



**KINGSLEYBOGARD**

ATTORNEYS

# **TITLE IX COMPLAINT PROCEDURES AND INVESTIGATION BEST PRACTICES**

**PRESENTED BY  
Lindsay K. Moore  
Ethan T. Retan**

**CHICO UNIFIED SCHOOL DISTRICT  
OCTOBER 19, 2023**

# Introductions



**LINDSAY K. MOORE**  
**Partner**



**ETHAN T. RETAN**  
**Senior Associate**



# Road Map

1. What is Title IX?
2. How Title IX Changed
3. Sexual Harassment Defined
4. Jurisdiction
5. The Four Roles
  - a) Coordinator
  - b) Investigator
  - c) Decision-maker
  - d) Appellate Decision-Maker
6. How Title IX Might Change Again



# Title IX Overview

## What is Title IX?

- Massive federal law prohibiting sex/gender discrimination in education
- One requirement is that districts have procedures to investigate and address sexual harassment



# How Title IX Changed

- Prior to May of 2020, school districts had only Office of Civil Rights (OCR) guidance and a few court decisions defining sexual harassment, or indicating the response required when allegations of harassment were received.
- So, Districts typically satisfied Title IX by following the Education Code's uniform complaint process, outlined in the Board Policy 1312.3.



# How Title IX Changed

- In May 2020, the Trump administration issued new, detailed rules. For our purposes today, the rules:
  - Define sexual harassment
  - Define standard of notice necessary to trigger duty to respond to harassment allegations
  - Outline investigation/due process procedures when duty to respond is triggered



# Title IX – What Is Sexual Harassment?

For purposes of Title IX, “sexual harassment” is any of the following:

- *Quid pro quo.* When an employee conditions a benefit, service, aid, etc. on participation in unwelcome sexual conduct.
- *Hostile Environment.* Unwelcome sexual conduct that is so severe, pervasive and objectively offensive that it denies a person equal access to District educational program/activity.
- Sexual assault.



# Title IX – Hostile Environment

- “Hostile environment” harassment is *by far* the most common type of sexual harassment to arise with students, so that is what we will focus on today.
- New rules make it more difficult to establish these allegations (“and” not “or”).
- But “more difficult” *does not* mean impossible.





# Title IX – Notice/Knowledge

- Under the new rules, Districts must respond to sexual harassment when it has “actual knowledge” of the harassment allegations. “Actual knowledge” is provided through:
  - Submission of complaint
  - Other circumstances demonstrating that any employee of the District knew/should have known of the allegations



# Title IX – Jurisdiction

- Not all sexual harassment falls under Title IX. Instead, only harassment that:
  - Occurs in the U.S.
  - In an educational program or activity in which the District exercises control over:
    - The “harasser” (respondent)
    - The circumstances in which the harassment allegedly occurs
  - The victim was participating in the District’s educational program/activity at the time harassment occurred.



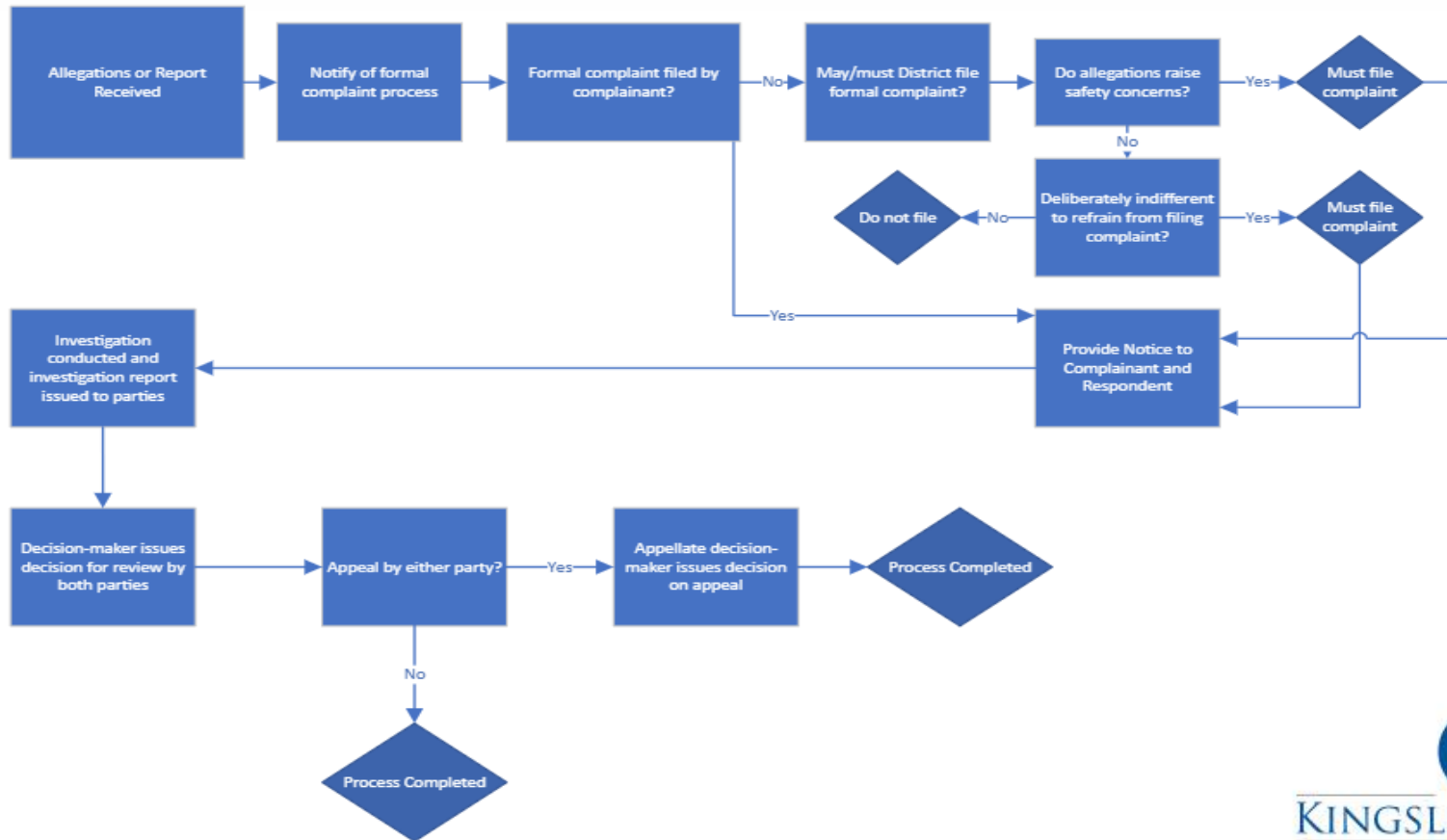
# Title IX – Don't Get Fancy

- Even though the definitions are technical, don't get "cute."
- Always take sexual harassment allegations seriously, even if you don't think the allegations qualify for a response under Title IX.
  - Could still qualify as uniform complaint (more on this later)
  - You may not know all the facts
- Consequences of non-compliance can be severe.
- If there's a question, contact legal.



# Title IX Complaint Overview

## TITLE IX PROCEDURAL FLOWCHART (BPs 4119.11/5147.7; ARs 4119.12/5145.71)



# Title IX – The Four Roles

- The Title IX process is handled by four roles:
  - Coordinator
  - Investigator
  - Decision-maker
  - Appellate decision-maker
- Roles must be filled by *different people* with *no* conflicts of interest or bias



# Title IX -- Coordinator

- The Coordinator is the “MC” of the Title IX process
  - Complaint intake/filing
  - Supportive measures
  - Emergency removals
- District’s designated coordinator is:  
Tina Keene  
Director, State and Federal Programs



# Title IX – Coordinator – Intake/Filing

- Coordinator is responsible for intake and filing of complaints
- Complaint must *always* be submitted in writing, although you can assist complainants with disabilities



# Title IX – Coordinator Hypothetical

You are the Title IX Coordinator...

Sbraya, a senior high school student, comes into your office and tells you that another student, Steven, sexually assaulted her in the bathroom that morning. You encourage her to file a Title IX complaint. But Sbraya refuses because she doesn't want to ruin her senior year.

What is the next step?





# Title IX -- Coordinator

- Coordinators are sometimes *required* to file a complaint *even if the complainant does not*
- Additionally, *may* (not must) file a complaint when failing to do so is “deliberately indifferent”



# Title IX -- Coordinator

- Coordinator has many other responsibilities
  - Notice of complaint filing
  - Supportive measures
  - Emergency removals
  - Informal resolution



# Title IX -- Coordinator

- When a formal complaint is filed, must provide written notice to both parties
- Notice must include many things such as:
  - Summary of complaint process
  - Statement that respondent is “innocent until proven guilty”
  - Right to an advisor
- Check your AR 4119.12/5145.71 for details (we also have a template)



# Title IX – Coordinator

- Upon receipt of a *report* (not complaint) of sexual harassment, must offer supportive measures
- Must be *non-punitive* (e.g., no discipline)
- Examples:
  - Schedule changes
  - No contact orders
  - Leaves of absence
  - Counseling



# Title IX -- Coordinator

- The Coordinator may also require the respondent's emergency removal
- For complaints against employees, employee may be placed on paid admin leave as normal



# Title IX -- Coordinator

- For complaints against students, emergency removals are more complicated
- Must conduct an “individualized safety and risk analysis”
  - Student must pose *immediate* danger to *physical* health and safety of another person
  - Process is undefined, but removal should be based on more than just the allegations
  - Also subject to appeal
  - Special education students retain rights



# Title IX -- Coordinator

- Coordinator *may* also offer informal resolution
  - Never required to offer
  - Parties never required to participate
  - Can withdraw at any time
- If parties choose to participate, must provide *written* consent
- Not appropriate in every case



# Title IX -- Investigator

- Investigations form the foundation of the complaint process
- Are the most important thing to get “right”
- Investigations will be scrutinized heavily by both parties





# Title IX -- Investigator

- It is *extremely* important that the investigator (and, later, the decision-maker) are *neutral*
- The investigator is gathering facts and making credibility determinations
  - Not trying to prove anything
  - Not trying to help the parties get along
  - Not trying to reach what you feel is a “fair” result, or any particular result at all



# Title IX -- Investigator

- Also, it is vitally important not to prejudge the issue
  - The allegations may seem egregious or far fetched
  - You may feel the complainant is overreacting or that the respondent is a terrible criminal
  - But the complaint is just allegations—after investigating the case the facts are very likely to be more complicated



# Title IX -- Investigator

- Conflicts of interest or bias, for both the investigator and the decision-maker, need to be avoided at all costs
- Conflicts/bias might include:
  - Personal connection to a party or party's family member(s)
  - Emotional impact of allegations
  - Strong feelings about a particular party
  - Anything that could undermine neutrality



# Title IX -- Investigator

- Investigator is responsible for gathering relevant evidence regarding the complaint
- Evidence can be almost anything:
  - Witness testimony/statements
  - Documents
  - Videos
  - Photographs
  - Text messages
- Evidence is “relevant” if makes a material fact named in the allegations more or less likely to be true
  - Includes information that is relevant to credibility



# Title IX -- Investigator

- In most situations, we recommend that the fact gathering process proceed like this:
  1. Obtain as much evidence as you can in advance of any witness interviews.
  2. Meet with the Complainant first to get a sense of the allegations and ask relevant questions regarding the complaint or evidence you gathered. During the interview, be sure to ask the complainant to provide any supporting evidence or evidence you feel is relevant to your investigation.
  3. Interview other relevant witnesses *other than* the Respondent. Again, ask for copies of supporting evidence, if available.
  4. Finally, interview the Respondent, incorporating the evidence you have already gathered into your questioning. Ask for copies of supporting evidence.
  5. Schedule follow-up interviews if necessary.



# Title IX -- Investigator

- While every investigation is different, there are some general tips for questioning as well:
  - Start with the easy questions!
  - Ask the basics (who, what, where, when)
  - Be neutral
  - Don't use "leading" questions if avoidable
  - Ask "why?"
  - Have a "flow"
  - *Always* ask:
    - Anything missed?
    - Any documents/evidence?
    - Any witnesses you think I should talk to?



# Title IX -- Investigator

- Properly documenting an investigation is often just as important as gathering evidence. Your investigation is only as good as its “record.”
  - Take real-time notes on any witness interaction, especially interviews
  - Don't rely on written statements if possible
  - Record credibility determinations
  - Have a witness present



# Title IX -- Investigator

- Once you have gathered all relevant evidence, you must create a draft investigative report
  - The report must contain a copy of all evidence gathered during the investigation
  - Witness testimony and credibility determinations may be summarized
- Draft report must be forwarded to the parties at least ten days prior to submission to decision-maker
- Parties must be permitted to review and issue a response to draft report
- After considering parties' feedback, draft report may be finalized and forwarded to the decision-maker





# Title IX -- Investigator

- A few things to note:
  - The investigation report *does not* reach a conclusion about the facts or whether harassment occurred; it is only a summary of the evidence
  - Parties are permitted to bring advisors to their interview(s) and must be provided at least 24 hours' notice
  - If, during the investigation, it is revealed that the District does not have jurisdiction over the complaint, it should be dismissed



# Title IX – Decision-Maker

- The next step in the process is the decision-maker, who decides whether harassment occurred
- Before reaching a decision, the decision-maker must give each party an opportunity to submit written questions to any party or witness, and permit limited follow-up questions



# Title IX – Decision-Maker

- Decision must be based on a “preponderance of the evidence standard”
  - Fancy term for “more likely than not” or the “weight of the evidence”
- In other words, allegation against respondent may be upheld if the evidence shows it is more likely than not to be true



# Title IX – Decision-Maker

- The decision-maker then issues a written decision. The decision must:
  1. Identify all allegations potentially constituting sexual harassment
  2. Describe the procedural steps taken from receipt of the complaint through the written decision, including identifying witnesses, investigation methodology, and notifications provided to the parties
  3. Issue findings of fact supporting the decision
  4. Conclude whether the respondent's behavior violated the District's code of conduct
  5. State the rationale as to each allegation of sexual harassment, as well as any sanctions to be imposed on the respondent and what remedies will be provided to the complainant
  6. Describe the complainant and respondent's right to appeal and applicable procedures



# Title IX – Decision-Maker

- Absent good cause, decision must issue no later than 60 days after the complaint was filed
  - No, this is not a long time.
- The District needs to make sure it is promptly moving through the complaint process



# Title IX – Appellate Decision-Maker

- Either party may appeal the decision within ten days for any of the following reasons:
  1. Procedural irregularity affecting the outcome
  2. New, material evidence that was unavailable previously
  3. Alleged conflict of interest or bias affecting the outcome



# Title IX – Appellate Decision-Maker

- If an appeal is filed, the appellate decision-maker must:
  1. Notify the other parties in writing that an appeal has been filed
  2. Give both parties the opportunity to submit a written statement in support of or challenging the outcome of the original decision
  3. Issue a written decision within 20 days deciding the appeal and the reasons therefore



# Title IX – What May Change

- Think you've mastered the Title IX complaint investigation process?
- The Biden administration has proposed significant changes to the process.





# Title IX – What May Change

- Some of these changes make the process easier!
  - Investigator and decision-maker/coordinator may be the same person
  - More privacy protections
  - Simplified and less formal notice requirements
- It is possible that these changes will allow Title IX investigations to be handled by the uniform complaint process



# Title IX – What May Change

- But some changes also make the process more difficult by significantly expanding the scope of the Title IX investigatory procedures
  - Title IX investigations will be required not only for sexual harassment but for any kind of “sex discrimination”
  - Sexual harassment definition has been expanded





KINGSLEYBOGARD

ATTORNEYS

# HYPOTHETICAL SITUATIONS & QUESTIONS???

