

**TITLE IX TRAINING:
REGULATIONS, INVESTIGATION PROTOCOLS,
REPORTS, AND DISTRICT OBLIGATIONS**

Lapeer County Intermediate School District

September 6, 2023

Presented by:
Jeremy D. Chisholm, Esq.
Collins & Blaha P.C.

31440 Northwestern Highway, Suite 170
Farmington Hills, Michigan 48334
(248) 406-1140

Notice

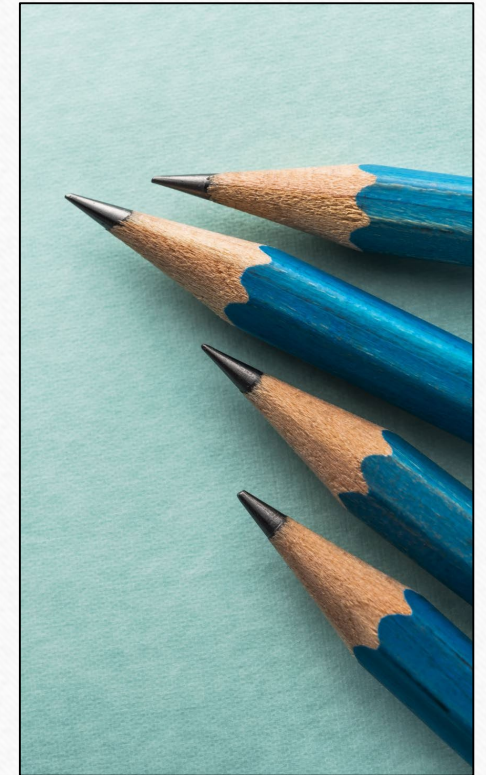
These slides reflect general legal standards and are not intended as legal advice for specific situations.

Future legal developments may affect these topics.

This document may not be reproduced or redistributed, in whole or in part, without the express written permission of Collins & Blaha, P.C.

OVERVIEW

1. Introduction to Title IX (Slides 4-7)
2. District Obligation (Slides 8-13)
3. Complaints and Investigation Process (Slides 14-54)
 - A. Formal Complaint (Complainant) (Slide 23)
 - B. Determine if Complaint Should be Dismissed (Title IX Coordinator) (Slides 24-26)
 - C. Provide Option of Informal Grievance Process (Title IX Coordinator) (Slides 27-30)
 - D. Written Notice (Title IX Coordinator) (Slide 31)
 - E. Investigation (Investigator) (Slides 32-40)
 - F. Fairly Summarize Evidence (Investigator) (Slide 41)
 - G. Provide Parties with Evidence Summary (Title IX Coordinator) (Slide 42)
 - H. Complete Investigative Report and Provide to Parties (Investigator) (Slides 43-45)
 - I. Parties May Submit Questions (Decision-Maker) (Slide 46)
 - J. What is Relevant Evidence? (Slides 47-48)
 - K. Determination of Responsibility (Decision-Maker) (Slides 49-52)
 - L. Appeal (Decision-Maker on Appeal) (Slide 53)
4. Case Decisions (Slides 55-64)
5. Lapeer County Intermediate School District Title IX Policy and Investigation Procedure, po2266 (Slide 65)
6. Proposed Regulations (Slides 66-70)
7. Presenter Biography (Slide 71)



Introduction to Title IX

- Title IX of the Education Amendments of 1972 is a federal law prohibiting discrimination on the basis of sex in all federally-funded educational institutions:

No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.
- Title IX applies to K-12 schools and postsecondary educational institutions that receive federal financial assistance.
- Title IX was established to:
 1. Prevent federal resources from being used to support discriminatory practices in education.
 2. Protect individuals against such discriminatory practices.

Scope of Title IX

Types of Interactions Covered

- Student/Student
- Employee/Student
- Employee/Employee
- Could also involve third parties, such as volunteers, third-party contractors, etc.

Types of Conduct Covered

- Sexual harassment
 - Includes quid pro quo harassment
- Sexual assault
- Dating violence
- Domestic violence
- Stalking

Definition of Sexual Harassment

1. A Board employee conditioning the provision of an aid, benefit, or service of the District on an individual's participation in unwelcome sexual conduct (often called "*quid pro quo*" harassment);
2. 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 District's education program or activity; or
3. Sexual assault, dating violence, domestic violence, or stalking.

Definitions

- ***Sexual assault*** means any sexual act directed against another person, **without the consent of the victim**, including instances where **the victim is incapable of giving consent**, and the "nonforcible" sex offenses of Incest and **Statutory Rape**. Sexual assault includes rape, sodomy, sexual assault with an object, **fondling**, incest, and statutory rape.
- ***Fondling*** is the **touching of the private body parts of another person for the purpose of sexual gratification**, without the consent of the victim, including instances where the victim **is incapable of giving consent** because of age or because of temporary or permanent mental or physical incapacity.
- ***Statutory Rape*** is sexual intercourse with a person who is under the statutory age of consent as defined by State law.
- ***Consent*** refers to words or actions that a reasonable person would understand as agreement to engage in the sexual conduct at issue. A person may be incapable of giving consent because of age or because of temporary or permanent mental or physical incapacity. A person who is incapacitated is not capable of giving consent.

When Does the District Have an Obligation to Act?

- District has an obligation to act when:
 1. It has actual knowledge;
 2. Of sexual harassment;
 3. Occurring within the school's education program or activity;
 4. Within the United States.

Actual Knowledge

- “[N]otice of sexual harassment or allegations of sexual harassment . . . **to any employee of an elementary and secondary school**. Imputation of knowledge based solely on vicarious liability or constructive notice is insufficient to constitute actual knowledge. This standard is not met when the only official of the recipient with actual knowledge is the respondent.” 34 CFR 106.30(a) (definition added by new 2020 regulations).
- Before the new 2020 regulations, a school district had “actual knowledge” of harassment if a school official with sufficient authority to take corrective action had knowledge, or reasonably should have known, of harassment.
- Now, the District is on notice of sexual harassment if **ANY K-12 EMPLOYEE** has knowledge of the allegations.
- **All employees need to know the legal definition of sexual harassment and what to do if they become aware of such allegations.**

Education Program or Activity

- The words **“effectively denies a person equal access to the school’s education program or activity”** mean the District has a duty to respond only if the harassment occurs as part of the school’s operations – in locations, events, or circumstances **where the district has substantial control over the harasser and substantial control over the context in which the harassment occurs.**
- Ask these questions:
 - Did the sexual harassment occur as part of the District’s operations (i.e., within its education program or activities)? AND
 - Did the sexual harassment occur in a location, at an event, or in circumstances where the District has substantial control over the harasser and substantial control over the context in which the harassment occurred?

District's Obligation to Act

- The District's response to an allegation of sexual harassment cannot be deliberately indifferent, or "clearly unreasonable in light of the known circumstances."
- The District must:
 - Offer both parties supportive measures
 - Investigate in accordance with its policies and Title IX regulations
 - Determine if sexual harassment occurred and
 - If it is determined that sexual harassment occurred, determine what remedial actions should be taken to remedy the harassment and prevent its reoccurrence

Liability Under Title IX

- **Deliberate Indifference Standard:** “A recipient with actual knowledge of sexual harassment in an education program or activity of the recipient against a person in the United States, must respond promptly in a manner that is not deliberately indifferent. A recipient [of federal funds] is **deliberately indifferent** only if its response to sexual harassment is **clearly unreasonable** in light of the known circumstances.” [34 CFR 106.44(a) (emphasis added) (new 2020 regulation).]
- A school district is also liable under Title IX if a school employee commits quid pro quo sexual harassment.
 - A school district can be liable for monetary damages under Title IX in cases involving an employee’s harassment of a student (quid pro quo or hostile environment) when the district has actual knowledge of the harassment and the school district acts with deliberate indifference. See *Gebser v Lago Vista Ind Sch Dist*, 524 US 274 (1998).

Is there an obligation to investigate?

Does the District have an obligation under Title IX to investigate sexual harassment allegations brought by Lapeer County Intermediate School District students that occurred in the following situations:

- A school field trip to the science museum?
- At a student's house after prom?
- The locker room at another school during an away game?
- A school-sponsored trip to Toronto?



Title IX

Complaints and the Investigation Process

Reporting Sexual Harassment

- Who *can* file a report or informal complaint of sexual harassment?
 - Any person, at any time
 - Can be a friend, witness, parent, etc.
 - Can be anonymous
- Who is *required* to file a report or informal complaint of sexual harassment?
 - Any school employee who observes, hears about, or has any notice of sexual harassment or allegations of sexual harassment.
- Remember: the District has actual knowledge of sexual harassment if *any* District employee has notice of sexual harassment.

Reporting Sexual Harassment (Cont.)

Allegations of sexual harassment or sexual harassment that you witness must be reported to the Title IX Coordinator(s)

Student-Related

Michelle Proulx
Director of Special Education
Lapeer County ISD
Administration Building
1996 W. Oregon St.
Lapeer, MI 48446
Phone: (810) 664-5917
Fax: (810) 277-3038
mproulx@lapeerisd.org

Staff-Related

Ann M. Schwieman
Director of Administrative Services and Personnel
Lapeer County ISD Administration Building
1996 W. Oregon St.
Lapeer, MI 48446
Phone: (810) 664-5917
Fax: (810) 277-3034
aschwieman@lapeerisd.org

Alternative Title IX Coordinator

Anthony Najor
Assistant Principal
Lapeer County Education and Technology Center
690 N. Lake Pleasant Rd.
Attica, MI 48412
Phone: (810) 664-1124
Fax: (810) 724-7600
anajor@lapeerisd.org

Barriers that May Prevent an Individual from Filing a Complaint

They may be confused or not understand what it means to be sexually harassed and may not feel that the definition or concept of sexual harassment applies to them or their situation;

They may fear that the harasser will retaliate against them; that others will not believe them, or may ridicule them or blame them for the harassment;

They may want to avoid conflict or may not want to hurt anyone, especially a respected authority figure;

They may be confused about the school district's procedures for dealing with allegations of sexual harassment and may feel that they are not prepared to take actions required by the school district's procedures;

They may feel that they are in some way responsible for provoking the harassment;

They may like the extra attention they are receiving from the harasser.

Title IX Coordinator Obligations

- **After receiving a report of alleged sexual harassment, the Title IX Coordinator must:**
 1. Promptly contact the alleged complainant/victim and parent(s).
 2. Discuss the availability of supportive measures (and that they are available whether or not a formal complaint is filed).
 3. Coordinate the effective implementation of supportive measures; any supportive measures provided shall be confidential to the extent possible.
 4. Explain to the complainant the process for filing a formal complaint.
 5. Remain completely neutral.
- A pending criminal investigation does not alleviate the District of its duty to conduct an independent Title IX investigation or to respond promptly to complaints.
 - **The District should NOT delay its investigation pending the outcome of a criminal investigation.**

Supportive Measures

- Supportive measures are non-disciplinary, non-punitive individualized services offered as appropriate and as reasonably available, without fee or charge, to both the complainant and the respondent.
- Supportive measures must be designed to protect the safety of all parties and to deter sexual harassment.
- Supportive measures must be made available before or after the filing of a formal complaint or where no formal complaint has been filed, in the cases of both student and employee complainants.
- IDEA, Section 504, and/or the ADA may impact what supportive measures are provided and the investigation generally.
- Emergency removal may apply to the alleged respondent if he/she is a danger to health or safety.
- District staff alleged to be respondents may be placed on administrative leave.

Supportive Measures May Include



Counseling



Deadline extensions or other curriculum-related adjustments



Modifications to work or class schedules or locations



Mutual restrictions on contact between the parties



Leaves of absence



Increased security and monitoring of certain areas of the campus



Academic support or tutoring services

What supportive measures might be appropriate in this situation?

Complainant, Sam, tells his football coach that another football player (Chris) has been recording videos of Sam during their biology class and posting them to Instagram with captions calling Sam “gay,” and a “p***y.” Sam also tells the football coach that Chris has been harassing him at football practice and games using this language. It is the last week of the regular football season.

- **What should the football coach do?**
- **What supportive measures might be appropriate in this situation?**

Emergency Removal

- Subject to limits and procedures imposed by state and/or federal law, the District may remove a student Respondent from its education program or activity on an emergency basis **after conducting an individualized safety and risk analysis.**
 - The purpose of this analysis is to determine if the student poses an *immediate* threat to the physical health or safety of any student or other individual arising from the allegations of sexual harassment that justifies removal.
- If the District determines that the student poses such a threat, it must **notify** the student (and his/her parents if under 18) and the student must have **an opportunity to challenge the decision** immediately following the removal.

Grievance Process

Formal Complaint is Filed (Complainant)

- **What is a formal complaint?**
 - A document filed by the Complainant or signed by the Title IX Coordinator that alleges sexual harassment against a Respondent and requests that the District investigate.
 - Can be an email or document submitted electronically that contains the Complainant's physical or digital signature, or otherwise indicates the Complainant is the person filing the Formal Complaint.
- **Who can sign a formal complaint?**
 - Complainant (or the complainant's parent/guardian if under 18 years of age).
 - The Title IX Coordinator

Grievance Process

Determine if
Complaint
Should be
Dismissed
(Title IX
Coordinator)

- **A formal complaint must be dismissed if the conduct alleged:**
 - Would not constitute sexual harassment (as defined by Board Policy 2266, Nondiscrimination on the Basis of Sex in Education Programs or Activities);
 - Did not occur in the District's education program or activity; or
 - Did not occur against a person in the United States.
- **A formal complaint may be dismissed, in the discretion of the Title IX Coordinator, if:**
 - The Complainant notifies the Title IX Coordinator in writing that he/she would like to withdraw the formal complaint/allegations;
 - The Respondent is no longer enrolled or employed by the District; or
 - Specific circumstances prevent the District from gathering evidence sufficient to reach a determination as to the Formal Complaint or allegations therein.
- The Title IX Coordinator must provide the parties with prompt written notice of the dismissal and the reasons for dismissal.

Sidenote: Options Outside Title IX

- If Title IX is not applicable because the conduct does not meet the definition of sexual harassment, it did not occur within the District's education program or activity, or another requirement is not met, **other options are available.**
- The District can continue to investigate and pursue remedies, including discipline, pursuant to the Student Code of Conduct, Board Policies, or applicable law.
- District staff should determine if they have any obligation to make any reports to Child Protective Services or law enforcement pursuant to their legal obligations.
- The Complainant may still consider filing a complaint with law enforcement.

Should a Title IX investigation proceed?

Complainant, Sam, tells his football coach that another football player (Chris) has been recording videos of Sam during their biology class and posting them to Instagram with captions calling Sam “gay,” and a “p****y.” Sam also tells the football coach that Chris has been harassing him at football practice and games using this language. It is the last week of the regular football season.

The football coach contacted the Title IX Coordinator, who reached out to Sam and his parents about supportive measures and whether they wanted to file a formal complaint. They file a formal complaint.

- **Is the informal resolution process an option here?**

Grievance Process

Provide Option
of Informal
Grievance
Process
(Title IX
Coordinator)

1. Formal resolution process

- Complainant must sign a formal complaint before the grievance process can begin.

2. Informal resolution process

- May be initiated after filing of formal complaint.
- **Informal resolution process is NOT available for employee-on-student harassment or cases involving sexual assault.**
- Both parties must voluntarily agree in writing.
- The parties may switch to an informal process even after a formal resolution has begun, and may end the informal process and return to the formal process at any time before agreeing to a resolution.
- **Informal resolution process = mediation, restorative practices, etc.**

Is the informal resolution process an option?

Complainant, Sam, tells his football coach that another football player (Chris) has been recording videos of Sam during their biology class and posting them to Instagram with captions calling Sam “gay,” and a “p****y.” Sam also tells the football coach that Chris has been harassing him at football practice and games using this language. It is the last week of the regular football season.

Sam and his parents do not want to use the informal investigation process and instead wants to proceed with the formal grievance procedure.

- **Should an investigation proceed?**

Formal Grievance Process

Investigation must be conducted by a trained investigator.

- Can be the Title IX Coordinator.
- Can be a third-party contracted by the District (like legal counsel).
- Must be unbiased and free from conflict.

No timelines specified in regulations; investigation must be prompt.

- Board Policy states District will seek to conclude the grievance process, including any appeals, within 60 days.

Respondent must be considered not responsible throughout investigation.

- Preponderance of the evidence standard applies.
- District has burden of proof to gather evidence sufficient to reach a determination regarding responsibility.

No “gag orders” allowed.

- The District cannot direct either party to refrain from discussing the investigation.

Role of Title IX Coordinator/Investigator/Decision Maker/Appeals Officer

- **Title IX Coordinator:**
 - Supervises investigation and ensures compliance with Title IX.
- **Investigator:**
 - Conducts investigation and completes report.
- **Decision-Maker:**
 - Makes determination of responsibility.
- **Appeals Officer:**
 - Hears appeals of dismissal and determination of responsibility.

The Investigator, Decision-Maker, and Appeals Officer are required to be different people.

- **Conflict of Interest.** All individuals involved in the Title IX process **are required** to:
 - Be impartial;
 - Have no bias;
 - Have no conflict of interest;
 - Be cognizant of implicit bias;
 - Avoid prejudgment of the facts.
 - Avoid reliance on sex stereotypes.

Grievance Process

Written Notice (Title IX Coordinator)

The Title IX Coordinator must provide written notice of the following to all known parties:

- The District's grievance process, including any informal resolution process;
- The allegations of sexual harassment, including sufficient details known at the time and sufficient time for the Respondent to prepare a response before any initial interview. Sufficient details include the identities of the parties, if known, the conduct allegedly constituting sexual harassment, and the date and location of the alleged incident, if known;
- A statement that the Respondent is presumed not responsible for the alleged conduct and that a determination regarding responsibility is made at the conclusion of the grievance process;
- A statement that the parties may have an advisor of their choice, who may or may not be an attorney; and
- A statement informing the parties that Board Policy prohibits knowingly making a false statement or submitting false information during the grievance process.

Grievance Process

How to Conduct An Investigation (Investigator)

A Title IX investigation *may* include:

- Conducting interviews
 - Complainant
 - Respondent
 - Other witnesses
- Obtaining written witness statements
- Reviewing student and personnel files, video footage, and/or police reports or similar documents, as applicable
- Reviewing emails, social media posts, text messages, or other communications
- Reviewing any evidence provided by either party
- Retaining an outside investigator

Grievance Process

How to Conduct An Investigation (Investigator)

A Title IX investigation *must* include:

- An opportunity for all parties to provide witnesses and evidence.
 - Ask at the end of the interview – is there anyone we should talk to who has information about this matter? Are there any documents or other evidence you would like us to review as part of our investigation?
- An opportunity for both parties to have others present during any meeting or proceeding, including the advisor of their choice (who may be an attorney but is not required to be).
 - When the Complainant or Respondent is interviewed, they must be given advance notice in writing of the day, time, location, and participants of the meeting.
 - When interviewing a party who is under 18 years of age who has made allegations of sexual harassment or who is accused of committing sexual harassment, a parent should always be present.
 - Also consider whether a parent should be notified and given advance notice and the opportunity to be present during interviews of non-party student witnesses (consider the age of the witness, the topics to be discussed, and other relevant factors).

What would be part of your investigation?

Complainant, Sam, tells his football coach that another football player (Chris) has been recording videos of Sam during their biology class and posting them to Instagram with captions calling Sam “gay,” and a “p****y.” Sam also tells the football coach that Chris has been harassing him at football practice and games using this language. It is the last week of the regular football season.

- **What would be part of your investigation into Sam’s allegations?**
 - **What steps would you take?**
 - **Who would you interview?**

Sidenote: Investigatory Interviews

Preparing for investigatory interviews:

- Start interviews *ASAP* after receiving formal complaint.
- If interviewing Complainant or Respondent, provide advance written notice, secure presence of a parent (if under age 18), and notify of the right to bring an advocate.
- Plan to have two staff members present to the extent possible.
 - One can be the primary interviewer while the other takes notes.
 - If possible, having a staff member of each gender may make the witness feel more comfortable.
 - The Title IX Coordinator can sit in on interviews (she can also be the investigator).
- Prepare questions in advance if possible.
- Hold interviews in a comfortable, quiet location.

Sidenote: Investigatory Interviews Cont.

Information to provide to the party/witness, parent, and advisor (if applicable) at the beginning of the interview:

- Explain the District is required to investigate allegations of sexual harassment and take appropriate action.
- Explain your role as investigator (information-gathering, not decision-maker).
- State no conclusions have been made.
- Discuss confidentiality and its limits and the prohibition against retaliation.
- Emphasize the expectation of answering truthfully and to the best of their recollection.
- End the interview by:
 - Asking if there is anyone else the witness thinks should be interviewed about the incident or conduct, and why
 - Asking if there are is any other evidence that should be reviewed as part of the investigation and why
 - Advising the witness you may need to follow-up as the investigation proceeds

Sidenote: Investigatory Interviews Cont.

- Have the witness describe the incident(s)/conduct in his or her own words.
 - Go through the 5 W's – who, what, where, when, why (and how).
 - After each question, ask, “is there anything else?”
 - Ask if the interviewee has told the interviewer everything that he or she can remember.
- Ask follow-up questions including questions to confirm the order of events and fill in any gaps.

Sidenote: Interview Techniques



Start out with general warm-up questions so the witness can get comfortable.



Listen for what is not revealed by the interviewee as well. For example, not denying accusations may provide insight.



Listen carefully. The interviewer can often learn new information by allowing the interviewee to speak freely at first. The interviewee may even suggest solutions not yet considered.



When questioning the interviewee, open-ended questions followed up with direct precise questions often yield the best results.



The tone of the question is almost always as important as the question itself. Tailor your interview style to be professional, friendly, or business-like depending on the interview's purpose.



Leading questions (yes/no questions) are often helpful to stimulate the conversation or to clarify an answer, but they should not be used to put words in an interviewee's mouth.

Sidenote: Interview Techniques Cont.



The interviewer should limit their comments only to those situations where reassurance or encouragement is required to help the employee discuss further relevant matters.



Questions should almost always be tailored to accomplish one of two objectives, (a) to obtain specifically needed information or (b) to direct the interview back to a productive path.



The setting of the interview should be conducive to a private, comfortable and relaxed atmosphere in which the interview can proceed without interruption.



The length of the interview should be dependent upon its purpose. Generally, the interviewee should be informed of the time required ahead of time. A second interview can be scheduled if needed.



Take good notes and capture the witness's exact language when important.



Repeat important questions, but with different wording, to confirm a witness's response and determine if the witness's statements are consistent.

Assessing Witness Credibility

When assessing a witness's credibility, the following factors should be considered:

- Other complaints against the same Respondent
- Witness's conduct during the interviews, including body language, eye contact, tone, nervous behaviors, sweating
- Consistent/inconsistent statements
- Corroboration by other witnesses, documents, or other evidence
- Changes in behavior of the Complainant

The following factors are **not** as relevant:

- A delay in reporting
- Minor inconsistencies in the story
- Complainant and Respondent once had a consensual relationship

Grievance Process

Fairly Summarize Evidence (Investigator)

- Throughout the investigation, the investigator should be keeping notes and drafting summaries on the evidence he or she is collecting. This includes:
 - **Interview summaries for each witness** including the date of the interview, who conducted the interview, a list of each person present, and a summary of the witness's statements.
 - **Summaries of other evidence** (i.e. video footage, email communications, text messages, a Student Code of Conduct provision, a personnel file, etc.).
- The Investigator must compile the interview and document summaries into a form that can be provided to both parties for review and inspection (see Slide 43).
- The Investigator will subsequently be required to draft an investigation report to provide to the Title IX Decision-Maker, which will need to include the evidence obtained during the investigation (i.e., a summary of the interviews and documentary evidence).

Grievance Process

Provide
Parties with
Evidence
Summary
(Title IX
Coordinator)

- The **Title IX Coordinator** must send each party and the party's advisor, if applicable, the evidence obtained as part of the investigation.
- The parties must be given at least 10 calendar days to submit a written response.
- The **Investigator** must consider the parties' written responses, if any, before completing the investigative report.

Grievance Process

Complete
Investigative
Report and
Provide to Parties
(Investigator)

- The **Investigator** must create an investigative report that fairly summarizes the **relevant** evidence and send it to each party and the party's advisor, if applicable, for their review and written response.
 - Any written response must be provided to the Decision-Maker, who must consider it when making his or her decision.
 - The investigative report must be sent at least 10 calendar days before the Decision-Maker issues his/her determination regarding responsibility (final decision).
- The Title IX Investigator also must send the report to the Decision-Maker, who is appointed by the Title IX Coordinator.
- Consider FERPA compliance.

Language Matters

- The language used in the investigative report (and determination of responsibility) creates a narrative of the case.
- Avoid language that:
 - Victim-blames (“she was passed out”);
 - Deflects responsibility from the perpetrator or makes the victim the subject of the sentence (the “sexual assault” or “Jamie was raped by Chris”);
 - Uses language of consensual sex or sexual acts, when not appropriate (“they kissed” or “he had sex with her”);
 - Uses terms that are not defined by law or statute, or by the report itself (i.e., “private parts,” or “crotch” – unless these terms are being used by a witness, which should be clear – The Complainant stated that respondent touched his “private parts” at recess).

How would you change the following statements?

- The rape occurred on September 12, 2021.
- This is a classic “he said, she said” case.
- Alex was sexually harassed when Sam made comments about her boobs, butt, and thighs.
- This disciplinary action will impact Jordan [the Respondent] for the rest of her life.
- The victim claims that John drugged her drink.

Grievance Process

Parties May Submit Questions (Decision-Maker)

- Before reaching a determination regarding responsibility, the Decision-Maker must give both parties the opportunity to submit written, relevant questions the party wants asked of any party or witness.*
 - Those questions, *if relevant*, are submitted to the other party or witness, to be answered, and the answers provided to the other party. Limited follow-up questions are permitted.
 - There are no specific timelines in place for this process, but we recommend that the parties be given a deadline for submitting questions and another for submitting responses.
 - This process can be facilitated by the Title IX Coordinator, if that is easier.
 - If a question is determined to not be relevant, the Decision-Maker must explain to the party proposing the question why the question was excluded.

*This process should be started as soon as the investigative report is sent to the parties and Decision-Maker.

What is Relevant Evidence?

- Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence (no definition of relevance in the regulations).
 - **Evidence that makes a material fact more or less likely to be true.**
 - Does this evidence help to prove or disprove anything material to the investigation?
- Rape Shield Protections
 - Evidence about the Complainant's sexual predisposition or prior sexual behavior is **not relevant**, unless:
 - Such questions and evidence about the Complainant's prior sexual behavior are offered to prove that someone other than the Respondent committed the conduct alleged by the Complainant; 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.

Which of the following are relevant evidence?

- A Complainant's attendance records show she missed significant amounts of school after her alleged sexual assault.
- A Complainant says, "We used to date, I know he's okay with us fooling around."
- A Respondent says, "It was an accident, I didn't do it on purpose," in response to an accusation that he touched another student's butt in the locker room while they were changing.
- Complainant alleges sexual assault over a period of four months; respondent provides a text message from the beginning of that period in which Complainant says, "come over 2nite? ;)"
- A student writes in her diary that she feels physically sick about going to school because of the comments her teacher makes about her clothing and appearance.

Grievance Process

Determination of Responsibility (Decision-Maker)

The Decision-Maker must simultaneously send to both parties a **written determination of responsibility**, which must include:

1. The allegations;
2. The steps taken during the investigation, beginning with receiving the formal complaint (including notifications provided to the parties, interviews with parties and witnesses, and methods used to gather other evidence);
3. Findings of fact supporting the determination;
4. A conclusion (using the preponderance of the evidence standard) for each allegation, along with rationale for the conclusion;
5. Conclusions regarding the application of the applicable code of conduct to the facts;
6. Disciplinary sanctions recommended, if applicable;
7. Remedies for the Complainant, if applicable; and
8. Information about the appeals process.

Sidenote: Remedies

If the District concludes that harassment has occurred, it must take steps to stop the harassment, prevent its recurrence, and remedy its effects. These steps may include:

- Placing the students in different classes;
- Counseling for the victim and/or harasser;
- Taking disciplinary action against the harasser;
- Restorative practices, if appropriate;
- Making sure students and parents know how to report any subsequent problems and make follow-up inquiries in case of retaliation;
- Directing a harasser to apologize to the harassed student;
- Directing a harasser to have no further contact with the harassed student;
- Providing training to students, staff, and/or the school community;
- Issuing new policy statements; or
- Other steps that are designed to clearly communicate the message that the school does not tolerate harassment and will be responsive to any student who reports it.

Sidenote: Employee Due Process Rights

Consider the following when the Respondent is an employee:

- A public employee facing dismissal for misconduct has a right to:
 - Oral or written notice of the charges;
 - An explanation of the employer's evidence; and
 - An opportunity to respond, in person or in writing, to the allegations of misconduct.
- Upon their request, union employees have a right to union representation at all investigatory meetings or interviews that the employee reasonably believes could result in discipline. [See *NLRB v Weingarten*, 420 US 251 (1975).]
- Upon their request, non-union employees have the right to be accompanied by a co-worker to investigatory meetings or interviews that the employee reasonably believes could result in discipline.

Sidenote: Employee Due Process Rights Cont.

- Review other potential sources for additional due process rights to which the employee may be entitled:
 - For noncertified staff, such as custodians, bus drivers, and paraprofessionals, check the Collective Bargaining Agreement (“CBA”).
 - For administrators, check individual contracts.
 - For certified staff, check Board Policies and Administrative Regulations (not in CBA due to prohibited subjects).
- Consider if paid administrative leave is warranted pending investigation (paid leave to avoid issues of double jeopardy if employee is subsequently disciplined as a result of investigation).

See *Cleveland Bd of Educ v Loudermill*, 470 US 532 (1985); *Plymouth-Canton Comm’y Schs v State Tenure Commission*, 435 Mich 76 (1990).

Grievance Process

Appeal (Decision-Maker on Appeal)

- Either party can file an appeal from a determination regarding responsibility or from the Title IX Coordinator's decision to dismiss a formal complaint by submitting a written appeal in writing.
 - Upon receipt of an appeal, the Title IX Coordinator will notify the other party in writing.
 - Both parties will have 5 days after notice is provided to submit a written statement in support of or challenging the decision being appealed.
- **An appeal must be based on one of the following, which affected the outcome of the matter:**
 1. Procedural irregularity;
 2. New evidence that was not reasonably available when the determination was made; or
 3. Conflict of interest or bias for/against one of the parties by the Title IX Coordinator, investigator, or decision-maker.

Title IX Record Keeping

- Records relating to Title IX reports must be maintained for at least seven (7) years.
 - Records of any supportive measures
 - Investigative reports
 - Disciplinary sanctions imposed on Respondent
 - Remedies provided to the Complainant
 - Appeals and results
 - Informal resolutions and results
 - All materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process.
 - These materials must also be made publicly available on the District's website.



Case Decisions



Doe 4 v Freeburg Cmty Consol Sch Dist No 70



- Long-time school district employee and superintendent (Robin Hawkins) groomed and sexually abused a district middle school student from 2006 to 2009.
- When the student came forward, it was learned that other former students had previously reported similar sexual abuse by Hawkins to school officials over the years. Officials disputed some of these accounts but did not dispute others.
- While school officials investigated two of these complaints, another complaint was disregarded, and no action was taken to monitor Hawkins or implement protective measures after the complaints were received.

See *Doe 4 v Freeburg Cmty Consol Sch Dist No 70*, 279 F Supp 3d 807 (SD Ill, 2017).

Doe 4 v Freeburg Cmty Consol Sch Dist No 70 Cont.



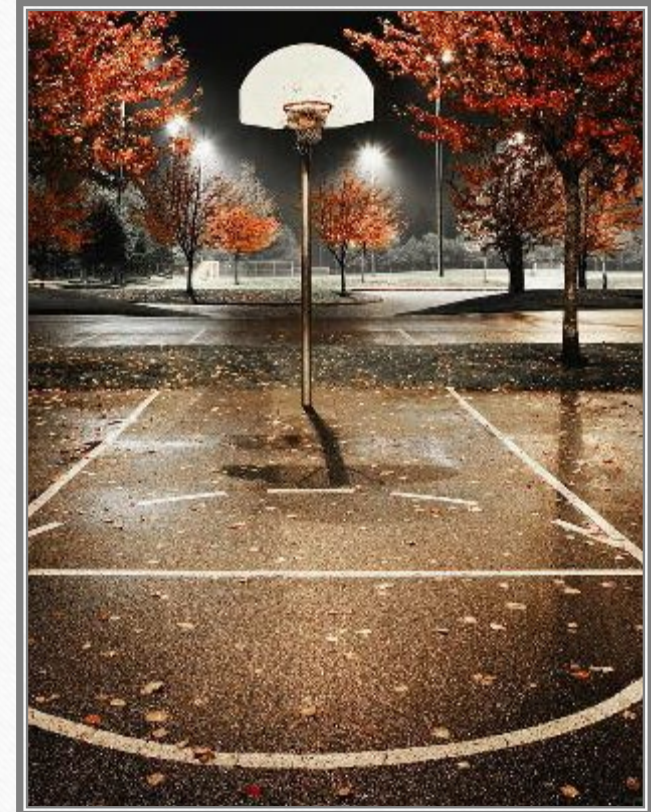
- School district found **liable** under Title IX as a matter of law.
 - District had **actual notice** due to other students who came forward, court noted district disputed some but not all of the prior accusers' allegations; and
 - District displayed **deliberate indifference**, given there were 3 separate complaints against Hawkins in a 10-year span and school officials took no action to monitor the situation or implement protective measures, and they disregarded the third complaint completely.

See *Doe 4 v Freeburg Cmty Consol Sch Dist No 70*, 279 F Supp 3d 807 (SD Ill, 2017).

Campbell v Dundee Community Schools

- Basketball coach engaged in a secret sexual relationship with student on basketball team during her seventh and eighth grade years.
- Parents complained regarding the coach's behavior of texting students and sitting in the back of the bus during trips to games, but these complaints concerned favoritism and hurting the "team dynamic."
- District athletic director discussed these complaints with the coach and told him to cease the complained of behavior, but neither the complaints nor the discussion indicated coach was involved in sexual relationship with 8th grade student.
- Janitor walked in on coach and student. Mother sued district under **Title IX.**
- Court found no liability for district – district had **no actual notice and did not display deliberate indifference.**

Campbell v Dundee Cmty Schs, 661 Fed Appx 884 (CA 6, 2016).



Davis v Monroe County Bd of Ed

- 5th grade girl claimed a male classmate attempted to touch her breasts and genital area and made statements such as “I want to get in bed with you” and “I want to feel your boobs” regularly over the course of many months. All incidents were reported to the classroom teacher by the student and her mother. They were assured that the school principal was aware of the conduct.
- The female student alleged that as a result of the harassment, her grades dropped, and she grew despondent to the point of drafting a suicide note.
- **The Court held that the school district’s failure to address the harassment constituted deliberate indifference to severe harassment, and therefore the district could be liable for monetary damages.**
 - No disciplinary action was taken against perpetrator.
 - No effort was made to separate the victim and perpetrator until three months of harassment complaints had been made – and at that point the victim was only permitted to change her seat, so she was no longer seated next to the perpetrator.
 - The district had not instructed its personnel on how to respond to peer sexual harassment, nor established a policy on this issue.

Davis v Monroe County Bd of Ed, 526 US 629 (1999).

KS v Detroit Public Schools

- Charles Pugh, former Detroit City Council member and president, was a volunteer teacher for Detroit Public Schools (“DPS”) at an all-boys academy operated by the district. Pugh ran a leadership skills training program at the academy.
- Student KS stated that during the program, Pugh flirted with him and sent him sexually explicit text messages.
- At the end of the school year, Pugh took KS shopping and put his hands in KS’s pants when helping him try on clothing. Pugh then sent KS hundreds of sexually explicit text messages and offered KS money for KS to make a sexually explicit video.
- KS testified that Pugh’s conduct caused KS to lose his friends and have difficulties focusing on his schoolwork.
- DPS administrators spoke with KS’s mother about gifts Pugh gave to KS, such as a new cell phone, but administrators did not conduct any investigation after being contacted by the parent.
- Members of the DPS Board had previously discussed Pugh’s reputation for “dating underage teenage boys” and informed the DPS’ emergency managers of their concerns, but Pugh’s leadership program was approved anyway.

See *KS v Detroit Pub Schs*, 130 F Supp 3d 1073 (ED Mich, 2015).

KS v Detroit Public Schools Cont.

- **The court held there was enough evidence of DPS’ actual knowledge and deliberate indifference, and KS’s Title IX claims could proceed:**
 - DPS was aware of concerns regarding Pugh’s reputation for relationships with underage boys.
 - DPS never conducted a criminal background check on Pugh or made efforts to observe Pugh in the leadership program meetings.
 - DPS’ “failure to take any action either to detect or to prevent Pugh’s harassment [of KS] was plainly unreasonable in light of [the emergency manager’s] personal knowledge of Pugh’s inclinations.”

See *KS v Detroit Pub Schs*, 130 F Supp 3d 1073 (ED Mich, 2015).



Chisholm v St Marys City School District

- Football coach with a history of allegations of harassing players (using unacceptable language and becoming physical) was accused of sexually harassing two players.
 - Football coach referred to students as female genitalia and gendered derogatory names.
 - When the District hired the coach, it was aware of his history of harassing conduct, but the Superintendent specifically stated he would keep an eye on him.
 - After the players brought a complaint of sexual harassment, the District interviewed the players and coaches and concluded that they did not find the language inappropriate; however, the investigation recommended the athletic director monitor the coach closely.

Chisholm v St Marys City Sch Dist, 947 F3d 342 (CA 6, 2020)

Chisholm v St Marys City School District Cont.



- The 6th Circuit held the school was **not liable** under Title IX.
 - When analyzing a complaint of sexual harassment, the conduct must be viewed in reference to the surrounding circumstances, expectations, and relationships.
 - In the football context, the statements were not “severe, pervasive, or objectively offensive.”
 - In football it is not unheard of for coaches and players to use offensive or gendered language.
 - While this language may not be “severe, pervasive, or objectively offensive” in the football context, this language may very well rise to this level in the context of, for example, a chess club or debate team.

Chisholm v St Marys City Sch Dist, 947 F3d 342 (CA 6, 2020)

Doe v Grandville Public School District

- Kindergarten students were given iPads for classroom use. Teacher discovered inappropriate pictures of a student (“Jimmy”). One picture was of Jimmy bending over, with his pants off, pulling his butt cheeks apart. Another was a zoomed in picture of Jimmy’s genitals.
- School administration: (1) collected the iPads from the students, (2) investigated the incident, (3) filed a police report and a report with MDHHS, (4) deleted the pictures—as instructed by the police, and (5) met with Jimmy’s mother.
- Prior to the next school year, Jimmy told his mother about the incident, and included possible new allegations. Administration: (1) contacted the district’s Title IX Coordinator, (2) contacted witnesses, (3) emailed Jimmy’s mother with the initial investigation steps, and (4) contacted MDHHS.
- The Western District of Michigan held that the district was **not liable** under Title IX for two reasons:
 - First: The district was not actually aware of the harassment until after the pictures were discovered. No further incidents of harassment had occurred.
 - Second: the district’s actions in investigating and contacting the appropriate parties was not clearly unreasonable. Therefore, the district was not deliberately indifferent.



Doe v Grandville Public Sch Dist, (WD Mich, July 12, 2019).

Lapeer County Intermediate School District Title IX Policy and Investigation Procedure

po2266: Nondiscrimination on the Basis of Sex in Education Programs or Activities

<https://go.boarddocs.com/mi/lapisd/Board.nsf/Public#>

A stack of several books with various colored spines (white, red, blue) is visible on the right side of the slide, partially obscured by a dark teal overlay.

TITLE IX: PROPOSED REGULATIONS

Proposed Regulations

- On July 12, 2022, the U.S. Department of Education ("DOE") published a Notice of Proposed Rulemaking in the Federal Register for revised Title IX regulations amending the regulations implemented by the DOE during the Trump administration.
- The proposed regulations are **not in effect** at this time.
- The formal rulemaking process must be concluded before any revisions go into effect. Individuals had until September 12, 2022, to submit comments on the proposed regulations.
- Based on a [blog post from the U.S. Department of Education](#), **the final Title IX rule is expected to be issued in October**. However, this does not mean that the final rule will be in *effect* in October.

Proposed Regulations – Significant Changes (Cont.)

- Requiring educational institutions to address sex-based harassment that contributes to a hostile environment **even when that harassment occurs outside of its education program or activities or outside of the United States;**
- Allowing complaints to be submitted by **former** students and employees;
- Removing the requirement that a complaint must be made formally in writing, and instead permitting a complainant to **request either orally or in writing** that an educational institution begin grievance resolution procedures;
- Removing the requirement that notice of allegations be given to parties in **writing** (postsecondary institutions are still required to provide written notice to parties);

Proposed Regulations – Significant Changes (Cont.)

- Removing the requirement that a determination be issued in **writing** (postsecondary institutions are still required to provide a written determination to all parties);
- Removing the requirement that all parties be given equal opportunity to inspect and review evidence gathered during the course of the school's investigation. Elementary and secondary schools are instead required to **provide a description of relevant evidence and a reasonable opportunity to respond** (postsecondary institutions are required to provide either equitable access to the evidence or a copy of a written investigative report; however, postsecondary institutions are also required to provide equitable access to the evidence to all parties upon the request of any party);
- Permitting educational institutions to offer an informal resolution to a complaint at **any time** before a formal determination is issued.

Proposed Regulations – Significant Changes (Cont.)

- Including coverage for harassment based on **sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity.**
- Removing the requirement that the unwelcome conduct must be 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, and instead requiring the unwelcome conduct to be **sufficiently severe or pervasive**, that, based on the **totality of the circumstances** and evaluated **subjectively and objectively, denies or limits** a person's ability to participate in or benefit from the recipient's education program or activity.”

Presenter Biography



Mr. Chisholm earned his bachelor's degree in Political Science with minor concentrations in economics, foreign affairs, and Spanish, from St. Mary's College of Maryland, and his J.D. from Ave Maria Law School in Ann Arbor, Michigan. During law school he was an active and award-winning competitor in state and national moot court competitions. Prior to practicing law in Michigan, Mr. Chisholm worked in Washington, D.C., for the United States Securities and Exchange Commission. Mr. Chisholm concentrates his practice in employment relations and labor law, while maintaining a broad practice serving the general needs for school clients.

THANK YOU FOR ATTENDING

**TITLE IX TRAINING:
REGULATIONS, INVESTIGATION PROTOCOLS,
REPORTS, AND DISTRICT OBLIGATIONS**

Lapeer County Intermediate School District

September 6, 2023

Presented by:

Jeremy D. Chisholm, Esq.

Collins & Blaha P.C.

31440 Northwestern Highway, Suite 170

Farmington Hills, Michigan 48334

(248) 406-1140

Questions?