



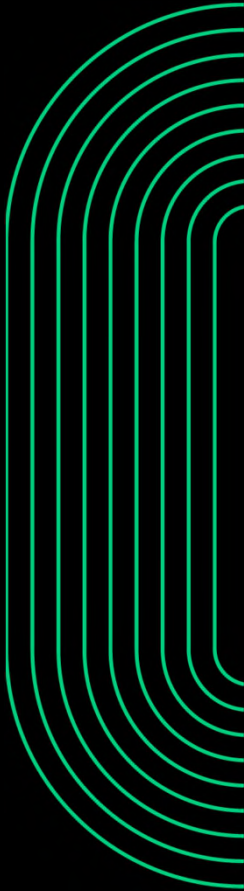
Investigations A-Z: Best Practices and Title IX Considerations

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February 18, 2022



Topics to be Covered

- Recognizing the Need to Investigate
- Understanding the Purpose of an Investigation
- A-Z of an Efficient and Thorough Investigation
- Conducting Effective Interviews/Dos and Don'ts
- Special Evidence Considerations
- Documentation Requirements/Best Practices
- Points to Remember/Prevention Tips
- **TITLE IX Considerations**



You Are Agents of the Board

- As members of the District Administrative team, you are an agent of the School Board.
- What you say - don't say, do - don't do, binds your employer the school district.
- Your actions create or reduce liability exposure for the District/School Board/possibly yourself.



Legal Principle of Agency

- There is a rhyme and reason for all these policies and procedures.
 - Under the legal principle of agency, or **respondeat superior**, the actions of the persons a school district entrusts with administrative responsibility are regarded as the actions of the institution.
 - Equally, if not more importantly, is the concept of **knowledge attribution**. Any knowledge that an administrator, principal or assistant principal possesses is attributed to the school district, the superintendent, and board of education regardless of whether persons in the chain of command may have possessed the same knowledge.



Legal Principle of Agency

- When an Administrator receives information about a complaint and takes no action, that decision not to take action is attributed to the school district, superintendent and board of education.
- The actions, inactions and decisions of the frontline Administrators are absolutely critical in protecting the district against potential liability exposure.



Core Competency

In today's world, being able to effectively conduct an effective investigation, is a core competency for a building administrator.



Understanding the Purpose of an Investigation

- Why have policies and procedures? Some policies REQUIRE an investigation
- It's the right thing to do – a student's well-being or an employee's job is on the line
- Obtain information that may assist the District in defending against future claims
- Act of investigating may assist the District in avoiding liability!!
 - One of the few situations under the law in which actions taken by the school after alleged misconduct has occurred may absolve the school of, or limit, its liability –
VERY IMPORTANT



Understanding the Purpose of an Investigation

- DUE PROCESS is required before an adverse employment or educational action is taken
- Applies when employee has a property right in continued employment and/or student has right to an education
- Nature of due process
 - Varies with circumstances, including severity of contemplated action/discipline
 - At a minimum, employee/student must have opportunity to tell side of story before decision made
 - LISTEN
 - INVESTIGATE IF NEEDED



Title IX Changes under the Final Rule



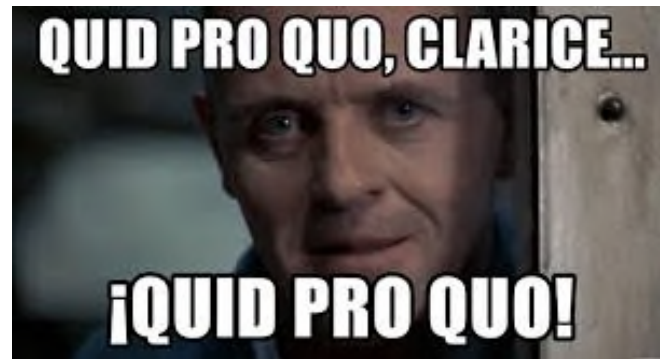
What is Title IX of the Education Amendments of 1972?

- 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.*



Definition of Sexual Harassment

- "Quid Pro Quo" harassment by a school employee.
- 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 Clery Act and the Violence Against Women Act.



Sexual Harassment – What Changed?

OLD DEFINITION (OCR Guidance)

- Unwelcome conduct
- Determined by a reasonable person
- To be severe, pervasive, or persistent, and to interfere with or limit a student's ability to participate in or benefit from school services, activities or opportunities

NEW DEFINITION (Final Rule)

- 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



Is It Title IX Sexual Harassment?

- **SEVERE:**
 - *Causing discomfort or hardship*
 - *Very painful or harmful*
 - *Requiring great effort or a great degree*
- **PERVASIVE:**
 - *Existing in or spreading through every part of something*
 - *Systemic*
- **OFFENSIVE:**
 - *Giving painful or unpleasant sensations*
 - *Causing displeasure or resentment*



Is It Title IX Sexual Harassment?

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

- **Single, isolated, events = unlikely, but could occur (e.g. rape)**
 - Butt smack in hallway
 - Single inappropriate text/photo (isolated vs. systemic disclosure?)
 - Verbal sexual remarks only = grey area
 - MUTUAL sexual conduct/communication (consent)
- **Severe, pervasive AND objectively offensive**
- **Effectively denies 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?**



If Not Title IX, What Is It?

STATE LAW = ELLIOT LARSEN CIVIL RIGHTS ACT

"Sexual harassment" is defined under Michigan law as unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature, when:

- Submission to such conduct is made either implicitly or explicitly a term or condition of an individual's employment, or status in a class, educational program, or activity;
- Submission or rejection of such conduct by an individual is used as the basis for employment or educational decisions affecting such individual;
- Such conduct has the purpose or effect of **interfering** with the individual's work or educational performance; of creating an intimidating, hostile, **or** offensive working, and/or learning environment; or of **interfering** with one's ability to participate in or benefit from a class or an educational program or activity.

NEOLA Board Policy **5517** (Anti-Harassment) vs. **2266** Title IX Sexual Harassment

Informal/Formal Investigation vs. Title IX Grievance Procedure



NEW TITLE IX POLICY AND PROCEDURE REQUIREMENTS



Revise/Adopt Title IX Board Policies (2266)

- New definition of Sexual Harassment under Title IX
 - *Include Cleary Act and VAWA definitions/citations*
- Identify **Title IX Coordinators**, or that the school will designate at least one (most schools identify 2: one male and one female Admin)
- 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!



Title IX Written Grievance Procedures: 10 Specific Items

1. Treat Parties Equitably
2. Objective Evaluation of Evidence
3. Training & No Conflicts of Interest
4. Presumption of Innocence
5. Reasonably Prompt Timelines
6. Description of Range of Outcomes
7. Standard of Evidence
8. Right to Appeal
9. Description of Range of Supportive Measures
10. Privileges



Investigation Procedures and Best Practices



Recognizing the Need to Investigate (Title IX or Other Matters)

- Many Circumstances May Prompt an Investigation
 - A formal (or informal) complaint
 - Employee/student reports of questionable conduct
 - Employee/student misconduct including violation of rules or policies
 - Theft or suspected theft
 - Drug use or activity
 - Workplace accidents
 - Student allegations / Student disclosures
 - Anonymous complaints



Best Investigator?



- Internal or External Investigator
- Skill-Set to Conduct the Investigation
 - Ability to judge credibility / Viewed as credible / Common sense
 - Effective interviewing skills / Ability to think on their feet and ask follow-up questions
 - Ability to be impartial, objective, non-judgmental, and understanding
 - Ability to determine the scope of the investigation / decipher what's relevant
 - Knowledge of school policies / employment or other issues
 - Time to conduct a prompt and thorough investigation
 - Ability to make a decision (ex: Title IX) - Have to be tough, but fair

Preparation is KEY

- **Clear understanding of the allegations**
 - Do not make any assumptions about the truth of the allegations
- **Gather relevant written policies, contracts, handbooks, rules**
 - If a bullying, discrimination or harassment case, make sure to collect all applicable policies, rules and forms
 - Review all relevant collective bargaining provisions
- **Determine what evidence is relevant and necessary**
 - What are you are trying to prove? – Develop a plan
 - What documentation do you need? (Emails, phone records, videos, etc.)
- **Consult with others (Administration, HR, Board or Legal)**
 - Need to understand objectives



Preparation is KEY

- **Review specific contract provisions**
 - Probationary Employee
 - Probationary Teacher
 - Definitions of Discipline
 - Progressive Discipline Language
 - Restrictions on Employee files
 - Language expunging disciplinary reports
 - Restrictions Concerning Complaint Handling and Investigations
 - Grievance / Arbitration Process & Powers
- **Review BOE policies**
 - Anti-Harassment, Discrimination, Title IX, Bullying
 - Acceptable Use / Technology
 - Athletic Code of Conduct



Preparation is KEY

- **Be aware of the rights of the person you are interviewing**
 - Right to representation / adviser
 - NO Right to Attorney (unless criminal charges pending or Title IX investigation)
 - Weingarten rights – check collective bargaining agreement
 - Parent involvement/rights? *In loco parentis!*
- **Be aware of any applicable timelines to take action**
- **Make any necessary preliminary decisions**
 - Should employee be placed on leave? Paid or Unpaid?
 - Should student be removed via Emergency Removal?
- **Report to Law Enforcement? CPS?**
 - Unless the misconduct is significant or could also be a crime, seek Central Office support on reporting to law enforcement.



When to Investigate

- **Investigate Promptly – won't get better with time**
 - Avoid unnecessary delay
 - Whenever possible, begin the investigation immediately
 - Prevents collaboration / forgetfulness
 - Continue the investigation without delay (if delay, document it and notify the parties)
 - Work diligently to conclude the investigation as quickly as possible
- **Give minimal notice of interview(s)**
 - **Title IX:** prior notice to parties = 24-48 hours



How to Investigate

- **Determine order of interviews**
 - Complainant
 - Subject of the complaint – get the facts
 - Witnesses for Complainant
 - Respondent
 - Respondent witnesses
 - Follow up interviews (if necessary)
- **Don't “wing it”**
- **Prepare open-ended, unbiased questions**
 - Have an outline
 - Review questions with HR or legal counsel
 - Have copies of BOE policy / handbook available



Title IX Formal Complaint Requirement – see Handout

- 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



Title IX: Written Notice to Parties – see Handout

1. The actual allegations and facts that would constitute sexual harassment.
 - Remember, Title IX involves nonconsensual sexual conduct or communication.
2. The presumption of innocence.
3. A statement that the parties are entitled to adviser of their choice.
4. A statement that the parties can request to inspect and review certain evidence.
5. Information regarding the code of conduct and false statements.



Title IX: Written Notice to Parties – see *Handout*

- Include notice to the parties of the school's grievance process, which must comply with the 10 items under Final Rule.
- Whether there is an opportunity to engage in informal resolution. (excluding when Respondent is an adult).
- 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.



BIRD WALK: Q&As and Scenarios Regarding Evidence





SHOULD THE DISTRICT REQUIRE WRITTEN STATEMENTS DURING INVESTIGATIONS?



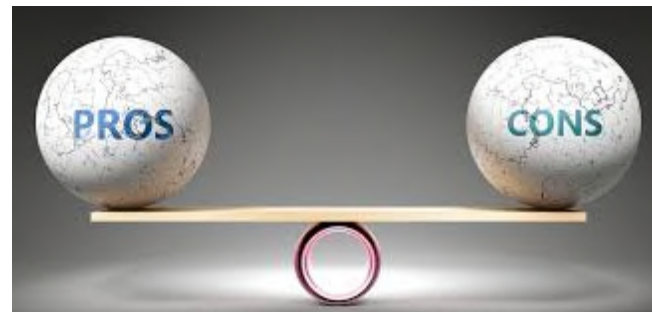
Evidence – Written Statements?

- **Advantages:**

- Preserves the witness' statement.
- Assists with further interviews.
- Provides roadmap for interview
- In their own words

- **Disadvantages:**

- Witness may be less forthcoming, if asked to put facts in writing.
- Can slow down the investigation.
- Creates discoverable record of potentially harmful evidence.



Evidence – Written Statements?

- Typically, yes, especially if litigation is likely to result from the investigation.
 - In their writing/legible/signed/dated.
- DO NOT RELY ON ONLY STATEMENT: follow up and fill in gaps/get additional context.
- Alternative: read back notes, have student or staff agree and/or initial your notes and note the process you followed in your notes and have your witness initial or sign.





SHOULD THE DISTRICT TAPE RECORD INTERVIEWS DURING INVESTIGATIONS?



Evidence – Tape Recording?

- **Advantages:**

- Preserves the witness' statement, in his/her own words.
- Unlike a written statement, recording avoids the argument that the school wrote out the words that it wanted the witness to say.
- Minimizes the likelihood of allegations that the witness' statement was coerced.
- Helpful to law enforcement, if criminal charges are filed.



Evidence – Tape Recording?

- **Disadvantages:**

- Appears heavy-handed.
- May cause the witness to be less forthcoming.
- May result in the recording of unrelated information that the school may not wish to record.
 - Witnesses tend to ramble.
 - Can ramble into irrelevant areas.
 - Can record harmful information that you may not want to record (e.g., “I reported this previously, but nothing was done about it.”).
- Recommend when: witness is likely to be unavailable later.
- Note BOE Policy on Recording District meetings: 2461



Law Enforcement Involvement & Student Searches



Scenario #1

A high school 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?
- What if they demand a copy of the video?



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.
- **However**, if the school uses the video to find witnesses to the altercation and the students are named or used as witnesses, the video becomes the witnessing student's education record also.



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 8330**

- 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.
 - No obligation to voluntarily release student information for requests not related to school misconduct/discipline.



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 and request confirmation from law enforcement that they will not disclose the video to 3rd party without parental consent or notification.
- 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: BOE Policy 5540
 - 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, 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

The 4th Amendment protects against unreasonable searches and seizures.

For Students:

- **General Rule:** Any government (school) action that intrudes upon and invades a student's justifiable expectation of privacy constitutes a search under the 4th Amendment.
- A "request to search" is not a search so long as student recognizes they are free to refuse consent.



The 4th Amendment – What is Reasonable?

Two Prong Test:

1. Was the search justified at its **inception**?
 - It is if at the inception of the search, there is reasonable suspicion that the search will reveal evidence that the student has violated or is violating the law or the rules of the school (code of conduct). Reasonable suspicion has been taken to mean “fair probability” or a “moderate chance.”
2. Was the search permissible in its **scope**?
 - It is when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction.



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, but consider electronic communication and privacy laws.
 - 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.



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).



BACK TO INVESTIGATION PROCEDURES ...



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 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.
- Ask the complainant to keep the investigation and information discussed during the interview confidential (exception: **Title IX** “Gag Orders”).
- Encourage the complainant to contact you during the investigation if he/she has any questions or concerns about retaliation. Provide BOE policy.



Witnesses

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



Respondent and Rebuttal Witnesses

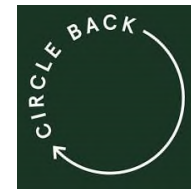
- **The Respondent**

- Rebuttal
- His/her side of the story
- Afford an opportunity to lie
(ex: Have you ever contacted X on social media?)
- 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 all of 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.



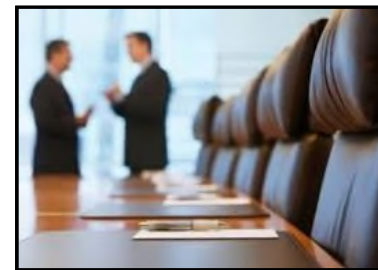
Interview Respondent/Accused

- 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.
- Ask to keep the investigation and information discussed during the interview confidential (ex: Title IX “Gag Orders”).
- 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.



Right to Union Representation?

- Upon employee request; but best to always offer and record response.
- When employee reasonably believes participating in investigatory interview that could lead to that employee's discipline = **WEINGARTEN RIGHTS**.
- But, look at your collective bargaining agreement – does it provide greater rights?
- This right is often expanded by union to other meetings which is not appropriate (i.e. performance, evaluation, etc.) What's your practice?



Role of Union Representative

- No authority to direct employee not to answer, in violation of supervisor's order
- Should not be allowed to answer questions for employee
- May caucus (note when and for how long)
- May ask clarifying questions or object to questions
- May emphasize points on employee's behalf
- May be zealous/enthusiastic in defense of employee
- No authority to "pick and choose" what union rep they want.
 - Caveat: severity of the allegations



Role of Parents?

- School employees act *in loco parentis* when students are in school.
- Do not need prior parental consent before Administration questions a student during an investigation.
- Parent refusal to cooperate/allow access for questioning?
- Parent Consent for Law Enforcement/DHHS? (Policy 5540)
 - DHHS/CPS: can question at school when allegations involve family member
 - Building Admin should ask whether contact to parent(s) is appropriate
 - Shall attempt to contact prior to questioning, if appropriate
 - Building Admin or counselor should request to remain in room to support student
 - Law Enforcement: at-school violations questioning during school hours
 - Building Admin shall attempt to contact parent first
 - Building Admin should remain in room unless compelling reason not to



Conducting Interviews in General

- **Explain the confidentiality rules that apply; but cannot guarantee 100%**
 - Only disclose when necessary; “need to know” basis
 - Request the same of interviewee
- **Explain the rules against retaliation**
 - Very important
 - Fear of retaliation may cause witnesses to clam up
 - Tolerating retaliation may give rise to liability
- **If requiring a written statement – tell witness up front**
- **If you have a written statement, clarify origin and purpose**
 - Is statement a recorded recollection of highlights or a detailed account
 - Remember any additional facts – sign and date statement



Conducting Interviews in General

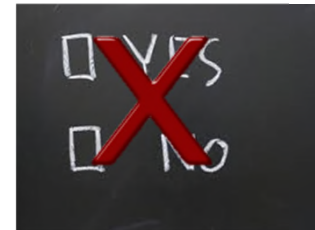
- Take verbatim (as possible) notes
- Ask open-ended and non-leading questions that cannot be answered with a simple “yes” or “no”

Example:

Closed: Were you angry when Jenny said that about you?
Response: Yes.

Leading: You were probably angry when Jenny said that about you.

Open: When Jenny said that about you, how did you feel?
Response: I was angry, upset, shocked, etc....
Follow-up: WHY?



Conducting Interviews in General

- Carefully listen to the answers; follow up if needed.
 - Don't be glued to your outline; be flexible.
- REMEMBER - Clarify conflicting or confusing information.
 - Are you saying...
 - Do you mean...
- Did they answer the question – if not, ask again!
- Watch for non-verbal behaviors and note them.
- Always ask the “catch all” questions at the end of every interview until they say “NO.”
 - “Is there **anything/anyone** else you would like me to know, or that you feel is relevant to this investigation, that we have not discussed?”



Conducting Interviews in General



- **Witness interviews (Complainant / Respondent)**

- Interview separately not in a group
- Emphasize need for completeness, accuracy, and truth
- Be mindful of additional conditions and events that need to be documented (witnesses spoke to each other before, threats made if statement given)
- Cover any other similar incidents or the lack thereof
- Be mindful of word choice. Speak like a regular person; "before" not "prior to." Don't refer to the "victim," use names.
- Ask who, what, when, where, why, how questions

Common Mistakes Made During Interviews

- **Doing the interview alone.**
 - Second witness can corroborate what was said (and not said!).
 - Provides second set of eyes and ears, to assess credibility, and help determine next steps and other questions to ask.
- **Approaching the interview with a closed mind.**
 - Prematurely making statements about the likelihood the accused did something wrong.
- **Disclosing the evidence before questioning the witness.**
 - Example: “Yesterday afternoon, at about 2:15, did you ask Sue what she was wearing under her skirt?” vs. “What happened yesterday with Sue?”



Common Mistakes Made During Interviews

- **Making admissions harmful to the District.**
 - e.g. – we just don't have the time to monitor every child on the playground.
 - e.g. – we may have been inconsistent in applying our policy.
 - e.g. – we did not get good guidance on what to do in these kinds of cases.
- **Promising 100% confidentiality.**
- **Demonstrating bias.**
 - e.g. – suggesting to the Complainant that you are not taking the complaint seriously.
 - e.g. – suggesting to the Respondent/accused that you do not believe the Complainant.
- **Failing to document the interview.**



How Do You Assess Credibility of Parties/Witnesses?

- **Through Corroboration!**
- **If there are conflicting versions of events, and credibility must be assessed, consider:**
 - Whether the party / witness is believable and whether the account provided makes sense. (*Plausibility*)
 - Did the party / witness appear to be telling the truth? (*Demeanor*)
 - Did the party / witness have a reason to lie? (Status [i.e., alternative ed. student] is not a reason to lie) (*Motive*)
 - Do other witness accounts or documentary evidence back up the party's / witness' account? (*Corroboration*)
 - What is reputation of party / witness for trustworthiness and veracity? (*Past Record*)



Roadblocks During an Investigation

- If a party is uncooperative:
 - Encourage participation by explaining the investigation process, answering any questions, and reiterating the prohibition against retaliation (if applicable)
 - Provide BOE policy
 - Enlist union rep in explaining need to respond
 - An employee can be compelled to cooperate in an investigation and it is appropriate to discipline employees who refuse to cooperate
 - Student / Title IX considerations



Roadblocks During an Investigation

- If a witness is uncooperative:
 - Try to determine reason for lack of cooperation
 - Often concerned about how it will look to peers
 - Witness can be uncomfortable and afraid of retaliation
 - Don't want to get involved
 - Nothing will change anyway
- Reassure witness that they are doing the right thing.
- Tell witness lack of evidence will inhibit investigation/ability for District to take action.
- Provide reassurance about how to handle actual or perceived retaliation – give names and numbers of who to contact if retaliation is suspected. Give BOE policy.



Documentation is Key!

- **Recording the Information collected during an Investigation:**
 - Determine at the outset how information will be documented
 - Options to document interviews include:
 - Handwritten notes
 - Typed summaries for signature by the witness
 - Allow witness to make changes before signing
 - Statements written by each witness
 - Tape record?
 - If handwritten notes are used, before concluding the interview, review notes with witness to ensure all information was captured accurately
 - Ask witness to initial notes
 - Handwritten notes should be legible

Dr B. Who	date: 1 Nov 1994
Farm Street 12	
Kirkville	
tel: 2276	
37	
Tuberculosis 1070 mg	
24. da. no. 30	
I. 1. ad. 1 h. before breakfast.	
Rp. suspension in milkshake	
10ml da. no. thirty; first	
I. one tablet every six hours,	
two before the night	
(maximum 1 daily)	
Ms/Mr	
address: Patient 32	
age: B. Who	



Documentation is Key!

- Create a separate (confidential) file for the investigation
- The file should include all documents and other information gathered during the investigation
 - The allegation/complaint
 - Notes
 - Evidence of all contacts or attempts to contact witnesses
 - Documents and physical evidence
 - Witness statements
 - Investigation Report
 - Documentation that parties received the outcome



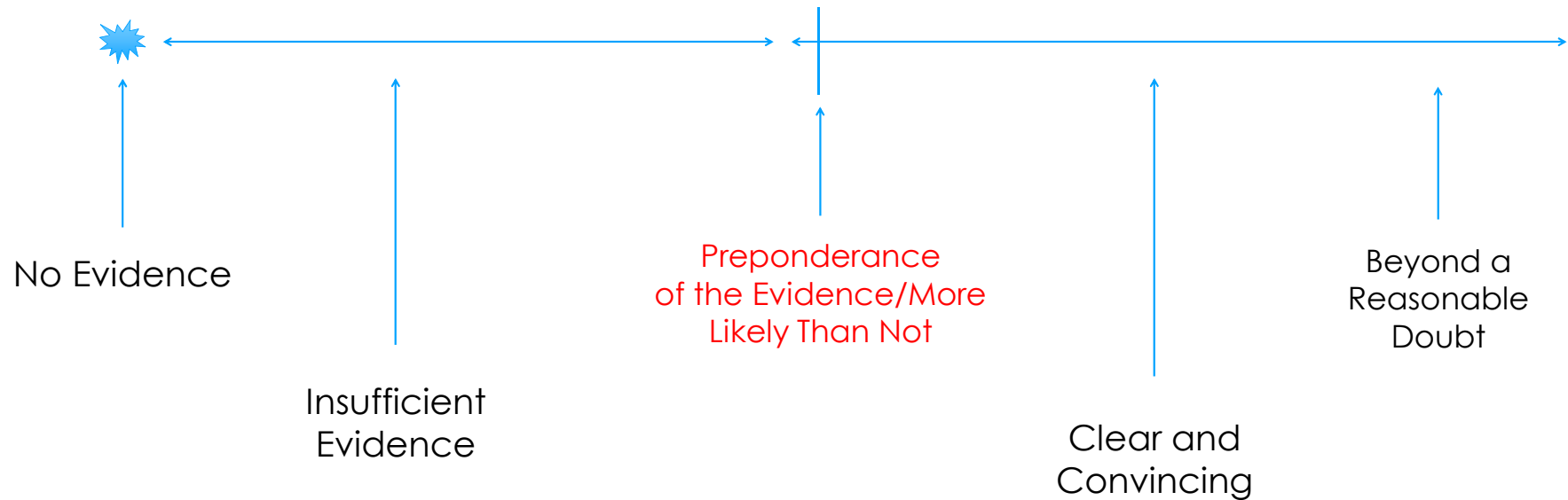
Make a Decision (EXCEPT Title IX)

- Make a Determination
 - Review all of the evidence, including witness interviews
 - If necessary, follow up with additional interviews or other activity needed to conduct an adequate investigation
 - If evidence conflicts, assess credibility (is witness believable, did witness account make sense, is account based upon personal knowledge or gossip, hearsay or speculation, does witness have reasons to lie, does account contradict documentary evidence)
 - Consider and weigh all the evidence and make a decision . . . Based on???
- **WHAT IS YOUR BURDEN OF PROOF??**



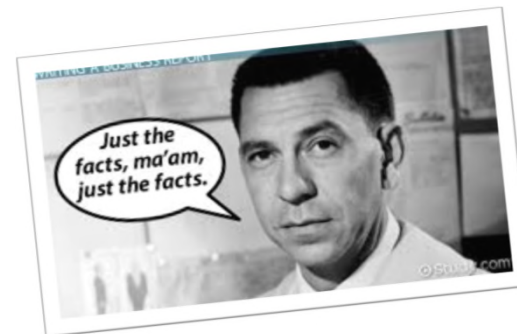
Evidence Thresholds

Evidentiary Standards



Put It All Together

- Remediation
 - Determine what, if any, correction action or remedial measures are necessary
 - Always consider policies and practices
 - Avoid a Discrimination Argument – “You treated me different!”
- Consider/Discuss how to organize and prepare the Investigation Report
- Prepare the Investigation Report



Investigation Report

- **The Investigation Report**

- The investigation report is the one comprehensive document summarizing the investigation, which includes:
 - Background information
 - An explanation of the situation prompting the investigation
 - How the investigation was carried out
 - Witnesses interviewed
 - Documentary evidence reviewed
 - Conclusions and basis for findings and discipline recommendation
 - Consider attaching significant documents to report

*I just need
the main ideas*



Title IX Investigation Report Requirements – See Handout

- Investigator needs to prepare a written investigative report on the allegations of the formal complaint.
- A school has to give the parties at least 10 days to respond to the report and supporting 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 and decision-maker.



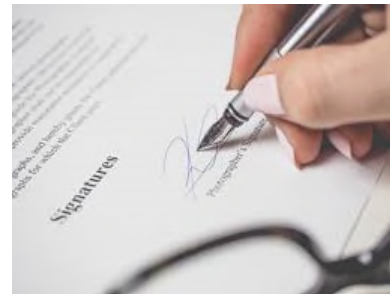
Investigation Report

- **Writing the report**

- If creating a first person statement, use the exact words used by the witness.
- If providing a summary with quotes, assure that the information in quotes is in the witness's exact words.
- Make sure you know how to contact the witness in the future if needed.
- Remember to date each document and place page numbers on each page.

- **Witness Statements**

- Dated
- Signed
- Legible



Investigation Report

- Think about your audience when writing your report
- Edit and proof your report from the perspective of someone with no knowledge of event
- Better yet, have someone with no knowledge read and see if it is clear (confidentiality)
- Decide how you are going to refer to your witnesses and then refer to them in the exact same way throughout the report (Mr. Jones, or R. Jones, or Robert Jones)
- Will the report be subject to a FOIA request?
- Will the report be Exhibit A in litigation?



Outcome to Parties

- The outcome of an investigation should be communicated to the party(ies) in writing
- Deliver outcome simultaneously!
- What should be in outcome letters:
 - Summary of Allegations
 - Summary of Investigation
 - Summary of Findings
 - Any sanctions/remedial measures to be taken
 - Protection against retaliation (if applicable)
 - Appeal?



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 10 day requirement under Title IX Final Rule*).
- 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.



Title IX Determination Requirements – see *Handout*

After the evidence has been weighed, the determination has to be written. It must include:

1. The portion of the school's policies that was violated.
2. A description of the procedural steps that were taken by the school on the way to getting to that point.
3. A findings of fact section.
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.



Title IX Determination Requirements – see *Handout*

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.



Title IX Mandatory Dismissals

- BEFORE OR DURING FORMAL INVESTIGATION
- 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.



Title IX Discretionary Dismissals

A school may dismiss a complaint:

BEFORE OR DURING FORMAL INVESTIGATION

- 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.
- See *Handout for Mandatory/Discretionary Dismissal Notice*



Appeal Rights? Title IX = YES

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.
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.
4. Schools can offer additional grounds for appeals, if they want to, so long as the grounds apply on an equal basis to the parties.



Appeal Rights? Other Board Policies/Investigations?

- Other Discrimination/Harassment Policies = NO
 - 1662, 3362, 4362, 5517
 - Superintendent decision final; No BOE appeal rights
- Do NOT expand the appeal process = Pandora's Box.
- Does the CBA/Grievance Procedure apply? If so, that's likely proper forum/avenue for appeal of employee discipline. (unless teacher discipline = prohibited subject)



Informal Investigations

- Some minor incidents can be resolved through confrontation and/or intervention.
- Restorative Justice/Circles/Mediation.
- OCR endorses and encourages informal resolution, and we believe it is a best practice, when voluntary. Check BOE policies.
- Title IX Considerations.



Informal Investigation Procedure

- Advising the student about how to communicate the unwelcome nature of the behavior to the accused.
- Distributing a copy of relevant BOE policies (anti-harassment / bullying / Title IX policy) as a reminder to the parties that the conduct is prohibited and the consequences for engaging in the prohibited conduct.
- If both parties agree, the Title IX / Compliance Officer (or designee) may arrange and facilitate a meeting between the parties to work out a mutual resolution.
- Other remedies as appropriate.



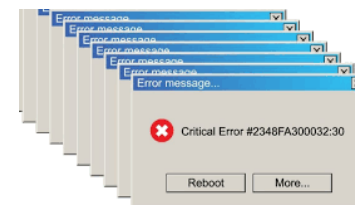
Informal Investigation Procedure

- **Just because it's informal, doesn't mean you can skip formal documentation!**
 - Document student/employee's willingness to forgo filing a formal complaint.
 - Document discussions with both parties and parents/union (if applicable).
 - Document actions taken to remedy the complaint.
 - Document any discipline imposed as a result.
 - Follow up via written correspondence.
 - Keep Title IX Coordinator / Compliance Officer "in the loop" to assure procedures are followed.
- **Title IX:** Supportive measures must still be considered!



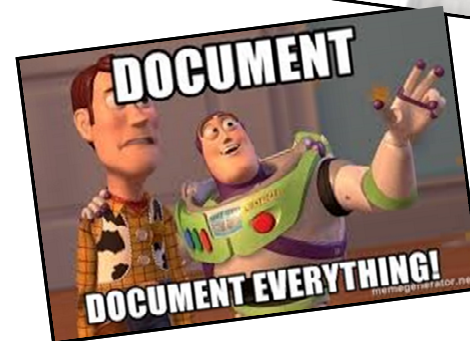
Investigation Errors to Avoid

- Failure to interview witnesses or eyewitnesses involved in the incident.
- Failure to rule out other suspects or explanations.
- Unreasonable (and undocumented) delays.
- Careless errors in facts or reports suggesting lack of focus or negligent investigation.
- Hasty interviews with complainant or respondent.
- Decisions or discipline not congruent with known facts or actual or potential harm or consistent with similar situations.
- Failure to notify parties of results in writing.
- **WORST ERROR = PROCEDURAL ERROR!!**



Points to Remember

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



Prevention Tips

- Administrators should be trained to document any complaint and to document their action, decision-making and investigation of that complaint. If the Administrator decides to take no action, their reasons for their decision should be adequately explained and documented.
- Principals, assistant principals, site supervisors and other administrators should be encouraged to involve the central office administrators (or legal counsel) if they have any questions or doubts about how to proceed in an investigation.
- The school district should train all administrative staff regarding investigations and documentation procedures and the school district's board policies and expectations. All training sessions should be well documented.



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, especially new definitions under **Title IX!**
- 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.



QUESTIONS?



Thank You



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Legal Disclaimer

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