



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

**2021 Title IX Training Academy
Module 3 | Part 2
Dec. 10, 2021**

Presented by:

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

Title IX Training Academy, Module 3

December 8, 2021 | 8:00 a.m. – 10:30 a.m. (Part 1)

December 10, 2021 | 8:00 a.m. – 10:30 a.m. (Part 2)

Part 2 – December 10, 2021

PRESENTED BY:

Eve P. Fichtner, Partner

Ashlee Reece, Associate

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Agenda

- Discuss Preponderance of the Evidence Standard
- Determination of Responsibility
- Written Determination
- Table of Contents for Written Determination
- Review Homework: Factual Finding & Rationale



Preponderance of the Evidence Standard

Evidentiary Standard

- The evidence is reviewed, compared and analyzed under a “preponderance of the evidence” standard to determine whether the allegations were with or without merit.
 - “Preponderance of the evidence” means that evidence on one side outweighs, or is more than, the evidence on the other side.
 - More likely than not; over 50%; more than 50%
 - There is a greater than 50% chance that the allegations are accurate
 - This is a qualitative, not quantitative, standard
 - Qualitative evidence includes interviews with Complainant, Respondent, or witnesses; data or information that is expressed in terms of the meaning of acts or events

Determination of Responsibility

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

- Decision-maker must issue a written determination regarding responsibility
- Decision-maker must understand the “preponderance of the evidence” or “clear and convincing evidence” standard
 - Most K-12 & COE’s use the “preponderance” standard
- *Reminder:* The Title IX Coordinator or investigator cannot determine responsibility

Determination of Responsibility

Written Determination must include:

- Identification of the allegations potentially constituting sexual harassment as defined under Title IX
- A description of the procedural steps taken from the receipt of the formal complaint through the determination, including any notifications to the parties, interviews with parties and witnesses, site visits, methods used to gather other evidence, and hearings held, (if any)
- Findings of fact supporting the determination
- Conclusions regarding the application of the District's code of conduct (or policy) to the facts

Determination of Responsibility

Written Determination must include, continued:

- A statement of, and rationale for, the result as to each allegation, including a determination regarding responsibility, any disciplinary sanctions the recipient imposes on the Respondent, and whether remedies designed to restore or preserve equal access to the recipient's education program or activity will be provided by the recipient to the Complainant
- The recipient's procedures and permissible bases for the Complainant and Respondent to appeal

Determination of Responsibility

Written Determination must include, continued:

- The written determination must be provided to the parties simultaneously
- The determination regarding responsibility becomes final either on the date the recipient provides the parties with the written determination of the result of an appeal, if an appeal is filed, or if an appeal is not filed, the date on which an appeal would no longer be considered timely.

Table of Contents for Written Determination

- Brief Introduction
- Investigative and Decision-Making Background
- Factual Findings
 - **Nature of Parties' Relationship Prior to August 21, 2020**
 - Factual Finding: I find by a preponderance of the evidence that, between August 5-19, 2020, Complainant and Respondent interacted with each other in a [friendly/flirty] way when [describe actions]. These actions were [welcome/unwelcome] to Complainant.
 - Rationale for factual findings: I made these findings because I found [Complainant/Respondent] version of events to be more credible based on [explain your objective reasons why you believed one person over the other]

Table of Contents for Written Determination

- Factual Findings, Continued
 - **Tutoring Session on August 20, 2020**
 - Factual Finding: I find by a preponderance of the evidence that on August 20, 2020, the parties engaged in a 20 minute tutoring session in the Library right after school, and they reviewed Chapter 1 of the Algebra class by following the Algebra Review Sheet. By all accounts, the parties did not engaged in any unwelcome or inappropriate behaviors with each other, and they agreed to hold another tutoring session the next day, August 21, 2020.
 - Rationale for factual findings: I made these findings because the parties did not dispute what occurred during their tutoring session in the library on August 20, 2020.

Table of Contents for Written Determination

- Factual Findings, Continued
 - **Tutoring Session on August 21, 2020**
 - Factual Findings. I find by a preponderance of the evidence that, on August 21, 2020, in the library after school, Respondent [did/did not] touch Complainant's private genital area with Respondent's left hand. Respondent touched Complainant's private genital area [accidentally/purposefully] and [with/without] Complainant's permission. While touching Complainant, Respondent [made/did not make] comments something like, "We should smash," which the Complainant [reasonably/unreasonably] interpreted as sexual comments. Respondent touched Complainant's private area based on [non-sexual reasons/sexual gratification]
 - Rationale for factual findings: I made these findings because....

Table of Contents for Written Determination

- Conclusions about Sexual Fondling
 - Conclusion: I find by a preponderance of the evidence that Respondent's actions [do/do not] rise to the level of sexual fondling as defined by [code of conduct/policy].
 - Rationale: I reach this conclusion because Respondent [did/did not] touch a private area of Complainant when placing a hand on Complainant's genital area [with/without] permission. The facts further demonstrated that Respondent touched Complainant [accidentally/for the purposes of sexual gratification].

Table of Contents for Written Determination

- Conclusions about Sexual Harassment
 - Conclusion: I find by a preponderance of the evidence that Respondent's actions [do/do not] rise to the level of sexual harassment as defined by [code of conduct/policy].
 - Rationale: I reach this conclusion because Respondent [did/did not] engage in unwelcome physical and verbal conduct based on sex towards Complainant, which determined by a reasonable person would be regarded as severe, pervasive, and objectively offensive.
- Responsibility
 - Based on a thorough review of the evidence, I find by a preponderance of the evidence that Respondent [is/is not] responsible for [sexual fondling and/or sexual harassment].

Table of Contents for Written Determination

- Sanctions (if responsibility)
 - I recommend the following sanctions for Respondent [List all that apply to the specific findings and conclusions]
- Remedies (if responsibility)
 - I recommend the following remedies for Complainant [List all that apply to the specific findings and conclusions]
- Appeal Rights Available for Both Parties
- Closing Statement

Discussion of Homework

Hypothetical Investigative Report

- Weigh the evidence and determine by a preponderance of the evidence whether Respondent was flirty 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 or friendly.
- Explain why you made that finding; what was 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 touching the Complainant’s groin, crotch, or private parts and determine whether Respondent touched Complainant’s groin area.
- If you find that Respondent touched Complainant’s groin, determine if the touch was sexual in nature **and** if Complainant permitted the touch **and** if the touch was for the purpose of sexual gratification.
- Write factual findings about the touch of the knee and whether the Respondent touched the 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?

Question & Answer Session

Disclaimer

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Thank You

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aalrr Title IX

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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
U.S. District Court, Eastern District of
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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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Associate

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Ashlee Reece provides counsel and representation to California community college districts, county offices and public school districts in a wide variety of employment and education law matters. Ms. Reece also conducts investigations for school and community college districts with respect to Title VII, Title IX and other discrimination allegations.

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

Events & Speaking Engagements

Cultural Competence & Sensitivity Institute
Virtual, February 10, 17 & 24, 2022

Alerts & Articles

Ms. Reece is a contributor to the firm's publications and blog.

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Educational Agencies

EDUCATION

J.D., Saint Louis University
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ADMISSIONS

2019, California
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PRACTICE AREAS

Investigations
Labor & Employment Law