Understanding Title IX:
Navigating Rights and Responsibilities

Session #3

PRESENTED BY MTSBA LEGAL STAFF



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Training Schedule and Topics

Session One - Tuesday, November 3 | 1:00-3:00 pm
Title IX Foundations: Building a Legally Compliant Program

Session Two - Tuesday, November 10 | 1:00-3:00 pm
Managing the Title IX Process

Session Three - Tuesday, November 17 | 1:00-3:00 pm
Decision-Making, Remedies, and Preventing Liability

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HYPOTHETICAL 1

- At Greenwood Middle School, a 7th-grade male student named Alex reported experiencing ongoing sexual harassment from a fellow female student, Jordan. The harassment included inappropriate comments, unwanted physical contact, and a set of deepfake pornographic photos of Alex that Jordan distributed to their friend group.

- The school implemented supportive measures to ensure Alex's safety, such as adjusting class schedules and providing counseling services.

- The school counselor promptly informed the Title IX Coordinator, Ms. Evans, who conducted an investigation. The investigative interview with Jordan and her parents starts with a bang when Jordan’s father starts yelling at the investigator that he is offended the school would even dignify this matter with a response. He also asserts that his daughter would never have done the things she is accused of. Ms. Evans reassures the respondent and her parents that Ms. Evans doesn’t really think a female student can sexually harass a strong young man and Alex needs to toughen up and realize this is actually a compliment to him.

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BEING AN EFFECTIVE INVESTIGATOR

- Be reasonable and calm
- Be impartial when considering evidence and weighing the credibility of parties and witnesses
- Do not be swayed by prejudice, sympathy, or a personal view that you may have of the claim or any party
- Be prepared to identify any actual or perceived conflict of interest and take necessary action to address

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INVESTIGATION REMINDERS

- ❑ Burden of proof and burden of gathering evidence is on the school district
- ❑ Equal opportunity to present witnesses
- ❑ May not prohibit parties from discussing allegations or gathering/presenting evidence
- ❑ Provide same opportunity to have others present including advisor of choice
- ❑ Written notice of any hearings/interviews/meetings
- ❑ Purpose is to gather facts and evidence for decision-maker

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INITIAL STEPS

- ❑ Review notes and information collected by the Title IX Coordinator
- ❑ Review Notices to Complainant and Respondent
- ❑ Review Policy/Code of Conduct
- ❑ Define Scope of Investigation
- ❑ Identify aspects of event(s) or conduct that will be disputed or agreed upon

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TYPES OF EVIDENCE

- ❑ Electronic communications
- ❑ Security information
- ❑ Pictures, videos, audio
- ❑ Police reports
- ❑ Personnel files
- ❑ Prior complaints against respondent

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IDENTIFYING WITNESSES TO INTERVIEW

- Who should be included?
- Who should NOT be included?
- In what order should the witnesses be interviewed?
- Refer to the policy or definition of sexual harassment when in need of guidance
- Consider what information witnesses are likely to have related to each element
- Consider what information witnesses are likely to have that may assist the decision-maker in determining credibility

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INTERVIEW TOOLS

- ❑ Allegations
- ❑ Investigation log
- ❑ Investigation notes cover sheet
- ❑ Prepared questions
- ❑ Evidence you may need to reference or show witness
- ❑ Policy or Handbook

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SETTING UP AND BEGINNING INTERVIEWS

- Develop a notetaking technique that allows for understanding days later
- Try to record exact quotes when possible
- Contact witnesses and begin by identifying yourself, your role, and a general outline of what you're investigating
- Don't give up on the interview until you've tried to schedule at least 3-4 times
- Be hospitable when interview begins
- Give an overview of why they are being interviewed
- Invite questions
- Elicit a monologue about the incident
  - What happened earlier that day before the incident?
  - What happened regarding the incident?
  - What happened next?

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CONDUCTING INTERVIEWS

- On important moments, ask the witness to describe details
  - ➢What could they see? Feel? Smell? Taste? Hear?
  - ➢Where were they? How positioned? Other persons present?
  - ➢What did they say to the other person? Other person to them?
  - ➢Describe other person's tone, demeanor, body language.

- During the interview don't be afraid to pause, no matter if uncomfortable, to understand what was said and review notes or ask further questions

- Re-review the elements of each charge

- Make sure to elicit all the information this witness might have about each element

- Make sure you have a clear understanding of what the witness said and how the witness obtained information shared

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CONCLUDING INTERVIEWS

- ❑ Final questions
- ❑ Secure copies of all evidence potentially available from the witness
- ❑ Inform the witness of next steps and how to reach you
- ❑ Update investigation log
- ❑ Review notes, make corrections/clarifications
- ❑ Update witness list
- ❑ Update list of evidence to be obtained
- ❑ Write down questions to ask other witnesses
- ❑ Consider whether appropriate to send email

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CONCLUDING INVESTIGATIVE PHASE

Provide All Evidence to Parties

- Allow 10 days to review
- Allow parties to submit a written response before completion of Investigative Report

Prepare Investigative Report

- Provide to parties 10 days prior to determination of responsibility
- Allow parties to submit written response

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GUIDING PRINCIPLES

- Keep an open mind until all evidence has been heard
- Render a sound, reasoned decision on every charge
- Determine the facts in the case based on the information presented
- Determine what evidence to believe, the importance of the evidence, and the conclusions to draw from that evidence

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HYPOTHETICAL 2

- At Blackwood Elementary School, Ms. Maisy Johnson, a 4th-grade teacher, reported experiencing sexual harassment from Mr. Smith, a physical education teacher. The harassment included inappropriate comments, unwelcome physical advances, and an unsolicited picture of Mr. Smith's genitals texted by accident to the District's boy's basketball team with an accompanying text of "I love you, Maisy" from Smith's phone number The principal promptly informed the Title IX Coordinator, Mr. Davis, who conducted an investigation. Davis considers including the basketball team as respondents and consolidating their complaints but decides against it because they see nudity in the locker-room after practice frequently.

- During the decision-making phase, Smith's attorney argues that the picture and text message are not relevant because they were not sent to the Respondent. He also argues that Johnson's allegations regarding the inappropriate comments and unwelcome physical advances is not credible because Johnson has had four failed marriages and many sexual partners. He submits this information to show that Johnson is not innocent and likely implicitly made such conduct from Smith welcome and/or consensual.

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ROLE OF THE DECISION-MAKER AND OBLIGATIONS

- Questions and evidence about the Complainant's sexual predisposition or prior sexual behavior are not relevant, unless such questions and evidence about the Complainant's prior sexual behavior are offered to prove that someone other than the Respondent committed the conduct alleged by the Complainant, or if the questions and evidence concern specific incidents of the Complainant's prior sexual behavior with respect to the Respondent and are offered to prove consent.

- Conduct an objective evaluation of all relevant evidence— including both inculpatory and exculpatory evidence

- Mandatorily dismiss Title IX complaints that do not rise to the level of "sexual harassment," did not occur in the recipient's education program or activity, or did not occur against a person in the country
- Afford each party the opportunity to submit written, relevant questions that a party wants asked of any party or witness, provide each party with the answers, and allow for additional, limited follow-up questions for each party

- Explain to the party proposing the questions any decision to exclude a question as not relevant

- Issue a written determination regarding responsibility by applying the "preponderance of the evidence" standard

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LIVE HEARING NOT REQUIRED

- The Office of Civil Rights determined cross examination in a live hearing is “not necessarily effective in elementary and secondary schools where most students tend to be under the age of majority and where… parents or guardians would likely exercise a party’s rights.”

- Live hearings are not required in K-12 schools, but districts have the option of holding one if determined to be necessary.

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STANDARD OF EVIDENCE

- MTSBA Model Policy 3225P and 5012P use the “preponderance of the evidence” standard

- This standard means the burden of proof is met when the party with the burden convinces the fact finder that there is greater than 50% chance that the claim is true

- Issue a written determination regarding responsibility by applying the “preponderance of the evidence” standard

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REVIEWING EVIDENCE

- The quality of evidence is not determined by the volume of evidence or the number of witnesses or exhibits
- It is the weight of the evidence, or its strength in proving the issue at stake
- An investigator will evaluate all the evidence based on judgment, experience, and circumstances
- Always evaluate witness credibility when considering testimony
- Give the testimony and information of each party or witness the degree of importance you reasonably believe it is entitled to receive

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EVALUATING CREDIBILITY

- Consider the reasonableness or unreasonableness, or probability or improbability, of the testimony
  - ➢Does the witness have any motive?
  - ➢Is there any bias?
  - ➢Is there any inconsistency, inaccuracy, memory gaps, implausibility, or unreliability?

- Credibility is determined fact by fact, not witness by witness

- The most earnest and honest witness may share information that turns out not to be true due to misperception

- Be prepared to make difficult decisions when locating the truth

- Look to all the evidence in total, make judgments about weight and credibility, then determine whether or not the burden has been met

- Any time you make a decision, use your standard of evidence

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REASONABLE INFERENCES

- Draw reasonable inferences when reviewing direct evidence
- Inferences are sometimes called “circumstantial evidence”
- Reasonable inferences can be useful when determining course of investigation
- Use inferences only as warranted and reasonable

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MAINTAINING FOCUS

- Don’t consider the potential impact of your decision on either party when determining if the charges have been proven

- Focus only on the charge or charges brought in the case and whether the evidence presented to you is sufficient to persuade you that the respondent is responsible for the charges

- Do not consider the impact of your decision on parties, district, or community; seek the truth

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APPEALS

- The Appeals Officer cannot be the investigator, Title IX Coordinator, or decision-maker that worked on the case

- The Appeals Officer must be trained in the same manner as the decision-maker

- The District must:
  - ❑ Offer the appeal to both parties
  - ❑ Let both parties know when an appeal has been filed
  - ❑ Give both parties a reasonable and equal opportunity to submit a written statement in support of or challenging the appealed decision
  - ❑ Issue a written decision describing the result of the appeal and the rationale for the result
  - ❑ Provide the written decision simultaneously to both parties

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BASIS FOR APPEALS

- Procedural irregularity that affected the outcome of the matter
- New evidence that was not reasonably available at the time of the determination, regarding responsibility or dismissal, that could affect the outcome of the matter
- The Title IX Coordinator/investigator/decision-maker(s) had a conflict of interest or bias for or against complainants or respondents generally, or the individual complainant or respondent that affected the outcome
- A District may offer an appeal equally to both parties on additional bases

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Thank you

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