





What is effective documentation?

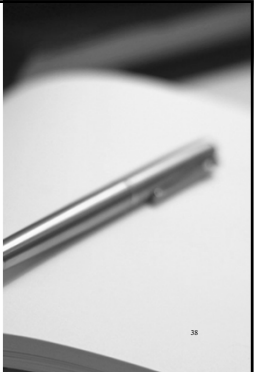
-  Clear, concise and unambiguous language
-  Language that conveys the intent of the writer
-  What message will the unintended reader receive?
-  Documentation as the most effective witness

37

37

Learning to write effective documentation

- ◆ Making use of exemplars
- ◆ Developing a professional style
- ◆ Peer review
- ◆ Message intended is the message received



38

38

The Importance of the Personnel File

- ◆ Documentation of performance problems establishes grounds for personnel action
- ◆ Helps with witness preparation
- ◆ Documentation as legal primary evidence is admissible in legal proceedings
- ◆ Effective negotiations with employee attorneys

39


39

Is Documentation Harassment?

- ◆ What legally constitutes harassment?
- ◆ How to deflect allegations of harassment
- ◆ The boss is not always right—but is always the boss

40

40



How Much and How Long?

- ◆ How thick must the file be?
- ◆ How long must we document?
- ◆ Quality vs. Quantity
- ◆ How long must students endure?
- ◆ Tying documentation to student achievement

41

41

Terminating Employees and Federal Law

- ◆ All school district employees protected by Title VII, ADEA, ADA prohibiting discrimination based on race, color, national origin, sex, religion, disability or age;
- ◆ Employees also have certain first and fourteenth amendment rights while employed by a school district.
- ◆ Many statutes have retaliation provisions, FMLA, FLSA, Whistleblower Act
 - ◆ Also EPSLA and EFMLEA

42

42

Employee Performance in a Pandemic

- ◆ What performance issues existed before the pandemic?
 - ◆ Is there documentation?
- ◆ Are the performance issues unique to the particular teaching environment during the pandemic?
 - ◆ i.e., virtual learning; in-person instruction; mitigating exposure due to high risk of serious illness
- ◆ Public perception of employment actions

43



44

Title VII and Sex: What Does it Mean?

45

Title VII of the Civil Rights Act of 1964

TITLE VII—EQUAL EMPLOYMENT OPPORTUNITY

DEFINITIONS

1. For the purposes of this title—
 the term “person” includes one or more individuals, partnerships, associations, corporations, legal representatives, trustees, trustees in bankruptcy, or receivers,
 the term “employer” means a person engaged in an industry, commerce, or business who has twenty-five or more employees on any day in each of twenty or more calendar weeks in the preceding calendar year, and any agent of such a person, but does not include (1) the United States, a corporation owned by the Government of the United States, an Indian tribe, or a political subdivision thereof, (2) a bona fide private club (other than a labor organization) which is exempt from taxation under section 501(c) of the Internal Revenue Code of 1954, (3) that during the first year after the effective date of this title (a) of section 716, persons having fewer than

46

Title VII – 42 U.S.C. § 2000e-2(a)(1)

“It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, **because of such individual's race, color, religion, sex, or national origin.** . . .”

47

Oncala v. Sundowner Offshore Services, Inc. (1998)



- ◆ U.S. Supreme Court addressed claim of male oil platform worker claiming hostile work environment sexual harassment under Title VII.
- ◆ Harassers were other males who worked on platform, two with supervisory authority. Plaintiff claimed he was forcibly subjected to sex-related, humiliating actions against him by three individuals in the presence of the rest of the crew.
- ◆ District Court held that Plaintiff, as a male, has no cause of action under Title VII for harassment by male co-workers.

48

Oncale – Unanimous Decision

- ◆ “If our precedents leave any doubt on the question, we hold today that nothing in Title VII necessarily bars a claim of discrimination ‘because of ... Sex’ merely because the plaintiff and the defendant (or the person charged with acting on behalf of the defendant) are of the same sex.”
- ◆ “We see no justification in the statutory language or our precedents for a categorical rule excluding same-sex harassment claims from the coverage of Title VII. . . . Title VII prohibits ‘discriminat[ion] ... because of ... sex’ in the “terms” or “conditions” of employment. Our holding that this includes sexual harassment must extend to sexual harassment of any kind that meets the statutory requirements.”

49

Glenn v. Brumby – 11th Circuit (2011)

- ◆ Employee in Georgia General Assembly’s Office of Legislative Counsel informed supervisor that she was proceeding with gender transition, would begin coming to work as a woman, and was changing her legal name. Head of OLC terminated Glenn because “Glenn’s intended gender transition was inappropriate, that it would be disruptive, that some people would view it as a moral issue, and that it would make Glenn’s coworkers uncomfortable.”
- ◆ Not a Title VII case – Glenn sued alleging violation of the Equal Protection Clause of the U.S. Constitution



50

Glenn v. Brumby cont’d

- ◆ “In *Price Waterhouse v. Hopkins*, (1989), the Supreme Court held that discrimination on the basis of gender stereotype is sex-based discrimination. In that case, the Court considered allegations that a senior manager at Price Waterhouse was denied partnership in the firm because she was considered ‘macho,’ and ‘overcompensated for being a woman.’ Six members of the Supreme Court agreed that such comments were indicative of gender discrimination and held that Title VII barred not just discrimination because of biological sex, but also gender stereotyping—failing to act and appear according to expectations defined by gender.”
- ◆ “[D]iscrimination against a transgender individual because of her gender-nonconformity is sex discrimination, whether it’s described as being on the basis of sex or gender.”

51

Bostock v. Clayton County, Georgia

- ◆ Decided by Supreme Court on June 15, 2020
- ◆ Actually three different cases:
 - ◆ *Bostock v. Clayton County, Georgia*:
 - ◆ *Altitude Express, Inc. v Zarda*:
 - ◆ *R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC.*”

52

Three Cases

- ◆ *Bostock v. Clayton County, Georgia*
 - ◆ Employee worked for county as a child welfare advocate. Under his leadership, the county won national awards for its work. After a decade with the county, Bostock began participating in a gay recreational softball league. Not long after that, influential members of the community allegedly made disparaging comments about his sexual orientation and participation in the league. Soon after, he was fired for conduct “unbecoming” a county employee.



53

Three Cases cont’d

- ◆ *Altitude Express, Inc. v Zarda*
 - ◆ Employee worked as a skydiving instructor. After several seasons with the company, Zarda mentioned he was gay, and was fired days later.
- ◆ *R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC*
 - ◆ Employee presented as a male when she began working at funeral home. Two years into service with company, she began treatment for despair and loneliness, was ultimately diagnosed with gender dysphoria, and clinicians recommended she begin living as a woman. After six years with the company, she wrote a letter to her employer explaining she planned to “live and work full-time as a woman” after she returned from an upcoming vacation. The funeral home fired her before she left, telling her “this is not going to work out.”



54

Three Cases – Different Resolutions Below

- ◆ *Bostock*: Eleventh Circuit held the law does not prohibit employers from firing employees for being gay; suit should be dismissed as a matter of law.
- ◆ *Zarda*: Second Circuit concluded that sexual orientation discrimination does violate Title VII and allowed case to proceed.
- ◆ *R.G. & G.R. Harris Funeral Homes*: Sixth Circuit reached decision along the same lines as *Zarda*, holding that Title VII bars employers from firing employees because of their transgender status

55

Bostock analysis

- ◆ “We proceed on the assumption that ‘sex’ signified what the employers suggest, referring only to biological distinctions between male and female.”
- ◆ “[T]he statute prohibits employers from taking certain actions ‘because of’ sex. . . . That form of causation is established whenever a particular outcome would not have happened ‘but for’ the purported cause.”
- ◆ “So long as the plaintiff’s sex was one but-for cause of [the challenged employment] decision, that is enough to trigger the law.”

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Bostock analysis

- ◆ “To ‘discriminate against’ a person . . . would seem to mean treating that individual worse than others who are similarly situated. . . . In so-called ‘disparate treatment’ cases like today’s, this Court has also held that the difference in treatment based on sex must also be intentional.”
- ◆ “So, taken together, an employer who intentionally treats a person worse because of sex – such as by firing the person for actions or attributes it would tolerate in another individual of another sex – discriminates against that person in violation of Title VII.”



57

Bostock analysis

“From the ordinary public meaning of the statute’s language at the time of the law’s adoption, a straightforward rule emerges: An employer violates Title VII when it intentionally fires an individual employee based in part on sex. It doesn’t matter if other factors besides the plaintiff’s sex contributed to the decision. And it doesn’t matter if the employer treated women as a group the same when compared to men as a group. If the employer intentionally relies in part on an individual employee’s sex when deciding to discharge the employee—put differently, if changing the employee’s sex would have yielded a different choice by the employer—a statutory violation has occurred. Title VII’s message is ‘simple but momentous’: An individual employee’s sex is ‘not relevant to the selection, evaluation, or compensation of employees.’ *Price Waterhouse v. Hopkins*, 490 U.S. 228, 239 (1989) (plurality opinion).”

58

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Bostock holding

“The statute’s message for our cases is equally simple and momentous: An individual’s homosexuality or transgender status is not relevant to employment decisions. That’s because it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex.”

59

Bostock reasoning

- ◆ “Consider, for example, an employer with two employees, both of whom are attracted to men. The two individuals are, to the employer’s mind, materially identical in all respects, except that one is a man and the other a woman. If the employer fires the male employee for no reason other than the fact he is attracted to men, the employer discriminates against him for traits or actions it tolerates in his female colleague. Put differently, the employer intentionally singles out an employee to fire based in part on the employee’s sex, and the affected employee’s sex is a but-for cause of his discharge.”
- ◆ “Or take an employer who fires a transgender person who was identified as a male at birth but who now identifies as a female. If the employer retains an otherwise identical employee who was identified as female at birth, the employer intentionally penalizes a person identified as male at birth for traits or actions that it tolerates in an employee identified as female at birth. Again, the individual employee’s sex plays an unmistakable and impermissible role in the discharge decision.”
- ◆ “[H]omosexuality and transgender status are inextricably bound up with sex. Not because homosexuality or transgender status are related to sex in some vague sense or because discrimination on these bases has some disparate impact on one sex or another, but because to discriminate on these grounds requires an employer to intentionally treat individual employees differently because of their sex.”

60

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Practical Effects of *Bostock*

- ◆ Does It Provide an Additional "Classification" for Claiming Discrimination
 - ◆ "Because of sex," or Because of sexual orientation and gender identity
 - ◆ E.g., "I am homosexual/transgender and I believe that is the reason for the adverse employment action."
- ◆ Timing of revelations can make sex discrimination claims feel like retaliation claims
 - ◆ "I told my boss I was homosexual in March, and my contract was nonrenewed in April."
 - ◆ "I told my supervisor I would be transitioning over the summer, and my coaching duties were removed."

61

Practical Effects of *Bostock*

- ◆ What might constitute "direct evidence" of discrimination?
- ◆ Is the employee's bathroom use now an issue?
- ◆ Dress codes for employees?
- ◆ What about parent complaints? Requests from parents for another teacher?
- ◆ Job applications asking for gender or sex?

62

What About Discrimination/Harassment Policies?

- ◆ GAAA – Equal Opportunity Employment
- ◆ Add sexual orientation or transgender status as basis for prohibited discrimination?
- ◆ Policy GAAA provides complaints procedure for alleged discrimination or harassment on the basis of sex – but Title IX may provide different procedures especially for sexual harassment.

63

Policy GAAA – Equal Opportunity Employment

COMPLAINTS PROCEDURE

Complaints made to the School District regarding alleged discrimination or harassment on the basis of race, color or national origin in violation of Title VI; sex (except as stated below) in violation of Title IX; religion in violation of Title VII; disability in violation of Section 504 or the ADA, or age in violation of the ADEA, will be processed in accordance with the following procedure:

1. (a) Any employee, applicant for employment, or other person with a complaint or report alleging a violation as described above, excluding sexual harassment as defined in 1b, shall promptly notify, in writing or orally, either the principal for his/her school or the appropriate coordinator designated by the school principal or the district. If the report or complaint is oral, either the coordinator or school principal to whom the complaint is made shall promptly prepare a memorandum or written statement of the complaint as made to him or her by the complainant and shall have the complainant read and sign the memorandum or statement if it accurately reflects the complaint made. If the complaint is made to a school principal, he or she shall be responsible for notifying the appropriate coordinator of the complaint. Reports or complaints other than those described in 1b shall be handled in accordance with the procedures starting in 2.
- (b) Any person with a complaint or report alleging sexual harassment as defined in Policy GAEB (whether or not the person reporting is the person alleged to be the victim of conduct that could constitute sexual harassment) may report, in person, by mail, by telephone, or by electronic mail, using the contact information listed for the Title IX Coordinator on the District's website, or by any other means that results in the Title IX Coordinator receiving the person's verbal or written report. Such a report may be made at any time (including during non-business hours) by using the telephone number or electronic mail address, or by mail to the office address, listed for the Title IX Coordinator. [Such reports will be handled in accordance with the procedures and grievance process specified in Policy GAEB.]

64

Policy GAEB – Title IX Sexual Harassment of Employees

Sexual harassment means conduct on the basis of sex that satisfies one or more of the following:

1. An employee of the District conditioning the provision of a District aid, benefit, or service on an individual's participation in unwelcome sexual conduct;
2. Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the District's education program or activity; or
3. "Sexual assault"- an offense classified as a forcible or nonforcible sex offense under the uniform crime reporting system of the Federal Bureau of Investigation; or

65

Policy GAEB – Sexual Harassment cont'd

"Dating Violence"- sex-based violence committed by a person-

- (A) who is or has been in a social relationship of a romantic or intimate nature with the victim; and
- (B) where the existence of such a relationship shall be determined based on a consideration of the following factors:
 - (i) The length of the relationship.
 - (ii) The type of relationship.
 - (iii) The frequency of interaction between the persons involved in the relationship; or

"Domestic Violence"- sex-based violence which includes felony or misdemeanor crimes of violence committed by a current or former spouse or intimate partner of the victim, by a person with whom the victim shares a child in common, by a person who is cohabitating with or has cohabitated with the victim as a spouse or intimate partner, by a person similarly situated to a spouse of the victim under the domestic or family violence laws of the jurisdiction receiving grant monies, or by any other person against an adult or youth victim who is protected from that person's acts under the domestic or family violence laws of the jurisdiction; or

"Sex-based Stalking" - engaging in a course of conduct directed at a specific person that would cause a reasonable person to-

- (A) fear for his or her safety or the safety of others; or
- (B) suffer substantial emotional distress.

66

Policy GAEB

“The School District prohibits discrimination based on sex and sexual harassment of employees by other employees, board members, students, volunteers, or others over whom the District has authority in any District education program or activity. Education program or activity includes locations, events, or circumstances over which the District exercises substantial control over both the respondent and the context in which the sexual harassment occurs. “

67

67

Do Title VII and Title IX Provide the Same Remedies to Employees?

- ◆ Different Standard of Proof
- ◆ Different Monetary Relief Available
- ◆ Liability for Individual Supervisors is Different
- ◆ Administrative Process is Different
- ◆ Potentially Different Definition of Sexual Harassment

68

68

Concurrent Sessions

- ◆ **Untangling All of the Leave Created for the Pandemic**
 - ◆ Understanding the New Leave Requirements and How Long Will They Last
 - ◆ Understanding What the Pandemic Has Done to Sick Leave, FMLA, Sick Leave Bank
 - ◆ Understanding How 504/ADA Applies To Those Afraid To Come To School
- ◆ **Reductions in Force, Furloughs and Other Responses to Recession**
 - ◆ Remember the Amendment to the FDA Passed Last Time
 - ◆ The FDA Still Applies Unless It Is Waived
 - ◆ The Major Legal Claims: Discrimination and Retaliation

69

69



70

How the Title IX Regulations Will Affect Personnel Hearings

71

71

What are the Provisions that Specifically Apply?

72

72

34 C.F.R. § 106.44(a)

“ . . . A recipient with actual knowledge of sexual harassment in an education program or activity of the recipient against a person in the United States, must respond promptly in a manner that is not deliberately indifferent. A recipient is deliberately indifferent only if its response to sexual harassment is clearly unreasonable in light of the known circumstances. . . . A recipient's response must treat complainants and respondents equitably by offering supportive measures . . . to a complainant, and by following a grievance process that complies with § 106.45 before the imposition of any disciplinary sanctions or other actions that are not supportive measures . . . against a respondent. The Title IX Coordinator must promptly contact the complainant to discuss the availability of supportive measures . . . , consider the complainant's wishes with respect to supportive measures, inform the complainant of the availability of supportive measures with or without the filing of a formal complaint, and explain to the complainant the process for filing a formal complaint. . . ”

73

Title IX Sexual Harassment Definition

34 C.F.R. § 106.30: “Sexual harassment means conduct on the basis of sex that satisfies one or more of the following:

- (1) An employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct;
- (2) Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity; or
- (3) “Sexual assault” as defined in 20 U.S.C. 1092(f)(6)(A)(v), “dating violence” as defined in 34 U.S.C. 12291(a)(10), “domestic violence” as defined in 34 U.S.C. 12291(a)(8), or “stalking” as defined in 34 U.S.C. 12291(a)(30).”

74

Title IX Sexual Harassment Definition

- ◆ “The term “sexual assault” means an offense classified as a forcible or nonforcible sex offense under the uniform crime reporting system of the Federal Bureau of Investigation.”
- ◆ The term “dating violence” means violence committed by a person--
 - (A) who is or has been in a social relationship of a romantic or intimate nature with the victim; and
 - (B) where the existence of such a relationship shall be determined based on a consideration of the following factors: (i) The length of the relationship. (ii) The type of relationship. (iii) The frequency of interaction between the persons involved in the relationship.
- ◆ The term “domestic violence” includes felony or misdemeanor crimes of violence committed by a current or former spouse or intimate partner of the victim, by a person with whom the victim shares a child in common, by a person who is cohabitating with or has cohabitated with the victim as a spouse or intimate partner, by a person similarly situated to a spouse of the victim under the domestic or family violence laws of the jurisdiction receiving grant monies, or by any other person against an adult or youth victim who is protected from that person's acts under the domestic or family violence laws of the jurisdiction.
- ◆ The term “stalking” means engaging in a course of conduct directed at a specific person that would cause a reasonable person to-- (A) fear for his or her safety or the safety of others; or (B) suffer substantial emotional distress.

75

Supportive Measures

“Supportive measures means non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, and without fee or charge to the complainant or the respondent before or after the filing of a formal complaint or where no formal complaint has been filed. Such measures are designed to restore or preserve equal access to the recipient's education program or activity without unreasonably burdening the other party, including measures designed to protect the safety of all parties or the recipient's educational environment, or deter sexual harassment. Supportive measures may include counseling, extensions of deadlines or other course-related adjustments, modifications of work or class schedules, campus escort services, mutual restrictions on contact between the parties, changes in work or housing locations, leaves of absence, increased security and monitoring of certain areas of the campus, and other similar measures. The recipient must maintain as confidential any supportive measures provided to the complainant or respondent, to the extent that maintaining such confidentiality would not impair the ability of the recipient to provide the supportive measures. The Title IX Coordinator is responsible for coordinating the effective implementation of supportive measures.”

76

Administrative Leave

“Nothing in this subpart precludes a recipient from placing a non-student employee respondent on administrative leave during the pendency of a grievance process that complies with § 106.45. This provision may not be construed to modify any rights under Section 504 of the Rehabilitation Act of 1973 or the Americans with Disabilities Act.”

-34 C.F.R. § 106.44(d)

77

Emergency Removal

“Nothing in this part precludes a recipient from removing a respondent from the recipient's education program or activity on an emergency basis, provided that the recipient undertakes an individualized safety and risk analysis, determines 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 provides the respondent with notice and an opportunity to challenge the decision immediately following the removal. This provision may not be construed to modify any rights under the Individuals with Disabilities Education Act, Section 504 of the Rehabilitation Act of 1973, or the Americans with Disabilities Act.”

-34 C.F.R. § 106.44(c)

78

Grievance Process

- ◆ Required in response to a formal complaint
- ◆ Must meet requirements of regs
- ◆ “Any provisions, rules, or practices other than those required by [the grievance process regulations] that a recipient adopts as part of its grievance process for handling formal complaints of sexual harassment as defined in § 106.30, must apply equally to both parties.”

79

Notice to Parties

“Upon receipt of a formal complaint, a recipient must provide the following written notice to the parties who are known:

(A) Notice of the recipient's grievance process that complies with this section, including any informal resolution process.

(B) Notice of the allegations of sexual harassment potentially constituting sexual harassment as defined in § 106.30, including sufficient details known at the time and with sufficient time to prepare a response before any initial interview. Sufficient details include the identities of the parties involved in the incident, if known, the conduct allegedly constituting sexual harassment under § 106.30, and the date and location of the alleged incident, if known. The written notice must include a statement that the respondent is presumed not responsible for the alleged conduct and that a determination regarding responsibility is made at the conclusion of the grievance process. The written notice must inform the parties that they may have an advisor of their choice, who may be, but is not required to be, an attorney, under paragraph (b)(5)(iv) of this section, and may inspect and review evidence under paragraph (b)(5)(vi) of this section. The written notice must inform the parties of any provision in the recipient's code of conduct that prohibits knowingly making false statements or knowingly submitting false information during the grievance process.”

80

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Investigation of Formal Complaint

34 C.F.R. § 106.45 (b)(5): “When investigating a formal complaint and throughout the grievance process, a recipient must—

(v) Provide, to a party whose participation is invited or expected, written notice of the date, time, location, participants, and purpose of all hearings, investigative interviews, or other meetings, with sufficient time for the party to prepare to participate;



81

Investigation of Formal Complaint

“(b)(5)(vi) Provide both parties an equal opportunity to inspect and review any evidence obtained as part of the investigation that is directly related to the allegations raised in a formal complaint, including the evidence upon which the recipient does not intend to rely in reaching a determination regarding responsibility and inculpatory or exculpatory evidence whether obtained from a party or other source, so that each party can meaningfully respond to the evidence prior to conclusion of the investigation. Prior to completion of the investigative report, the recipient must send to each party and the party's advisor, if any, the evidence subject to inspection and review in an electronic format or a hard copy, and the parties must have at least 10 days to submit a written response, which the investigator will consider prior to completion of the investigative report. The recipient must make all such evidence subject to the parties' inspection and review available at any hearing to give each party equal opportunity to refer to such evidence during the hearing, including for purposes of cross-examination.”

82

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Investigation of Formal Complaint

“(b)(5)(vii) Create an investigative report that fairly summarizes relevant evidence and, at least 10 days prior to a hearing (if a hearing is required under this section or otherwise provided) or other time of determination regarding responsibility, send to each party and the party's advisor, if any, the investigative report in an electronic format or a hard copy, for their review and written response.”



83

Before Determination

“For recipients that are elementary and secondary schools, and other recipients that are not postsecondary institutions, the recipient's grievance process may, but need not, provide for a hearing. With or without a hearing, after the recipient has sent the investigative report to the parties pursuant to paragraph (b)(5)(vii) of this section and before reaching a determination regarding responsibility, the decision-maker(s) must afford each party the opportunity to submit written, relevant questions that a party wants asked of any party or witness, provide each party with the answers, and allow for additional, limited follow-up questions from each party. With or without a hearing, questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant, unless such questions and evidence about the complainant's prior sexual behavior are offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or if the questions and evidence concern specific incidents of the complainant's prior sexual behavior with respect to the respondent and are offered to prove consent. The decision-maker(s) must explain to the party proposing the questions any decision to exclude a question as not relevant.”

84

83

84

When DFACS, PSC, and Law Enforcement Get Involved

85

PSC Code of Ethics

- ◆ Standard 2: An educator shall always maintain a professional relationship with all students, both in and outside the classroom. Unethical conduct includes but is not limited to:
 - ◆ 3. committing any sexual act with a student or soliciting such from a student;
 - ◆ 4. engaging in or permitting harassment of or misconduct toward a student that would violate a state or federal law;

86

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86

Child Abuse

- ◆ O.C.G.A. § 19-7-5(a)(4): "Child abuse" means:
 - ◆ (D) Sexual abuse of a child
- ◆ O.C.G.A. § 19-7-5(a)(10): "Sexual abuse" means a person's employing, using, persuading, inducing, enticing, or coercing any minor who is not such person's spouse to engage in any act which involves:
 - (A) Sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex;
 - (B) Bestiality;
 - (C) Masturbation;
 - (D) Lewd exhibition of the genitals or pubic area of any person;
 - (E) Flagellation or torture by or upon a person who is nude;
 - (F) Condition of being fettered, bound, or otherwise physically restrained on the part of a person who is nude;
 - (G) Physical contact in an act of apparent sexual stimulation or gratification with any person's clothed or unclothed genitals, pubic area, or buttocks or with a female's clothed or unclothed breasts;
 - (H) Defecation or urination for the purpose of sexual stimulation;
 - (I) Penetration of the vagina or rectum by any object except when done as part of a recognized medical procedure; or
 - (J) Any act described by subsection (c) of Code Section 16-5-46.

87

Outside Agency Investigations

- ◆ Coordinating Investigations
- ◆ Understanding Agency Responsibilities and Timelines
- ◆ Reviewing the Child Abuse Protocol
- ◆ Not jeopardizing other investigations – especially law enforcement.

88

87

88

Dismissal of a Formal Complaint

34 C.F.R. § 106.45(b)(3)(ii):

"The recipient may dismiss the formal complaint or any allegations therein, if at any time during the investigation or hearing: A complainant notifies the Title IX Coordinator in writing that the complainant would like to withdraw the formal complaint or any allegations therein; the respondent is no longer enrolled or employed by the recipient; or specific circumstances prevent the recipient from gathering evidence sufficient to reach a determination as to the formal complaint or allegations therein."

89

Why the Employee Might Welcome the Title IX Investigation

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90

34 C.F.R. § 106.44(a)

“ . . . A recipient with actual knowledge of sexual harassment in an education program or activity of the recipient against a person in the United States, must respond promptly in a manner that is not deliberately indifferent. A recipient is deliberately indifferent only if its response to sexual harassment is clearly unreasonable in light of the known circumstances. . . . A recipient's response must treat complainants and respondents equitably by offering supportive measures . . . to a complainant, and by following a grievance process that complies with § 106.45 before the imposition of any disciplinary sanctions or other actions that are not supportive measures . . . against a respondent. The Title IX Coordinator must promptly contact the complainant to discuss the availability of supportive measures . . . consider the complainant's wishes with respect to supportive measures, inform the complainant of the availability of supportive measures with or without the filing of a formal complaint, and explain to the complainant the process for filing a formal complaint. . . .”

91



Fair Dismissal Act

“Before the discharge or suspension of a teacher, administrator, or other employee having a contract of employment for a definite term, written notice of the charges shall be given at least ten days before the date set for hearing...”

92

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Practical Suggestions to Avoid the Quagmire

93

93

Dismissal of a Formal Complaint

34 C.F.R. § 106.45(b)(3)(ii):

“The recipient may dismiss the formal complaint or any allegations therein, if at any time during the investigation or hearing: A complainant notifies the Title IX Coordinator in writing that the complainant would like to withdraw the formal complaint or any allegations therein; the respondent is no longer enrolled or employed by the recipient; or specific circumstances prevent the recipient from gathering evidence sufficient to reach a determination as to the formal complaint or allegations therein.”

94

94

Dismissal of a Formal Complaint

34 C.F.R. § 106.45(b)(3)(i):

“The recipient must investigate the allegations in a formal complaint. If the conduct alleged in the formal complaint would not constitute sexual harassment as defined in § 106.30 even if proved, did not occur in the recipient's education program or activity, or did not occur against a person in the United States, then the recipient must dismiss the formal complaint with regard to that conduct for purposes of sexual harassment under title IX or this part; such a dismissal does not preclude action under another provision of the recipient's code of conduct.”

95

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Personnel Actions

- ◆ Resignation. If Respondent is no longer within jurisdiction of District, there is no Title IX authority
- ◆ No Formal Complaint. Can we now proceed with Fair Dismissal Act?
- ◆ If Formal Complaint, Consider Administrative Leave.

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