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TITLE IX INVESTIGATION TRAINING

Rupp, Anderson, Squires, Waldspurger & Mace, P.A. School Law Seminar

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I. TITLE IX VOCABULARY

- A. **Allegation:** An assertion or claim that someone has engaged in sexual harassment.
- B. **Complainant:** The person who has experienced the alleged sexual harassment. This person is considered the complainant regardless of whether they chose to file a formal complaint of sexual harassment.
- C. **Respondent:** The person accused of sexual harassment.
- D. **Reporter:** The person who reports sexual harassment to the school. This may be the complainant, but may also be someone else (called a “third-party reporter”).

NOTE: These materials and the corresponding presentation are meant to inform you of interesting and important legal developments. While current as of the date of presentation, the information that is provided may be superseded by court decisions, legislative amendments, rule changes, and opinions issued by bodies interpreting the area of law. We cannot render legal advice without an awareness and analysis of the facts of a particular situation. If you have questions about the application of concepts addressed in this outline or discussed in the presentation, you should consult with your legal counsel.

- E. **Title IX Grievance Process:** The formal name for the complete process of addressing complaints of sexual harassment, from the formal complaint through appeal.

II. INVESTIGATION PROCESS

A. Preliminary Steps.

1. **Consultation with Title IX Coordinator.** For each of these steps, the Investigator should consult with the Title IX Coordinator to determine whether the Title IX Coordinator has already taken that step and, if not, who will be responsible for it.
2. **Review the Complaint.** Determine that the alleged conduct, if true, would meet the definition of sexual harassment (or retaliation for reporting sexual harassment).
 - a) If the allegations would not support a finding of sexual harassment or retaliation if proven to be true, the formal complaint must be dismissed, but could be investigated outside of the Title IX process if it violates other school rules or policies.
 - b) If the allegations would support a finding of sexual harassment or retaliation, then there must be an investigation or voluntary resolution.
 - c) If the allegations could potentially constitute criminal conduct and/or maltreatment of a minor, contact law enforcement or MDE, or ensure that the person receiving the complaint already did so. Note that mandatory reporting is an *individual* obligation.
3. **Preliminary Plan.** Identify people who should be interviewed, including the complainant, respondent, and any witnesses. Identify whether there are any documents mentioned in the complaint that would be useful to review before interviewing witnesses and, if possible, make arrangements to obtain those documents.
4. **Notice.** Ensure the pre-investigation notice has been provided to the known parties, which will typically include any complainants and respondents.

5. **Review Collective Bargaining Agreements.** If an employee is the respondent, determine whether there are any requirements in a CBA related to discipline that may impose obligations above and beyond those required by Title IX.

B. General Investigation Tips

1. Starting an Investigative Interview

- a) Provide each witness with a Tennessen warning.
- b) Explain the purpose of the interview and that the district takes complaints of this nature seriously.
- c) Define your role in the investigation process as an impartial investigator.
- d) If there are others present (complainant or respondent representative, union representative for employee, attorneys), explain that they are there to offer support, but you need the information to come from the witness.
- e) Explain the investigation process. Inform the witness that the district will follow up on information that they provide.
- f) Also inform the person being interviewed that retaliation in any form will not be tolerated. Instruct them to report suspected retaliation immediately.

2. During the Interview

- a) Open with questions about the witness's background/interests. This helps you establish a rapport with the witness and gives you a baseline for their demeanor in responding to questions.
 - (1) For employees, their employment background, role, job duties, job environment, and identifying their supervisor or anyone they supervise, are typically relevant and good to evaluate demeanor.
 - (2) With students, background questions should be age-appropriate but not overly personal, and may not be relevant to the investigation. Questions about their favorite classes, favorite color, who their teacher is,

are usually safe, as are questions based on observations. For example, if a young student is wearing a Star Wars t-shirt, “do you like Star Wars? I do too! Which movie is your favorite?”

- (3) Observe the witness’s behavior when they respond to these questions and compare it to their responses to later questions. This is particularly helpful if you are attempting to discern whether a reaction is due to nerves or because the witness is lying.
 - (4) This opening also gives you an opportunity to put the witness at ease. Many respondents will be guarded initially, but asking “easy” questions gives you a chance to connect to see if they will let their guard down.
- b) Don’t be so committed to asking questions you developed ahead of time that you miss an opportunity to ask follow-up questions.
- (1) Consider grouping questions into topics, like “October 10 incident” or “allegations related to cafeteria.” Then ensure you have obtained all the information you need with respect to a specific topic before moving on. This strategy limits the need to look through all of your pre-written questions and all of your notes at the end to ensure you have asked everything you intended.
 - (2) Sometimes, unanticipated answers will lead you to important information and change the direction of the interview.
- c) Avoid leading questions. Instead, ask short, open-ended questions. Your goal is to have the witness talk more than you do.
- d) Use the funnel approach by starting with broad questions that get increasingly narrower.
- e) Always be sure to cover the who, what, when, where, why and how questions. Get specific details and do not allow the witness to generalize or draw conclusions rather than offer

facts. Follow each line of questioning to its logical conclusion.

- (1) Use “what do you mean by that?,” “tell me more about that” or “I don’t understand, can you explain...”
 - (2) Make sure you understand what the witness means by the language they are using, especially if the witness is young or using slang terms.
- f) Ask questions designed to separate what the witness knows from personal knowledge from what is information the witness heard from others. If the witness heard the information from someone else, ask the witness to identify the source of the information.
- g) Ask if there are any other people who might have information about the incident and determine what information they might have.
- h) Do not be afraid to ask tough questions. The subject matter in a Title IX investigation will almost certainly be a difficult topic. Individuals who are not comfortable asking detailed questions to gather information about allegations of sexual harassment should not serve as an investigator.
- i) Ask for corroborating evidence, including e-mail and voicemail messages, texts, Facebook or other social media posts, notes, diary entries, a calendar, and the names of other witnesses. Get this on the spot, if the witness is able to provide it, even if this adds some time to the interview.
- j) Follow-up on all “I don’t know” and “I can’t recall” answers.
- (1) Break the question down and/or rephrase it to determine whether the witness does not have the information or is being evasive.
 - (2) If you sense the witness is being evasive, circle around and come back to the question at other points in the interview.
 - (3) Do not hesitate to express your surprise that the witness is answering “I don’t know” or “I don’t recall”

if you can back up your expression of surprise with an objective reason.

- k) Make sure the individual answers the question you have asked, rather than some other question that was not asked.
- l) Ask “wrap-up” questions to ensure there isn’t confusion about multiple events. “Was this the only time Respondent spoke to you about X in person?” “Are there any other times you did Y?”
- m) Assume you will have to defend your interview questions in court or in arbitration. Be impartial and thorough. Be respectful, but do not be afraid to ask direct or tough questions. Keep in mind that evidence, including your notes, will need to be provided to the parties in a Title IX investigation and may otherwise be discoverable material at some point (i.e., they would have to be disclosed as part of a legal proceeding).
- n) Use your judgment in determining how much to tell the witness about the complaint. You should disclose as little as possible, but also be mindful of the fact that there are circumstances where it may be necessary to disclose what another witness said in order to determine whether someone is being honest.
- o) Observe witness demeanor throughout the interview and document your observations in your notes.

3. **Concluding the Interview**

- a) Inform every witness that retaliation will not be tolerated and that it should be reported immediately.
- b) Explain the next steps after interviewing the witness, whether there will be any follow-up with them, and the time frames for completion of those steps.

4. **Interview don’ts.**

- a) Do *not* guarantee any particular results from the investigation, and do not suggest that disciplinary or any other specific action will be taken against the respondent.

- b) Do *not* promise confidentiality because such a promise is unrealistic, inconsistent with Title IX requirements, and can impede the ability to investigate the complaint.
- c) Do *not* take sides with either the complainant or respondent.
- d) Do *not* be intimidated by a witness or their representative. It is your role to get the answers you need and others do not have the right to interfere with that process.

VII. ASKING THE RIGHT QUESTIONS

A. General Relevance Standard

- 1. Investigators should only ask relevant questions.
- 2. To exclude evidence or decline to provide a written question to another party or witness, an investigator or decision-maker must determine that the evidence is not relevant or that the proposed question is not designed to gather relevant evidence.
- 3. The test for relevant evidence is: **would knowing the answer to this question provide information that could affect my conclusion?**

B. Questions and Evidence Regarding Prior Sexual Behavior

- 1. Questions and evidence about the complainant's prior sexual behavior will *rarely* be relevant.
- 2. They can only be admitted if offered to prove someone other than the respondent committed the alleged conduct, or if they relate to prior conduct between the complainant and respondent and are used to prove consent.
- 3. Consent is not relevant if there is an allegation of sexual contact between an adult employee and a student because the employee is in a position of authority over the student. Minn. Stat. § 609.341.
- 4. Because these determinations are highly fact-specific, it is wise to consult legal counsel if you have a case where prior sexual behavior may be relevant. Such cases may include:
 - a) Allegations of sexual conduct between employees in which one employee alleges the conduct was consensual.

- b) Allegations of sexual conduct between students who are sixteen or older in which one student alleges the conduct was consensual.
- c) Allegations that sexual conduct occurred with someone other than the respondent.

VIII. CONDUCTING THE INVESTIGATION

A. Interview the Complainant.

1. Prior to interviewing the complainant, provide written notice to the complainant of the date, time, location, participants, and purpose of the interview. This must be done with “sufficient time for the party to prepare to participate.”
2. Remember the complainant has the right to have a representative of his or her choice present for the interview. The investigator may limit the participation of a party’s representative, but must impose equal limits on the representatives for the complainant and respondent.
 - a) In general, another student may be a representative for a complainant or respondent.
 - b) But schools can appropriately determine that the representative cannot be another student who is a witness in the investigation.
 - c) To avoid perception of bias or undue influence, schools should generally direct staff not to serve as representatives of students in this process.

B. Interview the Fact Witnesses.

1. Students

- a) Decide in advance whether parents will be permitted or invited to attend the interview of their child. Factors such as the age of the student and the subject matter of the investigation should be considered.
- b) Unless a school district has adopted a policy to the contrary, school officials are not required to permit parents to attend

interviews of fact witnesses. In contrast, for a complainant and respondent, Title IX allows to have a representative of their choice, who could be a parent, attend all interviews/hearings as part of the investigation.

2. **Staff**

- a) Staff being interviewed as fact witnesses are not entitled to have a representative attend with them, except in the rare case that a contract or policy says otherwise.
- b) Staff who are complainants have the right to have a representative of their choice attend all interviews or hearings.
- c) Staff who are respondents also have the right to have a representative of their choice attend all interviews or hearings. Because the interview could reasonably result in discipline to the employee, an employee who is a member of a union has the right to have a union representative present. *N.L.R.B. v. Weingarten, Inc.*, 95 S. Ct. 959 (1975). Since the employee will receive written notice prior to the interview, they should have sufficient time to arrange for union representation.

C. **Prepare for Respondent's Interview**

1. Prior to interviewing the respondent, provide written notice to the respondent of the date, time, location, participants, and purpose of the interview. This must be done with "sufficient time for the party to prepare to participate."
2. Outline the topics you intend to ask about and specific questions within each topic. Review notes from other interviews if necessary to ensure you are asking the respondent to respond to all evidence.
3. The new Title IX standards require the respondent to be informed about the allegations in advance. If the scope of the investigation has changed since the initial notice, send an updated written notice to the parties outlining any new allegations prior to the interview with the respondent.

D. **Interview the Respondent.**

1. **Opening remarks.**
 - a) Lay out the ground rules for the interview. Explain that you will not interrupt when the respondent is speaking, and he/she is not to interrupt when you are speaking.
 - b) Explain the limits for the respondent's representative, which must be consistent with any limits that were placed on the complainant's representative.
 - c) Explain that allegations have been made against the respondent and tell the respondent that this is his/her opportunity to tell his/her side of the story. Explain that the questions you are asking will identify the allegations against the employee and evidence you have reviewed so far
2. **Refusals to Answer.** Decide in advance how you will respond if the witness refuses to voluntarily answer your questions. In many cases, respondents will voluntarily cooperate if they are advised the investigation interview may be their only opportunity to provide information.
3. **Follow-up Questions.** Be prepared to ask appropriate follow-up questions in order to obtain the alleged offender's response to each allegation. Consider the tips discussed above in this outline, as well as those set forth below.
 - a) Do not tap dance around delicate topics. Ask the questions directly. This ensures respondents have a full opportunity to respond to the allegations.
 - b) If the respondent admits to some comments or actions, ask what his or her intent was.
 - c) If the respondent denies the allegations, ask if anyone would have a reason to fabricate the allegations.
 - d) Ask for the names of people the respondent thinks have firsthand knowledge of the alleged conduct or the fact that it did not occur. Ask what information each person would have in order to ensure that they are not simply "character witnesses."
4. **Closing Remarks.** Prepare a written outline of your closing remarks.

- a) Ask for any other information that may be helpful, or if there is any other information the respondent would like to provide.
- b) Ask the respondent if he or she feels like the investigator has provided a full and fair opportunity to respond to the allegations. If the respondent says no, ask what else he or she would like to add to what has already been said.
- c) Direct the respondent to refrain from engaging in retaliation or taking any action which could give the appearance of attempting to influence the testimony of a witness in the investigation.

IX. Drafting an Investigation Report

A. **Opportunity to review all evidence.** Prior to completion of the investigation report, the investigator *must* provide an opportunity for the complainant and respondent to inspect and review any evidence that is directly related to the allegations. They must be allowed ten days to submit a written response to the investigator.

B. Drafting the report

- 1. The purpose of an investigation report is to document the actions you have taken and summarize the evidence you received. In other words, the investigator should follow a math teacher's advice and show the investigator's work.
- 2. Title IX requires that both parties be provided an opportunity to present inculpatory and exculpatory evidence. Unless evidence is irrelevant, the investigator should summarize the evidence in the report.
- 3. The investigation report should describe the behavior that occurred, rather than relying on conclusory statements.
- 4. An investigator may include "recommended" findings of facts and conclusions, but the decision-maker will reach the final conclusion.
- 5. A good investigation report will include the following elements:
 - a) Summary of the allegations;

- b) Summary of the documents reviewed and witnesses interviewed;
- c) Findings of fact as to what occurred with respect to each allegation.

C. **Burden of Proof**

- 1. **The burden of proof is always on the school district.** This means it is the district's duty to gather evidence in support of any finding of responsibility.
- 2. Respondents are entitled to a presumption that they are not responsible. This means if the district does not find evidence of any specific fact required for a finding of responsibility, the decision-maker cannot conclude the respondent was responsible.
- 3. **If a respondent refuses to answer questions asked by the complainant, the decision-maker cannot take the respondent's failure to answer into account in making the decision.**

D. **Opportunity to review report.** After completion of the investigation report, it must be provided to the complainant, respondent, and decision-maker. If there will be a live hearing, the report must be provided at least ten days prior to the hearing. If there is no live hearing, it must be provided at least ten days before a determination of responsibility by the decision-maker.