

Wisler Pearlstine, LLP
ATTORNEYS AT LAW

BCIU Berks County
Intermediate Unit
an educational service agency

Investigation Training

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Berks County Intermediate Unit (BCIU)
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Preliminary Steps

- Review Complaint and understand scope of allegations you are investigating
- Gather information related to the incident from Title IX Coordinator building admin
- **Pointer – keep a folder or list of everything you gather and everyone you speak to*
- Information and documents gathered may not be required or not permitted to be disclosed under Title IX

Scheduling of Interviews

- Title IX requires that interview notices be sent to the parties being interviewed
 - Time, Date, Location
 - Purpose of Interview
- Pointer – ensure introduction by Title IX Coordinator or introduce yourself if unknown by the parties

Attorney / Advisor Participation

- Parties are allowed to bring advisors
- Students – include parents
- Employees – include Union reps
- If a party has an attorney:
 - Allow participation with guidance from the Title IX Coordinator
 - Any restriction must apply equally to all parties
 - Pointer – for attorney involvement – send to attorney prior to the interview so parameters are understood

Examples of Attorney and Advisor Restrictions

- There is no guidance in Title IX, but here are examples
- Parents
 - Shouldn't answer questions for their students
 - Provide an opportunity for parents to share information at the end of an interview
- Attorneys
 - Shouldn't answer questions for their clients
 - Shouldn't direct the line of questioning
 - Consultation – done in private, not when a question is pending

Preparation for Interview

- Review documentation you have in order to understand what has been done so far
- This should guide your questions
- Prepare questions in advance
 - *Pointer – questions may shift during actual interview
- Make arrangements for help if needed
 - Note taking
 - Invitation to another admin, counselor, or school employee

Design of Questions

- Questions should be aimed at getting both sides of the story
- No prejudgments
 - Investigators and decision-makers serve impartially
 - No prejudgments based on status as complainant or respondent
 - Your questions should not “lead” any party
- Again, start broad and then narrow
- Inquisitive, NOT interrogative!

Consider the Definition of Title IX

- Was this reported to have occurred more than once?
- What was the impact on both parties?
- Did either party miss school or could not access an education program or activity?
- Did the supportive measures have an impact?

Order of Interviews

- Title IX does not address this
- Investigator may use their discretion
- Suggestion (may vary)
 - Building admin who may have conducted a preliminary investigation
 - Complainant
 - Respondent
 - Witnesses*

During Interview

- **Tip** – Read a script before you begin
 - Introduction of yourself
 - Explain your role as investigator
 - Explain logistics and set expectations
 - You will be taking notes
 - Information **will be shared** with the other party and others within the District/school/educational entity
 - Provide restrictions on attorney, parent, or advisor

Interview Tips Generally / Questions to Ask

- Do you know of other relevant information?
- Are there other persons who have relevant information?
- Are there any notes or physical documentation regarding the allegations?
- If respondent says allegations are false, why would complainant lie?

After Interviews

- Prepare notes or summaries
- Title IX does not require a disclosure of “interview summaries” or notes, but requires:
 - Production of “evidence that is directly related to allegations raised in a formal complaint” including, the evidence upon which the recipient does not intend to rely on in reaching a determination regarding responsibility and inculpatory or exculpatory evidence whether obtained from a party or other source” so the parties can “meaningful respond.”
 - Requires investigator to summarize “relevant evidence” within the investigative report
 - No definitions provided

After Interviews (Cont'd)

- Continue gathering evidence as necessary
 - Standard – evidence is “sufficient” for the decision-maker to “reach a determination regarding responsibility.”
 - Burden on the educational entity, not the parties

Hypothetical

- You are investigating the Complaint filed by Sarah's family against David for the Swift Area School District. You sent out interview notice to Sarah's parents. You receive the following:

Dear Investigator,

*As I previously explained, no one is to talk to Sarah about this matter.
We will not be appearing for the interview.*

Sincerely,

Sarah's mom

- How does this impact your investigation?
- What do you say to Sarah's mom?

Hypothetical

- You are investigating the Complaint filed by Sarah's family against David. You sent out an interview notice to David's parents. You receive the following response:

Dear Investigator,

I represent David and his family. As you may know, Sarah's family filed a criminal complaint against David, and there is currently an active police investigation. I have advised David to not participate in an interview, until the criminal investigation is over.

Sincerely,

David's Attorney

- How does this impact your investigation?

Conclusion of Investigation

- Send parties evidence that is directly related to allegations raised in a formal complaint, including the evidence upon which the recipient does not intend to rely on in reaching a determination regarding responsibility and inculpatory or exculpatory evidence whether obtained from a party or other source
- Provide parties 10 days to respond prior to the completion of your investigative report

Logistics with Evidence Production

- No clear Title IX requirements or guidance
 - Call a Title IX attorney with questions
- Prior to sending evidence – send updates as necessary
- How to send evidence?
 - In hard copy?
 - Electronically – safe format?
 - Marking documents as confidential Title IX evidence?
 - Draft report v. evidence packet?
 - What about videos?
- Provide deadline and instructions for parties to submit response

Issues of Relevance?

- Title IX requires that that investigators receive training on “issues of relevance”
- Title IX – no definition of relevance
 - Commentary says an investigation and adjudication should focus on “evidence pertinent to proving whether facts material to the allegations under investigation are more or less likely to be true (i.e., on what is relevant).” *See 30,294*
- Remember other requirements
 - Prohibition on medical records, legal privilege, prohibitions on making credibility decisions based on sex stereotypes or based on status as complainant or respondent

Report

- Title IX requires creation of investigative report that fairly summarizes relevant evidence and, at least 10 days prior to a hearing, if one is held, 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.

Logistics for Report Drafting

- No guidance or requirements under Title IX
- Suggestions
 - Explain scope of allegations
 - Explain procedures you took
 - Include emails with parties as part of packet
 - Include credibility determinations
 - Include “Impressions” or thoughts, but refrain from making a decision.
 - Reference evidence and include as exhibits
- This is what the decision-maker will rely on
 - Everything should be within the four corners of your report.

Consider the Requirements of the Written Determination

- **Written Determination Must include:**
 - Identification of the allegations potentially constituting sexual harassment
 - A description of the procedural steps taken from the receipt of the formal complaint through the determination, including any notifications to the parties, interviews with parties and witnesses, site visits, methods used to gather other evidence, and hearings held;
 - Findings of fact supporting the determination;
 - Conclusions regarding the application of the educational entity's code of conduct to the facts;
 - A statement of, and rationale for, the result as to each allegation, including a determination regarding responsibility, any disciplinary sanctions the educational entity imposes on the respondent, and whether remedies designed to restore or preserve equal access to the educational entity's education program or activity will be provided by the educational entity to the complainant; and
 - The educational entity's procedures and permissible bases for the complainant and respondent to appeal.

Sending of Report

- Who is sending and to whom?
 - No Title IX guidance
 - Options:
 - Investigator sends to Title IX Coordinator, and Title IX Coordinator sends to parties and decision-maker
 - Investigator sends to decision-maker and parties

QUESTIONS?



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Decision-Making Training

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Title IX's Training Requirements

- Decision-Maker Training
 - Training on any technology to be used at a live hearing
 - Logistically – to be done by school, IT department, etc.
 - Training on issues of relevance of questions and evidence, including when questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant, as set forth in paragraph (b)(6) of this section.
 - Appears geared towards hearings and on the spot determinations at hearing (but see allowance of questions requirement)
 - Investigator – required to include relevant evidence

Witnesses

- Must provide an equal opportunity for the parties to present witnesses, including fact and expert witnesses, and other inculpatory and exculpatory evidence
 - Geared toward hearing?
 - If no hearing – should be covered by investigator



After Receiving the Report

- Decision-maker / entity must provide parties an opportunity to:
 - Provide a Written Response to the investigative report at least 10 days prior to a hearing or other time of determination
 - 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

Logistics for Questions

- Opportunity must be provided 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
- Tip – set deadline and related procedure

Is a question relevant? Should it be excluded?

- No definition of relevance provided, but consider the following:
 - Commentary says an investigation and adjudication should focus on “evidence pertinent to proving whether facts material to the allegations under investigation are more or less likely to be true (i.e., on what is relevant).” 30,294
- Consult with your Title IX attorney if you are unsure

Writing the Written Determination

- Before you start writing, ensure:
 - You have all documents you need and nothing more
 - Evidence provided to parties
 - Investigative Report
 - Procedural Notifications that went out
- *Remember – you are limited to what the investigator collected and must serve impartially. Do not bring in outside knowledge or outside information.
 - i.e., other unrelated disciplinary incidents, conversations you may have had with a party in the past
 - May still consider and apply school code of conduct or policy, as required

Written Determination Requirements

- **Written Determination must include:**
 - Identification of the allegations potentially constituting sexual harassment;
 - A description of the procedural steps taken from the receipt of the formal complaint through the determination, including any notifications to the parties, interviews with parties and witnesses, site visits, methods used to gather other evidence, and hearings held;
 - Findings of fact supporting the determination;
 - Conclusions regarding the application of the educational entity's code of conduct to the facts;
 - A statement of, and rationale for, the result as to each allegation, including a determination regarding responsibility, any disciplinary sanctions the educational entity imposes on the respondent, and whether remedies designed to restore or preserve equal access to the educational entity's education program or activity will be provided by the educational entity to the complainant; and
 - The educational entity's procedures and permissible bases for the complainant and respondent to appeal.

Determination Regarding Responsibility

- To reach this determination, the educational entity must apply whichever standard of evidence it chooses:
 - Preponderance of evidence
 - whether alleged facts are more likely than not to be true
 - Clear and convincing evidence
 - whether it is “highly probable” that the alleged facts are true
- Be sure to note and apply the standard!

Identification of the allegations potentially constituting sexual harassment

- Should be easy to find!
 - Should be included in the Title IX written notifications.
 - Should be included in the report.

Procedural Steps

- A description of the procedural steps taken from the receipt of the formal complaint through the determination, including any notifications to the parties, interviews with parties and witnesses, site visits, methods used to gather other evidence, and hearings held.
- *Review notifications, emails with parties.
 - If you think something is missing – ask the Title IX Coordinator.
 - Want to ensure record is complete – you are documenting compliance!

Findings of fact supporting the determination

- This assumes you are (1) making a determination and (2) findings of fact, which you are.
 - You are determining:
 - Whether the conduct occurred
 - Whether it was a violation of Title IX
- To determine this, review the report and use your judgment.
- Explain why you are determining something
 - “because” is your friend

Guidance from Dept. of Ed FAQ

Question 8: How can a school determine whether sexual harassment “effectively denies a person’s right to equal access to its education program or activity” under the “unwelcome conduct” category in the definition of sexual harassment in the 2020 amendments? (See the definition in Question 5.)

Answer 8: The preamble explains that to determine whether a person has been effectively denied equal access to a school’s education program or activity, a school must evaluate “whether a reasonable person in the complainant’s position would be effectively denied *equal* access to education compared to a similarly situated person who is not suffering the alleged sexual harassment.”¹⁸

The preamble provides this additional guidance to schools:

- An effective denial of equal access to educational opportunities may include skipping class to avoid a harasser, a decline in a student’s grade point average, or having difficulty concentrating in class.¹⁹
- Examples of specific situations that likely constitute effective denial of equal access to educational opportunities also include “a third grader who starts bed-wetting or crying at night due to sexual harassment, or a high school wrestler who quits the team but carries on with other school activities following sexual harassment.”²⁰

Guidance (Cont'd)

- A complainant does not need to have “already suffered loss of education before being able to report sexual harassment.”²¹
- Effective denial of equal access to education does not require “that a person’s total or entire educational access has been denied.”²²
- While these examples help illustrate an effective denial of access, “[n]o concrete injury is required” to prove an effective denial of equal access.²³
- Complainants do not need to have “dropped out of school, failed a class, had a panic attack, or otherwise reached a ‘breaking point’” or exhibited specific trauma symptoms to be effectively denied equal access.²⁴
- “School officials turning away a complainant by deciding the complainant was ‘not traumatized enough’ would be impermissible.”²⁵

Schools may wish to include these and other examples in their internal policies, training, and communications to students and employees to help illustrate this concept.

Conclusions regarding the application of the educational entity's code of conduct to the facts

- Review and be familiar with the entity's policy and code of conduct
- Potential questions that may arise
 - If you are imposing discipline – your code of conduct may require you to look at other disciplinary incidents that may not be in your packet of information.
 - Options?
 - Refer to a building admin to administer?
 - Continue to make a recommendation?
 - Consider outside discipline records?
 - Could pose a risk because you are looking elsewhere
 - Call your Title IX Attorney!

If you find that Title IX was not violated, what can you do?

- There is support to apply another code of conduct violation, even if you find Title IX was not violated. But, the Title IX guidance isn't entirely clear.
- § 106.45(b)(3)(ii) provides that if a complaint is dismissed, “dismissal does not preclude action under another provision of the recipient’s code of conduct.”
- § 106.71 considers retaliation (which is prohibited)
 - “including charges against an individual for code of conduct violations that do not involve sex discrimination or sexual harassment, but arise out of the same facts or circumstances as a report or complaint of sex discrimination”
 - i.e., charging with a non-sexual harassment offense to elude the Title IX process

Remaining Requirements

- A statement of, and rationale for, the result as to each allegation, including a determination regarding responsibility
 - *Be sure to determine each allegation
- Any disciplinary sanctions the educational entity imposes on the respondent
 - Explain why they are appropriate
- And whether remedies designed to restore or preserve equal access to the educational entity's education program or activity will be provided by the educational entity to the complainant
 - Explain why

Providing Notice of Appeal

- Entity is required to provide procedures and permissible bases for the complainant and respondent to appeal.
 - Procedural irregularity that affected the outcome of the matter;
 - New evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made that could affect the outcome of the matter; and
 - The Title IX Coordinator, investigator(s), or decision-maker(s) had a conflict of interest or bias for or against complainants or respondents generally or the individual complainant or respondent that affected the outcome of the matter.

Providing Appeal Procedures

- What is an appeal procedure?
 - No Title IX guidance on this, but procedures must be applied equally to both parties.
- Discretion to create procedures, like:
 - When should a party file notice of appeal
 - Deadline
 - Who should be informed?
 - Title IX Coordinator, appeals officer?
 - When should the non-appealing party respond?
- Should the decision-maker create them?
 - Up to discretion of the educational entity, but should be done at least in consultation with Title IX Coordinator.
 - May also be included in policy or grievance procedure.

Written Determination

- The educational entity must provide the written determination to the parties simultaneously.
- The determination regarding responsibility becomes final either on the date that the educational entity provides the parties with the written determination of the result of the appeal, if an appeal is filed, or if an appeal is not filed, the date on which an appeal would no longer be considered timely.

QUESTIONS?



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Appeals Training

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Preliminary Steps

- Who is going to be aware of the filing of an appeal?
 - Appeals Officer?
 - Title IX Coordinator?
 - Decision-Maker?
- Appeals Officer should ensure they have the written determination, evidence, investigative report

Providing Parties an Opportunity to Appeal

- Depending on your policy, or if procedures were set – the appeals officer will have to follow them
- If none were set – the appeals officer should create them in conjunction with the Title IX Coordinator as appropriate

Appeal Requirements

- The educational entity must offer both parties an appeal from a determination regarding responsibility, and from the educational entity's dismissal of a formal complaint or any allegations limited to the following bases:
 - Procedural irregularity that affected the outcome of the matter;
 - New evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made that could affect the outcome of the matter; and
 - The Title IX Coordinator, investigator(s), or decision-maker(s) had a conflict of interest or bias for or against complainants or respondents generally or the individual complainant or respondent that affected the outcome of the matter.
- A recipient may offer an appeal equally to both parties on additional bases.

Appeal Requirements (Cont'd)

- As to all appeals, the educational entity must:
 - Notify the other party in writing when an appeal is filed and implement appeal procedures equally for both parties;
 - Ensure that the decision-maker(s) for the appeal is not the same person as the decision-maker(s) that reached the determination regarding responsibility or dismissal, the investigator(s), or the Title IX Coordinator;
 - Ensure that the decision-maker(s) for the appeal is trained and has no conflict of interest;
 - Give both parties a reasonable, equal opportunity to submit a written statement in support of, or challenging, the outcome;
 - Issue a written decision describing the result of the appeal and the rationale for the result; and
 - Provide the written decision simultaneously to both parties.

Overview of Requirements

- Notify the other party in writing when an appeal is filed and implement appeal procedures equally for both parties
 - Self explanatory
 - Work with Title IX Coordinator
 - Be clear with parties re: deadlines, how to submit, etc.

Overview (Cont'd)

- Ensure that the decision-maker(s) for the appeal is not the same person as the decision-maker(s) that reached the determination regarding responsibility or dismissal, the investigator(s), or the Title IX Coordinator

Overview (Cont'd)

- Ensure that the decision-maker(s) for the appeal is trained and has no conflict of interest
- Ask do that have a conflict of interest that would prevent them from serving impartially?

Overview (Cont'd)

- Give both parties a reasonable, equal opportunity to submit a written statement in support of, or challenging, the outcome
- Set deadlines
- Consideration – exchanging submission documents to ensure parties can meaningfully respond

Overview (Cont'd)

- Issue a written decision describing the result of the appeal and the rationale for the result; and
- Explain why an appeal is denied or granted
- If granted – what is the result?
 - Little Title iX guidance on potential results. Options could include:
 - Reversal of decision
 - Order for decision-maker to consider something else
 - Requests to provide additional information from parties

Overview (Cont'd)

- Provide the written decision simultaneously to both parties.
 - Ask - is this coming from the appeals officer or Title IX Coordinator?

QUESTIONS?

