

Title IX Investigations and Best Practices For Investigators & Decision-Makers

Supporting Equal Access for Students, Staff and Others



GINGO
& BAIR
LAW, LLC

Agenda

- Is it Title IX?
- Complaint Process
- The Investigation
- The Determination



GINGO
& BAIR
LAW, LLC



Is it Title IX?



GINGO
& BAIR
LAW, LLC

Title IX Basics

- Title IX prohibits discrimination based on sex in any educational program receiving federal funding.
- Covers *all* programs at the educational institution.
- Covers students, employees and many third parties.
- Note that some courts and agencies have read “sex” to include sexual orientation and gender identity.
- “Sex” also includes pregnancy.



Key Participants

- **Title IX Coordinator:** School employee charge with overseeing the School's compliance with Title IX.
- **Complainant:** Alleged victim.
- **Respondent:** Alleged perpetrator.
- **Reporter:** Individual who makes the original report of a potential violation.
- **Witness:** Individual, other than the complainant and respondent, who provides information to the investigator and/or hearing officer.
- **Investigator:** Member of the Title IX compliance office who investigates the complaint.
- **Decision-Maker:** The individual appointed by the Title IX Coordinator to make a determination of responsibility.



Title IX's Reach

Includes domestic violence situations

Applies to internships, job training, CPP and other programs

Applies to third parties who are participating in or attempting to participate in school programs or activities

Applies to things that happen off campus but tie back to campus

Applies to all interactions between faculty/staff and students



Off-Campus Reach

Title IX applies to all school “operations,” whether on campus or off.

- If the activity occurred in one of the following settings, it occurred as part of the school’s “operations”:
 - Where the school exercised substantial control over the respondent and the context of the alleged harassment; or
 - At an off-campus building owned or controlled by a student group officially recognized by the school.
- The District’s digital platforms are also part of the District’s operations and are subject to Title IX.
- Currently, schools do not have jurisdiction outside of the United States.



Definition: Sexual Harassment

Unwanted sexual conduct (sexual advances, requests for sexual favors, other verbal, physical or visual conduct) when:

- Submission to the conduct is made (or threatened to be made) a *term or condition of employment or education*; or
- Submission to or rejection of such conduct is used (or threatened to be used) as a *basis for academic or employment decisions*; or
- The conduct is so *severe, pervasive and objectively offensive* that it substantially interferes with the individual's academic or professional performance, *effectively denying them equal access*; or
- The conduct constitutes *sexual assault, dating violence, domestic violence or stalking*.



Examples: Physical Harassment

- Unwanted advances/touching
- Invasion of personal space
- Elevator eyes
- “Fatal attraction” type of pursuits



GINGO
& BAIR
LAW, LLC

Definition: Verbal Harassment

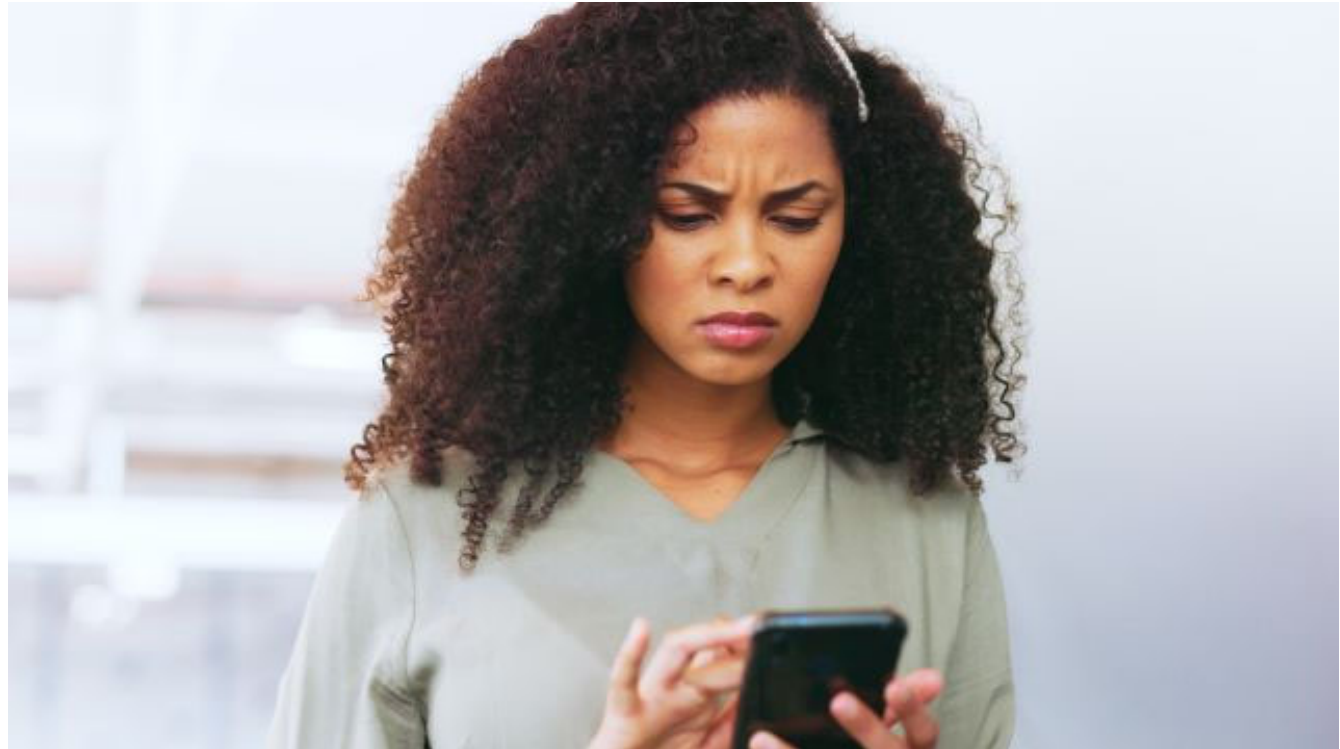
- Sexual innuendo
- Sexual profanity/name calling
- Discussion of a sexual nature
- Inquiries regarding sexual topics



GINGO
& BAIR
LAW, LLC

Examples: Visual Harassment

- Calendars/posters
- Screen savers
- Emails
- Gestures



GINGO
& BAIR
LAW, LLC

Examples: Situational Harassment



- Meeting sites that exclude based on gender, race or other protected class.
- Group entertainment of a sexual nature.
- Inappropriate conduct during social activities.



GINGO
& BAIR
LAW, LLC

What is Not Harassment?

- Change in assignment
- Negative evaluations or grades based on performance
- Supervisor or instructor directives related to the job/course
- Criticism of job performance or classwork
- Discipline consistent with employee handbooks or the student code of conduct
- Disagreements with supervisors, co-workers, instructors or other students



Domestic Violence, Dating Violence and Stalking

- **Domestic Violence:** Crimes of violence committed by a current or former intimate partner of a victim or by any other person against a victim who is protected from that person under Ohio's domestic or family violence laws.
- **Dating Violence:** Violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the victim (where the existence of such a relationship is determined by length, type and frequency of interactions).
- **Stalking:** Course of conduct directed at a specific person that would cause a reasonable person to fear for their safety or the safety of others or suffer substantial emotional distress.

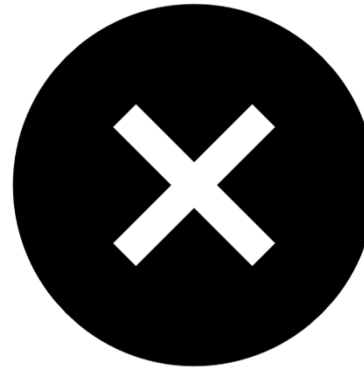


Retaliation

- Retaliation includes any action taken against someone because they made a complaint or participated in a Title IX investigation.
- In order for retaliation to have occurred:
 - The complainant must have engaged in a protected activity (i.e., making a complaint and/or participating in a Title IX investigation);
 - The perpetrator knew the complainant was engaging in a protected activity; and
 - The perpetrator subjected the complainant to adverse action because of the protected activity.



Activity #1: Is it Title IX?



The Complaint Process



GINGO
& BAIR
LAW, LLC

Responsibility of All District Staff

Take ALL complaints or rumors of inappropriate behavior seriously.

Maintain confidentiality. Only discuss with those who have a NEED to know.

Document and aid with investigation after reporting.

Follow up with all parties and maintain a compliant work/educational environment.



Actual Knowledge and Deliberate Indifference

The District has a responsibility to investigate any complaint about which it has “actual knowledge,” meaning:

- A formal complaint is filed by a Complainant (or a parent/guardian on behalf of a minor child);
- A Board employee receives a report otherwise has notice of an incident of sexual harassment or allegations of sexual harassment; or
- A Board employee witnesses the misconduct.

Once on notice of a complaint, the school must act in a way that is not “deliberately indifferently” to the concern.

- The Title IX Coordinator must reach out the complainant to discuss the complaint and supportive measures.
- Response is only “deliberately indifferent” if it is “clearly unreasonable in light of the known circumstances.”



GINGO
& BAIR
LAW, LLC

Protection in the Complaint Process

- There can be ***no guarantee*** of confidentiality in the process for the Complainant or the Respondent.
- All parties involved (complainant, accused and witnesses) should be:
 - Asked to keep the information confidential (though not formally required to).
 - Told the District will keep their information as confidential as possible.



Contents and Timing of a Complaint

- There is no required timeline for filing a complaint, but the sooner it is filed, the easier it is to investigate and respond.
- Complaints should include:
 - Date(s) and time(s) of the alleged conduct;
 - Names of all individuals involved (including potential witnesses);
 - Description of what happened; and
 - Contact information for the complainant.



Initial Response to Complaint

The Title IX Coordinator (or their designee) *must*:

- Contact the complainant to discuss supportive measures.
- Consider what the complainant wants with regard to supportive measures.
- Make clear to the complainant that supportive measures are available regardless of whether they file a formal complaint.
- Explain the process for filing a formal complaint.



GINGO
& BAIR
LAW, LLC

Reporting Involving Minors

Avoid singling them out; same policies apply

Does anything need to be reported as suspected abuse?

Is there a need to report the incident to parents? When?



GINGO
& BAIR
LAW, LLC

Formal Complaints

- Generally, the District is only required to investigate those complaints that are filed ***in writing*** and ***signed by the Complainant***.
- Exceptions (Certified by the Coordinator):
 - Where failure to investigate would amount to “deliberate indifference”; and/or
 - Where an investigation is necessary to protect the safety of the community.
- When deciding whether to sign a Formal Complaint, the Title IX Coordinator should consider a variety of factors, including but not limited to:
 - circumstances that suggest an increased risk of repeated Sexual Harassment, such as the alleged Respondent’s previous history of threats;
 - whether the sexual harassment was perpetrated with a weapon;
 - the age of the student subjected to the sexual harassment; and
 - whether the school can obtain relevant evidence through other means, such as from security cameras or witnesses.



Dismissal of Complaints

- Schools **must** dismiss a Title IX complaint if:
 - The alleged conduct does not constitute sexual harassment, even if true;
 - The conduct did not occur in the school’s program or activity; or
 - The conduct did not occur when the Complainant was in the United States.
- Schools **may** dismiss a Title IX complaint if:
 - The Complainant requests to withdraw and doing so is not clearly unreasonable;
 - The Respondent’s enrollment or employment ends; or
 - Specific circumstances prevent the district from gathering sufficient evidence to reach a decision.



Interim Measures

Supportive Services: Individualized services reasonably available that are non-punitive, non-disciplinary and not unreasonably burdensome to another, while designed to ensure equal educational access, protect safety and/or deter sexual harassment.

Examples include:

- Separating the parties or placing limitations on contact between the parties
- Making alternative class-placement or workplace arrangements
- Providing counseling and related supports
- Extensions of deadlines
- Leaves of absence



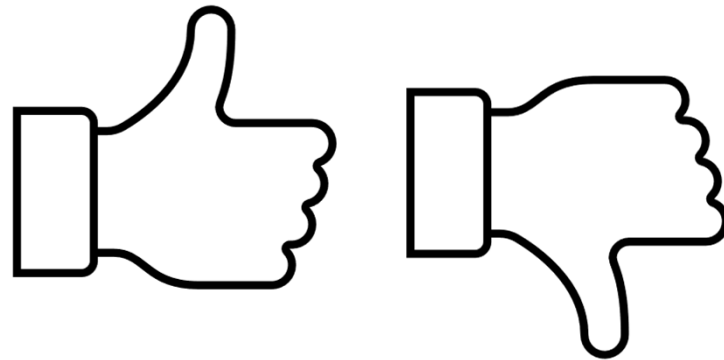
GINGO
& BAIR
LAW, LLC

Rights of Parties

- Identify and have the investigator consider witnesses and other evidence.
- Access to all information the investigator considers.
- Access to review statements or evidence provided by the other party.
- Access to review and comment on information the investigator develops.
- Presumption of non-responsibility.
- Right to an advisor



Activity #2: Title IX Dos and Don'ts



The Investigation



GINGO
& BAIR
LAW, LLC

Role of the Investigator

- Review and analyze all evidence and make determinations regarding:
 - Credibility
 - Reliability
 - Significance
- Operate without any conflict of interest.
- Act as an impartial investigator – not as an advocate for either party.



Conducting the Investigation

**Notify parties and
witnesses of
investigation in
writing**

**Interview
Complainant
and witnesses**

**Interview
Accused and
witnesses**

**Conduct follow-up
interviews as
necessary**



**GINGO
& BAIR**
LAW, LLC

Conducting the Investigation

Notify parties
and witnesses of
investigation in
writing

- **Written notices should be sent to both parties separately when:**
 - A formal complaint has been made.
 - **BEST PRACTICE TIP:** Although Title IX does not require schools to provide the respondent with a copy of the formal complaint, the Title IX Investigator should do so, or at least a written summary of the allegations (these are also included in the notice of allegations)
 - Parties and/or witnesses are being interviewed.
 - Evidence and/or draft investigation report is being circulated.
 - Final investigation report is submitted to the Decision-Maker.
- What should be included in the notices?
 - The Title IX Investigator's contact information.
 - Expectations for confidentiality (remember, you cannot guarantee confidentiality).
 - Reminder that retaliation will not be tolerated.



Notifying the Complainant

1

Advise that the investigation has begun: Thank them for bringing the conduct to the District's attention and confirm the District takes these issues seriously.

2

Ask Complainant for a description of the misconduct in writing (if you don't already have it).



3

Set an expectation for confidentiality.

Do not promise confidentiality. Assure Complainant you will keep information confidential to the greatest extent possible, and request they keep conversations with you confidential.

4

*Right to an advisor

Assure Complainant there will be no retaliation for making a good-faith complaint.

Ask Complainant to contact you immediately if they experience retaliation.

Notifying the Respondent

1

Advise that you are investigating an allegation that s/he engaged in misconduct.

2

Provide a summary of the allegations.

Best practice tip:
Provide a copy of the complaint.

3

Set an expectation for full cooperation.

*Right to an advisor



4

Set an expectation for confidentiality.

Do not promise confidentiality.
Provide same guidance as you provide Complainant.

5

Caution against retaliating against Complainant and/or witnesses.



GINGO
& BAIR
LAW, LLC

Notifying Witnesses

Advise

Advise that the District needs their help investigating a complaint of misconduct.

Assure

Assure witnesses the complaint is not directed at them and does not relate to their conduct.

Set Expectations

Set an expectation for confidentiality.
Do not promise confidentiality.
Assure witnesses you will keep information confidential to the greatest extent possible, and request that they keep conversations with you confidential.

Provide Summary

Provide brief summary of allegations.

Assure

Assure witnesses retaliation for their cooperation will not be tolerated and ask them to report to you immediately if they experience retaliation.



Conducting the Investigation



The Investigator should:

- Conduct interviews in private.
- Consider the credibility of interviewees.
- Focus on facts and avoid unsupported conclusions.
- Take thorough notes.

The Investigator should not:

- Promise confidentiality (but should set an expectation that the interviewee keep the discussion confidential).
- Prevent witnesses from leaving.
- Characterize alleged misconduct.



GINGO
& BAIR
LAW, LLC

Avoid Characterizing Conduct

Q. Is she boastful, though, or are they just perceiving that because they are haters? Is she just being boastful?

Q. Does she speak to them in a demeaning and disrespectful way?



Avoid Unsupported Conclusions

Q. But in terms of I've heard it's a little bit of a Peyton Place over there, a lot of drama.

Q. Was that an isolated incident in terms of maybe an inappropriate remark from somebody?

A. Yeah. It was isolated.

Q. Have you had male officers hitting on you constantly?



Conducting the Investigation

- Think 5Ws – who, what, when, where and why?
 - Who did/said conduct?
 - What was the conduct?
 - When did the conduct occur?
 - Why did the conduct happen?
- In general, just keep asking people to explain further.
- Summarize as you go, and again at the end.
- Empathize but don't take sides.

**Conduct follow-up
interviews as
necessary**



Appropriate vs. Inappropriate Questions

- The Title IX Investigator can ask the Complainant about their relationship with the Respondent.
- The Title Investigator cannot ask the Complainant about their past sexual behavior unless such information is offered to prove (a) that someone other than the Respondent is responsible for the alleged violation, or (b) consent.
- **Appropriate**
 - What was your relationship with the Respondent?
 - Where did the Respondent touch you?
 - Were you drinking or intoxicated when the alleged conduct occurred?
- **Inappropriate**
 - How many sexual partners have you had?
 - What kind of sexual acts did you engage in with the Respondent before/after the alleged incident?



Special Issues During Interviews

- Emotional complainant or accused: Sympathize but don't take sides.
- Complainant refuses interview:
 - If still employed/enrolled, try to compassionately persuade to participate.
 - If no longer employed/enrolled, document efforts to obtain cooperation and let them know the investigation will not go forward without their input.
- Respondent refuses interview:
 - If still employed/enrolled, advise that refusal to participate may result in discipline as the investigation will proceed without their input.
 - If no longer employed/enrolled, document efforts to obtain cooperation and inform that investigation may go forward without their input. For former employees, inform them conclusions will be placed in their personnel file.
- Respondent categorically denies allegations:
 - Document credibility of interviewees – that will be key.
 - If interviewees contradict each other, pay attention to objective evidence (i.e. email, physical evidence, etc.)



Role of Advisors

- All parties are entitled to have an advisor of their choosing to assist them throughout the grievance process. The advisor may be a parent/guardian, relative, friend, attorney, or any other supporter that the party chooses to advise them who is eligible and available.
- A party's advisor is permitted to accompany the party in all meetings and interviews at which the party is entitled to be present, including intake, investigative interviews, and appeals.
- The Title IX Coordinator, the investigator, and the decision-maker shall have discretion to determine whether advisors may be permitted to present on behalf of the Complainant or Respondent in a meeting or interview (not applicable to a parent).
- Limitations placed on an advisor shall apply to the advisor(s) for all parties.
- **Advisors are prohibited from interfering with the investigation or the grievance process.**



Activity #3: Building a Title IX Interview



The Determination



GINGO
& BAIR
LAW, LLC

Investigatory Report

- Before finalizing the investigation report, the Investigator must first circulate a ***draft report*** and all the evidence gathered to the parties.
 - Both parties get a 10-day period to review the draft investigation report and all evidence, including witness and party statements, even if the evidence was not considered in the draft report.
 - Both parties may submit a written response to the draft report to the investigator, who should incorporate those responses in the final report.
- The final investigation report should:
 - Identify all allegations of sexual harassment;
 - Identify the parties and witnesses;
 - Provide a timeline of events; and
 - Fairly summarize the investigation (including party and witness statements and any other evidence gathered.)



Follow-Up on Investigation Report

- The Decision-maker must afford both parties the opportunity to submit written questions to each other and/or witnesses.
- Parties/witnesses must respond to the questions in writing.
- **Best Practice Tip:** Decision-makers should create and communicate a schedule for the question process. For example:
 - Parties have 5 business days to submit their initial written relevant questions.
 - Receiving party and/or witness has 3 business days to submit written responses.
 - Parties have 3 business days to submit written, relevant follow-up questions.
 - Receiving party and/or witness has 1 business day to submit written response.

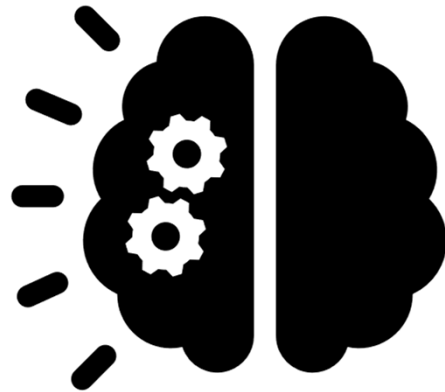


Relevancy Determination

- The Decision-maker is responsible for determining what evidence is relevant.
- Relevant evidence is evidence pertinent to proving whether facts material to the allegations under investigation are more or less likely to be true.
- The Decision-maker must:
 - Determine what evidence pertains to a material fact to the allegations under investigation.
 - Determine whether the evidence makes the material fact more or less likely to be true; and
 - Explain their final determination regarding that evidence.



Activity #4: Relevant or Not?



GINGO
& BAIR
LAW, LLC

Final Determination Report



At the conclusion of the investigation and written questioning process, the decision-maker must issue a report containing the following:



Description of the procedural steps taken



Findings of fact and conclusions about whether the alleged conduct occurred



Rationale for the result as to each allegation – evidence to support the determination



Disciplinary sanctions imposed on Respondent (if any)



Remedies provided to the Complainant (if any)



GINGO
& BAIR
LAW, LLC

Activity #5: Responsible or Not?



GINGO
& BAIR
LAW, LLC

Equitable Treatment

Throughout the grievance process, schools must ensure all parties receive equal treatment, including:



Both parties must be permitted to present evidence and witnesses.



Both parties must be permitted to have a supporter or adviser present throughout all stages of the process.



Both parties must have the opportunity to review **all** evidence (even that which the District will not rely upon to determine responsibility).



GINGO
& BAIR
LAW, LLC

Equitable Treatment



Neither party may be required to bear the burden of proof.



Neither party may be restricted in their ability to discuss the allegations.



Neither party may be restricted in their ability to gather evidence.



Questions

Presented by:

Megan Bair mbair@gingobair.com

Emily Spivack espivack@gingobair.com



GINGO
& BAIR
LAW, LLC