



TUETH KEENEY
COOPER MOHAN JACKSTADT P.C.

TITLE IX COMPLIANCE SERIES

Part 4: The Role of the Title IX Appeals Officer

Presented by:
Margaret Hesse
Christine Self

Date:
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Disclaimer

The materials available in this Guidance are for informational purposes only. You should contact legal counsel to obtain advice with respect to any particular issue or problem, as student discipline matters are all unique and specific.



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Presenters

Kylie S. Piatt

Kylie practices primarily in the areas of K-12 education law, school litigation, and labor and employment law, representing school districts and private schools throughout Missouri. Kylie also specializes in intellectual property matters affecting school districts, helping schools districts protect their assets and defending districts against copyright infringement claims. Prior to joining the Firm, Kylie practiced community association law where she represented numerous condominium and homeowners associations throughout the greater St. Louis area.

A Texas native, Kylie obtained her B.A. with honors from Southern Methodist University in Dallas, Texas, before moving to St. Louis to teach seventh- and eighth-grade Communication Arts at a downtown charter school through Teach for America. Kylie's experience in the classroom provides a unique perspective on her practice of education law. Kylie earned her J. D. from Saint Louis University School of Law.

Presenters

Margaret A. Hesse

Margaret is the President and Managing Shareholder of Tueth Keeney. She focuses her work in the areas of education law, employment law, and litigation. She has represented school districts across both Missouri and Illinois for many years. Margaret's experience over the last twenty-five years includes defending school districts in matters involving the Americans with Disabilities Act, the Missouri Human Rights Act, Title VII, the Safe Schools Act, Title IX, the Equal Pay Act, Section 1983, First Amendment and Sunshine Act compliance, to name a few. She consults with educators on a daily basis on a variety of issues.

Margaret is committed to creating a world where school leaders are spending as little time as possible thinking about legal concerns, so they can maximize their time and attention shaping young lives.

Presenters

Christine L. Self

Christine L. Self joined Tueth Keeney with 5 years of experience representing local municipalities and private clients. During this time, she gained experience in collective bargaining, conducting investigations into employee misconduct and advocating on behalf of municipalities and private clients before the Illinois Labor Relations Board, the Illinois Human Rights Commission, the Equal Employment Opportunity Commission and the U.S. Department of Labor. She has experience in the state and federal courts as well.

Christine is also knowledgeable about how local governments in Illinois operate. She has developed policies and ordinances and advised municipalities on laws such as the Illinois Freedom of Information Act and the Illinois Open Meetings Act. She has closely tracked legislative and case law changes that impact municipalities and assisted them in complying with those changes.

Christine also brings 15 years of experience as a public school teacher to her work in education law. Additionally, she taught at the community college and university levels. She is also involved in school related organizations in her hometown of Chatham, Illinois, including the Ball-Chatham Educational Foundation and Titan Fuel, a program to assist district students with food insecurity issues. These experiences provide her with multiple perspectives from which she can best advise clients.

Christine is a member of the Illinois Council of School Attorneys.

Poll Time!



Poll Time!



Poll Time!



Title IX

Title IX of the Education Amendments of 1972 provides that:

“[n]o 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...”

- Protected persons:
 - Students of all genders
 - Staff of all genders
- Applies only to sexual harassment as defined by the August 14, 2020 regulations

Title IX Definitions

Sexual Harassment: conduct on the basis of sex that satisfies one or more of the following:

- (1) An employee of the recipient **conditioning** the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct;
- (2) Unwelcome conduct determined by a reasonable person to be so severe, pervasive, **and** objectively offensive that it **effectively denies** a person equal access to the recipient's education program or activity; or
- (3) "Sexual assault" as defined in the Violence Against Women Act (VAWA) 20 U.S.C. § 12291(a)(10), "domestic violence" as defined in 34 U.S.C. § 12291(a)(8), or "stalking" as defined in 34 U.S.C. § 12291(a)(30).

Title IX Definitions

- **Complainant** – individual who is alleged to be the victim of conduct that could constitute sexual harassment
- **Respondent** – individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment
- **Actual knowledge** – notice of sexual harassment or allegations of sexual harassment to a recipient's Title IX Coordinator or any official of the recipient who has authority to institute corrective measures on behalf of the recipient, or to any employee of an elementary or secondary school

Title IX Definitions

- **Formal Complaint** – a document filed by a complainant or signed by the Title IX Coordinator alleging sexual harassment against a respondent and requesting that the recipient investigate the allegation of sexual harassment. At the time of filing a formal complaint, a complainant must be participating in or attempting to participate in the education program or activity of the recipient with which the formal complaint is filed.

Title IX Key Terms

Formal Resolution is the processing of a complaint from intake by the Title IX Coordinator, to investigation by an Investigator, to decision by a Decision-Maker and appeal to an Appeals Officer, if requested.

Informal Resolution is the process to resolve a complaint without resorting to the formal resolution procedures. This may include the use of mediation or other restorative justice measures.

Poll Time!



Title IX Key Terms

Informal Resolutions:

- Not allowed for allegations of an employee sexually harassing a student
- Parties must consent in writing to participate in an informal resolution process
- School must provide written notice disclosing the allegations and the requirements of the informal resolution process (including when the informal process precludes resuming the formal complaint process)
- At any time prior to agreeing on a resolution, either party can withdraw from the informal resolution process

Title IX Key Terms

Title IX Personnel:

- Title IX Coordinator

- Policy implementation
- Complaint intake
- Supportive measures implementer
- Can be investigator

- Investigator

- Implement grievance procedures
- Fact finder
- Credibility determination maker
- Report writer

Title IX Key Terms

Title IX Personnel:

- Decisionmaker
 - Facilitate the opportunity for parties to provide written, relevant questions and provision of answers
 - Make written determination of whether sexual harassment under Title IX occurred
 - Is respondent responsible for violation of Title IX?
 - Notice of appeal rights
- Appeals officer (aka Appellate decisionmaker)
 - Review determination of decisionmaker if appeal
- Informal Resolution Facilitator
 - Facilitate informal resolution process

Grievance Process

Overall Process:

- Prompt and equitable treatment
- Notice of allegations before interview
- Access to an advisor of their choice
- Equal opportunity to inspect and review evidence
- Equal opportunity to respond to allegations
- Objective evaluation of all relevant evidence
- No determination until after process is completed

Grievance Process

Initial Steps:

- Title IX Coordinator intake of formal complaint
- Notice of formal complaint
- Implementation of supportive measures, as appropriate

Investigation:

- Assign investigator (could be Title IX Coordinator); consider any conflicts of interest or bias of investigator
- Investigator conducts interviews and reviews other evidence; ensure thoroughness and participation of both parties
- Investigator completes report, allows for feedback prior to finalization of report
- After feedback, submits report to decision-maker

Grievance Process

Decision Maker:

- Appointed by Title IX Coordinator
 - Unbiased in decision making
 - No conflicts of interest
 - Must understand the Title IX process
 - Reviews investigatory report and evidence
 - Issues a written determination

Grievance Process

The process may stop once a decision is rendered, but it does not have to end there....appeals are allowed.

Appeal – How does a party appeal?

Complainant or Respondent makes a written request to the Title IX Coordinator appealing the determination or dismissal within [xx] days*

- must be based on one of the reasons for which appeals are allowed (three in new regulations, plus any additional allowed by recipient's policy)
- Title IX Coordinator must provide notice to the other party when an appeal has been filed, then:
 - Both parties provided five (5) school business days to submit a written statement in support of, or challenging the outcome
 - Promptly forwards all materials relative to the appeal to the Appeals officer

*34 C.F.R. §106.45(b)(1)(v) requires Title IX sexual harassment complaint grievance process to include a "reasonably prompt time frame for filing and resolving appeals"

Who has the right to appeal, and on what bases?

Both parties have the right to appeal a determination of responsibility and the recipient's dismissal of a complaint or any allegations therein for the following reasons:

- 1) A procedural irregularity that affected the outcome;
- 2) New evidence that was not reasonably available at the time of the determination and could affect the outcome;
- 3) Conflict of interest or bias on the part of the Title IX coordinator, investigator, or decision maker that affected the outcome;
- 4) Other reasons pursuant to the recipient's grievance procedure.*

*Recipients *may* include additional reasons for appeal, but are not required to do so.

Additional Bases for Appeal

Recipients may provide additional bases for appeal in their grievance process.

Examples of additional bases:

- Appeal the severity of sanctions
- Remedy seen as punitive

But, don't forget that there are potentially appeal rights to the Board of Education if a student or employee is disciplined! Strongly consider this before adding any bases for appeal through the Title IX process.

Why might a complainant appeal?

- Complaint is dismissed without investigation
 - Respondent found not in violation of Title IX after investigation, but new witness comes forward
 - Investigator stated during interview that “this is what happens when you have co-ed teams” and complainant believes this shows bias
 - Decision maker is a friend of respondent’s parents and complainant believes there was a bias as a result
- * Appeal by any complainant must tie back to a mandatory or permissive reason for appeal.

Why might a respondent appeal?

- None of respondent's suggested witnesses were interviewed
 - Complainant is the niece of the Title IX Coordinator and respondent believes Title IX Coordinator was biased as a result
 - Respondent wasn't allowed to review the evidence before investigation completed
- * Appeal by any respondent must tie back to a mandatory or permissive reason for appeal.

Additional examples of appeal arguments

- Inadequate or biased training materials (posting requirement)
- Inadequate or biased investigation
- Failure to provide both sides the opportunity to review the evidence
- Statements that imply bias by demonstrating favor to one party or the other
- Failure of Title IX personnel to follow the policies and procedures that are required

Appeal – Who may be an appeals officer?

Must be trained as outlined in section 106.45(b)(1)(iii)

May NOT be the Title IX Coordinator, Investigator, or Decision Maker

May NOT have a conflict of interest or bias against complainant(s) and respondent(s) generally or the particular complainant and respondent

Could be the Board, but consider that the Board may have to hear a later related procedure (dismissal hearing, expulsion hearing, and that may raise specter of bias there).

Appeal – Who may be an appeals officer?

Conflict of interest and bias are **not** defined in the regulations.

Conflict of Interest

- Conflict between private interest and professional responsibilities of a person in a position of trust
- Conflict between competing duties

Bias

- Fact determination
- Reasonable person standard
- Avoid sex stereotypes such as a known feminist will always side with the female, males are incapable of being sensitive to women, males are always guilty, etc.

Appellate Decision-Maker Role

Within [xx] school business days, the appellate decision-maker affirms, reverses, or amends the written determination regarding responsibility or the notice of dismissal.

Within [xx] school business days after the decision, the appellate decision-maker simultaneously issues a written decision to both parties that describes the result of the appeal and the rationale for the result (34 C.F.R. § 106.45(b)(8)(iii)(E),(F))

Decision on Appeal

Appellate Decision must include these components:

- 1) Name(s) of Complainant(s)
- 2) Name(s) of Respondent(s)
- 3) Date appeal was filed
- 4) Issues on appeal
- 5) Final decision (explain the result of the appeal and the rationale for the decision)
- 6) Signature of Appeals officer

Break time – we will return
in 5 minutes.

K-12 Title IX Compliance Training 2020- Hypothetical

Let's apply the rules!

Hypothetical

Accusation by Miss Doe against Morris that Morris, without permission, placed his hand under her sports bra while she slept on the bus returning from a cheerleading competition.

- Title IX Coordinator determined a formal complaint and investigation required;
- Investigator conducted an investigation, including interviews with the parties and other potential witnesses;
- Decision maker made a determination that conduct was not a Title IX violation, but did violate the Student Code of Conduct.

Hypothetical – Conclusions by DM

- **Clearly state determination of responsibility:**

➤ *Based on my review of the Investigation Report, the relevant evidence, and the additional evidence provided to me by the parties, it is my determination that Mr. Morris did place his hand underneath Miss Doe's sports bra without her consent. However, Mr. Morris' conduct does not constitute sexual harassment as defined by Title IX because Mr. Morris did not touch Miss Doe's breast for the purposes of sexual gratification. Instead, he was acting in response to a "dare" from his friends. The one-time incident, while wholly inappropriate, does not rise to the level of severe and pervasive conduct. Nevertheless, Mr. Morris' conduct is wholly inappropriate and unacceptable for the school environment. It is a clear violation of the District's student code of conduct.****

****This is an **EXAMPLE** of a **POSSIBLE** conclusion. Actual conclusions will always depend on the specific factual circumstances.*



Hypothetical – Conclusions by DM

- **State disciplinary sanctions:**

- *Respondent's conduct violated District Board Policy EFG-1, Student Discipline, including provisions prohibiting assault and harassment. Because this is Mr. Morris' first offense, he will be suspended for 10 days. He will also be suspended from the cheerleading squad for the remainder of the year.*

- **State the remedies:**

- *Complainant's and Respondent's class schedules will be adjusted to allow Complainant to not have classes with Respondent in the future.*

Hypothetical Appeal #1

When interviewed about the allegations, complainant provides her side of the story and provides a list of five other members of the cheerleading team she has since learned witnessed the alleged action. Additionally, one of those witnesses talked with respondent and learned that respondent in fact liked complainant and stated he enjoyed the encounter. None of these witnesses were interviewed in the investigation.

Poll Time!



Poll Time!



Hypothetical Appeal #2

The day after receiving the decision, complainant learns that the principal who was the decision-maker, is best friends with respondent's father. Further, complainant was told that the principal decision-maker had a meeting with respondent's father in his office behind closed doors the day before the decision was rendered.

Poll Time!



Poll Time!



Hypothetical Appeal #3

Jake alleges that Sarah took nude photographs of him without his permission. He alleges that Sarah sent the photos to several students and now he is being bullied and is embarrassed to come to school. He files a formal complaint.

After going through the entire process, the Decisionmaker determines that Sarah engaged in misconduct that violated Title IX and suspended Sarah for 30 days, along with issuing certain remedies.



Hypothetical Appeal #3

On appeal, Sarah argues that she didn't get to have an advisor of her choice for her interview. She also argues that she only received 48 hours' notice of her interview and therefore, didn't have sufficient time to prepare to participate.

Poll Time!



Poll Time!



Hypothetical Appeal #4

On appeal, Sarah also argues that there is new evidence that proves that she did not engage in sexual harassment. She argues that she couldn't present the exculpatory evidence previously because the witness was intimidated by the complainant to not come forward.

Poll Time!



Poll Time!



Hypothetical #5

Sarah loses her appeal. The Decisionmaker had suspended Sarah for 30 days.

Does the Appeals Officer examine the length of the suspension?

Can Sarah argue on appeal that her suspension was too long?

Can Jake argue on appeal that the suspension was too short?



Hypothetical #6

Student files a formal complaint against an employee. The employee resigns from the district before the investigation is completed. The Investigator dismisses the appeal because the employee is no longer employed, i.e., a basis for dismissal.

Student appeals the dismissal.

What happens next?

Hypothetical #6

A dismissal may be appealed.

Decisionmaker hears the appeal if the Title IX Coordinator or Investigator dismisses the matter.

Appeals Officer hears the appeal if the Decisionmaker dismisses the matter.

Use the same three bases for appeal to analyze the appeal.

After the Appeal

- When the appeal process is completed, the process is **not necessarily ended**:
 - Title IX Coordinator is responsible for effective implementation of remedies.
 - There may be discipline for violation of Title IX, as well as other school policies.
 - Alternative school placement may be in order.
 - Expulsion may be in order.
 - For employees, dismissal may be in order.

Note that students and employees retain rights to procedures like expulsion hearings, collective bargaining agreement procedures, dismissal hearings, etc.

Questions?

CPDU

Illinois Regional Office of Education #40 has partnered with Tueth Keeney to provide CPDU credit to participants.

To obtain IL CPDU Credit, please complete the information requested at:
<https://forms.gle/ymFtRmAtVCMDipm76>