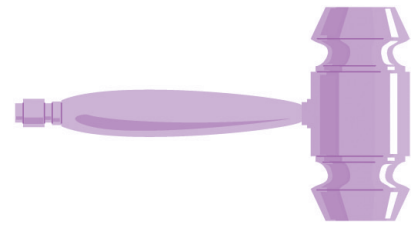


Legal Corner



By Michael I. Levin, Esq., PA Principals Association General Counsel

Title IX Sexual Harassment Investigations – Part II



In my last article, I addressed the information and training necessary for administrators to properly conduct a Title IX sexual harassment investigation. Those topics included:

1. The new Title IX sexual harassment regulations.
2. The required and prohibited procedures mandated by the new Title IX sexual harassment regulations.
3. The new definitions contained in the Title IX sexual harassment regulations.
4. The mechanics of how to conduct an investigation.

In this edition of my column, I will complete a review of what principals need to know in order to conduct a Title IX sexual harassment investigation properly and effectively. Those topics include:

5. How to ask questions and follow-up questions.
6. The rules of evidence, including prohibited questions.
7. How to apply rules of credibility; and
8. How to determine what constitutes the “preponderance of the evidence.”

5. How to ask questions and follow-up questions.

As part of the interview process, you should determine who you shall interview first and the order thereafter. You should also determine the topics to cover for each witness. However, you must be prepared to change and supplement the topics that you plan to cover as the facts unfold. As part of a fair and impartial investigation, the questions posed by investigators should be open ended and aimed at evoking answers and responses that lead to relevant information and evidence rather than a predetermined “path.” As noted, as the investigator, you do not make the determination as to whether or not there was sexual harassment. You ask the questions from which the facts are deduced and from which such conclusions are made. Therefore, questions should be fact-based and aimed at providing the “who” “what” “where” “how” and “when” at issue. Follow-up questions should seek to drill down on such facts or clarify or corroborate prior responses. All responses should be clarified and corroborated whenever possible. Unlike interviews of candidates for jobs, there is

no requirement that the same questions be asked of all witnesses and you should not be asking the same questions. The questions for each witness need to be tailored to what the witness may know.

6. The rules of evidence, including prohibited questions.

In reviewing the rules of evidence and what are and are not permissible questions, it is important to remember what your investigation is for – to determine if credible competent evidence exists to say whether the alleged perpetrator (referred to as the “Respondent” in the new regulations) sexually harassed the alleged victim (referred to as the “Complainant” under the new regulations).

Therefore, when you conduct your investigation, there are certain fundamental rules or principles that should guide your inquiry. First, you must ensure that the investigation is impartial. This means that you must enter the investigation without already making a presumption or conclusion as to any facts or the credibility of any witnesses. Second, you must rely on relevant evidence only. This means that you may not use or rely upon or seek the disclosure of information that is immaterial to the proceedings or protected under a legally recognized privilege or not relevant to the ultimate facts of the case. This also means that you may not rely on sex stereotypes or related prejudices. To that last point, Title IX prohibits questions related to what are commonly covered under “rape shield” protections. Simply stated, questions related to the complainant’s sexual predisposition or prior sexual behavior are generally not permissible and where permissible, are fairly limited in scope. Finally, Title IX’s regulations protect the privacy of each party’s medical, psychological and similar treatment records by denying access to such records unless consent is obtained. The bottom line is that if you believe in sex stereotypes and/or cannot be fair or impartial, you should not be doing the investigation.

Another requirement for your investigation is that there must be an equal opportunity for the Respondent and the Complainant to present witnesses, including fact and expert witnesses, and other inculpatory and exculpatory evidence. Any reasonable request to present witnesses or evidence must be granted to both. You cannot say that the school does not consider that kind of evidence as long as the evidence is relevant and will be helpful in determining guilt or innocence.

You also must provide both parties with an equal opportunity to inspect any evidence. The evidence that must be made available to the parties is evidence that is directly

related to the allegation and it includes both “inculpatory” evidence and “exculpatory” evidence. It even includes evidence upon which the school does not intend to rely in making its determination. Inculpatory evidence is evidence that tends to prove that the alleged perpetrator engaged in the conduct alleged. Exculpatory evidence, on the other hand, is evidence that tends to prove that the alleged perpetrator did not engage in the conduct alleged. All of this evidence, both inculpatory evidence and exculpatory evidence, must be provided to both parties.

When you, as the investigator, believe that you have gathered all of the evidence that there is to gather, you must send to the parties and their advisors, if any, the evidence that has been gathered. The parties must then be given 10 calendar days to submit a written response and you must consider the responses prior to completing your report.

The first draft investigative report must fairly summarize the relevant evidence. This means, all of the evidence – the inculpatory evidence, the exculpatory evidence and relevant evidence that may not necessarily be considered either inculpatory or exculpatory.

Remember, you will not be making the determination whether the complaint is founded or not founded, whether sexual harassment occurred or did not occur. You, as the investigator, are not permitted by law to make the determination whether sexual harassment occurred. You will only be summarizing the evidence that has been obtained.

7. How to apply rules of credibility.

As a reminder, the purpose of the investigation is to determine if credible competent evidence exists to say whether the Respondent sexually harassed the Complainant.

What is credible evidence?

Credibility refers to the believability and reliability of the information received from sources. “Credible” means able to be trusted or believed. Credible evidence is evidence that is most likely true as the circumstances dictate the likelihood of such fact(s) being true. See *TheLaw.Com Dictionary*. Credible evidence is not evidence, which is necessarily true beyond doubt, but is evidence worthy of belief. Credible evidence is often natural, reasonable and probable as to make it easy to believe. See *USLegal.Com*.

In terms of testimony, a credible witness is one whose testimony is more than likely to be true based on his/her experience, knowledge, training and appearance of honesty and forthrightness, as well as common human experience. A credible witness is one who is competent to give evidence and is worthy of belief. In deciding upon the credibility of a witness, it is always pertinent to consider whether he/she is



capable of knowing the things about which he/she testifies (percipient) and whether he/she was actually present at the transaction and/or paid sufficient attention to the events at issue. Credibility can also be assessed in terms of any perceptible or expressed illicit purpose on the part of a witness.

While there are guidelines used for determining what evidence is credible, there is no one absolute standard. Credibility is often a subjective determination. However, certain facts of a case that are not in dispute generally may be considered credible evidence. Multiple sources of corroboratory evidence (witnesses, documents, etc.) may also lend itself to overall credibility.

8. How to determine what constitutes the “preponderance of the evidence.”

As noted, the new Title IX regulations require public school entities to adopt either the preponderance of evidence standard or the clear and convincing evidence standard for determining whether sexual harassment occurred or not. We have recommended that the preponderance of evidence standard be adopted by public school entities.

What is the preponderance of the evidence?

After all the evidence has been presented, and all questions have been asked and answered, it is possible that you may still be in doubt as to the true facts of the case. The preponderance of the evidence is one type of evidentiary standard used to draw a conclusion. Under the preponderance standard, the burden of proof is met when the party with the burden convinces the fact finder that there is a greater than 50% chance that the claim is true. This is the burden of proof in a civil trial.

As noted, as an investigator, it will not be your charge to determine whether the actions involved amount to harassment under Title IX or not. However, you will determine

whether and to what extent the evidence is sufficient to prove certain facts which certainly may be dispositive on the outcome of the investigation. Those determinations of fact will be based upon preponderance of the evidence presented as determined by you.

The preponderance of the evidence standard specifies the degree to which you must be convinced by the evidence in order to find specific facts as true. Under the preponderance standard, the burden of proof is met when the party with the burden convinces the fact finder that there is a greater than 50% chance that the claimed fact is true. This traditionally requires demonstrating that the existence of the contested fact is more probable than its non-existence. Thus, if the information presented makes a fact more likely to be true than not, then the preponderance of evidence supports that finding.

Conclusion

This article is only a brief review of what school administrators will need to know in order to conduct Title IX sexual

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harassment investigations properly and effectively. As I said last time, if you do not know how to conduct a Title IX sexual harassment investigation, DO NOT CONDUCT THE INVESTIGATION! If you do not know whether you know how to conduct a Title IX sexual harassment investigation properly, DO NOT CONDUCT THE INVESTIGATION!

Title IX subjects school districts to serious liability for failing to promptly address claims of sexual harassment and adhering to the aforementioned processes. School administrators must receive training not only as to the definition of sexual harassment but as to conducting investigations and the grievance process, and how to serve impartially,

including avoiding prejudgment of the facts at issue, conflicts of interest and bias. Based upon the foregoing, school principals not only are required to be trained to recognize and identify sexual harassment as defined, but also trained in such procedures as are required, and their proper role in such matters.

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