



# INVESTIGATIONS AND TITLE IX

Carman-Ainsworth Community Schools

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# Notice

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# Topics Covered

- Employee Investigations (Slides 4-22)
  - *Preliminary Review/Investigations (Slide 7)*
  - *Tips on Conducting a Formal Investigation (Slides 8-9)*
  - *Interview Techniques (Slides 10-11)*
  - *Analysis of Findings (Slide 12)*
  - *Arbitrary and Capricious Standard (Slides 13-15)*
  - *Corrective Action (Slide 16)*
  - *Employee's Due Process/Weingarten Rights (Slides 18-20)*
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A photograph of an office setting. A person in a light blue shirt is standing and holding a pen over a document on a desk. Another person's hands are visible in the foreground, resting on the desk. The background is slightly blurred, showing office furniture and windows.

# Employee Investigations

# Employee Investigations – 7 Steps



Notice



Preliminary Investigation (initial strategy)



Strategize Investigation (will continue and potentially change throughout process)



Formal Comprehensive Investigation

Witness Interviews

Evidence Gathering

Meeting with parties (Due Process)



Analysis of Evidence



Findings/Conclusion



Discipline (if warranted)

# Notice



Written Notice



Verbal Notice



Once an Employer has received notice there is an obligation to investigate



First Step: A preliminary inquiry (may be the only step)



Check the applicable Collective Bargaining Agreement, Board Policy, Administrative Guideline, Employee Handbook Guidelines for Notice Requirements

# Preliminary Review/Investigation

What is the issue/complaint about?

Different laws/processes/standards of proof may apply depending on the issue/complaint.

- Teacher Misconduct/Performance—may implicate the Teachers' Tenure Act.
- Employment Discrimination Complaints.
- Title IX Complaints.
- Violation of Work Rules/Performance Issues.

Review Relevant Laws/Policies/Collective Bargaining Agreements/Investigation Procedures

- Assists in Establishing the Required Elements.
- Provides Clarity for What to Focus On.

Who needs to be involved?

- Contact Human Resources first.

Who needs to be notified and when?

- Appropriate Administrators
- Protective Services (if it's a student neglect or abuse issue)
- Police (if it involves a crime)
- Union

Administrative Leave Pending Investigation.

- Consider whether the employee needs to be suspended if the situation involves a serious allegation or the employee's presence could result in adverse consequences or further misconduct.
- Will his/her presence disrupt the educational process/building?

Requests for Confidentiality.

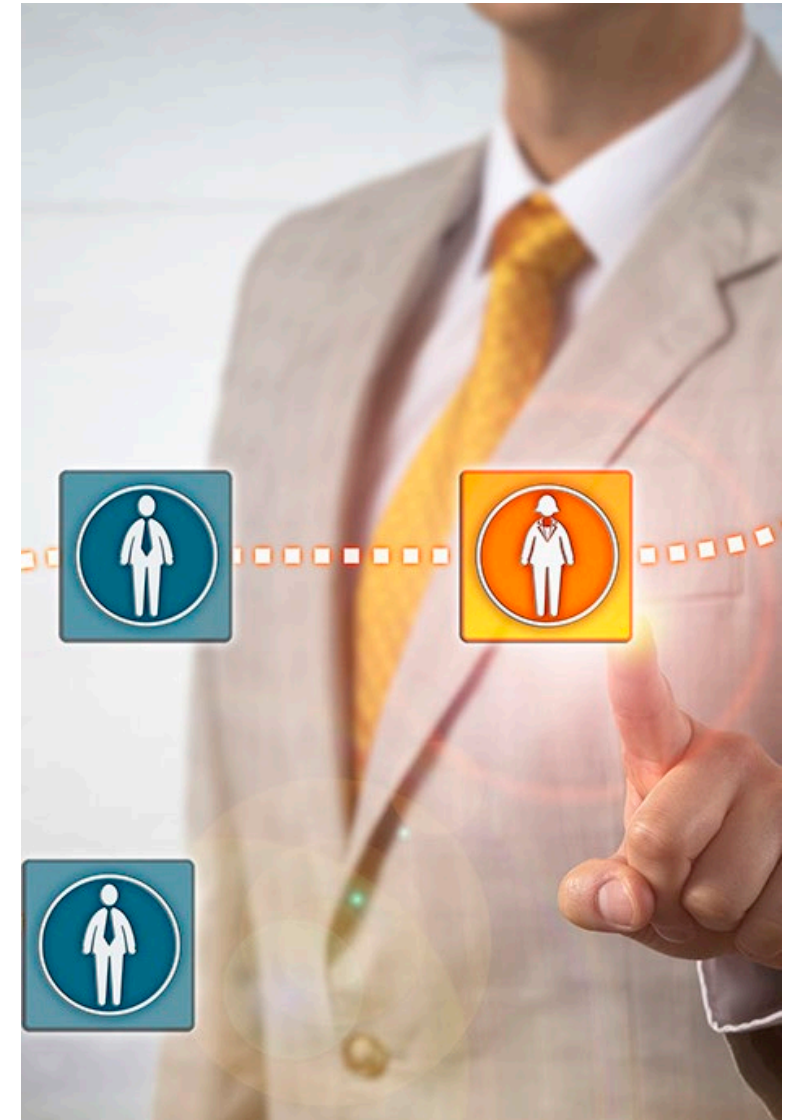
- What should you do if an alleged victim asks to keep the matter confidential?

# Conducting A Formal Investigation: General Tips

- Know the Issues.
- Obtain signed witness statements.
  - Ask witnesses to write down, in their own words, what they know about the situation.
  - This will help identify witnesses.
- Are there Undisputed Facts? Are they Significant?
- Are there Facts in Dispute? Are they Significant?
- Who Needs to be Interviewed?
- What Should be the Order?

# Conducting A Formal Investigation: General Tips Cont.

- Create an interview summary of each interview.
- Create a chronology log of all relevant documents, e-mails, dates of events, etc.
- Strategize when to notify the accused party
  - It may be immediately upon receipt of the report/notice.
  - In other circumstances, interviewing witnesses and accumulating evidence first may be the best practice.
- Document all investigation steps.
- After carefully weighing the evidence, produce a factually-supported final report, which references supporting documentation.
- Communicate the investigation conclusions to the involved parties.
- Make recommendations, including discipline (if applicable).



# Interview Techniques

- **Listen Carefully.**
  - You can often learn new information by allowing the interviewee to speak freely at first.
  - What is not revealed by the interviewee is important as well (i.e., not denying accusations).
  - An interviewee's tone, facial expressions, body language, etc. often reveal the interviewee's subjective beliefs.
  - Your first goal: understanding an answer's significance.
- **Use Thoughtful Questions.**
  - Prepare questions in advance if the information needed is known in advance.
  - Leading questions can be helpful to stimulate the conversation or clarify an answer, but they should not be used to put words in the interviewee's mouth.
  - Generally, open-ended questions are better. These can be followed up with direct, more precise questions.
  - Questions should answer who, what, where, and when, as well as determining the witness's relationship to the incident. If possible, questions answering why and how should be asked as well.

# Interview Techniques Cont.

- **Be Aware Of Your Role As The Interviewer.**
  - The interviewer's primary focus should only be on taking notes if they will be needed for future documentation. The interviewer and process is generally benefited by putting the interviewee at ease, encouraging purposeful conversation, guiding the conversation, and interpreting clues.
  - If possible, have a separate note-taker present at the interview.
  - Limit your comments only to those situations where reassurance or encouragement is required to help the student further discuss relevant matters.
  - Information gleaned from the interview should be held in confidence and not used for improper purposes.
- **Pay Attention To The Time and Place.**
  - Conduct the interview in a private, comfortable, and relaxed atmosphere where the interview can proceed without interruption.
  - Generally, the interviewee should be informed of the time needed for the interview ahead of time. A second interview can be scheduled if needed.

## Analysis of the Evidence/Findings

All evidence should be evaluated, including factual evidence by the parties and witnesses.



## Use Appropriate Standard of Review

Just Cause Standard

Arbitrary and  
Capricious Standard

Preponderance of the  
Evidence Standard  
(Title IX Investigations)

# Arbitrary and Capricious Standard Cont.

- Although the standard for discipline of teachers is no longer a prohibited subject of bargaining, the Tenure Act still applies the arbitrary or capricious standard:
  - [D]ischarge or demotion of a teacher on continuing tenure may be made only for a reason that is not arbitrary or capricious[.]” MCL 38.101.
- Tenure Commission’s First Interpretation of “Not Arbitrary or Capricious” Standard is found in *Cona v Avondale*, TTC 11-54:
  - “[F]ixed or done capriciously or at pleasure; without adequate determining principle; not founded in the nature of things; nonrational; not done or acting according to reason or judgment;...without fair, solid, and substantial cause;...without cause based on the law...not governed by any fixed rules or standard.”
- A decision is arbitrary and capricious if it is based on whim or caprice and not on considered, principled reasoning.
- The Commission stated that the “not arbitrary or capricious” standard was “highly deferential” to the controlling board.

# Arbitrary and Capricious Standard Cont.

- Even though the “not arbitrary or capricious” standard is “highly deferential” the Tenure Commission explained its role in the review of the board’s decision:
  - “...our review is not a mere formality and we are not required merely to rubber stamp the decision of a controlling board. Our responsibility in this case is to review the quality and quantity of the evidence and to determine if the decision to discharge appellant is the result of a deliberate, principled reasoning process supported by evidence.”
- The Commission cited two principles for applying the “not arbitrary and capricious” standard:
  - (1) If there is a reasoned explanation for the decision, based on the evidence, the decision is not arbitrary or capricious.
  - (2) If a controlling board overlooked important evidence or erred in appreciating the significance of evidence, its decision may be determined to be arbitrary or capricious.

# Arbitrary and Capricious Standard – Case Example

## *Whitley v Cadillac Area Pub Schs*, TTC 13-41

- A health teacher was discharged after she pled guilty to two drunk driving incidents. The teacher filed a claim of appeal with the Tenure Commission, arguing the decision to discharge her was arbitrary and capricious.
- The Commission held:
  - A controlling board can determine that certain illegal conduct is so outside the norm of acceptable behavior for a professional that, given all relevant circumstances, it merits discharge.
  - The board's decision in this case was based on proven facts surrounding the teacher's conduct and on principle consideration of those facts; it was not based on prejudice, animus or improper motives, and it did not reflect a failure to consider important evidence or to appreciate the significance of any evidence.
  - The teacher argued the ALJ did not consider evidence that the district failed to follow its own policies regarding assistance to employee with substance abuse problems. The Commission ruled that the teacher did not cite any authority to support a conclusion that a board's failure to follow its own policies regarding alcohol abuse precludes discharge of that teacher for alcohol-related criminal convictions. Further, a related administrative guideline specifically stated that a staff member can incur discipline up to and including termination if he or she commits a crime while under the influence of a chemical.

# Corrective Action – the Szopo Factors

The Tenure Commission identified ten factors to be measured in determining the appropriate disciplinary action to be taken against a teacher who has committed professional misconduct:

1. *Was the behavior planned or deliberate?*
2. *Did the behavior constitute a crime?*
3. *Did the behavior involve fraud, deceit, sexual misconduct, drugs or a weapon?*
4. *What was the teacher's motive or purpose?*
5. *Did the conduct result in harm to a specific victim and, if so, what is the gravity of the harm?*
6. *How much did the teacher's conduct deviate from the norms of appropriate conduct for members of society and teaching professionals?*
7. *Was there any previous disciplinary record, especially for the same type of misconduct?*
8. *What effect did any previous punishments or interventions have on the teacher's behavior?*
9. *What is the teacher's attitude, including whether the teacher accepts responsibility and exhibits a willingness to change?*
10. *What is the likelihood the behavior will recur?*

# Discipline

Employee Due  
Process Rights

*Weingarten* Rights

Consider Title IX  
Implications (if  
applicable)

Potential right to  
hearing and  
opportunity for  
cross examination

Simultaneous  
written notice to  
both parties of the  
outcome

A public employee facing dismissal for misconduct has a right to:

Oral or written notice of the charges;

An explanation of the employer's evidence; and

An opportunity to respond, in person or in writing, to the allegations of misconduct

Check the employee's collective bargaining agreement for any additional due process rights to which he or she may be entitled to.

Generally, employees facing dismissal for misconduct do not have the right to:

Full evidentiary hearings;

Cross-examine the witnesses against them;

Confront their accusers; or

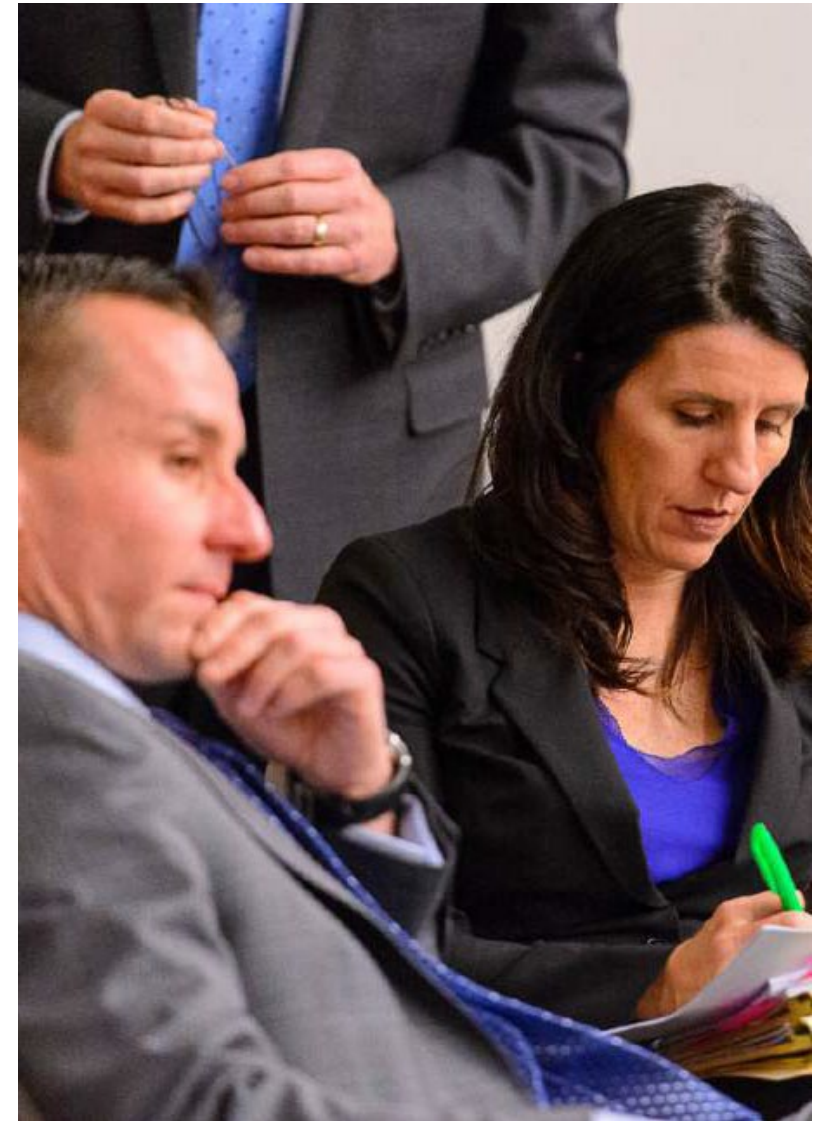
Compel witnesses to testify.

## Employee Due Process Rights

See *Cleveland Bd of Educ v Loudermill*, 470 US 532 (1985);  
*Plymouth-Canton Comm'y Schs v State Tenure Commission*, 435 Mich 76 (1990).

# Weingarten Rights

- A unionized employee has the right to have union representation at an investigatory meeting or interview that the employee reasonably believes could result in discipline. *NLRB v Weingarten*, 420 US 251 (1975).
  - The employee must make the request; an employer need not provide the representation or offer it to the employee.
- One rationale advanced by the NLRB, and upheld by the Supreme Court, for giving employees the right to have a witness present at such a meeting is to have a third party who can confirm what actually transpired between the employee and employer during the confrontation.
  - Even if an employee's request for representation is solely to substantiate his story at a later date, the request is proper and must be granted. See *ITT Lighting Fixtures v NLRB*, 719 F2d 851, 856 (6th Cir, 1983).



# Weingarten Rights Cont.

- A nonunionized employee has the right to have a coworker present during an investigatory meeting that the employee reasonably believes could result in discipline.
  - The D.C. Circuit Court of Appeals has extended the holding in *Weingarten* to situations involving non-union employees, holding that these employees may request the presence of a co-worker during an interview or meeting if a union employee would be granted representation in the same situation under *Weingarten*. See *Epilepsy Foundation of NE Ohio v NLRB*, 268 F3d 1095 (DC Cir, 2001).





# *Disciplinary Letter Checklist*

Before issuing discipline, make sure that you have reviewed and complied with all steps on the just cause flow chart (see Supplemental Handout).

Discipline may be issued for misconduct or omission.

The Disciplinary Letter should consist of:

- A statement that this letter constitutes discipline (specify type of discipline, whether written warning, written reprimand or suspension without pay).
- A statement of the facts involved in the misconduct, omission or failure to perform to an acceptable level. Such statement shall include: 1) the date of the incident, 2) time of the incident, 3) place of the incident, 4) witnesses to the incident and 5) actions of the individuals involved.
- A quotation of the rule or regulation breached. If the behavior did not breach a rule or regulation but fell below an acceptable standard, a statement of the standard of behavior which employees will be expected to maintain.
- An outline of any previous discipline issued for comparable or related offenses, which are documented.
- A statement if the employee does not improve, he/she will be subject to further disciplinary action.



## *Disciplinary Letter Checklist*

- A statement of a reasonable period of time within which it is expected that the misconduct, omission or the failure to perform to an acceptable level will be corrected.
- A statement that the employee is being given another opportunity to improve his/her conduct, and an expression of hope that he/she will do so.
- A statement outlining how the administration will help correct the employee's behavior.

The Disciplinary Letter shall be personally delivered to the employee and the employee shall acknowledge receipt.

A copy of the discipline shall be placed in the employee's personnel file as a permanent record of misconduct or omission.

\*If upon being informed that the employee is to receive discipline, the employee requests a union representative, the discipline shall not be given until a representative is present.

\*Unless your contract specifies otherwise, the employee must make a request for a union representative. Management has no duty to inform the employee of this right.

# State & Federal Laws

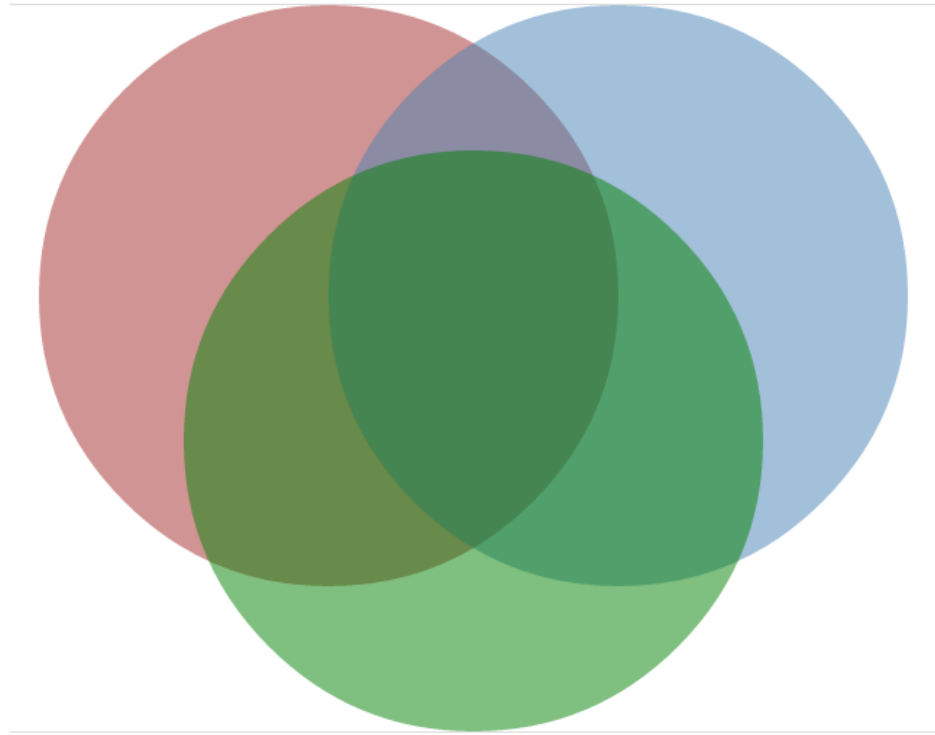


# POTENTIAL CAUSES OF ACTION AGAINST SCHOOL DISTRICTS

STATUTE	ALLEGED VICTIM/ PERPETRATOR	UNLAWFUL CONDUCT	SCHOOL DISTRICT LIABLE WHEN...	FILING REQUIREMENTS
<b>TITLE IX</b>	<p>Most commonly –</p> <ul style="list-style-type: none"> <li>•Student/Employee; and</li> <li>•Student/Student</li> </ul> <p>Can cover –</p> <ul style="list-style-type: none"> <li>•Employees and third-parties (Board members, volunteers, contractors) as victims or perpetrators.</li> </ul>	<ul style="list-style-type: none"> <li>•Sex discrimination</li> <li>•Sexual harassment</li> <li>•Sexual violence</li> </ul>	<ul style="list-style-type: none"> <li>•Employee in position of authority commits quid pro quo act of harassment.</li> <li>•District has actual knowledge of harassment and acts with deliberate indifference (its conduct or lack thereof is clearly unreasonable in light of the circumstances)</li> <li>•District knew or should have known of the harassment and the district failed to take immediate and appropriate corrective action.</li> </ul>	<p>180 days to file complaint with OCR; 3 years to file complaint in court</p> <p>Can file in court without filing with OCR first</p>
<b>TITLE VI</b>	<ul style="list-style-type: none"> <li>•Applicants, Students, Parents/District</li> <li>•Employee/District</li> <li>•Employee</li> <li>•Student/Student</li> </ul>	<ul style="list-style-type: none"> <li>•Race</li> <li>•Color</li> <li>•National Origin</li> </ul>	<ul style="list-style-type: none"> <li>•District directly discriminates against individuals in its discipline, curriculum, English language instruction, or other areas, based on race, color, or national origin.</li> <li>•District has actual knowledge of one student’s harassment of another based on membership in protected class and district acts with deliberate indifference</li> </ul>	<p>180 days to file complaint with OCR; 3 years to file complaint in court</p> <p>Can file in court without filing with OCR first</p>

# POTENTIAL CAUSES OF ACTION AGAINST SCHOOL DISTRICTS CONT.

STATUTE	ALLEGED VICTIM/ PERPETRATOR	UNLAWFUL CONDUCT	SCHOOL DISTRICT LIABLE WHEN...	FILING REQUIREMENTS
TITLE VII	<ul style="list-style-type: none"> <li>•Employee/ Employee</li> <li>•Employee/District (i.e., the district has discriminatory policies or practices)</li> </ul>	Discrimination or harassment based on race, color, religion, national origin, and sex.	<ul style="list-style-type: none"> <li>•It knows of harassment and fails to take immediate and appropriate corrective action to stop and correct it</li> <li>•Discrimination/harassment results in tangible employment action (i.e., firing, demotion, failure to promote)</li> </ul>	<p>300 days to file complaint with EEOC; Can file in court within 90 days of receiving a right to sue letter from the EEOC</p> <p>Must file complaint with EEOC first</p>
ELLIOTT-LARSEN	<p>Most commonly –</p> <ul style="list-style-type: none"> <li>•Employee/ Employee</li> <li>•Student/Employee</li> <li>•Student/Student</li> </ul>	<p>Discrimination or harassment –</p> <ul style="list-style-type: none"> <li>• By employers, based on religion, race, color, national origin, age, sex, height, weight, and marital status.</li> <li>• By schools, based on religion, race, color, national origin, and sex</li> </ul>	It had notice of the harassment and failed to rectify the problem. An employer has notice when a reasonable employer would have been aware of the substantial probability sexual harassment was occurring.	<p>300 days to file complaint with the Michigan Department of Civil Rights; 3 years to file complaint in court.</p> <p>Can file in court without filing complaint with MDCR first</p>



# Overlap of Discipline/Evaluation

# Insubordination/Discipline

- Insubordination is willful disobedience to a reasonable, consistently applied directive or policy by a person fully understanding such directive or policy.
- A school district must apprise the employee that specific conduct is unacceptable. The teacher must be given adequate time to correct his behavior.



# Distinguishing Insubordination from Incompetence

- Even if a teacher's problems are related to his/her competency, an administrator can discipline within the realm of insubordination, if the administrator can show a teacher's:
  - Non-compliance with a known reasonable directive from a person authorized to give such directive;
  - To take or refrain from taking a specific action;
  - Which the teacher understands and is capable of complying with; and
  - The teacher's non-compliance interferes with the operation and management of the school district.
- Insubordination entails a presumption of adverse effect.
- An administrator cannot establish that a teacher was insubordinate if the teacher tried to comply without success.
- A specific written directive provides better evidence that a directive has been violated.



# Distinguishing Insubordination from Incompetence Cont.

- Examples of insubordination from Michigan tenure cases:
  - Failure to send incident reports (*Flowers*, TTC 91-20).
  - Failure to meet specific deadlines (*Flowers*, TTC 91-20).
  - Failure of principal to file investigation/discipline reports (*Flowers*, TTC 91-20).
  - Failure of principal to file information on number of students enrolled in classes (*Flowers*, TTC 91-20).
  - Violating directive to grade late papers (*Mann*, TTC 79-58).
  - Violating verbal and written directives to provide students' record grades (*Mann*, TTC 79-58).
  - Failure to draft curriculum documentation (*Mikkelson*, TTC 82-59).

# Distinguishing Insubordination from Incompetence Cont.

- Leaving work early without permission (*Mikkelson*, TTC 82-59).
- Failing to meet with advisory committee to help with community interaction, field trips (*Mikkelson*, TTC 82-59).
- Excessive absences, provided notice has been given that absences are excessive and time has been given to rectify matter (*Graham v Trenton*, TTC 78-12).
- Assaulting an administrator (*Davis v Grand Rapids*, TTC 75-26).
- Failure to improve poor relations with other staff (*Adis*, TTC 94-15; *Buck*, TTC 88-28-R).
- Failure to turn in lesson plans, grade book.
- Corporal punishment.
- Refusal to perform teacher's rotating duties, including hall duty.
- Keeping students from class despite directive not to.

# Investigation Documents

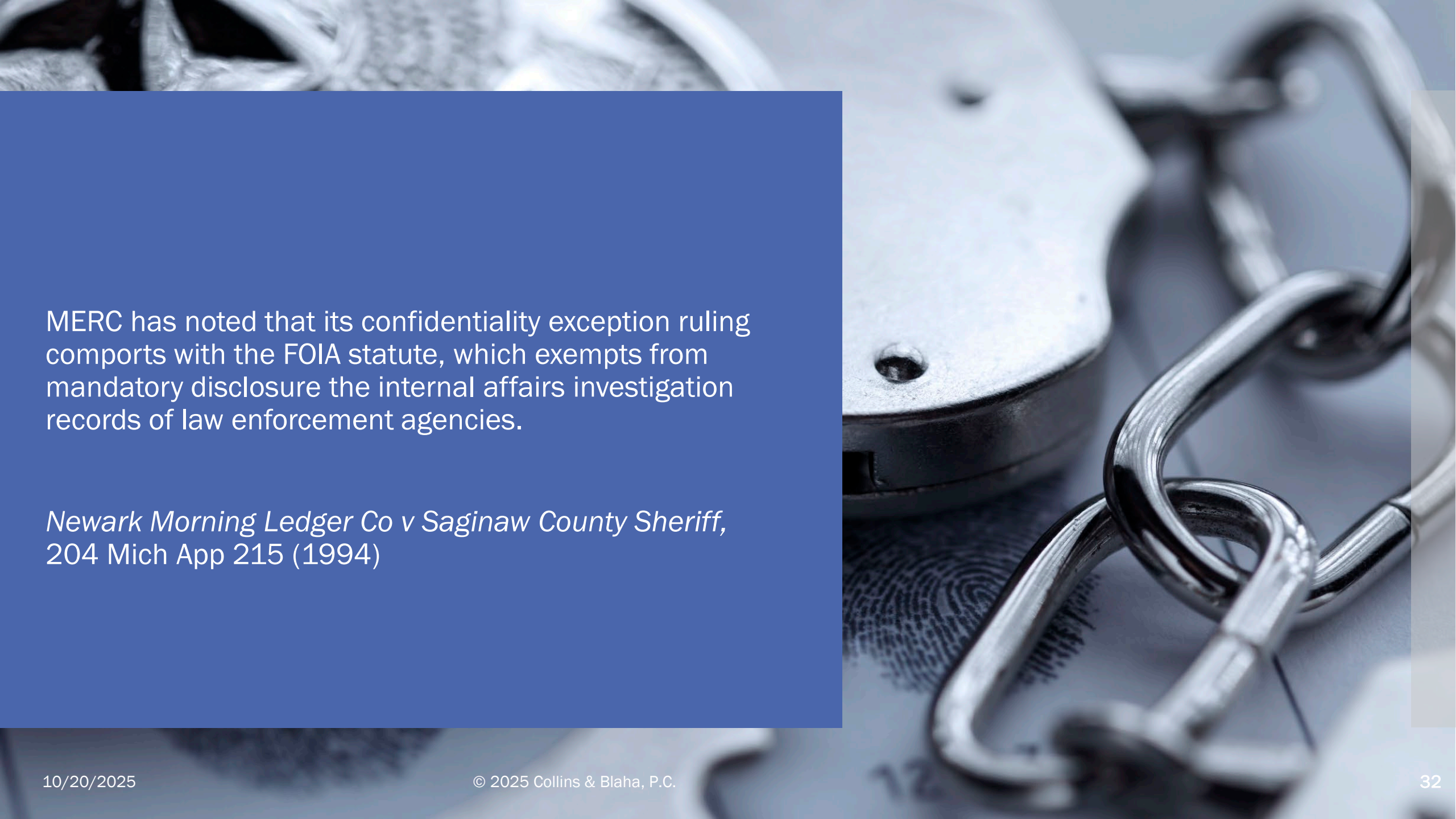
A public employer has no duty to disclose internal investigation report and witness statements because those documents are exempt from disclosure under the confidentiality exception.

*“...balancing the employer’s interest in keeping the information confidential within the union’s need for information to adequately represent the members...”*

*“...NLRB-type balancing test would prove unworkable with regard to disputes arising between public sector employees and labor organizations...”*

*Michigan State University, 1986 MERC Lab Op 407, 409*





MERC has noted that its confidentiality exception ruling comports with the FOIA statute, which exempts from mandatory disclosure the internal affairs investigation records of law enforcement agencies.

*Newark Morning Ledger Co v Saginaw County Sheriff,*  
204 Mich App 215 (1994)

A pair of scales of justice is shown against a blue background. The scales are made of metal and have two pans hanging from a central beam. The scales are slightly tilted, with the right pan being higher than the left pan. The lighting is dramatic, highlighting the metallic surfaces and the chains of the pans.

# Title IX Overview of Legal Obligations and Investigations

# Introduction to Title IX

- Title IX of the Education Amendments of 1972 is a federal law prohibiting discrimination on the basis of sex in all federally-funded educational institutions:

*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.*

- Title IX applies to K-12 schools and postsecondary educational institutions that receive federal financial assistance.
- Title IX was established to:
  1. Prevent federal resources from being used to support discriminatory practices in education.
  2. Protect individuals against such discriminatory practices.

# Scope of Title IX

## Types of Interactions Covered

- Student/Student
- Employee/Student
- Employee/Employee
- Could also involve third parties, such as volunteers, third-party contractors, etc.

## Types of Conduct Covered

- Sexual harassment
  - Includes quid pro quo harassment
- Sexual assault
- Dating violence
- Domestic violence
- Stalking

# Definition of Sexual Harassment

“Sexual Harassment” means conduct on the basis of sex that satisfies one or more of the following:

1. A Board employee conditioning the provision of an aid, benefit, or service of the District on an individual’s participation in unwelcome sexual conduct (often called “*quid pro quo*” harassment);
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, dating violence, domestic violence, or stalking.

# Definitions

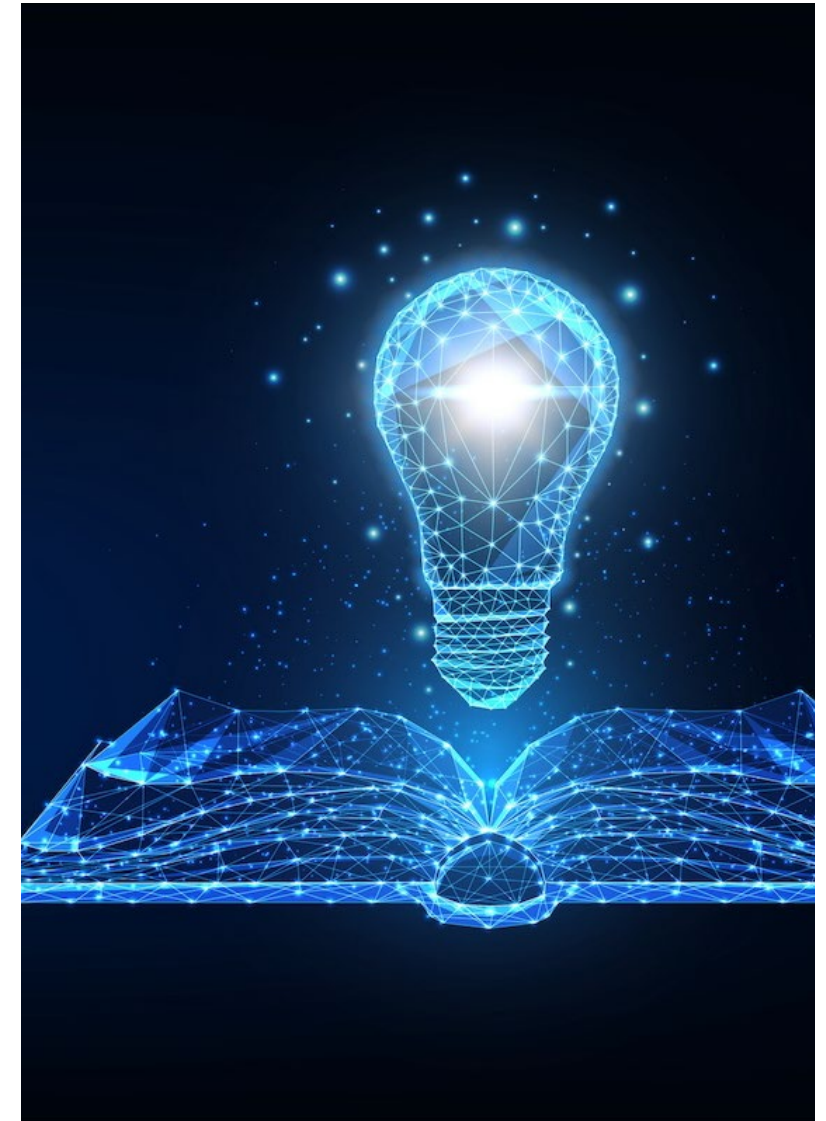
- ***Sexual assault*** means any sexual act directed against another person, **without the consent of the victim**, including instances where **the victim is incapable of giving consent**, and the "nonforcible" sex offenses of Incest and **Statutory Rape**. Sexual assault includes rape, sodomy, sexual assault with an object, **fondling**, incest, and statutory rape.
- ***Fondling*** is the **touching of the private body parts of another person for the purpose of sexual gratification**, without the consent of the victim, including instances where the victim **is incapable of giving consent** because of age or because of temporary or permanent mental or physical incapacity.
- ***Statutory Rape*** is sexual intercourse with a person who is under the statutory age of consent as defined by State law.
- ***Consent*** refers to words or actions that a reasonable person would understand as agreement to engage in the sexual conduct at issue. A person may be incapable of giving consent because of age or because of temporary or permanent mental or physical incapacity. A person who is incapacitated is not capable of giving consent.

# When does the District have an obligation to act?

- District has an obligation to act when:
  1. It has actual knowledge;
  2. Of sexual harassment;
  3. Occurring within the school's education program or activity;
  4. Within the United States.

# Actual Knowledge

- “[N]otice of sexual harassment or allegations of sexual harassment . . . to any employee of an elementary and secondary school. Imputation of knowledge based solely on vicarious liability or constructive notice is insufficient to constitute actual knowledge. This standard is not met when the only official of the recipient with actual knowledge is the respondent.” 34 CFR 106.30(a).
- The District is on notice of sexual harassment if **ANY K-12 EMPLOYEE** has knowledge of the allegations.
- **All employees need to know the legal definition of sexual harassment and what to do if they become aware of such allegations.**



# Education Program or Activity

- The words **“effectively denies a person equal access to the school’s education program or activity”** mean the District has a duty to respond only if the harassment occurs as part of the school’s operations – in locations, events, or circumstances **where the district has substantial control over the harasser and substantial control over the context in which the harassment occurs.**
- Ask these questions:
  - Did the sexual harassment occur as part of the District’s operations (i.e., within its education program or activities)? AND
  - Did the sexual harassment occur in a location, at an event, or in circumstances where the District has substantial control over the harasser and substantial control over the context in which the harassment occurred?

# District's Obligation to Act

- The District's response to an allegation of sexual harassment cannot be **deliberately indifferent**, or “clearly unreasonable in light of the known circumstances.”
- The District must:
  - Offer both parties supportive measures
  - Investigate in accordance with its policies and Title IX regulations
  - Determine if sexual harassment occurred and
  - If it is determined that sexual harassment occurred, determine what remedial actions should be taken to remedy the harassment and prevent its reoccurrence.



# Liability Under Title IX

- **Deliberate Indifference Standard:** “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 [of federal funds] is **deliberately indifferent** only if its response to sexual harassment is **clearly unreasonable** in light of the known circumstances.” [34 CFR 106.44(a) (emphasis added).]
- A school district is also liable under Title IX if a school employee commits quid pro quo sexual harassment.
  - A school district can be liable for monetary damages under Title IX in cases involving an employee’s harassment of a student (quid pro quo or hostile environment) when the district has actual knowledge of the harassment and the school district acts with deliberate indifference. See *Gebser v Lago Vista Ind Sch Dist*, 524 US 274 (1998).

# Title IX

Complaints and the  
Investigation Process



# Reporting Sexual Harassment

- Who *can* file a report or informal complaint of sexual harassment?
  - Any person, at any time
  - Can be a friend, witness, parent, etc.
  - Can be anonymous
- Who is *required* to file a report or informal complaint of sexual harassment?
  - Any school employee who observes, hears about, or has any notice of sexual harassment or allegations of sexual harassment.
- Remember: the District has actual knowledge of sexual harassment if *any* District employee has notice of sexual harassment.

# Title IX Coordinator Obligations

- **After receiving a report of alleged sexual harassment, the Title IX Coordinator must:**
  1. Promptly contact the alleged complainant/victim and parent(s).
  2. Discuss the availability of supportive measures (and that they are available whether or not a formal complaint is filed).
  3. Coordinate the effective implementation of supportive measures; any supportive measures provided shall be confidential to the extent possible.
  4. Explain to the complainant the process for filing a formal complaint.
  5. Remain completely neutral.
- A pending criminal investigation does not alleviate the District of its duty to conduct an independent Title IX investigation or to respond promptly to complaints.
- **The District should NOT delay its investigation pending the outcome of a criminal investigation.**

# Supportive Measures

- Supportive measures are non-disciplinary, non-punitive individualized services offered as appropriate and as reasonably available, without fee or charge, to both the complainant and the respondent.
- Supportive measures must be designed to protect the safety of all parties and to deter sexual harassment.
- Supportive measures must be made available before or after the filing of a formal complaint or where no formal complaint has been filed, in the cases of both student and employee complainants.
- IDEA, Section 504, and/or the ADA may impact what supportive measures are provided and the investigation generally.
- Emergency removal may apply to the alleged respondent if he/she is a danger to health or safety.
- District staff alleged to be respondents may be placed on administrative leave.

# Supportive Measures May Include

Counseling

Deadline Extensions or other curriculum-related adjustments

Modifications to work or class schedules or locations

Mutual restrictions on contact between the parties

Leaves of absence

Increased security and monitoring of certain areas of the campus

Academic support or tutoring services

# Emergency Removal

- Subject to limits and procedures imposed by state and/or federal law, the District may remove a student Respondent from its education program or activity on an emergency basis **after conducting an individualized safety and risk analysis.**
  - The purpose of this analysis is to determine if the student poses an *immediate* threat to the physical health or safety of any student or other individual arising from the allegations of sexual harassment that justifies removal.
- If the District determines that the student poses such a threat, it must **notify** the student (and his/her parents if under 18) and the student must have **an opportunity to challenge the decision** immediately following the removal.

# Formal Complaint is Filed (Complainant)

## What is a formal complaint?

- A document filed by the Complainant or signed by the Title IX Coordinator that alleges sexual harassment against a respondent and requests that the District investigate.
- Can be an email or document submitting electronically that contains the Complainant's physical or digital signature, or otherwise indicates the Complainant is the person filing the Formal Complaint.

## Who can sign a formal complaint?

- Complainant (or the complainant's parent/guardian if under 18 years of age).
- The Title IX Coordinator

A formal complaint *must* be dismissed if the conduct alleged:

- Would not constitute sexual harassment;
- Did not occur in the District's education program or activity; or
- Did not occur against a person in the United States.

A formal complaint *may* be dismissed, in the discretion of the Title IX Coordinator, if:

- The Complainant notifies the Title IX Coordinator in writing that he/she would like to withdraw the formal complaint/allegations;
- The Respondent is no longer enrolled or employed by the District; or
- Specific circumstances prevent the District from gathering evidence sufficient to reach a determination as to the Formal Complaint or allegations therein.

The Title IX Coordinator must provide the parties with prompt written notice of the dismissal and the reasons for dismissal.

Determine if  
Complaint  
Should be  
Dismissed  
(Title IX  
Coordinator)

# Provide Option of Informal Grievance Process (Title IX Coordinator)

## 1. Formal resolution process

- Complainant must sign a formal complaint before the grievance process can begin.

## 2. Informal resolution process

- May be initiated after filing of formal complaint.
- **Informal resolution process is NOT available for employee-on-student harassment or cases involving sexual assault.**
- Both parties must voluntarily agree in writing.
- The parties may switch to an informal process even after a formal resolution has begun, and may end the informal process and return to the formal process at any time before agreeing to a resolution.
- **Informal resolution process = mediation, restorative practices, etc.**

# Role of Title IX Coordinator/ Investigator/ Decision Maker/Appeals Officer

- **Title IX Coordinator:**
  - Supervises investigation and ensures compliance with Title IX.
- **Investigator:**
  - Conducts investigation and completes report.
- **Decision-Maker:**
  - Makes determination of responsibility.
- **Appeals Officer:**
  - Hears appeals of dismissal and determination of responsibility.

*The Investigator, Decision-Maker, and Appeals Officer are required to be different people.*

- **Conflict of Interest.** All individuals involved in the Title IX process are required to:
  - Be impartial;
  - Have no bias;
  - Have no conflict of interest;
  - Be cognizant of implicit bias;
  - Avoid prejudgment of the facts.
  - Avoid Reliance on Sex Stereotypes

# Written Notice (Title IX Coordinator)

**The Title IX Coordinator must provide written notice of the following to all known parties:**

- The district's grievance process, including any informal resolution process;
- The allegations of sexual harassment, including sufficient details known at the time and sufficient time for the respondent to prepare a response before any initial interview. Sufficient details include the identities of the parties, if known, the conduct allegedly constituting sexual harassment, and the date and location of the alleged incident, if known;
- 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;
- A statement that the parties may have an advisor of their choice, who may or may not be an attorney; and
- A statement informing the parties that Board Policy prohibits knowingly making a false statement or submitting false information during the grievance process.

## How to Conduct An Investigation (Investigator)

### A Title IX investigation *must* include:

- An opportunity for all parties to provide witnesses and evidence.
  - Ask at the end of the interview – is there anyone we should talk to who has information about this matter? Are there any documents or other evidence you would like us to review as part of our investigation?
- An opportunity for both parties to have others present during any meeting or proceeding, including the advisor of their choice (who may be an attorney but is not required to be).
  - When the Complainant or Respondent is interviewed, they must be given advance notice in writing of the day, time, location, and participants of the meeting.
  - When interviewing a party who is under 18 years of age who has made allegations of sexual harassment or who is accused of committing sexual harassment, a parent should always be present.
  - Also consider whether a parent should be notified and given advance notice and the opportunity to be present during interviews of non-party student witnesses (consider the age of the witness, the topics to be discussed, and other relevant factors).

# How to Conduct An Investigation (Investigator)

A Title IX  
investigation  
*may* include:

## Conducting interviews

- Complainant
- Respondent
- Other witnesses

## Obtaining written witness statements

Reviewing student and personnel files, video footage, and/or police reports or similar documents, as applicable

Reviewing emails, social media posts, text messages, or other communications

Reviewing any evidence provided by either party

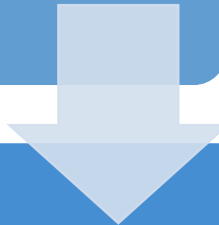
Retaining an outside investigator

# Fairly Summarize Evidence (Investigator)


- Throughout the investigation, the investigator should be keeping notes and drafting summaries on the evidence he or she is collecting. This includes:
  - **Interview summaries for each witness** including the date of the interview, who conducted the interview, a list of each person present, and a summary of the witness's statements.
  - **Summaries of other evidence** (i.e. video footage, email communications, text messages, a Student Code of Conduct provision, a personnel file, etc.).
- The Investigator must compile the interview and document summaries into a form that can be provided to both parties for review and inspection.
- The Investigator will subsequently be required to draft an investigation report to provide to the Title IX Decision-Maker, which will need to include the evidence obtained during the investigation (i.e., a summary of the interviews and documentary evidence).

# Provide Parties with Evidence Summary (Title IX Coordinator)

The **Title IX Coordinator** must send each party and the party's advisor, if applicable, the evidence obtained as part of the investigation.



The parties must be given at least 10 calendar days to submit a written response.



The **Investigator** must consider the parties' written responses, if any, before completing the investigative report.

# Complete Investigative Report and Provide to Parties (Investigator)

- The **Investigator** must create an investigative report that fairly summarizes the **relevant** evidence and send it to each party and the party's advisor, if applicable, for their review and written response.
  - Any written response must be provided to the Decision-Maker, who must consider it when making his or her decision.
  - The investigative report must be sent at least 10 calendar days before the Decision-Maker issues his/her determination regarding responsibility (final decision).
- The Title IX Investigator also must send the report to the Decision-Maker, who is appointed by the Title IX Coordinator.
- Consider FERPA compliance.



# Language Matters

- The language used in the investigative report (and determination of responsibility) creates a narrative of the case.
- Avoid language that:
  - Deflects responsibility from the perpetrator or makes the victim the subject of the sentence (“Jamie was raped by Chris”);
  - Uses language of consensual sex or sexual acts, when not appropriate (“they kissed” or “he had sex with her”);
  - Uses terms that are not defined by law or statute, or by the report itself (i.e., “private parts,” or “crotch” – unless these terms are being used by a witness, which should be clear – The Complainant stated that respondent touched his “private parts” at recess).

## Parties May Submit Questions (Decision-Maker)

- Before reaching a determination regarding responsibility, the Decision-Maker must give both parties the opportunity to submit written, relevant questions the party wants asked of any party or witness.\*
  - Those questions, *if relevant*, are submitted to the other party or witness, to be answered, and the answers provided to the other party. Limited follow-up questions are permitted.
  - There are no specific timelines in place for this process, but we recommend that the parties be given a deadline for submitting questions and another for submitting responses.
  - This process can be facilitated by the Title IX Coordinator, if that is easier.
  - If a question is determined to not be relevant, the Decision-Maker must explain to the party proposing the question why the question was excluded.

\*This process should be started as soon as the investigative report is sent to the parties and Decision-Maker.



# What is Relevant Evidence?

- Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence (no definition of relevance in the regulations).
  - **Evidence that makes a material fact more or less likely to be true.**
  - Does this evidence help to prove or disprove anything material to the investigation?
- Rape Shield Protections
  - 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.

# Determination of Responsibility (Decision- Maker)

- The Decision-Maker must simultaneously send to both parties a **written determination of responsibility**, which must include:
  - The allegations;
  - The steps taken during the investigation, beginning with receiving the formal complaint (including notifications provided to the parties, interviews with parties and witnesses, and methods used to gather other evidence);
  - Findings of fact supporting the determination;
  - A conclusion (using the preponderance of the evidence standard) for each allegation, along with rationale for the conclusion;
  - Conclusions regarding the application of the applicable code of conduct to the facts;
  - Disciplinary sanctions recommended, if applicable;
  - Remedies for the Complainant, if applicable; and
  - Information about the appeals process.

# Appeal (Decision-Maker on Appeal)

- Either party can file an appeal from a determination regarding responsibility or from the Title IX Coordinator's decision to dismiss a formal complaint by submitting a written appeal in writing.
  - Upon receipt of an appeal, the Title IX Coordinator will notify the other party in writing.
  - Both parties will have 5 days after notice is provided to submit a written statement in support of or challenging the decision being appealed.
- **An appeal must be based on one of the following, which affected the outcome of the matter:**
  - Procedural irregularity;
  - New evidence that was not reasonably available when the determination was made;
  - Conflict of interest or bias for/against one of the parties by the Title IX Coordinator, investigator, or decision-maker; or
  - The recommended remedies are unreasonable in light of the findings of fact.

# Title IX Record Keeping

Records relating to Title IX reports must be maintained for at least seven (7) years.

Records of any supportive measures

Investigative reports

Disciplinary sanctions imposed on Respondent

Remedies provided to the Complainant

Appeals and results

Informal resolutions and results

All materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process.

These materials must also be made publicly available on the District's website.



Questions?

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Jeremy D. Chisholm earned his bachelor's degree in Political Science with minor concentrations in economics, foreign affairs, and Spanish, from St. Mary's College of Maryland, and his J.D. from Ave Maria Law School in Ann Arbor, Michigan. During law school he was an active and award-winning competitor in state and national moot court competitions. Prior to practicing law in Michigan, Mr. Chisholm worked in Washington, D.C., for the United States Securities and Exchange Commission. Mr. Chisholm concentrates his practice in employment relations and labor law, while maintaining a broad practice serving the general needs for school clients.

