

June 5, 2024

Zanesville City School District

Title IX Compliance

Annual Training for Compliance Staff



GINGO
& BAIR
LAW, LLC

Training Requirements

Training must be conducted annually (or “promptly” upon hiring/change in position).

- 1. All Employees:** District’s obligation to address sex discrimination in its programs; definition of sex discrimination, including sex-based harassment; notification requirements.
- 2. Investigators, Decision-Makers, Other Implementers:** #1 + what triggers District’s obligations under Title IX; grievance procedures; how to serve impartially; and meaning and application of the term “relevant.”
- 3. Informal Resolution Facilitators:** #1 + rules and practices associated with informal process; and how to serve impartially.
- 4. Coordinator and Designees:** #1 + #2 + #3 + specific coordinator responsibilities; District’s record-keeping system and Title IX record-keeping requirements; and anything else necessary to coordinate District’s compliance with Title IX.



GINGO
& BAIR
LAW, LLC

Title IX Basics

Definitions, Scope of Coverage, and
the District's General Obligations



GINGO
& BAIR
LAW, LLC

What is Title IX?

- Title IX prohibits discrimination based on sex in any educational program receiving federal funding.
 - Covers all programs at the educational institution.
 - Covers students, employees and many third parties.
- “Sex” also includes sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity.



GINGO
& BAIR
LAW, LLC

Title IX Prohibitions: Discrimination

- **Disparate Treatment:** Treating someone differently based on their sex.
 - Respondent was aware of the complainant's sex and took action at least in part based on sex.
 - Does not require bad motives on the part of the Respondent.
- **Disparate Impact:** Applying a facially-neutral policy that has a different impact on one sex over the other.
 - Facially-neutral policy had a disproportionate adverse impact based on sex.
 - There was no substantial legitimate justification for the policy.



GINGO
& BAIR
LAW, LLC

Title IX Prohibitions: Harassment

Conduct “on the basis of sex” when:

- Submission to the conduct is made (or threatened to be made) a *term or condition of employment or education*; or
- Submission to or rejection of such conduct is used (or threatened to be used) as a *basis for academic or employment decisions*; or
- The conduct is unwelcome and *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 equal access to the education program or activity; or
- The conduct constitutes *sexual assault, dating violence, domestic violence or stalking*.



GINGO
& BAIR
LAW, LLC

Hostile Environment: Factors to Consider

- Degree to which the conduct affected complainant's ability to access the education program/activity;
- Type, frequency and duration of conduct;
- Parties' ages, roles within the program/activity, previous interactions, etc.;
- Location of conduct and context in which it occurred; and
- Other sex-based harassment in the program/activity.



GINGO
& BAIR
LAW, LLC

Title IX Prohibitions: Pregnancy Discrimination

“Pregnancy or related conditions” means:

- Pregnancy, childbirth, termination of pregnancy, or lactation;
- Medical conditions related to pregnancy, childbirth, termination of pregnancy, or lactation;
- Recovery from pregnancy, childbirth, termination of pregnancy, lactation, or related medical conditions.



GINGO
& BAIR
LAW, LLC

Reasonable Modifications for Pregnancy

Must offer reasonable modifications to students/employees for pregnancies and related conditions. Modifications may include:

- Time off to attend health appointments
- Breaks for pumping or breast feeding, and lactation space
- Access to online/homebound instruction
- Changes in schedule, extensions of time for work, rescheduling tests, etc.
- Allowing eating/drinking/restroom breaks as needed
- Voluntary leave of absence



GINGO
& BAIR
LAW, LLC

Title IX Prohibitions: Retaliation

- Definition: Intimidating, threatening, coercing or discriminating against an individual *for the purpose of interfering with any right or privilege secured by Title IX*, or because the individual *has made a report/complaint, participated in or refused to participate in an investigation, proceeding or hearing*.
 - District can still require an employee to participate in an investigation.
- Necessary elements:
 - Complainant engaged in protected activity and the actor knew about it.
 - The actor subjected the complainant to adverse action because of the protected activity.



GINGO
& BAIR
LAW, LLC

Implications for Students with Disabilities

If complainant or respondent is an identified student, Coordinator:

- **Must** consult with one or more members of the IEP/504 team to determine how to comply with IDEA/Section 504 requirements throughout investigation and with regard to implementation of supportive measures.
- **May** consult with Special Education/Student Services Director to determine how to comply with IDEA/Section 504.

****Update FERPA notice to make clear Coordinator is a school official with legitimate educational interests when performing functions under Title IX regulations.***



GINGO
& BAIR
LAW, LLC

Implications for Transgender Individuals

- Sex-segregated activities must not cause “more than de minimis harm.”
 - Regulations conclude that preventing a person from participating in a program or activity consistent with their gender identity is more than de minimis harm.
- Effective August 1, Title IX regulations will directly conflict with Ohio law on transgender athletes.
 - Ohio’s ban on trans athletes competing as the gender with which they identify is on hold pending litigation.
 - Federal law trumps state law generally, but there undoubtedly be further litigation on the Title IX regulations vs. state laws on athletic participation.



GINGO
& BAIR
LAW, LLC

Geographic Reach of Title IX

- Applies to all school “operations,” whether on campus or off.
 - Where the school exercised substantial control over the respondent and the context of the alleged harassment.
 - At an off-campus building owned or controlled by a student group officially recognized by the school.
 - District-operated digital platforms.
 - Anywhere subject to District’s disciplinary authority.
- Applies to a hostile environment occurring in school, even when the conduct causing the hostile environment happens outside the education program/activity.
 - Does not expand the scope to the actual conduct that occurs outside the program/activity—only expands to the **effect** of that conduct if the effect happens on campus.



GINGO
& BAIR
LAW, LLC

Knowledge of Issue

- The District has a responsibility to investigate any complaint about which it has any knowledge.
 - This is a change from “actual knowledge,” meaning an employee knew of the specific issue.
 - Knowledge is imputed to District once any employee (**other than confidential employees**) is aware of possible sex discrimination.
 - Confidential employees are those to whom legal privilege attaches (i.e. guidance counselors, certain mental health supports, etc.). **Mandatory reporter obligations still apply to these employees.**
- District’s obligation is to respond “promptly and effectively” to remedy the issue.
 - This is a change from a requirement to respond “reasonably” or in a manner “not deliberately indifferent.”
 - **All employees who are not confidential employees must notify the Coordinator when the employee has information about conduct that reasonably may constitute sex discrimination.**





The Grievance Process

From Complaint to Resolution



GINGO
& BAIR
LAW, LLC

Key Participants

- **Title IX Coordinator:** District employee charged with overseeing District's compliance with Title IX procedures.
- **Complainant:** Alleged victim (must be participating or attempting to participate in the District's programs *at the time of the alleged discrimination/harassment*)
- **Respondent:** Alleged perpetrator.
- **Reporter:** Individual who makes the original report of a potential violation.
- **Witness:** Individual, other than the complainant and respondent, who provides information to the investigator and/or hearing officer.
- **Investigator:** Individual appointed by the Title IX Coordinator to investigate the complaint.
- **Decisionmaker:** Individual appointed by the Title IX Coordinator to decide whether there was a Title IX violation.



GINGO
& BAIR
LAW, LLC

Procedural Guarantees

- Equitable treatment of Complainants and respondents
- No bias or conflicts of interest in Coordinator, investigator or decisionmaker
- Presumption of non-responsibility
- Reasonably prompt timeframes
- Reasonable steps to protect privacy of parties and witnesses
- Objective evaluation of relevant evidence and exclusion of impermissible evidence
- Notice of allegations to the parties



GINGO
& BAIR
LAW, LLC

General Grievance Process

- Complainant files complaint.
- Coordinator discusses availability of supportive measures, and formal vs. informal process, with Complainant.
- Coordinator assigns investigator (*may be the Coordinator*).
- Investigator conducts investigation.
- Decisionmaker (*may be the Coordinator or investigator*) reviews investigatory report and issues determination of responsibility.
- Appeal officer (if applicable) reviews determination of responsibility and renders final decision.



GINGO
& BAIR
LAW, LLC

Supportive Measures

- **Definition:** Individualized services reasonably available that are non-punitive, non-disciplinary and not unreasonably burdensome to another, while designed to ensure equal educational access, protect safety and/or deter sexual harassment.
- Available regardless of whether a complainant files a formal complaint.
- Examples:
 - Separating the parties/imposing no-contact order on one or more parties;
 - Adjusting class/work assignments or schedules regardless of whether there's a comparable alternative;
 - Counseling and related supports, or training and education programs
 - Extensions of deadlines
 - Leaves of absence (**including paid administrative leave for accused employees**)
 - Removal from program (only if determine there is an **imminent and serious threat to the health or safety** of students or staff arising from allegations)



Making a Complaint

- **Definition:** Oral or written request to District that can objectively be understood as a request to investigate and make determination about alleged sex discrimination.
 - Can be made to any District employee, but should be referred to the Coordinator to initiate the grievance process.
- Complaints may be filed by:
 - Sexual harassment: Complainant; parent/guardian or legal representative of complainant; Title IX Coordinator
 - Sex discrimination: Complainant; parent/guardian or legal representative of complainant; Title IX Coordinator; any student or employee; anyone else participating in or attempting to participate in the District's programs at the time of the alleged discrimination



GINGO
& BAIR
LAW, LLC

Initial Response to Complaint

The Title IX Coordinator (or their designee) ***must***:

- Contact the complainant to discuss supportive measures.
 - Consider what the complainant wants with regard to supportive measures.
 - Make clear to the complainant that supportive measures are available regardless of whether they file a formal complaint.
- Explain the process for filing a formal complaint and the options for informal resolution.
- Make initial determination as to whether the conduct as alleged could constitute sex discrimination.



GINGO
& BAIR
LAW, LLC

Formal Investigatory Process

- Investigations should include interviews with parties, interviews with witnesses identified by parties, collection of evidence from parties and witnesses.
- All parties must receive:
 - Advance notice of all interviews
 - Equal opportunity to present witnesses and relevant, permissible evidence
 - Equal access to evidence (District can provide accurate description of evidence instead of the evidence itself but, upon request, must provide opportunity to review the evidence itself)
- Burden is on the District to gather evidence



GINGO
& BAIR
LAW, LLC

Formal Decision-Making Process

Questions to answer: (1) Is it *more likely than not that the alleged conduct occurred* and, (2) if so, *does it constitute discrimination, harassment or retaliation* in violation of Title IX?

- Weigh credibility of parties/witnesses but do not draw inferences about whether harassment occurred ***based solely*** on a party's/witness's refusal to respond to questions.
- Provide simultaneous written notice of determination to parties, including:
 - Description of allegations
 - Information about policies and procedures used to evaluate allegations
 - Evaluation of relevant and permissible evidence
 - Determination of whether harassment occurred, disciplinary sanctions/remedies if applicable
 - Information about appeal procedures



GINGO
& BAIR
LAW, LLC

Formal Appeal Process

Parties may appeal for any of the following reasons:

- Procedural irregularity that would change the outcome
- New evidence that would change the outcome and was not reasonably available when the determination or dismissal was made
- Conflict of interest or bias



GINGO
& BAIR
LAW, LLC

Informal Process

- Regulations no longer require formal complaint before triggering the informal process.
- Can offer as soon as you know about conduct that “reasonably may constitute sex discrimination”
- Both parties must consent to use the informal process in order to move forward.
- District may decline to offer the informal process even if one or both parties wants to proceed informally.
- **Informal process is not available when the complaint alleges an employee engaged in sex-based harassment of a student.**



GINGO
& BAIR
LAW, LLC

Informal Process, cont.

Options for informal process:

- Mediation: Two ways to structure—
 - All parties (and advisors) in the same room with a facilitator; or
 - Parties in separate spaces and facilitator moving between them.
- Education: Can include training or other educational opportunities for one or more parties to increase sensitivity, improve communication, etc.

Regardless of the format of the informal resolution process, the facilitator should document the agreed upon resolution in an Informal Resolution Agreement.



GINGO
& BAIR
LAW, LLC



Know Your Role

Serving Impartially and Ensuring
Compliance as Coordinators,
Investigators and Decision-Makers



GINGO
& BAIR
LAW, LLC

Role of the Coordinator

- Explain the grievance process and the availability of supportive measures to all parties.
- Make initial determination of whether conduct as alleged could constitute sex discrimination. If not, dismiss complaint.
- Consider whether to file a complaint over a complainant's objection. Factors to consider:
 - Complainant's request not to proceed
 - Risk that additional acts of discrimination might occur without complaint
 - Scope of alleged discrimination
 - Whether District could end the discrimination and prevent future issues without initiating grievance procedures
 - Complainant's reasonable safety concerns
 - Severity of alleged discrimination
 - Age and relationship of the parties
 - Availability of evidence to assist decision-maker in making determination
- Monitor District's programs for barriers to reporting concerns of sex discrimination and work to address any such barriers.



GINGO
& BAIR
LAW, LLC

Ensuring Impartiality

All coordinators/designees, investigators and decision-makers must ensure they:

- Identify before participating any conflict of interest or bias with regard to the specific matter.
- Go into each case with an open mind about the allegations and parties and do not prejudge the facts at issue.
- Ensure any factual descriptions in reports are rooted in party/witness accounts; don't add to or embellish party/witness language.
- Avoid use of any materials that incorporate sex stereotypes.
- Scrutinize facts and factual inconsistencies/errors in the same manner regardless of the source of the inconsistency/error.

Determining Relevance

- Definition: Related to the allegations of sex discrimination under investigation as part of the grievance procedures.
- Information/a question is relevant when:
 - It seeks evidence that may aid in showing whether the alleged sex discrimination occurred.
 - It may help the decision-maker to determine whether alleged sex discrimination occurred.
- Evidence regarding past sexual conduct is not relevant unless it speaks to the identity of the individual who committed the alleged act.



GINGO
& BAIR
LAW, LLC

Impermissible Evidence

District may not require, allow, rely upon, or otherwise use questions or evidence that constitute, or seek disclosure of, information protected under a legally recognized privilege, unless the person holding such privilege has waived the privilege.

Examples:

- Doctor-patient privilege (medical records, psychiatric records, etc.)
- Counselor-patient privilege (guidance counselor notes, psychologist records, etc.)



GINGO
& BAIR
LAW, LLC

Judging Credibility

- Decisionmaker may not determine responsibility based solely on a participant's refusal to answer relevant, permissible questions, **BUT** may choose to place less weight or no weight on statements by a party/witness who refuses to answer relevant, permissible questions.
- Factors to consider in weighing credibility:
 - Consistency or inconsistency in statements (both compared to their own prior statements and compared to other parties'/witnesses' statements)
 - Reputation for truthfulness or untruthfulness
 - Bias or possible motives to be truthful or untruthful
 - Whether the individual has any personal interest in the outcome of the case



GINGO
& BAIR
LAW, LLC



Additional Notes

Notice and Record-Keeping Requirements



GINGO
& BAIR
LAW, LLC

Notice Requirements

- District must publicize contact information for the Title IX Coordinator(s).
 - If District appoints more than one coordinator, it must designate one of them as having “ultimate oversight” of compliance with Title IX.
- Title IX policy must include:
 - Prohibition on sex-based discrimination (including harassment and retaliation)
 - Grievance procedure
 - Available sanctions and supportive measures
- District must include its non-discrimination notice in all handbooks, codes of conduct, etc.



GINGO
& BAIR
LAW, LLC

Record-Keeping Requirements

Must keep the following records for 7 years:

- Employee trainings (no longer need to post online)
- Informal and formal grievance procedures
- Complaints and, for each, outcomes of all formal and informal proceedings
- Each report the Coordinator receives of potential sex discrimination and, for each, documentation of the District's actions in response



GINGO
& BAIR
LAW, LLC

Questions?



GINGO
& BAIR
LAW, LLC

Contact Information

Emily R. Spivack
Gingo & Bair Law, LLC
Summit One, 4700 Rockside Road, Suite 440
Independence, Ohio 44131
Office: 216-264-4359
Mobile: 216-544-9701
F: 888-827-0855
espivack@gingobair.com | gingobair.com



GINGO
& BAIR
LAW, LLC