TITLE IX: What You Need to Know!

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WHY ARE WE HERE TODAY?

- To ensure that all students are provided a safe and healthy learning environment.
- To clarify your District's legal obligations under Title IX and other applicable laws.
- To give you tools to effectively identify and respond to potential unlawful discrimination and harassment of students based on sex.
- Minimize legal liability for your District in an area of increasing court litigation and (decreasing?) U.S. DOE OCR enforcement activity.

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YOU ARE AGENTS OF THE SCHOOL BOARD

- **What does that mean?**
  - What you say or don't say MATTERS
  - What you do or don't do MATTERS

- **Your actions will EITHER:**
  (1) Create liability; or
  (2) Reduce liability for District/School Board/Yourself

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THE LEGAL PRINCIPLE OF AGENCY

There is a rhyme and reason for all of your policies and procedures!

- Under the legal principle of agency, or *respondeat superior*, the actions of the persons a school district entrusts with administrative responsibility are regarded as the actions of the institution.
- Equally important, is the concept of knowledge attribution. Any knowledge that an administrator, principal or assistant principal possesses is attributed to the school district, the superintendent, and board of education regardless of whether persons in the chain of command may have possessed the same knowledge.

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THE LEGAL PRINCIPLE OF AGENCY

- When a principal or assistant principal receives information about a Title IX complaint, and takes no action, that decision not to take action is attributed to the school district, superintendent and board of education.
- The actions, inactions and decisions of the frontline principals and assistant principals are absolutely critical in protecting the district AND YOURSELVES against potential liability exposure.

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QUALIFIED IMMUNITY

- This doctrine shields a principal and school administrator from money damages unless the plaintiff shows (1) the official violated a statutory or constitutional right; and (2) the right was "clearly established" at the time of the challenged conduct.

- Important to know what is clearly established Title IX law to avoid individual liability.

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CORE COMPETENCY

In today's world, recognizing when action is required and being able to effectively conduct an effective investigation, is a core competency for a building administrator!

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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

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TITLE IX CLIMATE: #METOO AND #TIMESUP

#MeToo: spread virally in October 2017 as a hashtag used on social media to help demonstrate the widespread prevalence of sexual assault and harassment, especially in the workplace - followed soon after the public revelations of sexual misconduct of allegations against Harvey Weinstein

- Wikipedia

#Timesup: movement against sexual harassment and was founded on January 1, 2018, by Hollywood celebrities in response to the Weinstein effect and #MeToo – raised $20 million (as of February 2018) for its legal defense fund, and gathered over 200 volunteer lawyers

- Wikipedia

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TITLE IX CLIMATE: #METOO AND #TIMESUP

- Raises awareness.
- Shines a spotlight on previously hidden issues.
- Greater # of complaints regarding sexual misconduct.
- Challenges to behavior that may have been previously regarded as “gray area” or “consensual.”
- Change in behavior of the social norms in hallways/classrooms?
- All of the above = Increased need for training!!!

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TITLE IX CLIMATE

- LGBTQ student issues.

- Sexual violence by teachers/coaches.
- Increased filing of OCR complaints alleging bullying and non-compliant Title IX policies and procedures.
- Increased “Reverse Discrimination” Title IX Complaints

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THE LAW

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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*.

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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.

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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)

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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**

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POP QUIZ!

- **WHAT WOULD YOU DO IF . . .**
  - Parent of female kindergarten student calls to complain about a third grade boy who pressured her daughter into lifting her skirt on the bus?
  - Third grade boy denies the allegations.
  - Now what?

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WHAT IF . . .

- The witnesses didn’t corroborate the complaint allegations?

- Then what?

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WHAT IF . . .

- **After your witness interviews, mom gives new details alleging:**
  - Her daughter told her that in addition to raising her skirt, the male student coerced her into pulling down her underwear and spreading her legs?

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WHAT IF . . .

- Mom calls police and the police find insufficient evidence of a crime.
- What if, any, weight do you give to the police department's findings?
- Do you do anything else after receiving the police report?

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WHAT IF . . .

- Mom is still insistent her daughter was sexually harassed and wants the District to protect her.

- Does your District have a duty to take any action to protect the female student if there was insufficient evidence of any sexual harassment in your school or of a crime?

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WHAT IF . . .

- The District offers to transfer the female student to a different bus?

- The District offers to leave empty rows of seats between the kindergartners and older students?

- Good or bad ideas? Why?

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WHAT IF . . .

- Mom insists that the boy be transferred to a different bus?

- Mom insists on a monitor be placed on the bus?

- Good or Bad Ideas? Why?

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WHAT IF . . .

- The District never adopts mom's suggestions and mom decides to drive her daughter to school each day instead of subjecting her to more potential harassment on the bus.

- The female student is distraught over the incidents, claims more harassment occurred during the school year, and she has an unusually high number of absences during the school year.

- Does the student have a Title IX claim?

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FITZGERALD V BARNSTABLE SCHOOL COMMITTEE, 555 U.S. 246 (2009)

- **Student files a lawsuit in Federal District Court alleging that the school district's response was inadequate and resulted in further harassment of her at school.**
- **Lawsuit is against the Board of Education <u>and</u> against the Superintendent.**
  - Title IX and Civil rights claims: 42 USC 1983; 14th Amendment EPC.
- **U.S. Supreme Court held that Title IX is <u>not</u> an exclusive remedy for addressing sex discrimination in school.**
  - Plaintiff could also pursue Section 1983 claim against school officials (teachers, administrators) <u>acting in their individual capacity</u>.
    - Remedies include financial damages, injunctive relief, attorney's fees.

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TAKEAWAYS

- **Tough decisions with no clear cut answers.**
- **The stakes are high!**
  - Safety of students.
  - Reputation of your District.
  - Liability of your District.
  - Risk of personal liability.

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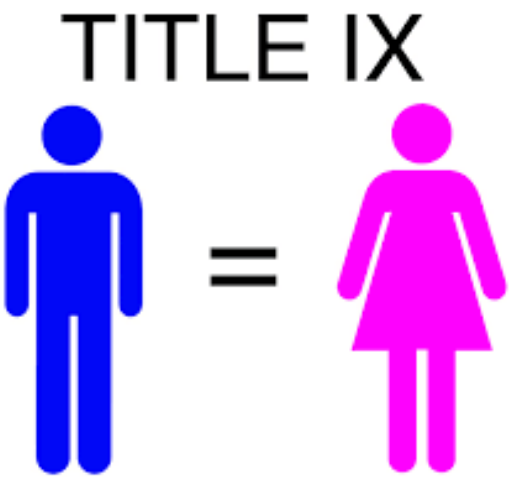
ELEMENTS OF A TITLE IX CLAIM



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

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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"

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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.

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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.

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SEXUAL HARASSMENT

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

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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 <u>in the alleged victim's position</u>, considering all of the circumstances."

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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).*

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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)

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DELIBERATE INDIFFERENCE AND DISCIPLINE

- The brother of a female middle school student starts the rumor that his sister masturbated with a hot dog. Students start calling her “hot dog” girl, and administrators reprimand but do not suspend such student perpetrators, and the name-calling stops.

- However, during the female student’s sophomore year in high school, three different students again call her “hot dog” girl or make references to the prior rumor. Each time the Principal investigates, reprimands each of the three students, who are freshmen boys, and none of three students repeat the name-calling.

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DELIBERATE INDIFFERENCE AND DISCIPLINE

- The female student has emotional problems which she relates to the harassment and allegedly leads her to drug use. She is placed into a hospital run by a religious organization by her parents to address her drug use. When she is released from the hospital, she enrolls in a neighboring public school district.

- Her parents sue the District for sexual harassment. How should the court rule when the District files its motion for summary judgment?

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BULLYING AND TITLE IX

- "Some student misconduct that falls under a school's anti-bullying policy also may trigger responsibilities under one or more of the federal antidiscrimination laws enforced by the Department's Office for Civil Rights (OCR)... **by limiting its response to a specific application of its anti-bullying disciplinary policy, a school may fail to properly consider whether the student misconduct also results in discriminatory harassment**."

- Therefore, a District should always be assessing whether a "bullying" complaint also constitutes a potential violation of its Anti-Discrimination/Harassment Policy, and VICE VERSA.

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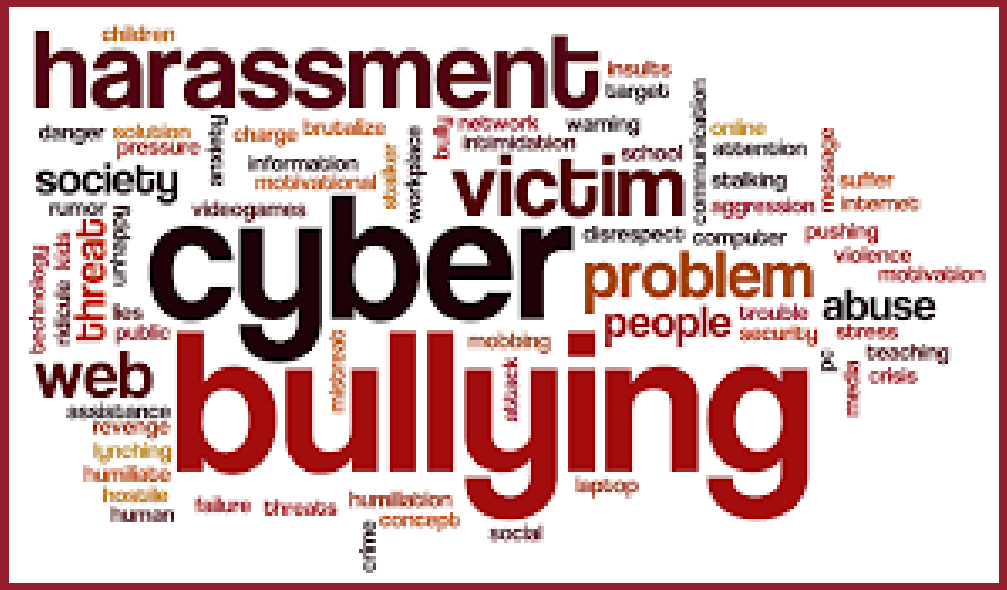
IS IT HARASSMENT OR BULLYING?



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BULLYING: WHAT IS IT?

- **"Bullying" is any written, verbal or physical act that is *intended* or that *a reasonable person would know is likely to harm* 1 or more pupils either directly or indirectly by doing any of the following:**

  (i) **substantially** interfering with educational opportunities, benefits or programs of 1 or more pupils.

  (ii) adversely affecting the ability of a pupil to participate in or benefit from the [school's] educational programs or activities by placing the pupil in reasonable fear of physical harm or by causing **substantial** emotional distress.

  (iii) having an actual and **substantial** detrimental effect on a pupil's physical or mental health.

  (iv) causing **substantial** disruption in, or **substantial** interference with, the orderly operation of the school.

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ANTI-HARASSMENT: WHAT IS IT?

- **Definition of Harassment:**
  - "Any threatening, insulting, or dehumanizing gesture, use of technology, or written, verbal or physical conduct directed against a student that:
    - Places the student in reasonable fear of harm to his/her person or damage to his/her property;
    - Has the effect of **substantially** interfering with a student's educational performance, opportunities, or benefits; or
    - Has the effect of **substantially** disrupting the orderly operation of a school."

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ANTI-HARASSMENT POLICY 5517

- *"The Board will vigorously enforce its prohibition against discriminatory harassment based on race, color, national origin, sex (including sexual orientation and transgender identity), disability, age (except as authorized by law), religion, height, weight, martial or family status, military status ancestry, or genetic information (collectively, "Protected Classes") that are protected by Federal civil rights laws (hereinafter referred to as unlawful harassment)"*
- ***Unlawful* Harassment has to be based on a "Protected Class."**

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SEVERE AND PERVASIVE

- **How do I know if it's "bad enough" to be harassment?**
  - Laws against "harassment" or creating a "hostile environment" are not meant to be a general civility code.
  - Harassment <u>must</u> be based on a protected category.

- **Conduct found <u>not</u> to be unlawful harassment –**
  - Simple teasing.
  - Isolated or offhand comments.
  - Isolated incidents that do not rise to a level of seriousness (hostile environment) or are not based on a protected category.

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BULLYING AND ANTI-HARASSMENT

- **Policy 5517.01 states:**

"If, during an investigation of a reported act of bullying/cyberbullying, the Principal or other Administrator believes that reported misconduct . . . may have constituted ***unlawful discriminatory*** *harassment* ***based on a Protected Class****, the Principal will report the act of bullying and/or harassment to one of the Compliance Officers/Title IX Coordinators so that it may be investigated in accordance with the procedures set forth in Policy 5517 – Anti-Harassment."*

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BULLYING: IS IT A REAL PROBLEM?

- **Study: Michigan worst state for bullying in U.S.**
  - Every 7 minutes, a child in the U.S. is bullied. Meanwhile, only 4 in 100 adults and 11% of the child's peers will intervene.
  - Michigan was ranked 3rd highest percentage (25%) of high school students bullied on school property.
  - Nearly 19% of high school students in Michigan reported being bullied online. 5th highest rate in the country.
  - 16% of Michigan teens seriously consider suicide as a result of bullying.

- ***Source:*** ***https://wallethub.com/edu/best-worst-states-at-controlling-bullying/9920/***

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BULLYING: TREND IN LAWSUITS IN MICHIGAN?

https://www.buckfirelaw.com/blog/student-bullying-lawsui

Student Bullying Lawsuits in...

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Student Bullying Lawsuits in Michigan

Please note that Buckfire & Buckfire P.C. is not accepting cases for student bullying. Recent case law in Michigan has made it extremely difficult to win this type of lawsuit against a school system or school employees. The content below is for informational purposes only. We sincerely regret that we cannot pursue this type of case for you or your child.

The bullying of students at school is nothing new and most kids have been harrassed by other students at some point during their school life. However, some times this bullying reaches such great heights that in has a significant impact on the lives, both present and future, of the bullied student. When school officials are aware of this problem and fail to act to prevent it from happening, the student has the right to file a lawsuit against the school district for the abuse resulting from the failure to act or intervene.

We recently added a Library Article to our website, Student Bullying Lawsuits, that discusses the laws in Michigan for these types of cases. **Parents of a bullied student should contact our office at (888) 797-8787 to see if their child has a case.**

We handle Michigan personal injury accident cases in Adrian, Ann Arbor, Battle Creek, Bay City, Birmingham, Bloomfield Township, Canton, Clinton Township, Dearborn,

CLICK HERE FOR LIVE CHAT

12:18 PM 6/4/2018

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BULLYING AND ANTI-HARASSMENT

- Train your Principals and Assistant Principals **to know the difference** between bullying and harassment. The difference will make the distinction between what policies/procedures you follow.
- Training on **INVESTIGATIONS** and best practices! Set your District up for success in the event an OCR/MDCR/EEOC complaint or lawsuit is filed.
- Review **BOTH** Bullying and Anti-Harassment policies during PD with your Administrators and Staff – discuss the difference.
- Distribute and **DISTINGUISH** between Bullying and Unlawful Harassment to school community, students and parents. Use definitions right from your policies!

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TRANSGENDER AND TITLE IX

Just because the Trump Administration withdrew the May 2016 Title IX Transgender guidance, does not mean Transgender students are not protected from bullying based on their transgender status:

- "Please note that this withdrawal of these guidance documents does not leave students without protections from discrimination, bullying, or harassment. All schools must ensure that all students, including LGBT students, are able to learn and thrive in a safe environment." (February 2017 DCL letter)

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MICHIGAN ELLIOTT-LARSEN CIVIL RIGHTS ACT (ELCRA)

- State law prohibits an educational institution from discriminating against an individual "in the full utilization of or benefit from the institution, or the services, activities, or programs provided by the institution because of . . . sex." MCL § 37.2402(a).

- Enforced by Michigan Department of Civil Rights (MDCR) and through a private lawsuit.

MICHIGAN DEPARTMENT OF CIVIL RIGHTS

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HOW MAY I SUE THEE?

- **Agency Review**
  - OCR under Title IX
  - MDCR under ELCRA
- **Court Action**
  - State under ELCRA
  - Federal under Title IX against PSD only
  - Federal under Section 1983
- **Section 1983 allows action against individuals, injunctive relief and attorney fees**
  - New Transgender wave of cases

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U.S. DOE – OFFICE OF CIVIL RIGHTS

- The Office for Civil Rights (OCR) enforces several federal civil rights laws that prohibit discrimination in programs or activities that receive federal financial assistance from the Department of Education, including Title IX.

- OCR has investigatory authority and aggressively investigates Title IX discrimination complaints.

- No cost for a person to file a complaint with OCR.

U.S. Department of Education

Office for Civil Rights (OCR)

- A person can file a Title IX complaint with OCR <u>and</u> file a private lawsuit against a District; not mutually exclusive.

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TITLE IX REMEDIES

Victims

- Title IX allows a private right of recovery for monetary damages; attorney's fees. *Franklin v Gwinnett Cty Pub Schs,* 42 USC 1988(b).

U.S. Government

- Enforced by U.S. DOE, Office of Civil Rights
- Government remedy: <u>termination of federal funding; or voluntary resolution agreement</u>.

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OCR/PLAINTIFF ATTORNEY ENFORCEMENT THEMES

- Failing to have an adequate Anti-Discrimination Policy.
- Not sufficiently notifying students of the Policies or Grievance Procedure, or appointing a sufficiently qualified Title IX Coordinator.
- Failing to adequately train staff on identifying and investigating potential discrimination/harassment of students.
- Not following up promptly after being on notice of potential discrimination/harassment.
- Not taking effective **INTERIM** and **REMEDIAL** action(s) to avoid continued discrimination/harassment in the school setting.

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BASIC TOOL KIT TO AVOID LIABILITY

- **Policy Statement of non-discrimination**
  - well publicized; age appropriate; Title IX Coordinator and contact information identified.
- **Grievance or complaint procedures**
  - well publicized; age appropriate.
- **Training of staff.**
- **Prompt thorough investigations.**
- **Take interim remedial measures.**
- **Provide notice of outcome with corrective action designed to eliminate recurrence and remediate past violations.**

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THINK FAST: MIDDLE SCHOOL SCENARIO

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MS SCENARIO

- **8th grades boys' basketball team plays games on the 7th grade players including**
  - "Lights out" – which involved turning the locker room lights out and then humping and gyrating on the 7th graders.
  - "Blind-fold sit up" – where a 7th grader would be told to try to do a sit up blindfolded and when they got to the end of the sit up an 8th grader would have his naked buttocks placed on his face.

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MS SCENARIO

- The pranks intensify when one of the 7th graders is forced to the ground, his pants are taken off, and he is anally penetrated with a marker.
- Student involved in marker incident does not report it because he is afraid of retaliation by the 8th graders.
- Basketball coach learns of incident two days later from his stepdaughter who heard the rumor in school.
- Coach tries to determine accuracy of report but does not report the incident to the Principal, the parents, or anyone else.

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MS SCENARIO

- Parent of a 7th grade victim learns of marker incident a week after it happened, and reports it to the Principal.

- Principal says he can't do anything until the Director of Schools returned from out-of-town but he does cancel basketball practices until the Director returns.

- Director of Schools decides to suspend perpetrators for 10 school days and also suspend them from the basketball team after meeting with the Principal and complaining parent.

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MS SCENARIO

- A few days later, another parent complains to the Principal about the sit up and lights out pranks played on her son.

- Principal tells parent they are just a “bad prank” and did not investigate.

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MS SCENARIO

- **The District did, however, take steps to prevent locker room misconduct by:**
  - Requiring the 7th and 8th graders to use the locker room at different times.
  - Requiring the door to the locker room to remain open during use.
  - Requiring an extra coach to monitor the locker room.
  - Requiring the coach to monitor the team more closely and issuing him a written reprimand for not reporting the marker incident.
  - Offering instruction on bullying and providing counseling to any victims.

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MS SCENARIO

- Meanwhile, over a four-day period, the two complaining students are harassed at school. Comments are made about their sexuality and one of the parents decides to remove her son from the school since it is no longer safe.

- About two weeks later, the District convened a group of high ranking school officials to discuss the marker incident.

- Personnel Director never mentions the lights out and sit up incidents at the meeting.

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MS SCENARIO

- The group decides to add one day of suspension to the marker incident perpetrators but reinstates them to the team on January 1.

- Suspended students appeal and get their team suspensions reduced to December 1.

- The male student involved in the marker incident is removed from school by his parents.

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DISCUSSION POINTS

- Was the District deliberately indifferent?
- Do any factors indicate it acted appropriately?
- Do any factors indicate it should have done more?

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TITLE IX INVESTIGATION KEY POINTS

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STARTS WITH TITLE IX COORDINATOR!

- Oversee the school's response to Title IX reports and complaints.
- Identify and address any patterns or systemic problems revealed by the complaints.
- Be informed of all reports and complaints arising under Title IX even when the complaint or report was initially filed with another school employee and even when someone other than the Title IX Coordinator is conducting the investigation (per BOE policy).
- If a school uses disciplinary procedures as part of Title IX obligations to comply with Title IX, the Title IX Coordinator must review the disciplinary procedures to make certain they comply with prompt and equitable requirements of Title IX.

(OCR Dear Colleague Letter – April 24, 2015)

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WHO IS YOUR TITLE IX INVESTIGATOR?

- **Must be TRAINED in:**
  - Title IX
  - BOE policy
  - Student Code of Conduct
  - CBAs/Employee Handbook/Agreements (if against adult)
  - Due Process Principals
  - Appropriate Investigation Procedures/Techniques

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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**."

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ARE YOU A R.E.?

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

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

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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.

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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.

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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.

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"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.

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THINK FAST: OFF SCHOOL PROPERTY

Parent calls High School Principal Monday morning to report her daughter was sexually harassed by a male student on Saturday night at a High School party. Parent demands the School District immediately expel the male student, or remove him from school property. A police report was filed and the police are conducting an investigation. Male student is denying all allegations.

Both students are in school today.

WHAT DO YOU DO?

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WHAT ABOUT CONDUCT OFF SCHOOL PROPERTY?

- **School sponsored activities are akin to on-campus conduct (field trips, athletic events, band camps, etc.)**
- **If not during a school activity or on school premises, you must investigate to assess whether the conduct outside of school property has caused a hostile learning environment for the complainant.**
  - "Adverse Effect on the Educational Environment"
- **Take remedial action to protect complainant from further possible discrimination/harassment.**
- **New CSC law – will discuss later**

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INTERIM MEASURES

- **A school may need to take interim remedial measures during the course of its investigation to:**
  - Ensure that the victim/respondent continue to have equal access to the school's educational programs and activities, and
  - Protect the students from illegal retaliation.

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INTERIM MEASURES

- **Vary depending on the facts of the case.**

- **The District is expected to CONSIDER the following with respect to any student victim of sexual discrimination:**
  - No contact order
  - Escort?
    - Victim vs. Respondent Considerations (“shadow monitor”)
  - Ensuring that the victim and respondent do not share the same:
    - Classes
    - Bus
    - Recess
    - Cafeteria/Lunch
    - Extracurricular activities
    - Locker hallways/areas

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MORE THINGS TO CONSIDER…

- Moving a party to another school.
- Providing comprehensive, holistic victim services including medical, counseling and academic support services, such as tutoring (cannot charge complainant for this service).
- Arranging for a party to have extra time to complete or re-take a class or withdraw from a class without academic penalty if any failing or poor grades were related to the incidents of sexual discrimination.

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STILL MORE…

- Reviewing any post-incident disciplinary actions against the victim to determine if there is a causal connection between the victim's misconduct and the sexual misconduct.

- Designating an individual from the school's counseling center who is specifically trained in providing trauma-informed comprehensive services to victims of sexual discrimination to assist the student.

- Issuing policy statements or taking other steps that clearly communicate that the school does not tolerate sex discrimination and will respond to any incidents and to any student who reports such incidents.

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INTERIM MEASURES

- Document any interim measures to be taken through e-mail, or letter.

- Be mindful of taking measures that may be viewed as adversely affecting only the complainant or respondent – possible retaliation allegation.

- **REVISIT PERIODICALLY; CHECK IN WITH STUDENT TO ENSURE THEY ARE WORKING.**
    - "If at first you don't succeed, try try again!"

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COMMUNICATIONS LOG

Date	Time	Contact	Type of Communication	Communication Notes	Resolution Provided/Follow-up Needed

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OCR GUIDANCE

- Good judgment and common sense of teachers and school administrators are important elements of a response that meets the requirements of Title IX.
- Doing nothing upon being put on notice is always the wrong response.
- Depending on the circumstances, there may be more than one right way to respond.
- Title IX OCR Guidance can be found online at: http://www2.ed.gov/about/offices/list/ocr/publications.html#TitleIX-Pubs

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OBLIGATION TO REPORT TO POLICE – TITLE IX

- Title IX does not require a school to report alleged incidents of sexual violence to law enforcement, but a school may have reporting obligations under state, local or other federal laws.

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OBLIGATION TO REPORT – STATE LAW

- **State School Information Policy (MCL 380.1308) requires a District to immediately report incidents of sexual assault <u>at school</u> to law enforcement.**
- **Defines "sexual assault" as:**
  - nonconsensual sexual penetration or the unconsented touching of a person's intimate parts,
  - consensual sexual penetration involving a person under age 16,
  - consensual sexual touching involving a person under the age of 13,
  - consensual sexual touching involving a person between the ages of 13-16 if the perpetrator is five or more years older than the victim.

YOU MAY REPORT MORE – THIS IS MINIMUM!

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COORDINATION WITH LAW ENFORCEMENT

- **OCR**:
  - "A school should notify a complainant of the right to file a criminal complaint, and should not dissuade a victim from doing so either during or after the school's internal Title IX investigation."
  - "Schools should not wait for the conclusion of a criminal investigation or proceeding to begin their own Title IX investigation and, if needed, must take immediate steps to protect the student in the educational setting."

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COORDINATION WITH LAW ENFORCEMENT

- "Although a school may need to delay temporarily the fact-finding portion of a Title IX investigation while the police are gathering evidence, it is important for a school to understand that during this brief delay in the Title IX investigation it must take interim measures to protect the complainant in the educational setting."
- In *Forest Hills*:
  - the "school admitted it was waiting for the police investigation to make its determination and did not suspend MM until after he pled guilty to state charges." Court found "deliberate indifference" where the District "waited months for someone else to make a conclusion as to whether the assault happened." (Ct. Opinion at 20-21).

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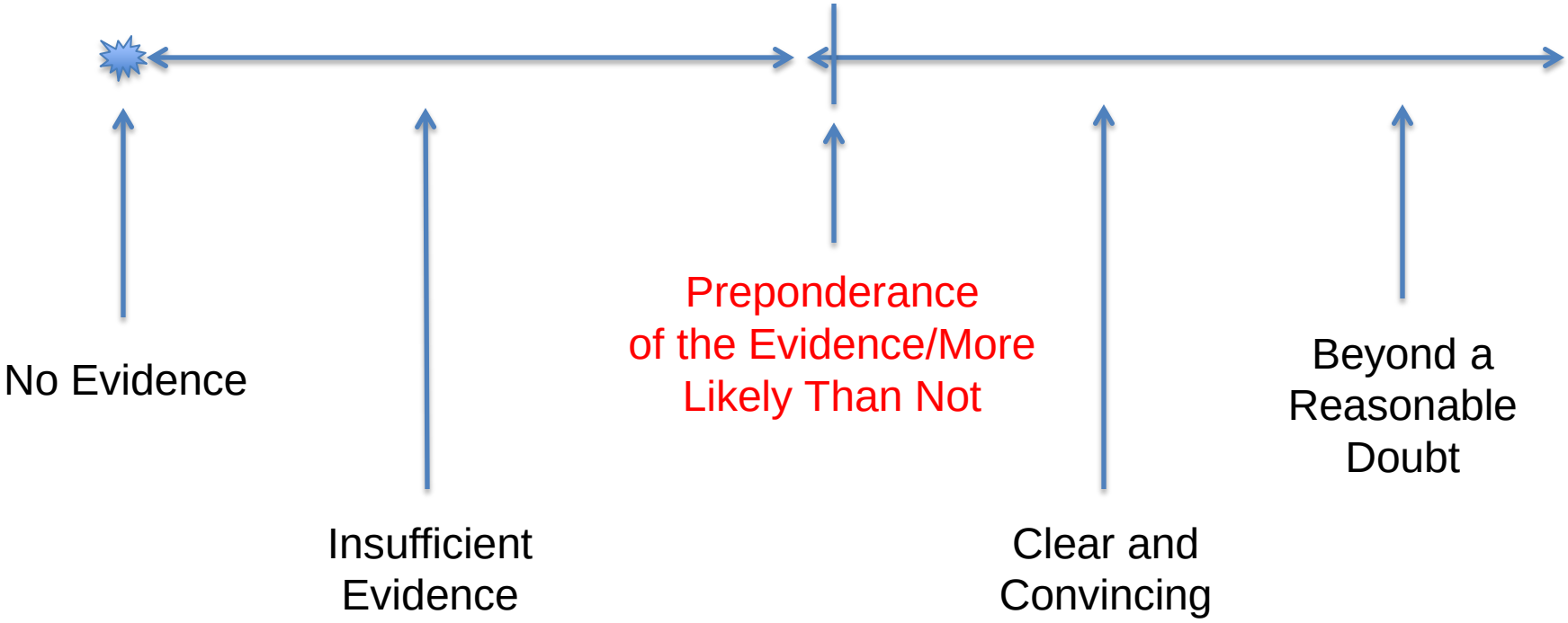
EVIDENCE THRESHOLDS

EVIDENTIARY STANDARDS



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WHAT ABOUT "CONFIDENTIALITY"?

What happens if a student/parent requests that their name not be disclosed to the alleged perpetrator, or that the school not investigate the allegations?

Can you *truly* guarantee confidentiality?

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WHAT DOES THE OCR SAY?

- **OCR suggests the following steps to respond to a request where the complainant's confidentiality request cannot be honored:**
  - Increased monitoring, supervision or security at the locations or activities where the misconduct occurred.
  - Changing and publicizing the school's policies on sexual discrimination.
  - Providing training and education materials for students and employees.
  - Conducting climate surveys regarding sexual discrimination.

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INTERVIEW BEST PRACTICES

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HOW TO PREPARE FOR INTERVIEWS

- **Gather relevant written policies, contracts, handbooks, rules**
  - Make sure to 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?
  - Attorney involved?

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NARROW SCOPE OF WEINGARTEN RIGHTS

- **Upon request, an employee within a collective bargaining unit, may ask for his or her representative during an investigatory interview that could lead to discipline.**
- **Employer not obligated to provide a representative, if willing to proceed with an investigation or even disciplinary action, absent hearing from the employee.**
  - Rare instance in which this would be encouraged or viable alternative for the employer.
- **No obligation to allow a specific union representative, such as the UniServ Director.**
- **Evaluation not disciplinary – but may permit attendance as an observer.**
  - Best practice to allow at final evaluation meeting if recommending disciplinary action such as dismissal.

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WHAT ABOUT ATTORNEYS/PARENTS?

- **Attorneys are generally not permitted in interviews unless criminal charges are pending.**
- **No right to attorney because not conducting a criminal investigation.**
- **If criminal investigation is ongoing, provide employee with written Garrity notice to sign.**
  - Public employee has right to be free from compulsory self-incrimination related to a pending criminal proceeding but the employee can be ordered to cooperate in the employer's investigation and directed to truthfully answer questions narrowly related to the employee's duties.
  - Answers cannot be used for criminal proceedings but may be used for employee discipline.
  - Refusal to answer could result in discharge.

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WHAT ABOUT ATTORNEYS/PARENTS?

- To ensure a fair investigation, OCR warns that if you let a party have an attorney present during any stage of the proceedings you must do so equally for both parties.
- Political considerations with students.
- Think about impact with allowing parent(s) to be present.

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HOW TO PREPARE FOR INTERVIEWS

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

- **Minimal Notice**

- **Create a consistent opening statement**
  - Purpose of the interview
  - Any rights and obligations
  - Process to be followed
  - What they can expect to happen

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HOW TO PREPARE FOR INTERVIEWS

- **Select a private and quiet interview space**
- **Determine 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?

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ORDER OF INTERVIEWS (NOT SET IN STONE)

- Interview complainant
- 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
- Follow up, if necessary

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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**

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QUESTIONING SKILLS

- **ASK OPEN-ENDED QUESTIONS**
  - *i.e.,* Who, What, Where, When, Why, How, etc.
  - Close-ended questions often result in only a yes/no response.

Example:

Closed: Were you angry when Jenny said that about you?

Response: Yes.

Open: When Jenny said that about you, how did you feel?

Response: I was angry, upset, shocked, etc….

Follow-up: WHY?

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QUESTIONING SKILLS

- **Carefully listen to the answer; follow up if needed.**
  - Don't be glued to your outline; be flexible.
- **Clarify conflicting or confusing information.**
  - "Are you saying…"
  - "Do you mean…"
- **Make sure the answer you are getting is to the question you ask!**
- **Watch for non-verbal behaviors and note them.**
  - Silence is golden.
- **Avoid unnecessary writing, have a 2nd person present to take notes.**
- **Never accuse a party of conduct during an interview; do not argue.**
- **Always provide BOE policy and make sure to explain it to the student.**
- **Always ask the "catch all" question at the end of every interview.**
  - "Is there anything else you would like me to know, or that you feel is relevant to this investigation, that we have not discussed?"

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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

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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**

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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

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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

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COMMON MISTAKES MADE DURING WITNESS INTERVIEWS

- **Doing the interview alone.**
  - Second witness can corroborate what was said.
  - Provides second set of eyes and ears, to assess credibility, and help determine next steps and other questions to ask.

- **Approaching the interview with a closed mind.**
  - Prematurely making statements about the likelihood the accused did something wrong.

- **Disclosing the evidence before questioning the witness.**
  - Example: "Yesterday afternoon, at about 2:15, did you ask Sue what she was wearing under her skirt ?" vs. "What happened?"

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COMMON MISTAKES MADE DURING WITNESS INTERVIEWS

- **Making admissions harmful to the District.**
  - e.g. – we just don't have the time to monitor every child on the playground.
  - e.g. – we may have been inconsistent in applying our policy.
  - e.g. – we did not get good guidance on what to do in these kinds of cases.
- **Promising confidentiality.**
- **Demonstrating bias.**
  - e.g. – suggesting to the Complainant that you are not taking the Complainant seriously.
  - e.g. – suggesting to the Accused that you do not believe the Complainant.
- **Failing to document the interview.**

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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.

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SHOULD YOU TAPE RECORD THE INTERVIEW?

- **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.

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POST-INVESTIGATION FOLLOW THROUGH!

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THE OCR 60 DAY RULE

- **PRIOR:** OCR states: "a typical investigation takes approximately 60 calendar days"

- **CURRENT:** "There is no fixed time frame under which a school must complete a Title IX investigation. OCR will evaluate a school's good faith effort to conduct a fair, impartial investigation in a timely manner designed to provide all parties with resolution."

- "Best Practice" should still be 60 days or less; typically, could be completed in less.

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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)
  - Our anecdotal experience . . .

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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

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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?

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REMEDIAL ACTION

- **Must eliminate the hostile environment, prevent its recurrence and remedy any effects.**
- **May include:**
  - Disciplinary action against the respondent.
  - Offering medical, counseling and academic support services, such as tutoring, to the complainant.
  - Providing an escort so the complainant can move safely between classes and activities.
  - Ensuring complainant and respondent do not share classes or extracurricular activities.
  - Moving the respondent or complainant to a different school within the District (be mindful of a possible retaliation issue).

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REMEDIAL ACTION

- **Arrange for the party to have extra time to complete or re-take a class or withdraw from a class without academic penalty.**
- **Changes to the school's services and policies.**
  - Training or retraining of school staff on Title IX, distribution of educational materials, school climate check, training for specific students, issuing policy statements or taking other steps to clearly communicate that the school does not tolerate sexual discrimination and will respond to any incidents, developing a protocol to work with local law enforcement.

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REMEDIAL ACTION

- In the event a complainant does not take advantage of an offered interim measure (*i.e.*, counseling), the prior refusal does not mean it should not be offered as a final remedial measure.

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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).

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NOTICE OF OUTCOME

- **OCR recommends that a school provides 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 <u>not</u> be told of the remedies offered or provided to the complainant.**

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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.

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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
  - Witness statements
  - Evidence of all contacts or attempts to contact witnesses
  - Documents and physical evidence (text messages, emails, video clips, etc.)
  - Final report
  - Outcome letters

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DON'T FORGET ABOUT RETALIATION!

- **Retaliation <u>against individuals who complain</u> formally or informally about sex discrimination is a violation of Title IX.**
  - Retaliation includes intimidating, threatening, coercing, or in any way discriminating against the individual.
- **If the OCR finds that a recipient of Federal financial assistance (recipient) retaliated in violation of Federal civil rights laws the OCR will seek the recipient's voluntary commitment through a resolution agreement to take specific measures to remedy the violation.**
  - The resolution must ensure that the individual who was retaliated against receives redress and ensure that the recipient complies with the prohibition against retaliation in the future.
  - Monetary relief may be appropriate based on the facts of the case.

(OCR Dear Colleague Letter, April 24, 2013)

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AND DON'T RETALIATE!

- Remind any participating individuals (complainant, respondent, witnesses, investigator(s)) not to retaliate and provide copy of BOE policy.
- Note: witnesses can be retaliated against, too! Advise witnesses to report retaliation immediately.
- If retaliation occurs, investigate promptly (separate investigation). Failure to investigate may be evidence of retaliation.
- Retaliation = ADVERSE action
- Can be liable for harassment, even if no underlying Title IX complaint not supported.

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DON'T FORGET ABOUT RESTORATIVE JUSTICE!

- **7 factors still must be *considered* prior to any discipline decision for respondent:**
  - 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.
- **CAVEAT: TITLE IX SITUATIONS!**
  - Where alleged sexual violence or non-consensual sexual acts between students, while you must consider RJ, unlikely will use RJ in lieu of traditional discipline.

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IS YOUR TITLE IX PROCESS IRON CLAD?

- Lack of promptness
- Displays of partiality
- Compromising confidentiality
- Poor planning
- Failure to thoroughly interview all relevant witnesses and secure all evidence
- Failure to reach conclusion
- Offering opinions
- Not consistently following policies/procedures

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NEW SEXUAL ASSAULT/CSC LEGISLATION

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NEW MICHIGAN LAW FOR CSC

- Effective August 8, 2018: PA 145 of 2018.
- Resulting from Brighton Public Schools sexual assault of multiple female students “off campus.”
- New CSC offense is created, “Criminal Sexual Conduct against another pupil enrolled in the same school district.”
- Does not require the offense to be committed “at school” – on school grounds, transportation or at activity/event.
- CSC committed by one student against another student from the same District – at any time/anywhere – is a violation the District can now punish.

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NEW MICHIGAN LAW FOR CSC

- A District may suspend or expel someone who is charged with CSC against another student in the District off campus.
- A District must permanently expel a student who "pleads to, is convicted of, or is adjudicated for" CSC against another student.
- Mandate kicks in only after there has been a Court proceeding and adjudication – which could be months later.

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NEW MICHIGAN LAW FOR CSC

- If a student is convicted of CSC against another student in the District, the Court (not the District) shall order that the convicted student not attend school in the same building as the victim.
- PPO to be issued to the student-victim (on top of the bar from attending the same school).

- Remember: School District is NOT a party to the Order or PPO. The parties to the proceeding, not the school, are responsible for complying with any Order from the Court.
- However, if student is special education, District may be responsible under IDEA or Section 504 to find alternative schooling or transportation for student.

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NEW MICHIGAN LAW FOR CSC

- **Permanent expulsion is also subject to 7 Restorative Justice Mitigating Factors**
  - "Whether a lesser intervention would properly address the violation or behavior committed by the student."

- **This allows a District to conclude that a 60-day suspension or a non-permanent expulsion, for example, could "properly address" the violation, rather than a permanent expulsion.**

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CHANGE IN CODE OF CONDUCT

- Most Codes of Conduct currently identify as an offense a violation of Michigan's CSC law on school property.

- Should add a **NEW** category of CSC, covering a violation of Michigan's CSC law against, "any student of the District, regardless of location."

- Consequence: "Suspension up through permanent expulsion."

- "Under state law, the District may suspend or expel a student who is charged with CSC with another District student. The District shall suspend or permanently expel a student who is convicted, by plea or adjudication, of CSC with another District student."

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NEW MICHIGAN LAW FOR CSC SOL

- Public Act 180 and 181

- Amend statute of limitations for ***civil actions*** because of CSC from 3 years to 10 years. It is not necessary for a criminal prosecution to have been brought as a result of the conduct.

- Add new Section 5851b to allow an individual who, while a minor, is the victim of CSC to commence a civil action to recover damages from CSC at any time until they are 28 years old (previous – 19 years) or until 3 years after the individual discovers his or her injury and its relationship to CSC, whichever is later.

- 1st degree CSC: No criminal statute of limitations

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NEW MICHIGAN LAW FOR CPS REPORTING

- **HB 5659**
- **Amend the Child Protection Act to include the following among the individuals who are required to report to DHHS child abuse or child neglect:**
  - Physical Therapist
  - Physical Therapist Assistant
  - Athletic Trainer

- **Previously included coaches, but later removed.**
- **Headed to the Senate for Approval. Stay tuned . . .**

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FAILURE TO REPORT REMINDER FOR CPA

- Mandated Reporters ONLY
- If a mandated reporter, reporting to Principal or Superintendent is insufficient
- Criminal misdemeanor, 90 days in jail and/or $500 fine and maybe license or certification consequences (not automatic)
- Governmental Immunity protects from civil liability unless reporter is **grossly negligent** and failure to report was **THE** proximate cause of child's injuries
- Best Practice?

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TYING IT ALL TOGETHER

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HIGH SCHOOL SCENARIO

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HIGH SCHOOL CASE STUDY

- Fall of 2011: Teacher begins texting relationship with freshman student that becomes sexual in December/January. On December 31, 2011, the teacher performed oral sex on the student.

- On January 19, student is circulating nude pictures of teacher.

- **QUESTION**: Rumor of nude photos is reported to you by a parent. What do you do?

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INTERIM MEASURES

- By January 20, school begins investigation, teacher placed on paid administrative leave and police contacted.
- Teacher resigned the next week and is criminally charged.
- Principal meets with assistant principals, instructing them to ensure that student is protected, and to tell teachers to watch out for verbal or physical harassment, and immediately report it.
- Principal meets with all staff, reiterating that the student is the victim, and staff should protect student, stop rumors, and confiscate devices containing inappropriate comments about student. Staff told not to name student to protect his privacy.

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HIGH SCHOOL CASE STUDY

- January 25, Mom presents names of students harassing her son on Facebook.

- List of names of students commenting on her son's Facebook page and list of students who "liked" the comments. Demands these students be disciplined.

- Slippery Slope #1: Does the District have Jurisdiction to discipline students for Facebook posts or likes? Why/Why not? What do you do?

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DISCIPLINE AND OTHER ACTIONS

- **High School Principal:**
  - Principal advises male student to stay off social media and instructs assistant principal to speak with harassing students who commented. Assistant principal investigates, verbally reprimands students and tells them to leave student victim alone;
  - Suspended a student for throwing a chair at the student victim in the lunch room and telling him to keep his mouth shut;
  - Admonished the football team captain not to make negative comments about the victim; and
  - Told an alumnus that negative comments would not be tolerated.

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STUDENT VICTIM DISCIPLINED

- February 2: Student victim suspended for chewing tobacco, as observed by a coach.

- Mom appeals tobacco incident, which is ultimately expunged due to "investigative errors."
    - Failure to obtain student statements; students later denied.

- Student victim also suspended, along with other students, for viewing and showing naked pictures of female student that were on the Internet.

- Slippery Slope #2: What if victim/parents claim discipline is retaliation?

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WHAT HAPPENS NEXT?

- Student victim unsure if welcome in sports; he is assured that as long as he is academically eligible, he is welcome. He participates in track, a no-cut sport.

- At beginning of third trimester, student seeks to study online from home; request granted. Two weeks later, he wants to return to original high school. Counselor meets with him, discourages him from attending same class as daughter of teacher with whom he was involved. Counselor recommends a new class; student and parents agree.

- Slippery Slope #3: What about OCR guidance that says do not burden the victim?

- Student attends school out of state in his sophomore year, but returns to Michigan district, attending a new high school, where he is not harassed or bullied.
    - How can we prove this?

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STUDENT VICTIM NOT IN SCHOOL

- In December of second year, Mom complains school not doing enough to help son who has emotional problems. Because student now 16, school asks for a meeting with the student, and a psychologist to formulate a plan. Mom never follows up. Student continues at new high school, apparently without incident, until...

- In March of third year of high school, student arrested for DUI and spends time in jail.

- Student returns to original high school in senior year, drops out and never graduates.

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COURT FINDINGS

- **Case dismissed by federal court, W.D. Michigan**
  - No Title IX Violation
  - No Retaliation or Hostile Environment
    - What is definition of Hostile Environment?

- **Dismissal Affirmed by Sixth Circuit Court of Appeals (April 2017)**
  - No Retaliation
    - Must qualify as "sufficiently severe to dissuade a reasonable person from engaging in protected activity"
    - Defendant made "reasonably informed decision" before punishing student; responded appropriately to complaints from parent
  - No Title IX Violation
    - 22 remedial measures cited by Defendant
    - No deliberate indifference – 2 ways to prove: what are they?

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INTERIM/REMEDIAL MEASURES CITED BY DISTRICT

1. Granting student request to drop theatre (due to anxiety);
2. Allowed flexibility to leave class and study independently when anxious;
3. Gave extended time to complete assignments and tests;
4. Offered alternative test dates;
5. Made tutors available;
6. Had teachers provide additional help;
7. Sent assignments home;
8. Granted request to take online courses;
9. Granted request to move back to regular classes;
10. Moved to new neighborhood to facilitate fresh start;
11. Allowed to take courses for credit / no credit;
12. Counselor followed progress closely and communicated with parent frequently;
13. Chemistry teacher offered additional assistance;
14. Assistant Principal personally tutored student in English;
15. Assistant Principal arranged for student to be evaluated for participating in a reading intervention program known as AARI;
16. Counselor gave student credit for an English course where student had fallen just short of earning a passing grade;
17. Meeting scheduled with parents at the end of school year to plan for next academic year (parents chose not to attend);
18. English teacher emailed parent regarding student's assignments and progress and spoke to her about option of working in Focus Room;
19. English teacher kept administrators apprised of student's progress;
20. Assistant Principal emailed parent regarding student's attendance and progress;
21. Principal arranged a meeting between student and Varsity Football and Varsity Baseball head coaches to discuss continued participation; and
22. Athletic Directors at both High Schools wrote letters to the Michigan High School Athletic Association seeking waiver of the ineligibility transfer rule for the student.

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WHAT DID WE LEARN?

- **What did the District do here to avoid liability?**
  - *When it received notice?*
  - *During the investigation?*
  - *After the investigation?*

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WHAT'S THE CURRENT TITLE IX CLIMATE?

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GRANDVILLE SCHOOL DISTRICT

- Kindergarten male student was sexually assaulted over multiple months in the classroom.
- During “free time,” four male students took victim male student to the ‘mudroom’ area of the classroom where they touched, sodomized him and preserved evidence of the assaults by photographing the victim’s genitals using their school-issued iPads.
- Male students told victim that if he told anyone they would not be his friends and they would say sexual activity was his idea.
- Victim’s parents noticed he was physically and mentally deteriorating.

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GRANDVILLE SCHOOL DISTRICT

- Male victim was harassed by other students who heard about and viewed the photographs of his assaults on their iPads.
- Parents reported concerns to teacher, but were told nothing amiss was happening in the classroom.
- 4 months later, teacher notices student hiding the screen of his iPad as she walked by. Took iPad and found camera role full of photos of victim's genitals, and in various poses taken over a span of weeks.
- Principal reports to mother of victim, mother requests investigation.

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GRANDVILLE SCHOOL DISTRICT

- Mother arrives at school 10 minutes later and Principal tells mother "investigation already completed." Principal interviewed other male students and found no indication of coercion or assault.

- Mother requests police involvement and that the school turn over the photos to the police. Principal tells mother she cannot view the photos and police directed her to delete photos.

- Police report states Principal assured officers that she had contacted police only because mother demanded it, she already conducted an investigation, deleted the photos and no further investigation was necessary. Principal declines to identify 4 assailants to police.

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GRANDVILLE SCHOOL DISTRICT

- Several days later, parents meet with Administration. Administration offers to move male victim to another school in District. Administration tells parents that “kindergartners are curious” and suggested if the parents persisted on pressing the matter, the male victim would be disciplined. No Title IX rights or policies were shared with parents.

- Parents remove male victim from school for the remainder of the school year. Victim had to repeat kindergarten; 4 assailants moved to 1st grade.

- During his 2nd year of kindergarten, male student was teased on the playground by students who seen and knew about photos from 1st year.

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GRANDVILLE SCHOOL DISTRICT

- As a result, male student spent the majority of each recess in hiding places that he dug beneath play structures where he would cover himself with mulch.
- Male student's only friend reported to Principal he was being harassed on playground. Parents reported to Principal and allege nothing was done to protect him.
- Parents allege Title IX and 14th Amendment violations.
- Defendants: District, Former Superintendent, Current Superintendent, Assistant Superintendent, Principal and Teacher.
- CASE PENDING IN FEDERAL COURT

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FRUITPORT SCHOOL DISTRICT

- Sophomore male student: 16 on 2/22/15.
- Female secretary (40 years/married), PESG employee.
- Early 2015, Vice Principal confiscated student's phone and noticed "unusual" text messages between student and secretary. Did not report/further investigate.
- Secretary was late for chaperone duties on prom night. Vice Principal noticed "giddy" behavior.
- After prom, parent called school to report he saw student in secretary's car, parked in front of student's house for over 30 minutes.
  - Parent of son (another student at District) reported this was not first time.

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FRUITPORT SCHOOL DISTRICT

- Following the report, Principal interviewed student. During the interview, student's phone rang and Principal saw it was secretary. No plausible explanation.

- Principal calls mom to report student was in same vehicle with secretary; mom has no knowledge. Principal fails to report:
  - Over 30 minutes.
  - Same car, same location and multiple occasions.

- Student makes up excuse to parent when confronted.

- Parent reports to Principal excuse; Principal believes.

- Principal has verbal conversation with secretary re: "proper boundaries and conduct/contact with students."

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FRUITPORT SCHOOL DISTRICT

- District ignored a number of student complaints regarding student had a relationship with secretary both before and during her employment at District.

- Secretary voluntarily quit end of May 2015.

- August 2015: student finally admits his sexual relationship with secretary to parents and that he had sexual intercourse with secretary 6 days after 16th birthday.

- Parents report to police. MLive Article detailing charges against secretary is published. In response to the article, Superintendent sends a response to school community representing secretary was terminated for "poor performance."
  - Parents of student NOT included on response.

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FRUITPORT SCHOOL DISTRICT

- Male student was teased and harassed after secretary was charged with CSC.
- Secretary pleads “no contest” to 2nd degree CSC.
- Male student drops out of District at beginning of junior year. Enrolled in online program, but continued to struggle with behavior and emotional issues.
- District sued for (can you guess how much?):
  - Title IX: deliberate indifference/failure to investigate
  - § 1983: failure to train.
  - ELCRA.
  - Negligent Hiring and Supervision.

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IMPORTANT TO REMEMBER FOR TITLE IX…

- **Need to train Title IX Coordinator, school officials, and "responsible employees" on discrimination/harassment (document all Title IX training).**
  - Identifying potential policy violations based on observed or overheard conduct.
  - Reporting obligations to Title IX Coordinator.
  - Off school conduct (cyberbullying) counts!
  - Retaliation responsibilities and need to follow up.
  - Being aware of and need to report any disintegration of the complainant's learning environment.

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IMPORTANT TO REMEMBER…

- **Documentation.**
  - Witness interviews.
  - Communications with police, parents, victim, accused, witnesses.
  - Remedial measures implemented (and those offered and declined).
  - Final findings.

- **COORDINATE WITH police investigation.**
  - Need to investigate and act even more promptly (including issuance of interim measures) while school is in session due to potential misconduct that may occur during school day.
  - Title IX investigation is not a criminal trial – burden of proving a violation of Board Policy, Student Code of Conduct is less!

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WHAT SHOULD YOU DO AFTER TODAY?

- Make sure your Grievance Procedures are up to date and posted/disseminated.
- Identify a Title IX Coordinator and know who your "responsible employees" are.
- Train all employees to be your "eyes and ears" and conduct in-depth training with your investigatory staff.
- Follow up on any "red flags".

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QUESTIONS?

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PLEASE NOTE

This presentation does not constitute legal advice nor create an attorney client relationship.

It contains general recommendations and information and should not be relied upon for any specific purpose without consultation with legal counsel and in the context of specific facts and circumstances.

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THANK YOU!

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