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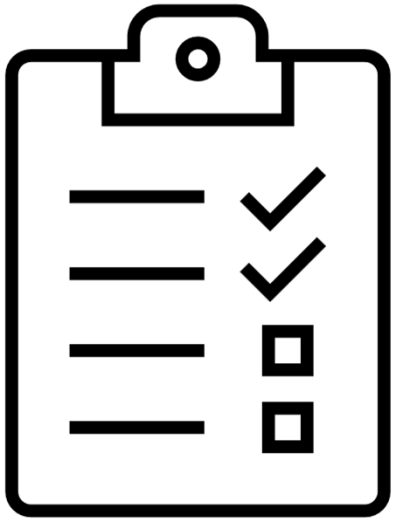
Title IX and Investigation Best Practices

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Agenda



Overview of Title IX

- What is Title IX?
- Relevant and important definitions

Current Title IX Policy and Procedure Requirements

- Ten mandatory Title IX policy requirements

Title IX Investigation and Grievance Procedures

- Step-by-step review of the formal grievance procedure

Other Investigation Best Practices

- Interview Do's and Don'ts
- Evidence Scenarios

Overview of Title IX



What is Title IX of the Education Amendments of 1972?

No **person** in the United States shall, **on the basis of sex**, be excluded from participation, or denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.
20 U.S.C. § 1681, *et seq*.



Title IX's Protections



Protects ALL students in the educational environment

- ALL students protected – all grade levels
- General Education & Special Education students

Protects ALL employees of the District as well as 3rd party employees

- Employees protected under both Title IX and Title VII for sexual harassment

"Same sex" discrimination claims must be handled with same procedures as opposite sex claims

Title IX is More Than Athletics

Title IX protects students in all:



- Academics and Education
- Extracurricular and Athletic Programs
- Other programs or activities of the school:
  - in a school's facilities;
  - in classrooms (including virtual);
  - on school transportation; and
  - at an activity or program sponsored by the school at another location or where the school has substantial control over the students (i.e., field trips, sporting events)

Within District's Educational Program or Activity

- All operations of the District, including but not limited to:
  - In-person and online educational instruction
  - Employment
  - Extracurricular activities, athletics, performances, and community engagement and outreach programs
  - All activity that occurs on school grounds or on other property owned or occupied by the Board
  - Also includes locations, events, and circumstances that take place off school property/grounds over which the Board exercises substantial control over both the Respondent and the context in which the Sexual Harassment occurs

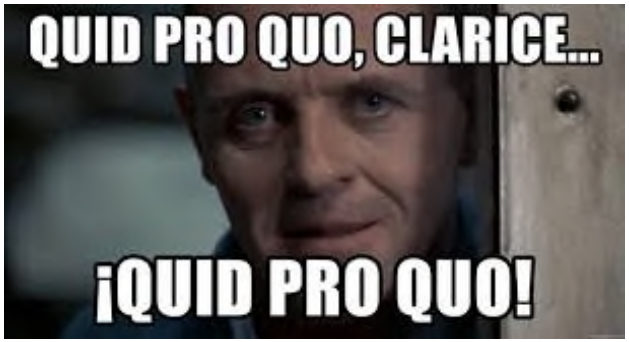


NOT Within the Educational Program or Activity

- Remember this language: **Board must exercise substantial control over both the Respondent and the context in which the Sexual Harassment occurs**
- Does not apply to Sexual Harassment that occurs off school grounds, in a private setting, and outside the scope of the District's education programs and activities
- This is a fact-specific determination
- What about:
  - An incident in the bathroom of a museum during a field trip?
  - An incident in the parking lot after a football game ended?
  - An incident between students at a weekend house party?

Definition of Sexual Harassment

- "*Quid Pro Quo*" harassment by a school employee. Quid pro quo (Latin for "this for that") conditions a benefit (i.e., higher grades) on sexual advances/favors.
- 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 school's education program or activity.
- "Sexual assault," "dating violence," "domestic violence," or "stalking" as those terms are defined under other Federal laws called the Cleary Act and the Violence Against Women Act.



A Note on "Sexual Assault" Definitions

- "Sexual assault," "dating violence," "domestic violence," or "stalking" are defined by federal law.
- The Clery Act defines "sexual assault" as "an offense classified as a forcible or nonforcible sex offense under the uniform crime reporting system of the Federal Bureau of Investigation." The definitions in the FBI User Manual are intended to be "generic" so as to not exclude more specific **state crimes**. Thus, we look at state law!
- Michigan's Penal Code addressing criminal sexual conduct and similar offenses defines "sexual contact" as:

> the intentional touching of the victim's or actor's intimate parts or the intentional touching of the clothing covering the immediate area of the victim's or actor's intimate parts, if that intentional touching can reasonably be construed as being for the purpose of sexual arousal or gratification, done for a sexual purpose, or in a sexual manner for i) revenge, ii) to inflict humiliation, iii) out of anger. MCL 750.520a(q).

Is It Title IX Sexual Harassment (Severe, Pervasive, and Objectively Offensive)?

- **SEVERE:**
  - *Causing discomfort or hardship*
  - *Very painful or harmful*
  - *Requiring great effort or a great degree*
  - *Dependent upon the circumstances (age, disability status, other characteristics)*

- **PERVASIVE:**
  - *Existing in or spreading through every part of something*
  - *Systemic*
  - *Extensive, Widespread, Prevalent*
  - *"Pervasive" can also mean multiple people are involved*



- **OBJECTIVELY OFFENSIVE:**
  - *Giving painful or unpleasant sensations*
  - *Causing displeasure or resentment*
  - *Disrespectful, derogatory, insulting*
  - *Based on the reasonable person – not just the victim's perception*

Is It Title IX Sexual Harassment?

Going to require individual case-by-case analysis by frontline Administrators first.

- **Single, isolated, events = unlikely**
  - Butt smack in hallway
  - Single inappropriate text/photo (isolated vs. systemic disclosure; content of photo or text messages; child pornography?)
  - Verbal allegations only (simple teasing and name-calling = not Title IX)
  - Mutual sexual conduct/communication (consent = not Title IX)

- **Effectively <u>denies</u> equal access to education**
  - Drop out/withdrawal from program or activity
  - Increased absences
  - Decline in grades
  - Increased emotional or academic supports

If Not Title IX, What Is It?



- **Bullying/Cyberbullying?**
- **Other discrimination/harassment?**
- **Student Code of Conduct Offenses?**
  - Inappropriate Displays of Affection
  - Undesirable Physical Conduct
  - Sexual Misconduct
  - Profanity/Obscenity
  - Inappropriate Conduct/Communication (Teasing/Disorderly Conduct)
  - Acceptable Use Violation/Technology Abuse
- **What is your duty to investigate? Who is your investigator? What type of investigation required?**

Allegation of Sexual Harassment ("SH")

1. Ask where the conduct occurred. Was it at school, on the bus, or at a school activity/program?

YES

NO

2. Is it severe, pervasive, AND objectively offensive?

Must meet all three to qualify as SH under Title IX; also consider quid pro quo or sexual assault if applicable

NO

YES

3. AND did it effectively deny complainant's access to the program or activity (not a high bar)?

Look at grades, attendance, and participation.

NO

YES

Proceed under Title IX Grievance Procedures (formal or informal)

NOT Title IX SH

1. If the school <u>does not</u> have substantial control over BOTH the respondent and the context

2. If it does not meet the definitions of SH

Proceed with:
Code of Conduct or other Board Policy
Mandatory Dismissal of Complaint

Also consider:
State law SH
Bullying or Other Harassment
Inappropriate Displays of Affection
Indecency

Actual Knowledge and School Personnel

- The Title IX Coordinator(s) for the school district.
- Schools must provide the contact information for the Title IX Coordinator(s) (Board Policies, Handbooks, Website)
- Other people within the school who have authority to institute corrective measures. This could vary from school to school but always includes the Title IX Coordinator(s).



IMPORTANT: In elementary and secondary schools, telling any school employee always puts the school on notice. The school must not respond in a manner that is deliberately indifferent.

Actual Knowledge – What Is It?

- **Notice to any employee triggers the duty to respond.** There is no distinguishing between employees at the K-12 level (and it is unreasonable to require young students to make a distinction between the "right" and "wrong" person).
- Notice results whenever any elementary and secondary school employee:
  - witnesses sexual harassment;
  - hears about sexual harassment or sexual harassment allegations from a complainant or a third party (parent, friend, or peer);
  - receives a written or verbal complaint about sexual harassment or sexual harassment allegations.
- Must inform the Title IX Coordinator.



Deliberate Indifference – What Is It?

- When a school is deemed to have actual knowledge, the school must not act in a manner that is deliberately indifferent.
- Deliberate indifference is when a school responds to sexual harassment in a manner that is "**clearly unreasonable** in light of the known circumstances." Federal courts in Michigan have noted that "clearly unreasonable" is a high bar.
- A response must:
  - Be prompt;
  - Consist of offering supportive measures;
  - Ensure the Title IX Coordinator contacts each complainant to discuss supportive measures;
  - Explain the process for filing of a formal complaint (*side note: the Title IX Coordinator can sign a formal complaint even if the complainant decides against it*).



Current Title IX Policy and Procedure Requirements



Title IX Board Policy

- Definition of Sexual Harassment under Title IX Final Rule
- Identify Title IX Coordinators, or that the school will designate at least one (most schools identify two: one male and one female administrator)
- Continue to identify Compliance Officers: responsible for *other* complaints of discrimination/harassment (e.g., race, religion, disability, etc.) and non-Title IX sexual harassment
- Separate grievance procedure for investigation of non-Title IX sexual harassment complaints – know your policies & procedures! (Contained in Administrative Regulations)

Who Are the Title IX Players at your District?

- Title IX Coordinator(s): Alice Hoekstra and Tristan Livock
- Investigators: Title IX Coordinator(s), Central Office Administrators, Principals, Assistant Principals, Athletic Director
- Decision-Maker: NOT Title IX Coordinator, NOT Investigating Administrator
- Appeal: Superintendent
- Informal Resolution Facilitators: Administrator, School Counselor, School Social Worker
- Legal counsel may be consulted at any/all stages of Title IX Grievance Procedure; legal counsel may be assigned or designated as Investigator, Decision-Maker or Appeal Officer

Note: Individuals involved must be trained in Title IX!

Written Grievance Procedures

- Schools must have a written grievance procedure for dealing with sexual harassment which must abide by the regulations.

- The grievance procedures themselves cannot discriminate on the basis of sex, and any additional provisions that a school adds must apply equally to complainants and respondents. Treating complainants and respondents fairly and equally is a requirement!

- Written grievance procedures need to include 10 specific items.

Requirement 1: Treat Parties Equitably

- The school's grievance process must treat complainants and respondents equitably by providing remedies to a complainant if a respondent is found responsible, and by following the prescribed grievance process imposing discipline on a respondent.

- The remedies for a complainant have to be designed to restore or preserve equal access to the school's education program or activity.

- Unlike supportive measures in place with or without a grievance process pending, a complainant's remedies CAN be punitive or disciplinary against the respondent.



Requirement 2: Objective Evaluation of Evidence

- The school's grievance process must ensure an objective evaluation of all relevant evidence – including inculpatory and exculpatory evidence.
- Credibility determinations can't be made on the basis of a person's status as a complainant, respondent, or witness.



Requirement 3: Training; No Conflicts of Interest

- The individuals involved in the process – Title IX Coordinator, investigators, appeals, decision-makers, appeal or facilitators of informal, voluntary resolution efforts – must not have any bias or conflict of interest.

- These individuals must also be trained. The materials used to train Title IX personnel can't rely on sex stereotypes, must promote impartial investigations and adjudications, and must be posted on each school's website (and if a school does not maintain a website, make them available for public inspection upon request).

- Important restrictions on who can serve in what role:
  - Investigator cannot be decision-maker.
  - Decision-maker cannot be investigator or Title IX Coordinator.
  - Decision-maker on appeal cannot be the investigator, Title IX Coordinator, or the decision-maker.



Requirement 4: Presumption of Innocence

- Under the school's grievance procedures, the respondent must be presumed not responsible, so that any finding of responsibility only comes at the conclusion of a grievance process.

Requirement 5: Reasonably Prompt Timeframes

- The grievance process must include reasonably prompt timeframes for resolving formal complaints of sexual harassment. Prior OCR guidance 60 days.
  District policy = 60 days.

- Temporary delays are permitted only for good cause (law enforcement activities, the absence of a party or witness, etc.).

- Some timeframes are proscribed (Investigation Report, Decision-Maker).

Requirement 6: Description of Range of Outcomes

- The grievance process must describe or list the range of possible remedies and disciplinary sanctions that could occur following a determination of responsibility.

- **Possible disciplinary sanctions:**
  - Suspension up to and including permanent expulsion
  - Discipline up to and including termination

- **Possible remedies (aka Remedial Measures)**
  - No Contact Order (for both parties)
  - Change in classroom, lunchroom, bus, locker assignment
  - Restorative Justice, if applicable
  - Job Transfer/Reassignment
  - Supportive measures to be continued after investigation

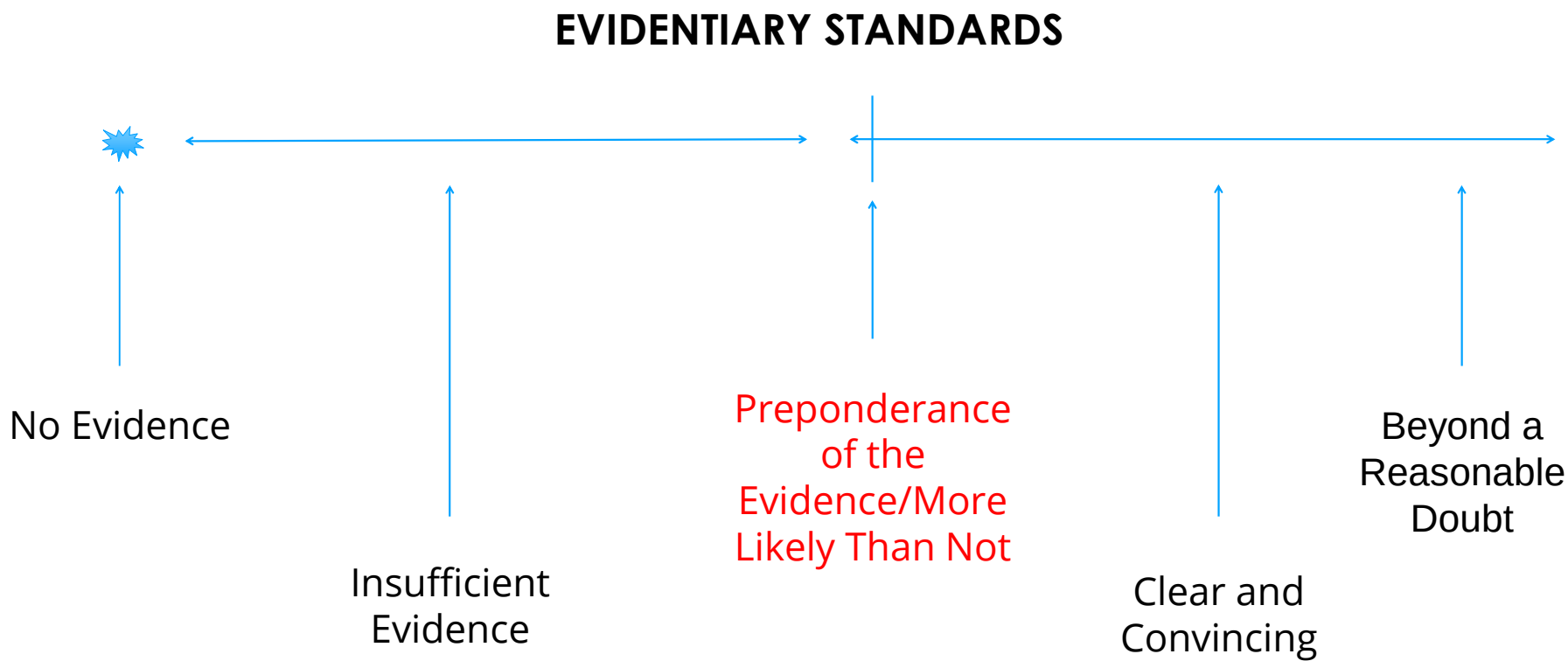


Requirement 7: Standard of Evidence

- The grievance process must state which standard of evidence the school will use to reach a determination regarding responsibility, to be used for all sexual harassment proceedings.
- Schools can choose between the preponderance of the evidence standard and the clear and convincing evidence standard.
- Whichever standard the school chooses, it has to use that standard for all formal complaints of sexual harassment, whether the respondent is a student or employee, including a faculty member.
- All sexual harassment proceedings must have the same standard of evidence.



Evidence Thresholds



Requirement 8: Right to Appeal

- The grievance procedures have to contain the right to appeal the result of a grievance process, and information about how to invoke the right to appeal.

- Schools must offer an appeal to every party on certain bases, and schools also have the option to expand the bases on which an appeal may be taken, as long as they apply those bases equally to both parties.

Requirement 9: Description of Range of Supportive Measures

- The school's grievance process must describe the range of supportive measures available to complainants and respondents.

- Supportive measures can include no contact orders, changes in schedules, campus escorting, counseling, or other measures.

Requirement 10: Privileges

- The school's grievance process must explain that no information protected by a legal privilege, such as the attorney-client privilege or the doctor-patient privilege, can be used during an investigation unless the person holding that privilege has waived it.

- Neither a party nor the school is allowed to seek, permit questions about, or allow the introduction of evidence that is protected by a recognized privilege.

- Individuals can always opt to waive their own privileges, if they want, but they don't have to.



Title IX Investigation and Grievance Procedures



An Overview of the Formal Grievance Procedure

Step 1: Notice of Allegations of Sexual Harassment – Respond!

Step 2: Offer of Supportive Measures (even if no formal complaint)

Step 3: Written and Signed Formal Complaint of Sexual Harassment

Step 4: Written Notice of the Allegations Sent to Both Parties

Step 5: Evidence Gathering and Investigation

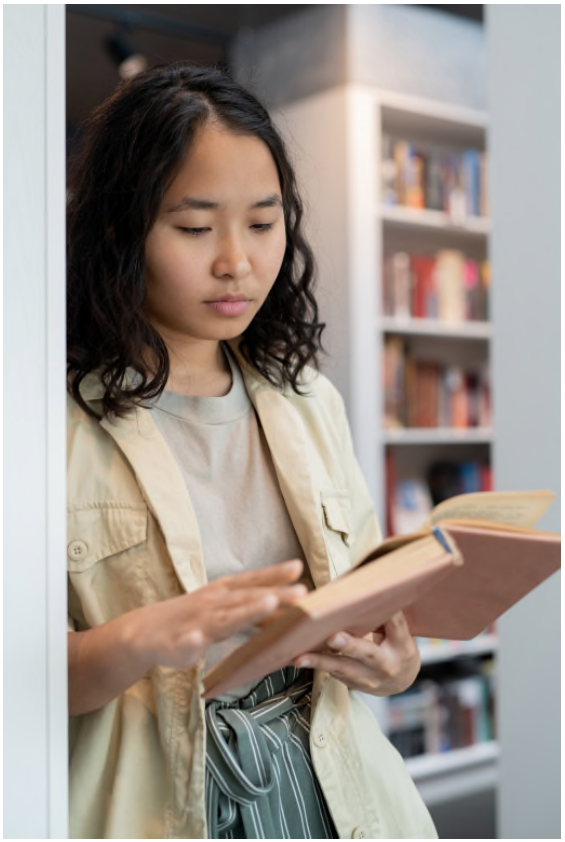
Step 6: Investigation Report (also: party responses and written relevant questions)

Step 7: Written Determination of Responsibility from the Decision-Maker

Step 8:* Appeal, if applicable, of the Determination or a Dismissal



Terminology: Complainant, Respondent



- Apply to parties in both ***reports*** and ***formal complaints*** of sexual harassment

- ***Complainant***: A person who is alleged to be the victim of conduct that could constitute sexual harassment
  - NOT a third party who reports alleged sexual harassment perpetrated against someone else
  - NOT the Title IX Coordinator, even if this person "signs" a formal complaint
  - NOT the District

- ***Respondent***: A person who has been reported to be the perpetrator of conduct that could constitute sexual harassment

Step One: Initial Response

34 C.F.R. 106.30(a), .44(a)

- Title IX Coordinator must promptly, even if no formal complaint is filed:
  - Contact the complainant to discuss the availability of "supportive measures"
  - Consider the complainant's wishes with respect to supportive measures
  - Inform the complainant of the availability of supportive measures with or without the filing of a formal complaint
  - Explain the process for filing a formal complaint; discuss/offer informal, if appropriate

This is part of the District's response – must NOT be deliberately indifferent!

Step Two: What Are Supportive Measures?

- Supportive measures are free, individualized services designed to restore or preserve equal access to education, protect safety or deter sexual harassment.
- There doesn't need to be a formal complaint for an alleged victim to receive supportive measures.
- Supportive measures support a student, and they aren't punitive or disciplinary with respect to another student.
- Supportive measures must be kept confidential (need-to-know basis).
- Supportive measures don't unreasonably burden any other person.
- The Title IX Coordinator is responsible for implementing and monitoring supportive measures.
- Still the implication to "err" on the side of the victim as school always has to consider the alleged victim's wishes when it comes to requests for supportive measures.



Step Two: Supportive Measures

Examples:



- No Contact Orders (both ways)
- Counseling
- Extensions of deadlines for assignments/tests
- Changes in classroom/lunchroom/bus assignments
- Increased Monitoring and Supervision
- Assigning a "safe" person
- Administrative Leave/Temporary Transfer
- Other supportive measures

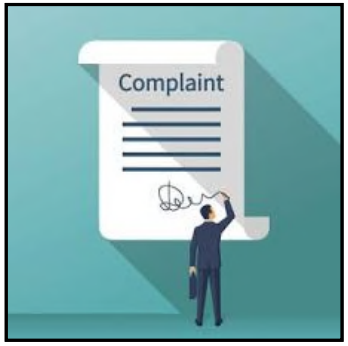
Supportive measures are dependent on a student or employee's unique needs and circumstances. Coordination with various departments may be necessary.

Step Three: Title IX Formal Complaint Requirement

- Defined as a document filed by a complainant or the Title IX Coordinator alleging sexual harassment against a respondent and requesting that the recipient investigate the allegation of sexual harassment. 34 C.F.R. § 106.30(a).

- Actually signed by the complainant or Title IX Coordinator. A document or electronic transmission (an email) that contains a physical or digital signature suffices.

- We recommend having a form to be completed, as this can help gather important information.



Emergency Removal / Admin Leave

Immediate Emergency Removal (34 C.F.R. 106.55(c))

- Based on an individualized safety and risk analysis
- Necessary to protect a student or other individual from **immediate threat** to **physical health or safety**
- Notice, opportunity to challenge provided "immediately" following the removal
- Consider other laws, e.g., "change in placement" under IDEA

Employee Administrative Leave (34 C.F.R. 106.44(d))

- Not prohibited. Consider state law, board policy, handbooks, and bargaining agreements.



Step Four: Written Notice to Parties

The written notice of allegations is provided to the parties after receipt of a formal complaint.

The notice must include:

1. The allegations and facts that would constitute sexual harassment, including: the parties, the conduct, and the date and location of the incident(s), if known.

2. The presumption of innocence for the respondent.

3. A statement that the parties are entitled to advisor of their choice (attorney, parent).

4. A statement that the parties can request to inspect and review certain evidence.

5. Information regarding the code of conduct and prohibition of false statements.



Step Four: Written Notice to Parties

- Include notice to the parties of the school's grievance process, which must comply with the 10 items under Final Rule. We recommend sending the policy as an attachment.
- Whether there is an opportunity to engage in informal resolution (excluding when respondent is an adult employee of school district).
- The school has to provide written notice of the date, time, location, participants, and purpose of all hearings, interviews, or other meetings, with sufficient time for the party to prepare.
- Additional notice must be sent to the parties if additional allegations arise and are going to be investigated.



Step Five: Gathering Evidence (Schools and Parties)



- The school must also provide equal opportunities for the parties and their advisors to inspect and review the evidence obtained by the school as part of its investigation, if the information is directly related to the allegations raised in the formal complaint.
- The school also has to give the parties a meaningful opportunity to respond to the evidence after the school has provided it.
- Formal complaint, witness statements, emails, text messages, video, etc.

Step Five: Gathering Evidence (Schools and Parties)

- The school must provide an equal opportunity for the parties to have witnesses and evidence as well as inculpatory or exculpatory evidence.

- The school can't restrict the ability of either party to discuss the allegations under investigation, or to gather and present relevant evidence (i.e., No Gag Orders).

- The school has to provide the same opportunities to the parties to have others present during the grievance proceedings, including access to an advisor of choice for any meetings or hearings.



Step Six: Title IX Investigation Report Requirements

- Investigator needs to prepare a written investigative report that summarizes the relevant evidence gathered for review and response. The report can be sent to the parties in an electronic format or hard copy. (We call this the "preliminary" report).

- A school must give the parties **at least 10 days** to respond to the report and evidence in writing. If a response is submitted, the investigator must consider that response before finalizing the investigative report.

- The investigative report can then be finalized and provided to the parties (advisors) and decision-maker. (We call this the "final" report).



Step Six: Investigation Report Requirements/Timeline

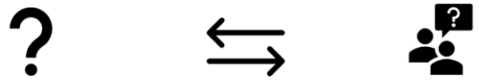
- **Preliminary Report/Evidence**
  - The "preliminary report" provides the parties and their advisors (if any) an opportunity to review the evidence gathered
  - Allow at least 10 days for the parties to review and provide a response, if any

- **Final Report/Evidence**
  - Finalize the report with responses from the parties (if any) and provide the final report to the parties, their advisors (if any), and the decision-maker

At this stage, the Title IX investigator's duties are complete.
The decision-maker carries out the remaining steps of the grievance process.



Step Seven: Title IX Determination Requirements



- An elementary or secondary school must give the parties equal opportunity to submit relevant, written questions to each other, before the decision-maker reaches a determination (i.e., *second # day requirement under Title IX Final Rule, differs dependent on policy*).

- The decision-maker must then ask the questions to the party and record the answers, unless the decision-maker determines the questions are not relevant to the investigation.

- Questions and evidence about a complainant's prior sexual history are not relevant, with two limited exceptions:
  - Offered to prove that someone other than the respondent committed the alleged misconduct; or
  - Offered to prove consent.

Decision-Making: Objective and Unbiased

- The school's decision-maker needs to objectively evaluate the relevant evidence and reach conclusions about whether the respondent is responsible for the alleged sexual harassment.
- A school's decision-maker needs to use independent judgment, so the decision-maker **cannot** be the same person who conducted the investigation and cannot be the school's Title IX Coordinator.
- Who are the decision-makers?
- Decision-makers must be free from conflicts of interest or bias for or against complainants or respondents and must be impartial and know how to decide what evidence is relevant.
- The decision-maker will weigh the relevant evidence, decide whether it meets the school's standard of evidence for sexual harassment allegations and issue the written determination to both parties (i.e., outcome letters).



What Is Relevant Evidence?

- Michigan Rules of Evidence define "Relevant evidence" as:

  "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.

- Although your investigation does not take place in a courtroom, you need to determine what evidence is relevant to an investigation and what is not.

- Evidence includes both written and oral evidence (i.e., witnesses).

- An investigator has the ability to exclude evidence that is not relevant, but before doing so, you should review the evidence and be prepared to explain why it is not relevant to the investigation.



Step Seven: Title IX Determination Requirements

The decision-maker must issue a written determination regarding responsibility based on the evidence gathered in the investigation and the written report. It must include:

1. The allegations potentially constituting sexual harassment and portion of the school's policies that apply.

2. A description of the procedural steps that were taken by the school (when the formal complaint was filed, when interviews were held, etc.).

3. A findings of fact section that is used to support the determination.

4. A section that draws conclusions after applying the facts to the portion of the school's policy that applies.

5. A statement and rationale for the ultimate determination of responsibility.

Step Seven: Title IX Determination Requirements

6. Any disciplinary sanctions that the school will impose on the respondent, and state whether the school will provide remedies to the complainant.

7. A statement and rationale for any remedies for the complainant, addressing how those remedies will restore or preserve equal access.

8. A statement of the recipient's procedures, a statement that the parties have a right to appeal the initial determination regarding responsibility, and the permissible bases for appeal.

Step Seven: Decision-Making, After the Decision

- The school must send the written determination to the parties **simultaneously**, along with information about how to appeal the determination.

- A school has discretion to set deadlines for when an appeal must be filed, bearing in mind the obligation to conclude the entire grievance process and bring resolution to the situation for both parties, within a reasonably prompt timeframe.

- The Title IX Coordinator is responsible for carrying out the remedies contained in the written decision.



Step Eight (Maybe): Appeals in Title IX



- A school has to offer *both* parties an opportunity to appeal. Appeals are determined by a separate individual (the decision-maker on appeal), who was not involved in the process.
- Appeals are offered in two circumstances:

1. **After a dismissal** (either mandatory or permissive) of a formal complaint of sexual harassment.
2. At the end of the grievance process **following a determination of responsibility**.

Appeal Rights? Title IX = YES

The bases of appeal in Title IX are limited! Schools can offer additional grounds for appeals, if they want to, so long as the grounds apply on an equal basis to the parties.

1. A procedural irregularity affected the outcome of the matter.

2. New evidence has been discovered that was not reasonably available at the time of the determination on responsibility or dismissal, that could affect the outcome of the matter.

3. A conflict of interest on the part of a Title IX Coordinator, an investigator who compiled evidence, or a decision-maker, and the conflict of interest affected the outcome.



Appeal Processes

- The recipient has to notify both parties in writing that an appeal was filed and implement appeal procedures equally.
- Both parties must have equal opportunity to submit a written statement supporting or challenging the outcome. There is no specific deadline applied for the statements (must be a "reasonable" opportunity but check your policy).
- The person or body who decides the appeal cannot be the same person who reached the determination regarding responsibility, or the investigator or Title IX Coordinator.
- After considering the parties' written statements, the decision-maker on appeal must issue a written decision describing the results and rationale and send it to the parties simultaneously.
- The school's determination about whether the respondent is responsible for the sexual harassment allegations becomes **final** after appeal.



Mandatory Dismissals

A school must dismiss a complaint:

- that does not describe conduct that meets the definition of sexual harassment;
- that alleges sexual harassment that did not occur in the school's education program or activity;
- that alleges sexual harassment that did not occur in the United States at all.

- Schools can still address these complaints under their code of conduct, even if the misconduct is not sexual harassment under Title IX.



Discretionary Dismissals

A school may dismiss a complaint:

- if the complainant notifies the Title IX Coordinator in writing that the complainant wishes to withdraw the formal complaint or some of its allegations;
- if the respondent is no longer enrolled or employed by the school; or
- if specific circumstances prevent the school from gathering evidence sufficient to reach a determination about the allegations.



Other Requirements: Recordkeeping

This duty extends for 7 years, and includes several categories of documents:

1. Records of a school's investigation.
2. Records of any appeal, the results, and the materials associated with an appeal.
3. Records of any informal resolution process and result therefrom.
4. All materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution. These materials also must be posted on a recipient's website, or made available for public inspection if the recipient doesn't have a website.
5. Records of the supportive measures that they took in response to a report or complaint of sexual harassment. (This is your proof that the school was not deliberately indifferent.)



Other Requirements: Recordkeeping

106.45(b)(10)

- Records related to alleged sexual harassment must be maintained for a minimum of 7 years
  - Investigation records
  - Disciplinary sanctions
  - Remedies
  - Appeals
  - Records of any actions taken, including supportive measures

- Must document for every instance:
  - Why response was not deliberately indifferent
  - That measures were taken to restore or preserve equal access to the educational program or activity
  - If no supportive measures provided, why that was not deliberately indifferent



Other Issues: Retaliation

- No school or person is allowed to retaliate against anyone for exercising rights under Title IX.
- Any person retaliated against can file a complaint with the school and the school must have procedures in place for the prompt and equitable resolution of such complaints.
- The school should keep the identities of parties and witnesses confidential, unless disclosure of someone's identity is required under other laws or is necessary in order to conduct the grievance process.



Informal Resolution

- Schools can offer informal resolution in appropriate cases.
  - *Exception*: Where the respondent is an employee of the school.
  - Other exceptions may exist in policies – make sure to check!
- Informal resolution may only be attempted if each party enters the process completely voluntarily.
- A school can never force, threaten, or require any party, complainant or respondent, into going into informal resolution.
- If informal resolution proceeds, the school must provide a facilitator who is free from conflicts of interest or bias, and who has received special training.
- The school still needs to provide complainants and respondents with notice of the allegations, notice of their rights, information about whether an informal process is confidential, and about withdrawing from the process.

Informal Investigation Procedure

- **Just because it's informal, doesn't mean you can skip formal documentation!**
  - Document parties' voluntary consent to participate.
  - Who will be present, day, time, location.
  - Document discussions with parties, parents/union/advisor (if applicable).
  - Document actions taken to remedy the complaint.
  - Follow up via written correspondence.
  - Keep Title IX Coordinator involved.
  - Supportive measures must still be considered (and documented)!



Investigation Best Practices



Complainant Interview

- **Interviewing the complainant**
  - Explain the purpose of the interview and the District's commitment to enforcing its policies and complaint procedure including the prohibition against retaliation, if applicable.
  - If the complainant is not familiar with you, introduce yourself, and try to put him/her at ease.
  - Explain that the information from the complainant will be shared with others on a need to know basis so that the complainant understands that the information will not be held strictly confidential.

Complainant Interview

- **Interviewing the complainant**
  - Obtain information from the complainant about the incidents upon which the complaint is based.
  - Obtain detailed information about each incident by eliciting the six "Ws" and one "H": who, what, when, where, why, witnesses and how.
    - Ask the complainant if he/she has any notes or other documentary evidence (i.e., text messages, social media, etc.).
  - Obtaining the details or specifics of each incident is critical because the factual basis for complaint will determine the scope of the investigation.



Understand the Context of the Interview

- **Interviewing the complainant**
  - Obtain information about the complainant's response to the reported behavior, if any.
  - Obtain information about the prior interactions or relationship between the complainant and alleged respondent/accused, including whether there are prior unreported incidents or prior interactions of a similar nature.
  - Obtain information about the individuals with whom the complainant discussed the conduct with immediately after the incident, before reporting.



Fully Explore Facts and Scope of Knowledge

- **Interviewing the complainant**
  - If the complainant did not immediately report the incidents, ask why.
  - Ask the complainant what action he/she would like the District to take to resolve the complaint.
  - Ask who he/she thinks you should interview. If the reason for interviewing a suggested individual is not immediately apparent, ask why. What will they tell you?
  - Before concluding the interview, ask the complainant if there is any other information that he/she would like to share or believes is relevant to the complaint.
  - Encourage the complainant to contact you during the investigation if he/she has any questions or concerns about retaliation. Provide BOE policy.



Facts and Details are Important

- Important to find out **DURATION**, **FREQUENCY** and **SEVERITY** of the alleged behavior from the Complainant:
  - *How long has this been going on?*
  - *One student vs. multiple?*
  - *When and where does the conduct/communication occur?*
  - *How often does it occur?*
  - *How many times per day/week?*
  - *Is anyone else around to witness? Who? Common areas (video?)*
  - *Physical vs. verbal? Exact words or location on body.*
  - *Cyber? Social media/text messages?*



Facts and Details are Important

- Important to find out the **EFFECTS** of the alleged behavior on the Complainant:
  - *How did the alleged perpetrator's remarks/actions affect you?*
  - *When you say you were upset, what do you mean?*
  - *How did you act? Did you experience a change in behavior? Give me examples…*
  - *Did you go to a doctor or counselor? If yes, for what?*
  - *Has your school, work or studies been affected? How?*
  - *Have you spoken to anyone about your feelings after the incidents? Who?*



Witnesses

- Witnesses identified by the Complainant
  - Corroboration vs. hearsay
  - Interview separately
  - Relationship to Complainant/credibility analysis
  - Review tangible evidence relevant to the investigation that you have obtained (e.g., social media; emails; texts; surveillance tapes)
  - Do homework before confronting the Respondent/Accused



Respondent and Rebuttal Witnesses

- **The Respondent**
  - Rebuttal
  - His/her side of the story
  - Collect any documentary evidence



- **Rebuttal witnesses identified by the Respondent**
  - Corroboration
  - Relationship to Respondent/credibility analysis

- **Do you need to go back to the Complainant?**



Interview Respondent/Accused

- Inform of District policy and expectation of conduct. Give copy.
- Discuss the incidents that form the basis of the complaint and ask the Respondent/accused to respond as you identify each incident.
  - When discussing the incidents, (eventually) disclose the details provided by the complainant and do not omit information.
  - Obtain detailed information from the respondent/accused by eliciting the six "Ws" and one "H": who, what, when, where, why, witnesses and how.
  - Obtain all documentation or other evidence the Respondent/accused has supporting the response to the allegations.

Interview Respondent/Accused

- Obtain information about his/her prior interaction or relationship with the complainant.
- If the Respondent/accused claims the allegations are false, ask why the complainant would lie or has reason to fabricate the allegations.
- Ask who he/she thinks you should be interview. If the reason for interviewing a suggested individual is not immediately apparent, ask why.



Interview Respondent/Accused

- Before concluding the interview, ask if there is any other information that he/she would like to share or believes is relevant to the investigation.

- Encourage him/her to contact you during the investigation if he/she has any questions.

- Reiterate the District's policy against retaliation. Provide BOE policy.



Special Evidence Scenarios: Law Enforcement Involvement & Student Searches



Scenario #1

A fight between two students is captured on a school's video surveillance camera and the District uses the video to identify the students and issue discipline.

- What if…..



Evidence – Video Surveillance?

- Parents of one of the students demands to see the video footage?
- In the video, you can clearly see the two students engaged in the fight.
- You can also see two other students clearly in the video standing close by and watching the fight.
- How do you proceed with this request?



U.S. Department of Education, Family Policy Compliance Office (FPCO)

- FPCO's current informal guidance is that where a video (or other picture image) of one or more students is taken, the video or image is "directly related" to, and thus the "education record" **of, the student or students who are the focus of the video** (such as two students in an altercation). Therefore, students (or their parents) who are the "focus" of the video may view the video or image since it is their "education records".

- The video would not be a FERPA-protected education record for those students who are **"set dressing"** (i.e., present, but not directly involved in the altercation), since they are not the focus of the video.

What If . . . .

- One of the student's parents press criminal charges against the other student.
  - Local Law Enforcement requests the student(s) telephone and address to contact the parents/students?
  - Local Law Enforcement requests a copy of the video footage?
  - Local Law Enforcement wants to interview the student(s) at school for the criminal investigation?



Request for Student Information

- **FERPA: BOE Policy**
  - Typically, student address and telephone is "directory information" under FERPA that does not require parental consent prior to release to a 3rd party.

  - *HOWEVER*,
    - Parents may have "opted out" of the annual directory information notice under FERPA. Therefore, parental consent is required.
    - School District may have policy/procedure that parents are first at least notified that there has been a request by a 3rd party to obtain information.
    - Always contact Central Office with these types of requests prior to releasing student information from educational records to ensure you are complying with BOE Policy and District protocols.

Request for Video Footage

- **34 CFR § 99.31 Exceptions to FERPA for:**
  - Producing educational records to state and local authorities, within a juvenile justice system.
  - Producing educational records in response to a lawfully issued **Subpoena or Search Warrant.**

- Notify parents prior to disclosure to law enforcement.

- Request Subpoena or Search Warrant from law enforcement to keep on file.

- Involve Central Office when you receive request to ensure BOE policy and District procedure followed.

Request to Interview/Interrogate Student

- Interrogation of Students
  - For misconduct or a crime that did **not** happen during school, on school property or transportation, or during school sponsored event or activity = No obligation to allow interrogation during school or at school.
  - For school misconduct: Prior to questioning, the Principal **shall** attempt to contact parents.
    - Shall remain in the room during questioning, unless compelling reasons prohibit it.
    - Shall confirm with law enforcement that if questioning for possible crime, student will be read or informed of rights to remain silent, shall have an attorney/parent present, etc.

Scenario #2

Based on information that you have obtained from other students, you suspect that Jim has pornography in his locker. You also believe that there are text messages on Jim's personal cell phone that corroborate that he has sent nude pictures to other students.

- What should you do?



Evidence – Searches

1. You may not search Jim's locker or examine his cell phone, because he has an expectation that the contents of his locker and his text messages on his personal cell phone are private.

2. You may search his locker and examine his cell phone without consent.

3. You may search his locker without consent, but you may not demand to examine his cell phone or search his cell phone without consent.

4. You may search his locker and cell phone, but only with his consent.

Student Searches – The 4th Amendment

- **School Property**: If the object searched is school property or school-provided user account, consent from the student and/or parent is not required under the 4th Amendment.
  - District policies should cover the right to search and should state that students have no legitimate expectation of privacy in electronic communications from school equipment. This includes school computers, school-issued laptops, e-Readers, or tablet devices signed out to individual students.
- **Personal Property**: If object searched is the student's personal property/account, reasonable suspicion or consent from parent and/or student will be required under 4th Amendment.
  - But Note: Other laws on electronic communication and privacy may prohibit search.

School Searches

- No expectation of privacy in school locker or on school equipment (school technology/emails included).
- Search only when there is an individualized suspicion or reasonable cause to suspect a rule violation.
  - Obtain statements to support suspicion/reasonable cause
- Conduct the search in the least intrusive manner possible.
- If pat down, same gender with a witness (same gender) present.
- Avoid strip and/or body cavity searches.
- If all else fails with cell phone, confiscate and wait for parent/law enforcement assistance.

Michigan Internet Privacy Protection Act MCL 37.274

Section 4 of IPPA:

An educational institution shall not do any of the following:

(a) Request a student or prospective student to grant access to, allow observation of, or disclose information that allows access to or observation of the student's or prospective student's personal internet account.

(b) Expel, discipline, fail to admit, or otherwise penalize a student or prospective student for failure to grant access to, allow observation of, or disclose information that allows access to or observation of the student's or prospective student's personal internet account.

IPPA Different for Employees! MCL 37.375

Section 5:

This act does not prohibit an employer from doing any of the following:

(c) Conducting an investigation or requiring an employee to cooperate in an investigation in any of the following circumstances:

(i) If there is specific information about activity on the employee's personal internet account, for the purpose of ensuring compliance with applicable laws, regulatory requirements, or prohibitions against work-related employee misconduct.

May use employee's refusal as evidence of adverse effect (after notice to employee regarding failure to comply).



Points to Remember

- Preparation is the key
- Investigate promptly
- Listen to both sides
- Consider alternative explanations
- Make sure questions are understood
- Get actual answers
- Ensure confidentiality when possible
- Document everything



Prevention Tips

- Send a clear and consistent message that complaints will be promptly investigated and addressed.
- Review district's policies and procedures for consistency, procedure and definitions. Use these to your advantage.
- Investigate Promptly. Establish who is in charge of investigating allegations, and what is the procedure for filing a complaint. Keep your chain of command informed.
- Do not ignore behavior or make assumptions it will stop, it was a "one time incident" or it is not a violation of Board policy or the Code of Conduct.

Thank You



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Legal Disclaimer
This document is not intended to give legal advice. It is comprised of general information. Employers facing specific issues should seek the assistance of an attorney.

Clark Hill