



Ennis Britton Co., L.P.A.  
Attorneys at Law

Cincinnati • Cleveland • Columbus

August 6, 2020

# Title IX for Compliance Officers and Administrators

Presented by:

Bob McBride

Jeremy Neff

Erin Wessendorf-Wortman

[rmcbride@ennisbritton.com](mailto:rmcbride@ennisbritton.com)

[jneff@ennisbritton.com](mailto:jneff@ennisbritton.com)

[ewwortman@ennisbritton.com](mailto:ewwortman@ennisbritton.com)



## What We Will Discuss Today . . .

- New Title IX Regulations – Review of what has Changed
- What does a Title IX Coordinator Do?
- Investigations



# **\*New\*** Title IX Regulations

# Title IX

Title IX was enacted in 1972 as part of amendments to the Higher Education Act of 1965.

Title IX prohibits discrimination in federally funded educational programs on the basis of sex.

Any school district receiving any Federal funds **MUST** comply with Title IX.

The US Department of Education's Office for Civil Rights (OCR) enforces Title IX.

## Title IX prohibits sex discrimination in federally funded educational programs.

“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.”

Under Title IX, any public elementary and secondary school, school district, etc., receiving any Federal funds **MUST** comply with Title IX.

The US Department of Education's Office for Civil Rights (OCR) enforces Title IX.

In OCR's Dear Colleague Letter issued April 24, 2015: **the most egregious and harmful Title IX violations occur with failure to designate Coordinator OR Coordinator not sufficiently trained.**

## What is Prohibited?

1. Students may not be **discriminated against** on the basis of sex.
2. Students may not be **retaliated against** for making complaints regarding sexual harassment or discrimination.
3. School Districts cannot be **deliberately indifferent** to complaints of sexual harassment by students.  
(Employees are protected under Title VII)

## What is Required?

- Schools must provide **equal opportunities** to both sexes in the following:
  - Awarding of **scholarships** (applies primarily to intercollegiate programs)
  - **Participation opportunities**, dates and scheduling, including the number of opportunities available, selection of sports, and level of competition
- Treatment and benefits.
- Administrative remedies need not be exhausted before suit is filed.



## What Are Our Responsibilities Under Title IX?

1. **Designate** at least 1 Title IX Coordinator for the District  
(and perhaps by building if large district)
2. **Publish** a policy that states that the District does not discriminate on the basis of sex in its education programs and activities
3. **Establish** a grievance complaint procedure
4. **Implement** the grievance complaint procedure

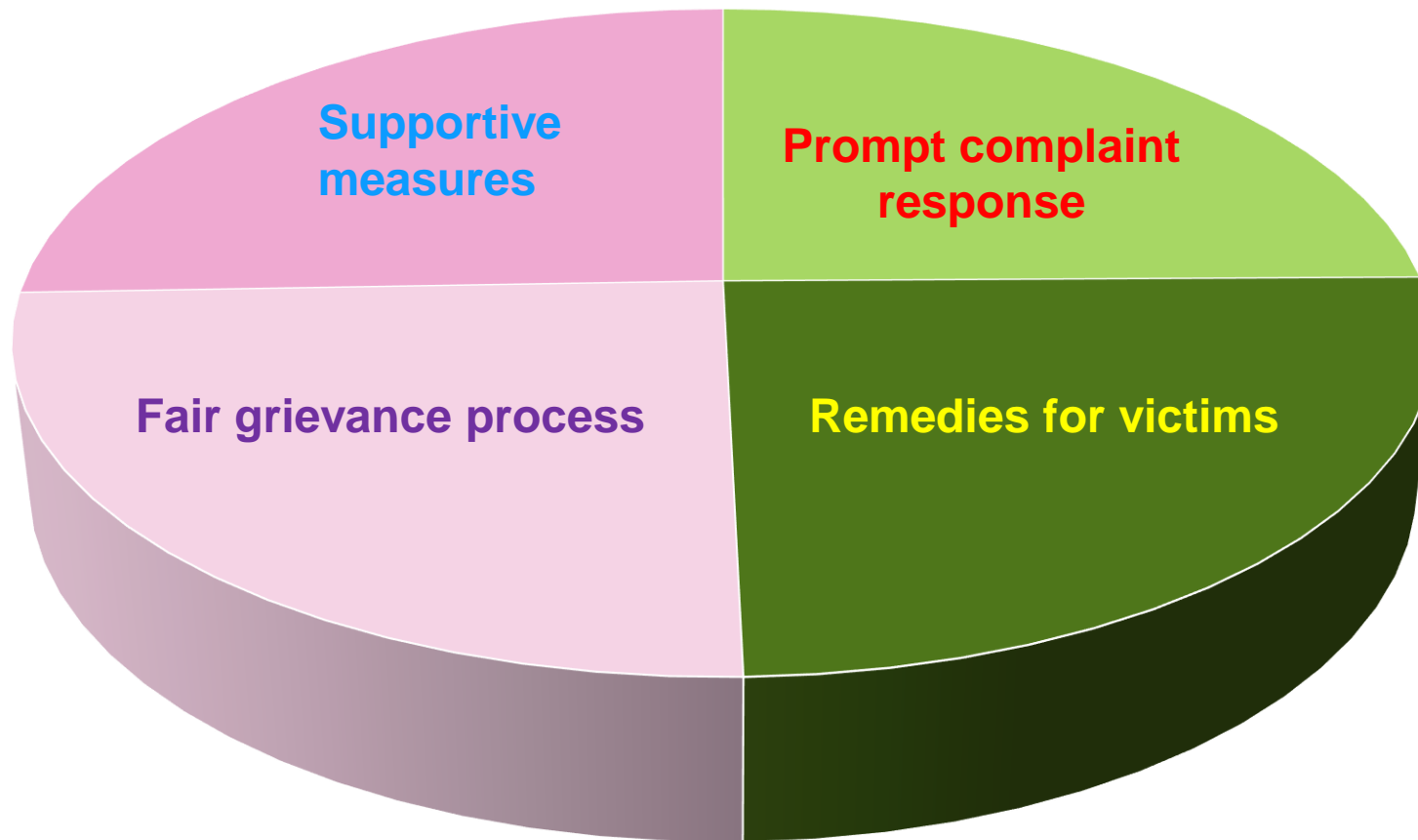
## Types of discrimination prohibited include:

- Sex stereotypes
- Sexual harassment
- Failure to provide equal opportunity in athletics
- Discrimination based on pregnancy or parental status
- Sexual violence
- Scheduling and other things such as equipment and access to facilities
- Gender identity, transgender, sex role expectations
- Discipline
- Retaliation

## US DOE Changes Title IX Regs

- The U.S. Department of Education released revised Title IX regulations, which includes several new provisions.
- U.S. DOE Sec. DeVos stated that the changes take "historic steps to strengthen Title IX protections for all students and to ensure all students can pursue an education free from sex discrimination."
- The regs take effect **August 14<sup>th</sup>, 2020.**
- Check with your policy providers for updates.

## 4 main change areas



- Offering supportive measures
- Prompt complaint response
- Fair grievance process
- Remedies for victims

## District's Title IX Obligations with Respect to Sexual Misconduct

- Investigate
  - End
- Remedy
- Prevent

## Designation of Coordinator

- Districts must designate at least one employee as the “Title IX Coordinator.”
- Must provide the Coordinator’s contact information to:
  - Applicants for admission and employment,
  - Students,
  - Parents or legal guardians of elementary and secondary school students,
  - Employees, and
  - All unions or professional organizations holding CBA’s or professional agreements with the district.

**34 CFR Sec. 106.8(a)**

## Training the Title IX Coordinator

- Coordinators need to receive training on:
  - the definition of sexual harassment,
  - how to investigate,
  - the grievance process, (including hearings, appeals, and informal processes)
  - How to serve impartially,
  - Technology to be used at a live hearing,
  - Include a presumption that respondent is not responsible until a determination of responsibility is made,
  - Post training material on website for public inspection.

## Responsibilities – Break-Down

- Designated Coordinator Responsibilities:
  - **Oversee** all complaints (filing, investigation, resolution)
  - **Identify** and address any patterns and/or systemic problems
  - **Draft, revise and provide training** on district's policies and procedures on sex discrimination for compliance with Title IX
  - **Conduct** constituent surveys for analysis
  - **Monitor** students' participation in athletics & extra-curricular activities (disproportionality)
  - **Monitor** students' participation in academic programs (disproportionate)



## Adoption of Grievance Procedures

- Districts must **adopt and publish an updated grievance process** that complies with the new regs.
- Grievance process will be followed for formal complaints of sexual harassment.
- It must include **how to report or file a complaint** of sexual harassment or discrimination **and how the recipient will respond**.

**34 CFR Sec. 106.8(c)**

## General Response to Sexual Harassment

- The Title IX coordinator is required to:
  - (1) Immediately contact the complainant with information regarding supportive measures,
  - (2) Consider the complainant's wishes regarding those measures,
  - (3) Inform the complainant of those measures with or without filing a formal complaint, and
  - (4) Explain the process of filing a formal complaint to the complainant.

## Responsibilities – Break-Down

- Outline of Grievance Procedure Requirements:
  - Right to file complaint (informal or formal)
  - Right to adequate, reliable, and impartial investigation of complaints
  - Equal opportunity to **present witnesses and other evidence**
  - Right to same **appeal process**
  - Right to **notice of timeframes**
  - Burden of Proof
  - Prompt and equitable resolution
  - General disciplinary procedures may apply to address
  - Right to notice of outcome **INCLUDING (FERPA): sanction imposed, BUT ONLY WHEN sanction directly relates to complainant**

# Grievance process

- Process also must include:
  - Timeframes for reasonably prompt conclusion
  - Must describe general list of remedies and disciplinary sanctions
  - Make a choice of evidence standard- **preponderance or clear and convincing**
  - Describe appeal process
  - All provisions must apply equally to complainant and respondent
  - **Provide for written questions-** after investigative report sent, but **BEFORE** conclusion about responsibility is made, each party must:
    - be able to submit written, relevant questions to any party,
    - provide the answers to each party, and
    - allow limited follow up questions.

# Grievance Process

- Making the call:
  - The decision-maker about whether there has been sexual harassment/misconduct **MAY NOT be the same person** who did the investigation or the Title IX Coordinator.
  - The decision-maker must issue a report with:
    - Findings of fact
    - Conclusions about whether misconduct occurred
    - Rationale for each determination
    - Any disciplinary sanctions
    - Remedies for the complainant
    - Must be sent at the same time to parties
    - Must include appeal information.

# Appeals

- **Bases for appeal:**
  - Procedural irregularity
  - Newly discovered evidence
  - Bias or conflict of interest of Title IX Coordinator or other investigative personnel

## Informal resolution

- Schools may offer:
  - Mediation
  - Restorative justice
  - Other informal methods of resolution
- As long as:
  - Both parties agree
  - Voluntary, informed, written consent
  - May withdraw at any time
  - Staff must be well-trained in these options.
- May not offer informal resolution *until formal complaint filed*. Not available if staff member alleged to have sexually harassed a student.

## Fair grievance process- **ACTION ITEM**

- **Update grievance process**
- How, though?
  - Must make it clear that neither accused (respondent) nor victim will be subject to sex discrimination for making a complaint
  - Must offer supportive measures that preserves equal education access
  - May not treat respondent as responsible until grievance process concludes



## Dissemination of Policy

- **Eliminates** the requirement that a district publish notice of their Title IX coordinator and grievance procedures in local newspapers and magazines.
- *Instead*, districts must “prominently” display this information on its **website**.
- It does not contain a requirement to publish by a certain date.
- Don’t forget to post the training materials.

**34 CFR Sec. 106.8(b)**

## Dissemination of Title IX Coordinator info on website

- **Action Item:**
- Make sure the Title IX Coordinator info on the website includes:
  - Name
  - Address
  - Email
  - Phone number
  - Add that reports may be made in person, by phone, regular mail, and by email.
  - Notice must include that reports may be made at any time by phone, mail or email, even during non-business hours.

## Changes to Definitions

- ***Actual knowledge***: Definition met when person provides notice of sexual harassment or allegations to a district's Title IX Coordinator or any individual with authority to use corrective measures at the district, or ***to any employee of an elementary or secondary school***. "Notice" includes, but is not limited to, a report of sexual harassment.

## Actual knowledge change

- Means a report may be made to *any* school employee
- Also means that when a report is made to **any school employee**, this starts the clock on responding to the complaint promptly.
- Contact complainant to explain how to file a formal complaint and offer supportive measures.
- Explain supportive measures may occur with or without a formal complaint.

## “Actual Knowledge” of what?

- **Err on the side of caution!** There are many examples in which notice of sexual harassment may be obtained other than by direct complaint:
- Examples:
  - Teacher hears a rumor about a sexual relationship between another teacher and a student;
  - A staff member watching a student speak in a sexually inappropriate way to another student;
  - The school receiving notice that that an off-campus sexual violence event is creating retaliation at school.
  - Incident on the bus where a student grabs another student.
- Although the law is still not quite settled on what constitutes notice, it is recommended these types of instances be reported to the district’s Title IX coordinator for follow-up.

## Must the Conduct Occur at School?

- School officials are responsible for acts occurring on school grounds or situations over which the school exercised “substantial control”
  - Athletic Events
  - Field Trips
  - Class Trips
  - Banquets, concerts, etc.
  - Keep an eye out for this if you are a chaperone or someone working or assisting during these events.

## What are these “supportive measures”?

- Defined as:
  - “individualized services reasonably available that are nonpunitive, non-disciplinary, and not unreasonably burdensome to the other party while designed to ensure equal educational access, protect safety, or deter sexual harassment.”
  - Examples: changing classes, stay away orders, different schedules, assigning buses, guidance counselor access, checking in regularly, etc., etc.

## Changes to Definitions

- ***Sexual harassment***: Conduct that satisfies **one or more** of the following:
  - An employee conditioning aid, benefits, or services on participation in unwelcome sexual conduct.
  - Unwelcome conduct so *severe, pervasive and objectively offensive* that it denies a person equal access.
  - Sexual assault, dating violence, domestic violence, or stalking.

**34 CFR Sec. 106.30(a)**



## General Response to Sexual Harassment

- This **new section** requires that districts respond **promptly** and in a way that is not intentionally indifferent, when it has **actual knowledge** of sexual harassment.
- Districts must treat complainants and respondents equally in offering supportive measures to the complainant and by following a compliant grievance process **before** issuing disciplinary sanctions on the respondent.

**34 CFR Sec. 106.44(a)**

## Emergency Removal

- A district **may remove** a respondent from school and activities on an emergency basis **as long as** it:
  - Undertakes a *safety and risk analysis*,
  - *Justifies emergency removal* by determining that an immediate threat to the health and safety of any individual, and
  - Provides the respondent with *notice and appeal options* following their removal.
- Provision states that this is not intended to modify any rights under IDEA, 504, or the ADA.

### **34 CFR Sec. 106.44(c)**

## Discrimination on the Basis of Sex

- A district's **treatment of either the complainant or respondent** in response to a formal complaint of sexual harassment could **itself be considered as sex discrimination** under Title IX.

**34 CFR Sec. 106.45(a)**

## Changes to investigation process

- Written notice must be given for/of:
  - The allegations of a formal complaint must be given to both parties
  - Any investigative hearings, interviews, meetings
  - Evidence directly related to allegations and give **10 days to respond.**
  - The investigative report, **with 10 days to respond.**
- **ACTION ITEM:** Make sure these timelines are in your updated grievance process.
- This process will require administration to *slow down* in some processes (immediate disciplinary action, immediate questioning)
- Both parties must be given opportunity to present evidence
- No “gag orders”- may not prevent complainant or respondent from discussing allegations.



## Changes to investigation process

Schools **must** dismiss if conduct does not meet definition of sexual harassment/misconduct or did not occur in school program. Only for Title IX purposes.

Schools **may** dismiss formal complaints if:

- Complainant wishes to withdraw complaint
- If respondent is no longer enrolled/employed at school
- If specific circumstances prevent school from gathering sufficient evidence
- Dismissal notice:
  - Must be given in writing to parties with the reasons for the dismissal

## Live hearings

- Live hearings with cross examination are optional for K-12. If a school chose to do that:
  - Questions must be asked by an advisor (not complainant or respondent personally)
  - School must provide an advisor free of charge to ask questions of the other party if the party does not have one.
  - Only relevant questions may be asked.
  - May be live in person or virtual
  - A record must be kept of the hearing (transcript, video, etc.)
- If the live hearing option is not chosen, a written question and response time is provided.

## Title IX lawsuits in action

- Title IX, Section 1983 case- Tennessee district court in the 6<sup>th</sup> Circuit (our federal circuit)
- Boys basketball team was unsupervised in locker room: over period of months, and 2 boys were sexually assaulted, investigation was done, some boys suspended, coach reprimanded. Student discipline was rescinded and boys placed back on team.
- Parents of boys who were assaulted withdrew their students and sued the District.
- Court held.....
  - Title IX claim **could proceed** against the District
  - Section 1983 claim failed
  - Could the investigation and response have prevented the litigation?

*Mathis v. Wayne County*, 782 F. Supp.2d 542 (M.D. Tennessee 2011)



## Title IX lawsuits in action

- Female high school senior committed suicide the summer after graduation. During high school, the student allegedly suffered harassment from other students who were sexting a nude picture of the student among themselves.
  - Students allegedly chastised her with epithets and derogatory remarks, threw things at her while at school and at school sponsored events, harassed her by phone and online, etc.
- Parents sued school district, school resource officer and city employer, and students based on:
  - Title IX sexual harassment discrimination
  - Section 1983 claim based on due process and equal protection
  - Negligent infliction of severe emotional distress. District moved to summary judgment.

## Title IX lawsuits in action

- Court held:
  - Section 1983 equal protection, due process claims:
    - Principal was final policymaker, and executed the policy in a way that *deprived her of her rights*, and there were questions about which other officials were aware of the harassment.
  - Title IX sexual harassment discrimination claim **may proceed** against the school district because:
    - **Principals knew** of harassment: they didn't have to know exact details
    - **Did not investigate or enforce policy** (deliberately indifferent), and
    - Student may have been deprived of educational opportunity as a result of the harassment.

## What does Sex Mean?

- It's broader than we think...
- In *Bostock v. Clayton County*, decided June 15, 2020, the U.S. Supreme Court ruled that the meaning of "sex" in Title VII includes LGBTQ workers.
- But isn't this a Title IX presentation?
  - The ruling means that every law prohibiting sex discrimination protects against LGBTQ protection as well.
- "It is impossible to discriminate against a person for being LGBTQ without discriminating on the basis of sex."
- Definition of "Sex" includes:
  - Biological sex
  - Gender
  - Sex stereotyping
  - Sexual orientation
  - Sex (verb)

## How will *Bostock* affect Title IX litigation and case law?

- Lower courts addressing sex discrimination claims under Title IX's definition of "sex" (or sexual harassment) will consider the ruling in *Bostock*.
- Could affect athletics litigation, participation, locker rooms, bathroom access, etc.
- Trump administration has been active in issuing guidance to schools in Title IX stating that "sex" is limited to male and female and not LGBTQ status. How will that change?
- The new regulations under Title IX we are discussing today, issued on May 6, do not of course mention protection for LGBTQ students.
- So....expect further guidance.



# What Does a Title IX Coordinator Do?

## What does a Title IX Coordinator actually do?

- **Oversee** all complaints (filing, investigation, resolution)
- **Identify** and address any patterns and/or systemic problems
- **Draft, revise and provide training** on district's policies and procedures on sex discrimination for compliance with Title IX
- **Conduct** constituent surveys for analysis
- **Monitor** students' participation in athletics & extra-curricular activities (includes fundraising and donations)(disproportionality)
- **Monitor** students' participation in academic programs (disproportionate)
- **Recommends** solutions
- **Coordinates** district efforts to comply with the law

# When Do Districts “Drop the Ball”?

When they fail to:

- **Now---- including ---- having notice and failing to report to a Title IX Coordinator.**
- Take allegations seriously, and **conduct an investigation**
- **Discipline** as appropriate
- **Notify the affected parties** of the investigation results and follow up [remember your timelines]
- **Remedy the effects** of the harassment/bullying
- **Prevent retaliation**
- **Check in with the claimant** after the investigation
- Annually review monies spent in athletics
- And ... when they **do the same thing over and over again** that does not work!

# Quick Title IX and Monies in Athletics



# Title IX and Fundraising

- School districts are responsible to ensure that
  - “...benefits, services, treatment and opportunities overall, regardless of funding sources, are equivalent for male and female athletes.”
- This is true even if the funds are raised by the student-athletes themselves or by a booster club.
- Travel is listed as a specific factor to be considered in determining equality of opportunity for male and female athletes.
- Schools should determine if there is an imbalance between male and female athletic opportunities.

## **Title IX and Fundraising - Avoiding Title IX Fundraising Claims**

- To successfully defend itself from Title IX claims, the district should keep accurate records of how both school and private dollars have benefited male and female athletics.
- The only requirement of Title IX is that there generally be equal opportunity for male and female athletes. It does not have to be the same types of things, i.e.: all travel is equal, all uniforms are equal.
- Districts may choose to adopt a policy by which all booster gifts and fundraising on behalf of an athletics team must go to the general athletics fund for equitable distribution.
- Formation of one umbrella booster organization to handle fundraising and distribution, with the charge to ensure that funds are equitably distributed.
- Ensure that where possible, one booster organization serves comparable sports (e.g. baseball and softball).

## What if we don't have any complaints?

- A **proactive approach** is your best approach, especially when considering school district athletic programs and possible Title IX violations.
- If not only the Title IX Coordinator reviewing, consider a committee to annually review your district's athletics including:
  - Money spent from the District on:
    - Facilities
    - Coaches
    - Uniforms
    - Equipment
    - Transportation
    - Trainers
  - **Donations** received from PTOs/boosters
  - **Schedule** of games and practices
  - Quality of **facilities**
  - Advertisement of games
  - Athletic code of conduct and enforcement
  - Participation numbers (male vs. female)
  - Pay-to-play fees
- Annually document your findings.



**So Let's Investigate!**

## CONDUCTING AN INVESTIGATION

1. Complaint Received
2. Review board policy and CBA
3. Consider Informal Resolution
4. Choose an investigator
5. Plan the investigation
6. Start digging
7. Summarize your findings and conclusions
8. Develop your measured response
9. Reflect

# Step 1: Complaint Received

## When is an investigation warranted?

- When you discover a possible violation of policy and/or law
- When a complaint/concern is reported by a board member, staff, student, parent, community member.
- When a formal complaint is made by the Title IX Coordinator.
- When you get notice of an EEOC/OCR/ODE complaint.
- When the reporter calls.

## When must a complaint be submitted?

- There are **no timelines** to initiate a complaint.
  - Statutes of limitations don't really confine board duty to investigate.
  - Policy may recommend that individuals make every effort to report within a certain number of days. However, from an investigation standpoint...the sooner the better.
- Policy may indicate that all members of the school community must report incidents of discrimination or retaliation that are reported to them to the Coordinator within a certain number of business days.
  - Again, failure to adhere to this deadline **is not** sufficient reason to ignore investigation process.



## Formal Complaint Procedure

- A formal complaint is a document filed by a Complainant or signed by the Title IX Coordinator alleging sexual harassment against a respondent and requesting the District investigate the allegations of sexual harassment.
  - What happens if someone refuses to submit a complaint in writing?
  - Can we allow for anonymous complaints?
    - A Formal Complaint is required before the commencement of either an investigation of informal resolution process, and as all elements must be met before a complaint or allegation is considered a Formal Complaint, the identity of the Complainant must be known.
    - But, if the complainant does not want their identity known, we can consider supportive measures as the threshold that must be met to obtain supportive measures is lower. The complainant's identity may remain confidential from the respondent (to the extent possible).
- Coordinator must initiate investigation within a certain number of days (Example: 2 business days). Check your policy.

## Formal Complaint Steps

- #1 Upon receipt of formal complaint, the Title IX Coordinator **must provide written notice** of the following:
  - Notice of the Board's grievance process, including any informal resolution processes
  - Notice of the allegations of misconduct that potentially constitutes sexual harassment, including sufficient details known at the time and with sufficient time to prepare a response before any initial interview.
    - This must include a statement that the Respondent is presumed not responsible for the alleged conduct and that a determination regarding responsibility will be made that the conclusion of the grievance process.
  - Inform the parties that they may have an advisor of their choice, who may be, but is not required to be an attorney, and may inspect and review evidence.
  - Inform the parties of any provision of the Board policies, code of conducts or handbooks that prohibits knowingly making false statements or knowingly submitting false information during the grievance process.

## Identifying the Issues

- Context
- Nature (e.g. verbal or physical)
- Frequency
- Duration
- Location of incidents
- Identity, number, and relationships of persons involved
- Particularized characteristics
- Incidents outside complaint
- Policies, handbooks, codes of conduct implicated

## **Dos and Don'ts – Identifying the Issues**

**Don't** ignore the minor issues

**Don't** emphasize the infraction title or code to the Complainant.

**Don't** insist behavior can't be bullying or harassment just because it happens only once, especially for egregious conduct.

**Do** emphasize that the District issues consequences based on the particular facts, and there is no one-size-fits-all approach.

**Do** apply student code of conduct flexibly within appropriate parameters. Be careful not to overuse zero-tolerance policies.



# Step 2: Review Board Policies & the CBA

## Review Board Policies

- Board policy should frame the investigation parameters and clearly describe the investigation process
  - Find out who the coordinators are and if any investigators are named in the policies.
  - Review definition/description of violations.
  - Review the procedures - pay careful attention to deadlines!
- There may be more than one policy triggered by a complaint (anti-harassment, bullying, restraint and seclusion, etc.)
  - Which policies and procedures do you follow?!?
- Review board policies thoroughly and have a good working knowledge of process and timelines under each of them.
  - If the allegations are against a staff member the formal complaint process is always used and there is no option for informal.
    - Watch any applicable provisions in your CBA when employees are involved.

# Step 3: Consider Informal Resolution

## Informal Complaint Procedure

- Under the new regulations, a formal complaint process **must** be filed in order to offer the informal resolution process.
  - The goal of the informal complaint: facilitate quicker resolution that is mutually agreed upon and controlled.
- Keep in mind: a person *may terminate informal process at any time* to start formal process.
  - i.e., do not create artificial barriers to complaint process.
- All parties must **agree** to participate in informal procedures.



## Informal Complaint Procedure

- If a formal complaint is filed, the Title IX Coordinator may offer to the parties an informal resolution process.
  - It must be mutually agreed to in writing.
  - If it is agreed to the Title IX Coordinator **designates a trained individual** to facilitate the informal resolution process (e.g. mediation) that does not involve the full investigation and adjudication.
  - It can be used at any time prior to a determination on responsibility in the formal complaint investigation process.
  - Any party can withdraw and resume the grievance process.

## Informal Complaint Procedure

- If proposing informal resolution, the Title IX Coordinator must provide to the parties written notice disclosing;
  - The allegations
  - The requirements of the informal resolution process including the circumstances under which it precludes the parties from resuming a formal complaint arising from the same allegations; and
  - Any consequences resulting from participating in the informal resolution process, including the records that will be maintained or could be shared.
- Voluntary, written consent to participate in the informal process is **REQUIRED**. Signatures required.

## Formal Complaint Procedure

- Under the new regulations, the formal complaint procedure is in the background at all times during an informal resolution process. Once a formal complaint is filed, the informal resolution process can be offered. If it is offered and accepted by both parties, then the investigation and adjudication processed are on hold.
  - Informal resolution can be terminated at any time by any party and the formal process is no longer on hold.
- *All complaints involving a district employee or any other adult member of the school district community **against a student must** be formally investigated.*

# Step 4: Choose the Investigator

## Formal Complaint Steps – Investigator

- #2 Title IX investigator decides whether the who the investigator will be and provides notice to the Investigator of the Complaint and for him/her to begin the investigation process.
- The Investigator Must have received training on:
  - Definition of Sexual Harassment
  - Scope of the District's education program / activity
  - How to conduct an investigation and implement the grievance process that is outlined in policy, appeals and informal resolution processes
  - How to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias
- Documentation of that training is essential to maintain (required to keep for 7 years).

## Formal Complaint Steps – Investigator

- How to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias – items to consider:
  - Is a paid staff member biased in favor of the District?
  - What is the investigator's relationship with the decision-maker, the complainant, the respondent?
  - Social media posts supportive of any side
  - Have we mixed the roles – adjudicative and administrative?

## Formal Complaint Steps – Investigator

- The regulations did “leave recipients flexibility to use their own employees, or to outsource Title IX investigation and adjudication functions, and the Department encourages recipients to pursue alternatives to the inherent difficulties that arise when a recipient’s own employees are expected to perform functions free from conflicts of interest and bias.”
- Discretion is provided to Districts, and even a common-sense approach, but this means the appointment of investigators and decision-makers should be intentional and well reasoned by the District.
- Key: Open minds, active listening, consideration of all evidence and testimony, no prejudgment.

## Formal Complaint Steps - Investigator

- Investigator will provide to any party who is invited or expected to participate written notice of the date, time, location, participants and purposes of all hearings (if allowed), investigative interviews, and other meetings with sufficient time for that party to prepare to participate.
  - Policy may set a number of days for minimum notice.
- Investigator provides opportunity to respondent and claimant to inspect and review any evidence obtained that is directly related to the allegations in the Formal Complaint – including evidence the investigator does not intend to rely on, inculpatory or exculpatory evidence, etc.



# Step 5: Plan Your Investigation

Equity  
Impartiality  
Fairness  
Unbiased

## Investigation process

1. Contact complainant and discuss/offer “supportive measures” if that has not already happened
2. Review the complaint
3. Notify parent/guardian of complainant and respondent (accused) of allegations (including basic details), assumption of respondent is not responsible, applicable policy/procedures
4. Identify sources of evidence and investigate – plan to allow parties sufficient time to prepare
5. Present parties all evidence directly related to allegations at least 10 days before finalizing report. Allow a written response.
6. Draft final report and present to parties at least 10 days before sending to decision-maker. Allow a written response.
7. Send notice and report to decision maker.
8. Allow for written questions submitted by either party and directed at witnesses or parties. Provide answers. Allow for follow-up questions. Provide answers. (Offer a hearing?)
9. Notify parties of determination of responsibility, and discuss right to appeal
10. **Do all this in a reasonably prompt time frame**

## **Other Steps May Need to be Taken Simultaneously**

- Police involvement
- Child protective services
  - Union involvement
- Public relations response
- ODE Office for Professional Conduct

## Temporary and/or Immediate Action

- It may be necessary to undertake intermediate measures before conducting/completing the investigation to ensure that further discrimination/harassment does not occur.
  - Assign employee to home – paid administrative leave.
  - Reassign employee to different location within the building or to a different building entirely.
  - Separate students.
  - Implement safety plan during school hours.

**E|B** Ennis Britton Co., L.P.A.  
Attorneys at Law  
Cincinnati • Cleveland • Columbus

Scholars in Education Law

### Emergency Removal

- A district **may remove** a respondent from school and activities on an emergency basis **as long as** it:
  - Undertakes a *safety and risk analysis*,
  - *Justifies emergency removal* by determining that an immediate threat to the health and safety of any individual, and
  - Provides the respondent with *notice and appeal options* following their removal.
- Provision states that this is not intended to modify any rights under IDEA, 504, or the ADA.

**34 CFR Sec. 106.44(c)**

# Step 6: Start Digging

# Sources of Evidence

- Here's where you find the evidence:
  - Student/employee files, other written documentation
  - Surveillance video
  - Statement from victim
  - Statement from alleged perpetrator
  - Statements from witnesses
  - Interviews with the victim, accused, witnesses
  - Evidence obtained by victim, witnesses, accused
  - Consultation with staff
  - Involvement of parents
  - Follow up conversations with victim, accused, witnesses
- **Expect the unexpected and go where the evidence takes you.**

## Interview Order

- Generally:
  - Complainant
  - Other witnesses
  - Accused last
- It does not always go as planned, so be prepared!



## Witness Interviews

- Develop a preliminary witness list for interviews and arrange for a logical ordering and discreet method of conducting the interviews.
- Develop an outline listing areas of inquiry.
  - This may be an outline or checklist: **who, when, where, why, how.** General to specific questions.
  - Ask if others are aware of the issues (may identify additional witnesses)
  - Ask if they have anything to add at the end.
  - Seek clarification of times, other facts if needed.
  - Let the witness talk.
  - Ask open ended questions.
- How will information be recorded?

## Explain Before Every Interview That . . .

- Retaliation is **strictly prohibited and will be dealt with swiftly.**
  - Give explicit instructions about who to contact if someone experiences retaliation.
  - NOTE: “Gag orders” are no longer allowed
    - No need to explain this to parties, but be careful not to direct them contrary to this prohibition
- Parties are allowed an “advisor” of their own choosing
- Ideally, explain these terms in person and in writing.
- Hand out the policy. A lot.

## Witness Interviews

- Stress the need for factual information.
- Elicit and record facts and first-hand knowledge – avoid giving significance to conclusion, innuendo, and **unreliable hearsay**.
  - What makes you say that?
  - When did you learn that?
- Remain flexible – you will have to go off script.
- Ask if additional people have relevant information.
- Make arrangements for follow-up with the witness and request that he/she communicate any additional relevant information.
- Check your “confirmation bias”.
- Evaluate credibility.
- Summarize interview in writing promptly.

## Interviewing the Respondent (Alleged Offender )

- Adequate notice of interview to allow time to prepare
- Adequate notice of charges/policies/code of conduct allegedly violated.
- Stress the objectivity of the investigation and that this is the alleged offender's opportunity to tell his/her side of the story.
- Document (there may be critical admissions).
- Ask if there is additional information that should be considered.
- Close the interview by providing the alleged offender with an update on his/her status or any interim plans.
- Provide a timeframe for the completion of the investigation.

# Interviewing a Respondent Employee

- Extend same rights and fair process offered to Claimant
  - Be prepared for a more vigorous response
- Control the interview
  - Breaks to confer with union representation
  - Objections and clarifying questions by representative.
  - Treat employee with dignity, decency and respect.
  - Maintain calm.
- Right to compel discussion/5<sup>th</sup> Amendment assertion
- Other evidence- emails, texts, photos, etc.
  - Anything else to add?
  - Statements
- Confidentiality issues (FERPA – not per Title IX)
- **No retaliation** against complainant

## Document and Retain

- Effective documentation is **critical** to your investigation!
  - There are a lot of moving parts to an investigation, and important information can get lost along the way.
  - Each source of information/evidence is but one piece to the puzzle.
- Be mindful about what you say and how you say it.
  - At minimum any relevant records are going to be produced to the complainant, the respondent, and their advisors.
- Make sure you preserve evidence along the way.
- Remember – the parties must be provided all relevant evidence at least 10 days prior to the final report. Don't allow a backlog of interview summaries.

# Step 7: Summarize Your Findings and Conclusions

## Finalize the Investigation Report

- Once all follow-up interviews are completed, evidence is collected, and the parties have had 10 days to review and respond, **promptly** draft a concise and factual investigation report with signature and date (lawyers and/or outside company can help).
- Capture your process.
- **Make the call**: Set forth a factual finding on each allegation made and investigated, citing your authority as an investigator, and reference all relevant facts determined by the process.
- Address how you reached factual conclusions in areas of dispute (but record contrary assertions).
- This report **does not** determine responsibility. It just provides factual findings and gathers evidence from the investigation.



## Finalize the Investigation Report

- Cite relevant board policy, work rules, directives, law. Be specific.
- Emphasize admissions by the parties, corroboration by witness, and direct evidence while downplaying unreliable circumstantial evidence, hearsay, and/or innuendo.
- Attach relevant documentation relied upon in the report (email, text, photos, interview summaries).
- Provide the report to the parties. Allow 10 days for a written response.
- Provide the investigation report to the decision-maker.

# Step 8: Decision-maker and appeal

## Determination of responsibility

- The investigator cannot be the decision-maker or part of a decision-making committee
- Upon receipt of the investigation report allow for the submission by the parties of follow-up questions for parties or other witnesses. Provide answers.
- The decision maker must review the report and apply the board-adopted standard of evidence to determine responsibility (same standard whether student or employee is respondent)
- The decision maker must dismiss any complaint that does not meet the regulation's definition of "sexual harassment" or that does not occur in a school's education program or activity and within the US.
  - Such a dismissal does not prohibit application of other school rules and discipline, but brings to an end any Title IX proceedings (except for an appeal of the dismissal)



## Determination of responsibility

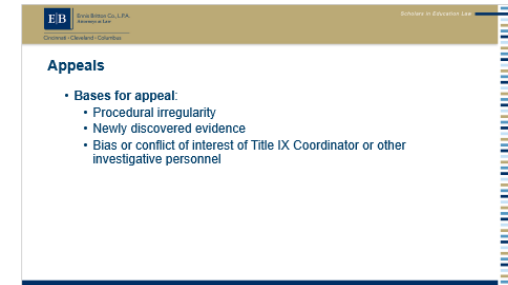
- Unless a complaint is dismissed, there must be a determination of responsibility
- Determination is in writing, sent to both parties, and includes:
  - Findings of fact
  - Conclusions about whether the alleged conduct occurred
  - Rationale for findings as relates to each allegation
  - Disciplinary sanctions to be imposed on respondent (if any)
  - Remedies provided to complainant (if any)
  - Offer of an appeal process to either party

## Characteristics of an Effective Response to Confirmed Harassment

- Must be **tailored** to the situation
- Must be **reasonably calculated** to address behavior
- Must set **good precedent** for issues down the road
- **Consistent** application
- Must be **ongoing**
- Must be reevaluated in the future

## Appeal Process

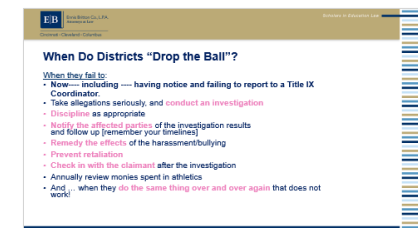
- Must be equally available to both parties
- Both parties must be informed when there is an appeal
- A new decision-maker must decide the appeal
- Appeals may be limited to written submissions
- Appeal decisions must be in writing and provide the rationale for the decision
- Decisions must be provided simultaneously to both parties



# Takeaways and Tips: What Have We Learned?

# What have we learned?

- Preparing for, conducting, and finalizing good investigative work product is hard work. Do it anyway.
- Documentation is imperative to success.
- Overcome the obstacles - think about what you will hand to your successor(s) in terms of your compliance team, your processes, your school climate.
- Interpretations of facts and circumstances may vary, so avoid a rush to judgment – cases are often “fluid.”
- Impartiality and lack of bias are central themes.





## Additional resources

- Ennis Britton Title IX employee module
  - Available for all school employees
  - Essential for Title IX compliance
  - “Actual knowledge” and reporting requirements
- OCR and US Department of Education materials
  - <https://www2.ed.gov/about/offices/list/ocr/docs/titleix-summary.pdf>

# Questions?

**Bob McBride**

[rmcbride@ennisbritton.com](mailto:rmcbride@ennisbritton.com)

**Jeremy Neff**

[jneff@ennisbritton.com](mailto:jneff@ennisbritton.com)

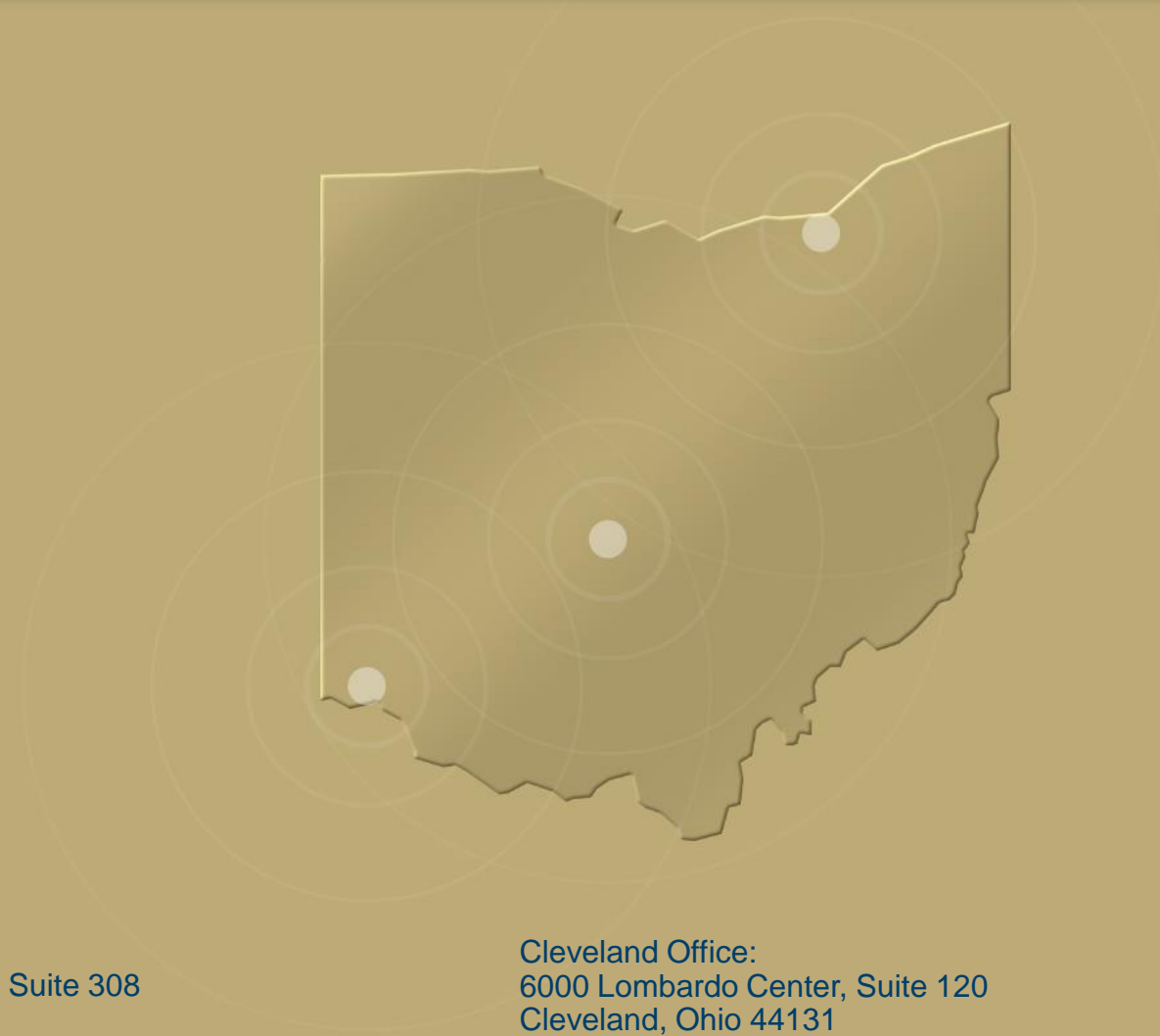
**Erin Wessendorf-Wortman**

[ewwortman@ennisbritton.com](mailto:ewwortman@ennisbritton.com)

Cincinnati Office:  
1714 West Galbraith Road  
Cincinnati, OH 45239

Columbus Office:  
300 Marconi Boulevard, Suite 308  
Columbus, OH 43215

Cleveland Office:  
6000 Lombardo Center, Suite 120  
Cleveland, Ohio 44131





# *Thank you!*

The information in this handout and presentation was prepared by Ennis Britton Co., L.P.A. It is intended to be used for general information only and is not to be considered specific legal advice. If specific legal advice is sought, please consult an attorney.



@EnnisBritton



Ennis Britton Co., LPA

Cincinnati Office:  
1714 West Galbraith Road  
Cincinnati, OH 45239

Columbus Office:  
300 Marconi Boulevard, Suite 308  
Columbus, OH 43215

Cleveland Office:  
6000 Lombardo Center, Suite 120  
Cleveland, Ohio 44131

