

Title IX Decision-Maker Training Part 2

Hartford Board of Education

Melinda B. Kaufmann

April 21, 2022

- Review all evidence collected during the investigation
- Determine whether any other evidence needs to be collected, and if so, request the same
- Facilitate “written cross-examination” of the parties and witnesses
- Make relevancy determinations regarding the evidence
- Make credibility determinations
- Make findings of fact
- Make an independent judgment on responsibility
- Either determine or recommend sanctions if Respondent found to be responsible for sexual harassment under Title IX

What you need to review at the outset of receiving the investigation file

- The District's Title IX policies and procedures
- The formal complaint
- The investigative report
- All relevant evidence collected by the investigator
- The written responses submitted by the parties – if any exist

First Steps – Is the File Complete

- Make sure you understand the elements of the alleged provision of the policy that has been violated
- Is there any more information you think you need in order to formulate a decision as to whether the Respondent is responsible for violating that policy
- If so, you have the right to ask the investigator to go back and gather more information/ask more questions

Next Step: The “Written Cross Examination” Process

- Because K-12 schools are not required to provide in-person hearings on Title IX complaints, there is a process for the parties to ask written questions of the other party/parties and/or witnesses
- Step 1 – advise both parties of the right to request written questions be asked of other parties and witnesses
- Step 2 – rule on which questions are relevant and appropriate
- Step 3 – to the extent you decide not to ask a question, provide written notice to the party asking the question with an explanation of the denial
- Step 4 – send the written questions to the appropriate party/witness
- Step 5 – receive the answers
- Step 6 – send the answer to the parties
- Step 7 – follow same process for one round of follow up questions

- Relevant information is any information that makes a fact or issue in dispute more or less likely to be true
- Consider all relevant evidence – including those that make it more likely the Respondent is responsible and those that might exonerate the Respondent
- Make sure to exclude any evidence that is privileged
 - Sexual behavior of the Complainant (except limited circumstances)
 - Legal privilege such as:
 - Attorney-client privileged communication
 - Fifth Amendment - privilege against self-incrimination
 - Confessions to clergy or religious figures
 - Spousal privilege
 - Medical/Mental Health treatment records (unless you have written permission from the parent to use it)

- Applies to Complainant ONLY
 - You must exclude questions related to the Complainant's sexual behavior or predisposition
 - Unless
 - Used to provide someone other than the respondent committed the conduct; or
 - It concerns the specific incidents in question and is offered to prove consent.

Questions that can be excluded or reworded

- You can ensure that questions are not harassing
- You can rephrase questions to avoid profanity, obscenities, etc.
- You can combine or exclude repetitive questions
- You must justify excluding any questions and provide written notice with the justification to the party posing the question

Written Cross Examination Cont.

- The District can set reasonable time limits for questions, responses and follow up question
- Parties and witnesses cannot be disciplined for failing or refusing to respond to the questions
- Remember, the burden of proving or disproving responsibility always remains on the district, not the Respondent or Complainant

Prejudgment, Bias and Conflicts of Interest

Decision-Makers must avoid prejudgment of the facts at issue

34 C.F.R. 106.45(b)(1)(iii)

- Each case is unique and different
- As a decision-maker you must keep an open mind until all of the evidence has been received and evaluated
- You cannot come to any judgments, opinions, conclusions or beliefs about any aspect of the complaint until you have reviewed all of the permissible and relevant evidence
- You cannot consider information that you have may that is outside of what is provided during the investigation

Decision-Makers “may not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent.”

34 C.F.R. 106.45(b)(1)(iii)

- Per the comments to the regulations “The [Department of Education] declines to define certain employment relationships or administrative hierarchy arrangements as per se conflicts ... or to state whether particular professional experiences or affiliations do or do not constitute per se violations.” 85 FR 30252

- “Whether bias exists requires examination of the particular facts of a situation and the Department [of Education] encourages recipients to apply an objective (whether a **reasonable person** would believe bias exists) common sense approach to evaluating whether a particular person serving in a Title IX role is biased, exercising caution not to apply generalizations that might unreasonably conclude that bias exists ... the prior professional experience of a person whom a recipient would like to have in a Title IX role need not disqualify the person from obtaining the requisite training to serve impartially in a Title IX role.” FR 30252

FACT FINDING AND EVALUATING EVIDENCE

Objectively evaluating relevant evidence

- Per the preamble to the regulations, decision-makers should look at:
 - Consistency
 - Accuracy
 - Memory
 - Credibility (p. 85 FR 30315)
 - Implausibility
 - Inconsistency
 - Unreliability
 - Ulterior motives
 - Lack of credibility (85 FR 30333)

Fact Finding When there are Disputes

- List all facts that all parties agree on
- List facts that the parties disagree on
- Determine whether there is a preponderance of the evidence to support the facts that there is disagreement over

Fact Finding – Look at the Elements

- Break down each alleged policy violation into its elements and determine whether there is a preponderance of the evidence to support each element
- If you have a preponderance of the evidence that each element is present – the result is that you have a policy violation
- If you do NOT have a preponderance of the evidence that one or more elements exists, you do NOT have a policy violation

Hostile Work Environment

- Conduct on the basis of sex (gender)
- That is unwelcome
- That a reasonable person would find to be
 - Severe, AND
 - Pervasive, AND
 - Objectively offense
- That effectively denies a person equal access to the district's education program or activity

34 C.F.R. 106.30(a)

Quid Pro Quo

- Conduct on the basis of sex
- By an employee of the district
- The conduct conditions the provision of an aid, benefit or service of the district on an individual's participation in sexual conduct
- The conduct is unwelcome

Retaliation

- Did a person or institution
- Intimidate, threaten, coerce, or discrimination (or take any other adverse action) against any individual
- For engaging in protected activity under Title IX?
 - For the purpose of interfering with any right or privilege secured by Title IX or
 - Because the individual made a report or complaint, testified, assisted or participated or refused to participate in any manner in an investigation or proceeding under Title IX.

- The behavior in question must occur in the district’s “education program or activity”
- For purposes of the grievance process, an “education program or activity” includes “locations, events, or circumstances over which the recipient exercised **substantial control over BOTH the respondent and the context in which the sexual harassment occurs.**”

34 C.F.R. 106.44(a)

- The conduct must also interfere with the complainant’s access or participation in the district’s education program and/or activity

- For purposes of Title IX, credibility refers to the process to weighing the accuracy and truthfulness of evidence
- NOTE – credibility and honesty do not mean the same thing
 - A witness could honestly believe something even though the evidence does not support a finding that the witness’s belief is credible
 - The witness could be testifying as to what they believe is true but the testimony may be found not to be credible
- The investigator may assess credibility of witnesses and offer their opinions as to credibility, but it is up to the decision-maker to make credibility determinations

CREDIBILITY DETERMINATIONS

- Some things to consider when assessing credibility of evidence
 - The source and content of the evidence
 - The plausibility of the evidence in light of other evidence
 - First-hand information is always best
 - Look at where the witnesses were
 - Were they in a position to actually see/hear what claim to have seen/heard
 - Look at the level of detail and the consistency of each account
 - Physical evidence is always best (camera evidence, recordings, written evidence, etc.)
 - Is there corroborating evidence that you would logically expect to have that is missing

- Evidence of the complainant’s (or respondent’s) reactions or behavior shortly after the alleged incident
 - Things reported to friends, others
 - Witnesses who observed the complainant being upset
 - Changes in behavior, school attendance, work completion, avoiding certain places or activities
- Contemporaneous evidence
 - Diary entries, emails or other written messages
 - Communication to friends, parents, about the conduct

Preponderance of the Evidence Standard

- Use the “preponderance of the evidence” standard for each disputed fact
 - If the evidence is 50-50 or less, then you do not have preponderance of the evidence so you have insufficient evidence to support the existence of the fact/element

- The written determination MUST:
 - Identify the allegations that potentially constitute sexual harassment under Title IX
 - Describe the procedural steps taken from the receipt of the formal complaint through the issuance of the decision and any deviations from the procedures set up in the district's policy
 - Findings of fact as to each element of the underlying policy violation
 - Undisputed facts
 - Disputed facts and how they were resolved with an explanation

▪ Decision-Maker Template

▪

- I. Executive Summary: [summarize findings here]
- II. Alleged Violations: _____
- III. Procedural History: [including the date of the incident, the date on which it was reported, to whom was it reported, the date on which the investigator was assigned, the date on which the investigation report was sent to the parties]
- IV. Involved Parties
 - Complainant: _____
 - Respondent: _____
 - Witness 1: _____ [Note – witnesses should be identified by the role (student, teacher, etc.) and not by name. A separate key can be provided with the witnesses' names]
 - Witness 2: _____
 - Witness 3: _____

V. Standard of Evidence: To determine whether Respondent has violated District policy and is responsible for sexual harassment in violation of Title IX, the standard of evidence required is preponderance of the evidence (i.e. that the evidence shows it is more likely than not that the conduct occurred).

VI. Summary of Interview

Complainant: _____

Respondent: _____

Witness 1: _____

VII. Credibility Determinations: [including Complainant, Respondent and witnesses]

VIII. Other Relevant Evidence:

▪ [list all relevant information considered here. Evidence may need to be redacted to comply with FERPA, the IDEA and/or ADA privacy requirements]

I. Findings of Fact and Analysis

▪ Facts:

- 1. _____
- 2. _____
- 3. _____
- 4. _____

Application of Facts to Alleged Title IX Violation:

X. Conclusion: Based on the totality of the circumstances and the information obtained pursuant to this investigation, and based on the preponderance of the evidence standard, it is concluded that it **is/is not** more likely than not that **[Respondent]** violated Policy and is, therefore, a responsible party, for the following reasons:

XI. Sanction **[if the sanction is not within the authority of the decision-makers, only a recommendation for a sanction can be provided here and the person with authority will become an additional decision-maker]**

XII. Remedies: List any remedies designed to restore or preserve equal access to the district's educational program or activities that will be provided to the Complainant

XIII. Appeal: Provide the district's procedures and permissible bases for appeal

- You receive a Title IX complaint from Jessica.
- She tells you that she dated Kevin last year but they broke up over the summer. Sometime during the summer, Kevin physically attacked her in her bedroom but that nothing sexual happened. She complained that at school he always seemed to be around when she was in the hallways and that on at least two occasions he had physically pushed her. She said that on one occasion her friend Sarah was present when Kevin called her a bitch and pushed her. On another occasion, she said that Kevin's friend Jim was present when he grabbed her while she was walking down the hallway and pulled her toward him.
- Jessica says that recently Kevin's cousin, Rachel has been giving her menacing looks and often calls her names when she walks by. She does not know if anyone has ever heard this.
- Jessica and her parents have requested a formal complaint investigation.



Melinda B. Kaufmann

Tel: 860.424.4390

Email: mkaufmann@pullcom.com

Thank you for joining us!

Please visit our website at:

<https://www.pullcom.com/practices-schoollaw>

for further information.



These slides are intended for educational and informational purposes only. Readers are advised to seek appropriate professional consultation before acting on any matters in this update. These slides may be considered attorney advertising. Prior results do not guarantee a similar outcome.