



TUETH KEENEY  
COOPER MOHAN JACKSTADT P.C.

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# TITLE IX COMPLIANCE SERIES

## Part 2: The Role of the Title IX Investigator

*Presented by:*  
Aigner Carr  
Christine Self

*Date:*  
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DIFFERENT  
BY DESIGN

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# Presenters

## **Aigner Carr**

Aigner S. Carr practices in the areas of education, litigation, and labor & employment law. Her practice includes both appellate and trial courts matters involving complex legal questions. Aigner also works with public and private K-12 and post-secondary educational institutions, in addition to private corporations. She provides general advising to educational institutions on a range of legal issues, including student matters and employment matters. In addition, she works with colleges and universities to investigate matters related to equity and Title IX.

During law school, Aigner competed on the Thurgood Marshall Mock Trial Team and was awarded Best Trial Advocate of the Mid-West region for 2015-2016 competition. Aigner is also a former member of the Theodore McMillian American Inns of Court. Before joining the firm, Aigner interned for the Saint Louis Circuit Attorney's Office and the Federal Public Defender's Office of the Eastern District of Missouri.

Aigner is a member of the Counsel for School Attorneys and the National Association of College and University Attorneys



# Presenters

## Christine 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.



# 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.

\*More on this later!

# 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

# Role of the Investigator Under New Title IX Regulations

- 1) Must ensure the burden of proof and of gathering evidence is on the District, not the parties
- 2) Must provide an equal opportunity for the parties to present witnesses and evidence
- 3) Must not restrict either party's ability to discuss the allegations or gather and present evidence
- 4) Must provide the parties with the same opportunities to have others present during interviews or other related proceedings, including an advisor (for any part of the grievance process) who may but is not required to be an attorney

# Role of the Investigator Under New Title IX Regulations

5) Provide, to a party who is invited or expected to attend, written notice of the date, time, participants, purpose and location of any investigative interview, hearing, or other meeting with enough time to allow the party to prepare to participate

6) Provide both parties and advisors equal opportunity to review all evidence on which recipient does not intend to rely and any exculpatory or inculpatory evidence from any source, prior to the completion of the final investigation report and in time to give parties at least 10 days to prepare a written response, which the investigator must consider prior to completing the investigation report

7) Prepare a written investigation report that fairly summarizes the relevant evidence and provide the report to the parties and their advisors, if any, for their review and written response, at least 10 days before a hearing or other determination of responsibility

# Role of the Investigator Under New Title IX Regulations

## Role of advisors during investigations

- Parties may be accompanied by an advisor of their choice (attorney, co-worker, friend, family member, or etc.).
- The choice or presence of advisor may not be limited to any meeting or grievance proceeding.
- School may establish restrictions regarding the extent to which the advisor may participate in the proceedings, as long as the restrictions apply equally to both parties.
- Once advisor is confirmed, school should send communications to both parties and each advisor.

# Role of the Investigator Under New Title IX Regulations

## When does the investigation begin?

- When notice is received, preparations begin!
- The Title IX Investigator begins his or her job when selected by the Title IX Coordinator to conduct an investigation.
- Title IX Coordinator and Investigator need to be aware of reporting requirements to local law enforcement or other agencies, agreements in place for reporting, and agreements about reciprocity of investigation materials.



# Role of the Investigator Under New Title IX Regulations

## Working with Law Enforcement

- In some cases, law enforcement/state's attorneys may request that a school not conduct its investigation simultaneously.
- Do not impede law enforcement's efforts with your own investigation.
- Be sure to document attempts to follow up with law enforcement regarding inquiries as to when the school may start its own investigation.
- When Respondent is an employee, Garrity rights implicated if there are potential criminal charges.

# Role of the Investigator Under New Title IX Regulations

## Working with Law Enforcement

- Who is interviewing the student and for what purpose? (school official, SRO, law enforcement)
  - Law enforcement (inc. SROs and other school security personnel) do not have inherent authority to interview students on school property for law enforcement purposes
- Be careful when involving School Resource Officers during interviews
  - Consider 4<sup>th</sup> Amendment Constitutional rights at stake when dealing with law enforcement
  - Consider the need for a student's parents to be present during interviews
  - SROs can act on own initiative or at request of school personnel to further school response to misconduct, promote school interventions, or school discipline

# K-12 Title IX Compliance Training 2020- Hypothetical

**Let's apply the rules!**

# K-12 Title IX Compliance Training 2020- Hypothetical

- **Tuesday February 10<sup>th</sup>** the cheerleading team and coaches returned from Orlando to Indiana on a chartered bus. JANE DOE awoke to realize that a male cheerleader and 9th-grade student, Trevor Morris (“Morris”), had one hand underneath her sports bra.
- Same day, JANE DOE told another cheerleader, Jake Hafley (“Hafley”), and her older sister what occurred on the bus.

# K-12 Title IX Compliance Training 2020- Hypothetical

- The next week, on **Wednesday, February 18th**, at a home basketball game, Hafley informed the assistant cheerleading coach, Janice Frye (“Frye”), of the incident. When asked, JANE DOE confirmed the incident to Coach Frye
- After admitting to the incident, Coach Frye immediately took Morris home from the game. Morris was dismissed from the cheerleading team that night by the head coach.

# K-12 Title IX Compliance Training 2020- Hypothetical

- That same night, JANE DOE's father found out and immediately called principal Gary Fields ("Principal Fields") and left a voicemail on his phone regarding the incident.
- Principal Fields checked his voicemail during his late lunch the next day at **1:30 p.m on February 19<sup>th</sup>.**

**At what point did the school acquire *actual knowledge* on February 18<sup>th</sup>?**

# Initial Response Once Actual Knowledge is Received Pre-Investigation (Title IX Coordinator)

## “Supportive measures”

- Non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, and without fee or charge to the complainant or the respondent **before or after the filing of a formal complaint or where no formal complaint has been filed.**
- Designed to restore or preserve equal access to the recipient’s education program or activity without unreasonably burdening the other party, including measures designed to protect the safety of all parties or the recipient’s educational environment, or deter sexual harassment.
- Must be kept confidential to the extent possible.

# Initial Response Once Actual Knowledge is Received Pre-Investigation (Title IX Coordinator)

## “Supportive measures”

- Examples can include:
  - Counseling
  - Course Modifications
  - Schedule changes
  - Increased monitoring or supervision
  - No contact orders
- **A measure that completely removes a student from an activity would likely be considered punitive.**
- Exception – Emergency removals and administrative leave for employees.



# Initial Response Once Actual Knowledge is Received Pre-Investigation (Title IX Coordinator)

## Emergency Removal?

- Need to perform analysis of safety and risk on a case by case basis.
- Establish it is necessary to protect a student or another person from immediate threat to physical health or safety.
- Must give notice to the student and an opportunity for the student to immediately challenge the removal.
- Must consider other protections provided to the student, such as IEP and/or 504 Plan, which could take precedence.

# K-12 Title IX Compliance Training 2020- Hypothetical

- Principal Fields immediately called Morris and Hafley into his office. Both confirmed the incident.
- Principal Fields also met with Mr. DOE and contacted the Fictional Police Department.
- Principal Fields then contacted the Superintendent of Imaginary School District (“ISD”).
- Morris immediately transferred to an alternative school for students with behavioral problems.

# K-12 Title IX Compliance Training 2020- Hypothetical

- Any concerns with the way Principal Fields responded to the allegations?
- ***Deliberate Indifference*** means a failure to respond reasonably in light of known circumstances.

# K-12 Title IX Compliance Training 2020- Hypothetical Revised

## Same facts, except:

- Morris had been accused of having nonconsensual intercourse with a different student on the cheerleading team at the student's home, over winter break.
- Mr. Doe is the only person Jane Doe reports the incident to. Mr. Doe then contacts the school principal.
- Principal pulls Jane Doe from class. Jane Doe confirms the incident and files a formal complaint with the school's Title IX Coordinator.

# K-12 Title IX Compliance Training 2020- Hypothetical

**Under the new Title IX regulations, if it is necessary to proceed to a full investigation, how does the investigatory process operate?**

# The Investigation - Initiation

Title IX Coordinator refers case to a designated ***Investigator***

- Cannot have a bias, either explicit or implicit
- Consider complainant's request for a specific investigator
- Title IX Coordinator may also be the Investigator

## **THE COORDINATOR MONITORS THE INVESTIGATION PROCESS TO ENSURE:**

- Complete and thorough investigation within specified timelines
- There is no bias, either explicit or implicit during the investigation
- Applicable Title IX policies are followed by the Investigator

# The Investigation - Initiation

## Investigation Planning Stage

- **Who** will you interview?
- **What** questions will you ask?
- **What** documents do you need to review?
- **Where** will you interview each person?
- **When** will you interview each person?
- **Why** will each person be important to your investigation?
- **How** will you order your interviews?

# The Investigation - Initiation

## **Investigation Plan**

- Scope of investigation
- Timeline
- Potential witnesses

## **Gathering Resources**

- Written policies and procedures
- Collective Bargaining Agreements (if applicable)
- Police or other official reports
- Photos, videos, texts, voicemails
- Personnel files or work logs

## **Interviews**

- Need for special provisions? (translator, assistive devices, parent/guardian)



# The Investigation – Preparing to Investigate

## Employee Witnesses

### Review Collective Bargaining Agreement, if applicable

- Before you interview any employee, review the CBA to determine required procedures, including notice, timelines, right to union representation
- Weingarten rights providing for union representation are implicated if the employee's employment status may be threatened, but you may consider (or be required) to allow union representation for all union members regardless, unless there are other concerns

### Criminal Conduct Concerns

- If there are or may be a criminal investigation related to the same circumstances, employees are protected from having their statements provided to the employer used against them in a criminal proceeding
- The employer can compel employees to cooperate in an employment investigation, but statements provided during that investigation cannot be used by law enforcement against the employee during a criminal investigation.
- The Investigator should provide the employee with information about their Garrity rights that explains this and require signature of the employee indicating the information has been provided.

# The Investigation – Preparing to Investigate

## Garrity Warning for Employees

1. The purpose of this interview is to obtain information that will assist in the determination of whether administrative disciplinary action is warranted.
2. I am not questioning you for the purpose of instituting criminal proceedings against you.
3. During the course of this interview, even if you disclose information which indicates you may be guilty of criminal conduct in this matter, neither your self-incriminating statements, nor the fruits thereof, will be used against you in any criminal proceeding.
4. I am ordering you to answer the questions that I direct to you concerning this matter.
5. If you refuse to answer my questions, you will be subject to immediate dismissal.

# The Investigation – Investigative Strategies

- Determine potential witnesses from preparation phase and during interviews
- Review any documentation available from any witnesses or other sources
- If witness statements are provided, consider if you need to do interview as well
- Stay focused on the issues to be investigated
- Assess credibility of witnesses (demeanor, witness knowledge of event, witness motivation)

# The Investigation – Preparing to Investigate

## Reluctant Witnesses

- Anticipate questions and concerns of witnesses
- Presence of others during interviews
- Non-employee or non-student witnesses who cannot be compelled to cooperate

Break time – we will return  
in 5 minutes.

# The Investigation – Conducting Interviews

- Introduce yourself in your role as investigator
- Explain the reason for the interview
- Advise of timeframe and further steps as necessary
- Explain what information might be shared outside of the interview
- Build rapport with interviewee while being professional and unbiased

# The Investigation – Conducting Interviews

- Clearly explain importance and reasons for requesting confidentiality- make sure the interviewee understands why confidentiality matters.
- Clearly explain the school's prohibition against retaliation and identify a contact person to report retaliation to. Be sure to ensure the interviewee has the contact's information.
- Document the information provided to the interviewee. Considering asking them to sign and verify that they were provided with the information.
- Explain the scope of the investigation and the process to be followed.

# The Investigation – Conducting Interviews

## Questioning

- Ask open-ended questions.
- Allow sufficient time for interviewee to respond.
- Avoid compound questions.
- Be specific as to time, location, people in questions and request the same for the responses.
- Verify responses as necessary to avoid confusion or incorrect information.
- Use plain language that is not triggering (avoid terms like victim, attacker, legal terms, slang).
- Ask the interviewee to identify other persons or documents they believe would be helpful.



# The Investigation – Conducting Interviews

## Tips for interviewing Complainant

- Ask the complainant to tell his / her story without many interruptions
- Who? What? When? Where? How?
- Is there anyone you think may have heard or seen the incident?
- Were they close enough to see or hear?
- To whom have you spoken about the incident, both school personnel and others?
- Have you provided a written statement to anyone?
- Have you created any notes, diaries, online posts, other written records about the incident?
- Do you know of others who may have experienced the same or similar?
- Action or remedy sought?
- How has this affected you?

# The Investigation – Conducting Interviews

## Rape Shield Protections for Complainants

- The regulations provide rape shield protections for complainants.
- Any questions or evidence about a complainant's prior sexual behavior will be deemed irrelevant *unless* it is offered to prove that someone other than the respondent committed the alleged misconduct or offered to prove consent.

# The Investigation – Conducting Interviews

## Tips for interviewing Respondent

- Ask open ended questions first to establish the “baseline” – and ask clarifying questions later
  - Do you know Student/Employee A?
  - How do you know Student/Employee A?
  - Has there ever been a time when you’ve been alone with Student/Employee A?
    - Yes? Under what circumstances?

# The Investigation – Conducting Interviews

## Tips for interviewing Respondent

- Be straightforward and unbiased.
- Explain what the allegations are against individual.
- Allow the Respondent to tell his or her full story.
- If the Respondent denies the allegations, ask what reason the Complainant might have in making the allegation?
- Are there witnesses that will support the Respondent's side of the story?
- Inform the Respondent that no conclusions will be made until the investigation is complete.
- Reiterate that there can be no retaliation against the Complainant or witnesses supporting the Complainant.

# The Investigation – Conducting Interviews

## **Conduct any necessary follow up**

- Additional documentation?
- Follow up interviews?

# The Investigation – Documenting the Investigation

- Note name of interviewee, location of interview, date, time, additional persons in the interview.
- Note any documents being provided by the interviewee, if applicable.
- Is a recording necessary (or allowed)?
- If the investigator is unable to conduct the interview and take notes at the same time, have an assistant help with note-taking.
- Review notes as soon as possible after interview while information is fresh; review for accuracy, but also for additional details, potential witnesses for follow-up.

# The Investigation – Concluding the Investigation

- Ask again if the interviewee has any additional information to add.
- Thank the interviewee for cooperation.
- Remind interviewee of need for confidentiality.
- Provide method for follow up if the interviewee has anything to add.

# Investigation Interview Example

See handouts “Tueth Keeney K-12  
Title IX Compliance Training  
Example Interview Outlines”



# Investigation Report

Introduction/background – What occurred to lead to the investigation?

Allegations – statute, policies, etc. that are alleged to have been violated

Narrative – provide details of the information provided during the interviews; remember that the investigation report is not the decision-making stage

Note additional allegations that arose during investigation, if any

Conclusion – Tie together the narratives from the interviewees and any violations that occurred.

# Investigation Report

## Summary of witness interviews

- Identify the witness and connection to the district and investigation
- Identify when and where you interviewed the witness
- Identify any other individuals present during the interview
- Describe in detail each incident or topic discussed during the interview

# Investigation Report

## Summary of witness interviews

- Provide a chronology of the event as reported by the witness – what happened and in what order
- For any key statements, document verbatim what the witness reported was said
- Note the name of any other witnesses identified by the witness
- Describe in detail any alleged gestures or physical contact
- Describe any documents or other evidence provided by the witness
- Consider attaching documents to report if appropriate

# Investigation Report

## Summary of witness interviews

- Identify what information you provided to the witness (if any) about the complaint or your investigation
- Note any discussions about confidentiality, retaliation, next steps, etc.
- Describe in detail how the witness responded to the information provided
  - What did the witness say?
  - Any physical or emotional response?
  - Did they deny having any relevant information?

# Investigation Report

- Remember tone and voice
  - When recounting information from the parties or witnesses, identify the source of the information and avoid conclusory statements
    - Use statements such as:
      - "Maria reported that Dave called her fifteen times on Tuesday right after school."*
  
      - "The following is a summary of the information provided by Maria....."*
    - Instead of:
      - "Dave called Maria fifteen times after school on Tuesday."*

# Investigation Report

## Summary of witness interviews

- Note inconsistencies in the witness's account or discrepancies between what the witness says during the interview and any subsequent communications
- BUT again, avoid conclusions
  - Good:

“During my initial interview with Maria, she said David did X. After informing her that David denied doing X, she explained that David had actually done Y.
  - Not So Good:

“Maria lied during her initial interview when she said David did X. She later admitted David had actually done Y.”

# Investigation Report

## Other considerations to include

- If witness was not contacted, explain way – Unavailable? Refused to participate? Not needed?
- If certain evidence was not obtained, explain why – Not accessible? Deemed irrelevant?
- Be as specific as possible – avoid vague terms like “some,” “many,” “a lot”
- Use consistent terminology throughout
- Focus on the facts and avoid subjective terms

# K-12 Title IX Compliance Training 2020- Hypothetical

- Morris's school records revealed that during his 5<sup>th</sup> grade year in Imaginary Elementary School, Morris and another male student received one day of in school suspension for kissing each other during recess.
- JANE DOE testified that Morris's actions were unexpected and were not representative of his past behavior.
- The Alternative Placement Committee recommended to the Superintendent that Morris return to IHS due to his good behavior, attendance and performance. The Superintendent, for the first time, rejected both of the recommendations.



# K-12 Title IX Compliance Training 2020- Hypothetical

- One month after school started, Morris was allowed to return to IHS for 10<sup>th</sup> grade.
- Monitoring of hallways, ensuring they would not have any classes together, requiring Morris to eat lunch in a separate room.
- No attempted contact and no future incidents between the Complainant and the Respondent were reported.

**Were the school's actions appropriate?**

# Frequent Occurrences

## What happens if:

- The complaint is anonymous?
- The complainant asks to remain anonymous?
- Witnesses asks to remain anonymous?
- The complainant discloses information to school but says they do not want to move forward with investigation?
- The school has actual knowledge, but the victim refuses to participate in the investigation?
  - Depending on allegations, supportive measures may suffice!

# Frequent Occurrences

## Other issues that arise:

- Is a victim who refuses to participate in the Title IX process entitled to:
  - Notice?
  - Presentation of witnesses?
  - Appeal ?

# Other issues that arise

What about a respondent or witnesses who refuse to participate in the process?

- No retaliation for failure to participate
- Under Title IX, employees have reporting obligations and other obligations to share information they have

# Completion of the Investigation

*Title IX Coordinator Refers matter to decision-maker after investigation is complete*

- Decision-maker cannot be the Title IX Coordinator or the Investigator

# Questions?

# CPDU

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