

Title IX for Investigators Part 2: The Report

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Today's To Do List:

- ▶ Review of Part 1
- ▶ Bias - we all have it - how do we work around bias in investigations?
- ▶ Review of results of homework assignment - Harvard Implicit Bias test
- ▶ Anti-Bias Checklist
- ▶ Trauma informed investigations - what does that look like?
- ▶ Cultural Considerations for Investigations
- ▶ Break
- ▶ Investigation Report Template
- ▶ Drafting allegations
- ▶ Analysis of coercion, pattern, etc.
- ▶ Credibility assessments

Part 1 Training Review

- ▶ Discussed District's obligation under TIX
- ▶ Definition of Sex Discrimination per TIX
- ▶ Discussed Investigator Role and Conflicts of Interest
- ▶ CCSD TIX Standard Operating Procedures
- ▶ Reviewed a Case Study involving an investigation report and the determination.
- ▶ Questions about anything that we covered last time?

Title IX Regulations require training on “avoiding bias”

- ▶ While the Title IX regulations does not explicitly require anti-bias training, the regulations require training in the following areas:
 - ▶ the definition of sexual harassment;
 - ▶ the scope of the institution’s education programs where the Title IX policy applies;
 - ▶ how to conduct an investigation;
 - ▶ the grievance process including appeals, and informal resolution; and
 - ▶ and how to serve impartially to avoid bias and conflicts of interest.

Impartiality Required in Investigations

- ▶ 34 C.F.R. 106.45(1)(iii) requires that educational institutions provide training for Title IX Coordinators, investigators, decision-makers, and any person who facilitates a resolution process.
- ▶ Training materials must not rely on sex stereotypes and must promote impartial investigations and adjudications of formal complaints. 34 C.F.R. 106.45(b)(1)(iii).

What is implicit bias?

- ▶ *The stories we make up about people before we know who they are.*
- ▶ Attitudes and/or stereotypes that affect one's understanding, actions, or decisions in an unconscious way
- ▶ Not explicit bias (operates consciously)
- ▶ Implicit bias operates subconsciously or unconsciously
- ▶ Can affect Title IX coordinators' /investigators perception of Complainant and Respondent
- ▶ Must learn to recognize behavior that may indicate bias or differential treatment
- ▶ (Kang, Jerry and Lane, Kristin, Seeing Through Colorblindness: Implicit Bias and the Law, 58 UCLA L. Rev. 465-520 (2010)).

HOW CAN IMPLICIT RACIAL BIAS AFFECT TITLE IX INVESTIGATIONS?

- ▶ Implicit bias can affect perception of Complainant and Respondent, witnesses, of social groups to which either are members, etc.
- ▶ Can create confirmation bias - concept that people seek information/evidence that confirms their beliefs and preconceived notions
- ▶ Can affect how the investigators and adjudicators perceive witness credibility due to witness's race.

TYPES OF BIAS

- ▶ Attitude and stereotypes can determine our thoughts about certain social categories, including gender and race

Attitude

- ▶ Association between some concept (often a social group) and an overall evaluative feeling/belief, either positive and negative.
 - ▶ Ex: A negative association with Hispanic Americans.

Stereotypes

- ▶ Association between a concept and a trait, negative or positive
 - ▶ Ex: A stereotype that African Americans are good athletes.

IMPACT OF IMPLICIT BIAS IN SCHOOLS?

- ▶ **Disproportionality in discipline:** Policies that appear racially neutral on their face, but result in the over-representation of students of color -- particularly black boys -- in suspensions, expulsions, and referrals for subjective infractions like "defiance".
- ▶ **Disproportionality in special education:** Misguided placements that result in the over-representation of culturally and linguistically diverse students in special education programs.
- ▶ **Teacher mindsets and beliefs:** Underestimating the intellectual capacity of culturally and linguistically diverse students, and often girls, inside the classroom.
- ▶ **Tracking:** School policies that automatically place students of color in remedial or low-track courses.
- ▶ **Dominant discourse:** Ways of thinking and talking about students and families that diminish, underestimate, or even pathologize them.

Harvard Implicit Bias Test

- ▶ How did you do?
- ▶ What did you think of the test?
- ▶ Were you surprised by the results?
- ▶ How can you use these results when conducting a Title IX investigation?

How to Work through Implicit Bias in Title IX Investigations?

- ▶ Become aware of your biases so that you can interrupt them.
- ▶ Check yourself with a neutral party.
- ▶ Be careful about trying to match your facts to your bias.
- ▶ Study and teach colleagues about implicit bias.
- ▶ Isolate and track instructional practices that interrupt, or promote, bias.
- ▶ Look out for tone policing - emphasis becomes on *how* something was said, not *what* was said.
- ▶ Tune into implicit bias in your school.
- ▶ Recognize implicit bias in yourself and in others.
- ▶ Know that people can counteract their biases - just do not go too far in the other direction.
- ▶ Participate in and encourage dialogue about implicit bias and its effects.

BASIS FOR ALLEGATIONS OF BIAS IN A TITLE IX INVESTIGATIONS

- ▶ Generally, to state a claim for racial discrimination, the plaintiff must allege:
 - ▶ He/she is a member of a protected class.
 - ▶ He/she was treated differently from similarly situated individuals.
 - ▶ The disparate treatment was intentional and based on his/her membership in the protected class.
 - ▶ There may be racial discrimination in Title IX cases if the institution brings a disproportionate number of cases against parties of a particular race (selective enforcement) or enacts harsher penalties against members of that race (erroneous outcome).
 - ▶ Could constitute basis for appeal.



Checklist for Countering Bias in Title IX Investigations



1. Test Yourself

- ▶ When you see or hear about sexual harassment cases in the news, on social media, in popular culture or elsewhere, do you tend to react strongly one way or another?
- ▶ Do you think you have strong reactions when you hear references to the Me Too Movement, etc.?
- ▶ If yes, think about why you are having those reactions and how you can neutralize them.

2. Develop a consistent intake process

- ▶ To avoid prejudging and mischaracterizing the nature of a complaint, develop a consistent methodology for receiving and understanding complaints so that you can accurately and consistently assess whether a complaint falls within Title IX jurisdiction, whether informal resolution may be an option or whether an investigation is required.
- ▶ The individual conducting intake should likely not investigate.
- ▶ Same with supportive measures.

3. Create a truth-telling environment

- ▶ Investigations are especially susceptible to affinity bias (also called “like me” bias - giving more or less credence to information depending on whether it is received from someone “like” or “not like” the investigator).
- ▶ Recognize the potential for this bias. Take steps to counteract.
- ▶ Be honest - It may mean that you do not investigate.

4. Prepare, prepare, prepare

- ▶ In addition to preventing confirmation bias, preparation will also minimize the dangers of priming - using stimuli to generate an (unconscious) effect on behavior/reaction.
- ▶ In investigations, this means you should not ask leading questions, such as, “You don’t think Bob was bullying Vanessa when he yelled in the meeting, do you?”
- ▶ Prepare your questions in advance and identify the areas about which you must question the parties/witnesses.

5. Develop a system to summarize interviews

- ▶ There is no special sauce when determining how best to document your interviews (written statement drafted by witness, written statement drafted by you and reviewed by witness, typing or handwriting your own notes, for example).
- ▶ The “trick” is to develop and follow a system that is reliable, accurate and consistent for you.
- ▶ You may want to have some protocols followed by all investigators, i.e. notes includes in report or no notes?

6. Rely on tools which lend themselves to impartial investigations

- ▶ **Create a timeline that only lists dates/times and events,** with no commentary. This allows you to look at evidence more objectively thereby removing bias from the analysis.
- ▶ **Use experts to help you interpret complicated information or data more objectively.** This might include IT professionals, teachers or subject matter experts.
- ▶ **Play devil's advocate:** Consult with trusted colleagues. Describe the facts in the most objective way possible and see if they reach a different conclusion. If so, discuss why.
- ▶ **Put yourself in the shoes of both parties?** Does this make you see things differently? Do their versions of events make sense? Why or why not?
- ▶ **Determine the order of interviews in advance:** How might the order impact your neutrality?

7. Collect and consider all evidence - the good, the bad and the ugly

- ▶ **There are no good or bad facts, only facts.** Even if you've been meticulous about asking unbiased questions and seeking to collect all information, don't get tripped up during your analysis - confirmation bias might still creep into your report. Do not leave something out because it does not match the picture in your head. Paint a complete picture.
- ▶ Objectively review the facts collected so that the decision-maker can reach findings that are in line with the information collected and therefore much more likely to be bias-free.

8. Appropriately Weigh the Relevance of the Evidence and Witnesses

- ▶ Not all Sexual Harassment is equal.
- ▶ Not all evidence is equal.
- ▶ Not all witnesses are equal.
- ▶ Title IX regulations do not define relevance.
 - ▶ The preamble to the regulations explains relevant evidence as “evidence pertinent to proving whether facts material to the allegations under investigation are more or less likely to be true.”
 - ▶ That is a fairly broad standard.
 - ▶ Remember the Title IX regulations, at 34 C.F.R. § 106.45(b)(6)(i)-(ii), state that a complainant’s sexual predisposition is “not relevant,” and that a complainant’s prior sexual behavior is “not relevant”.

9. Track your work at every stage of the investigation

- ▶ One of the best ways to see if bias affects your decision-making is to check your record.
 - ▶ Do you tend to find the Complainant credible, but not the Respondent? Or the opposite?
 - ▶ Do you tend to spend less time on investigations involving students who do not have involved parents?
 - ▶ Do you tend to spend more time on allegations against students or employees of a certain racial groups?
- ▶ In addition to checking your own record, the Title IX Coordinator should keep and review data on Title IX investigation outcomes to ensure consistency and fairness in investigations.

10. Identify and Report Conflicts of Interest

- ▶ A conflict of interest that disqualifies you from a Title IX investigation is one that prevents you from being able to impartially participate.
- ▶ You should first determine what type of conflict is present as you consider your ability to impartially serve.
- ▶ Immediately report conflicts of interest to the Title IX Coordinator.
- ▶ The *appearance* of a conflict cannot be countered.

Trauma informed Interviews and Investigations

- ▶ A trauma-informed approach means recognizing trauma, understanding how, what, where and when to ask questions, and importantly, employing techniques and strategies that support a process that mitigates or reduces the possibility of re-traumatization.
- ▶ When gathering evidence during the investigation of sexual harassment or sexual assault, you will have to ask sensitive, difficult and intimate questions of parties and witnesses.
- ▶ Do not make Parties tell their stories multiple times.
- ▶ Parties and witnesses may find these questions difficult to answer due to trauma - either past trauma or the trauma of the incident they have reported.
- ▶ The phrasing of questions during interviews is important. Depending on how a question is asked, it might be perceived by a Complainant as blaming them for their actions, or for what they may be unable to recall.
- ▶ Try cognitive interviewing techniques to aid memory and accuracy: recall everything, reverse the order, change perspective and reinstate the context.

Trauma informed Interviews and Investigations cont.

- ▶ Instead of
- ▶ “Did you say no?”
- ▶ Ask
- ▶ “What are you able to recall doing or saying during the incident?”
- ▶ Instead of
- ▶ “Why did you...”
- ▶ Ask
- ▶ “Explain to me...”
- ▶ Instead of
- ▶ “What happened first?”
- ▶ Ask
- ▶ “Where do you want to begin? What happened next?”
- ▶ More examples at: <http://www.theiacp.org/sites/default/files/2020-06/Final%20Design%20Successful%20Trauma%20Informed%20Victim%20Interviewing.pdf>

Cultural Factors for Consideration

- Native American cultures tend to utilize more nonverbal communication.
- Native American parents often use “silent language,” such as gestures, body language, touch and facial expression, to communicate with their children.
- One study found that Navajo mothers had a more passive and silent interactional style with their infants than African American or white mothers did.
- Verbal interaction with adults, especially with young Native American children, may not be a familiar method of communication.

Cultural Factors for Consideration cont.

- Individuals in a tribe or clan have some relationship to every other individual and could be considered family.
- Children may live in a nuclear family, or they may live with many family members.
- Native Americans, similar to African-Americans, tend to watch and care for all the children belonging to their group.
- Approximately 30% of Native American households are headed by women.
- Native American students may hesitate to put themselves forward at another student's expense.
- Discipline in the Native American family tends to be relaxed and consistent with the values children are taught, including: sharing, cooperation, harmony with nature, non-interference, respect for elders, loyalty, and a present, rather than future, time orientation.

How might trauma
informed questioning
and cultural
considerations impact
your investigation?
Discuss.



Title IX Due Process

- ▶ Procedural
- ▶ Substantive
- ▶ Substantive due process asks the question of whether the government's deprivation of a person's life, liberty or property is justified by a sufficient purpose.
- ▶ Procedural due process, by contrast, asks whether the government has followed the proper procedures when it takes away life, liberty or property.

Title IX Due Process Continued

- ▶ Title IX regulations have built in procedural and substantive due process rights, which are reflected in your policy and standard operating procedures.
- ▶ Follow your policy and SOPs and you will provide due process.
- ▶ Be reasonable - just be equitable.
 - ▶ If a party requests an extension and it is reasonable - provide to both parties.
 - ▶ Due Process = Fair Procedures
- ▶ **Notice** of the proposed action and the **grounds asserted** for it. Opportunity to present reasons why the proposed action should not be taken. The **right to present evidence**, including the right to call witnesses.

Review investigation report template

Case Study - Complaint

- ▶ During PE class, a male student was providing marijuana to other students to smoke during lunch. A female student is offered marijuana, but tells the male student that she does not have any money. The male student offers to provide her marijuana in exchange for sex.
- ▶ Initially, she told him no. As class went on, the male student continued to pressure her to have sex with him.
- ▶ She then told him that she would do it if he also bought her chick-fil-a for lunch.
- ▶ The male student told her to meet him at his car at lunch and went to buy her lunch.
- ▶ The female student told her friend what she had agreed to and told her that she did not want to have sex with the male student.
- ▶ The female student's friend encouraged her to meet the male and have sex so they could get the marijuana.
- ▶ The female student's friend walked her out to the male student's car. The female student tried to back out, but her friend and the male student continued to "pressure" her to get into the car.
- ▶ Eventually, the female student got into the male student's car and they had sex.
- ▶ The female left with her chick-fil-a and her weed.

Notice of Allegations

- ▶ Always use a template for the Notice of Allegations and Advisement of Rights.
- ▶ The regulations require certain information be provided in the written notice of allegations. Your template contains this information.
- ▶ Remember that your notice of allegations kicks off your investigation.
 - ▶ Statements made, by Respondent, prior to service of this Notice likely cannot be used in the investigation.
 - ▶ Draft allegations based on the facts provided in the case study.
 - ▶ Take a few minutes and we will discuss.

Notice of Allegations Model

- 1 Whether Respondent's conduct constitutes coercion of the Complainant to engage in non-consensual sexual activity with another student, in exchange for drugs, in violation of Title IX and District Policy #1234 Student Sexual Harassment.
- 2 Whether Respondent's conduct, constitutes sexual harassment in violation of Title IX and District Policy #1234 Student Sexual Harassment.
- 3 Whether Respondent's conduct created a hostile environment, in which to learn, for Complainant, in violation of Title IX and District Policy #1234 Student Sexual Harassment.

Summary of Relevant Evidence

- ▶ **Should be a summary of information and evidence provided by the parties and witness, without interpretation.**
- ▶ This:
- ▶ During her interview with Title IX investigator on March 20, 2023, Complainant reported that she was in P.E. class, playing basketball when she was approached by Respondent. They were talking and playing basketball when Respondent mentioned that he had marijuana and asked if she wanted some.
- ▶ Not this:
- ▶ During her interview with Title IX investigator on March 20, 2023, Complainant reported that she was in P.E. class, playing basketball, like she was directed to do by the teacher, when she was approached by Respondent, who should have been on his side of the gym. Respondent interrupted Complainant's game and offered to sell her illegal drugs - marijuana.

Coercion Analysis

- ▶ When an allegation of coercion is made, the investigator must provide an analysis of the facts for the decision-maker to determine if coercion is likely to have occurred.
- ▶ Remember, if coercion is present, there can be no consent.

Coercion: In a sexual context, coercion is demonstrated by an unreasonable amount of pressure to engage in sexual activity. Determining what is unreasonable should be a function of duration, frequency, isolation, and intensity. Coercion can result in acquiescence, but not sincere, positive, or enthusiastic consent. It must then be determined whether the amount of pressure was reasonable or unreasonable.

- ▶ Analyze the facts as presented in the case study to reach a conclusion regarding coercion.

Pattern Analysis

- ▶ An **alleged pattern** to include allegations or other evidence that one person has engaged in two or more substantially similar incidents or behaviors toward one or more targets. A **confirmed pattern** exists when a preponderance of the evidence supports that the alleged acts actually occurred. The similarity can be:
 - ▶ ● in the type of act
 - ▶ ● commonality of chosen victims,
 - ▶ ● location,
 - ▶ ● consistency of premeditation
 - ▶ ● and/or signature or modus operandi (method of operation) of the perpetration
- ▶ Pattern analysis can be of particular concern when conducting a risk assessment to determine if a student should be removed during the investigation.

Intimidation Analysis

- ▶ An implied threat, which is different from a threat which is clear and overt. Intimidation, as a type of force describes a situation when someone uses their power or authority to influence someone else. There are subjective and objective requirements to the proof of intimidation. Subjectively, the reporting party must have felt intimidated, but objectively Respondents' actions must would have been intimidating to a reasonable person, under the same or similar circumstances, as well.
- ▶ Intimidation is more likely to be present when you have
 - ▶ older student and a younger student,
 - ▶ a supervisor and subordinate,
 - ▶ Employee and student
 - ▶ Coach and athlete

Force and Threat Analysis

Any threat that causes someone to do something they would not have done absent the threat could be enough to prove force. This is especially true when coupled with evidence that the threatened individual reasonably believed the individual making threatens had the will and capacity to carry out the threat. A threat must have a negative condition attached.

- ▶ “If you do not have sex with me, I will tell people you raped me.”
- ▶ “If you do not have sex with me, I will hurt you.”
- ▶ “If you do not sleep with me, I will fail you in my course.”
- ▶ “If you do not have sex with me, I will harm someone close to you.”
- ▶ **“If you do not have sex with me, I will share this compromising video, pictures on the internet, with your parents, your boss.”**

Physical Violence Analysis

- With actual violence or the use of a weapon. No matter how slight, any intentional physical violence upon another, use of physical restraint, or the presence of a weapon to gain sexual access will constitute the use of force.
- The key question is whether the physical violence enabled the person's ability to gain sexual access.

Credibility Assessments

- ▶ Consider
 - Consistency of evidence;
 - Corroborative evidence that supports or refutes evidence of the party;
 - Forthcoming, straightforward evidence, versus evasive and defensive;
 - Plausibility of evidence (does it make sense?);
 - Admissions against one's own interest;
 - Motive.
 - Credibility assessments provide insight to the decision-maker who did not interview these individuals.

Example from Case Study

- ▶ Complainant submitted a timely report following the incident. The information she provided was corroborated by Witness 1, who reported witnessing Respondent's offer to give her drugs in exchange for sex. The facts may not support Complainant's allegation that she was coerced into the sexual acts; however, Complainant risked getting in trouble for marijuana to make this complaint. Complainant explains that she did not want to go through with it, but did not know how to say no. Complainant's account was also corroborated by Respondent who admitted that he offered Complainant drugs for sex, but denies the sexual activity was not consensual. Complainant appears credible.
- ▶ Respondent has a motive to lie or not give accurate information to protect his own interest. Respondent; however, admitted to offering drugs to Complainant. Respondent denies giving drugs to other students, but witnesses confirmed that he was selling marijuana on campus. Respondent said that it was Complainant's idea to exchange the drugs for sex. Respondent says that when Complainant asked him to get her food as well, he thought they had reached "a deal". Respondent made statements against his own interests when admitting to providing marijuana to Complainant, but denies coercion. He says that he waited in his car, with food and marijuana, and the Complainant came out to his car and got inside. Respondent appears mostly credible.

Bottomline:

- ▶ Reports should be clearly written and understandable.
- ▶ Title IX coordinator should review the report before it is processed to the parties or the decision-maker.
- ▶ Reports should be written in a neutral and objective manner - must avoid any appearance of bias.
- ▶ Reports should provide decision-maker with all exhibits and information necessary to make a fair and neutral decision.
- ▶ Reports can be used in future litigation, so think of your report as Exhibit A.

Got Questions?



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