Mid-Ohio ESC Title IX Workshop

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Title IX Training

- Title IX Sexual Harassment and other important definitions
- Defining roles: Title IX Coordinator, investigator, decision-maker
- The grievance process
- Impartiality
- Relevance
- Effective investigations
- The investigative report

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Important Definitions

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Discrimination and harassment on the basis of sex

- Title IX prohibits sex-based discrimination in educational programs and activities
- Title IX provides:

  "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"

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Title IX Sexual Harassment

- Applies grievance procedure to sexual harassment, which is defined as conduct on the basis of sex that satisfied one or more of the following:
  - Conditioning provision of an aid, benefit, or service of the District on an individual's participation in unwelcome sexual conduct; (Quid pro quo)
  - Unwelcome conduct that a reasonable person would determine to be so severe, pervasive and objectively offensive that it effectively denies a person equal access to the District's educational program or activity; (hostile environment) or
  - "Sexual assault" as defined in 20 USC 1092(f)(6)(A)(v), "dating violence" as defined in 34 USC 12291(a)(10), "domestic violence" as defined in 34 USC 12291(a)(8) or "stalking" as defined in 34 USC 12291(a)(30)

Determining the Applicable Standard

- If alleged harassment or discrimination on the basis of sex doesn't meet the revised definition of sexual harassment, direct the individual to the applicable process for investigation
- The Final Rule became effective August 14, 2020 and applies to complaints/incidents on or after this date
- For earlier complaints/incidents previous standard can be applied
  - Retain old policy/procedures if plan to apply them
  - Clearly communicate which standard will apply in these circumstances

Complaint Dismissal

- Complaints are required to be dismissed under certain circumstances
  - Required complaint dismissal does not preclude the District from taking action under the Code of Conduct
- Permissive options for complaint dismissal also exist
- Whether mandatory or permissive, notice of complaint dismissal must be provided to both parties

Complaint Dismissal

- Formal complaints **must** be dismissed in the following circumstances:
  - Alleged conduct would not constitute sexual harassment even if proven;
  - Alleged conduct did not occur in the District's education program or activity; or
  - Alleged conduct did not occur in the United States

Complaint Dismissal

- Formal complaints or allegations **may** be dismissed anytime during investigation or hearing in the following circumstances:
  - Complainant provides written notice to Title IX Coordinator requesting withdrawal of formal complaint or any allegations;
  - Respondent no longer is enrolled or employed by the District; or
  - Specific circumstances prevent the District from gathering sufficient evidence to reach a determination as to the complaint or allegations

Educational Program or Activity

- The Final Rule defines the scope of the "educational program or activity"
- This includes locations, events or circumstances over which the District exercised substantial control over both the Respondent and the context in which the sexual harassment occurs

Other Important Definitions

- "Complainant"
  - Individual who is alleged to be the victim of conduct that could constitute sexual harassment
- "Respondent"
  - Individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment
- "Actual Knowledge"
  - Notice of sexual harassment or allegations of same to the Title IX Coordinator or any official of the District who has authority to institute corrective measures on behalf of the District, or to any employee of any elementary or secondary school

Other Important Definitions

- "Formal Complaint"
  - Document filed by Complainant or signed by Title IX Coordinator alleging sexual harassment against a Respondent and requesting District investigate the allegation
- "Supportive Measure"
  - Non-disciplinary, non-punitive individualized services offered to Complainant or Respondent as necessary and appropriate at any stage in the process
  - ***Note***: Measures included in policy as potential disciplinary measures cannot be applied as supportive measures
  - ***Note***: Disciplinary measures cannot be applied until a final determination has been made

Roles and Responsibilities

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Defining Roles

- All current documentation should reference the person serving as Title IX Coordinator
  - Should not use Compliance Officer reference
- The Title IX Coordinator can serve as investigator
- However, neither the Title IX Coordinator nor the investigator can serve as decision-maker
- The investigator is responsible for gathering evidence that will be used by the decision-maker in making his or her decision with regard to the complaint

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The Grievance Procedure

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Applicable Procedures

- Districts first must determine the applicable standard to apply.
- Complaints that meet the new definition of "sexual harassment" must be handled under the Grievance Procedure
- Complaints of incidents that do not meet the definition should be addressed under other complaint procedures
- Current Title IX regulation provisions governing athletic participation, employment and single-sex education are not impacted by the final rule

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The Grievance Procedure

- Consolidation and informal resolution
- Records retention
- Due process
- Required notices
- Evidentiary standards
- Retaliation
- Hearings
- Appeals

Consolidation and Informal Resolution

- **<u>Consolidation</u>**
  - Formal complaints may be consolidated in circumstances where allegations arise out of the same circumstances
- **<u>Informal Resolution</u>**
  - District may offer informal resolution process at any time during a formal complaint process prior to determination of responsibility, except in the case of allegations that an employee sexually harassed a student or student-to-student sexual assault
  - In order to offer this option, District must:
    - Provide written notice to the parties; and
    - Obtain the parties' voluntary, written consent to informal resolution process

Informal Resolution Notice

- Written notice to the parties must disclose the following:
  - The allegations;
  - Informal resolution process requirements, including circumstances that would preclude a party from resuming the formal complaint process and ability to withdraw from informal resolution; and
  - Consequences resulting from informal resolution process participation, including records that will be maintained or may be shared

Notices

- Notice of allegations must include:
  - Sufficient details known at the time, including identity of the parties; date and location of the alleged incident; and the alleged conduct
    - Notice of allegations that may arise during the process
  - Sufficient time to prepare a response
- A statement regarding presumption of Respondent innocence and that determination will be made at the end of the grievance process
- Notice of the right to have an advisor present and to inspect and review evidence
- Notice that the Code of Conduct prohibits false statements

Records Retention

- Certain records and documentation must be maintained for a period of seven (7) years, including:
  - Training materials
  - Documentation of District response to all reports and formal complaints
  - Investigation records
  - Record of formal resolutions
  - Records related to appeals

Due Process, Timelines, Notices

- Burden of proof and gathering evidence rests with the District
- Complainant and Respondent must be treated equitably
- Staff members must be properly trained and free from bias or conflict of interest
- The timeline for the grievance process must be reasonably prompt
  - Familiarize yourself with board policies and procedures in advance to ensure compliance with all stated timelines
- Written notice of any hearings, interviews and/or meetings must be provided
- Parties must receive notice of the grievance process and allegations

Evidentiary Standards

- **Preponderance of the Evidence:** It is "more likely than not" that the perpetrator committed the action. Used in civil context. Also known as 51% rule
- **Clear and Convincing:** It is "substantially more likely to be true that the perpetrator committed the act"
- **Beyond a Reasonable Doubt:** The only logical explanation is that the perpetrator committed the act/crime, no other logical explanation exists. This is used in the criminal context because a high standard is needed to deprive someone of freedom
- The same standard should be applied to complaints against students and complaints against employees

Retaliation Prohibited

- No school or 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 because the individual has made a report or complaint, testified, assisted, or participated or refused to participate in any manner in a Title IX investigation, proceeding, or hearing.



Retaliation

- Charging an individual with code of conduct violations that do not involve sexual harassment, but arise out of the same facts or circumstances as a report or formal complaint of sexual harassment, for the purpose of interfering with any right or privilege secured by Title IX constitutes retaliation.
- The school must keep confidential the identity of complainants, respondents, and witnesses, except as may be permitted by FERPA, as required by law, or as necessary to carry out a Title IX proceeding.

Not Retaliation

- The exercise of rights protected under the First Amendment does not constitute retaliation.
- Charging an individual with a code of conduct violation for making a materially false statement in bad faith in the course of a Title IX grievance proceeding does not constitute retaliation; however, a determination regarding responsibility alone, is not sufficient to conclude that any party made a bad faith materially false statement.

Retaliation

- Retaliation should immediately be reported to the Title IX Coordinator pursuant to grievance procedures
- Retaliation can include any adverse action against an individual, including but not limited to intimidation, threats, coercion, discrimination
- Upon report of retaliation, consider appropriate measures to address and avoid future instances of retaliation
  - Necessary supportive measures
  - Does the retaliation violate an existing supportive measure?

Hearings

- K-12 schools are not required to conduct live hearings, but may choose to
- Regardless of having a hearing, provide each party the opportunity after the completion of the investigative report to submit written, relevant questions that the party wants asked of another party or witness, provide each party with the answers, and provide for limited follow-up questions

Written Questions

- With or without a hearing, after the school has sent the investigative report to the parties 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.
- The decision-maker(s) must explain to the party proposing the questions any decision to exclude questions as not relevant.

Determination of Responsibility

- Decision-maker must issue a written determination to both parties simultaneously addressing:
  - Allegations
  - Procedural steps taken
  - Findings of fact and conclusions
  - Application of Code of Conduct to facts
  - Statement of and rational for result as to each allegation including:
    - Determination of responsibility
    - Any disciplinary sanctions
    - Whether remedies to restore or preserve equal access to the educational program or activity will be provided
  - Appeal procedures

Appeals

- **Must** offer the option to appeal in the following circumstances:
  - Procedural irregularities
  - New evidence that could impact the outcome and that was not reasonably available at the time the determination was made
  - Conflict of interest or bias with regard to Title IX Coordinator, Investigator, and/or Decision-maker
- **May** offer the option to appeal for other reasons so long as the options is provided equally to both parties

Appeals

- Written notice should be provided to the other party any time an appeal is filed
- A different decision-maker is required; cannot be the Title IX Coordinator, investigator, or original decision-maker
- Appeal decision-maker must be properly trained and cannot have a conflict of interest or bias against Complainant or Respondent
- Both parties should be provided the ability to submit a written statement
- The appeal decision-maker must issue a written decision, which should be provided to both parties simultaneously and should provide basis for appeal decision

Impartiality

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Impartiality

- Impartiality is addressed in the preamble with a focus on the impact of bias

- To maintain impartiality:
  - Avoid prejudging the facts at issue
  - Avoid sex stereotyping
  - Avoid conflicts of interest
  - Avoid bias

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Conflicts of Interest

- Concerns were expressed regarding conflicts of interest for employees participating in the process. For example:
  - Title IX Coordinator with supervisor role over decision-maker
  - Decision-makers with interests that align with the District
  - Differentiation between an actual conflict of interest and the appearance of a conflict of interest
  - Employees serving simultaneously in administrative and adjudicative roles

Bias

- Determining whether bias exists is a fact-specific determination
  - Use common sense
  - Avoid generalizations
- Take caution to avoid unreasonable conclusions of bias:
  - By making assumptions about groups of individuals
  - Based solely on outcomes of grievance processes decided under the Final Rule
- Final Rule allows for use outsourcing of investigation and adjudication functions where employees have conflicts of interest or bias

Prejudging Facts

- Make a conscious effort to actively listen and avoid prejudging the facts presented to reduce bias and increase impartiality
- It is vitally important to be open minded
  - Each situation is different – don't make assumptions – collect/report the facts as presented
- Do not assume credibility based on position (e.g. Respondent v. Complainant)
- Avoid sex stereotypes, such as men are sexually aggressive or more likely to perpetrated sexual assault, and women falsely accuse men of harassment
  - Application of sex stereotypes is a form of prejudgment and makes an assumption about a group of individuals based on a categorization

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Relevance

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Relevance of Questions and Evidence

- The Final Rule specifically provides that Rules of Evidence do not apply
- Both parties are permitted to submit all relevant evidence and ask witnesses relevant questions
- Unless specifically addressed, information is considered relevant. Addressed items include:
  - Medical, psychological, and similar records, unless voluntarily written consent;
  - Information protected by legally recognized privilege;
  - Evidence about Complainants prior sexual history, with narrow exception;
  - Statements that have not been subjected to cross-examination at a live hearing

Questions and Evidence about Complainant

Questions about a complainant's prior sexual behavior or sexual predisposition only are permitted to establish that another person committed the alleged conduct or that the conduct was consensual

Legally Recognized Privilege

- 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 privilege has waived the privilege

- **For instance**:
  - Medical and treatment records
  - Attorney-client communications
  - Spousal testimony
  - Confessions to clergy

Effective Investigations

Effective Investigations

- Review grievance process in advance; look out for other impacted policies
- Remain impartial and unbiased throughout the process; remember your role
- Review and document all relevant evidence at investigation outset and each step during the process
- Prepare in advance for interviews – general questions first, and then drill down to specifics
- Adjust for new information gathered during the investigation and properly document evidence

Effective Investigations

- Review all available documentation and procedures as the first step in the process
- Document evidence gathered at the outset of the investigation
- Consider relevant witnesses and individuals who need to be interviewed, as well as individuals who should not be interviewed
- Remain flexible throughout the process to ensure the investigation is thorough
- Take caution to avoid prejudgment with regard to guilt or innocence, stereotyping, bias, etc.
- Use the information gathered at this stage to craft questions for witnesses

Investigatory Interviews

- Review documentation in advance of the interview
- Have necessary documentation on hand during the interview for reference
  - Relevant documentation related to questions/circumstances to show witnesses
  - Questions prepared for the witness
  - Relevant policies and procedures
  - Allegations
  - Summaries of your documentation for your reference
- Be prepared with necessary resources to take thorough notes during the interview

Investigatory Interviews

- Provide written notice to parties of date, time, participants, purpose, and location of each investigative interview, with sufficient time to prepare
- Be persistent in scheduling witness interviews
- Prepare questions in advance of the interview
  - Tailor questions to each witness
  - Plan to begin with open-ended questions that allow the witnesses to speak in narrative form
  - Gradually narrow questions, with most specific, pointed questions reserved for last
  - Adjust questions as necessary to address information gathered during the interview

Interview Questions

- Ask very broad questions at first
  - "Tell me what happened on [insert date]."
- Narrow your questions slightly, but remain aware of words used and resist the urge to get too specific too quickly
  - "You mentioned that you saw the Respondent on [insert date]. Where did you see Respondent on this day? ***OR*** When did you see Respondent? ***OR*** What was Respondent doing?"
- Reserve the most pointed questions for last
  - "Did you see the Respondent interact with the Complainant on [insert date]?"

Interview Questions

- Include questions that illustrate credibility
- Don't make assumptions and don't rely on stereotypes; remain impartial
- Be conscious of your tone and choose your words wisely
- Ensure that questions are adjusted for age appropriateness and sensitivity to trauma
- Take notes while the witness is speaking and adjust your subsequent questions to follow-up on new and/or unexpected information
- Ask for documentation of evidence discovered during the interview

Trauma and Credibility

- It's important to note that trauma responses can cause individuals to behave differently, which sometimes can be confused with lack of credibility
- Trauma can manifest in different ways and impacts brain processing. For instance, in the form of memory issues or forgetfulness, confusion, hesitancy to report, etc.
- Don't assume that a lack of trauma indicators means that an incident didn't occur
- Likewise, if trauma indicators are present, be cautious to avoid prejudgment by assuming that the underlying trauma was caused by Respondent

Trauma-Informed Approach

- Be aware of the impact trauma can have
- Choose your words carefully
  - Use policy and procedure terminology
  - Consider the impact of references to a complainant as a "victim"
- Take care to avoid retraumatization

Investigatory Interviews

- Clearly communicate all details regarding the interview process
- Remain polite and unbiased during the interviews
- Encourage the witness to ask questions and provide as much detail as possible
- Communicate next steps to the witness at the end of the interview
- Address confidentiality without prohibiting a party from discussing the allegations
- Update your documentation with notes from interviews, including additional information received or incoming evidence you're expecting from interview
- Adjust questions for other witness as necessary based on gathered evidence

Investigation Finalization

- Prior to investigative report finalization, each party and his/her advisor must receive evidence to inspect and review in electronic format or hard copy
  - All evidence directly related to the allegations must be provided
- Parties must be provided 10 days to submit written responses
  - Follow-up on submitted responses as needed
- The investigator must consider these written responses prior to completion of the investigative report

The Investigative Report

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Investigative Reports

- The investigative report must fairly summarize the relevant evidence
- As with all other steps, take caution to avoid bias in determining which evidence is relevant and properly documenting such information
- Remember, the investigative report should not include a determination with regard to the matter
- Investigative reports only summarize facts and relevant evidence collected during the investigation

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Investigative Report Timeline

- The investigative report must be provided to both parties and their advisors
- Parties must be provided ten (10) days after receipt of the investigative report to submit a written response
- The investigative report also is submitted to the decision-maker who is prohibited from holding a hearing or making a determination in the matter until ten (10) days from receipt of the investigative report by the Complainant and Respondent
- Opportunity to submit written, relevant questions and for reasonable follow-up must be provided prior to a determination of responsibility in the matter

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Highlights

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Highlights

- Know the policies and procedures and ensure compliance with all requirements and timelines
- Know the facts of the circumstances being investigated
- Evaluate for conflicts of interest
- Know your biases – don't prejudge facts, choose your words wisely, remain unbiased
- Be flexible and adjust for information gathered during the process
- Properly document all facts and evidence collected, but don't make any conclusions with regard to the matter – don't lose sight of your role in the process

Questions?



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