

Title IX Appeal Officer Training for K-12 Districts and COE's

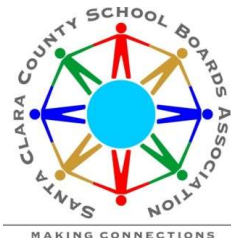
**Santa Clara County Office of Education
Title IX Appeal Officer Training**

September 1, 2023

PRESENTED BY:

Eve P. Fichtner, Partner

Cerritos • Fresno • Irvine • Marin • Pasadena • Pleasanton • Riverside • Sacramento • San Diego



Agenda

- Review Appeal Officer Role on Title IX Team
- Review Title IX Regulations: Scope and Definitions
- Appeal Procedures
- Reminders
- Hypothetical & Practical Application



Learning Objectives

1. Understanding the duties of the individual Title IX team members if the implementation of those duties is are challenged on appeal
2. Understanding the Title IX complaint process to see if followed
3. Understanding what decisions can be appealed
4. Understanding the proper grounds for an appeal
5. Understanding that an appeal involves both parties even if only one party has filed an appeal

APPEAL OFFICER ROLE ON TITLE IX TEAM

Who's on the Title IX Team?

1. Title IX Coordinator, per §106.8(a)
 2. Investigator(s)
 3. Decision Maker(s)
 4. Appeal Officer Decision Maker (s)
 5. Informal Resolution Process Facilitator(s)
- *All team members must be impartial, unbiased, and free from conflicts.*
 - *All team members must be trained in the new Title IX Regulations.*

Title IX Team: Appeals Officer

Appeal Officer Role:



- Implements the right to appeal for both parties based on three grounds for appeal:
 - **Procedural irregularity** that affected the outcome of the matter
 - **New evidence** that was not reasonably available at the time of the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter
 - The Title IX Coordinator, investigator(s), or decision-makers(s) had a **conflict of interest or bias** for or against complainants or respondents generally or the individual complainant or respondent that affected the outcome of the matter
- District may offer additional grounds for appeal for both parties, but proceed carefully if expanding grounds

Title IX Team: Appeals Officer

Appeal Officer Role:



- If an appeal is filed, the Appeal Officer evaluates the appeal request to determine applicability
- Provides a written Notice of Appeal to both parties
- Reviews Notice of Allegations, Final Investigative Report and Decisions
- Elicits and reviews written statements and arguments from both parties
- Renders written decision on appeal and explains rationale for the result
- Provides written decision to parties at same time

OVERVIEW OF THE TITLE IX COORDINATOR, INVESTIGATOR AND DECISION-MAKER ROLES

Title IX Team: Title IX Coordinator

Title IX Coordinator Duties:



- Coordinates Title IX compliance and training
- Conducts intake meeting with Complainant
- Offers supportive measures to Complainant & Respondent
- Explains grievance process, accepts formal complaint & determines mandatory dismissal
- Evaluates emergency removal
- Evaluates use of informal resolution process
- Assigns unbiased investigator free from conflicts
- Sends notices (e.g., Notice of Allegations)
- Considers permissive dismissal of complaint

Title IX Team: Title IX Coordinator

Title IX Coordinator duties, continued:

- Reviews investigative reports, written decision, & appeal decision, but **does not make decision** about responsibility
- Drafts letter of outcome after written decision issued
- *Likely does not* determine sanctions
- If applicable, ensures effective implementation of remedies for Complainant, sanctions for Respondent, and overall corrective plan
- *May* investigate when needed
- *May* act as facilitator of an informal resolution process

Title IX Team: Investigator(s)

Investigator Role:



- Trained and Knowledgeable
- Impartial, unbiased, & free from general or specific conflicts of interest
- Investigates formal complaint
 - Reviews complaint
 - Gathers, reviews, weighs, and synthesizes evidence
 - Interviews parties and witnesses
 - Assesses relevance and credibility
- Coordinates two review processes and assesses responses
- Prepares a written investigative report and compiles evidence
- Investigator does **not** make decision about whether Respondent is “responsible” for violation of sexual harassment policy

Title IX Team: Decision Maker

Decision Maker Role:



- Reviews Final Investigative Report with “fresh eyes” to see if information is missing or incomplete
- Facilitates relevant written questions & “cross-examination” from parties for parties and witnesses
- Makes conclusions about whether alleged conduct occurred and determines responsibility
- Prepares written determination with findings of fact, policy conclusions, and rationale for the result as to each allegation
- If applicable, recommends sanctions for Respondent and remedies for Complainant
- Provides written determination to the parties and advisors simultaneously; notice of appeal rights

OVERVIEW OF THE TITLE IX SCOPE AND DEFINITIONS

Federal Law - Title IX:

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.

(Title IX of the Education Amendments of 1972 (20 U.S.C. Section 1681 et seq.) and related regulations (34 C.F.R. Part 106).)

Response to Sexual Harassment

According to **34 CFR §106.44(a)**: A recipient with **actual knowledge** of sexual harassment in an education program or activity of the recipient against a person in the United States must **respond promptly in a manner that is not deliberately indifferent** (e.g.; clearly unreasonable in light of the known circumstances.)

“Actual Knowledge” occurs when **any employee** has notice of sexual harassment or allegations of sexual harassment.

Education Program or Activity

- Per **§ 106.44(a)**: An education program or activity includes locations, events, or circumstances over which the recipient exercised ***substantial control over both the Respondent and the context*** in which the sexual harassment occurs....
- At time of filing the formal complaint, the Complainant must be ***participating or attempting to participate*** in recipient's education program or activity.
- **Application to appeals**: A party may appeal a Title IX Coordinator's dismissal of a formal complaint or an allegation in the complaint if the allegations did not fall within the education program or activity of the District. (E.g., a potential procedural error.)

Sexual Harassment Defined

According to § 106.30, Sexual Harassment means conduct on the ***basis of sex*** under one or more of following:

1. Quid Pro Quo Harassment

- **Employee** conditions the provision of an aid, benefit, or service of the recipient on the Complainant's participation in unwelcome sexual conduct

2. Hostile Environment Sexual Harassment

- Unwelcome conduct determined by a reasonable person to be **so severe, pervasive and objectively offensive** that it effectively denies Complainant equal access to the recipient's education program or activity

Sexual Harassment Defined, Cont.

3. Sexual Assault

– **Forcible:**

- Any sexual act directed against Complainant, forcibly, against Complainant's will, or without consent, including rape, sodomy, sexual assault with an object, and fondling

– **Nonforcible:**

- Offenses that do not involve force where the Complainant is incapable of giving consent, including statutory rape and incest

Sexual Harassment Defined, Cont.

4. Dating Violence (34 U.S.C. 12291(a)(10))

- Violence (on the basis of sex) committed by Respondent:
 - who is or has been in a social relationship of a romantic or intimate nature with the Complainant; and
 - where the existence of such a relationship shall be determined based on a consideration of the following factors:
 - (i) The length of the relationship
 - (ii) The type of relationship
 - (iii) The frequency of interaction between the persons involved in the relationship

Sexual Harassment Defined, Cont.

5. Domestic Violence (34 U.S.C. 12291(a)(8))

Felony or misdemeanor crimes of violence (on the basis of sex) committed by:

- A current or former spouse or intimate partner of the Complainant
- A person with whom the Complainant shares a child in common
- A person who is cohabitating with or has cohabitated with the Complainant as a spouse or intimate partner
- A person similarly situated to a spouse of the Complainant under the domestic or family violence laws of the jurisdiction receiving grant monies, or
- Any other person against an adult or youth Complainant who is protected from that person's acts under the domestic or family violence laws of the jurisdiction.

Sexual Harassment Defined, Cont.

6. Stalking (34 U.S.C. 12291(a)(30))

The term “stalking” means engaging in a course of conduct (on the basis of sex) directed at Complainant that would cause a reasonable person to:

- **Fear** for their safety or the safety of others; or
- Suffer substantial **emotional distress**

APPEAL PROCEDURES

Appeal Rights

Both parties must be offered an appeal from a determination regarding responsibility, dismissal of a formal complaint or any allegations therein, on the following bases: procedural irregularity, new evidence, or conflict of interest or bias.

Summarized from 34 C.F.R. Part 106, §106.45(b)(8)

Appealable Decisions

Under the Title IX regulations only certain decisions can be appealed:

1. A decision to **dismiss a complaint**, whether it is a mandatory dismissal or a permissive dismissal
2. A decision to **dismiss one or more allegations** within a complaint (but not the whole complaint)
3. The **decision-maker's written decision** after the Title IX complaint process, which includes whether the Respondent is **responsible** for sexual harassment or whether the Respondent is **not responsible** for sexual harassment

Mandatory Dismissal of Formal Complaint

- **Required Dismissal per §106.45(b)(3)**
 - Recipient must dismiss the formal complaint *if* the conduct alleged:
 - Would not constitute sexual harassment as defined in §106.30 even if proved
 - Did not occur in the recipient's education program or activity
 - Did not occur against a person in the United States

Permissive Dismissal of Formal Complaint

- **Permissive Dismissal per §106.45(b)(3)**
 - Recipient may dismiss the formal complaint or allegations any time during the investigation or hearing, *if* :
 - The Complainant notifies the Title IX Coordinator in writing to withdraw the complaint
 - The Respondent is no longer enrolled or employed
 - Special circumstances prevent the recipient from gathering evidence in order to reach a determination
- **Note:** All dismissals require written notice & reasons delivered to the parties at the same time, including the right to appeal

Grounds for Appeal

1. **Procedural irregularity** that affected the outcome of the matter
2. **New evidence** that was not reasonably available at the time of the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter
3. The Title IX Coordinator, investigator(s), or decision-makers(s) had a **conflict of interest or bias** for or against complainants or respondents generally or the individual complainant or respondent that affected the outcome of the matter
4. A District may offer an appeal equally to both parties on additional bases, but proceed carefully when expanding appeal rights.

Reasons for Allowing Appeals

1. **To ensure the procedures were followed**, including procedures involving the investigation, the “cross examination” opportunity, and the decision.
2. **To ensure that any new evidence** that was not reasonably available at the time of the decision can be considered, if it could affect the outcome of the matter.
3. **To ensure that bias, partiality or a conflict of interest** (if any) of the Title IX Coordinator, the investigator, or the decision maker did not affect the outcome of the matter.

Did Procedural Errors Affect the Outcome?

- **Investigator Responsibilities per §106.45(b)(5):**
 - Investigator must thoroughly gather evidence
 - Investigator cannot access, consider, disclose or use a party's privileged records without receiving voluntary, written consent from the party and/or parent (e.g., physician, psychiatrist, psychologist, counselor or other recognized professional assisting in that capacity.)
 - Investigator must provide equal opportunities to the parties, written notice of the interviews, allow the presence of advisors, allow the gathering of evidence and witnesses, provide review of the directly related evidence, and create a report that fairly summarizes the relevant evidence for the parties' review

Did Procedural Errors Affect the Outcome?

Decision-Maker Determines Responsibility per §106.45(b)(7):

- When determining responsibility, decision-makers must:
 - Apply the standard of evidence (e.g., “preponderance of evidence”)
 - Fairly implement a “written cross-examination” process for the parties by allowing relevant questions
 - Determine if Respondent is “responsible” or “not responsible” for sexual harassment
 - Be unbiased, impartial, and not have a conflict of interest
 - Prepare a thorough written determination including findings of fact, conclusions, and the rationale

Steps During Appeal

- 1. Appeal Request Initiated** - Complainant and/or Respondent submit a written appeal to the Title IX Coordinator, who assigns an Appeal Officer
 - The Appeal Officer cannot be the investigator, decision maker, and/or the Title IX Coordinator in the present matter; the Appeal Officer must be unbiased, impartial and free from a conflict of interest in the matter being appealed, and the Appeal Officer must be trained in the Title IX regulations.
- 2. Notification** – the Appeal Officer will notify all parties in writing of the appeal and offer both parties the opportunity to submit a written statement in support of, or challenging, the outcome.

Steps During Appeal

3. Review Information – The Appeal Officer will review the appeal, any written statements submitted by the parties, as well as the Notice of Allegations, the Final Investigative Report (with attachments), the written cross examination process, and the written determination.

- If needed, the appeal officer can ask questions of the investigator, Title IX coordinator, and/or decision makers
- The appeal officer may conduct limited interviews with the parties or witnesses as necessary for clarification, but avoid re-doing the investigation or cross examination process.

4. Issue a Written Decision Simultaneously to Both Parties – The written appeal decision must describe the result of the appeal and the rationale for the result.

PRACTICAL APPLICATION & OTHER CONSIDERATIONS

Practical Considerations

1. Review and **follow your policy's** stated procedures and standards
2. Understand the **equitable participation** of each party in the appeal process
3. Understand the **value of deference and narrow appeals**
4. Do not second-guess the decision; while you may not have reached the same decision being appealed, you must show **deference** to the decision **unless there is a clear problem that affected the outcome**
5. Do not provide a new review of all the evidence or hold a **“*de novo*” hearing**
6. Make an independent and impartial determination on appeal
7. Use the correct **evidentiary standard** (most likely preponderance of evidence)
8. Maintain the **limited grounds** for appeal

Best Practices with Appeals

- **Explain your rationale**

- Why are you rejecting or upholding an appeal?

- **Remand as a Remedy**

- If you agree with an issue on appeal, the most common remedy will be to remand the matter back to the appropriate level to be corrected

- If the investigation is incomplete and additional relevant evidence may alter the outcome, consider sending it back for further investigation
 - If the decision did not apply the preponderance of the evidence standard or was unclear, consider sending it back for clarification

Discussion of Hypothetical Scenarios

1. You receive an appeal from a student Complainant because their formal complaint was dismissed because the quid pro quo sexual harassment complaint was against a student Respondent.
2. You receive an appeal after a decision finding the Respondent responsible for sexual harassment. The Respondent claims that the Title IX Coordinator was biased against Respondent because Respondent saw a #metoo sticker on the Title IX Coordinator's office window.
3. You receive an appeal from a Complainant because they found new social media evidence that corroborates the negative impact on Complainant at school based on Respondent's harassment of Complainant.

REMINDERS

Reminders

1. **Recordkeeping** - For each response required under §106.44, a recipient must create and maintain records for 7 years.
2. **Retaliation - Section 106.71(a) – Retaliation Prohibited**
 - No recipient or other person may intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by Title IX or because the individual has made a report or complaint, testified, assisted, or participated or refused to participate in an investigation, proceeding, or hearing.
 - *Avoiding the Title IX Process May Be Retaliation* - If the alleged behavior falls under Section 106.30 definitions, a recipient cannot use the student conduct process as a way to avoid the rigorous Title IX grievance procedures; such a decision may constitute retaliation.

Reminders, Continued

3. Confidentiality Required by Recipient

- Recipient must keep identity of Complainant, Respondent, and witness(es) confidential unless required by law “or as necessary to carry out Title IX proceeding”
- Regulations imply that the improper release of this confidential information could be retaliation

4. First Amendment Rights

- Parties exercising their 1st Amendment rights does not constitute retaliation under Section 106.71(a)

Question & Answer Session

Disclaimer

This AALRR is intended for informational purposes only and should not be relied upon in reaching a conclusion in a particular area of law. Applicability of the legal principles discussed may differ substantially in individual situations. Receipt of this or any other AALRR presentation/publication does not create an attorney-client relationship. The Firm is not responsible for inadvertent errors that may occur in the publishing process.

©2023 Atkinson, Andelson, Loya, Ruud & Romo

