

STUDENT DISCIPLINE, INVESTIGATIONS AND A SPRINKLE OF TITLE IX!



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TOPICS TO BE COVERED

- How to Properly Investigate Student Misconduct: Best Practices and Pitfalls
- Student Discipline Process and Documentation: Cross Your T' and Dot Your I's
- Restorative Justice: Don't Forget to Consider!
- Special Education: Considerations Before, During and After the Discipline Process
- Title IX Refresher: The Nuts and Bolts!





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WHY INVESTIGATE?

- **Schools should conduct an investigation whenever a school official with authority to take action becomes aware, through any means, of possible violations of Board policies (especially prohibiting bullying, harassment or discrimination of students).**
 - formal complaint
 - informal report (e.g. – employee/student sticks head in office, and says “I just want you to know”)
 - personal observations that suggest violations or misconduct (e.g. – sexually-oriented email; racist graffiti; repeated rumors?)
- **Why?: (1) students should learn in a school free of violations of important Board policies; (2) failure to investigate can give rise to liability (e.g. – defense to harassment claim, that school took prompt and effective remedial action); (3) failure to investigate could suggest indifference to misconduct, which could result in increased damages; (4) the investigation itself can be a defense.**

RECOGNIZING THE NEED FOR AN INVESTIGATION

A school should conduct an investigation even if:

- **No one requests that an investigation be conducted.**
 - “Teacher or Student is making inappropriate comments to me about my race or gender orientation.”
- **The person complaining requests that no investigation be conducted.**
 - “Teacher or Student is making inappropriate comments.”
 - Teacher has a wife and children.
 - I don’t want anything done; I just want you to know.

RECOGNIZING THE NEED FOR AN INVESTIGATION (CONT'D)

- **The person complaining states that he or she is speaking “off the record.”**
 - The law does not recognize an OTR exception to the duty to investigate.
- **The policy requires that complaints be in writing, and no written complaint has been filed.**
 - It is good to request that complaints be in writing: (1) record of complaint; (2) useful in interviewing.
 - But, even if the complainant refuses to put the complaint in writing, you still must investigate in certain circumstances to protect the student, the employee, yourself and the District.

PURPOSE OF THE INVESTIGATION

- Gather facts and relevant evidence
- Provide basis for decision on what action if any to take
- Establish expectations of behavior
- Provide reassurance that misconduct will be taken seriously
- Investigation is not for the purpose of law enforcement or prosecution
- Enforce and comply with a variety of anti-harassment policies where the obligation to investigate is part of the employer's or school's best practice to avoid liability

OBJECTIVES IN CONDUCTING INVESTIGATIONS

- **Gather facts and relevant evidence, so that appropriate action can be taken.**
 - The main reason for investigating – so you can “do the right thing.”
 - Your role is to gather information so that appropriate action can be taken (e.g. – what did X say or do; witnesses; did anyone have similar experiences with X; etc.).
 - A student’s well-being or an employee’s job depend on your investigation.
- **Obtain information that may assist the District in defending against future claims.**
 - Contemporaneous statements by witnesses with personal knowledge of the facts.
 - Possible admissions by the accused.

OBJECTIVES IN CONDUCTING INVESTIGATIONS (CONT'D)

- **Act of investigating may assist the District in avoiding liability.**
 - One of the few situations under the law in which actions taken by the school, after alleged misconduct has occurred, may absolve the school of, or limit, its liability.
- **Afford a wrongdoer the opportunity to lie.**
 - Witness credibility is very important.
 - Example: sexual harassment case: have you ever contacted Student Y using social media?

WHO SHOULD INVESTIGATE

- **Internal or external**
- **Skill-set to conduct the investigation**
 - Knowledge of child development if with students
 - Ability to judge credibility
 - Ability to think on their feet and ask follow-up questions and (with kids) go with the flow
 - Ability to be impartial, objective, and non-judgmental
 - Ability to determine the scope of the investigation
 - Knowledge of school policies and potential employment or other issues
 - Time to conduct in a relatively prompt timetable
 - Ability to make decision in particular situation without fear of retaliation from individual being investigated

HOW TO PREPARE FOR INVESTIGATION

- **Consult with others (Superintendent, HR, Board, Administration)**
 - Need to understand their objectives
- **Be familiar with the allegations**
 - Do not make any assumptions about the truth of the allegations
- **Determine what evidence is relevant and necessary**
 - Have a clear understanding of what you are trying to prove – develop a plan
 - Determine order of interviews
 - Emails, telephone records, cell phones, text messages – PRIORITY ATTENTION
- **Consider whether you should use outside legal counsel**

HOW TO PREPARE FOR INVESTIGATION (CONT'D)

- **Investigation will not always be the same**
 - When dealing with students be prepared to throw your “plan” out the window
- **Circumstances or conduct prompting investigation will determine manner and scope**
 - Information provided by witnesses almost always changes the scope
- **Objective is to obtain sufficient information upon which to make decisions (or take action) and collect reliable information to support decisions (or action)**

HOW TO PREPARE FOR INVESTIGATION (CONT'D)

- **Gather relevant written policies, contracts, handbooks, rules**
 - If a harassment case, make sure collect all applicable policies, rules and forms
 - Review all relevant collective bargaining provisions
- **Be aware of the rights of the person you are interviewing**
 - Employee right to representation
 - Weingarten rights – check collective bargaining agreement as rights may exceed Weingarten
 - Parents notified?

HOW TO PREPARE FOR INVESTIGATION (CONT'D)

- **Investigate Promptly – won't get better with time**

- Avoid unnecessary delay
- Whenever possible, begin the investigation immediately
- Continue the investigation without delay
- Work diligently to conclude the investigation as quickly as possible



- **Create a consistent opening statement**

- Purpose of the interview
- Any rights and obligations
- Process to be followed
- What they can expect to happen



HOW TO PREPARE FOR INVESTIGATION (CONT'D)

- **Select a private and quiet interview space**
- **Determine initial timeline for investigation if possible**
- **Prepare an outline of all questions to be asked and topics to be covered (need to be flexible)**
- **Make any necessary preliminary decisions**
 - Should student be temporarily suspended?
 - Should employee be placed on leave? If so, paid or unpaid?
 - Do you need to contact police or DHS?
 - Do you need to contact parents?

ORDER OF INTERVIEWS (NOT SET IN STONE)

- **Prepare open-ended, unbiased questions**
 - Review questions with HR or legal counsel
- **Interview complainant**
- **Interview witnesses to the behavior or action that forms the basis for the complaint**
- **Interview witnesses identified by the complainant**
- **Interview the person who is the subject of the complaint**
- **Additional witnesses identified by the subject of the complaint**

PLANNING FOR THE INTERVIEW

- Give witness minimal notice of interview
- Check collective bargaining agreement on right to union representation
- How to handle waiver of right to union representation
- Prior notice to union representative?



CONDUCTING AN EFFECTIVE INVESTIGATION

- **If requiring a written statement – tell witness up front**
- **If you have a written statement, clarify origin and purpose**
 - Is statement a recorded recollection of highlights or a detailed account
 - Remember any additional facts
- **Take verbatim notes**
- **Ask open-ended questions that cannot be answered with a simple “yes” or “no”**
- **Children - avoid questions about time and distance**



CONDUCTING AN EFFECTIVE INVESTIGATION

- **Witness interviews**

- Interview separately not in a group
- Emphasize need for completeness, accuracy, and truth
- Be mindful of additional conditions and events that need to be documented (witnesses spoke to each other before, threats made if statement given)
- Cover any other similar incidents or the lack thereof
- Be mindful of word choice. Write (and speak) like a regular person; "before" not "prior to." Don't refer to the "victim," use names
- Ask who, what, when, where, why, and how questions



CONDUCTING AN EFFECTIVE INVESTIGATION

- **Ask questions about inconsistencies and gaps in information**
- **Ask questions about discrepancies with previous statements**
- **Ask for specific detail**
- **Do not fill in the gaps for witness**
- **Ask if there is a way to corroborate witness's account**
- **Silence really is golden!**



CONDUCTING AN EFFECTIVE INVESTIGATION

- **Take steps to assure that the witness understands the question you are asking**
 - Ask witness (particularly students) to restate the question you asked
 - Always remember that what you say may not be what witness hears (ex. be brave and tell the truth)
- **Make sure the answer you are getting is to the question you asked**
 - Are you saying...
 - Do you mean...



CONDUCTING AN EFFECTIVE INVESTIGATION

- **If witness/student is uncooperative**
 - Try to determine reason for lack of cooperation
 - Students often concerned about how it will look to peers
 - Students can be uncomfortable and afraid of repercussions
 - Students want to “be cool”
- **Reassure student that they are safe and doing the right thing**
- **Tell them what you know or think you know**
- **Provide reassurance about how to handle actual or perceived retaliation – give names and numbers of who to contact if retaliation is suspected**

CONDUCTING AN EFFECTIVE INVESTIGATION

- **Interviewing subject of complaint (“Respondent”)**
 - Ask about relationship and prior contact with complainant
 - Ask if subject of complaint can think of any reason why complaint would have made
 - Try to get agreement, i.e., Is it possible..., Would you agree that.... (ex. I can understand why she thinks I might be stalking her)
 - Ask who he/she thinks you should interview (common witnesses can be pivotal)
 - Before concluding interview, ask if there is any other information they have to share
 - Remind of ‘no retaliation’ policy
 - May want to direct subject not to have contact with complainant or other witnesses to avoid taint of investigation or alleged retaliation or harassment

CONDUCTING AN EFFECTIVE INVESTIGATION

- **Confidentiality**

- When interviewing, always asks the witnesses to treat the information discussed during the interview confidential
- Explain why confidentiality is necessary
- Explain that the information provided during the interview will be shared on a need to know basis and not necessarily held in strict confidence
- State any policy prohibiting retaliation (if applicable)



DOCUMENTATION

- **Recording the Information**

- Determine at the outset how information will be documented
- Options to document witness interviews include:
 - Handwritten notes
 - Typed summaries for signature by the witness
 - Allow witness to make changes before signing
 - Statements written by each witness
- If handwritten notes are used, before concluding the interview review notes with witness to ensure all information was captured accurately
- Handwritten notes should be legible

SHOULD YOU TAPE RECORD THE INTERVIEW?

- **Advantages:**

- Preserves the witness' statement, in his/her own words.
 - Unlike a written statement, TR avoids the contention that the school wrote out the words that it wanted the witness to say.
- Minimizes the likelihood of allegations that the witness' statement was coerced.
- Helpful to law enforcement, if criminal charges are filed.

SHOULD YOU TAPE RECORD THE INTERVIEW? (CONT'D)

- **Disadvantages:**

- Appears heavy-handed.
- May cause the witness to be less forthcoming.
- May result in the recording of unrelated information that the school may not wish to record.
 - Witnesses tend to ramble.
 - Can ramble into irrelevant areas.
 - Can record harmful information that you may not want to record (e.g., “I reported this previously, but nothing was done about it.”).
- Recommend when: witness is likely to be unavailable later.

DETERMINATION

- **Reach a Determination**

- Review all of the evidence, including witness interviews
- If necessary, follow up with additional interviews or other activity needed to conduct an adequate investigation
- Consider and weigh all the evidence
- If evidence conflicts, assess credibility (is witness believable, did witness account make sense, is account based upon personal knowledge or gossip, hearsay or speculation, does witness have reasons to lie, does account contradict documentary evidence)

DETERMINATION

- **Remediation**
 - Determine what, if any, correction action or remedial measures are necessary
 - Always consider policies and practices
- **Consider/Discuss how to organize and prepare the report**
- **Prepare the report**

PREPARE THE REPORT

- **The Investigation Report**

- Is a written report needed or will a verbal report be sufficient?
- Will report (whether written or verbal) provide the facts with conclusions or will recommendations be included?
- If a formal report is needed, the report should include:
 - Background information
 - An explanation of the situation prompting the investigation
 - How the investigation was carried out
 - Witnesses interviewed
 - Documentary evidence reviewed
 - Consider attaching significant documents to report

PREPARE THE REPORT

- Think about your audience when writing your report
- Edit and proof your report from the perspective of someone with no knowledge of event
- Better yet have someone with no knowledge read and see if it is clear (confidentiality)
- Decide how you are going to refer to your witnesses and then refer to them in the exact same way throughout the report (Mr. Jones, or R. Jones, or Robert Jones)
- Will the report be subject to a FOIA request?
- Will the report be Exhibit A in litigation?

NOTICE OF OUTCOME

- **Written notice to respondent and complainant concurrently.**
- **Complainant must be told in writing:**
 - whether or not the alleged conduct occurred,
 - any individual remedies offered or provided to the complainant,
 - any sanctions imposed on the respondent that directly relate to the complainant,
 - steps taken to eliminate the hostile environment.
- **The respondent should not be told of the remedies offered or provided to the complainant.**



NOTICE OF OUTCOME

- **April 4, 2011 – OCR Dear Colleague Letter**
 - After a school investigation concludes, FERPA influences how schools can relay the outcome to the complainant and the public.
 - Both parties **must be notified, in writing**, about the outcome (*i.e.*, whether or not discrimination/harassment occurred).
 - **FERPA permits a school to disclose to the harassed student information about the sanction** imposed upon a student who was found to have engaged in harassment when the sanction directly relates to the harassed student (*i.e.*, an order that the harasser is to stay away from the harassed student, has been transferred to another class, or is prohibited from attending school for a period of time).

NOTICE OF OUTCOME

- **Respondent should be told in writing:**
 - Summary of evidence reviewed (do not give witness names or share evidence)
 - Summary of findings
 - Any remedial action to be taken regarding the respondent
 - Non-retaliation expectations



INVESTIGATION FILE

- **Create a separate file for the investigation**
- **The file should include all documents and other information gathered during the investigation**
 - The allegation/complaint
 - Notes
 - Evidence of all contacts or attempts to contact witnesses
 - Documents and physical evidence (text messages, emails, video clips, etc.)
 - Final report
 - Documentation that parties received the final report

POINTS TO REMEMBER FOR INVESTIGATIONS

- Investigate promptly
- Listen to both sides – stay neutral until the end
- Adjust language to developmental level of witness
- Make sure questions are understood and fully answered
- Ensure confidentiality when possible
- Document EVERYTHING
- Prepare a final report/formal documentation to parties
- Follow BOE policies and procedures – READ!

DISCIPLINE PROCEDURES AND DOCUMENTATION



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DISCIPLINE DOCUMENTATION

- **Long-Term Discipline/Expulsion Recommendation Letter:**
 - TO: Parent(s) **AND** Student
 - Date of offense/complaint
 - Summary of Investigation, if applicable:
 - # of witnesses interviewed/statements
 - Video or other evidence review?
(i.e. text messages/social media)
 - Admissions by student?
 - Findings, including citation to BOE policy/Code of Conduct/Law

DISCIPLINE DOCUMENTATION

- **Long-Term Discipline/Expulsion Recommendation Letter:**
 - Discipline Recommendation
 - Note RJ was considered
 - Notice of Hearing
 - Date/time/location
 - Prehearing Rights (5610)
 - Review evidence
 - Review student records
 - Waive hearing (include waiver form)



DISCIPLINE DOCUMENTATION

- **Long-Term Discipline/Expulsion Recommendation Letter:**
 - Rights at Hearing:
 - Appear and produce witnesses/cross-examine witnesses
 - Produce other evidence
 - Attach: Copies of relevant BOE policies/Code of Conduct

****GIVE 3-5 DAYS PRIOR TO HEARING****

DUE PROCESS HEARING DOCUMENTATION

- **Checklist:**

- Waiver
- Witness statements
- Video/photos
- Student academic file
- Confirmation if student is Section 504/IEP
- Witnesses to testify on behalf of District
- Investigator/Administrator recommending discipline
- Others involved
- Restorative Justice Factors Checklist



RESTORATIVE JUSTICE



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THE MICHIGAN REVISED SCHOOL CODE (MRSC)

- Legislation that applies to Michigan Public School Districts, Michigan Public School Academies and Michigan Intermediate School Districts
- Prior to Restorative Justice legislation, the MRSC required certain offenses committed by students in K-12 to be considered “Zero Tolerance Offenses.”
- “Zero Tolerance” legislation went into effect after the Columbine Massacre at Columbine High School, Colorado in 1999.
- Removed situational discretion from school officials and instituted mandated minimum penalties that often included police involvement for drug, weapon and violence offenses on school grounds.

PREVIOUSLY:

- **Before August 1, certain serious infractions required expulsion, not only from the District, but from every public school in the State.**
 - Possession of dangerous weapons – firearms, knife with blade over 3”, switchblades, certain other weapons, not too often seen.
 - Arson at school.
 - Criminal Sexual Conduct at school – any of four levels.
 - Assault on school employee, volunteer or contractor.

- **Other infractions required discipline of some sort.**
 - Assault on another student – shall be suspended or expelled “for up to 180 days.”
 - Verbal assault, bomb threat or other threat against school – shall be suspended or expelled for a period of time determined by the school.

PROCEDURAL BENCHMARKS

➤ Under the new bills, there is a rebuttable presumption that suspension over ten days or expulsion are not warranted unless the school can justify that it considered **SEVEN** mitigating factors:

- pupil's age;
- disciplinary history;
- whether the pupil had a disability;
- the seriousness of the violation;
- whether the violation threatened the safety of any pupil or staff member;
- whether Restorative Practices will be used to address the violation; and
- whether a lesser intervention would properly address the behavior.

SUSPENSION (10 DAYS +) OR EXPULSIONS

- With regard to a suspension of more than 10 days or an expulsion, there is a rebuttable presumption that a suspension or expulsion is not justified unless the District can demonstrate that it considered each of the 7 mitigating factors.
- For a suspension of 10 or fewer days, there is no rebuttable presumption, but the District shall consider each of the mitigating factors.
- This does NOT apply if the student is being expelled under section 1311(2) for possessing a firearm in a weapon free school zone.

IMPORTANT NOTE:

The new statutes do not require a district to implement restorative practices in any or all cases – just to consider it.

Will not be appropriate in some cases.

DOCUMENTATION = CONSIDERATION

- **Assuming that the school has documented consideration of the mitigating factors, it may proceed with the appropriate discipline.**
- **Documenting the mitigating factors should begin with the initial disciplinary referral and carry through to the ultimate outcome.**
 - “The method used for consideration of the factors is at the sole discretion of the Board” – MCL 380.1310d.
- **Failure to document the consideration of the mitigating factors could result in a challenge to the discipline.**

SPECIAL EDUCATION



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COMMON MISTAKES

- Failing to document behaviors and failing to respond to the documentation
- Failing to implement IEPs [BIPs common complaint and hearing issue]
- Overusing suspensions and removals
- Failing to use forms or to document discipline decisions and interventions
- Failing to monitor for the pattern of exclusion
- Failing to convene compliant / timely MDRs
- Failing to offer and implement proper IAES

REMOVALS

- **IEP sets student's placement**
- **Removal:**
 - Disciplinary sanction
 - If deployed, alters student's placement for a period of time
- **If “enough” removals:**
 - Special IDEA protections kick in
 - IDEA FAPE obligations kick in
- **Accurate communication and tracking of removals is critical!**



INVESTIGATIONS

- Conduct a timely and thorough investigation
- Describe the conduct concretely
- Include dates, times, places and people
- Get detail regarding weapons and drugs
- Encourage staff to document behavior factually without editorial comments



CONTINUUM OF BEHAVIOR INTERVENTIONS



- District / building level PBIS (**Least Restrictive; Most Effective**)
- Classroom interventions
- Individualized classroom interventions
- Individualized behavior plans and interventions
- In-school removals
- Restraint and seclusion in school
- Out-of-school suspension
- Expulsion (**Most Restrictive; Least Effective**)

WATCH THE NOT-YET-ELIGIBLE STUDENTS

- **Before the behavior:**
 - Parent expressed written concern that child needs special education and/or related services to supervisory, administrative or teaching personnel
 - Parent requested an evaluation of child
 - Teacher or other district personnel expressed concern about a pattern of behavior to the director or “child find” / “referral” personnel
- **Exceptions:**
 - Parent refused evaluation; or
 - Parent refused or revoked consent for services; or
 - District evaluated and student not eligible

PROCESS FOR NYE STUDENT

- Do a record review immediately
- Evaluation must be expedited
- Depending on the behavior, the student may be brought back to the prior placement
- Difficult to evaluate when student not in school
- May need to provide access to curriculum and supports while evaluating
- Manifestation must be done within 10 business days of a change in placement or decision to change placement
- MDR may need to be adjourned or reconvened until evaluations are completed

COUNTING REMOVALS

- The number of removals dictates procedure and service requirements
- Removals are not limited to suspensions
- Data demonstrates many are continuing to overuse removals and disproportionately suspending special education students
- Alternatives to removal avoids or delays the crisis
- Failing to count correctly will result in procedural and substantive errors
- Recent MDE complaints and OCR complaints around the state are a case in point

SPECIFIC COUNTING RULES

- **Partial days count as full days**
 - Begins when directed to go home for rest of day
 - Be careful that clean hands in “parent removal”

- **Watch for the Hidden Suspensions / Removals**
 - Can't come back without a parent meeting – suspension runs until parent meeting
 - Can't come back unless you get an evaluation demonstrating you are safe to attend – suspension continues until the evaluation occurs and may be construed as IDEA violation because evaluation obligation may belong to school

TRANSPORTATION SUSPENSIONS

- **Special Transportation suspension**
 - Any day of school missed because of suspension from special education transportation included in the IEP counts as removal
 - If student does not come through district-arranged alternative, feds say it counts as a removal

- **Regular Transportation suspension**
 - Parent responsibility to get student to school
 - If student misses school, an absence day
 - Not a blank check. If recurring behavior, may be prudent to see whether additional support is needed to address the bus behaviors

IN-SCHOOL SUSPENSIONS

- **In-school suspensions count unless**
 - Student is afforded opportunity to appropriately participate in general education curriculum
 - Student receives services specified in IEP
 - Student can participate with non-disabled peers to the extent would in their IEP
- **Access to instruction must be through certified teacher complying with MDE non-certified personnel standards**
- **Counts as a removal if you don't meet criteria**
- **Keep accurate data regarding removals to ISS**
- **MDE complaint investigators seem to be counting even if they meet the criteria above**

BEHAVIOR PLAN “REMOVALS”

- MDE is not clear on whether they count or not
- Conservative approach is to count them
- MDE and OCR expect to be logged and monitored
- The location of the removal, the length of the removal; access to peers and services; the frequency of the removal and the effectiveness of the removal will be factors
- If it is used as a disciplinary consequence, it likely counts
- **If it re-enforces the negative behavior or if it isn't working, stop doing it**

REDUCED OR SHORTENED SCHOOL DAYS

- The law jealously guards the full school day
- A shortened school day for the convenience of the staff or the administration is illegal
- A shortened school day must be supported by data demonstrating that the reduced day is necessary for FAPE and access
- A shortened school day should never be long term
- The IEP Team should be aggressively and continuously working on return to a full school day
- An improper shortened school day will result in compensatory education and other remedies
- A shortened school day may require a prorated or reduced membership

WATCH THE CLOCKS

- **The Consecutive Clock**

- Counts consecutive days of removal
- Starts at zero and stops at 10, after which a change in placement occurs
- Clock starts over with each removal



- **The Cumulative Clock**

- Counts all days of removal in a school year
- Starts at zero and keeps ticking through the school year
- Each incident of removal is counted



PATTERN OF EXCLUSION

- **No bright line**
- **At some point after 10th cumulative day, a pattern occurs**
- **Factors to consider:**
 - Similarity to behavior that caused prior removals
 - Length of each removal
 - Proximity of removals to one another
 - Total time of removal
- **MDE wants to see a documented process and implementation**
- **Can be subject of complaint or due process**

THE “SAFETY” ZONE

- **When are you in it?**
 - 10 days or less on the cumulative clock
- **What services?**
 - No FAPE, unless services are provided to non-disabled students
- **What procedure?**
 - None except the basic protections given all students



THE “BORDERLINE” ZONE

- **When are you in it?**
 - More than 10 cumulative days, but not POE
- **Services and procedures?**
 - Services begin on 11th cumulative day of removal
 - Determined by school personnel, including at least one of the student's teachers
 - Must enable the child to continue to participate in the GE curriculum & progress toward meeting IEP goals
 - Look at whether a FBA/BIP review appropriate
 - Extent of services determined by length of the removal, the extent to which the student had been removed in the past, the student's needs and educational goals
 - Documentation critical

THE “CHANGE IN PLACEMENT” ZONE

- **Three ways to get there:**
 - More than 10 consecutive days of suspension for one incident
 - More than 10 cumulative days of suspension and a pattern of exclusion
 - Placement in an interim alternative educational setting (IAES) for weapons, drugs, serious bodily injury for up to 45 school days

- **What procedures and services?**
 - Elevated procedural safeguards, including SE Procedural Safeguards, MDR; FAPE in IAES

UNILATERAL IAES

- **Available if:**

- Child carries weapon to/possesses weapon at school, school premises, school function
- Child knowingly possesses or uses illegal drugs or sells or solicits sale of controlled substance while at school, school premises or school function
- Has inflicted serious bodily injury at school, school premises, school function



WEAPONS AND DRUGS

- Definition of weapon under IDEA is different then definition of weapon under Revised School Code and your policies
- Definition of drugs (illegal or controlled substance) under IDEA is different then definition of drugs under your policies
- For purpose of unilateral IAES, you must follow the federal definitions
- Photograph and identify the weapons and drugs

SERIOUS BODILY INJURY

- **Injury that involves**
 - Substantial risk of death
 - Extreme physical pain
 - Protracted and obvious disfigurement, or
 - Protracted loss or impairment of the function of a bodily member, organ, or mental faculty
- **18 USC 1365(h)(3) (attached)**
- **Very high bar**
 - Kicking principal in knee not SBI
 - *Bisbee Unified Dist No 2*, 54 IDELR 39 (SEA AZ, 2010)

IAES SERVICES

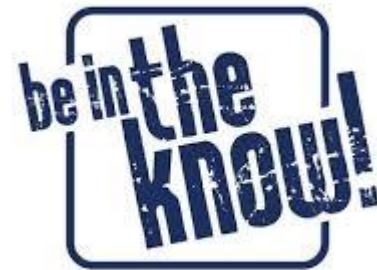
- **Services must be provided during period of change in placement:**
 - To enable the student to participate in the general education curriculum
 - To progress toward meeting the goals and objectives in the IEP
 - To provide the student, as appropriate, a functional behavioral assessment, a behavior intervention plan and behavior interventions, services and modifications that are designed to address the behavior so that it does not recur
- **Services determined by the IEP Team**
 - Can use IAES form
- **Remember to meet other IEP deadlines.**

NATURE OF THE SERVICES

- District may choose the location where the services will take place
- If you cannot provide a proper IAES in the location, you cannot put the student in that location
- Services need not replicate every aspect of the student's educational program
- Service decisions need to be individualized

PREP FOR THE MDR

- **Have complete information regarding the incident ready for the meeting**
- **Get the right staff to the meeting:**
 - Relevant members of the IEP Team (consider other possible purposes for meeting, e.g., 45 school day IAES, post expulsion FAPE, where may need actual IEP Team)
- **Know the student**
- **Know the behavior**
- **Know the evaluations and IEP**



AT THE MDR

- **Do a thorough record review before answering the questions**
- **Look at IEP goals and objectives before the meeting**
- **Teacher observations, parent input**
- **Ask the right questions:**
 - Was the behavior caused by or directly and substantially related to the student's disability?
 - Was the behavior caused by the district's failure to implement the IEP?

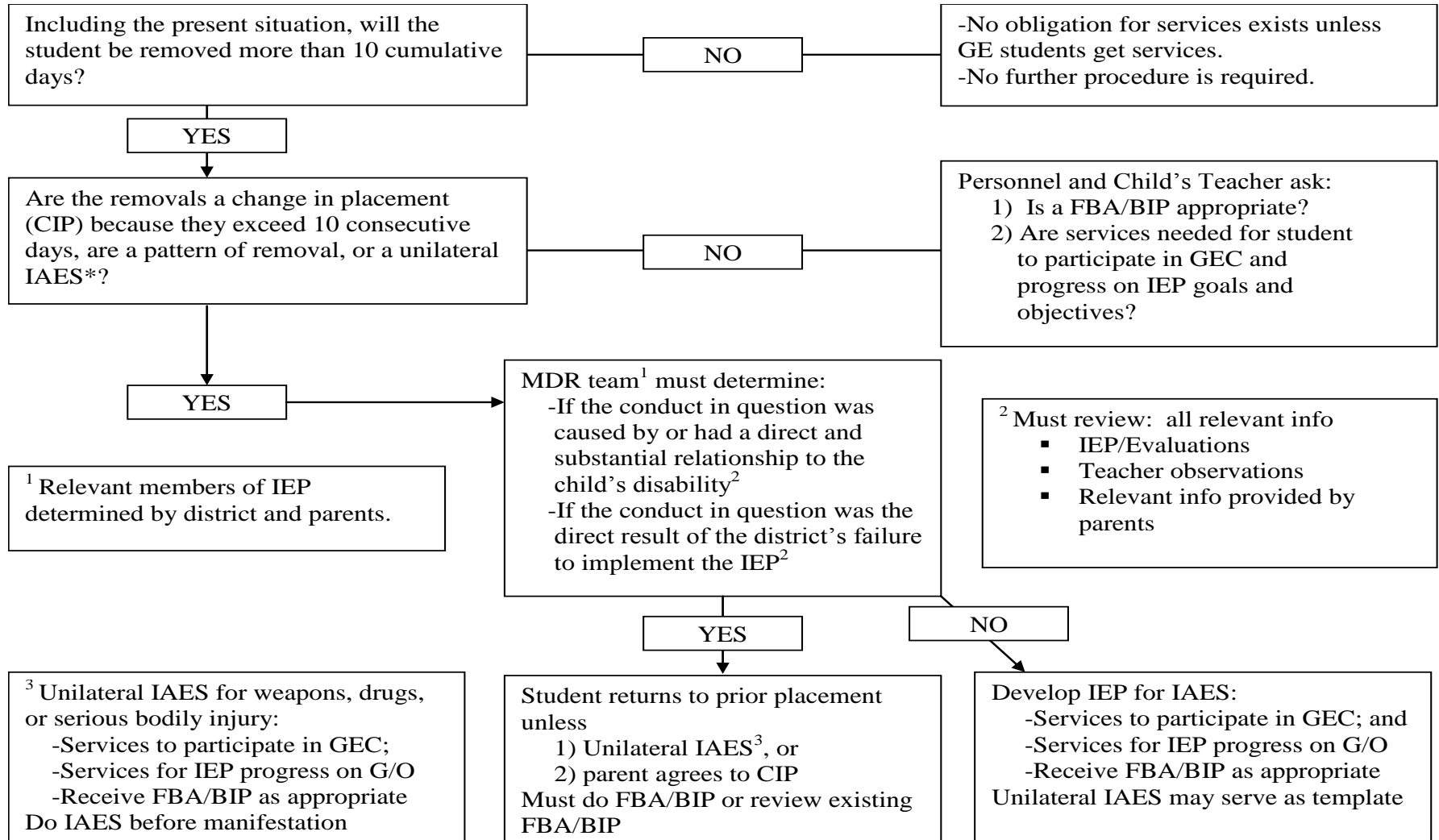
WHEN CONDUCT IS A MANIFESTATION

- **IEP Team must address the BIP situation**
 - If student BIP-less, must do FBA and create BIP
 - If student has BIP, must review
- **The student must be returned to the prior placement unless:**
 - The parties otherwise agree
 - A unilateral IAES (weapons, drugs, serious bodily injury) is available or
 - Court / ALJ-ordered “dangerousness” IAES is obtained and implemented
- **Address any deficiencies in IEP implementation that caused the behavior**

MULTIPLE MDRS

- An MDR is required when the District initiates or proposes to initiate a disciplinary change in placement
- The MDR must be convened within 10 school days of the change in placement or the decision to change placement
- The pattern of exclusion student may require multiple MDRs
- The cumulative clock does not reset and each time a change in placement occurs (e.g., pattern of exclusion), a new MDR must be held

DISCIPLINE FLOW CHART



TITLE IX

"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."

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TITLE IX LAWSUITS

- **Multiple federal court lawsuits**
 - Allege Teacher-to-Student sexual misconduct.
 - Allege Student-to-Student sexual misconduct.
 - Allege District undertook no investigation and implemented no remedial measures to address the employee's or student's conduct, or that the actions taken were unreasonable.
 - Allege District retaliated against the students.
 - Transgender



WHAT IS TITLE IX OF THE EDUCATION AMENDMENTS OF 1972?

- No person in the United States shall, on the basis of sex, be excluded from participation, or denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.
20 U.S.C. § 1681, *et seq.*



TITLE IX IS MORE THAN ATHLETICS

- **TITLE IX PROTECTS STUDENTS IN ALL:**
 - Academics and Education
 - Extracurricular and Athletic Programs
 - Other programs of the school:
 - in a school's facilities;
 - on a school bus; and
 - at a class or training program sponsored by the school at another location, or elsewhere. (*i.e.*, field trip)



TITLE IX'S STUDENT PROTECTIONS

- **PROTECTS ALL STUDENTS**

- Elementary → High School
- Male + female + straight + gay + lesbian + bisexual + transgender + questioning students.
- Gender Identity claims
 - Failure to conform to stereotypical notions of “masculinity” or “femininity.”
- “Same sex” discrimination claims must be handled with same procedures as opposite sex claims.



WHAT ARE YOUR LIABILITY CONCERNS?



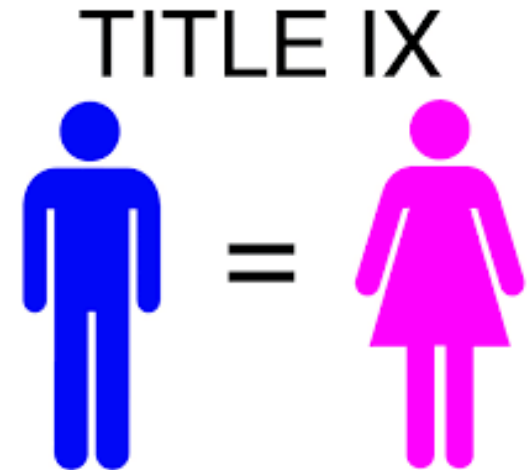
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COMMON TITLE IX SCENARIOS

- **Athletic equality between male and female sports**
 - Title IX requires that females and males be provided equitable opportunities to participate in sports.
 - Hidden liability: Crowdfunding.
- **Sexual Misconduct/Sexual Assault**
 - On school property, transportation or at school-sponsored events and activities.
 - Out of school misconduct?
- **Sex Discrimination or Harassment**
- **Retaliation**
- **Transgender – New Wave of Cases**

ELEMENTS OF A TITLE IX CLAIM

- **NOTICE**
- **HOSTILE SEXUAL ENVIRONMENT**
- **DELIBERATE INDIFFERENCE**



NOTICE REQUIRED

- **Actual Notice of Sexual Harassment/Discrimination**

- Direct Observation
- Report from Victim
- Report from Parent
- Report from Administration/Agent
- Report from Responsible Employee

- **Constructive Notice**

- Look out for **RED FLAGS**
 - “Rumors” in the hallways between students
 - Inappropriate adult relationships with students
 - Things that make you go, “Hmmm”
 - School community “scuttlebutt”



TITLE IX SEXUAL DISCRIMINATION

- Includes:

- Sexual violence.
 - Non-consensual sexual activity.
 - Analysis of consent requires consideration of age and maturity of student.
 - When adult is alleged perpetrator, consent is *irrelevant*.
- Sexual harassment.
- Hostile sexual environment.



SEXUAL VIOLENCE

- Sexual violence defined as “physical sexual acts perpetrated against a person’s will or where a student is unable to give consent” because of the student’s age, intellectual disability, or due to the use of drugs or alcohol.
- Sexual violence can be carried out by school employees, other students, or third parties.
- In Michigan, legal age of consent is 16.
- There is no consent when adult/employee is involved with student.

SEXUAL HARASSMENT

- **Unwelcome conduct of a sexual nature.**
- **Examples:**
 - unwelcome sexual advances
 - requests for sexual favors
 - Sending sexually explicit photos, video, text messages
 - other verbal, nonverbal, or physical conduct of a sexual nature, such as sexual assault or acts of sexual violence.



HOSTILE SEXUAL ENVIRONMENT REQUIRED

“Harassment creates a hostile environment when the conduct is sufficiently severe, pervasive, or persistent so as to interfere with or limit a student’s ability to participate in or benefit from the services, activities, or opportunities offered by a school. When such harassment is based on race, color, national origin, sex, or disability, it violates the civil rights laws that OCR enforces.”

(OCR Dear Colleague Letter – Oct. 26, 2010)

“The conduct ...evaluated from the perspective of a reasonable person in the alleged victim’s position, considering all of the circumstances.”

DELIBERATE INDIFFERENCE REQUIRED

- To establish “deliberate indifference” plaintiff must show the District either completely ignored reported harassment, or had a “clearly unreasonable” response to a harassment complaint.
- Recent cases show plaintiffs are focusing on second prong since most districts do not ignore these situations.
- *Davis v Monroe Cty Bd of Ed*, 526 U.S. 629, 649 (1999); *Williams v Port Huron School Dist*, (6th Cir 2012).

DELIBERATE INDIFFERENCE REQUIRED

“Where a school district has knowledge that its remedial action is inadequate and ineffective, it is required to take reasonable action in light of those circumstances to eliminate the behavior. Where a school district has actual knowledge that its efforts to remediate are ineffective, and it continues to use those same methods to no avail, such district has failed to act reasonably in light of the known circumstances.”

Patterson v Hudson Area Schools, (6th Cir. 2012)

WHEN IS A DISTRICT ON NOTICE?

- **District is on notice if a “responsible employee” knew or in the exercise of reasonable care should have known about sexual discrimination.**
 - A responsible employee includes “any employee who has the authority to take action to redress sexual violence; who has been given the duty of reporting incidents of sexual violence or any other misconduct by students to the Title IX Coordinator or other appropriate school designee, **or whom a student could reasonably believe has this authority or duty.**”

ARE YOU A R.E.?

- **Superintendent**
- **Principal**
- **Assistant Principal**
- **Title IX Coordinator**

- **Teacher?**
- **Counselor?**
- **BOE Member?**
- **Janitor/Cafeteria?**



RESPONSIBLE EMPLOYEE

- **Whether an employee is a responsible employee depends on factors such as “age and education level of the student, the type of position held by the employee, and consideration of both formal and informal school practices and procedures.”**
- **OCR:**
 - It might be reasonable for an elementary student to believe that a custodial staff person or cafeteria staff person is an appropriate person for the student to approach with a complaint, but that a high school student should know that these employees would not have the authority to act. Thus, high school students would be expected not to take their complaints of sexual discrimination to custodial staff or cafeteria employees.

RESPONSIBLE EMPLOYEE

- **Responsible employees must be told:**
 - Of their reporting obligations.
 - To whom they should report.
 - Their obligation to inform complainants of the employee's obligation to report allegations of sexual discrimination.
 - Their obligation to inform complainants of their right to file a Title IX complaint with the school and to report a crime to law enforcement.



HOW DOES A DISTRICT RECEIVE NOTICE?

- **Formal complaint/grievance by parent or student.**
- **Employee witnesses or overhears discussions of potential misconduct.**
 - Do not honor requests to “keep things quiet” or “not tell anyone” if a student discloses possible discrimination/harassment.
- **Indirectly through third parties.**
 - General public, police, media, social networking sites.
- **A District cannot “bury its head in the sand” to avoid notice.**
 - OCR: If the school would have found out about the sexual discrimination had it made a proper inquiry, knowledge of the sexual discrimination will be imputed to the school even if the school failed to make an inquiry.

“RED FLAGS” TO LOOK OUT FOR



- Widespread rumors or observations of a coach or teacher having a sexual relationship or spending “a lot of time together.”
- Observed jokes, name calling, teasing, or leering towards a student.
- Multiple student/parent complaints being received about the same person alleging similar misconduct.
- A possible lack of a response by school officials or “responsible employees” after learning they may have been put on notice of a possible discrimination issue.

QUESTIONS?



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- As with all legal issues, this presentation provides general principles only, and your attorney should be consulted for specific questions related to any and all principles contained herein.
- School law issues are complex and fact specific; when in doubt, consult with your legal counsel!

THANK YOU!



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