Title IX: Certification for Investigators

June 16, 2026

Laura M. Castille, esq.

CASTILLE LAW
ESQ. 2021

Today's To Do List:

- Discuss District/School obligation under TIX.
- Overview of Title IX regulations related to Title IX investigations and 2020/2024/2025 changes.
- Title IX Definitions
- Discuss Investigator Role and Conflicts of Interest.
- TIX Standard Operating Procedures.
- Credibility Determinations
- Case Study

CASTILLE LAW
ESC. 2021

Title IX of the Education Act

"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 education program or activity receiving Federal financial assistance."

CASTILLE LAW
ESC. 2021

Overview of the Title IX

Investigation Process – SOPs and Checklist

- Receiving & processing reports/complaints of unlawful discriminatory conduct.
- Offering supportive measures, discussing options and wishes of Complaint to file a formal complaint and contact/assistance contacting law enforcement when requested/necessary.
- Determining Title IX jurisdiction.
- Functioning as neutral, objective fact finders.
- Conducting investigations or facilitating informal resolutions, when warranted.
- Determining when informal resolution is an option.
- Ensuring the investigation is prompt and equitable to all parties.

Ensuring a determination is rendered by a neutral and objective decision-maker.

- Implementing any sanctions rendered, post determination/appeal.
- Continuing supportive measures as needed.

CASTILLE LAW
ESC. 2021

District/School Obligationto Respond Under Title IX

- **Stop** the Reported Conduct
- **Prevent** it Recurrence
- **Remedy** its Effects
- **Hold Accountable** through Corrective or Disciplinary Action those responsible for conduct

CASTILLE LAW
ESC. 2021

District/School Obligation to Respond Under Title IX

- District/School must respond promptly to Title IX sexual harassment in a manner that is not deliberately indifferent, which means in a way that is not clearly unreasonable in light of the known circumstances.

CASTILLE LAW
ESC. 2021

NEW 2020/2025 Title IX Regulation Changes

- **Regulations took full effect on August 14, 2020.**
- **Replaced by 2024 regulations.**
- **Reverted back to 2020 regulations in January 2025.**
- Department of Education released 2083 pages of regulations and guidance to review. (See link to 2020 regulations in the chat.)
  - Extremely prescriptive changes focusing primarily on due process for Respondents through “grievance process requirements”.
  - Regulations amend the Code of Federal Regulations and
  - are enforceable by OCR.
  - 2011 Obama administration changes to Title IX were
  - “guidance”
  - Regulations are now codified and have the force of law.

CASTILLE LAW
ESC. 2021

The **NOW OLD** 2024 Title IX Regulation Related to Sexual Harassment(K-12): Highlights

- Broader definition of sexual harassment: Includes conduct that is "sufficiently severe or pervasive".
- Clarification on special education interaction with Title IX.
- Training requirements.
- Clarification of prohibition on discrimination based on pregnancy: Includes current, potential, or past pregnancy or related conditions
- Support for LGBTQ+ students: Confirms protections for LGBTQ+ students
- Improved reporting process: Makes it easier for complainants to report sexual harassment
- Support for parents and guardians: Supports the rights of parents and guardians to file a Title IX complaint on behalf of a minor student.
- Clear communication of nondiscrimination policies: Requires schools to clearly inform key people of their nondiscrimination policies and procedures
- Prohibition of sharing personal information: Prohibits schools from sharing confidential personal information during the TIX process, except as allowed by law.

CASTILLE LAW
ESC. 2021

How did the January 2025 change Impact Your School/District?

- Revision of policies? **Check to see.**
- Specific definitions for sexual assault, stalking, dating/domestic violence, sexual harassment. **(All the same, except sexual harassment)**
  - Extensive training required of investigators, Title IX Coordinators and decision-makers. (No change)
- Training must be posted on the District's website. **(No change.)**
- Must adopt the codified definition of sexual harassment. **(Must update your definition.)**
- Must conduct investigation based on **prescriptive** requirements in the regulations. **(No change, which is why you are here today.)**

CASTILLE LAW
ESC. 2021

The NOW OLD Definition= Do you require a Policy change?

- 34 C.F.R. Section 106.2 "**sex-based harassment** is a form of sex discrimination, and include both sexual harassment, which is conduct of a sexual nature, as well as other forms of harassment that are not necessarily "sexual" but are based on a person's sex, such as pregnancy harassment, gender identity, or sex-based stereotypes."
- **Revised definition**: Sex-based conduct that, based on the totality of the circumstances, is subjectively **and** objectively offensive and is so severe **or** pervasive that it limits or denies a person's ability to participate in or benefit from your education program or activity.
- **Retaliation** definition changes now clarifies that nothing in that definition **prohibits institutions from requiring employees to participate as a witness in**, or otherwise assist with, a Title IX investigation, proceeding, or hearing. 34 C.F.R. Section 106.2
- *Remember – sexual harassment is evaluated on the manner it was received, not the manner in which it was intended.*

CASTILLE LAW
ESC. 2021

Sexual Discrimination/Harassment under Title IX - Now

- Any District employee engaging in *Quid Pro Quo* harassment;
- Anyinstance of **sexual assault** (as defined in the Clery Act), dating violence, domestic violence, or stalking as defined in the Violence Against Women Act (VAWA);
- Any unwelcome conduct that a reasonable person would find so **severe, pervasive, and objectively offensive** that it denies a person equal educational access. **(SPOO)**

CASTILLE LAW
ESC. 2021

Quid Pro Quo

"This for that"

- Submission or rejection, explicitly or implicitly, as a term, condition or basis for academic, employment or activity or program participation, i.e. you scratch my back, I scratch yours...
  - Examples of this type of harassment can include:
    - **A supervisor requesting sexual favors as a condition for hiring, promotion, advancement, or opportunities.**
    - **A manager threatening to terminate, transfer, demote, or otherwise adversely affect an employee's work life if sexual favors are not given or continued.**
    - **A teacher promising or giving a student a higher grade because of real or expected sexual favors.**
    - **A Coach benching a student for refusing to engage in sexual conduct**
- NM House Bill 128 requires mandatory reporting of sexual abuse and other requirements. Many Districts/Schools not complying with this NM requirement.

CASTILLE LAW
ESC. 2021

Elements of Sexual/Gender-Based Harassment

- **Unwelcome** conduct that a **reasonable person** would find so **severe, pervasive, and objectively offensive** that it denies a person equal educational access. **See Hostile Environment.**

- **Reasonable Person** is a hypothetical individual who approaches any situation with the appropriate amount of caution and then takes sensible action. It is an objective test used in deciding whether a person's actions are appropriate under the circumstances.

- **Hostile Environment** is created by unwelcome conduct determined by a reasonable person, placed in a substantially similar situation, to be so severe, pervasive, *and* objectively offensive that it effectively **denies a person equal access to the District's education program or activity**.

- **NOW Title IX requires that the conduct meet all three factors - severe, pervasive, objectively offensive - in order to rise to the level of a title IX violation.**

CASTILLE LAW
ESC. 2021

Sexual Assault

- **Sexual Assault** is any attempted or actual sexual act directed against another person, **without consent** of the complainant, including instances where the complainant is incapable of giving consent.
  - **Any attempted or actual sexual act** directed against another person, **without consent**, including instances where the complainant is incapable of giving consent. i.e. intellectual disability
  - **Rape** is the penetration, no matter how slight, of the vagina or anus, with any body part or object, or oral penetration by a sex organ of another person, **without the consent** of the complainant.
  - **Fondling** is the touching of the private body parts of another person for the purpose of sexual gratification, **forcibly and/or against that person's will** (without the consent of the complainant), including instances where the complainant is **incapable of giving consent** because of the complainant's age or youth or because of the complainant's permanent or temporary mental incapacity.
  - **Incest** is sexual intercourse between person who are related to each other within the degrees wherein marriage is prohibited by law.
  - **Statutory Rape** is sexual intercourse with a person who is under the statutory age of **consent.**
- All offenses are applicable to all genders.

CASTILLE LAW
ESC. 2021

Dating & Domestic Violence

- **Dating Violence** is violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the complainant; and where the existence of such relationship shall be determined based on a consideration of the length of the relationship, the type of relationship, frequency of interaction between the persons involved in the relationship.
- **Domestic Violence** is violence committed:
  - By a current or former spouse or intimate partner of the complainant;
  - By a person with whom complainant shares a child in common;
  - By a person who is or has cohabitating with complainant, as a spouse or intimate partner;
  - By a person similarly situated to a spouse of complainant 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 complainant who is protected from that person's acts under the domestic or family violence **laws of the jurisdiction** in which the crime of violence occurred.

CASTILLE LAW
ESC. 2021

Stalking

- **Stalking** is 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.
- **For the purposes of this definition:**
- Course of conduct means two or more acts.
  - Reasonable person means a reasonable person under similar circumstances and with similar identities to the complainant.
- Substantial emotional distress means significant mental suffering or anguish that may, but does not necessarily require medical or other professional treatment or counseling.

CASTILLE LAW
ESC. 2021

Actual Knowledge?

- The District/School has "actual knowledge" of discriminatory conduct when notice of sexual harassment or allegations of sexual harassment are made to the Title IX coordinator or any School/District official/employee who has the authority to institute corrective measures.
  - All recipient employees are mandated reporters for the purposes of Title IX.
  - When, in course of your investigation, you determine a failure to report, you must include this in the investigation and refer for disciplinary action.

CASTILLE LAW
ESC. 2021

Privacy & Confidentiality

- These cases may not be discussed outside your role as an investigator.
- Private - You do not share
- Confidential - You only share with individuals who have a right to know.
- Title IX trumps FERPA, so information/evidence/sanctions is required to be shared among the Parties.
- Investigators must recuse if they have a real or perceived conflict of interest.
- Perceived conflicts may be worse - you can work around real conflicts.

CASTILLE LAW
ESC. 2021

What is a conflict of interest?

- **Any** time that an Investigator has a personal interest (whether actual, potential or perceived) that conflicts with the interests of the Parties.
- **A** conflict of interest challenge to the investigation is avoided by not having a conflict or the appearance of a conflict.
- **Be** honest about any conflicts or perceived conflicts from the beginning of the process.

CASTILLE LAW
ESC. 2021

Supportive Measures

- Offered to both Complainant and Respondent
- Referral to Counseling and/or medical
- No Contact Orders issued
- Academic Accommodations
- Transfer classes/schools
- Job Modification
- Increased Monitoring, Supervision, Security

CASTILLE LAW
ESC. 2021

Standard Investigation Techniques

- **Choosing the right individuals for the investigation**
- **Referring back to School/District policy throughout the investigation**
- **Create an investigation plan**
  - In what order will you interview?
  - Have you preserved video evidence?
  - Do you have access to documents, emails, other evidence needed to question witnesses?
- **Ensuring a high level of excellent documentation**
  - Do you record investigation interviews?
  - If so, what happens to the interviews?
  - Include with the report or not?
  - Be consistent.
- **Developing the right interview questions**
  - Prepare your interview topics/questions in advance
- **Utilizing/including all available information/evidence**
  - Decision-maker ultimately determines relevance of evidence
- **Gathering evidence through a variety of methods**
  - Do not just rely on what witnesses may provide you.
- **Employing consistent techniques across investigations**
- **Communicating with Parties and TIX coordinator regularly throughout the investigation**
- **Prioritize confidentiality**

CASTILLE LAW
ESC. 2021

Investigation Process - Checklist

- Procedures include:
  - Complaint;
  - Intake;
  - Dismissals of complaints/allegations, *if/when warranted*;
  - Determination of need for accommodations, i.e. special education/504
  - Written Notice of Allegations;
  - Informal Resolution Consideration
  - Interviews;
  - Informal resolution process, *if/when warranted*;
  - Inspection of evidence/records & draft report;
  - Process draft report to parties for inspection, questions and response;
  - Final report and evidence;
  - Appeals.
  - Implementation of Sanctions.
  - Implementation of Remedies.

CASTILLE LAW
ESC. 2021

Determining Title IX Jurisdiction

- Two-pronged test:

- **Does the District have control over the harasser; and**

- **Does the District have control over the context of the harassment (on our property, in our programs, on land we lease or control, or at events we sponsor).**

- The District reserves the option to take jurisdiction of off-campus misconduct when deemed necessary due to the involvement and/or impact on students and/or employees, i.e. social media, AI generated content

CASTILLE LAW
ESC. 2021

Notice of Allegations- Template and Sample

- Initiates the investigation process.
- Must be comprehensive of all allegations or you must re-issue and begin the process again.
- Must be in writing and state all rights afforded to the Parties. (use template)
- Provided simultaneously to both parties.
- Parties may respond to the allegations in writing (not mandatory).
- Notifies parties of right to present relevant witnesses and evidence.
- Notify parties that the Respondent is presumed not responsible.

CASTILLE LAW
ESC. 2021

Standard of Evidence

The **PREPONDERANCE OF EVIDENCE** standard in reviewing evidence and determining if a violation of District Policy has occurred.

"More likely than not"

CASTILLE LAW
ESC. 2021

Relevant Evidence

- "Relevant evidence" means **evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.**
- Does the evidence provide information that will aid the Decision-Maker in reaching a determination?
- Who/what is the source of the evidence? It is important to determine the credentials of the person/group responsible for the evidence.
  - Is the source of the evidence credible.
  - Does the evidence corroborate a version of events that makes sense?

CASTILLE LAW
ESC. 2021

Prior Sexual Behavior or Sexual Predisposition

Rape shield protections & exceptions defined in 34 C.F.R. § 106.45(b)(6)(i).

- Evidence about the complainant's sexual predisposition or prior sexual behavior are **not relevant, unless**:
  - are offered to prove that someone other than the Respondent committed the conduct alleged by the Complainant, or
  - if they concern specific incidents of the Complainant's prior sexual behavior and are offered to prove consent.

CASTILLE LAW
ESC. 2021


BREAK

Credibility Determinations

- **The most reliable credibility factors** (Gold Standard) when you're struggling
  - to decide who is telling the truth:
    - **Corroboration** – witness testimony, text message or email exchanges, video or photo evidence, also assessing reliability of testimony with a witness's recollection of events
    - **Consistency** – Is there witness testimony or physical evidence that is consistent with the complainant's testimony? Or are there inconsistencies that make you doubt credibility?
    - **Inherent plausibility** – Does the testimony make sense? Which version of the events seems more plausible? Is there a plausible reason for inconsistencies (ex., a student has left out part of the story to protect a friend from getting in trouble)?
    - **Motive to falsify** – Is there motivation to lie (fear of retaliation, a witness who wants to protect someone, etc.)?
    - **Material omission** – Did someone omit something that was important, despite having an opportunity to provide the information?

CASTILLE LAW
ESC. 2021

Credibility Pitfalls

- **Confirmation bias** – you know the parties, or you stop investigating because of investigator bias – you've decided that you think something happened in a certain way. There may also be internal bias to get the investigation completed.
- **Making a determination** – then conducting your investigation in a manner that supports your determination.
- **Incomplete Investigation** – you have not talked to all the witnesses or obtained enough information. You will need to ask more questions or talk to more witnesses.

CASTILLE LAW
ESC. 2021

Review of Report & Inspection of Evidence - Template and Sample Report

- An Investigation Report will be drafted and sent electronically to the Parties, accompanied by relevant evidence.
- Parties have **ten (10)** school days to respond to the Report in writing, and provide additional evidence, should they choose to do so. Any responses will be included in the final report.
- Parties may pose questions in writing to the other Party to be submitted with any response to the draft report.
  - Questions and answers, if provided, will be included as appendices
- The final report/evidence submitted to the parties.

CASTILLE LAW
ESC. 2021

Privileged Information

- In NM, individuals with legal privilege may include **medical providers, attorneys, psychologists, clergy, counselors, and social workers**.
- Privileged information may not used as evidence **unless** the Party (or parent of minor) has given voluntary, written consent for use of those records.
- Information about any Party's medical, psychological, and similar records are irrelevant unless the Party has given voluntary, written consent.

CASTILLE LAW
ESC. 2021

Responsibility Determinations & Sanctions

- The Decision-Maker may be provided with documentation of the Respondent's conduct history, prior to the Decision-Maker issuing a decision.
- The Decision-Maker will issue a written decision to include:
  - A determination that a violation of policy has or has not occurred; and
- A list of the allegations; and

CASTILLE LAW
ESC. 2021

Responsibility Determinations & Sanctions cont.

- A description of the procedural steps taken from the receipt of the formal complaint through determination; and
- Findings of fact supporting the determination; and
- Conclusions regarding application of policies to the facts; and
- A statement of and rationale for the results of each allegations, including sanctions to be imposed on Respondent; and any remedies afforded to the Complainant, and
- Notice of the right to appeal the determination.

CASTILLE LAW
ESC. 2021

SANCTIONS, if policy violation is found:

- Employees:
  - Reprimand/Warning (oral/written) through
  - Suspension, demotion, or involuntary termination/dismissal.
  - Mandatory training
  - Leave without pay
- Students:
  - Warning (verbal or written),
  - Disciplinary Probation,
  - Restricted Privileges or Activities,
  - Community Service,
  - Counseling,
  - Evaluation,
  - Suspension, Expulsion

CASTILLE LAW
ESC. 2021

- REMEDIES, if policy violation is found:
  - District must implement any steps or actions designed to restore or preserve equal access to the District's educational programs.
- May including individualized services.
  - Imposed as deemed appropriate to the individual facts and circumstances of each case.

CASTILLE LAW
ESC. 2021

Can Parties Appeal?

- **YES**
  - When a Title IX complaint or allegation in a complaint is dismissed; and/or
- From the Decision-Maker's determination;
- Both Parties have the right to appeal.

  - Time periods & requirements specified in SOPs.

CASTILLE LAW
ESC. 2021

Allowable Basis for Appeal

- New facts and evidence, not reasonably available at the time of the determination, which may impact the outcome of the investigation.

- Evidence that the Investigator or Decision-Maker had a **conflict of interest or bias** for, or against a party, which affected the outcome of the investigation.

- Evidence that **investigation procedures** were not followed during the course of the investigation.

CASTILLE LAW
ESC. 2021

What about Special Education Students?

- Special Education students can be found responsible under Title IX.
- IDEA and Title IX are two voluminous and parallel running federal laws.
- Always check to see if the student is a special education student.
- If a student has an IEP, notify the case manager that the student is a party to a Title IX investigation.
- Determine if accommodations are required for the student to meaningfully participate in the investigation.
- Proceed with investigation.
- If special education student found responsible, must conduct an MDR prior to the administration of sanctions.

CASTILLE LAW
ESC. 2021

Think About It.

What questions might want answered before interviewing a special education student in a Title IX investigation?

Interviewing Special Education Students

- Check with the case manager – are they able to comprehend the questions and answer appropriately?
- Do they have the cognitive capacity to participate in an investigation?
- Do they need a social worker or other support to participate in an investigation?
- Did the student have the capacity to consent to the conduct?
- Does the student have the capacity to understand consent?
- What is the student's disability?
- What about adults requiring accommodations?

CASTILLE LAW
ESC. 2021

What is Informal Resolution?

- An option for resolving a formal complaint that does not involve a full investigation.
- Methods (*mediation*, *restorative justice*, *facilitation*, *etc*.) used vary depending on circumstances and wishes of the Parties.
- In some cases, it may be used as an alternative to proceeding with investigation and determination.
- Cases involving a student *Complainant vs an Employee Respondent* are not eligible for informal resolution.

CASTILLE LAW
ESC. 2021

Informal Resolution

- **May be offered in certain matters**
  - Both parties must agree in writing to participate.
- May include training, restrictions, etc.
  - Be sure Parties understand that Informal Resolution concludes their case, but supportive measures may be ongoing.
- Talk it over with Title IX Coordinator.

CASTILLE LAW
ESC. 2021

Training Requirements

Section 106.8(d)(2) requires all investigators, decision-makers, and other persons responsible for implementing the recipient's grievance procedures or who have the authority to modify or terminate supportive measures to also be trained on the recipient's obligations; the recipient's grievance procedures, and if applicable, how to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias…

CASTILLE LAW
ESC. 2021

Impartiality Required in Investigations

- 34 C.F.R. 106.45(1)(iii) requires that educational institutions provide training for Title IX Coordinators, investigators, decision-makers, and any person who facilitates a resolution process.
- Training materials must not rely on sex stereotypes and must promote impartial investigations and adjudications of formal complaints. 34 C.F.R. 106.45(b)(1)(iii).

CASTILLE LAW
ESC. 2021

What is implicit bias?

- *The stories we make up about people before we know who they are.*
- Attitudes and/or stereotypes that affect one's understanding, actions, or decisions in an unconscious way
- Not explicit bias (operates consciously)
- Implicit bias operates subconsciously or unconsciously
- Can affect Title IX coordinators'/investigators perception of Complainant and Respondent
- Must learn to recognize behavior that may indicate bias or differential treatment
- (Kang, Jerry and Lane, Kristin, Seeing Through Colorblindness: Implicit Bias and the Law, 58 UCLA L. Rev. 465-520 (2010)).

CASTILLE LAW
ESC. 2021

HOW CAN IMPLICIT RACIAL BIAS AFFECT TITLE IX INVESTIGATIONS?

- Implicit bias can affect perception of Complainant and Respondent, witnesses, of social groups to which either are members, etc.
- Can create confirmation bias – concept that people seek information/evidence that confirms their beliefs and preconceived notions
- Can affect how the investigators and adjudicators perceive witness credibility due to witness's race.

CASTILLE LAW
ESC. 2021

TYPES OF BIAS

- Attitude and stereotypes can determine our thoughts about certain social categories, including gender and race

Attitude

- Association between some concept (often a social group) and an overall evaluative feeling/belief, either positive and negative.
  - Ex: A negative association with Hispanic Americans.

Stereotypes

- Association between a concept and a trait, negative or positive
  - Ex: A stereotype that African Americans are good athletes.

CASTILLE LAW
ESC. 2021

IMPACT OF IMPLICIT BIAS IN SCHOOLS?

- **Disproportionality in discipline**: Policies that appear racially neutral on their face, but result in the over-representation of students of color -- particularly black boys -- in suspensions, expulsions, and referrals for subjective infractions like "defiance".

- **Disproportionality in special education**: Misguided placements that result in the over-representation of culturally and linguistically diverse students in special education programs.

- **Teacher mindsets and beliefs:** Underestimating the intellectual capacity of culturally and linguistically diverse students, and often girls, inside the classroom.

- **Tracking:** School policies that automatically place students of color in remedial or low-track courses.

- **Dominant discourse:** Ways of thinking and talking about students and families that diminish, underestimate, or even pathologize them.

CASTILLE LAW
ESC. 2021

How to Work through Implicit Bias in Title IX Investigations?

- Become aware of your biases so that you can interrupt them.
- Check yourself with a neutral party.
- Be careful about trying to match your facts to your bias.
- Study and teach colleagues about implicit bias.
- Isolate and track instructional practices that interrupt, or promote, bias.
- Look out for tone policing – emphasis becomes on *how* something was said, not *what* was said.
- Tune into implicit bias in your school.
- Recognize implicit bias in yourself and in others.
- Know that people can counteract their biases – just do not go too far in the other direction.
- Participate in and encourage dialogue about implicit bias and its effects.

CASTILLE LAW
ESC. 2021

BASIS FOR ALLEGATIONS OF BIAS IN A TITLE IX INVESTIGATIONS

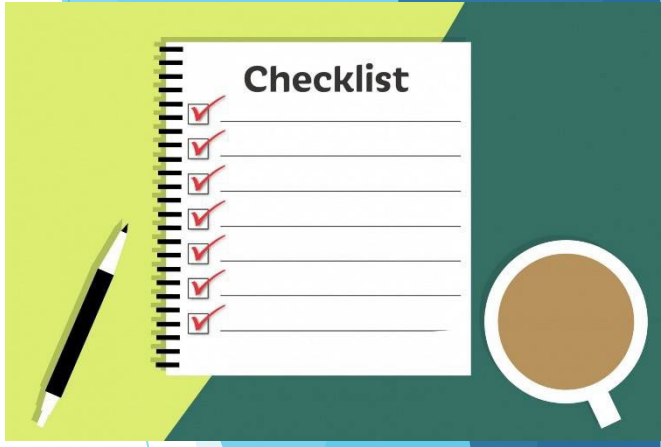
- Generally, to state a claim for racial discrimination, the plaintiff must allege:
  - He/she is a member of a protected class.
  - He/she was treated differently from similarly situated individuals.
  - The disparate treatment was intentional and based on his/her membership in the protected class.
  - There may be racial discrimination in Title IX cases if the institution brings a disproportionate number of cases against parties of a particular race (selective enforcement) or enacts harsher penalties against members of that race (erroneous outcome).
  - Could constitute basis for appeal.

CASTILLE LAW
ESC. 2021

Lunch Break



Checklist for Countering Bias in Title IX Investigations



CASTILLE LAW
ESC. 2021

1. Test Yourself

- When you see or hear about sexual harassment cases in the news, on social media, in popular culture or elsewhere, do you tend to react strongly one way or another?
- Do you think you have strong reactions when you hear references to the Me Too Movement, etc.?
- If yes, think about why you are having those reactions and how you can neutralize them.

CASTILLE LAW
ESC. 2021

2. Develop a consistent intake process

- To avoid prejudging and mischaracterizing the nature of a complaint, develop a consistent methodology for receiving and understanding complaints so that you can accurately and consistently assess whether a complaint falls within Title IX jurisdiction, whether informal resolution may be an option or whether an investigation is required.
- The individual conducting intake should likely not investigate.
- Same with supportive measures.

CASTILLE LAW
ESC. 2021

3. Create a truth-telling environment

- Investigations are especially susceptible to affinity bias (also called “like me” bias – giving more or less credence to information depending on whether it is received from someone “like” or “not like” the investigator).
- Recognize the potential for this bias. Take steps to counteract.
- Be honest - It may mean that you do not investigate.

CASTILLE LAW
ESC. 2021

4. Prepare, prepare, prepare

- In addition to preventing confirmation bias, preparation will also minimize the dangers of priming – using stimuli to generate an (unconscious) effect on behavior/reaction.
- In investigations, this means you should not ask leading questions, such as, “You don’t think Bob was bullying Vanessa when he yelled in the meeting, do you?”
- Prepare your questions in advance and identify the areas about which you must question the parties/witnesses.

CASTILLE LAW
ESC. 2021

5. Develop a system to summarize interviews

- There is no special sauce when determining how best to document your interviews (written statement drafted by witness, written statement drafted by you and reviewed by witness, typing or handwriting your own notes, for example).
- The “trick” is to develop and follow a system that is reliable, accurate and consistent for you.
- You may want to have some protocols followed by all investigators, i.e. notes includes in report or no notes?

CASTILLE LAW
ESC. 2021

6. Rely on tools which lend themselves to impartial investigations

- **Create a timeline that only lists dates/times and events**, with no commentary. This allows you to look at evidence more objectively thereby removing bias from the analysis.
- **Use experts to help you interpret complicated information or data more objectively**. This might include IT professionals, teachers or subject matter experts.
- **Play devil's advocate**: Consult with trusted colleagues. Describe the facts in the most objective way possible and see if they reach a different conclusion. If so, discuss why.
- **Put yourself in the shoes of both parties?** Does this make you see things differently? Do their versions of events may sense? Why or why not?
- **Determine the order of interviews in advance:** How might the order impact your neutrality?

CASTILLE LAW
ESC. 2021

7. Collect and consider all evidence – the good, the bad and the ugly

- **There are no good or bad facts, only facts.** Even if you've been meticulous about asking unbiased questions and seeking to collect all information, don't get tripped up during your analysis – confirmation bias might still creep into your report. Do not leave something out because it does not match the picture in your head. Paint a complete picture.
- Objectively review the facts collected so that the decision-maker can reach findings that are in line with the information collected and therefore much more likely to be bias-free.

CASTILLE LAW
ESC. 2021

8. Appropriately Weigh the Relevance of the Evidence and Witnesses

- **Not all Sexual Harassment is equal.**
- **Not all evidence is equal.**
- **Not all witnesses are equal.**
- **Title IX regulations do not define relevance.**
  - The preamble to the regulations explains relevant evidence as "evidence pertinent to proving whether facts material to the allegations under investigation are more or less likely to be true."
  - That is a fairly broad standard.
  - **Remember the Title IX regulations, at 34 C.F.R. § 106.45(b)(6)(i)-(ii), state that a complainant's sexual predisposition is "not relevant," and that a complainant's prior sexual behavior is "not relevant".**

CASTILLE LAW
ESC. 2021

9. Track your work at every stage of the investigation

- One of the best ways to see if bias affects your decision-making is to check your record.
  - Do you tend to find the Complainant credible, but not the Respondent? Or the opposite?
  - Do you tend to spend less time on investigations involving students who do not have involved parents?
  - Do you tend to spend more time on allegations against students or employees of a certain racial groups?
- In addition to checking your own record, the Title IX Coordinator should keep and review data on Title IX investigation outcomes to ensure consistency and fairness in investigations.

CASTILLE LAW
ESC. 2021

10. Identify and Report Conflicts of Interest

- A conflict of interest that disqualifies you from a Title IX investigation is one that prevents you from being able to impartially participate.
- You should first determine what type of conflict is present as you consider your ability to impartially serve.
- Immediately report conflicts of interest to the Title IX Coordinator.
- The *appearance* of a conflict cannot be countered.

CASTILLE LAW
ESC. 2021

Trauma informed Interviews and Investigations

- A trauma-informed approach means recognizing trauma, understanding how, what, where and when to ask questions, and importantly, employing techniques and strategies that support a process that mitigates or reduces the possibility of re-traumatization.
- When gathering evidence during the investigation of sexual harassment or sexual assault, you will have to ask sensitive, difficult and intimate questions of parties and witnesses.
- Do not make Parties tell their stories multiple times.
- Parties and witnesses may find these questions difficult to answer due to trauma – either past trauma or the trauma of the incident they have reported.
- The phrasing of questions during interviews is important. Depending on how a question is asked, it might be perceived by a Complainant as blaming them for their actions, or for what they may be unable to recall.
- Try cognitive interviewing techniques to aid memory and accuracy: recall everything, reverse the order, change perspective and reinstate the context.

CASTILLE LAW
ESC. 2021

Trauma informed Interviews and Investigations cont.

- Instead of
- "Did you say no?"
- Ask
- "What are you able to recall doing or saying during the incident?"
- Instead of
- "Why did you…"
- Ask
- "Explain to me…"
- Instead of
- "What happened first?"
- Ask
- "Where do you want to begin? What happened next?"
- More examples at: http://www.theiacp.org/sites/default/files/2020-06/Final%20Design%20Successful%20Trauma%20Informed%20Victim%20Interviews.pdf

CASTILLE LAW
ESC. 2021

Cultural Factors for Consideration

- Native American cultures tend to utilize more nonverbal communication.
- Native American parents often use “silent language,” such as gestures, body language, touch and facial expression, to communicate with their children.
- One study found that Navajo mothers had a more passive and silent interactional style with their infants than African American or white mothers did.
- Verbal interaction with adults, especially with young Native American children, may not be a familiar method of communication.

CASTILLE LAW
ESC. 2021

Cultural Factors for Consideration cont.

- Individuals in a tribe or clan have some relationship to every other individual and could be considered family.
- Children may live in a nuclear family, or they may live with many family members.
- Native Americans, similar to African-Americans, tend to watch and care for all the children belonging to their group.
- Approximately 30% of Native American households are headed by women.
- Native American students may hesitate to put themselves forward at another student's expense.
- Discipline in the Native American family tends to be more relaxed and consistent with the values children are taught, including: sharing, cooperation, harmony with nature, non-interference, respect for elders, loyalty, and a present, rather than future, time orientation.

CASTILLE LAW
ESC. 2021

How might trauma informed questioning and cultural considerations impact investigations in your District?

CASTILLE LAW
ESC. 2021


Have
a
Break
Waage

Title IX Due Process

- Procedural
- Substantive
- Substantive due process asks the question of whether the government's deprivation of a person's life, liberty or property is justified by a sufficient purpose.
- Procedural due process, by contrast, asks whether the government has followed the proper procedures when it takes away life, liberty or property.

CASTILLE LAW
ESC. 2021

Title IX Due Process Continued

- Title IX regulations have built in procedural and substantive due process rights, which are reflected in your policy and standard operating procedures.
- Follow your policy and SOPs and you will provide due process.
- Be reasonable - just be equitable.
  - If a party requests an extension and it is reasonable – provide to both parties.
  - Due Process = Fair Procedures
- **Notice** of the proposed action and the **grounds asserted** for it. Opportunity to present reasons why the proposed action should not be taken. The **right to present evidence**, including the right to call witnesses.

CASTILLE LAW
ESC. 2021

Case Study - Complaint

- During PE class, a male student was providing marijuana to other students to smoke during lunch. A female student is offered marijuana, but tells the male student that she does not have any money. The male student offers to provide her marijuana in exchange for sex.
- Initially, she told him no. As class went on, the male student continued to pressure her to have sex with him.
- She then told him that she would do it if he also bought her chick-fil-a for lunch.
- The male student told her to meet him at his car at lunch and went to buy her lunch.
- The female student told her friend what she had agreed to and told her that she did not want to have sex with the male student.
- The female student's friend encouraged her to meet the male and have sex so they could get the marijuana.
- The female student's friend walked her out to the male student's car. The female student tried to back out, but her friend and the male student continued to "pressure" her to get into the car.
- Eventually, the female student got into the male student's car and they had sex.
- The female left with her chick-fil-a and her weed.

CASTILLE LAW
ESC. 2021

Notice of Allegations

- Always use a template for the Notice of Allegations and Advisement of Rights.
- The regulations require certain information be provided in the written notice of allegations. Your template contains this information.
- Remember that your notice of allegations kicks off your investigation.
  - Statements made, by Respondent, prior to service of this Notice likely cannot be used in the investigation.
  - Draft allegations based on the facts provided in the case study.
  - Take a few minutes and we will discuss.

CASTILLE LAW
ESC. 2021

Notice of Allegations Models

1. Whether Respondent's conduct constitutes coercion of the Complainant to engage in non-consensual sexual activity with another student, in exchange for drugs, in violation of Title IX and District Policy #1234 Student Sexual Harassment.

2. Whether Respondent's conduct of coercing Complainant into have sexual intercourse, in exchange for food and marijuana, constitutes sexual harassment in violation of Title IX and District Policy #1234 Student Sexual Harassment.

3. Whether Respondent's conduct of coercing Complainant into having sex, in exchange for food and marijuana, created a hostile environment, in which to learn, for Complainant, in violation of Title IX and District Policy #1234 Student Sexual Harassment.

CASTILLE LAW
ESC. 2021

Summary of Relevant Evidence

- **Should be a summary of information and evidence provided by the parties and witness, without interpretation.**

- <u>This:</u>
- During her interview with Title IX investigator on March 20, 2024, Complainant reported that she was in P.E. class, playing basketball when she was approached by Respondent. They were talking and playing basketball when Respondent mentioned that he had marijuana and asked if she wanted some.
- <u>Not this:</u>

- During her interview with Title IX investigator on March 20, 2024, Complainant reported that she was in P.E. class, playing basketball, like she was directed to do by the teacher, when she was approached by Respondent, who should have been on his side of the gym. Respondent interrupted Complainant's game and offered to sell her illegal drugs - marijuana.

CASTILLE LAW
ESC. 2021

Coercion Analysis

- When an allegation of coercion is made, the investigator must provide an analysis of the facts for the decision-maker to determine if coercion is likely to have occurred.
- Remember, if coercion is present, there can be no consent.

Coercion: In a sexual context, coercion is demonstrated by an unreasonable amount of pressure to engage in sexual activity. Determining what is unreasonable should be a function of duration, frequency, isolation, and intensity. Coercion can result in acquiescence, but not sincere, positive, or enthusiastic consent. It must then be determined whether the amount of pressure was reasonable or unreasonable.

- **Analyze the facts as presented in the case study to reach a conclusion regarding coercion.**

CASTILLE LAW
ESC. 2021

Pattern Analysis

- An **alleged pattern** to include allegations or other evidence that one person has engaged in two or more substantially similar incidents or behaviors toward one or more targets. A **confirmed pattern** exists when a preponderance of the evidence supports that the alleged acts actually occurred. The similarity can be:

  - ● in the type of act
  - ● commonality of chosen victims,
  - ● location,
  - ● consistency of premeditation
  - ● and/or signature or modus operandi (method of operation) of the perpetration

  - Pattern analysis can be of particular concern when conducting a risk assessment to determine if a student should be removed during the investigation.

CASTILLE LAW
ESC. 2021

Intimidation Analysis

- An implied threat, which is different from a threat which is clear and overt. Intimidation, as a type of force describes a situation when someone uses their power or authority to influence someone else. There are subjective and objective requirements to the proof of intimidation. Subjectively, the reporting party must have felt intimidated, but objectively Respondents' actions must would have been intimidating to a reasonable person, under the same or similar circumstances, as well.

- Intimidation is more likely to be present when you have
  - older student and a younger student,
  - a supervisor and subordinate,
  - Employee and student
  - Coach and athlete

CASTILLE LAW
ESC. 2021

Force and Threat Analysis

Any threat that causes someone to do something they would not have done absent the threat could be enough to prove force. This is especially true when coupled with evidence that the threatened individual reasonably believed the individual making threatens had the will and capacity to carry out the threat. A threat must have a negative condition attached.

- “If you do not have sex with me, I will tell people you raped me.”
- “If you do not have sex with me, I will hurt you.”
- “If you do not sleep with me, I will fail you in my course.”
- “If you do not have sex with me, I will harm someone close to you.”
- **“If you do not have sex with me, I will share this compromising video, pictures on the internet, with your parents, your boss.”**

CASTILLE LAW
ESC. 2021

Physical Violence Analysis

- With actual violence or the use of a weapon. No matter how slight, any intentional physical violence upon another, use of physical restraint, or the presence of a weapon to gain sexual access will constitute the use of force.
- The key question is whether the physical violence enabled the person's ability to gain sexual access.

CASTILLE LAW
ESC. 2021

Credibility Assessments

- Consider
  - Consistency of evidence;
  - Corroborative evidence that supports or refutes evidence of the party;
  - Forthcoming, straightforward evidence, versus evasive and defensive;
  - Plausibility of evidence (does it make sense?);
  - Admissions against one's own interest;
  - Motive.
  - Credibility assessments provide insight to the decision-maker who did not interview these individuals.

CASTILLE LAW
ESC. 2021

Example from Case Study

- Complainant submitted a timely report following the incident. The information she provided was corroborated by Witness 1, who reported witnessing Respondent's offer to give her drugs in exchange for sex. The facts may not support Complainant's allegation that she was coerced into the sexual acts; however, Complainant risked getting in trouble for marijuana to make this complaint. Complainant explains that she did not want to go through with it, but did not know how to say no. Complainant's account was also corroborated by Respondent who admitted that he offered Complainant drugs for sex, but denies the sexual activity was not consensual. Complainant appears credible.
- Respondent has a motive to lie or not give accurate information to protect his own interest. Respondent; however, admitted to offering drugs to Complainant. Respondent denies giving drugs to other students, but witnesses confirmed that he was selling marijuana on campus. Respondent said that it was Complainant's idea to exchange the drugs for sex. Respondent says that when Complainant asked him to get her food as well, he thought they had reached "a deal". Respondent made statements against his own interests when admitting to providing marijuana to Complainant, but denies coercion. He says that he waited in his car, with food and marijuana, and the Complainant came out to his car and got inside. Respondent appears mostly credible.

CASTILLE LAW
ESC. 2021

What About AI in TIX?

- Key best practices for using AI in Title IX investigations include:

- Use it as a support tool rather than a decision-making tool,
- Maintain human oversight to verify output and conclusions,
- Carefully vetting vendors regarding bias and privacy/FERPA compliance, and
- Disclose the use of AI tools when appropriate
- AI can enhance Title IX investigations, but it should always complement the judgment and ethical considerations of trained professionals.

Review the Sample Investigation Report

- What do you notice?
- What would you still like to know?
- If you were the decision-maker would you have enough information to make a decision?
- Is there more that should be done to speak with the Respondent?
- Do you have any concerns about bias in this report?
- Do you have any concerns about this report?

CASTILLE LAW
ESC. 2021

Bottomline:

- Reports must be clearly written and understandable.
- Title IX coordinator should review the report before it is processed to the parties or the decision-maker.
- Reports should be written in a neutral and objective manner – must avoid any appearance of bias.
- Reports should provide decision-maker with all exhibits and information necessary to make a fair and neutral decision.
- Reports can be used in future litigation, so think of your report as Exhibit A.

CASTILLE LAW
ESC. 2021



Thank You!

Laura M. Castille, Esq.
505-670-8361
laura@castillelaw.org

CASTILLE LAW
ESQ. 2021