SCLS SCHOOL & COLLEGE LEGAL SERVICES OF CALIFORNIA

THE LIFE OF A TITLE IX COMPLAINT

October 12, 2023

Presented by:

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Areas of Expertise

Title IX/Discrimination; Collective Bargaining; Elections/Board Vacancies; General Education Code and Student Issues; Governance Matters; Litigation and K-12 Personnel Issues

Experience

Ms. Houck joined SCLS after serving as both in-house and outside general counsel to school districts. Most recently, Ms. Houck served as general counsel to the San Francisco Unified School District where she was responsible for managing an eight-attorney legal office, the office of labor relations, the employee relations team and for providing direct advice and counsel to the Board of Education and Superintendent. Her practice has included oversight of all legal matters for school districts with a focus on compliance with Title IX and anti-discrimination statutes, labor and employment matters, investigations and governance matters. While in San Francisco, Ms. Houck led the effort to adopt an adult professional boundaries policy, and designed the content and delivery of abuse prevention training for every administrator in the 10,000 employee district.

In addition to serving eight years in San Francisco Unified, Ms. Houck has served as in-house counsel to Oakland and Alameda Unified School Districts. She was also an associate in a boutique education law firm as well as of counsel for a state-wide education law firm. Ms. Houck has supervised risk management functions, including oversight and direction for hundreds of litigation matters before state and federal courts and administrative tribunals.

Ms. Houck has extensive experience providing training to administrators on various legal issues with an emphasis on providing useful tools and an interactive learning experience that incorporates adult learning theory.

Education

J.D., University of California, King Hall School of Law (1998); B.A., University of California at Davis (1995)

School and College Legal Services (SCLS) is a joint powers authority serving school districts, county offices of education, SELPAs, and community colleges in over fifteen counties in Northern California. Our primary focus, as *a preventative law firm*, is helping clients avoid future costly legal problems. We are a collaborative office, working to ensure our clients receive the most legally defensible advice in the most efficient manner possible.

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Areas of Expertise

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Personnel and Student Issues
Special Education

Experience

Ms. Schwendeman's practice is concentrated collective bargaining and personnel matters. She also provides assistance to clients in special education and Section 504 law, and student matters. She regularly counsels school districts and county offices of education on a wide range of day-to-day legal issues. Ms. Schwendeman has appeared before the California Department of Fair Employment and Housing, California Department of Labor Standards and Enforcement and the U.S. Department of Education's Office for Civil Rights, as well as other administrative agencies tasked with investigating and enforcing civil rights and labor laws.

Prior to joining SCLS, Ms. Schwendeman practiced special and general education law in New York State for three years at a law firm in Albany, New York. She then joined a boutique law firm in San Francisco, practicing private-sector labor and employment law. During law school, Ms. Schwendeman served as a law clerk to the late Justice Melvin P. Schweitzer, New York State Supreme Court, Commercial Division, in New York County. Before becoming an attorney, Ms. Schwendeman taught music in the New York City public schools.

Ms. Schwendeman is a member of the State Bars of California and New York.

Education

B.Mus, University of Hartford, Hartt School of Music, *summa cum laude* (2010)
J.D., Fordham University School of Law (2015)

Year joined SCLS: 2019

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SCLS SCHOOL & COLLEGE LEGAL SERVICES OF CALIFORNIA

The Life of a Title IX Complaint

October 12, 2023

Presented by:
Danielle Houck, General Counsel
Kaitlyn Schwendeman, Associate General Counsel
School & College Legal Services of California

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Agenda

- The Basics
  - Background information and definitions
- Processing a Title IX Complaint
  - Initial Meeting
  - Investigation
  - Decision
- Last Thoughts
  - Common Questions/Errors
  - Follow-Up

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Overview of Title IX Complaint Process

- Report
- Supportive Measures
- Formal Complaint / Informal Resolution
- Investigation
- Draft Investigation Report
- Review and Comment Period - 10 days*
- Final Report
- Question Period Before Final Decision Issued - 10 days*
- Final Decision
- Appeal*

**Check your policies for timelines*

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Upcoming Changes to TIX

- New Regulations expected Winter/Spring 2024, for 2024-25 implementation
- Expected Changes:
  - Severe or Pervasive
  - Expanded Jurisdiction
  - Enhanced level of response
  - Fewer individuals involved in grievance procedures
  - K-12: streamlined grievance procedures
  - CCD: Optional hearings

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The Basics

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Title IX

"No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any educational program or activity receiving federal financial assistance."

20 U.S.C. § 1681 and 34 C.F.R. Part 106

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Title IX Sexual Harassment

1. Unwelcome conduct on the basis of sex that a reasonable person would determine is so "**severe, pervasive and objectively offensive**" that it effectively denies a person equal access to the recipient's education program or activity;
2. **Quid pro quo** harassment; or
3. Sexual assault, dating violence, domestic violence, or stalking as defined in the Clery Act/Violence Against Women Act ("VAWA").

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Katie and Lindsay are sophomores at T9 High School. They have been friends with benefits for the last 3 months. Now, Katie has decided to date Robert and she breaks it off with Lindsay.

Lindsay is distraught and emails Katie the nude photos they shared during better times. Katie is furious and starts spreading rumors at school that Lindsay is a "noob" in bed. Robert spreads the rumors too - Teacher Tomas overhears the rumors during passing period and notices Lindsay crying in class.

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What should Teacher Tomas do?

(a) **Counsel Lindsay that this too will pass and she should see the Wellness counselor to talk about it.**

(b) **Interview Lindsay to determine whether the rumors are impacting her ability to access her education.**

(c) **Report the incident to the T9 Coordinator because the District now has actual knowledge of a potential complaint?**

(d) **Other?**

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Actual Knowledge

"*Actual knowledge* means notice of sexual harassment or allegations of sexual harassment…Imputation of knowledge based solely on vicarious liability or constructive notice is insufficient to constitute actual knowledge. This standard is not met when the only official of the recipient with actual knowledge is the respondent."

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Katie has a party over the weekend at her house and invites many of her classmates.

During the party, Katie gropes the breast of another student, Tiana. Katie also pulls Tiana's blouse up while mocking the size of Tiana's breasts in front of the party goers.

Tiana approaches the principal to make a report and to file a T9 complaint.

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Does the school have jurisdiction to investigate the party incident under T9?

Why or why not?

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Jurisdiction

Title IX protects students in connection with all academic, educational, extracurricular, athletic, and other programs of the recipient.

This includes programs:

- in a recipient facility
- on a school bus
- sponsored by the recipient at another location, or on a school-sponsored field trip.

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Jurisdiction

Includes locations, events, or circumstances over which the recipient exercised ***substantial control*** over ***both*** the respondent and the context in which the harassment occurs.

Includes any building owned or controlled by a **student organization** that is officially recognized by a CCD.

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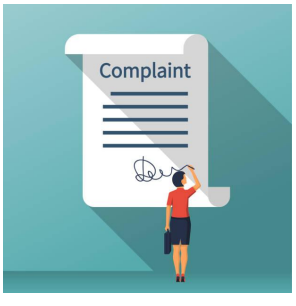
Processing a Title IX Complaint



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The Initial Meeting

Participants:

- Complainant & Parents (if appropriate/applicable)
- Title IX Coordinator

Goals:

- Explain institution's non-discrimination/harassment policy, including Title IX
- Find out what happened
- Explain and offer Formal Complaint
- Offer Supportive Measures

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No Formal Complaint - What Next?

- ✓ Address conduct to ensure it does not recur.
- ✓ Offer Informal Resolution
- ✓ Offer Supportive Measures & Remedies to Complainant

What about discipline for Respondent?

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Lindsay has been receiving counseling. She still doesn't want to file a T9 complaint (for the photos and rumors), but she wants her principal to expel Katie.

Can the school expel Katie without a formal T9 complaint and findings?

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Formal Complaint - What Next?

- Notify Respondent of allegations, process and rights
- Provide written notice of allegations to Complainant
- Offer Supportive Measures (if you haven't already) AND document your offer
- Assess for jurisdiction and potential dismissal
- If appropriate, offer Informal Resolution

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Formal Complaint: Informal Resolution Considerations

Informal Resolution is not appropriate in all cases.

Consider:

- are the allegations made by a student against an employee or is there another power imbalance (dating violence)?
- what is the nature or severity of the alleged offense?
- is there is an ongoing threat of harm or safety to the school/campus community?
- is the respondent a repeat offender?
- are the parties likely to be able to participate in good faith and comply with an eventual agreement?
- are both parties willing to participate?

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Formal Complaint: Supportive Measures

At your table, review the Supportive Measures Menu.

- What supportive measures has your school/college used with success?
- What new or additional supportive measures would you add to the menu?
- How do you assess and determine what supportive measures to offer?

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Formal Complaint

Gallery Walk - To sign or Not to Sign?

- In groups of 2 or 3, read each scenario.
- Should the Title IX Coordinator:

File a Formal Complaint

Not File a Formal Complaint

Get More Information to Decide

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Formal Complaint: Who Signs?

Title IX Coordinator may sign a Formal Complaint.
Consider:

- **Pattern** - Is there a pattern of misconduct/multiple reports against the same Respondent?
- **Predation** - is there evidence of grooming or similar predatory behavior?
- **Threat** - is there an ongoing serious health or safety risk to others in the school/college?
- **Violence** - was significant violence involved?
- **Weapons** - was a weapon involved?
- **Minor** - is the Complainant a minor and the Respondent is in position of authority/leadership?
- **Investigation** - can you conduct thorough investigation without cooperation?

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Dismissing the Complaint

Mandatory:

- If complaint doesn't meet TIX definition of SH
- If the event didn't occur in recipient's educational program or activity
- If the event was outside the U.S.

Permissive:

- Per written request of Complainant
- Respondent disenrolls/quits
- Circumstances prevent investigation

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Return to Jayden and Rowan…

Upon further investigation, you discover that Jayden's history of sexualized behaviors includes hiding in the bathroom and sexually assaulting boys.

In this instance, Jayden had a butcher knife that he brandished at Rowan before the assault.

Can you remove Jayden pending the investigation?

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Emergency Removal - Student

Permitted After:

1. An individualized safety and risk analysis, resulting in
2. A determination that an immediate threat to the physical health or safety of any student or other individual arising from the allegations of sexual harassment justifies removal, and
3. So long as the district/college provides the respondent with notice and an opportunity to challenge the decision immediately following the removal.

Keep in mind procedural safeguards for special education students.

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Emergency Removal - Employee

- Student process doesn't apply; can place employee on paid administrative leave at discretion of employer.
- Considerations:
  - Seriousness of allegations (if true, will dismissal result?)
  - Likelihood that conduct will be repeated
  - Integrity of investigation
  - Ability for employee to defend themselves
  - Community perception
- *Keep in mind: placing employees on PAL may be considered disciplinary action under relevant collective bargaining statutes.*

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The Investigation

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Assigning an Investigator

Requirements:

- Trained
- Unbiased
- No conflict of interest

Options:

- TIXC
- In-House Investigator
- Private Investigator
- Legal Counsel

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Assigning an Investigator

Considerations:

- Potential liability
- Complexity/Scope
- Timeframe for completion
- Confidentiality
- Community Perception

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The Investigation Process

TIX does not have specific requirements for investigation process, but:

Investigation must, at a minimum:

- ✓ Include an interview of all relevant parties including Complainant, Respondent and witnesses
- ✓ Gather and review all potential evidence
- ✓ Determine relevance of evidence gathered
- ✓ Make credibility assessments

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The Investigation Process - Relevance

Relevant = a tendency to prove or disprove something at issue.

Note: All relevant evidence, inculpatory and exculpatory, must be admitted.

Specific Evidence Determined Not Relevant:

- Complainant's sexual predisposition.
- Prior sexual history, unless to prove consent or that someone else "did it."
- Treatment records without consent.
- Privileged information.

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Relevancy

Returning to Coach Cameron... The following evidence is presented as part of the investigation. Determine if it is relevant or not relevant.

- ➢ Coach Cameron is a very religious man, and his religion prohibits homosexuality.
- ➢ The first incident was alleged to occur last year and the player didn't report it until now.
- ➢ Coach Cameron has previously received discipline for not following safety protocols during practices.
- ➢ One of the reporting players identifies as gay.

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The Investigation Process: Credibility

Investigator must determine credibility of all witnesses.

Factors to consider when making credibility determination:

- Changes in behavior of the Complainant
- Witnesses' conduct during interviews, including body language, eye contact, tone, nervous behaviors, sweating
- Consistent/inconsistent information and/or detail
- Corroboration by other witnesses, documents, or other evidence

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The Investigation Process: Credibility

Factors that aren't as relevant to credibility:

- A delay in reporting
- Minor inconsistencies in story
- Complainant and respondent once had a consensual relationship
- "Character" evidence

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The Investigation Report

Per Title 5, an Investigation Report must include:

- Description of circumstances giving rise to complaint
- Summary of testimony provided by each witness
- Analysis of relevant data and other evidence collected
- Specific finding as to whether there is probable cause for each allegation
- Any other information deemed appropriate and relied on to reach a finding or conclusion

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The Investigation Report: Right to Review Draft Report & Evidence

Draft Report

- Prior to finalizing report, investigator distributes draft to Complainant, Respondent & their advisors
- Must have **10 days** to review and provide comment

Evidence

- Prior to finalizing report, investigator must make all evidence (including evidence determined not-relevant) for review by Complainant, Respondent & their advisors
- Evidence must be available for **10 days**.

Run these two periods simultaneously

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Written Determination: Selecting the Decision Maker

- Current regulations require that Decision Maker be **someone other than Title IX Coordinator & Investigator**

Requirements: **Trained**, impartial, no conflict of interest

- Responsible for independently reviewing investigation report to determine whether there is a violation of Title IX.
- Decision Maker is not required to adopt credibility or fact determinations made by investigator.

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CCDs: Hearing Process

Key Requirements:

- Simultaneous notification to parties of hearing, at least 10 days prior
- Investigator presentation of factual findings
- Live testimony and cross-examination
- Decision Maker will rule on relevancy of each question as asked.
- Parties may have advisors present during hearing (check your policy and CBAs for rules around advisors)
- Hearing must be recorded

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K-12: Cross-Examination

Parties must have opportunity prior to determination being issued to ask one another relevant questions.

Recommended Process:

- Send letter to both Complainant and Respondent
- Party sends questions to Decision Maker
- Decision Maker vets for relevancy (see slide 22), passes along any relevant questions to the other party or investigator
- Party answers questions in writing
- Offer follow-up opportunity

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Written Determination: Required Components

Written determination/Notice of Outcome must include:

- Specific alleged violation(s)
- Description of procedural steps taken
- Finding for each alleged violation and findings of fact supporting the determination
- Statement and rationale for the result
- Any sanctions issued, if permissible to share
- Remedies to Complainant

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Outcomes

Disciplinary Consequences/Sanctions: In accordance with student discipline and/or employee disciplinary policy or collective bargaining agreement.

Supportive Measures: As required to restore access to Complainant.

Campus-wide Restorative Measures: Designed to prevent, address and educate regarding Title IX.

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Grounds for Appeal

- **Procedural irregularity** that affected the outcome of the matter;
- **New evidence** that was not reasonably available at the time of the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter; and
- The Title IX Coordinator, Investigator(s), or Decision-Maker(s) had a **conflict of interest or bias** for or against complainants or respondents generally or the specific individual complainant or respondent that affected the outcome of the matter.

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Appeal Process

1. Send letter notifying both parties of appeal
2. Parties submit written explanation for appeal/objection to appeal
3. Appeal Decision Maker issues determination
4. Provide determination to both parties simultaneously

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Common Questions/Errors

- Failing to recognize an allegation may be a violation of Title IX
- Failing to assess credibility
- Failing to recognize your personal bias
- Failing to investigate

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Follow-Up From Today

- Check your policy; update if necessary
- Check your website; coordinator contact information must be easily accessible
- Publish library of Title IX training materials (including this workshop!)
- Communicate with Superintendent/Cabinet about assigning roles and training, if needed

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Questions?

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SUPPORTIVE MEASURES MENU

Supportive Measures are non-disciplinary, non-punitive individualized services designed to restore or preserve equal access to a student's education program or activity offered as appropriate, reasonably available, and implementable without unreasonably burdening another Student.

Supportive Measures should be offered to *both* the Complainant (victim) and Respondent (accused student) immediately after a concern is reported.

The Most effective **Supportive Measures** are:

- Targeted to the individual students' needs, both as expressed an observed
- Designed with the input of the student and other relevant stakeholders (teachers, parents, etc.)
- Monitored regularly and adjusted based on progress over time
- Integrated in and informed by existing school systems and programs
- As minimally restrictive as possible (ie: the "just right" amount of support to ensure the student continues to develop independence rather than reliance upon the support)
- Successfully in strengthening students' sense of connectedness to the school, academic outcomes, and social skills

Supports to Address Safety Concerns	Supports to Address Emotional Wellbeing
• Safety + Support Plan • Schedule/teacher change • Behavior contract • If/then Incentive Chart • Check In/Check Out • Increase in adult supervision	• Wellness check-ins • Enrollment in Wellness-based counseling • Tier 2/small affinity groups • Referral to Community Organizations • 504 Plan to address depression/anxiety • SEL lessons (Tier 1, 2, or 3)
Supports to Address Social Skills	**Supports to Address Academic Impacts**
• Restorative actions/projects • Independent Learning Modules • Tier 2/Social skills groups • EHRMS counseling services • Positive behavior tracker • Community service project • Community Building activities • Trusted friend circles/contracts	• Deadline extensions • Workload reduction • Short-term independent study • Academic tutoring • Tier 2/academic skill groups • Attendance Plan • SST Plan

Remember that disciplinary action cannot be taken against a student until an investigation has determined responsibility for policy violating conduct.