

Thrun Law Firm Webinar: Title IX Investigator Training

Title IX
Investigator Training

THRUN
LAW FIRM, P.C.

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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.

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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)

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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.

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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

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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

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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

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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

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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!

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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

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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

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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

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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

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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

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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

TESTIMONY
EVIDENCE

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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

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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

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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!

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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)

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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?

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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



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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

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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)

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Craft Your Investigation Plan

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Conducting Interviews

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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)

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Practice Tips

- Advise interviewee ahead of time to distinguish between what they saw/heard firsthand 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

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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?

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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



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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

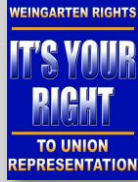
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“Weingarten” Right

- 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



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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

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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

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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



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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!

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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, prejudgment or conflicts of interest!

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Writing an Investigation Report

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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

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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

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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

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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

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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 and 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

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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

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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.**

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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

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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

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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

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