
2023 Title IX Training Academy – Module 3

Title IX Decision-Maker Training for School Districts & County Offices

Part 1

November 6, 2023

Presented by:

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Title IX Decision-Maker Training for K-12 Districts & COEs

Title IX Decision-Maker Training
November 6, 2023 – 9:00 a.m.

SESSION ONE


PRESENTED BY:
Eve P. Fichtner, Partner
Ashlee Reece-Walker, Senior Associate

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



Agenda

- Definitions for Training
- Review Title IX Decision-Maker Role
- Review Final Investigative Report
- Facilitate Written Questions for the Parties
- Review Hypothetical “Cross-Examination” Questions
- Preparation for Session 2



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Definitions for Training

- Complainant/Respondent
- Parties
- Witness
- Advisor
- Grievance Process
- Final Investigative Report
- Written Cross-Examination Questions
- Determination of Responsibility

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; must be trained on issues of relevance
- Reviews all evidence, identifies the disputed issues, and weighs the evidence

Title IX Team: Decision-Maker

Decision-Maker Role:

- 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 and appeal rights to the parties/advisors simultaneously

REVIEW FINAL INVESTIGATIVE REPORT

Review Final Investigative Report

- **Review your Title IX Board Policies and/or Administrative Regulations**

- Look at the policies and regulations cited in the Final Investigative Report and the Notice of Allegations
- Review your role as Decision-Maker, and determine the scope of your decision
 - Are you deciding if there is a preponderance of evidence to find quid pro quo sexual harassment, hostile environment sexual harassment, sexual assault, fondling, stalking, and/or dating violence, etc. under the Title IX administrative regulations? (Federal Law)
 - Are you deciding if there is a preponderance of evidence to find quid pro quo sexual harassment, hostile environment sexual harassment, sexual assault, and/or sexual battery, etc. under the Board Policies prohibiting sexual harassment? (State Law)

Review Final Investigative Report

- **Read Final Investigative Report and Review Attachments**

- Take notes, highlight important areas, and create a list of questions (if any)

- **Calendar timelines to accommodate these phases:**

- Time to ask questions of Parties and exchange written “cross examination” questions between Parties or from the Parties to witnesses
- Time to analyze the evidence, write the decision, and allow Title IX Coordinator, administrator or legal advisor to review the decision for thoroughness and readability
- Deliver written decision to the Complainant, Respondent, Advisors (if any), and Title IX Coordinator with notice of appeal rights

- **Plan and Schedule the Process with the Parties**

- If needed, seek help from Title IX Coordinator to schedule and plan logistics

Discuss *Hypothetical* Final Investigative Report

- Review Table of Contents for Roadmap
- Read the Notice of Allegations and Formal Complaint
- Tips for what to look for in the Investigative Report
 - Note the steps taken in the Title IX complaint process **for this matter** because that information will likely be “copied” into your decision
 - Note where Complainant or others describe an **impact on the educational environment** (e.g., how did the matter affect Complainant’s access to or actual education?)
 - Note where Complainant or others describe the **desired remedy** (e.g., what result does the Complainant want from the formal complaint?)

Discuss *Hypothetical* Final Investigative Report

- Tips for what to look for in the Investigative Report, continued :
 - Note the evidence received from Complainant and Respondent
 - Pay attention to the **timing** of statements (e.g., What’s in the NOA vs. the Formal Complaint? When did Respondent know of allegations?)
 - Pay attention to the **content** of statements (e.g., vague, offering too much or too little information, full or partial denial, conditional denial - “I would never...”)
 - Pay attention to where the parties **disagree** about what happened
 - Pay attention to what makes one person more **credible** than another person
 - Credible: The person offers reasonable grounds for being believed
 - You must articulate your credibility observations in a deliberate, systematic, and objective process (e.g., look at corroboration; consistency/inconsistency; admissions against interest; plausibility; motive to lie/falsify, etc.)

FACILITATE WRITTEN QUESTIONS BETWEEN PARTIES OR FOR WITNESSES

Written Questions Between Parties

Before making a decision about responsibility, the Decision-Maker must facilitate a question process:

The Decision-Maker must afford *each party the opportunity to submit written, relevant questions that a party wants asked of any party or witness*, provide each party with the answers, and allow for additional, limited follow-up questions from each party. (34 CFR 106.45(b)(6)(ii).)

Purposes for the questions may include:

- The opportunity for the parties to seek information that may shed light on someone's credibility
- The opportunity for the Decision-Maker to ask questions and observe the credibility of Complainant, Respondent and witnesses, since the Decision-Maker did not conduct the investigation

Written Questions Between Parties

Requirements for Questions

- Questions must be **relevant**
- Questions and evidence about the Complainant's sexual predisposition or prior sexual behavior are **not** relevant...
 - Unless such questions and evidence about Complainant's prior sexual behavior are offered to prove that someone other than the Respondent committed the conduct alleged by the Complainant; or
 - If the questions and evidence concern specific incidents of Complainant's prior sexual behavior with respect to the Respondent and are offered to prove consent.
- You must explain any decision to **exclude** a party's question as irrelevant

Written Questions Between Parties

Definition of Relevance

- Having significant and demonstrable bearing on the matter at hand
- Affording evidence tending to prove or disprove the matter at issue or under discussion
- Synonyms: applicable, material, pertinent
(Merriam-Webster)
- Legalistic definition of relevance:
 - That quality of evidence which renders it properly applicable in determining the truth and falsity of the matters at issue between the parties.

(Black's Law Dictionary, Sixth Edition)

Written Questions Between Parties

Guidelines for Questions

- Questions should not be repetitive
 - Ask the party to ask another question intended to elicit different information
- Questions should be clear
 - Ask the party to clarify the question
- Avoid compound questions
 - Ask the party to separate the questions
- Avoid questions with difficult words
 - Ask the party to rephrase the question
- Avoid argumentative questions
 - Ask the party to rephrase the question

REVIEW HYPOTHETICAL “CROSS EXAMINATION” QUESTIONS

PREPARATION FOR SESSION 2

Discussion of Homework for Session 2

Hypothetical Investigative Report

- Weigh the evidence and determine by a preponderance of the evidence whether Respondent was flirty and/or friendly with Complainant before the August 21 incidents.
- If you find that Respondent was flirty, write factual findings to demonstrate the flirting.
- If you find the Respondent was friendly in a non-sexual way, write factual findings to demonstrate the non-sexual friendliness.
- Your factual findings should include who, what, where, when, why & how of what happened that was flirty and/or friendly.
- Explain why you made that finding; explain your rationale.
- **GOAL:** We may disagree, but did you adequately explain your rationale?

Discussion of Homework

Hypothetical Investigative Report

- Review the evidence surrounding the touching of the knee and determine if the touch was based on “sex.”
- Review the evidence related to Respondent touching the Complainant’s groin area and determine whether that touching occurred.
- If you find that Respondent touched Complainant’s groin, determine (1) if the touch was sexual in nature **and** (2) if Complainant permitted the touch **and** (3) if the touch was for the purpose of sexual gratification.
- Write factual findings about the touching of the knee and whether or not the Respondent touched the Complainant’s groin for sexual gratification.
- Explain why you made that finding; what was your rationale.
- **GOAL:** We may disagree, but did you adequately explain your rationale?

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Question & Answer
Session

Disclaimer

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Thank You

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I go beyond identifying potential legal problems. I try to anticipate our clients' strategic options which are consistent with their values.

Eve Peek Fichtner represents school districts, county offices of education, community colleges, and private employers for personnel matters, student issues, and all forms of discrimination and harassment claims. Ms. Fichtner has certification and significant experience conducting impartial, prompt, thorough, and effective workplace investigations and Title IX investigations. She also serves as a hearing officer for K-12 expulsion matters and for Title IX hearings with the University of California, the California State University system, and private universities. In addition, Eve provides resolution-based services to clients, including workplace coaching for employees and supervisors, conflict resolution training, and facilitated meetings.

Ms. Fichtner provides representation, advice, and counsel on numerous school and employment matters, including employee leave, evaluation, discipline and dismissal, student discipline, bullying, reasonable accommodation, interactive meetings, release of public records, search and seizure law, restraining orders, and motions to quash defective subpoenas. Ms. Fichtner has represented clients before state courts and administrative bodies. She has served as General Counsel to several school districts, including Davis Joint Unified School District for over ten years.

Ms. Fichtner is an experienced and effective trainer on a variety of legal issues, including Title IX sexual misconduct matters; prevention of sexual harassment, discrimination, bullying and retaliation; understanding student discipline laws; conducting internal investigations; addressing electronic misconduct; effective conflict resolution techniques; and the FRISK® Documentation Model.

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EDUCATION

J.D., University of California, Davis
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ADMISSIONS

1994, California
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PRACTICE AREAS

Board Governance
Discrimination & Harassment
Education
Employee Performance & Evaluation
Equity in Education/Office for Civil
Rights
Investigations
Student Discipline
Workplace Training

Eve P. Fichtner

Events & Speaking Engagements

Ms. Fichtner developed a comprehensive Title IX training series for K-12 and CCD's to address the new Title IX regulations released in 2020. She also developed an investigation training seminar, PROOF, which she has presented throughout California. She has prepared and presented workshops on a variety of other topics as well, including sexual harassment prevention, cyber-misconduct, bullying, free speech/religion, the Brown Act, California Public Records Act, employee evaluation, student discipline, and ADA/FMLA.

Publications

Ms. Fichtner contributes to the firm's publications and education law blog.

Community & Professional

Ms. Fichtner served as President of the Camerado Springs Middle School Parents Club for 5 years. Additionally, she is a member of the following organizations:

- Association of Title IX Administrators
- Association of Workplace Investigators
- California Council of School Attorneys
- Sacramento Bar Association, Labor and Employment Section

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Ashlee Reece-Walker provides counsel and representation to California public school districts, county offices, and cities in a wide variety of employment and education law matters. Ms. Reece-Walker primarily conducts investigations for school and community college districts with respect to allegations of discrimination, harassment and retaliation. She has used this experience to develop a Cultural Sensitivity Training, which she has presented to individual clients, statewide conferences and professional consortiums. Ms. Reece-Walker is also a member of the firm's Title IX Sexual Misconduct Committee. She has fulfilled the role of Investigator and Decision-Maker in Title IX matters and helps train Decision-Makers across the state of California. Additionally, Ms. Reece-Walker has successfully defended clients against charges brought by the DFEH, EEOC and PERB.

Prior to joining Atkinson, Andelson, Loya, Ruud & Romo, Ms. Reece-Walker was a labor and employment law associate for a large law firm in downtown Los Angeles where she handled matters including ADA, FEHA, wrongful termination, and Unruh Civil Rights Act litigation. Prior to working in litigation Ms. Reece-Walker was an Equity Officer at a private Jesuit research university in St. Louis, Missouri where she conducted Title VII and Title IX investigations, and trained new managers.

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EDUCATION

J.D., Saint Louis University
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ADMISSIONS

2019, California
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United States District Court
Central District of California

PRACTICE AREAS

Investigations
Labor & Employment Law