

RUPP, ANDERSON, SQUIRES & WALDSPURGER, P.A.



TITLE IX OVERVIEW AND INVESTIGATION TRAINING

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Introduction and Background

LAWS PROHIBITING SEX DISCRIMINATION

- **Multiple Definitions at Play**
- **Minnesota Human Rights Act (“MHRA”)**
- **Title IX**
- **Title VII**
 - Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when:
 - Submission to such conduct is made either explicitly or implicitly a term or condition of an individual’s employment,
 - Submission to or rejection of such conduct by an individual is used as a basis for employment decisions affecting such individual, or
 - Such conduct has the purpose or effect of unreasonably interfering with an individual’s work performance or creating an intimidating, hostile, or offensive working environment.

NEW REGULATIONS

**Effective Date: Tomorrow,
August 14, 2020.**



NEW REGULATIONS

- To Do List:
 - Revise existing sexual harassment policies. (MSBA 413 and 522)
 - Develop a written grievance procedures document
 - Identify who will serve in the various roles
 - Post contact information for Title IX Coordinator, your non-discrimination policies, and your written grievance procedures on the district's website.

NEW REGULATIONS

- To Do List Cont'd
 - Post the training materials to your website
 - Include the following in any student and employee handbooks, as well as any course catalogues:
 - Policies prohibiting sex discrimination and sexual harassment;
 - Contact information for the Title IX Coordinator; and
 - Written Title IX grievance procedures.

NEW REGULATIONS: SCOPE

- Only relate to allegations of sexual harassment.
- Standards applicable to responding to allegations of sexual harassment and retaliation that occurs during or as a result of a sexual harassment investigation.

NEW REGULATIONS: PERSONNEL

- Title IX Coordinator
 - Expanded Role
 - “Authorized” to coordinate compliance
- Investigators, Decision-makers, and Informal Resolution Facilitators
 - At least one, preferably more in each position
 - Can serve in multiple roles during *different* investigations
 - No bias
 - Training

SEXUAL HARASSMENT DEFINED

- Conduct on the basis of sex that includes one or more of the following:
 - An employee conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct (also called quid pro quo harassment);
 - Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to a school's education program or activity;
 - Sexual assault, dating violence, domestic violence, stalking

COVERAGE

- "Locations, events, or circumstances over which the recipient exercised substantial control over both the [subject of a complaint] and the context in which the sexual harassment occurs..."
- Online
- Not outside the U.S.

NONDISCRIMINATION POLICY

- Review existing policies to ensure Title IX Coordinator is identified
- Remove outdated definitions
- Notice of Policy
 - Provide notice to certain groups
 - Notice must include contact information for Coordinator
 - Prominently displayed on website
 - In handbook or catalogues

GRIEVANCE PROCEDURE: REQUIREMENTS

- Equal treatment
- Objective evaluations of relevant evidence
- Investigations by trained, unbiased individuals
- Presumption of no responsibility
- “Reasonably prompt” time frames
- Identify possible disciplinary sanctions
- Standard of evidence (“preponderance of the evidence” or “clear and convincing”)
- Describe appeal procedure and bases
- Supportive measures for complainants and respondents
- No requirements to waive legally recognized privilege

REPORTING SEX DISCRIMINATION OR SEXUAL HARASSMENT

- Any person to Coordinator
- May report in person, by mail, by telephone, by e-mail, or other means
- Any time
- Parents may file on behalf of minor child

NOTICE OF SEXUAL HARASSMENT ALLEGATIONS

- Actual knowledge
- An elementary or secondary school is deemed to have *actual knowledge* of alleged sexual harassment of *any employee* has notice of the allegations



RESPONDING TO ALLEGATIONS OF SEXUAL HARASSMENT

- Prompt and not “deliberately indifferent”
- *Only* if the school’s response is “clearly unreasonable in light of the known circumstances.”



FORMAL COMPLAINTS

- Filed by complainant (alleged victim)
- Complainant must participate or attempt to participate in education program or activity
- Title IX Coordinator may also file formal complaint
- If formal complaint filed, must follow grievance procedure

TITLE IX COORDINATOR COMPLAINTS

- Title IX Coordinator may file over the objection of a complainant if it is “reasonable”
 - Not clearly unreasonable
- Consider Complainant’s wishes

RESPONDING TO COMPLAINTS THAT ARE NOT FORMAL COMPLAINTS

- Require response, but not grievance process
- Deliberate indifference
- If district has actual knowledge, Title IX Coordinator must contact complainant about supportive measures and discuss filing complaint



SUPPORTIVE MEASURES

- Non-disciplinary, non-punitive individualized services offered as appropriate
- Before or after a formal complaint is filed or in situations where not formal complaint is filed
- Deter sexual harassment and restore or preserve equal access
- Confidential to the extent possible
- Title IX Coordinator responsibility

EXAMPLES OF SUPPORTIVE MEASURES

- Counseling
- Extensions of deadlines or other course-related adjustments
- Modifications of work or class schedules
- Campus escort services
- Mutual restrictions on contact between the parties
- Increased security and monitoring of certain areas of campus
- Other similar measures

NOTICE TO PARTIES

- Written notice must include:
 - Grievance procedures, including informal resolution
 - Notice of the allegations, including:
 - Identities, description of conduct, date and location
 - Sufficient time to prepare a response before initial interview
 - Respondent presumed not responsible

NOTICE TO PARTIES, Cont'd

- Written notice must include (continued):
 - Parties may have advisor of their choice
 - Right to inspect and review evidence
 - Any provisions of code of conduct prohibiting false statements
- If investigation expands, must send new notice

OBLIGATION TO INVESTIGATE OR DISMISS

- Investigation or dismissal required for formal complaint
- A formal complaint must be dismissed if:
 - The conduct alleged in the formal complaint would not constitute sexual harassment, as defined above, even if provided or
 - Did not occur against a person in the United States
- If dismissed, may proceed under other laws or policies

INVESTIGATION PROCESS

- Grievance process will identify specific requirements
- Generally:
 - District bears burden of proof
 - No access to medical or psychiatric records without consent
 - Both parties have opportunity to present fact and expert witnesses, and other evidence
 - **No prohibition on talking to others**

INVESTIGATION PROCESS Cont'd

- Same opportunity for both parties to have others present during proceedings
 - Advisor may be attorney, but not required
 - No limitations on who advisor is, but may impose equal limitations on the participation of the advisor in the process
- Reasonable, advance written notice for any meeting:
 - date,
 - time,
 - location,
 - participants,
 - and purpose

INVESTIGATION PROCESS, Cont'd

- Equal opportunity to review evidence
- Both parties have at least ten days to review evidence and submit written response before investigation report is completed
- Both parties have at least ten days to review investigation report and submit written response before determination is made

DATA PRIVACY

- Cannot use FERPA as reason for failure to provide required written notice to parties



DECISION-MAKER'S ROLE

- Decision-maker (not investigator) makes “determination of responsibility”
- Decision-maker is not Coordinator
- Only requirements are impartiality and training
 - Licensed Administrator or Supervisor with authority to issue discipline, if necessary

LIVE HEARING OR WRITTEN QUESTIONS

- Process may include hearing
- If not hearing, exchange of written questions:
 - From any party to other party or witness
 - Decision-maker determines relevance
 - Limited follow-up



INFORMAL RESOLUTION

- Must be voluntary
- Any time before decision, subject to certain requirements
- **May not be used if allegation is employee sexual harassment of student**



WRITTEN DECISION REQUIRED

- Must include:
 - Allegations
 - Procedure
 - Findings of Fact
 - Conclusions
 - Result of each allegation
 - Procedures for appeal



APPEALS

- Any party from determination of responsibility or dismissal
- Three identified grounds, all must affect outcome
- Decision-maker on appeal
 - Someone other than investigator, initial decision-maker, or Coordinator
 - Potentially School Board, but must have training

REMOVALS DURING GRIEVANCE PROCESS: Students

- Not prohibited, if:
 - Individualized safety and risk analysis
 - Determination that there is any immediate threat to the physical health or safety of person based on allegations
 - **Notice and opportunity to challenge after removal**
- Must also comply with IDEA, Section 504, ADA, and Pupil Fair Dismissal Act
 - Given the minimum timelines required by the regulations, suspension for entire period of investigation is unlikely

REMOVALS DURING GRIEVANCE PROCESS: Employees

- May be placed on paid leave, unless collective bargaining agreement, policy, or individual contract says otherwise
- Paid leave is generally not disciplinary

TRAINING COMPONENTS: Who?

- Coordinators
- Investigators
- Decision-makers
- Informal Resolution Facilitators



TRAINING COMPONENTS: What?

- ✓ Definition of sexual harassment
- ✓ Scope of education programs and activities
- ✓ How to conduct investigation and grievance process
- ✓ How to serve impartially by avoiding prejudice of facts at issue, conflicts of interest, and bias
- ✓ Determining relevance of questions and evidence
- ✓ How to prepare investigative report

ADDITIONAL REQUIREMENTS

- Post training materials on website
- Maintain materials for seven years
- Training for all employees
 - Not required
 - Recommended because of “actual knowledge” standard
 - Need not be extensive

PROHIBITION ON RETALIATION

- Prohibition on “intimidating, threatening, coercing, or discrimination against anyone for the purpose of interfering” with Title IX or because of a complaint or participation
- Complaints of retaliation follow grievance process

RECORDS

- For every incident that requires a response, must maintain records of:
 - Complaint
 - Any consequences
 - Remedies
 - Supportive measures
- Seven year retention requirement, including records of every:
 - Investigation
 - Dismissal
 - Appeal
 - Informal resolution



INVESTIGATION TRAINING

PRELIMINARY STEPS

- Consultation with Title IX Coordinator
- Review the Complaint
 - If true, would the conduct meet the definition of sexual harassment or retaliation under Title IX?
 - If no, dismiss
 - If yes, investigate
 - If potentially criminal, report to law enforcement and/or MDE
- Preliminary Plan
 - Who should be interviewed?
 - What evidence needs to be gathered?

PRELIMINARY STEPS, Cont'd

- Notice
 - Ensure notice of the formal complaint has been sent to parties
- Review Collective Bargaining Agreements or applicable employment policies
 - Are there obligations beyond those required by Title IX
- Placing Respondent on Leave
 - Individual risk assessment for student
 - Employees consistent with contract
- Supportive Measures
 - Coordinator obligation

INTERVIEW THE COMPLAINANT

- Written notice of interview
 - Separate requirements than notice of formal complaint
 - Must include date, time, location, participants and purpose
 - Sent with “sufficient time to prepare”
- Advisor of complainant’s choice may attend
 - May limit participation, but must impose equal limits for complainants and respondents
- Explain purpose of interview
- Explain your role in process
 - Do not take sides

INTERVIEW THE COMPLAINANT, Cont’d

- Explain process
 - Follow up on information and talk to witnesses
 - Prohibition on retaliation
- Tennessean Warning
- Do *not* promise confidentiality
- Ask the complainant who, what, where, why, and how.
 - Details
 - “Last Wednesday during work time in math, Teacher A said ‘when do you turn eighteen again?’ in a suggestive tone, and then winked at me.”

INTERVIEW THE COMPLAINANT, Cont'd

- Ask tough questions, no matter how uncomfortable
- Corroborating evidence
 - Emails, texts, social media posts
 - Physical evidence
 - Other witnesses
- Did Complainant talk to anyone else?
- No guarantee of results
- Explain next steps

INTERVIEWING WITNESSES: Students

- Parent attendance
- In contrast, complainants and respondents entitled to advisor of their choice, who may be parent
- If using outside investigator, some schools have policies regarding interviews by outside agencies

INTERVIEWING WITNESSES: Staff

- Staff fact witnesses not entitled to representative unless contract or policy says otherwise
- Staff who are complainants have the right to have an advisor of their choice attend all interviews or hearing
- Staff who are respondents also have the right to an advisor of their choice
 - If union employee, *Weingarten* rights apply
 - Title IX “advisor of choice” likely means employee can identify a specific union representative

GENERAL TIPS FOR INTERVIEWS

- Tennessean Warning
- Ask short, open-ended questions
- Who, what, where, when, why, how
- Impartial and thorough
- Respectful, but ask tough questions
- Notes will be maintained as part of investigation

GENERAL TIPS FOR INTERVIEWS, Cont'd

- Observe and document demeanor
- Follow up on “don’t know” or “don’t remember”
- Ensure they answer the question
- Understand location, if relevant
- Use judgment in determining which details to reveal
 - Sometimes necessary to explain what other witness said to get response
- Ask about other witnesses
- Reminder about prohibition on retaliation

PREPARE FOR RESPONDENT’S INTERVIEW

- Written notice “sufficient time” in advance
- Outline questions
- Update original notice if necessary



INTERVIEW THE RESPONDENT

- **Opening remarks**
 - Explain role
 - Tennessen warning
 - Ground rules, including limits for representative
 - Explain allegations and evidence
- **Loudermill Hearing for Employees**
 - Notice
 - Evidence
 - Opportunity to respond

INTERVIEW THE RESPONDENT, Cont'd

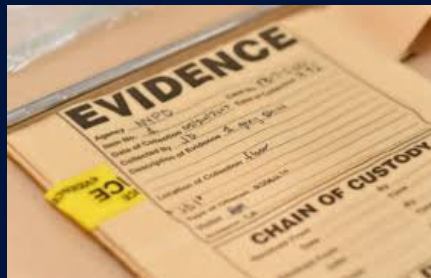
- **Refusals to Answer**
- **Follow-up Questions**
 - No tap dancing!
 - Ask about intent
 - Ask whether anyone has reason to fabricate the allegations
 - Ask for witnesses and what they will say

INTERVIEW THE RESPONDENT, Cont'd

- Closing Remarks
 - Other information
 - Have you had a full and fair opportunity to respond to the allegations?
 - Directive to avoid retaliation

REVIEW EVIDENCE

- Both parties may review evidence and have ten days to submit written response
- Review report with at least ten days to respond before determination of responsibility



DRAFTING THE REPORT

- Procedural steps and summarize facts
- Inculpatory and exculpatory evidence should be referenced
- Describe conduct, not conclusions
- May include recommended findings of fact and conclusions

DRAFTING THE REPORT, Cont'd

- Title IX requires that both parties be provided an opportunity to present inculpatory and exculpatory evidence. Unless evidence is irrelevant (explained in more detail below), the investigator should summarize the evidence in the report.
- Components
 - Summary of allegations
 - Summary of evidence
 - Findings of fact for each allegation

LIVE HEARING

- Not required



WRITTEN EXCHANGE OF QUESTIONS

- Must allow both parties to submit written relevant questions to any party or witness
- Explain decision to exclude questions
- Written answers
- “Limited” follow-up questions
- No time limits in regulations

WRITTEN DETERMINATION OF RESPONSIBILITY

- Identify allegations
- Procedural steps
- Findings of fact
- Conclusions applying policies to facts
- Result of each allegation and rationale
- Appeals
- Provide decision to parties simultaneously

BASES FOR APPEAL

- Procedural irregularity that affected the outcome of the matter
- New evidence that was not reasonably available earlier
- Conflict of interest or bias

PROCESS FOR APPEAL

- New decision-maker
- Notice to parties
- Opportunity to submit written statement
- Written decision describing result and rationale
- Provide decision simultaneously

CONDUCTING AN INFORMAL RESOLUTION PROCESS

- Informal resolution *may* be offered in all cases except allegations of employee sexually harassing student
- Must follow formal complaint
- Any time after formal complaint, with written notice
 - Allegations
 - Process
 - Right to withdraw
 - Consequences

INFORMAL RESOLUTION, Cont'd

- Voluntary, written consent
- No specific options in regulations. Consider mediation or restorative practices
- Provide information at same time as notice of complaint



EVALUATING EVIDENCE

- **General Relevance Standard**
 - Used to exclude evidence or questions
 - Federal Rule of Evidence 401
 - Is the fact more or less likely?
 - Does the fact matter to the outcome?
- **Prior Sexual Behavior**
 - Rarely will be relevant
 - Only to show someone else committed the conduct or consent
 - Consent likely not relevant to most K-12 investigations

BURDEN OF PROOF

- School district's burden to gather evidence
- Presumption that respondents are not responsible
- Refusal to answer questions cannot factor into decision

STANDARD OF EVIDENCE

- Designated in grievance procedures
- Preponderance of the Evidence=More likely than not
- Clear and Convincing=Higher
- Preponderance of the evidence is more "user friendly"

IMPARTIALITY: BIAS

- Do not let bias affect outcomes
- Implicit bias
- Complainants and Respondents generally

IMPARTIALITY: CREDIBILITY DETERMINATIONS

- Inherent Plausibility
- Demeanor
- Motive to falsify
- Corroboration
- Past Record
- **None of the above factors are determinative as to credibility.**

CONFLICTS OF INTEREST

- If it would affect the individual's judgment, it's a conflict
- Avoid family, close friends, and close work relationships
 - Principal and assistant
 - Principal and student
- Financial conflicts

AVOID PREJUDGING FACTS

- Presumption that respondent is not responsible
- Receive all evidence and hear from all witnesses
- Base findings on the investigation, not generalizations

RASW SCHOOL LAW SEMINAR

Friday, September 25, 2020

9:00 a.m. to 4:00 p.m.

Webinar

Registration information at

www.raswlaw.com

or in email following this
presentation

Topics include:

- Case Law Update
- Common Problems in Policies
- First Amendment Rights
- School Contracts in a Pandemic
- School Liability
- COVID-19 and Employees
- COVID-19 and Students

Questions?

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