

# Robbins Schwartz

## Training for Homer CCSD 33-C Title IX Personnel

December 15, 2021

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# Training for Homer CCSD 33C Title IX Personnel

Presented By: Todd K. Hayden and Michelle L. Weber

December 15, 2021

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## Background on New Title IX Regulations



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## Background on Title IX Regulations

- On May 6, 2020, the U.S. Department of Education released new Title IX regulations establishing how education programs that receive federal funding must respond to sexual harassment under Title IX.
- Among other changes, the new regulations prescribe a narrower definition of sexual harassment than in previous Title IX guidance, and they require school districts to follow detailed procedures when adjudicating formal Title IX sexual harassment complaints.
- The regulations went into effect on August 14, 2020.

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## Recently Issued Guidance

- Since taking office, President Biden and his Administration have issued key guidance documents interpreting the 2020 regulations and taken action/steps signaling an intent to amend certain aspects of the regulations in the coming months.
  - March 2021 Executive Order
  - April 2021 Letter to Stakeholders
  - June 2021 Title IX Public Hearing
  - July 2021 Question & Answer Document

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## Current Status

- So long as the Department of Education's review of the current Title IX regulations is ongoing and until any new regulations go into effect, school districts must continue to comply with the existing regulations.

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## Impact on School Districts

- The 2020 Regulations require:
  - Revisions to policies and procedures
  - Staffing determinations
  - Training for all personnel involved in a school district's investigation and grievance process, including:
    - Title IX Coordinator(s)
    - Investigators
    - Decision-makers
    - Appellate decision-makers
    - Informal resolution facilitators
  - Publishing of information and training materials on the district's website

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## Overview of Relevant Laws



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## Relevant Laws

- The below laws are relevant to the District's policies and procedures that address sexual harassment:
  - Title IX of the Education Amendments of 1972 ("Title IX")
  - Title VII of the Civil Rights Act of 1964 ("Title VII")
  - Illinois Human Rights Act ("IHRA")
  - Abused and Neglected Child Reporting Act ("ANCRA")
  - Every Student Succeeds Act ("ESSA")

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## Relevant Laws

- **Title IX:** Prohibits sex-based discrimination, including sexual harassment, in educational programs and activities receiving federal financial assistance.
- **Title VII:** Prohibits discrimination, including discrimination based on sex, in employment.

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## Relevant Laws

- **Illinois Human Rights Act:**
  - Prohibits discrimination in Illinois, including in employment.
  - Also prohibits sexual harassment in elementary, secondary and higher education.
- **Abused and Neglected Child Reporting Act:** Requires immediate reporting when a school employee has reasonable cause to believe that a child known to them in their professional or official capacities may be an abused child or a neglected child.



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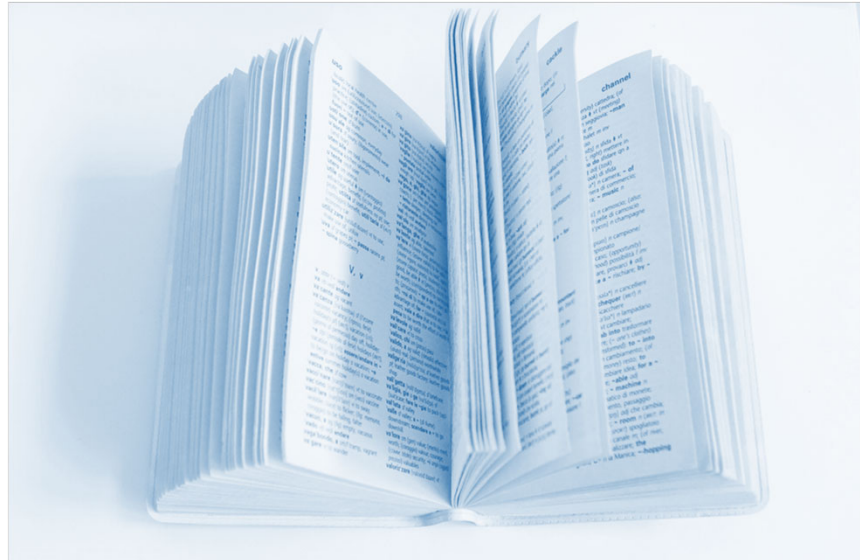
## Relevant Laws

- **Every Student Succeeds Act:** Requires states and districts to have in place policies prohibiting the “aiding and abetting of sexual abuse.”

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## Key Definitions



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## Title IX Sexual Harassment

### Sexual harassment includes:

1. **Quid pro quo** harassment by a District employee
2. Unwelcome conduct that a reasonable person would find **so severe, pervasive and objectively offensive** that it **denies** a person equal educational access
3. Any instance of **sexual assault, dating violence, domestic violence or stalking**

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## Title IX Sexual Harassment: **Quid Pro Quo**

- When an employee of the District conditions aid, benefits, pay, a position or other opportunities for advancement on an individual's submission to unwelcome sexual conduct.

- Example: Mr. Jones promises his student, Jane, that he will give her an A on her midterm if she engages in sexual conduct after class.

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Title IX Sexual Harassment: "Hostile Environment"

- Unwelcome conduct that a reasonable person would find so severe, pervasive, and objectively offensive that it denies a person equal educational access
  - Severe and pervasive and offensive
  - Denial of equal educational access

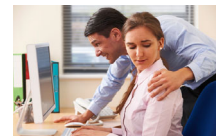
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Title IX Sexual Harassment: "Hostile Environment"

- Compare with Title VII definition for workplace hostile environment claims:
  - Unwelcome sexual advances and other conduct of a sexual nature having the purpose or effect of **interfering with an individual's work performance or creating an intimidating, hostile or offensive working environment.**

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## Title IX Sexual Harassment: "Hostile Environment"

- Compare with IHRA definition:
  - Any conduct of a sexual nature exhibited by an education representative toward a student, when such conduct has the purpose of **substantially interfering with the student's educational performance or creating an intimidating, hostile or offensive educational environment.**

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## Title IX Sexual Harassment: Other Categories

- Title IX's definition of sexual harassment also includes:
  - Sexual Assault
  - Dating Violence
  - Domestic Violence
  - Stalking

*As defined under the Clery Act/Violence Against Women Act*

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## Sexual Assault, Dating Violence, & Stalking

### Sexual Assault:

- An offense that meets the definition of rape, fondling, incest, or statutory rape as used in the FBI's Uniform Crime Reporting program.

### 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.

### Stalking

- Engaging in a course of conduct directed at a specific person that would cause a reasonable person to –
  - Fear for the person's safety or the safety of others; or
  - Suffer substantial emotional distress.

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## Domestic Violence

### • A felony or misdemeanor crime of violence committed:

- By a current or former spouse or intimate partner of the victim;
- By a person with whom the victim shares a child in common;
- By a person who is cohabitating with, or has cohabitated with, the victim as a spouse or intimate partner;
- By a person similarly situated to a spouse of the victim under the domestic or family violence laws of the jurisdiction in which the crime of violence occurred; or
- By any other person against an adult or youth victim who is protected.

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Key  
Definitions:  
**Hypothetical**

- You have been assigned to investigate a formal complaint alleging that a student was sexually harassed by his guidance counselor.
  - What types of evidence/information would be relevant to determining whether the alleged harassment was severe, pervasive and objectively offensive?
  - What types of evidence/information would be relevant to determining whether the alleged harassment resulted in a denial of equal educational access?

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Jurisdiction



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## Jurisdiction Under Title IX

- The Title IX regulations apply only to alleged sexual harassment that occurs “in the district’s education program or activity, against a person in the United States.”

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## Title IX Jurisdiction: Scope of District’s Education Program or Activity

- Includes locations, events, or circumstances over which the school district exercised substantial control over both the Respondent and the context in which the sexual harassment occurred.

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**Title IX  
Jurisdiction:  
Scope of  
District's  
Education  
Program or  
Activity**

- Homer SD examples for discussion:
  - Hotel during overnight athletic competition?
  - Local business where students are participating in District fundraising activities?
  - Off-campus District-sponsored field trip?

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**Jurisdiction:  
"... in the  
United States"**

- To fall under Title IX, the alleged misconduct must have occurred in the United States.
  - Example: Sexual assault that occurs during high school study abroad program?

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## Jurisdiction Analysis

- If the alleged misconduct did not occur in the District's education program or activity and/or did not occur in the United States, look to other applicable laws (i.e. Title VII, IHRA) and other district policies, such as:
  - 2:260, *Uniform Grievance Procedure*
  - 5:10, *Equal Employment Opportunity*
  - 5:90, *Abused and Neglected Child Reporting*
  - 5:120, *Ethics and Conduct*
  - 7:20, *Harassment of Students Prohibited*
  - 7:191, *Prevention of and Response to Bullying, Intimidation and Harassment*
  - 7:185, *Teen Dating Violence Prohibited*
  - 7:190, *Student Behavior*

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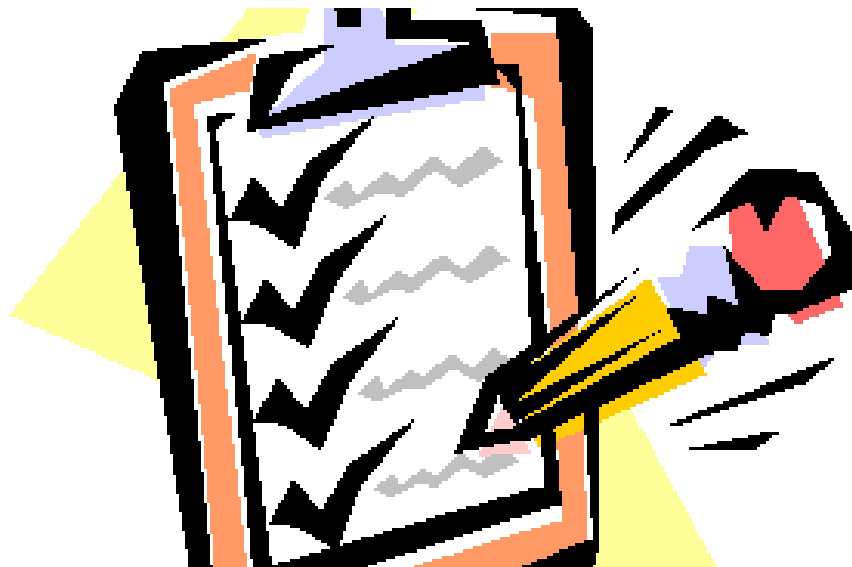
## Jurisdiction: Hypothetical

- Compare:
  - A student athlete allegedly sexually harasses another student while off-campus on a school field trip.
  - A student athlete allegedly sexually harasses another student while at a teacher's home (the two students are friends with the teacher's child, who is also a student at the high school)
- Which type of alleged misconduct falls under Title IX?
- What are the District's response obligations with regard to each type of alleged misconduct?

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Board Policy  
2:265 – Title IX  
Sexual  
Harassment  
Grievance  
Procedure



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Policy 2:265 –  
Prohibitions

- **Prohibits sexual harassment**, as defined under Title IX.
- **Prohibits retaliation** against anyone who, in good faith, has made a report or complaint, assisted, or participated or refused to participate in any manner in a proceeding under the policy.

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## Policy 2:265 – Applicability

- The District complies with Title IX and its implementing regulations concerning everyone in the District’s education programs and activities, including:
  - Applicants for employment
  - Students
  - Parents/guardians
  - Employees
  - Third parties

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## Policy 2:265 – Enforcement

- **District employees** found to have engaged in Title IX sexual harassment will be subject to disciplinary action, up to and including discharge
- **Students** found to have engaged in Title IX sexual harassment will be subject to disciplinary action, up to and including suspension and expulsion
- Title IX sexual harassment by **third parties** (*e.g.*, vendors, parents, visitors) will be addressed in accordance with the authority of the Board, in the context of the relationship with the third party

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Policy 2:265 –  
Key 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 the conduct that could constitute sexual harassment

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Policy 2:265 –  
Key Definitions

**Formal Title IX Sexual Harassment Complaint:**

- Document filed by a Complainant or signed by the Title IX Coordinator alleging sexual harassment in violation of Title IX and requesting that the District investigate the allegation.
  - Note: Parent/guardian may file a formal complaint on behalf of their child. In such a case, the student is still the “Complainant” for purposes of Title IX.

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## Policy 2:265 – Key Definitions

### Supportive Measures:

- non-disciplinary, non-punitive individualized services
- offered as appropriate, as reasonably available, and without fee or charge
- offered to the Complainant or the Respondent before or after a formal Title IX sexual harassment complaint is filed or where no formal Title IX sexual harassment complaint has been filed

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## Policy 2:265 – Other Elements

- Requires the Superintendent and/or designee to ensure that the District prevents and responds to allegations of Title IX Sexual Harassment
  - Curriculum components
  - Education and training for school staff
  - Notice of policy and contact information of Title IX Coordinator

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## Policy 2:265 – Other Elements

- Reporting and confidentiality of reports
- Initial processing of reports
- Required elements for procedures the District must implement for formal Title IX sexual harassment complaint process

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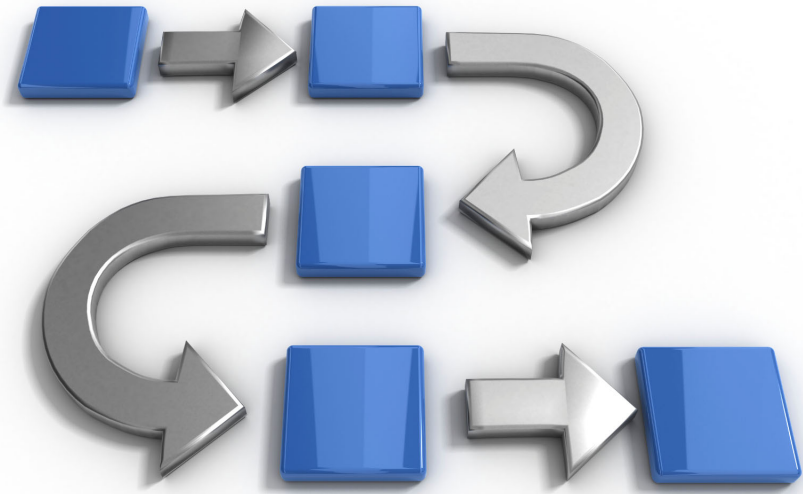
## Policy 2:265 – Key Principles for Procedures

- Treat Complainant and Respondent equitably
- Objective evaluation of relevant evidence
- Presumption that the Respondent is not responsible for the alleged conduct until a determination regarding responsibility
- Compliance with grievance process before any disciplinary actions against a Respondent.
- Include reasonably prompt timeframes for conclusion of the grievance process
- Base all decisions upon the preponderance of evidence standard

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Administrative  
Procedures for  
Board Policy  
2:265



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Administrative  
Procedures for  
Board Policy  
2:265

- 2:265-AP1, *Title IX Sexual Harassment Response*
- 2:265-AP2, *Formal Title IX Sexual Harassment Complaint Grievance Process*

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## Purpose of Procedures

- Implement Board Policy 2:265
- Establish the District's required response to reports of sexual harassment that may violate Title IX (2:265-AP1)
- Establish the District's investigation and response process in response to a formal Title IX sexual harassment complaint (2:265-AP2)

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## Role of Title IX Coordinator

- Upon receiving knowledge of sexual harassment allegation, promptly contacts Complainant to discuss supportive measures and explain the process of filing a formal complaint.
- Analyzes reports under other relevant Board policies to determine appropriate method for processing and reviewing reports.
- Maintains the confidentiality of the sexual harassment allegation, to the greatest extent practicable.
- May sign a Formal Title IX Sexual Harassment Complaint.

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## Role of Title IX Coordinator

- When a Formal Complaint is filed, follows the Formal Title IX Sexual Harassment Grievance Process (2:265-AP2).
- Ensures a determination is made about whether an emergency removal or administrative leave is necessary, pending the investigation outcome.
- Creates and maintains, for at least seven years, records of any actions and supportive measures taken and provided in response to the report of sexual harassment.

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## Role of All District Employees

- Immediately report any suspicion of child abuse or neglect.
- Promptly forward all reports of sexual harassment (including anonymous reports) to the Title IX Coordinator.

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## Reporting Alleged Sexual Harassment



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## Reporting: The Who

- Who can report?
  - Anyone – including students, employees and third parties
  - Need not be the person who is alleged to be the victim of the misconduct
- To whom should reports be made?
  - Title IX Coordinator
  - District administrator (Principal, AP, Dean of Students)
  - Any employee with whom the person is comfortable speaking

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## Reporting: Employee Obligations

- Under Policy 2:265:
  - All District employees must report allegations of sexual harassment, including anonymous reports.
  - School employees must respond to incidents of sexual harassment by promptly making or forwarding a report to the Title IX Coordinator.
  - An employee who fails to promptly make or forward a report may be disciplined, up to and including discharge.

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## Reporting: Confidentiality of Reports

- Under Policy 2:265, reports of alleged sexual harassment will be confidential to the greatest extent practicable, subject to the District's duty to investigate and maintain an educational program or activity that is productive, respectful, and free of sexual harassment.

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## Abused and Neglected Child Reporting Act

- Provides for the reporting and investigation of child abuse and neglect.
- Education personnel are required to immediately report when they have reasonable cause to believe that a child known to them in their professional or official capacities may be an abused child or a neglected child.
- All reports of suspected child abuse or neglect made under this Act must be made immediately.

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## Questions?



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## Response to Reports Alleging Sexual Harassment



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## “Actual Knowledge” Under Title IX

- Notice of sexual harassment or allegations of sexual harassment to any District employee or to the District’s Title IX Coordinator

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## “Deliberate Indifference” Under Title IX

- Once the District has actual knowledge of alleged sexual harassment, the District must respond to the allegations:
  - Promptly
  - In a manner that is not “clearly unreasonable in light of the known circumstances”

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## Overview of District Response Process

1. Analyze report to determine the appropriate method for processing/reviewing it.
2. For any report alleging Title IX sexual harassment, promptly contact the Complainant to:
  - a. discuss and offer supportive measures,
  - b. consider the Complainant’s wishes with respect to supportive measures,
  - c. explain that supportive measures are available with or without filing a formal complaint, and
  - d. explain the process for filing a formal complaint.

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## Response Process: Analyze Report

- Step 1: Analyze the Report.
  - Does Title IX apply?
  - Does another District policy apply?

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## Title IX Jurisdiction Analysis



**If YES to 1, 2 and 3:**

Promptly contact the Complainant to discuss supportive measures and options for filing a formal complaint

**If NO to 1, 2 or 3:**

Title IX does not apply. Check other District policies. Send Notice of Applicable Policies.

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Response  
Process:  
**Contact  
Complainant**

- Step 2: Contact the Complainant.

- Reminder: Complainant is the individual who is alleged to be the victim of sex-based misconduct



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Response  
Process:  
**Contact  
Complainant**

- When meeting with the Complainant, the Title IX Coordinator should:

- discuss and offer supportive measures;
- consider the Complainant's wishes with respect to supportive measures;
- explain that supportive measures are available with or without filing a formal complaint; and
- explain the process for filing a formal complaint.

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Grievance Process  
for Formal Title IX  
Sexual  
Harassment  
Complaints



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Grievance  
Process for  
Formal  
Complaints

**Formal complaint:**

- Document filed by a Complainant or signed by Title IX Coordinator alleging sexual harassment in violation of Title IX and requesting that the District investigate the allegation.
- At the time a Complainant files a formal complaint, he or she must be participating in or attempting to participate in the District's education programs or activities.

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## Formal Complaint Hypothetical

A student graduates in June. In September, the former student contacts the Title IX Coordinator to report that she was sexually harassed by another student (who is now a current senior) the previous February. The former student indicates that she would like to file a formal complaint.

- Can the former student file a formal complaint?
  - If no, what options does the District have?

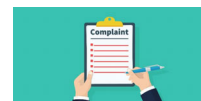
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## Grievance Process: Notice of Allegations

- Must be sent **simultaneously** to both parties (or the parties' parent(s)/guardian(s)) after Title IX Coordinator's receipt of formal complaint.
- Informs the parties of:
  - The grievance process, including informal resolution
    - Notice Letter Regarding Informal Resolution should be enclosed
  - The allegations
  - The presumption of non-responsibility on the part of the Respondent
  - The parties' right to an advisor
  - The parties' right to inspect and review evidence
  - The District policies prohibits knowingly making false statements or submitting false information during the grievance process.

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## Grievance Process: Emergency Removals and Administrative Leave

- Prior to initiating or completing the grievance process in response to a formal complaint, the District may remove a Respondent from its education program or activity on an emergency basis.
  - Only permitted where the District has determined, based on an individualized safety and risk analysis, that an immediate threat to the physical health or safety of an individual arising from the allegations of sexual harassment justifies removal.
- District must provide the Respondent with notice and an opportunity to challenge the decision immediately following the removal.
- **Be mindful of SB 100 requirements.**

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## Grievance Process: Emergency Removals and Administrative Leave

- The District may place an employee on administrative leave during the pendency of the grievance process in response to a formal complaint.

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## Informal Resolution



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## Informal Resolution

- Fully discretionary: Requires parties' **voluntary, written consent**
  - Consent to Participate in Informal Resolution
  - Resolution Documentation / Agreement Template
- May occur at any time after the parties receive the initial notice of allegations and prior to a determination regarding responsibility being reached.
- May not be required as condition of:
  - Enrollment/continuing enrollment,
  - Employment or continuing employment,
  - Enjoyment of any right, or
  - Waiver of the right to a formal investigation/adjudication

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## Informal Resolution

- Party may **withdraw** at any time prior to a resolution
  - Withdrawal triggers resumption of grievance process.
- Not permitted in allegations of **employee** sexual misconduct toward a **student**

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## Consolidation and Dismissal of Formal Complaints



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## Consolidation of Formal Complaints

- Title IX Coordinator may consolidate formal complaints where the allegations of sex-based misconduct arise out of the same facts or circumstances.

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## Dismissal of Formal Complaints

- *Dismissal does not preclude action altogether – just for purposes of Title IX.*
  - Notice Letter to Complainant/Respondent of Dismissal of Allegations

### **Mandatory dismissal:**

- Title IX Coordinator or designated investigator determines that conduct alleged in the formal complaint does not meet
  - (a) Title IX's definition of sexual harassment and/or
  - (b) Title IX's jurisdictional requirements.

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## Dismissal of Formal Complaints

### Discretionary dismissal if:

- Complainant gives written notification of desire to withdraw formal complaint or certain allegations;
  - Respondent is no longer enrolled in or employed by the District; or
  - Specific circumstances prevent the District from gathering evidence sufficient to reach a determination.
- A party may appeal a decision to dismiss a formal complaint or allegations therein.

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## Investigation of Formal Complaints



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## Investigations: Written Notice

- Written notice required to both parties:
  - Allegations (upon receipt of a formal complaint)
    - Notice Letter to Complainant/Respondent of Allegations
  - Investigative interviews or meetings
    - Notice Letter of Investigative Interview
  - Mandatory or discretionary dismissal
    - Notice Letter to Complainant/Respondent of Dismissal of Allegations

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## Investigations: Evidence

- Equal opportunity for parties to provide:
  - Fact witnesses
  - Expert witnesses
  - Inculpatory evidence
  - Exculpatory evidence
- No gag orders

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## Investigations: Advisors

- Both parties may select an advisor of their choosing
  - May, but need not be, an attorney
- Advisor's role is to provide support, guidance, advice
- May not speak on behalf of the party



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## Investigation: Access to Evidence

- Both parties must have equal access to inspect and review all evidence that is directly related to the complaint allegations.
  - Be mindful of FERPA, ISSRA and student privacy considerations.
  - Consider whether redactions are necessary
  - Notify parties of parameters/limitations on re-disclosure of records and evidence.

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## Investigation: Access to Evidence

- At the conclusion of the investigation and prior to the completion of the investigator's report, the investigator must send both parties a copy of all relevant evidence.
  - Notice Letter to Complainant/Respondent of Investigation Evidence and Right to File Response
- The parties will have 10 school business days to submit a written response to the evidence, which the investigator must consider prior to completion of his/her investigative report.
  - Investigator must also to send a copy of each party's written response to the other party.

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## Investigation: Preparation of Investigation Report

- After receiving/reviewing the parties written responses, the investigator must create an investigative report that fairly summarizes the relevant evidence, which the investigator will forward to the initial decision-maker.
  - Investigation Report Template



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## Investigation: Preparation of Investigation Report

- At least 10 school business days prior to the initial decision-maker's determination, the investigator must send to each party (and their advisors) the investigative report and allow the parties 10 school business days to submit a written response to the report.
- Notice Letter to Complainant/Respondent of Final Investigation Report and Right to File Response

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## Submission of Written Questions



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## Written Questions: Process

- Alternative to live hearing
- Opportunity given to both parties by the decision-maker after investigator sends investigative report
  - Notice Letter to Complainant/Respondent of Opportunity to Submit Written Questions
- Parties may only submit written, **relevant** questions they want the initial decision-maker to ask of any party or witness
- Parties must submit questions within five (5) school business days after they receive the Notice of Opportunity to Submit Written Questions.

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## Written Questions: Process

- The initial decision-maker must:
  - Exclude any irrelevant questions
  - Forward relevant questions to the appropriate party or witness
    - Notice Letter to Party or Witness of Questions Requiring Answers
  - Give party or witness five (5) school business days to respond
  - Provide asking party with answers and explain any decision to exclude questions
    - Notice Letter to Complainant/Respondent of Exclusion of Submitted Questions
- Allow both parties limited follow-up questions

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Written  
Questions:  
**Rape Shield  
Protections**

- Questions about the Complainant's sexual pre-disposition or prior sexual behavior are not permitted unless:
  - Offered to prove that someone other than the Respondent committed the alleged conduct; or
  - Questions and evidence concern specific incidents of the Complainant's prior sexual behavior with respect to the Respondent and are offered to prove consent.

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Determination  
Regarding  
Responsibility



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## Issues for Decision

- Initial decision-maker's role is to determine:
  - Whether facts presented establish that the alleged conduct occurred;
  - Whether that conduct constitutes Title IX sexual harassment; and
  - If the answers to the above are "yes," which sanctions (if any) and remedies are appropriate.

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## Considering Evidence

- Relevant documents may include, but are not limited to:
  - The formal complaint
  - The initial written notice of the allegations
  - Written statement(s) and responses by the parties and/or witnesses
  - The investigation report
  - The parties' written questions and answers
  - Police reports, photographs and/or video footage (if any)
  - Prior discipline records
    - Only relevant to issue of appropriate sanction



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## Preponderance of the Evidence Standard

- “More likely than not”
- Whether the facts supporting the allegations have greater weight/strength than the facts presented in denial of the allegations
- If 50/50, no violation.

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## Written Determination

Determination of Responsibility Letter must include:

- Identification of allegations potentially constituting Title IX sexual harassment
- Description of procedural steps taken
- Findings of fact supporting determination
- Conclusions regarding application of conduct standards
- Statement & rationale for result of each allegation, including:
  - Determination of responsibility
  - Disciplinary sanctions being recommended
  - Whether any remedies will be provided to the Complainant
- Procedures and permissible bases for Complainant and Respondent to appeal

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## Remedies

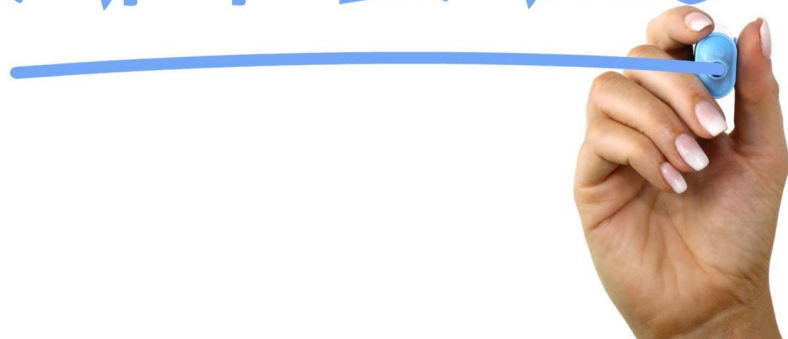
- The Title IX Coordinator is responsible for implementing any remedies for the Complainant, as ordered by the decision-maker.

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## Appeals

# APPEALS



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## Appeals

- Both parties have right to appeal any:
  - Determination regarding responsibility
  - Dismissal of any formal complaint or allegations therein
- Party must submit written appeal request to Title IX Coordinator
  - Within 10 school business days of receipt of written determination or dismissal
- Title IX Coordinator must forward request to **designated appeals administrator**

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## Appeals: Grounds to Appeal

- a) Procedural irregularity that affected the outcome
- b) New evidence or information exists that could affect the outcome but that was not reasonably available at the time the determination was made
- c) Conflict of interest or bias that affected outcome, amongst:
  - Title IX Coordinator, Investigator, or Initial Decision-Maker

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## Title IX Coordinator

- Notifies the other party in writing that an appeal has been filed.
  - Notice Letter to Complainant/Respondent of Appeal
- Provides both parties 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 Appellate Decision-Maker.

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## Appellate Decision Maker

- Affirms, reverses, or amends the written determination regarding responsibility or the notice of dismissal.
  - 2:265-AP2 requires this to occur within 30 school business days of the appeal.
- Written decision issued to both parties simultaneously within 5 school business days after conclusion of the review.
  - Appeal Determination Letter

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## Recordkeeping



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## Recordkeeping

- District must create and maintain, for at least seven (7) years, records of:
  - The sexual harassment investigation, including any determination regarding responsibility, any sanctions imposed on the Respondent and any remedies provided to the Complainant;
  - Any appeal and its result; and
  - Any informal resolution and its result.
- Compare with ISSRA requirement for maintenance of temporary school student records.

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## Conflicts of Interest & Bias



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## Conflict of Interest & Bias

Any individual designated by the District as a Title IX Coordinator, investigator, decision-maker, or any person designated by the District to facilitate an informal resolution process, must not have a conflict of interest or bias for or against Complainants or Respondents generally or an individual Complainant or Respondent.

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## Conflict of Interest & Bias

### Conflict of interest:

- In the decision-making context, a situation in which an individual is “subject to two coexisting interests that are in direct conflict with one another.”
  - Not: “I know one of the parties.”

### Bias:

- “Prejudice in favor of or against one thing, person, or group compared with another, usually in a way considered to be unfair.”

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## How to Address Implicit Bias

- More deliberate or conscious thinking
  - Sometimes called “Staring” (as opposed to “Blinking”)
  - This involves allowing yourself time to fully think through a scenario before coming to a decision/conclusion

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## How to Address Bias: Create a Checklist

- Create a checklist beforehand
  - For ex: A pre-made checklist of allegations to be proven/disproven
- Decision-making checklists can encourage less biased decisions; they provide an objective framework to assess your thinking<sup>1</sup>
- Can be effective in overcoming stereotypes<sup>2</sup>
- Helps reduce the attention given to biased characteristics that may influence decision-making<sup>3</sup>

1. Arkes. Hal R. Arkes & Victoria A. Shaffer, Should We Use Decision Aids or Gut Feelings? in G. GIGERENZER & C. ENGEL, EDS., HEURISTICS AND THE LAW (2004).  
2. Isaac. Carol Isaac, Barbara Lee & Molly Carnes, Interventions That Reduce Bias in Clinical Decision Making: A Systematic Review, 84 Academic Medicine 1440 (2009).  
3. Uhlmann. Eric Luis Uhlmann & Geoffrey L. Cohen, Constructed Criteria: Reducing Stereotype-Based Discrimination, 16 PSYCHOL. SCI. 474 (2005).  
All materials compiled by the ABA Implicit Bias Toolkit, which can be found here: <https://www.americanbar.org/groups/diversity/resources/implicit-bias/>

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Questions?



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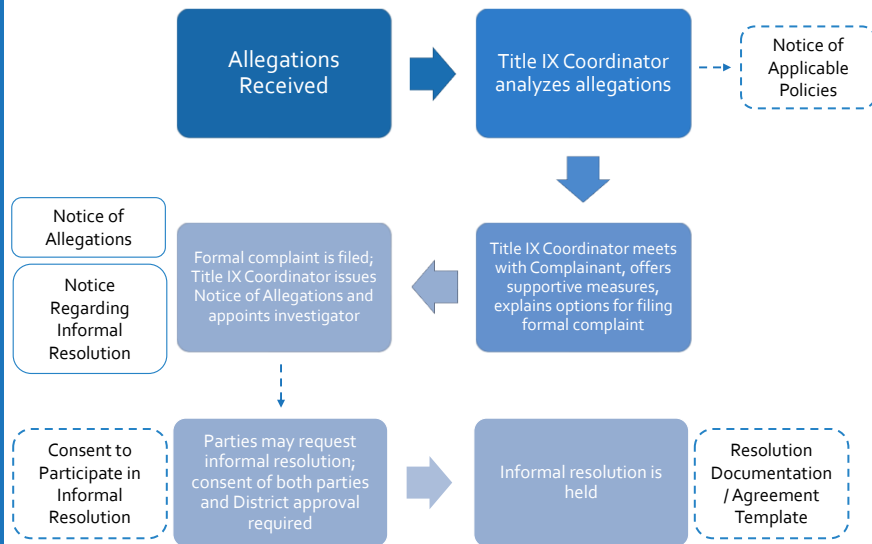
## Final Review and Hypothetical



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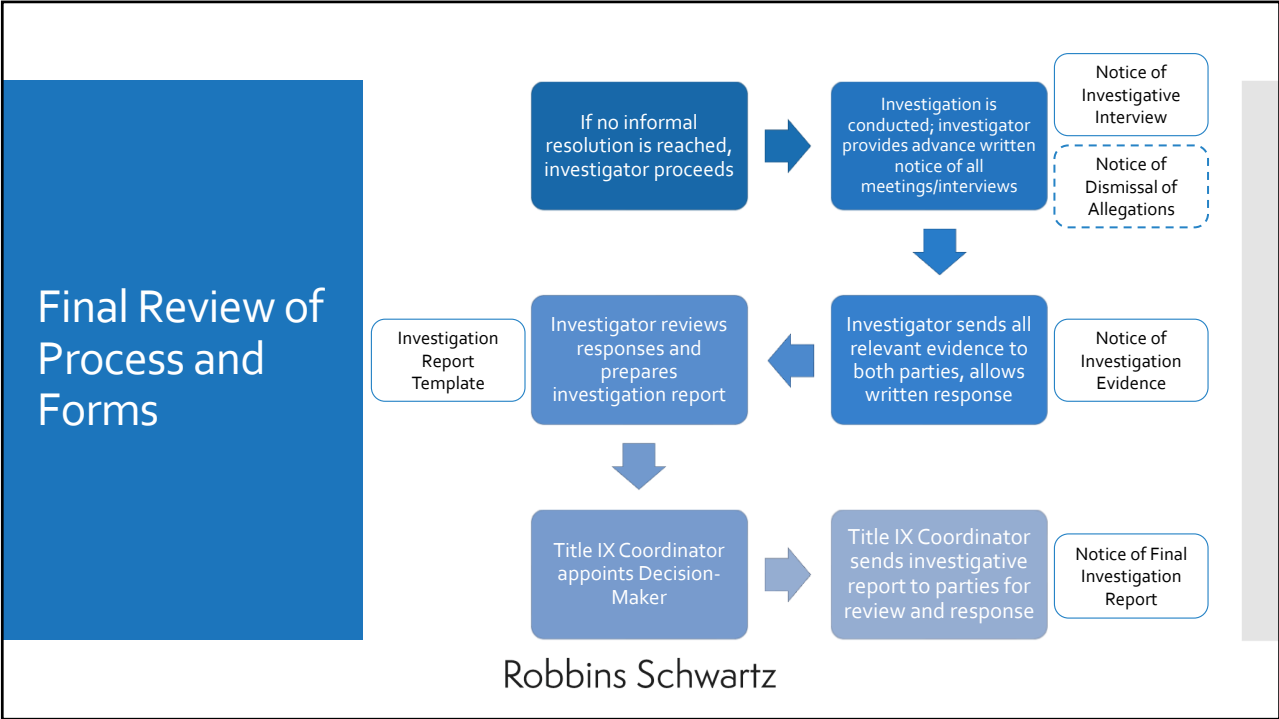
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## Final Review of Process and Forms

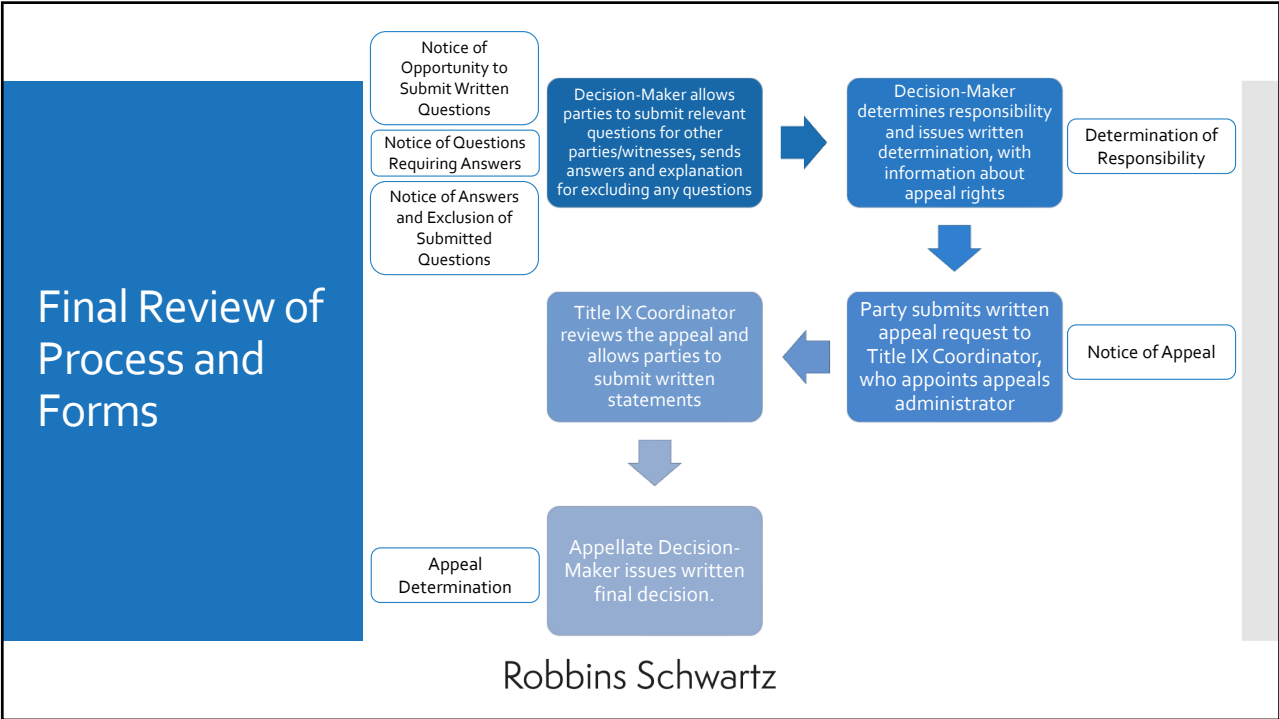


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## Hypothetical

- Jen, an 8<sup>th</sup> grade student, reports to her English teacher that a classmate, Steve, has been making inappropriate sexual jokes and innuendos.
  - She and Steve both attended the same virtual summer school course.
  - They were assigned to work on a project together, much of which was to be done on their own time, over Zoom, and required the exchange of personal contact information.
  - After the project was complete, Steve allegedly called Jen and asked her to get together. Jen said yes.
  - Jen states that they went to the movies once, but then Jen decided not to go out with Steve again.

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## Hypothetical

- Jen alleges that Steve began telling all of their mutual friends that Jen “sleeps around”, and he allegedly began making false statements that she sent him sexually explicit photos.
- Jen alleges that Steve’s comments took place over the course of the summer, at various off-campus class gatherings where the teacher and other students were present.
- Most recently, they both attended the same off-campus party. Steve was drinking and he tried to pressure Jen into drinking as well. Jen reports that Steve stated, “Rumor has it, you’re more fun when you’re drunk.”
- Jen reports that she told Steve he was not funny, and to leave her alone.

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## Hypothetical

- Steve reportedly became drunk, and one of Jen's friends witnessed Steve showing other party-goers a sexually explicit photo of a female and telling them it was Jen.
  - The photo did not show a face, so others at the party did not know if the photo was of Jen or not. Some male classmates seemed to believe Steve.
- Jen is distraught. Jen is considering transferring schools until the end of the year so she will not have to interact with Steve.
- The English teacher documents her discussion with Jen. What should the English teacher do with these allegations? Discuss.

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## Hypothetical

- Based on these facts, analyze the jurisdiction under Title IX.
  - Did Steve's conduct occur in the District's education program or activity?
- Do Steve's actions constitute Title IX sexual harassment?
  - Reminder: Three types of sexual harassment:
    - **Quid pro quo** harassment by a District employee
    - Unwelcome conduct that a reasonable person would find **so severe, pervasive and objectively offensive** that it **denies a person equal educational access**
    - Any instance of **sexual assault, dating violence, domestic violence or stalking**

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## Hypothetical

- Jen files a formal complaint. The parties proceed to submitting written questions to the decision-maker.
  - Can Steve have the decision-maker ask Jen if she has ever had a sexual relationship with Steve?
- After a full grievance process, the District's appointed decision-maker (who is close friends with the college counselor to whom Jen made her initial report) finds that Steve is responsible for engaging in Title IX sexual harassment.
  - After receiving the decision-maker's determination, Steve feels that the decision-maker had a conflict of interest that affected the outcome of the grievance process. He submits an appeal request to the Title IX Coordinator.
- What steps does the Title IX Coordinator need to take with respect to the appeal?

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## Questions?



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# Robbins Schwartz

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Todd Hayden practices in the areas of school and municipal law. He provides governmental employers with guidance and counseling regarding labor and employment, including employee discipline and termination, board governance, collective bargaining, contract, public finance and transactional matters.

Todd has represented employers in various employer-employee disputes including federal and state litigation, EEOC/Department of Human Rights charges, State Labor Board Proceedings and grievance and arbitration proceedings. Todd has extensive experience in collective bargaining, including unit formation proceedings, negotiations, mediation and interest arbitration. He has performed construction contract reviews, served as local bond counsel and worked on school boundary changes.

Todd is approved by the Illinois State Board of Education to provide school board member training.

### AWARDS

Illinois Leading Lawyer, Employment Law: Management, Labor Law: Management, School Law and Governmental, Municipal, Lobbying & Administrative Law, 2015

### RECENT PUBLICATIONS

Contributing author, "Civil Rights Litigation," *Illinois School Law*, IICLE (2017)

### RECENT PRESENTATIONS

*Collective Bargaining for School Board Members and Administrators*, IASB/IASA/Illinois ASBO Joint Annual Conference (November 2018)

*Employee Free Speech and the Public Employer*, HR Source Employment Law Conference at Northern Illinois University (September 2018)

*Practical Advice for Maintaining a Harassment Free Workplace*, IASA (February 2018)



### PRACTICE AREAS

Commercial Transactions  
Education Law  
Employee Benefits  
Labor & Employment  
Litigation  
Municipal Law  
Public Finance & Taxation  
Student Discipline

### EDUCATION

J.D., *cum laude*, Indiana  
University School of Law

B.A., University of  
Michigan

### ADMITTED TO PRACTICE

Supreme Court of the  
United States

U.S. Court of Appeals for  
the Seventh Circuit

Trial Bar of the U.S.  
District Court for the  
Northern District of Illinois

U.S. District Court for the  
Northern District of Illinois

Supreme Court of Illinois

**ORGANIZATIONS**

Illinois Council of School  
Attorneys

Illinois State Bar  
Association

Will County Bar  
Association – Local  
Government Committee

# Robbins Schwartz

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Michelle practices in the area of education law with a focus on special education and student matters. She counsels school districts and community colleges regarding the IEP process, due process, Section 504, student discipline, board policy and student records.

Prior to joining Robbins Schwartz, Michelle worked as an attorney for Waukegan Public Schools and Chicago Public Schools, focusing in special education. She has experience counseling IEP teams and school administrators, representing districts in complex due process hearings and developing policies and procedures for school districts. Prior to starting law school, Michelle was a Middle School Language Arts Teacher in Los Angeles, CA.

### **RECENT PUBLICATIONS**

"DeVos Rollbacks Could Hit Schools Hard," *Chicago Daily Law Bulletin* (2017)

### **RECENT PRESENTATIONS**

*Risk Assessments, Threat Assessments and the Impact on Students with Disabilities*, Illinois Alliance of Administrators of Special Education Fall Conference (October 2019)

*Escalating Student Behavior and Safety Concerns: Legal Options and Considerations*, Illinois Alliance of Administrators of Special Education Winter Conference (February 2019)

Student Bullying Legal Framework & Recommended Practices, In-Service (August 2018)



### **PRACTICE AREAS**

Education Law  
Special Education  
Student Discipline

### **EDUCATION**

J.D., Loyola University  
College of Law

M.A., Loyola Marymount  
University

B.A., Trinity College

### **ADMITTED TO PRACTICE**

Supreme Court of Illinois

### **ORGANIZATIONS**

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Illinois Council of School  
Attorneys