

Title IX Sexual Harassment Investigator Training

Title IX Sexual Harassment 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

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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

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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



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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

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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

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



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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?

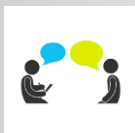
Always Ask

- 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



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

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“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



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!

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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

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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

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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

#TeamThrun Title IX Attorneys

