual acts (*with two exceptions*)
- A Decision-maker must make a determination as to relevancy for EVERY question asked
 - If not relevant: must explain rationale for that decision
 - Exclusion of questions based on relevancy could be appealable after the determination has been issued

Related vs. Relevant

- **Related**

- Investigator has a duty to collect ALL EVIDENCE that is related to the allegations whether or not it is relevant
- This does not include evidence that is privileged, such as medical records.

- **Relevant**

- Relevant evidence is all evidence that is related to the allegations, EXCEPT that which is protected under the rape shield provisions

When is the decision final?

- The determination regarding responsibility becomes final either on the date that the District provides the parties with the written determination of the result of the appeal, if an appeal is filed, or if an appeal is not filed, the date on which an appeal would no longer be considered timely.
- After a determination becomes final, the Title IX Coordinator is responsible for the effective implementation of any remedies.
- Disciplinary actions and procedures shall be consistent with the Student and Employee Codes of Conduct, District policies, procedures, and other applicable state and federal laws, rules, regulations, and constitutional requirements.

The Appeal



- If a party wishes to file an appeal, the appeal must be submitted in writing to the Superintendent within ten (10) days from the receipt of the Decision-Maker's final determination.

Informal Resolution

A matter can be informally resolved ONLY IF both parties give voluntary and informed, written consent.

Cannot require as a condition of enrollment or employment, the waiver of the right to a formal investigation and adjudication process.

INFORMAL RESOLUTION IS NEVER PERMITTED TO RESOLVE ALLEGATIONS THAT AN EMPLOYEE SEXUALLY HARASSED A STUDENT.

QUESTIONS?

Thank you!

November 2, 2021

