

## Investigator Training



## Caution

- These slides reflect general legal standards for the related presentation and are not intended as legal advice for specific situations. Future legal developments may affect these topics.
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## Training Certification

- This training is NOT intended to satisfy the training requirements for Title IX Coordinators, Investigators, Decision-Makers, and Appeals Officers.
- Review of these slides without the synchronous training may not satisfy training requirements.
- These training materials must still be posted on your District's website.

## New Definition of Sexual Harassment

Conduct on the basis of sex that satisfies one or more of the following:

- Employee *quid pro quo*;
- Sexual assault, dating violence, domestic violence, stalking (definitions from Violence Against Women Act); and
- Hostile Environment (new stricter definition)

## Hostile Environment

- "Unwelcome conduct determined by a reasonable person to be so severe, pervasive, **and** objectively offensive that it **effectively denies** a person's equal access to the recipient's education program or activity."
- "Education program" is any location, event, or circumstance over which the recipient exhibits substantial control over both the Respondent and the context in which the harassment occurred.

## Denial of Equal Access

- Reactions to sexual harassment may vary
- Assess from perspective of reasonable person in complainant's position
- Denial may include skipping class to avoid harasser, grade decline, difficulty concentrating in class
- No concrete injury required
- Do not have to show that complainant dropped out of school, failed a class, had a panic attack, or otherwise reached "breaking point"

OCR, Question and Answers Regarding the Department's Final Title IX Rule, September 4, 2020

### Possible Examples of Verbal Harassment

- Unwelcome comments, including derogatory, sexually suggestive, or vulgar language
- Sexual innuendos
- Unwelcome advances or repeated requests for dates
- Threats based on a person's sex

### Possible Examples of Visual Harassment

- Subjecting another to images, text, or cartoons that are:
  - Sexually suggestive
  - Obscene
  - Pornographic
- Use of obscene gestures
- Leering at an individual

### Possible Examples of Physical Harassment

- Unwanted kissing, touching, patting, hugging, pinching, or unwanted physical contact
- Stalking or sex-based assault or battery
- Impeding a person's movements

### Title IX Roadmap

1. Report of sexual harassment
2. Formal Complaint
  - Written, signed by Complainant or Title IX Coordinator
3. Investigation or Informal Resolution
  - Respondent presumed not responsible
  - Both parties are sent evidence for review/response
4. Determination of Responsibility
  - Final investigation report given to Decision-Maker and both parties
  - Decision-Maker makes determination
  - Cannot issue discipline or sanctions until DoR
5. Appeal

### Making a Report

- Who can make a report?
  - Anyone can – verbal, written, electronic
  - Report ≠ Formal Complaint
- How?
  - Reports can be made to any employee or sent to Title IX Coordinator
  - Mail, telephone, or email, or by any means that results in the Title IX Coordinator receiving the person's report
  - Employees should convey report to Title IX Coordinator
- When can a report be made?
  - Anytime!

### Responding to Report

- Title IX Coordinator must, upon receipt of report:
  - Contact Complainant to discuss “supportive measures”
  - Inform Complainant of “supportive measures” available whether Formal Complaint filed or not
  - Explain process for filing Formal Complaint

### **Bifurcating the Investigation**

- New regulations *only* apply to Title IX sexual harassment
- If a report or Formal Complaint includes allegations implicating other harassment/discrimination policies, you can bifurcate the investigation
- BUT Title IX sexual harassment issue must be investigated pursuant to the new regulations

### **Supportive Measures**

- Available before, during, and after investigation, *and* if no Formal Complaint filed
- Must be:
  - Non-disciplinary
  - Non-punitive
  - Individualized
  - Designed to restore or preserve equal access to education program or activity without “unreasonably” burdening the other party

### **Supportive Measures**

- Examples: Counseling, work/class schedule changes, increased monitoring
- Does *not* include anything that completely removes Respondent from an activity except under *very limited* circumstances
  - Removal is considered punitive, except:
    - For students: emergency removal permitted
    - For staff: administrative leave permitted
- Document whether supportive measures were offered and which were taken
- Keep confidential to extent possible while still complying with Title IX requirements

### **Formal Complaint**

- A document filed and signed by a Complainant or signed by the Title IX Coordinator;
- Alleging sexual harassment by a Respondent; and
- Requesting that the District investigate the sexual harassment allegation

### **Formal Complaint: Next Steps**

Written notice to both parties that includes:

- Grievance procedures
- Allegation details
- Parties' right to inspect and review relevant evidence
- May have advisor of their choice
- Statement that Respondent is presumed not responsible and determination of responsibility provided at conclusion of grievance process
- Notice must be supplemented if new allegations arise during investigation

### **Starting the Investigation**

- Involve parents
- Consider Mandatory Reporting Requirement & report to law enforcement
- Don't discourage criminal complaint
- Secure evidence
  - Physical
  - Documentary
  - Electronic & Video
- Identify disputed facts and follow up
- Review police records if available
- If necessary, place employee on paid administrative leave

### Investigation Tips

- Interview Complainant to gather all information
- Use that information to determine who to interview next
- Conduct site visits, if applicable

### Full & Fair Investigation

- Suspend judgment until investigation is complete
- Do not investigate to *prove* what is alleged to have happened but rather to discern *what happened*
- Interview all with knowledge
- Make credibility determinations

### Title IX Considerations

- School has burden of proof and burden to “gather evidence sufficient to reach a determination of responsibility”
- Standard of evidence must be same for all complaints (employee and student)
  - Preponderance of evidence recommended
- Reasonably prompt timeframes
- Consider law enforcement and CPS reporting obligations
- Consult your policy for specific procedures!

### CPS Reporting

- School administrator/counselor/teacher
- **Reasonable cause to suspect** abuse/neglect
  - Immediately: oral report
  - 72 hours after oral report: written report
- School employee shall
  - Notify “person in charge” of finding
  - Make written report available
  - **Not** be dismissed or penalized for making report or cooperating in an investigation

MCL 722.623(1)(a)

### Creating an Investigation Plan

- Who will you interview?
  - Complainant & all witnesses s/he identifies
  - Respondent & all witnesses s/he identifies
  - Others who may have knowledge (Consider where/when)
    - Teacher on hall monitoring duty or lunch duty at same time as incident? Food Service Staff?
    - Bus Driver? Coach? Assistant or Volunteer Coaches?
  - People may be added to/removed from list as investigation proceeds
- Is there any tangible evidence you need to preserve and review?

### Preserve Tangible Evidence

- Surveillance video
- School records : personnel files, student disciplinary records
- Text messages, emails, voicemails
- Screenshots of social media (Instagram, SnapChat, TikTok)
- Tobacco, cigarettes, paraphernalia
- Caution: Turn over drugs and weapons to law enforcement
  - Take photos or make copies of weapons, drugs, graffiti, vandalism
  - Use ruler to establish length of knife blade

### Digital Evidence Considerations

- Review acceptable use policy
- Cut access to email and school computers/servers
- Stop automatic delete function
- Collect school electronic devices
- Consider access to personal electronic data

### CAUTION: Photos and Videos of Students

- If allegation involves sexting or other photos or videos of students that could possibly be considered child pornography,

#### **CALL LAW ENFORCEMENT**

- Do not view, save, copy, disseminate, handle or maintain photos and videos of students that could be considered child pornography
- Legal exposure for employee & school

### Photos/Videos of Students

- Photo/video of student is an education record if
  - Directly related to student
  - Maintained by school or party acting for the school
- FERPA excludes records created and maintained by school's law enforcement unit

20 USC 1232g; FPCO FAQ (April 19, 2018)

### Directly Related to Student

Context-specific to be determined on case-by-case basis, but does video depict activity:

- Which may be used for disciplinary action (or other official purpose) involving student (including victim)?
- Of student violating the law?
- Of student being injured, victimized?
- Of specific student focus?

20 USC 1232g; FPCO FAQ (April 19, 2018)

### Video of Multiple Students

- If an education record, parent has right to review
- If images of other students can be redacted (without destroying meaning), school should do so
  - No charge to redact
  - May charge for copy
- FERPA does not generally require release of copies

20 USC 1232g; FPCO FAQ (April 19, 2018)

### Video Disclosure to Police

If an education record, disclosure *only* if:

- Prior written consent from parent
- Application of consent exception
  - Health or safety emergency
  - Court order or subpoena

20 USC 1232g; FPCO FAQ (April 19, 2018)

## Craft Your Investigation Plan

## Conducting Interviews

### Interview Considerations

- Interview witnesses while memories are still fresh!
- Before interview
  - Outline questions to be asked
  - Use same central questions for each witness
- During interview
  - Present directive to be honest and forthright
  - Take notes, which may be discoverable

### Direct vs Leading Questions

- Use "stepped" direct questions if possible
  - Where were you on Monday morning?
  - Who was with you?
  - What were you doing?
- Leading questions suggest the answer and minimize interaction, may be useful with some students, be careful not to put words in their mouth!
  - What color was the shirt? (direct)
  - Was the shirt blue? (leading)

### Practice Tips

- Advise interviewee ahead of time to distinguish between what they saw/heard first hand and what they were told happened by someone else
- Don't interrupt interviewee answers
- Don't try to fill the silence, let the pauses breathe
- Listen to the answers and ask follow up questions! Don't let your outline drive you away from relevant information

### Using Evidence in Interviews

- Lay foundation of interviewee awareness of evidence before substantive questions
  - You mentioned that X sent you a message that made you uncomfortable, how was that sent?
  - Do you recall when you saw it?
  - Is this that message? (Present screenshot of message)
- Then question:
  - How did that message make you feel?
  - What about those words stood out to you?

### Accused's Rights

- Explanation of allegations
- Opportunity to respond, rebut, and defend against charges
- Copy of relevant policies and procedures
- Anything else specifically identified by contract and policy

### Always Ask

- Awareness (as applicable) of
  - Code of Conduct
  - Board policy
  - Prior directives
- At end of interview, ask:
  - Is there anything you think I need to know that I didn't ask you?
  - Is there anyone else you think I should talk to?
- Possible Directive: no retaliation, no contact

### If Respondent is Employee

- Follow Board policy and CBA
- Union representation
- Another administrator
- Direct employee to provide truthful responses
- Engage the conversation
  - Start broadly
  - Eventually narrow
- Pursue "I don't recall"

### *NLRB v Weingarten* 420 US 251 (1975)

- Employee has right to union representation at investigatory interview which might reasonably result in disciplinary action
- MERC has same standard
- Violation is an unfair labor practice of "interference" with union activity

### "Weingarten" Right

- Employee must request
- Employer not required to bargain or interact with union representative
- Employer, not union, controls interview
- Violation may invalidate investigation and allow for employee's reinstatement

### Refusing to Comply with Investigation

- Student refusal vs employee refusal
- Employee refusal
  - Consequences
    - Insubordination
    - Disciplinary action
- Due process concerns?

### When to Interview the Respondent?

- At the beginning of the investigation
  - Helps to set the scope
  - But will likely require a second interview
- At the end of the investigation
  - Have more information about what occurred
  - More complete interview
  - Easier to wrap-up

### During the Interview

- Don't base Complainant credibility assessment solely on whether Complainant was emotional/upset when describing allegations
- Caution advisor, attorney, or parent, if necessary, that questions are for the interviewee, not them
- For student interviews, allow parent to weigh in if they choose, *after* all student questions are completed
- Allow breaks, if necessary, but do not break between question and answer

### Recording

- Neither required, nor prohibited
- Consider "chilling" effect
- If interviewee records, so should you
- Michigan law only requires consent of one party to the conversation

### Interview Tips Summary

- Establish guidelines with advisor and interviewee, and anyone else present (i.e., parent/guardian, union representative)
- Explain allegations, if applicable
- Be direct - ask simple, straightforward questions
- Ask awareness of applicable policies, rules, codes of conduct
- Ask who else may have useful information, anything you didn't ask that they think you should know
- Re-interview Complainant, Respondent or witnesses if needed
- Be cognizant of implicit bias or conflicts of interest!

### Remember

#### The District:

- Has the burden of proof and the burden to gather evidence sufficient to reach a DoR
- Cannot, generally, use questions or evidence that constitute, or seek disclosure of, legally-privileged information
- Cannot access, consider, disclose, or otherwise use a party's medical records, including mental health records, unless the District obtains that party's voluntary, written consent to do so

Watch out for bias, prejudice or conflicts of interest!

### Writing an Investigation Report



## Remember

The Investigator:

- Must give parties equal opportunity to present witnesses, inculpatory/exculpatory evidence
- Cannot restrict parties from discussing allegations or gathering/presenting relevant evidence
- Must provide date/time/location, participants, and purpose of all hearings (if any), investigative interviews, and meetings, to party whose participation is invited or expected, in writing
  - Notice must be given a sufficient time in advance so that a party may prepare for interview

## Evidence Review Timeline

- *At least 10 calendar days before* investigation report is finalized: Parties/advisors must be sent copy of all evidence to inspect and review
- **10 day** timeline allows for parties to consider evidence, prepare arguments about relevancy and whether evidence has been omitted, and consider how the party intends to respond to the evidence
- Parties can submit written response to Investigator during **10 day** period

## What Evidence do Parties have Access to?

- **ANY** evidence, including:
  - Evidence upon which the District does not intend to rely in reaching a determination regarding responsibility; and
  - Inculpatory or exculpatory evidence obtained from any source.
- Consider reminder to parties that redisclosure of evidence outside of Title IX Grievance Process is prohibited

## General Tips

- Ensure report is clear, concise, and complete
- Report is more than copying and pasting witness statements
- Assume report may be released by either party
- Use quotes, dates, times, and locations when possible

## Complaint and Allegation Information

- Date Formal Complaint filed/signed
- Summary of Formal Complaint
  - Describe allegation, including date, time, place, and nature of the incident(s)
  - Identify any witnesses interviewed
  - Provide interview summaries

## Complainant & Respondent Information

- Complainant and Respondent names
- Name of advisor or attorney (if any), name or parent(s)/guardian(s) if involved
- Date notice provided for interview(s)
- Date of interview(s)
- Identify any other contacts with Complainant, Respondent

### Investigator Information

- Investigator name and title
- Statement that investigator does not have conflict of interest or bias against either party, generally or individually, that affected the investigation
- Date investigator sent each party and advisor all evidence subject to inspection and review
- Party responses to evidence, if any
- Any action taken after response(s) received

### Other Fact-Finding Activities

- Describe any other fact-finding that occurred as part of the investigation (e.g., site visits, record review, or hearing)
- Describe any findings of fact made during the investigation (e.g., statements relied upon, credibility determinations)
- *The investigator does not make a determination of responsibility.*

### Assessing Evidence

- Commentary: No definition of relevancy, use ordinary meaning of the word
- Relevant evidence: evidence that makes a fact more or less likely than it would be without the evidence
  - Does this piece of evidence impact the facts? If so, it's probably relevant!
  - Low bar to meet
- BUT relevancy does not determine weight, credibility, or persuasiveness
- Weigh evidence based on credibility and other circumstances

### Assessing Witness Credibility

- Monitor consistency
- Consider corroboration either from other witnesses or physical evidence
- Consider whether there is a motivation to lie
- Previously consenting does not imply future consent

### Writing About Evidence

- Remember, testimony IS evidence!
- Consider summarizing relevant information from interviews rather than copying and pasting Q&A
- Consider grouping similar witnesses together (e.g., student-athletes, coaches, eyewitnesses)
- Use quotes from interviews or detailed descriptions of tangible evidence

### Investigation Report Summary

- Investigator must objectively evaluate evidence
- Report must fairly summarize relevant evidence
- Consider your audience!
  - Parties get to review it
  - Decision-Maker uses it
  - Report can be FOIA'd or released by parties

**Questions?**

**THANK YOU!**

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