

TITLE IX COMPLIANCE

Kenneth A. Roos, Solicitor
Christina Gallagher, Esquire
Wisler Pearlstine, LLP

Supplemental Title IX training – School District of Philadelphia
January 11, 2021

©2021 Wisler Pearlstine, LLP

Conducting Investigations

- Begin by interviewing complainant
 - NOTE: If sexual abuse alleged, stop (or don't start) interview and report to ChildLine and police.
- Then interview witnesses
- Interview accused near end of process after you have had a chance to gather evidence and speak with witnesses
- Document all interviews

Investigations

- Just the facts
 - Who?
 - What?
 - Where?
 - When?
 - Why?

Investigations

- Examples
 - Who committed the alleged misconduct?
 - When did it occur?
 - Where did it occur?
 - Was anyone else present?

Investigations

- With the accused
 - Ask open ended questions
 - If accused is not providing relevant information then ask more focused questions
 - If accused claims complainant and/or witnesses are lying, ask why they would lie
 - Pay attention to “admissions” and clarify such admissions for the record

Do the timelines for processing student complaints need to be the same as timelines for employee complaints?

Yes, the timelines are the same

Could you provide some Factors/Threshold when a complaint implicates the Title IX procedures?

When it is so frequent or severe that it creates a hostile or offensive learning or work environment.

For example:

- Student cannot go to class or be in presence of respondent.
- Conduct constitutes a crime.
- Conduct is part of a pattern.
- Perpetrator has had multiple complaints by different parties
- Perpetrator is employee, in particular an employee with authority over the complainant.

Limited to locations, event and circumstances over which the educational entity exercises substantial control over both respondent and context in which sexual harassment occurs.

Does the Title IX coordinator have a duty to file a complaint against the wishes of a complainant?

No, the regulations do not automatically impose a duty. ("The final regulations do not mandate circumstances where a Title IX Coordinator is required to sign a formal complaint; rather, the final regulations leave a Title IX Coordinator with discretion to sign a formal complaint.").

Standard is “deliberate indifference.”

Without a duty, are there times when a Title IX coordinator *should* sign a complaint against a complainant's wishes?

- If a recipient has actual knowledge of a pattern of alleged sexual harassment by a perpetrator in a position of authority.
- Upon receiving multiple reports against a respondent.
- For allegations against employees, a coordinator may sign if the school "wishes to investigate allegations in order to determine whether the recipient has probable cause of employee sexual misconduct that affect the recipient's ESSA obligations."

Does the recipient need to allow witnesses to have an advisor?

No, but you may permit the attendance of parents/guardians if that is a typical practice for student witnesses.

- If during the course of a witness interview, it becomes suspected that the witness may be have committed a Title IX violation then the interview should be terminated until a determination is made as to whether a complaint will be brought against them
- If during the course of an interview of a bargaining unit member, it becomes suspected that the witness may be have committed a disciplinary infraction of any nature, then the interview should be terminated until a determination is made as to whether a disciplinary investigation will be commenced against them.

May a recipient prohibit complainants and respondents from talking to witnesses?

Typically, no, a recipient may not restrict the ability of either party to discuss the allegations under investigation or to gather and present relevant evidence.

- Respondent can be told that if contact with witness rises to level of retaliation, it can be separate basis for discipline.

- Both parties can be told not to have contact with third parties beyond what is necessary to support case and also told not to disseminate evidence.

 - in that regard, social media postings may be disciplinable

How does an investigator and/or decision maker decide whether evidence can be considered (cont.)?

- Must include both inculpatory and exculpatory evidence
- The educational entity cannot access, consider, disclose, or otherwise use a party's medical records made and maintained in connection with the provision of treatment to the party, unless the educational entity obtains that party's voluntary, written consent to do so.

How does an investigator and/or decision maker decide whether evidence can be considered (cont.)?

- Questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant
 - Unless such questions and evidence about the complainant's prior sexual behavior are offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or
 - If the questions and evidence concern specific incidents of the complainant's prior sexual behavior with respect to the respondent and are offered to prove consent.

Should the investigator provide a recommendation of finding?

Answer: While not explicitly prohibited, the investigator should not provide a recommendation as to finding since it may lead to allegations of bias.

The investigator may state reasons why a particular party or witness is or is not being credible.

What is the legal effect of a determination being final? Can the disciplinary sanctions be imposed prior to the appeal filing deadline or must a recipient wait to see if an appeal is filed?

Answer: A final determination allows the District to impose consequences relating to Title IX sexual harassment. Grievance process must conclude before the imposition of any disciplinary sanctions or other actions that are not supportive measures against a respondent

-For employees, suspension with pay may be imposed or sanctions may be imposed for other misconduct.

-For students, sanctions may be imposed for other misconduct arising out of incident.

Can the decision maker recommend discipline rather than decide the discipline?

Answer: Yes, particularly since all decisions as to discipline are subject to review by the Superintendent or, in some cases, the Board.

Is a hearing required?

- Grievance process may, but need not, provide for a hearing.
- With or without a hearing, after the educational entity has sent the investigative report to the parties and before reaching a determination regarding responsibility, the decision-maker(s) must afford each party the opportunity to submit written, relevant questions that a party wants asked of any party or witness, provide each party with the answers, and allow for additional, limited follow-up questions from each party.

Does Title IX allow the person deciding the appeal to hold a whole new hearing, call witnesses, etc.?

Answer: Yes, as long as this is offered to both parties equally.

This could set a bad precedent, however.

Do the Title IX regulations override a union employees right to arbitration?

Answer: No, a disciplined employee may still avail themselves of the grievance process, including arbitration which entails a whole new hearing.

Can an arbitrator overturn decision by the Title IX decisionmaker? If so, is that okay even if we do not allow arbitration for non-union appeals?

Answer: Yes, if the arbitrator decides that the discipline violates the collective bargaining agreement. It does not matter whether arbitration is not an option for non-union employees.

Does a complainant under Title IX have the right to not be subject to cross examination again?

Answer: Unless the District voluntarily chooses to have a hearing, the complainant need never be cross-examined during the Title IX process.

-questions can be posed in writing by other party.

If the matter proceeds to a Board hearing, arbitration, unemployment compensation hearing, or court proceeding (civil or criminal), the complainant may be cross-examined.