MODULE 3

Title IX: Hearing, Decision-Making, Appeals, Informal Resolutions, and Emergency Removals
Recap from Session 1

- Title IX and New Regulations
- Definitions of Sexual Harassment
- Three-prong definition
- Reporting Requirements
Recap from Session 1

• Pop Quiz!
Recap from Session 2

• Institutional Requirements
  • Policy, Title IX Coordinator
  • Notice
  • Recordkeeping

• Responding to Sexual Harassment
  • General Response
  • Response to a formal complaint

• Notice of Allegations
Recap from Session 2

• Dismissals
  • Mandatory
  • Permissive
• Grievance Process
• Investigations
  • Process as Required in Title IX Regulations
  • How to Conduct Investigations - Best Practices
  • Investigative Report Writing
Recap from Session 2

• Pop Quiz!
Writing the Report

• The Title IX regulations require that the investigator create a written report that “fairly summarizes relevant evidence.” 34 CFR § 106.45(b)(5).

• The regulations do not set forth any other required elements for the report but see requirements for decision-maker’s written decision. 34 CFR § 106.45(b)(7).
Writing the Report

• What does relevant mean?
• Black’s Law Dictionary defines “relevant” to mean “logically connected and tending to prove or disprove a matter in issue; having appreciable probative value – that is, rationally tending to persuade people of the probability or possibility of some alleged fact.”
• Material that is not relevant to the allegations in the complaint should not be included in the report.
Writing the Report

• The investigator **must** consider any information that the complainant or respondent submitted after their opportunity to review the evidence so be sure to include a summary of any such information in the report.

• Writing the investigation report requires the investigator to evaluate the evidence.
What should be in a report?

• Introduction
  • Name of the complainant and respondent and date of complaint
  • Brief summary of the allegations
  • List of supportive measures implemented at the outset.

• Applicable School Board Policy
  • Citation to the relevant policies and excerpts of relevant provisions, if appropriate

• Investigative Procedure
  • A summary of the investigation process, including names of all witnesses and identifying all documents, etc.
What should be in a report?

- Statement of Facts
  - The allegations in the formal complaint
  - The respondent’s response to each allegation
  - The facts relevant to each allegation, including other witness’s statements and documents, etc. that support or refute the allegation
  - Any information that the complainant or respondent submitted after their opportunity to review the evidence

- Conclusions
  - Reach a conclusion as to each allegation and explain how the conclusion was reached.
  - Explanation of credibility determinations
  - Explain how conflicts were resolved
Writing the Report

• When evaluating the evidence, consider:
• Credibility determinations
• Determine the weight to give each witness’s statements and other pieces of evidence
• Consider the following
  • Consistency
    • Was the person’s statement internally consistent?
    • Was it consistent with other witness’s statements?
  • Bias
    • Does this person have any biases?
  • Personal relationships
    • What is the person’s relationship to the complainant/respondent and how might that impact the weight you give their statements?
  • Motive
Writing the Report

- General Tips:
  - Write clearly and succinctly.
  - Use proper grammar and write professionally.
  - Use the active voice and provide necessary details.
    - COMPARE: “The victim was called derogatory names. The incident was reported to the gym teacher the next day.”
    - WITH: “Sarah reported that on November 10, 2020, Joe repeatedly called her derogatory names, including ‘bitch,’ ‘slut,’ and ‘whore.’ Sarah verbally reported this incident to Mrs. Smith, the gym teacher, the following day, on November 11, 2020.”
Agenda for Today

- Hearings
- Decision-Making
- Appeals
- Informal Resolution
- Emergency Removals
• In the K-12 context, a live hearing is not required.
• However, after the investigation report has been sent to the parties, the decision-maker 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.
  • The school division is free to set a reasonable timeline for submitting “limited follow-up questions.”
Limitation on Subject Matter

Questions and evidence about the complainant’s sexual predisposition or prior sexual behavior are not relevant, unless offered to prove either

- That someone other than the respondent committed the alleged conduct, 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.
Hearing by Decision-Maker 34 CFR § 106.45(b)(6)

- Limitation on Subject Matter
  - Remember that the basic requirements for the grievance process includes a prohibition on questions or evidence that seeks privileged information unless the privilege is waived. 34 CFR § 106.45(b)(1).
    - Attorney-client privilege
    - Physician-patient privilege
    - Therapist-patient privilege
    - Spousal privilege
Hearing by Decision-Maker 34 CFR § 106.45(b)(6)

• Decision-maker may exclude questions that are not relevant but must explain the decision to exclude.

• Consider instructing the parties that when submitting written questions, the parties must do so in a respectful manner (i.e., without using profanity or irrelevant personal attacks).

• What if a witness refuses to provide answers to written questions?
  • The commentary stresses that nothing in the regs compel anyone to participate in the Title IX process, including supplying subsequent answers.
Hearing by Decision-Maker 34 CFR § 106.45(b)(6)

• The process of submitting and answering written questions must be completed before the decision-maker issues a decision.

• Consider intersection with state law regarding discipline of students.
  • The US Department of Education takes the position that the Title IX regulations trump state law.
The decision-maker (who must be a different person from the Title IX Coordinator and the investigator) must apply the standard of review that has been adopted and issue a written determination or responsibility that includes six elements:

1. Identification of the allegations that potentially constitute sexual harassment.
2. A description of the procedural steps taken.
3. Findings of fact.
4. Conclusions regarding the application of the code of conduct to the facts.
5. A statement of and rationale for the result for each allegation, including a determination of responsibility, disciplinary sanctions, and whether remedies will be provided to complainant.
• The decision is final only after the time period to file an appeal has expired or if the party does file an appeal, after the appeal decision has been sent to the parties.
Rendering a Decision

• Remember that the decision maker is determining whether the conduct alleged occurred and, if so, whether it meets the definition of sexual harassment.

• Three-prong definition
  • Quid pro quo
  • “Unwelcome conduct” (or “Hostile environment”)
  • Sexual violence as defined by Federal law
Rendering a Decision

• Quid pro quo
  • "An employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct"

• “Unwelcome conduct” (or “Hostile environment”)
  • "Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient’s education program or activity."

• Sexual violence as defined by Federal law
Both parties have the right to appeal a determination of responsibility and the dismissal of a formal complaint or any allegations on the following bases:

- A procedural irregularity that affected the outcome
- New evidence not reasonably available at the time the determination was made and that could affect the outcome
- The Title IX Coordinator, investigator, or decision maker had a conflict of interest or bias for or against complainants or respondents generally or individually that affected the outcome of the matter
- Any additional bases the school division chooses to offer (but must be available to both parties)
Appeal 34 CFR § 106.45(b)(8)

- For all appeals, the school division must
  - Notify the non-appealing party in writing and implement appeal procedures equally for both parties
  - Ensure the decision maker on appeal is not the same person as the original decision maker, investigator, or Title IX Coordinator
  - Ensure that the decision maker on appeal meets all the qualifications as the original decision maker in terms of training and conflict of interest
  - Give both parties an equal opportunity to submit a written statement in support of or challenging the outcome
  - Issue a written decision that is provided simultaneously to both parties and that describes the result and rationale
The Title IX regulations permit school divisions to offer informal resolution but its use is limited.

Informal Resolution cannot be mandatory, cannot be used unless a formal complaint has been filed, and cannot be used to resolve allegations that an employee sexually harassed a student.
Informal Resolution 34
CFR
106.45(b)(9)

• Any time before reaching a determination regarding responsibility, the school division may facilitate an informal resolution process (such as mediation), that does not involve a full investigation and adjudication, if the school division
  • Provides to the parties a written notice disclosing:
    • the allegations,
    • the requirements of the informal resolution process including the circumstances under which it precludes the parties from resuming a formal complaint arising from the same allegations, provided, however, that at any time prior to agreeing to a resolution, any party has the right to withdraw from the informal resolution process and resume the grievance process with respect to the formal complaint, and
    • any consequences resulting from participating in the informal resolution process, including the records that will be maintained or could be shared; and
  • Obtains voluntary written consent from both parties.
Informal Resolution 34
CFR 106.45(b)(9)

- Must be completed in a reasonably prompt timeframe.
- Commentary (p. 1370) – “Informal resolution may encompass a broad range of conflict resolution strategies, including, but not limited to, arbitration, mediation, or restorative justice.”
- The commentary acknowledges (p. 1370) that an informal resolution may result in disciplinary action, including suspension and expulsion taken against the respondent.
- Note, however, if that is the case, the written notice must state any such possible consequences.
• At any time during the formal complaint process and prior to reaching a determination regarding responsibility, the parties may participate in an informal resolution process, such as mediation, that does not involve a full investigation and determination of responsibility.

• When one party requests an informal resolution process, the other party must respond to the request within 5 days. The informal resolution process must be completed within 20 days of the agreement to participate in the process.
The informal resolution process may be facilitated by a trained educational professional, consultant, or other individual selected by the Title IX Coordinator under the following conditions:

- the parties are provided a written notice disclosing the allegations, the requirements of the informal resolution process, including the circumstances under which it precludes the parties from resuming a formal complaint arising from the same allegations; provided, however that at any time prior to agreeing to a resolution, any party has the right to withdraw from the informal resolution process, resume the grievance process with respect to the formal complaint, and be informed of any consequences resulting from participating in the informal resolution process, including the records that will be maintained or could be shared;
The informal resolution process may be facilitated by a trained educational professional, consultant, or other individual selected by the Title IX Coordinator under the following conditions:

- the parties, voluntarily and in writing, consent to the informal resolution process; and
- the informal resolution process cannot be used to resolve allegations that an employee sexually harassed a student.
Informal Resolution – Policy
JBCC/GBCC

• If the matter is resolved to the satisfaction of the parties, the facilitator shall document the nature of the complaint and the resolution, have both parties sign the documentation and receive a copy, and forward it to the Title IX Coordinator.

• If the matter is not resolved, the formal complaint process is resumed.
Informal Resolution – Policy
JBCC/GBCC

• Parties cannot be required to participate in an informal resolution process.
• An informal resolution process is not offered unless a formal complaint is filed.
Emergency Removal 34 CFR § 106.44(c)

• Remember that 34 CFR § 106.45(b)(1) prohibits taking any “disciplinary sanctions or other actions that are not supportive measures” against the respondent until the grievance process has been concluded.

• Significant impacts on discipline process for students and, to some extent, employees.

• Limited exception for emergency removal.
• A school division may remove the respondent from the education program or activity “on an emergency basis, provided that the recipient undertakes an individualized safety and risk analysis, determines that an immediate threat to the physical health or safety of any student or other individual arising from the allegations of sexual harassment justifies removal, and provides the respondent with notice and an opportunity to challenge the decision immediately following the removal.”
Emergency Removal 34 CFR § 106.44(c)

- Must still comply with other laws, including IDEA, 504, ADA.
- According to the commentary, “Emergency removal under § 106.44(c) is not a substitute for reaching a determination as to a respondent’s responsibility for the sexual harassment allegations; rather, emergency removal is for the purpose of addressing imminent threats posed to any person’s physical health or safety, which might arise out of the sexual harassment allegations.” (Commentary p. 727)
Additionally, the threat must be one “arising from the allegations of sexual harassment”, that the allegations themselves or circumstances arising from the allegations may form the basis of the threat.

“For example, if a respondent threatens physical violence against the complainant in response to the complainant’s allegations that the respondent verbally sexually harassed the complainant, the immediate threat to the complainant’s physical safety posed by the respondent may ‘arise from’ the sexual harassment allegations.” (Commentary p. 728)
Emergency Removal is a high threshold: “An emergency removal under §106.44(c) separates a respondent from educational opportunities and benefits, and is permissible only when the high threshold of an immediate threat to a person’s physical health or safety justifies the removal.” (Commentary p. 756).
Emergency Removal 34 CFR § 106.44(c)

• Intersection with risk assessment under state law:
• “[W]e decline to require recipients to follow more prescriptive requirements to undertake an emergency removal (such as requiring that the assessment be based on objective evidence, current medical knowledge, or performed by a licensed evaluator). While such detailed requirements might apply to a recipient’s risk assessments under other laws, for the purposes of these final regulations under Title IX, the Department desires to leave as much flexibility as possible for recipients to address any immediate threat to the physical health or safety of any student or other individual.” (Commentary P. 727-28)
• Intersection with risk assessment under state law:

• Nothing in these final regulations precludes a recipient from adopting a policy or practice of relying on objective evidence, current medical knowledge, or a licensed evaluator when considering emergency removals under § 106.44(c).” (Commentary P. 728)

• “To the extent that other applicable laws establish additional relevant standards for emergency removals, recipients should also heed such standards. To the greatest degree possible, State and local law ought to be reconciled with the final regulations, but to the extent there is a direct conflict, the final regulations prevail.” (p. 731)
Post-Removal Challenges

- Requires notice and an opportunity to be heard, otherwise flexible
- Notice and opportunity to be heard must be provided immediately

“The term “immediately” will be fact-specific, but is generally understood in the context of a legal process as occurring without delay, as soon as possible, given the circumstances. “Immediately” does not require a time frame of “minutes” because in the context of a legal proceeding the term immediately is not generally understood to mean an absolute exclusion of any time interval. “Immediately” does not imply the same time frame as the “reasonably prompt” time frames that govern the grievance process under § 106.45, because “immediately” suggests a more pressing, urgent time frame than “reasonable promptness.”
• A post-removal challenge “is not designed to resolve the underlying allegations of sexual harassment against a respondent, but rather to ensure that recipients have the authority and discretion to appropriately handle emergency situations that may arise from allegations of sexual harassment. As discussed above, the final regulations revise the language in § 106.44(c) to add the phrase “arising from the allegations of sexual harassment,” which clarifies that the facts or circumstances that justify a removal might not be the same as the sexual harassment allegations but might “arise from” those allegations.” (p. 744)
Emergency Removal 34 CFR § 106.44(c)

- Emergency removal may be labeled as a suspension or expulsion under state law. “[T]he final regulations prohibit suspending or expelling a respondent without first following the § 106.45 grievance process, or unless an emergency situation justifies removal from the recipient’s education program or activity (which removal may, or may not, be labeled a “suspension” or “expulsion” by the recipient).” (Commentary p. 753).
May a school division assign a respondent to alternative education pending the grievance process absent facts that would establish “emergency removal?”

Maybe. According to the commentary: “Whether an elementary and secondary school recipient may implement an “alternate assignment” during the pendency of an investigation (or without a grievance process pending), in circumstances that do not justify an emergency removal, when such action is otherwise permitted by law, depends on whether the alternate assignment constitutes a disciplinary or punitive action or unreasonably burdens the respondent (in which case it would not qualify as a supportive measure as defined in § 106.30). (p. 751-52)
Emergency Removal of Students

• What does this all mean from a practical standpoint?
  • A student respondent cannot be disciplined (or be subjected to any other adverse action) before the completion of the grievance process, unless grounds for emergency removal exist.
  • In the absence of grounds for emergency removal, the student stays in place until the conclusion of the grievance process, unless there is an alternative educational placement that does not unreasonably burden the respondent.
  • BUT REMEMBER, you must also follow state law as well as IDEA, 504, and ADA.
A school division may place employee respondents on administrative leave during pendency of the grievance process (but not before the grievance process is initiated).

The standard for emergency removal does not apply to administrative leave.

Additionally, the post-removal notice and opportunity to challenge do not apply to administrative leave.
The regulations do not specify whether the administrative leave must be with or without pay (or with or without benefits).


- Superintendent/designee can suspend an employee with pay for up to 5 days. After 5 days, the employee must be given notice of the reasons for the suspension and the right to a hearing on the suspension before the school board.

- Only the school board can suspend an employee without pay, after notice and opportunity for a hearing.
• The practical impact of this section is that employee respondents will likely rarely be removed under the emergency removal provisions because it will be a far lower bar to use administrative leave/suspension.

• The commentary recognizes that this section sets up a different standard for student respondents and employee respondents.
  • “[T]he final regulations permit, but do not require, what may amount to an interim suspension of an employee-respondent (i.e., administrative leave without pay) even though the final regulations prohibit interim suspensions of student-respondents.” (p. 772)
Administrative Leave 34 CFR § 106.44(d) (Employees)

- Must still comply with other laws, including 504, ADA.
Questions?

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