



When Decisions Matter

Title IX Investigator Training

October 21st and 28th



Brooke E. D. Say, Esq.



Gareth D. Pahowka, Esq.



Dr. Leigh E. Dalton, Esq.



Christopher L. Harris, Esq.



Taylor M. Baublitz, Esq.

Agenda

- General overview and definition of sexual harassment
- Grievance process
- Bias and conflicts of interest
- Relevancy
- Investigative Techniques
- Mock Interview
- Takeaways

Introduction to Title IX

- **Title IX of the Education Amendments of 1972 (Title IX) is a federal civil rights law that prohibits discrimination on the basis of sex in federally funded education programs and activities.**
 - It has been more than 45 years since enactment of Title IX.
 - Title IX states in part:
 - *“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....”*

Definitions Throughout

- Recipient = School District
- Complainant = Alleged Victim of Sexual Harassment
- Respondent = Alleged Perpetrator of Sexual Harassment
- Title IX Coordinator = ???
- Title IX Investigator = Person authorized to conduct an investigation into the allegations
- Title IX Decision-Maker = Person reviewing evidence and determining responsibility

Definitions Throughout

- What does “Sex” Mean?
 - Biological Sex
 - Gender
 - Sex Stereotyping
 - Sexual Orientation
 - Gender Identity
- Formal Complaint
 - “A document filed by a complainant or signed by the Title IX Coordinator alleging sexual harassment against a respondent and requesting that the recipient investigate the allegation of sexual harassment”

Review of District Obligations

- List of District Policies to Update – 103/104/247/249/317.1/824
 - 103 – Nondiscrimination in School and Classroom Practices
 - 104 – Nondiscrimination in Employment and Contract Practices
 - 247 – Hazing
 - 249 – Bullying/Cyberbullying
 - 317.1 – Educator Misconduct
 - 824 – Maintaining Professional Adult/Student Boundaries
- Address complainant and provide supportive measures
- Mandatory reporting
- In limited circumstances, offer an Informal Resolution
- Investigation
- Formal grievance process: notice, report, decision, appeal

Title IX Team

- Title IX Coordinator
- Title IX Investigator
- Title IX Decision-Maker

Title IX Investigator

- Who can be an Investigator
- How one becomes the Investigator
- Role of the Investigator

The Role of a Title IX Investigator

- Conduct an impartial investigation;
- Draft an investigative report;

Why do I need to know these things, especially right now?

- On August 14, 2020, new regulations to Title IX became effective – new regulations require Title IX Investigators to be trained in specific areas.
- Failure to report incident(s) could result in liability to the school district and/or *THE EMPLOYEE*.

What actions constitute “Sex Discrimination” under Title IX?

- Treating one person differently from another based on that person’s sex/gender in determining whether such person satisfies any requirement or condition for the provision of such aid, benefit, or service;
- Providing different aid, benefits, or services or provide aid, benefits, or services in a different manner;
- Denying any person any such aid, benefit, or service;
- Subjecting any person to separate or different rules of behavior, sanctions, or other treatment

New definitions of Sexual Harassment

- Sexual harassment means conduct on the basis of sex that justifies one of more of the following: Quid Pro Quo, Hostile Environment, or Clery crimes.
- **Quid Pro Quo** – An employee of the school district conditioning the provision of an aid, benefit, or service of the school district on an individual's participation in unwelcome sexual conduct;
- **Hostile Environment** – Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denied a person equal access to the recipient's education program or activity; or
- **Clery Crimes** – Sexual assault, dating violence, domestic violence, or stalking.

Jurisdiction

- Under the new Title IX regulations, if the District does not have jurisdiction it must dismiss the Title IX complaint
- This does not, however, preclude supportive measures or other Code of Conduct violations
- What is the District’s “education program or activity” and why is it important to know?

The Scope of District's “Education Program or Activity”

- Why is the scope important?
- Which incidents are under the District's jurisdiction?
 - All incidents of Sexual Harassment occurring *on-campus*;
 - All incidents of Sexual Harassment occurring *off-campus* if either of the two following conditions are met:
 - Off-campus incident occurs as part of the recipient's “operations;” or
 - If the recipient exercised substantial control over the Respondent and the context of the alleged Sexual Harassment that occurred off-campus.

Hypothetical #1

- Facts: Mary (a student) alleges that Mr. Gary (a teacher) has made repeated remarks to her in the classroom of a sexual nature. In addition, Mary alleges that Mr. Gary told her, after class, that if she performs sexual acts for him, she will pass Chemistry. During your interview with Mary, you learn that Mary and Mr. Gary had sexual relations at his house last Sunday.

Please respond to the poll.

Your answers are anonymous.

Retaliation Prohibited

“No recipient or other person may intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by Title IX or this part, or because the individual has made a report, complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing under this part...”

Grievance Procedures - General Requirements

- Treat complainants/respondents equitably; no sanctions until process complete
- No conflict of interest or bias; trained staff
- Presumption that respondent is not responsible
- Reasonably prompt timeframes
- Range of possible sanctions/remedies

Overview of the Grievance Process

1. Title IX Coordinator promptly contact Complainant and institute supportive measures if applicable – this could occur before a formal complaint is filed;
2. Title IX Coordinator explains the process to file a formal complaint and the grievance process that will follow;
3. Title IX Coordinator authorizes an investigation; and
4. Title IX Coordinator provides notice to Complainant and Respondent.

Overview of the Grievance Process

5. Title IX Coordinator offers both the Complainant and Respondent voluntary informal resolution, if applicable
6. Title IX Investigator begins an investigation;
7. Title IX investigator concludes investigation and provides all evidence to Complainant and Respondent and allows each party the opportunity to submit more evidence or provide statements relative to the evidence; and
8. Title IX Investigator drafts an Investigative Report and submits the report to both parties, simultaneously, and to the Title IX Decision-Maker.

Overview of the Grievance Process

9. Title IX Decision-Maker reviews the evidence and allows both parties to submit relevant questions to either party or witness;
10. Title IX Decision-Maker provides answers to questions, if applicable;
11. Title IX Decision-Maker drafts a Decision regarding responsibility and providing appeal rights; and
12. Appeal Decision-Maker drafts a Decision regarding responsibility if applicable.

Pausing the Investigation for “good cause”

- While investigating, you may be directed by the Title IX Coordinator to pause your investigation
- What constitutes Good Cause?

Hypothetical #2

- Facts: After interviewing Mary, and making mandatory reports of child abuse, the police direct you to stop your investigation.

Please respond to the poll.

Your answers are anonymous.

Investigative Process

- Burden of proof and burden of gathering evidence is on the District
- Equal opportunity to present witnesses
- May not prohibit parties from discussing allegations or gathering/presenting evidence
- Provide the same opportunity to have others participate in the grievance process; including advisor of choice (parent, attorney, etc.)
- Written notice of any interviews/meetings
- Provide all Evidence to Parties in a non-editable format (such as through a PDF)
- Prepare investigative report

How to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias

- Being impartial is greatly aided by not prejudging facts
- Conflicts of interest
- Bias—Implicit Bias
- Not relying on sex stereotypes

Hypothetical #3

Who may be impartial?

Answer Choices:

- Superintendent--Respondent was expelled last year and the Investigator is the Superintendent who investigated the expulsion incident and asked the Board to expel respondent for one year
- Band Director—Complainant is in the band and the Investigator is the Band director
- Coach—Respondent is a football player and the Investigator is the Cheer Coach
- None

Please respond to the poll.

Your answers are anonymous.

Hypothetical #4

Which, if any, of the investigators need to recuse themselves?

Answer Choices:

- Superintendent—Respondent was expelled last year and the Investigator is the Superintendent that investigated the expulsion incident and asked the Board to expel for one year
- Band Director—Complainant is in the band and the Investigator is the Band director
- Cheer Coach—Respondent is a football player and the Investigator is the Cheer Coach

- None

Please respond to the poll.

Your answers are anonymous.

Hypothetical #5

Which, if any, scenario poses a conflict of interest?

Answer Choices:

- Respondent was expelled last year and the Investigator is the Superintendent that investigated the expulsion incident and asked the Board to expel for one year
- Complainant is in the band and the Investigator is the Band director
- Respondent is a high school teacher and the brother of the Superintendent Investigator is the High School Principal
- The School Board is authorized to sit as the appellate decision-maker in a case where the Respondent is a daughter to one Board member
- None

Please respond to the poll.

Your answers are anonymous.

Important Considerations: Potential Responses to Trauma

- Delayed reporting
- Difficulty remembering specifics
- Reluctant reporting
- Remaining in a relationship with the respondent
- Failing to identify the accused
- The alleged victim thinks s/he is to blame and somehow s/he welcomed the unwanted behavior

Break

What evidence is relevant to the investigation

- The investigator must provide “any evidence obtained as part of the investigation that is directly related to the allegations raised in a form complaint, including the evidence upon which the recipient does not intend to rely in reaching a determination...”
- In writing the investigative report, the Investigator must “fairly summarize relevant evidence...”
- Evidence is relevant if it *has any tendency to make a fact more or less probable than it would be without the evidence – and – the fact is of consequence in determining the action.*

Hypothetical #6

- Mary alleged that Bobby touched her inappropriately. During Mary's interview, Mary says this occurred during 5th period math class. Should the investigator notate in the investigative report that Bobby said he was in history class during 5th period?

Please respond to the poll.

Your answers are anonymous.

Hypothetical #7

Which, if any, piece of evidence would need to be turned over to both parties but may not be included in an investigative report?

Answer Choices:

- A picture of Bobby and his identical twin brother
- Information that Bobby is gay – introduced to prove that Bobby would never inappropriately touch a female student
- There is one eye witness to the event, who provided information, and the eye witness is Bobby's twin brother
- None of the above

Please respond to the poll.

Your answers are anonymous.

Issues of Relevancy - Legally Privileged Information

- **Even if the evidence is relevant – it may be excluded from consideration!**
- Section 106.45(b)I5)(i): when investigating a formal complaint, recipient:
 - “Cannot access, consider, disclose, or otherwise use a party’s records that are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in the professional’s or paraprofessional’s capacity, or assisting in that capacity, and which are made and maintained in connection with the provision of treatment to the party, unless the recipient obtains that party’s voluntary, written consent to do so for a grievance process under this section.”

Issues of Relevancy - Legally Privileged Information

- Section 106.45(b)(1)(x):
 - A recipient's grievance process must...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 a privilege has waived the privilege.
 - Some legally recognized privileges are attorney-client privilege, doctor-patient privilege, and spousal privilege.
- Section 106.45(b)(6)(ii):
 - Complainant's sexual predisposition or prior sexual behavior is not relevant unless...

Hypothetical #8

- Bobby wants to include evidence that Mary has had sexual encounters with 15 different boys in the class.

Please respond to the poll.

Your answers are anonymous.

Hypothetical #9

- Bobby wants to include evidence that Mary was having sexual relations with Bobby during the time that he allegedly inappropriately touched her.

Please respond to the poll.

Your answers are anonymous.

Consent

The word “consent” is left for schools to define - no required definition in law, regs, or guidance

Introduction to Investigative Techniques

- Review notes and information collected by Title IX Coordinator
- Review Notices to complainant and respondent
- Review policy/Code of Conduct
- Define scope of investigation
- Begin Evidence List
- Begin Witness List
- Craft Questions for Each Witness

Organizing for the Interview

- What should you have with you?
 - Allegations
 - Investigation Log
 - Investigation notes cover sheet
 - Prepared questions
 - Evidence you may need to reference or show witness
 - Policy or Handbook

The Interview

- Identify yourself, your role, and a general outline of what you are investigating
- Consider requesting the Title IX Coordinator check in with those who fail to respond or refuse to participate
- Set the Stage
- Begin Broadly
- Freeze Frames
- Ask Follow-Up Questions
- Credibility
- Closing the Interview
- Confidentiality

After the Investigation

- Update investigation log
- Review notes, make corrections/clarifications
- Update witness list
- Update list of evidence to be obtained
- Write down questions to ask other witnesses
- Consider whether appropriate to send email
- Physical Evidence

Inspection and Review of Evidence

- Provide ALL Evidence to both parties and advisors
 - Include everything directly related to allegations, even if you don't expect decision maker to rely on it
 - Allow at least 10 days to review
 - Allow written response
 - Follow up where necessary
 - Consider responses when preparing report

Create Investigative Report

- Fairly summarize relevant evidence
- No determination
- Provide to parties and advisors
- Allow at least 10 days to review

Investigator Takeaways

- Study your updated grievance procedures
- Know the definition of sexual harassment and keep the policy language in mind as you interview parties and witnesses
- Identify when/if another policy such as bullying/cyberbullying is in play
- Make sure you understand potential biases

Investigator Takeaways

- Trauma may affect how someone responds to an incident
- Prepare for your interview with questions and statements
- Start with open-ended questions
- Obtain any documentary evidence that you can

Mock Interview

Questions?