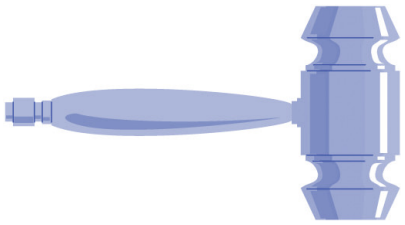
Legal Corner



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Title IX Sexual Harassment Investigations - Part I

Let me begin this article by saying, 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! The failure to conduct a Title IX sexual harassment investigation properly in accordance with law may lead to legal liability. The failure to conduct a Title IX sexual harassment investigation properly in accordance with law may lead to an innocent alleged "perpetrator" being falsely labeled as a sexual harasser. Equally, the failure to conduct a Title IX sexual harassment investigation properly in accordance with law may lead to a "guilty" alleged perpetrator to suffer no consequences.

In order to conduct a Title IX sexual harassment investigation properly, principals need to have a working knowledge of the following topics:

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;
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."

If you are unsure whether you have a working knowledge of each of these things, do not conduct a Title IX sexual harassment investigation. Instead, obtain the required training to ensure that you obtain the requisite working knowledge to conduct the investigation effectively in accordance with law. If your school entity named you as an "investigator" for Title IX sexual harassment complaints, you must receive not only the general training associated with the new Title IX sexual harassment regulations, but also specialized training focused on how to conduct investigations.

1. The New Title IX Sexual Harassment Regulations.

I addressed the new sexual harassment regulations, in general, in this column in the prior edition of this magazine, Volume 24, Number 3, Fall 2020. I refer readers to that article for an overview.

2. Required and Prohibited Procedures.

Principals have a working knowledge of the procedures required for student discipline, particularly the informal and formal hearing processes relating to student suspensions and expulsions under the regulations of the State Board of Education. *See* 22 Pa. Code §12.8. If a formal complaint of sexual harassment has been made against a student, you are prohibited from using or following those procedures and are prohibited from imposing discipline upon the student in accordance with those procedures until the Title IX sexual harassment procedures are concluded. Instead, the school district must comply with and follow the Title IX sexual harassment regulations and procedures. Similarly, the procedures followed by your school for employee discipline cannot be followed in the case of investigations of formal complaints of sexual harassment.

3. The New Definitions.

The quintessential focus of a sexual harassment investigation is to determine whether "sexual harassment" has occurred. You cannot conduct an effective sexual harassment investigation unless you have a working knowledge of the concept. Questions cannot be posed properly unless you know the details and nuances of the definition. Please refer to this column in the Volume 24, Number 3, Fall 2020 edition of *The Pennsylvania Administrator* for a discussion of the new definitions.

4. The Mechanics of an Investigation.

a. ***Prompt Investigation.*** The law requires that the investigation be conducted promptly. As a public school administrator, you have too many things on your plate and not enough time to do everything as you would like. However, when it comes to a Title IX sexual harassment investigation of a formal complaint, it takes priority over everything else. Your supervisor needs to know that, and you need to work on the investigation so that it is done promptly.

Continued on next page

If there is going to be a delay, the regulations require that a written notice be given to both the complainant and the respondent. The reason for the delay must be set forth in the written notice. Only good cause will justify a delay. Good cause may include the absence of a party, the absence of a party's advisor or the absence of a witness. Good cause may be required in order to allow law enforcement to act without the school interfering. Another reason for delay may be the need for language assistance or accommodation of disabilities.

b. ***Equal Opportunity.*** There must be an equal opportunity for the perpetrator and the victim 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.

c. ***Confidentiality***. You cannot require or even recommend confidentiality by the victim or the perpetrator – they both have a legal right to discuss the allegations under investigation and to gather and present relevant evidence. Although you cannot require the parties to maintain confidentiality, the school has a general responsibility to keep matters confidential. As an investigator, you must keep the following information confidential: **(1)** the identities of any individuals who have made a report or complaint of sex discrimination; **(2)** any complainant; **(3)** any individual who has been reported to be the perpetrator; **(4)** any respondent; and **(5)** any witness. You may be wondering how you can conduct an investigation and comply with due process if you cannot disclose the identities of the parties and witnesses. The answer is that there are exceptions to the confidentiality rules. Disclosure is allowed for a number of reasons. Perhaps the most relevant exception is that you can make a disclosure as necessary to conduct the investigation. So, if you have to disclose the name of the opposing party or of witnesses in order to get to the bottom of the matter, you can disclose the name. In addition to this commonsense exception, you can disclose information as permitted by FERPA, that is, the Family Education Rights and Privacy Act. You need to read the regulations which describe all of the situations in which information is allowed to be disclosed under FERPA.

d. ***Advisors.*** Both the victim and the perpetrator have the right to have an advisor of their choice at the investigative interview. The advisor does not need to be an attorney but can be. However, you can establish restrictions regarding the extent to which the advisor may participate in the proceedings, as long as the restrictions apply equally to both the perpetrator and the victim. Parties have the right to choose their own advisors and they need not be attorneys or union representatives. Advisors, for example, may be friends, family members, attorneys or other individuals with whom the party has a trusted relationship. If an employee who is subject to possible discipline wants union representation, he or she is entitled to same. On the other hand, if the employee does not want union representation at the interview, the union has no right to be there. Although the parties may have an advisor of their choice, you may require advisors to use the evidence received for inspection and review as well as the investigative report only for purposes of the grievance process. You may require advisors not to disseminate or disclose these materials. The regulations do not prohibit a recipient from using a nondisclosure agreement that complies with these final regulations and other applicable laws.

e. ***Written Notice.*** You must give written notice to the alleged victim and the alleged perpetrator. The notice must be in writing and it must state the date, time, location, participants and purpose of the investigative interview. The notice must be provided with sufficient time for the party to prepare to participate in the interview.

f. ***Equal Opportunity to Inspect Evidence.*** You must provide both parties with an equal opportunity to inspect the evidence. The evidence that must be made available to the parties must be 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.

g. ***Records.*** I cannot stress strongly enough the need to keep meticulous records. That is part of the legal duty and responsibility of the school under the new

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regulations. You cannot conduct your investigation properly under the regulations unless your record keeping is meticulous. And you cannot establish that you have conducted a proper investigation – or otherwise responded to allegations of sexual harassment properly – if you don't create and maintain proper documentation.

Because of the rights of the parties to see and inspect the evidence, it is critically important that you properly organize and preserve the evidence. It is highly recommended that documents and pictures should all be marked with sequential numbers. All interviews should be with a court reporter and the transcript should be marked with an exhibit number. All exhibits should be given Bates numbers.

h. ***Distribution of the Evidence.*** When you as the investigator believe that you have gathered all of the evidence that can reasonably be gathered, you must send to the parties (and their advisors, if any) the evidence that has been gathered – all of the evidence. If you take our advice to have an electronic filing cabinet with the evidence, I recommend that you provide notice to the parties when the evidence gathering process is complete. 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.

i. ***Planning the Investigation.*** If you are the assigned investigator, you will need to prepare an investigative plan. I must stress that the plan must be flexible so that you can make changes as warranted. You will need a witness list and will have to add to this list, if and when, you learn that there are additional witnesses who may have relevant information. You will need to determine the order of the interviews. You should determine the topics to cover for each witness and you must be prepared to change and supplement the topics that you plan to cover.

For those of you who have been involved in the process of interviewing job applicants, we want to stress that this process is significantly different than the job applicant interview process. In the job applicant interview process, it is common practice to ask the same questions of all of the applicants. In this investigative interview process, there is no requirement that the same questions be asked. On the contrary, whatever questions need to be asked to find the truth are the questions that should be asked. It is wrong to limit yourself to asking the same questions of each witness.

The investigative plan should include a list of the physical evidence needed, such as records, reports, documents, calendars, etc. To the extent that you believe that any party or witness may have such documents or evidence, you should be asking them to bring the relevant items to the investigative interview. You can ask them to send the material to you in advance of the investigative interview so that you have time to review the material. An important item to consider is where the meetings with witnesses will take place, especially because you are required to preserve confidentiality as stated earlier. It is not uncommon to have the investigative interviews in the administration offices of a school district or in the offices of legal counsel.

j. ***Promises.*** The rules related to promises are easy. First, don't promise anything other than the promise to do a thorough and fair investigation. Second, don't promise confidentiality. Third, don't promise or offer "immunity."

k. ***Documenting Interviews.*** One of the things that you will have to think about is how you will memorialize or document the information provided by witnesses. Will you simply take notes, will you have an audio recording or will you retain and utilize use a court reporter? It is my recommendation that a court reporter be utilized, but any of these methods are permitted. Remember, if you take notes, they will have to be provided to the parties. If you have a recording, you must either make the recording available, or you must have it transcribed and made available to the parties. You can have a note taker present in the investigative interview, but if you do, you must give written directives to the note taker to keep everything confidential; not to give copies of the notes to anyone, except the investigator, counsel for the school, the Title IX coordinator or superintendent/executive director; and not to destroy any handwritten or other notes used to prepare the final "record" of the interview.

l. ***Searches.*** The investigation may involve searches of lockers, bookbags, pockets, desks or electronic devices. If you conduct a search as part of the investigation, remember that you must comply with the Fourth Amendment and with the regulations of the State Board of Education. A quick refresher is that you need reasonable suspicion for a search and the search be reasonable in scope. With respect to searches of lockers, the State Board of Education regulations provide: "Prior to a locker search, students shall be notified and given an opportunity to be present. When school authorities have a reasonable suspicion that the locker contains materials that pose a threat to the health, welfare or safety of students in the school, student lockers may be searched without prior warning."

Sometimes the investigation might require you to confiscate and search an electronic device. If that is what you are going to do, I recommend that you use a chain of custody form. You should have the student or employee turn it off before you take it. You will need to decide whether a forensic IT consultant will be hired and whether a forensic image of the hard drive is needed. You will have to decide who turns it on and searches it, and that person will

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have to prepare and maintain a meticulous record of what he/she does when searching the computer.

m. ***Fair and Impartial Investigation.*** Your investigation must be fair and impartial. There are several rules to follow to ensure that you are fair and impartial. First, don't prejudge the facts – wait until you hear all the evidence from all of the witnesses. Second, you must presume the non-responsibility of respondents until the conclusion of the grievance process when a decision is made based on a fair assessment of the evidence. Third, both parties must have equal opportunity to present witnesses and other evidence.

In order to be fair and impartial, you must dispense with any prejudices that you may have due to the nature of allegations; the identity of the parties or the witnesses; or the status of the parties or the witnesses. You must not rely upon or consider stereotypes or other irrelevant facts, such as: the manner of dress of the parties, most past disciplinary issues, whether the parties wear tattoos or the occupations of the parents of the parties. For example, I once had a case where a student victim of sexual harassment by a teacher was the daughter of a mother who worked as a stripper. The union representing the teacher brought that evidence forward and the arbitrator heard the evidence and may have considered it in deciding not to believe the student. That would be in violation of the new regulations.

When investigating the complaint, you must not rely upon untrustworthy evidence, and you must not rely on uncorroborated hearsay. Go to the source of the information. Don't rely on summaries or descriptions of a document, get the document and read it.

n. ***Conflicts.*** There may be times when a conflict prevents you from being the investigator of a particular matter, and you will have to recuse yourself. Simply knowing the parties or witnesses is not a reason to recuse yourself. On the other hand, friendship, socializing out of school, membership in the same clubs, organizations or religious congregations, may be a reason to recuse. Even if those things don't create bias, they may create the appearance of a bias. Similarly, your belief that you cannot perform your function fairly and without bias to any party is a reason to recuse yourself. Obviously, if you are named as the alleged perpetrator, you must recuse yourself. If you have had a prior significant event with either party or a witness, such as giving an unsatisfactory rating to teacher, it is probably not enough, by itself, to require recusal. A prior suspension of a student, by itself, is probably not enough to require recusal. On the other hand, if you have testified against a student or teacher in another proceeding, you probably should recuse yourself.

o. ***Pending Criminal Proceedings.*** What do you do if there is a criminal proceeding relating to the allegations? Do you wait? What happens if the police tell you not to talk to any of the witnesses or the alleged perpetrator or alleged victim, are you allowed to forego the investigation? The answer is no, you must conduct the investigation promptly anyway. Under the regulations, criminal proceedings do not relieve the school of its duties under Title IX – you and the school must investigate promptly, decide promptly, provide supportive measures promptly and take appropriate action based on the decisions made. In addition, the decision of police is not determinative of whether there was unlawful harassment unless there is guilty plea or verdict of an offense whose elements establish "sexual harassment."

In the next edition of this 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.

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