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Title IX

Guidance for Title IX Coordinators and Investigators

Lusk Albertson, PLC

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Roadmap

- The 2020 Title IX Regulations
 - Significant Provisions
 - Enforcement
- Navigating the Title IX Process
 - Notice
 - Supportive Measures
 - Investigation
 - Decision-Making, etc.
- Goal for Module = **Ensure Compliance with Updated Regulations!**



Definition of Sexual Harassment

- Sexual harassment is:
 - Conditioning an aid, benefit, or service on an individual's participation in unwelcome sexual conduct (*quid pro quo*)
 - Unwelcome sexual behavior determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to a program or activity offered by the school district
 - "Sexual assault," "dating violence," "domestic violence," or "stalking," as defined by federal statutes known as the Clery Act and the Violence Against Women Act (VAWA)
- Sexual harassment under Title IX *likely* includes harassment based on sexual orientation and gender identity. See *Obergefell v Hodges*, 576 US 644 (2015) and *Bostock v Clayton Cnty*, 590 US ____ (2020)



Quid Pro Quo



- Generally, conditioning a benefit or aid offered by the school district on acquiescence to a sexual advance
- Examples
 - A teacher who conditions a grade on such acquiescence
 - An administrator who conditions a promotion on such acquiescence
 - A school board member who conditions a his or her vote on such acquiescence

Effective Denial

- Unwelcomed sexual behavior a reasonable person determines is:
 - So "severe," "pervasive," and "objectively offensive"
 - That it effectively denies a person equal access to a program or activity offered by the school district

This definition needs to be unpacked

Effective Denial - Hypotheticals

- An affair between two consenting adult employees, reported by a parent
- An administrator or teacher who:
 - Makes a sexually charged comment about a colleague or a student
 - Inappropriately touches a colleague or a student
- A female student or group of female students:
 - Who, daily, tease a male student about his sexual orientation on the bus
 - Who frequently squeeze a male student's bottom and call him sexy

Third Prong – Clery Act and VAWA

- **"Sexual Assault"** is an offense, classified as forcible or nonforcible sex offense by the FBI's uniform crime reporting system
- **Forcible Sex Offenses**
 - Forcible Rape, including where victim is incapable of giving consent because of age, or temporary or permanent mental or physical incapacity
 - Forcible Sodomy, similarly-defined
 - Sexual Assault with an Object, similarly-defined
 - Forcible Fondling, defined as forcibly touching of private body parts of another for sexual gratification, similarly-defined
- **Nonforcible Sex Offenses**
 - Incest
 - Statutory Rape. In Michigan, the age of consent is 16. However, statutory rape is defined to include consensual sex between teachers and students who are younger than 18.

Third Prong – Clery Act and VAWA

- **“Dating Violence”** is violence committed by a person:
 - Who is or has been in a social relationship of a romantic or intimate nature with the victim; and,
 - Where the existence of the relationship is determined by considering the following factors:
 - The length of the relationship
 - The type of relationship
 - The frequency of interactions

Third Prong – Clery Act and VAWA

- **“Domestic Violence”** includes felony or misdemeanor crimes of violence committed by a current or former spouse or intimate partner of the victim, by a person with whom the victim shares a child in common, by a person who is cohabitating with or has cohabitated with the victim as a spouse or intimate partner, by a person similarly situated to a spouse of the victim under Michigan domestic or family violence laws, or by any other person against an adult or **“youth”** victim who is protected from that person's action under Michigan domestic or family violence laws
 - For purposes of this law, a “youth” is defined as a person from 11 to 24 years old
- **“Stalking”** is engaging in a course of conduct directed at a specific person that would cause a reasonable person to fear for his or her safety or the safety of others; or, suffer substantial emotional distress

Key Terms

Complainant = an individual who is alleged to be the victim of conduct that could constitute sexual harassment

Respondent = an individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment

Actual Notice - Definition

- A school district is deemed to have actual notice of alleged sexual harassment if *any* school district employee believes an employee or student has been sexually harassed
- This standard is **significantly broader** than the actual notice standard established in the *Gebser* and *Davis* cases

The Title IX Coordinator

- Every school district is required to appoint a Title IX Coordinator, whose job title includes the words "Title IX Coordinator"
- Every school district is required to post the Title IX Coordinator's contact information (i.e., office location, telephone number, and email address) on its website, to publish the contact information in all catalogues and handbooks, and to notify each employee union
- School districts are also required to post Title IX training on their websites



Title IX Coordinator's Duties

- To oversee the school district's compliance with Title IX
- To respond to any report of sexual harassment against any school district employee or student
- To oversee and/or participate in the resolution of any formal complaint of sexual harassment according to the school district's grievance procedure

Responding to Reports of Sexual Harassment

- Reports of sexual harassment may be verbal or written and may be received at any time
- Upon receiving a report, the Title IX Coordinator must:
 - Contact Complainant as soon as practicable
 - Notify Complainant of his/her right to file a formal complaint and the grievance process
 - Discuss and implement “**supportive measures**”



Contacting Complainant

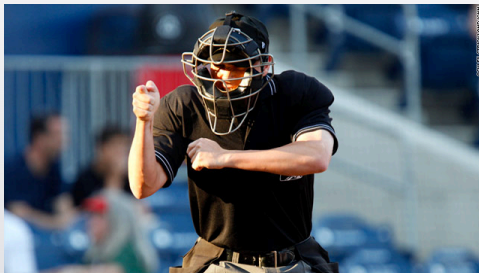
- Keep in Mind:
 - At the K-12 level parents should be included
 - Complainant and parents may not be aware of the report prior to notice from the Title IX Coordinator
 - An in-person or virtual meeting may be preferable to a telephone conversation
 - The difficulty of describing the grievance process unless Complainant and parents are looking at the policy
 - A formal complaint followed by the grievance procedure may delay the imposition of disciplinary measures against a Respondent-student
 - “Supportive measures” can and should be implemented regardless whether a formal complaint is filed
 - It’s a lot to take in, and no final decisions need be made during the first conversation
 - The importance of emphasizing Title IX’s prohibition against retaliation
- **Take Notes!!**



Supportive Measures

- Title IX was enacted to prevent sex discrimination and harassment from adversely affecting access to educational opportunities
- Supportive measures should restore or ensure continued access to educational opportunities, must be free to Complainant, and may not be punitive or unreasonably burden Respondent
- Non-exclusive examples of supportive measures include: **no-contact orders, counseling, course modifications, schedule changes, transfers, increased security and monitoring**
- The Title IX Coordinator must consider, *but is not bound by*, Complainant's wishes

Temporary Removal



- The temporary removal of a Respondent-student is not a supportive measure
 - A Respondent-student may be removed based on an individualized assessment that he/she poses an immediate threat to the physical health or safety of Complainant or others
 - Due process must follow immediately
- A Respondent-employee may be placed on a temporary administrative leave

Disabled Students

- A disabled student's status as a Respondent does not waive or otherwise affect his/her protections under the IDEA, the ADA, or Section 504
- Generally, but subject to statutory exceptions, an IDEA or Section 504-eligible student may not be disciplined for misconduct that is a manifestation of his/her disability
- ***A few additional thoughts ...***



The Formal Complaint

- A formal complaint should describe the **who, what, why, where, and when**
- A formal complaint must be signed by Complainant or the Title IX Coordinator
- **Formal Complaint forms [see next slide]**





FORMAL COMPLAINT OF SEXUAL HARASSMENT SUBMITTED BY COMPLAINANT	FORMAL COMPLAINT OF SEXUAL HARASSMENT SUBMITTED BY TITLE IX COORDINATOR
<p><i>Complainant:</i> _____</p> <p>I am filing a formal complaint of sexual harassment pursuant to the School District's Title IX policies and procedures prohibiting sexual harassment. The name of the person(s) who sexually harassed me is: _____</p> <p style="text-align: center;">OR</p> <p>I do not know the name of the person who sexually harassed me and can best describe him/her as follows: _____ _____</p> <p>I was sexually harassed in the following way (include all relevant dates, times, places, and events, attaching additional pages as necessary): _____ _____ _____ _____ _____ _____ _____ _____ _____ _____ _____ _____ _____ _____ _____</p> <p><i>Complainant</i> _____</p> <p>Signature _____</p> <p>Date _____</p> <p style="text-align: right;">Page 1 of ____</p>	<p><i>Complainant:</i> _____</p> <p><i>Respondent:</i> _____</p> <p>I received a report of sexual harassment by Complainant against the Respondent. I met with the Complainant on _____ to discuss supportive measures and the option of filing a formal complaint. That conversation is documented in a letter dated _____. The Complainant chose not to file a formal complaint. Nevertheless, in my capacity as the School District's Title IX Coordinator, I am filing a formal complaint because: _____ _____ The Respondent is alleged to have sexually harassed Complainant as follows (include all relevant dates, times, places, and events, attaching additional pages as necessary): _____ _____ _____ _____ _____ _____ _____ _____ _____ _____ _____ _____ _____ _____ _____</p> <p><i>Title IX Coordinator</i> _____</p> <p>Signature _____</p> <p>Name _____</p> <p>Date _____</p> <p style="text-align: right;">Page 1 of ____</p>

Presumption of Innocence

- Respondents are **always** presumed innocent; or, more technically, not responsible for sexual harassment
- Respondents may not be sanctioned unless and until an investigation is completed and a final decision rendered
- **Why?**



Notice

- The Title IX Coordinator must notify Complainant and Respondent, in writing, when a formal complaint is filed
- Notice to Respondent must include:
 - a statement of the allegations in sufficient detail to permit Respondent to prepare a response
 - a statement Respondent is presumed not responsible until a final decision is rendered
 - the parties' right to inspect the formal complaint and all relevant evidence
 - the parties' right to be represented by an advisor, who may be an attorney
 - any provision of the Student Code of Conduct prohibiting false statements or representations
- Supplemental notice must be provided if new allegations arise during the course of the investigation
- Notice forms [see next slide]



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INITIAL NOTICE TO COMPLAINANT-STUDENT (FOR RESPONDENT-STUDENT)

(Date)
(Parent(s) Name(s))
(Address)

Re: Notice of Formal Title IX Complaint

To the Parents of (Complainant's Name):

This letter confirms (Complainant's name) is a Complainant in a formal complaint filed under the School District's Title IX policy, (insert policy number/other reference). Please review (policy number/other reference) carefully, as it will govern the manner in which the formal complaint is investigated and resolved. The School District is required by law to presume Respondent is not responsible until an investigation is completed and a final decision is reached. Therefore, it is necessary to initiate an investigation. You may, if you wish, select an advisor to assist you with the investigation, and your advisor may be an attorney.

(Name or I) will serve as the Investigator. The Investigator will, among other things, schedule an interview with (Complainant's name) to gather additional information and evidence concerning the formal complaint. The Investigator will notify you and (Complainant's name) before the interview and provide you with all relevant information necessary to prepare for the interview. Please recall that (insert reference) of the School District's Student Code of Conduct prohibits any student from making a false statement or providing false information to the Investigator. This prohibition applies equally to (Complainant's name), Respondent, and all other student witnesses.

The Investigator is required to notify Respondent of (Complainant's name)'s interview and permit Respondent and (his/her) parents and advisor, if any, to attend. Similarly, the Investigator will schedule an interview with Respondent, which you, (Complainant's name), and your advisor may attend. We understand it may be uncomfortable to be in the same room as Respondent and (his/her) parents and advisor. However, the Investigator will not permit direct exchanges between parents, students, or their advisors. Furthermore, (insert policy number/other reference) strictly prohibits retaliation by or against anyone for filing a formal complaint or participating in an investigation. The same anti-retaliation provision prohibits

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retaliation against witnesses. You should contact me immediately if you believe prohibited retaliation has occurred.

Thank you for your attention to this matter. You may feel free to contact me if you have any questions or comments.

Sincerely,


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<p style="text-align: center;">INITIAL NOTICE TO RESPONDENT-STUDENT</p> <p style="text-align: center;">(Date)</p> <p>(Parent(s) Name(s)) (Address)</p> <p>Re: Notice of Formal Title IX Complaint</p> <p>To the Parents of (Respondent's Name):</p> <p>Title IX prohibits discrimination on the basis of sex, including sexual harassment. A formal complaint of sexual harassment has been filed against your (son/daughter), (name). The formal complaint alleges: (include a reasonably complete description of the formal complaint). The School District will investigate and resolve the formal complaint according to (reference policy or administrative regulation), which you may access (here (insert hyperlink)).</p> <p>At this point, the School District presumes (Respondent's name) is not responsible for sexual harassment. Therefore, it is necessary to initiate an investigation and reach a final decision according to (reference policy or administrative regulation). You may, if you wish, select an advisor to assist you during this process, and your advisor may be an attorney.</p> <p>(Name or I) will serve as the Investigator. The Investigator will, among other things, schedule an interview with you and (Respondent's name) to gather information and evidence concerning the formal complaint. The Investigator will notify you and (Respondent's name) before the interview and provide you and (Respondent's name) with all relevant information necessary to prepare for the interview. Please recall that (insert reference) of the School District's Student Code of Conduct prohibits any student from making a false statement or providing false information to the Investigator. This prohibition applies equally to (Respondent's name), Complainant, and all other student witnesses.</p> <p>The Investigator is required by law to notify Complainant of (Respondent's name)'s interview and permit Complainant and (his/her) parents and advisor, if any, to attend. Similarly, the Investigator will schedule an interview with Complainant, which you, (Respondent's name), and your advisor may attend. We understand it may be uncomfortable for (Respondent's name) to be in the same room as Complainant during the interview. However, the Investigator will not</p> <p style="text-align: center;">Page 1 of 2</p>	<p>permit direct exchanges between parents, students, or their advisors, if any. Furthermore, (insert policy number/other reference) strictly prohibits retaliation by or against anyone for filing a formal complaint or for participating in an investigation. You should contact me immediately if you believe prohibited retaliation has occurred.</p> <p>I have imposed a mutual no-contact order between Complainant and (Respondent's name), pending the completion of the investigation and until a final decision is reached. This means that, until a final decision is reached, (Respondent's name) may not contact or communicate with Complainant, directly or indirectly. (Notice of other supportive measures affecting Respondent). Any violation of (the no-contact order or other restrictions) would violate (provisions) of the School District's Student Code of Conduct, the penalty for which ranges from (range). Similarly, the conduct alleged in the formal complaint, if it occurred, may violate (provisions) of the School District's Student Code of Conduct, the penalty for which ranges from (range). You may review the Student Code of Conduct by clicking (here (insert hyperlink)).</p> <p>Thank you for your attention to this matter. You may feel free to contact me if you have any questions or comments.</p> <p style="text-align: center;">Sincerely,</p> <p style="text-align: center;">Page 2 of 2</p>
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<p style="text-align: center;">INITIAL NOTICE TO RESPONDENT-EMPLOYEE</p> <p style="text-align: center;">(Date)</p> <p>(Employee's Name) (Address)</p> <p>Re: Notice of Formal Title IX Complaint</p> <p>To (Employee's Name):</p> <p>Title IX prohibits discrimination on the basis of sex, including sexual harassment. A formal complaint of sexual harassment has been filed against you. The formal complaint alleges: (include a reasonably complete description of the formal complaint). The School District will investigate and resolve the formal complaint according to (reference policy or administrative regulation), which you may access (here (insert hyperlink)).</p> <p>At this point, the School District presumes you are not responsible for sexual harassment. Therefore, it is necessary to initiate an investigation and reach a final decision according to (reference policy or administrative regulation). You may, if you wish, select an advisor to assist you during this process, and your advisor may be an attorney.</p> <p>(Name or I) will serve as the Investigator. The Investigator will, among other things, schedule an interview with you to gather information and evidence concerning the formal complaint. The Investigator will notify you before the interview and provide you with all relevant information necessary to prepare for the interview.</p> <p>The Investigator is required by law to notify Complainant of your interview and permit Complainant and (his/her) parents and advisor, if any, to attend. Similarly, the investigator will schedule an interview with Complainant, which you and your advisor may attend. We understand it may be uncomfortable for you to be in the same room as Complainant during the interview. However, the Investigator will not permit direct exchanges between the parties, parents, and advisors. Furthermore, (insert policy number/other reference) strictly prohibits retaliation by or against anyone for filing a formal complaint or for participating in an investigation. You should contact me immediately if you believe prohibited retaliation has occurred.</p> <p style="text-align: center;">Page 1 of 2</p>	<p>You have been placed on temporary administrative leave, pending the completion of the investigation and until a final decision is reached. This means that, until a final decision is reached, you are not permitted on school district property and may not contact Complainant, directly or indirectly. (Notice of other supportive measures affecting Respondent). Any violation of (the no-contact order or other restrictions) may result in disciplinary action.</p> <p>Thank you for your attention to this matter. You may feel free to contact me if you have any questions or comments.</p> <p style="text-align: center;">Sincerely,</p> <p style="text-align: center;">Page 2 of 2</p>
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Dismissals

- The Title IX Coordinator **must** dismiss a formal complaint if:
 - The allegations do not establish sexual harassment even if they are true
 - The allegations did not occur in connection with the school district's programs or services
 - The allegations did not occur in the United States
 - Need to document basis for dismissal
- The Title IX Coordinator **may** dismiss a formal complaint if:
 - Respondent's employment with or enrollment in the school district ends
 - Specific circumstances prevent the school district from gathering sufficient relevant evidence to reach a final decision (e.g., passage of time, unavailability of witnesses or other information)




Informal Resolution

- Once a formal complaint is filed, the school district may not informally resolve allegations of sexual harassment unless:
 - Complainant and Respondent have been advised of their rights and the circumstances in which informal resolution may preclude resumption of a formal complaint investigation
 - Complainant and Respondent have voluntarily consented to informal resolution, in writing
- Informal resolution may consist of the following, as well as other informal resolution procedures:
 - A written agreement, facilitated by the Title IX Coordinator or others
 - Restorative practices, See, e.g., MCL 380.1310c
 - Facilitated mediation
 - Arbitration, etc.
- Example letters [see next slide]



<p style="text-align: center;">EXAMPLE LETTER: INFORMAL RESOLUTION</p> <p style="text-align: center;">[Date]</p> <p>[Parent(s) Name(s)] [Address]</p> <p><i>Re: Informal Resolution of Title IX Complaint</i></p> <p>To the Parents of [Complainant/Respondent's Name]:</p> <p>We recently discussed a proposal to informally resolve the pending formal Title IX complaint involving your [son/daughter], [name]. Specifically, we discussed informal resolution by [insert type and a short description of informal resolution process].</p> <p>The School District cannot informally resolve a formal Title IX complaint unless Complainant and Respondent have been advised of their rights, including circumstances in which Complainant may not resume the formal complaint investigation, and Complainant and Respondent have consented to informal resolution, in writing. In order to meet these conditions, you may access the School District's Title IX policy [here (insert hyperlink)]. You may also contact me directly if you have any questions about your rights under the Title IX policy. Complainant may resume the formal complaint investigation unless he/she waives the right to do so in a written agreement reached as a result of the informal resolution.</p> <p>If you would like to attempt to informally resolve the formal Title IX complaint in the manner described in this letter, please countersign below and return it to my attention. If Complainant and Respondent both agree to informal resolution, in writing, I will contact you concerning next steps. Otherwise, the formal complaint investigation will continue as described in the School District's Title IX policy.</p> <p>You may feel free to call with any questions or comments.</p> <p style="text-align: right;">Sincerely,</p> <p style="text-align: center;">Page 1 of 2</p>	<p>Signature(s) of Parent(s) of [Complainant/Respondent]</p> <p>_____</p> <p>Date</p> <p>_____</p> <p style="text-align: center;">Page 2 of 2</p>
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Investigation - Overview

- Appointing the Investigator
- Fairness and Impartiality
- Respondent's Response
- Interviews and Information Gathering
- The Investigator's Report
- Questions, Responses, and Appeals



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Appointing the Investigator

- The Title IX Coordinator or designee may serve as the Investigator
- Consider the Pros and Cons:
 - The Title IX Coordinator is very familiar with the school district's Title IX policy, the requirements of Title IX, and has training and experience
 - The Title IX Coordinator's role as an impartial investigator may limit his/her ability to empathically support Complainant and Respondent
 - After the parties receive the Title IX Coordinator's investigative report, one or both may not view the Title IX Coordinator as impartial



Fairness and Impartiality

- Bias
 - The Investigator may not be biased
 - Bias is a predisposition or preconceived opinion that prevents a person from impartially evaluating facts that have been presented for determination; a prejudice
- Presumption of Innocence
 - Until the investigation is completed the Investigator must presume Respondent has not sexually harassed Complainant



Respondent's Response

- Respondent should be given an opportunity to submit a written response
- Respondent's response may help focus the investigation and highlight or identify relevant witnesses and information
- The School District should not require a response




Interviews and Information Gathering

- Interviewing Complainant and Respondent
 - Complainant and Respondent should be interviewed in every case
 - The interview must be preceded by written notice that gives the parties adequate time to prepare for the interview and:
 - identifies the date, time, and place of the interview
 - provides both parties with all relevant evidence (redacted per FERPA)
 - The same notice may preclude the parties from disclosing the relevant evidence and/or conditioning production of relevant evidence on the execution of a non-disclosure agreement. *Example letters [see next slide]*
 - Both parties and their parents and advisors may attend the interview
 - In order to maintain control, the Investigator should prohibit direct exchanges between the parties, parents, and advisors
 - The Investigator should create a written summary of the interview as soon as practicable




<p style="text-align: center;">EXAMPLE LETTER: INTERVIEW OF COMPLAINANT/RESPONDENT (STUDENTS)</p> <p style="text-align: center;">[Date]</p> <p>[Parent(s) Name(s)] [Address]</p> <p><i>Re: Notice of Investigative Interview of [Complainant/Respondent]</i></p> <p>To the Parents of [Complainant/Respondent's Name]:</p> <p>The investigative interview of [Complainant/Respondent] has been scheduled on [date] at [time] at [location]. The relevant evidence gathered thus far is enclosed. The School District considers the relevant evidence to be private and confidential. Disclosure of the relevant evidence by you, [Complainant/Respondent's name], or your advisor may result in legal consequences, including: disciplinary charges for the student or any School District employee; allegations or claims of retaliation under the School District's Title IX policy; adverse inferences in this investigation; or, civil actions.</p> <p>You, [Complainant/Respondent's name], and your advisor may attend the interview. The Investigator will be conducting the interview and no one else will be permitted to address questions to the interviewee. Nor will the Investigator permit direct exchanges between or among those present for the interview. Any violation of these rules may result in removal from the interview. Toward the end of the interview, the Investigator will consult with you, [Complainant/Respondent's name], and your advisor privately, which consultation may or may not lead to additional or follow up questions.</p> <p>You may feel free to call with questions or comments.</p> <p style="text-align: right;">Sincerely,</p> <p style="text-align: center;">Page 1 of 2</p>	<p style="text-align: center;">EXAMPLE LETTER: INTERVIEW OF COMPLAINANT-STUDENT (TO RESPONDENT-EMPLOYEE)</p> <p style="text-align: center;">[Date]</p> <p>[Employee's Name] [Address]</p> <p><i>Re: Notice of Investigative Interview of Complainant</i></p> <p>To [Employee's Name]:</p> <p>The investigative interview of [Complainant] has been scheduled on [date] at [time] at [location]. The relevant evidence gathered thus far is enclosed. The School District considers the relevant evidence to be private and confidential. Disclosure of the relevant evidence by you or your advisor may result in legal consequences, including: disciplinary charges for students or any School District employee; allegations or claims of retaliation under the School District's Title IX policy; adverse inferences in this investigation; or, civil actions.</p> <p>You and your advisor may attend the interview. The Investigator will be conducting the interview and no one else will be permitted to address questions to the interviewee. Nor will the Investigator permit direct exchanges between or among those present for the interview. Any violation of these rules may result in removal from the interview. Toward the end of the interview, the Investigator will consult with you and your advisor privately, which consultation may or may not lead to additional or follow up questions.</p> <p>You may feel free to call with questions or comments.</p> <p style="text-align: right;">Sincerely,</p> <p style="text-align: center;">Page 1 of 2</p>
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Interviews and Information Gathering

- Interviewing Witnesses
 - Generally, all identified eye-witnesses should be interviewed
 - Questioning should cover the allegations, relationship to the parties, and the identification of other witnesses and information of which the parties may not be aware
 - The Investigator should create a summary of the interview as soon as practicable
- Securing Data, Documents, and Other Information

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Interviews and Information Gathering

- Relevant Evidence
 - Title IX does not assume Investigators will apply the Rules of Evidence like lawyers in a trial
 - Investigators should consider information "relevant" if it makes the existence of an allegation, or a response to an allegation, more or less likely
- Rape-Shield
 - Information about the sexual behavior or proclivities of Complainant is not relevant, by definition, unless it is about Complainant's sexual behavior with Respondent to prove consent
- Privileged Information
 - The Investigator may not seek, access, or rely on privileged information (e.g., medical records) without a party's written consent



The Investigative Report

- The Investigator must complete an investigative report within the timeline specified in the school district's Title IX policy
- The Title IX Coordinator may grant extensions (adjournments) for good cause
- The investigative report must fairly summarize the relevant evidence
- The Investigator should not resolve credibility issues, but should fairly summarize information that may bear on the Decision-Maker's resolution of credibility issues



Delivery of Investigative Report

- The Investigator must deliver the following documents to the Title IX Coordinator and simultaneously to the parties within the time specified in the District's Title IX policy
 - A cover letter – **Example [see next slide]**
 - The investigative report
 - Witness summaries (redacted per FERPA)
 - Other relevant information



EXAMPLE LETTER: INVESTIGATIVE REPORT (TO COMPLAINANT-/RESPONDENT-STUDENTS)

(Date)

(Parent(s)/Name(s)
(Address)

Re: Investigative Report

To the Parents of (Complainant/Respondent's Name):

I have enclosed the Investigator's investigative report. I have also enclosed the Investigator's summaries of the interviews of all witnesses, including Complainant and Respondent, and other relevant evidence. The School District considers the investigative report, interview summaries, and other relevant evidence private and confidential. Any disclosure of these documents by you, (Complainant/Respondent's Name), or your advisor may result in legal consequences, including: disciplinary charges for the student or any School District employee; allegations or claims of retaliation under the School District's Title IX policy; adverse inferences in this investigation; or, civil actions.

You may file a written response to the investigative report within seven (7) school days or ten (10) calendar days. You may also, if you wish, submit written questions for the Investigator to pose to the opposite party or any witness. The Investigator will either pose the question and provide you with a written response or explain why he/she declined to pose the question.

You may feel free to call with questions or comments

Sincerely,

EXAMPLE LETTER: INVESTIGATIVE REPORT (TO RESPONDENT-EMPLOYEE)

(Date)

(Employee's Name
(Address)

Re: Investigative Report

To (Employee's Name):

I have enclosed the Investigator's investigative report. I have also enclosed the Investigator's summaries of the interviews of all witnesses, including Complainant and Respondent, and other relevant evidence. The School District considers the investigative report, interview summaries, and other relevant evidence private and confidential. Any disclosure of these documents by you or your advisor may result in legal consequences, including: disciplinary charges for the student or any School District employee; allegations or claims of retaliation under the School District's Title IX policy; adverse inferences in this investigation; or, civil actions.

You may file a written response to the investigative report within seven (7) school days or ten (10) calendar days. You may also, if you wish, submit written questions for the Investigator to pose to the opposite party or any witness. The Investigator will either pose the question and provide you with a written response or explain why he/she declined to pose the question.

You may feel free to call with questions or comments

Sincerely,

Parties' Questions and Responses

- The parties, after receiving the investigative report, may submit written questions to the opposite party or witnesses and may, within the time permitted by the school district's Title IX policy, file a response
- Generally, the Investigator should submit written questions and provide responses. If the Investigator declines to submit a question, he/she must notify the party who submitted it with an explanation



The Decision-Maker

- The Decision-Maker determines whether Respondent sexually harassed Complainant.
- The Decision-Maker **may not** be the Title IX Coordinator or the Investigator
- The Decision-Maker:
 - Reviews all of the information collected during the investigation
 - Issues a decision concluding Respondent is or is not responsible for sexual harassment in violation of Title IX



Decision – Standard of Proof

- The standard of evidence may be “**a preponderance of the evidence**” or “**clear and convincing evidence**”
- Proof by a “**preponderance of the evidence**” means the evidence on one side of a question is more convincing than the evidence on the other side
 - This concept must be distinguished from the quantity of the evidence
 - In other words, for a variety of reasons, one witness may be more convincing than two others
- “**Clear and convincing evidence**” is a higher standard of proof
 - Evidence is “clear and convincing” if the evidence on one side of a question is highly and substantially more probable than the evidence on the other side



Decision - Credibility

- Credibility determinations may be based on a variety of factors, including:
 - Ability and capability to observe
 - Consistency with other known facts
 - Consistency over time
 - Relationship to parties
 - Others
- The Decision-Maker may not make credibility determinations based on a person's status as a Complainant or Respondent



Decision-Maker's Report

- Required Components
- The Decision-Maker's Report **must** be delivered to the parties and the Title IX Coordinator
 - Complainant's allegations
 - Procedural steps taken to resolve allegations
 - Site visits, or other methods used to gather evidence
 - Findings of fact
 - The application of the school district's Title IX policy and the school district's student code of conduct
 - A statement of and rationale for the result as to each allegation; including determinations of responsibility, disciplinary sanctions, whether Complainant will be provided remedies to restore or preserve his/her equal access to the school district's education programs and activities, and the procedure and bases for appeal

Appeals



- Complainant or Respondent may appeal the Decision-Maker's Decision
- Bases for Appeal:
 - Procedural irregularity affecting the outcome
 - Decision-Maker not aware of newly discovered evidence
 - Bias or conflict of interest on the part of the Investigator or Decision-Maker
 - How shown?

Resolving Appeals

- Appellate Officer must:
 - Review the appeal
 - Determine whether the appeal implicates one or more the bases for appeal
- If not, the appeal should be denied
- If so, the Appellate Officer must:
 - Review the entire record
 - Decide whether to grant the appeal, in whole or in part
 - Affirm or reverse the Decision, in whole or in part
 - If necessary, remand the Decision to the Investigator or Decision-Maker for further action
- Decision are not final until the appeal process is over or the time for taking an appeal has passed with no appeal



Retaliation

- Retaliation is broadly prohibited by the new regulations
- **“For the purpose of interfering with Title IX rights” or “because the person has participated or refused to participate in any manner in a proceeding under Title IX regulations”**
- Charges against an individual for SCC violations not involving sex discrimination or sexual harassment, but arising out of the same facts or circumstances, constitute retaliation IF the purpose is to interfere with any right or privilege secured by Title IX



Recordkeeping



- Records related to alleged sexual harassment must be maintained for a **minimum of seven (7) years**
 - All records ... investigation records, disciplinary sanctions, remedies, appeals, supportive measures, etc.
- Must document:
 - Why response was not deliberately indifferent
 - Measures were taken to restore or preserve equal access to educational program or activity
 - If no supportive measures provided, why that was not deliberately indifferent

Training

- Required for ALL staff (to identify and report sexual harassment)
- Required for Title IX Coordinator, investigators, and decision-makers (both initial and appeal)
- Maintain records for seven (7) years and **post training materials on website****
 - Attorney copyright considerations



Policy/Regulation Considerations

- Sample Policy =

Discrimination and Harassment. The Board of Education is committed to maintaining a learning/working environment in which all individuals are treated with dignity and respect, free from illegal discrimination and harassment. There will be no tolerance for discrimination or harassment on the basis of race, color, national origin, religion, sex, marital status, genetic information, disability, age, or any other basis prohibited by law. The Superintendent will develop administrative regulations to implement this policy. The Superintendent designates [REDACTED] to supervise the implementation of this policy and its implementing regulations.



Hypothetical #1

Mr. John Jones is the Principal of Harmony High School in suburban Detroit. Mr. Jones has been employed by the Harmony School District for 32 years. Prior to becoming Principal, he was a high school English teacher for 10 years and an Assistant Principal for 5 years.

The Superintendent of the Harmony School District receives a telephone call from one of Mr. Jones' former students, Mrs. Jennifer Smith, who is now a mother. She inquires whether her daughter, a rising freshman, can attend the School District's Symphony High School instead of Harmony. The Superintendent asks why? In response, Mrs. Smith explains that, when she was a student, she had an affair with Mr. Jones and the thought of her daughter attending Harmony makes her very uncomfortable. The Superintendent grants the transfer request.

The Superintendent calls the School District's attorney and asks her to investigate Mrs. Smith's allegation against Mr. Jones. Mrs. Smith meets the attorney and tells him:



- She served as a classroom assistant for Mr. Jones, who was single at the time;
- She was 17 years old and he was 23;
- Over time, they developed feelings for each other;
- They met at Mr. Jones apartment for lunches and dinners;
- They hugged and kissed at his apartment, but nothing else;
- She suggested they meet in Windsor, Ontario for dinner at a romantic river-front restaurant where they were unlikely to be seen by anyone they knew;
- After dinner, Mr. Jones rented a motel room where they had sexual relations;
- Their romantic and sexual relationship continued, off-and-on, for two more years, until she ended it;
- Now that she's older, she realizes their relationship was wrong and blames Mr. Jones;
- She does not hold any hard feelings, but doesn't feel comfortable with her daughter attending Harmony High School.





The School District's attorney then interviews Mr. Jones. After the usual amount of evasion and equivocation, Mr. Jones admits:

- Jennifer was an intelligent but troubled young lady;
- Jennifer told him she was using drugs;
- Jennifer told him she had been sexually abused by an uncle;
- Jennifer complained to him that other girls circulated rumors she was promiscuous, although "it was none of their business;"
- He wanted to help her because he saw her potential;
- She was seductive and initiated the romantic and sexual aspects of their relationship;
- The only time they did anything other than kiss, at least before she graduated, was in the motel room in Windsor; and,
- He now regrets their relationship, but the events that occurred after she graduated were between consenting adults and, in his opinion, are not the School District's concern.



The School District's attorney prepares a report based on these interviews, which he presents to the Superintendent and the Board of Education. The report is presented in closed session, as permitted by Michigan's Open Meetings Act, because the attorney's report falls within the attorney-client privilege. The Board does not make any decisions during the closed session, but the Superintendent gathers the impression it would be best if Mr. Jones chose to voluntarily resign to avoid the scandal that would surely ensue if Mrs. Smith's story become public. The School District's attorney negotiates a severance agreement, pursuant to which Mr. Jones is compensated for the remainder of the school year and receives a favorable letter of recommendation from the Superintendent.



Questions – Hypothetical #1

- Did the Superintendent violate Title IX? How?
- Assume the Superintendent reported his conversation with Mrs. Smith to the Title IX Coordinator. What is the next step?
- What do we call Mrs. Smith?
- What do we call Mr. Jones?
- Is Mrs. Smith or the Title IX Coordinator required to file a formal complaint?
- The definition of sexual harassment has three components. What are they and does Mr. Jones' conduct fall within one or more of the definitions?
- If a formal complaint is filed, is the Title IX Coordinator required to dismiss it? If so, why?
- If a formal complaint is filed, does the Title IX Coordinator have the discretion to dismiss it? If so, why?



- Assume an investigation takes place:
 - May Mr. Jones and Mrs. Smith sit in on each others' interviews? If so, may anyone else sit in?
 - Assume Mr. Jones tells the Investigator the same things he told the School District's attorney. Which of these items is irrelevant?
- Assume the Investigator is a School District administrator who is in the same union as Mr. Jones. Does this establish a disqualifying bias or conflict of interest? Does it make any difference if the Investigator is the president of the union? Does it make any difference if the Investigator and Mrs. Smith attend the same church?
- The local newspaper makes a Freedom of Information Act request for the Investigator's file. Can the School District refuse to produce the file?



Hypothetical #2

The Harmony High School marching band camp is a week-long event that takes place at a privately owned facility near Jackson, Michigan. The camp is voluntary, but the band director encourages members to participate. The cabins are segregated by sex.

Jake, who plays trumpet, and Emily, a percussionist, are 18 year old seniors. They dated for two years but broke up two weeks before camp started.

The third night, several students, including Jake and Emily, get high after the adults go to sleep. Emily gets higher than she intended. Jake and Emily walk into the woods, hand-in-hand. The other kids go back to their cabins.

Emily returns to her cabin disheveled and sobbing, claiming she was raped by Jake. One of her cabin-mates reports this to the band director who reports to the Title IX Coordinator, as required by School District policy. The band director also takes Emily to the hospital.



The Title IX Coordinator contacts Emily to ascertain appropriate supportive measures and determine whether she wants to file a formal complaint. She does. The Title IX Coordinator also contacts Emily's parents. Emily's parents, livid, insist that Jake be removed from the marching band and expelled from school. The Title IX Coordinator declines to remove Jake from the marching band or initiate disciplinary procedures. However, she does issue a mutual no-contact order.

The Title IX Coordinator decides to do the investigation herself. Jake's parents hire an attorney to act as his advocate. The Title IX Coordinator interviews Emily. Jake and his attorney are present. The band director is present as Emily's advocate. Emily's father is also present. Emily states:





- She was high and doesn't remember everything that happened;
- She remembers:
 - Walking into the woods with Jake;
 - Making out with Jake;
 - Telling Jake to stop because they had broken up;
 - Jake on top of her, engaging in intercourse against her will; and,
 - Going to the hospital.
- She does not remember returning to her cabin.

At the end of the interview, while everyone is still in the room, Jake's attorney insists the Title IX Coordinator secure a release of information from the hospital. Emily's father flatly refuses. The Title IX Coordinator also interviews Jake. Emily and the band director are present. Jake states:



- He was high but remembers what happened;
- Emily was also high, but acting normal;
- They made out;
- She started to perform oral sex on him then stopped, saying it was wrong because they had broken up;
- They laid next to each other for a while and talked;
- Without saying anything, she leaned over, kissed him and they started making out again;
- Making out led to sex without another word being spoken;
- The sex was no different than dozens of times when they were dating; and,
- Suddenly, she pushed him off, jumped up, grabbed her clothes, and starting running toward her cabin.
- He started to follow her but changed his mind and walked back to his cabin.



Questions – Hypothetical #2

- Does the Title IX Coordinator have the authority to investigate this case, which occurred off School District premises and on private property? If so, why?
- With respect to the Title IX Coordinator's authority, does it matter Jake and Emily are adults?
- Can/should the Title IX Coordinator report this matter to the police? What is the likely effect of reporting to the police?
- Who else should the Title IX Coordinator interview?
- What should the Title IX Coordinator do about Jake's attorney's request for Emily's hospital records?
- Is Jake's statement about previous sexual experiences with Emily relevant?
- The School District has adopted a "preponderance of the evidence" standard for Title IX investigations. If, at the end of the day, the Decision-Maker determines the evidence is perfectly balanced what should be her conclusion?



- How can the Decision-Maker resolve a case when Claimant says one thing and Respondent says another (i.e., he said – she said)? What factors may the Decision-Maker not take into account when making a credibility determination?
- Assume the Decision-Maker concludes Jake is responsible for sexual harassment.
 - What is the appropriate penalty?
 - Jake appeals on the grounds his responsibility was not established by a "preponderance of the evidence." What are the appellate officer's options?
- Assume the Decision-Make concludes Jake is not responsible for sexual harassment. How should the Title IX Coordinator address the inevitable concerns that will be raised by Emily and her parents?



Hypothetical #3

Jason and Jessica were 14 when they started “talking.” Eventually, Jason persuaded Jessica to trade intimate pictures. Jessica broke up with Jason a few weeks later. Jason texts Jessica’s pictures to several friends as revenge. Jessica finds out but, mortified, doesn’t tell her parents.

Jessica, claiming illness, misses the first few days of school. Eventually, her parents insist she go to school. The first day back is awful. Jessica thinks everyone is looking, whispering, laughing, and pointing. She tells her teacher she feels sick and is excused to go to the office where she runs into her counselor, Mrs. Anderson. Realizing something is wrong, Mrs. Anderson takes Jessica to her office where Jessica confides what happened.



Mrs. Anderson informs the Title IX Coordinator, Mrs. Goodman. Mrs. Goodman contacts Jessica and her parents to discuss supportive measures and Jessica’s right to file a formal complaint. Mrs. Goodman suggests that, as other students have seen the pictures, it might best if Jessica transfers to another school for a fresh start. Mrs. Goodman also suggests it might be best to hold off on a formal Title IX complaint, as ordinary school disciplinary procedure will probably reach a more expeditious conclusion. Finally, Mrs. Goodman points out it might be wise to file a police report. Jessica and her parents decide to follow Mrs. Goodman’s advice. Mrs. Goodman confirms their discussion in a letter, including a copy of the School District’s Title IX policy, and, issues a no-contact order to Jason and Jessica.

The building administration initiates disciplinary action and temporarily suspends Jason. The building administration also schedules a manifestation determination (MDR) for Jason, who has a 504 Plan based on a diagnosis of Oppositional Defiant Disorder (ODD) and depression. Separately, the police charge Jason, obtain a warrant, seize his phone and computers, and run down and seize most of the pictures. The MDR concludes Jason’s misconduct was a manifestation of his disability and disciplinary proceedings are terminated. Jason returns to school. The criminal charges proceed in Juvenile Court.





In the meantime, Jessica is doing as well as might be expected at her new school. A couple of weeks, Jessica's parents find out Jason is still in school. Stunned, they contact Mrs. Goodman. Mrs. Goodman confirms Jason's status and, otherwise, declines to provide an explanation based on Jason's "privacy rights." Jessica's parents, outraged, insist on filing a formal complaint and consult a private attorney to determine what recourse exists against the School District and/or Jason.



Questions – Hypothetical #3

- Should Mrs. Anderson, the counselor, be concerned she divulged Jessica's confidential communication to Mrs. Goodman, the Title IX Coordinator?
- Assume the Title IX investigation determines the facts are exactly as described above.
- Is Jason responsible for sexual harassment?
- If Jason is responsible for sexual harassment:
 - What sanction is appropriate for Jason?
 - What remedy is appropriate for Jessica?
- What legal remedy does Jessica have against the School District?
- What legal remedy does Jessica have against Jason?
- What is the moral of this story?



