

Effective Hand-Offs in Title IX Cases Involving Students and Employees

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Initial Issues for Investigation

- What has been alleged?
- Why investigate? / Who will investigate? What institution offices must be involved?
- Do we need to take interim action before initiating the investigation?
- What laws, policies, rules and regulations impact the investigation?
 - Title IX, Title VII, Clery Act reporting, etc.
- Is discipline / discharge a potential outcome and, therefore, what due process must be involved?

Reminder – Title IX Scope

“No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance[.]”

According to the U.S. Department of Education, this legislation addresses:

- Sex-based harassment
- Sexual violence
- Pregnancy discrimination
- Failure to provide equal athletic opportunity
- Sex-based discrimination in a school's STEM courses and programs
- Discriminatory application of dress code policies and/or enforcement
- Retaliation for opposing discrimination

<https://www.ed.gov/laws-and-policy/civil-rights-laws/title-ix-and-sex-discrimination>

Reviewing/Analyzing the Allegations

Identifying the Alleged Victim(s)/Respondent(s)

- Do the allegations involve student(s), employee(s), volunteer(s), vendor(s), contractor(s).
- Do the allegations involve non-affiliated third parties?
 - Visitors
 - Former students
 - Unknown persons
- Alleged victim:
 - Student – participating or attempting to participate in school programming
 - Employee – employed by the school

Note: State law provides protections against harassment and discrimination in the employment context beyond the scope of employees, and can include contractors, vendors, other third parties subjected to harassment in an environment controlled by the school (contracted building cleaning services).

Did the alleged event(s) occur within the school's program or activities?

- Education programs and activities include all operations of each recipient of federal funds covered by Title IX.
 - Applies only to those programs or activities for persons inside the United States (relative to strict procedures for investigations).
 - Applies to all aspects of each program or activity, such as eligibility, location, events, and circumstances.
 - Off-campus activities may be “education programs or activities” if: **(1)** the off-campus event/incident occurs as part of the school’s “operations” and **(2)** the school exercised substantial control over respondent in the context of alleged sexual harassment that occurred off-campus. **Example:** away athletic events.
 - When recipients are uncertain whether an activity is covered by Title IX, the recipient should consider factors such as whether the recipient is funding/promoting/sponsoring the activity/program and the amount of control the recipient exercised over the circumstances.

Understand the Nature of the Complaint

- Preliminary review of sex-based allegations:
 - Relate to sexual harassment or sexual violence?
 - Relate to discriminatory policies or practices? For example, participation in athletics (*West Virginia v. B.P.J.*, U.S. Supreme Court, June 30, 2026).
 - Relate to employment conditions?
- Does the matter involve potential criminal activity?
 - Engage campus police or local law enforcement
 - Chapter 48 implications (child abuse or neglect)
- Are alleged violations ongoing or finite in nature?
 - If alleged conduct is ongoing or it is uncertain if it is – need to identify responsible official for remedial action (i.e. administrative leave, interim measures)
- Determine correct official to oversee the managing of the complaint (Title IX Coordinator, Compliance Coordinator, HR Department, other compliance officials)

Does Complaint Involve Sexual Harassment or Sexual Violence

- A Title IX investigation must occur if any of the following conduct is alleged to have occurred within an education program and/or activity:
 - A school employee conditioning the aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct (as identified in the comments to the rule, the bargain can be proposed by the offender in either an explicit or implied manner, and unwelcome must be considered subjectively);
 - Unwelcome conduct that a reasonable person would deem so severe, pervasive, and objectively offensive that it effectively denies the individual's equal access to the recipient's education program(s) or activity(ies); OR
 - Any of the following crimes:
 - Sexual assault (i.e., an offense classified as a forcible or nonforcible sex offense under the FBI's uniform crime reporting system),
 - Dating violence (i.e., violence committed by a person in a social relationship of a romantic or intimate nature with the victim),
 - Domestic violence (i.e., felony or misdemeanor crimes committed by a current or former spouse or intimate partner), or
 - Stalking (i.e., engaging in conduct toward a specific person that causes that person to fear for their own safety or the safety of others or causes them to suffer substantial emotional distress).

Allegations May Be Multi-Faceted

- Circumstances can often involve a variety of protected activities and/or protected classifications.

For Example – an allegation of sexual assault of a minority student may result in allegations of both Title IX covered conduct as well as race discrimination/harassment allegations.

- Assure that all responsible compliance officials are informed.
- Title IX Coordinator involved in Title IX complaints immediately.

Why Investigate?

- Obligation to maintain an environment conducive to full participation by all students and employees.
- Criminal / Potential Criminal Conduct.
- Inappropriate Conduct:
 - Violation of Board policies.
 - Violation of Employee Handbook or Student Code of Conduct provisions.
 - Violation of individual contract, letter of intent, assignment, etc.
- Potential Liability.
- Safety.
- Public Relations.

Involving Appropriate Personnel.

Identifying Appropriate Policy(ies) and Essential Personnel

- Requirements flowing from laws, policies, rules and/or regulations.
 - Consult applicable policies – many campuses direct the investigatory responsibility to personnel based on the identity of the alleged respondent (i.e. student, student-employee, faculty, administrator, other employee).
- Who has authority to make personnel decisions (i.e. use of administrative leave)?
- Who has authority to authorize interim supportive measures for students (i.e. schedule modifications, asynchronous/virtual learning, course withdrawal, etc.).
- Familiarity with campus services (medical, mental health, counseling, advocate).
- Advise legal department, college leadership?
- Public relations professionals?
- Identify hearing examiner or committee applicable to process. Policy should dictate who this is or who appoints. Evaluate potential bias or conflicts.
- Identify decisionmaker and official handling appeal. Identify and potential bias or conflicts.

Determining Victim Intent to Proceed with Complaint

- If allegations involve sexual harassment or sexual violence, a formal written complaint is required to proceed.
 - Determine if Informal process is appropriate and acceptable to the parties involved. Be sure to document these discussions and to assure notice of withdrawal from informal process exists for any party involved.
 - Determine if complaint must be dismissed because it fails to raise a basis for the complaint (i.e. does not qualify as sexual harassment or sexual violence), conduct did not occur in the program and activity of the institution, or the alleged conduct did not victimize someone physically in the United States. Be sure to articulate the basis for this decision.
- **Note:** permissive dismissal is available if circumstances prevent effective investigation. It is important to detail the basis for this determination to support the decision and to provide for potential appeal.

Considerations / Actions Prior to Commencing Investigation

- Supportive measures for the complainant / alleged victim.
- Consultation with legal department.
- Interaction with law enforcement (criminal conduct).
 - Child abuse investigation.
 - The investigation and/or recommendations resulting therefrom need not be postponed until criminal proceedings are completed.
 - Need to proceed with dispatch.
 - Prejudice to accused.
 - Fifth Amendment concerns – Garrity (protection against criminal self-incrimination, not employment self-incrimination).

Prior to Commencing Investigation (continued)

- Administrative Leave.
 - Paid.
 - Unpaid.
- Reassignment.
- Notice to Accused.
 - Cooperation – compelling participation (insubordination) / adverse inference (Title IX concerns).
 - Honesty / Dishonesty – consequences.
 - Communication with others / concerted activity.

Who Will Investigate?

- Legal complexities of the investigation / experience and competence of investigator.
- Impartiality of investigator to all parties involved:
 - Objectivity and lack of bias.
 - Perception of objectivity and lack of bias.
- Investigator as a witness.
- Properly trained and capable of handling.
- Political concerns.
- Efficiency.
- Who will serve as decisionmaker?

Note: Considering all facets of what the matter involves prior to assigning investigator improves the likelihood of “prompt and equitable” resolution.

Initiating the Investigation

Engaging the Appointed Investigator

- Provide all collected evidence, complaint, narratives, notices provided, etc. – be sure that Title IX required notices are provided to the complainant(s) and respondent(s) at the time of initiation of investigation.
- Identify authorities that investigator can rely on for access to records (class schedules, contact information, personnel records, IT support to access electronic records, etc.).
- Provide grievance policy and any investigation procedures that govern the investigation.
- Assure investigator's familiarity with required timelines if any (Title IX is always "prompt" but specific policies may incorporate a more specific timeline).
 - Assure investigator understands process for extension of any specified timelines when required due to the complexity of the case, availability of witnesses, etc.
- Identify any particulars that complicate the process (involves high ranking official, media attention, large number of witnesses, potential criminal conduct and related warnings to employee witnesses, etc.).
- Assure investigator understands duty to compile evidence for Respondent review prior to issuing final report.

Garrity Warnings

- Public employees generally have a professional or contractual duty to cooperate with internal investigations into employee misconduct. Failure to cooperate, such as refusing to be interviewed or providing false information, can be deemed insubordination and may serve as an independent basis for employee discipline or termination.
- Fifth Amendment protections.
 - No person ... shall be compelled in any criminal case to be a witness against himself...
- *Garrity v. New Jersey* is a 1967 U.S. Supreme Court decision, which held that a public employee's answers given under threat of removal from office constitute compelled statements that prosecutors cannot use in subsequent criminal proceedings due to the Fifth Amendment's right not to self-incriminate.
- A *Garrity* warning must inform the employee that:
 - The employee cannot refuse to answer the employer's questions based on the employee's right to not self-incriminate;
 - If the employee refuses to answer, the employer may make an adverse inference against the employee regarding the questions AND the employer may discipline (up to and including termination) the employee for refusing to cooperate; and
 - The employee's answers cannot be used against him/her in any subsequent criminal proceedings.

Weingarten Rights

- *NLRB v. J. Weingarten, Inc.* is a 1975 U.S. Supreme Court decision, which held that an employer commits an unfair labor practice in violation of the National Labor Relations Act if it interferes with, restrains, or coerces the protected individual right of an employee to engage in concerted activities for mutual aid and protection, which includes denying an employee's request that her union representative be present at an investigatory interview which the employee reasonably believed might result in disciplinary action. However, *Weingarten* technically only confers rights on private sector employees.
- The Wisconsin Employment Relations Commission (WERC) adopted a right similar to the *Weingarten* rights for public sector employees under the Municipal Employment Relations Act (MERA) as well as the State Employee Labor Relations Act (SELRA). Whether a right to representation exists depends on the purpose of the employer-employee interaction and whether protected rights could reasonably be impaired by denying representation in such circumstances. *Waukesha County*, (WERC 3/78).
- Title IX – Respondents have rights in allegations of sexual harassment or sexual violence investigations to have advocacy.

Investigation Report

- Purpose of the report is to objectively detail evidence collected in the course of the investigation to transmit to hearing officer/committee.
- Detailed description of investigation procedures:
 - Witnesses interviewed, timing, what records were created, who was present
 - Identify all evidence reviewed (emails, surveillance footage, cell phone pictures/video, etc.)
- Note any credibility issues – witness demeanor (cooperation), consistency with other evidence, consistency with other witnesses.
- Identify any barriers or complications to obtaining evidence.
- Consult with administrative team / legal counsel.
- **Note** – in investigations not governed by the Title IX investigation procedures, investigator will also include detailed findings of fact and recommendations.

Investigation File

- What should be documented?
 - A timeline of events that is maintained—this will be helpful as more information is gathered throughout the investigation.
 - The initial complaint.
 - All interviews.
 - Documentary evidence – catalogued for ease of review.
 - All actions taken in furtherance of the investigation.
 - All communications to parties.
 - Documented opportunity to review evidence, to equally request witnesses, and to provide evidence.
 - A final written report.
- Compile investigation records and store them in a secure in a manner for secure transmission to the parties and to the hearing .

Preparing for Hearing

Hearing Procedures

- Hearing examiner or committee must be provided with the investigative report and evidentiary attachments.
- Determination of whether the complainant and respondent have an advisor – or if one is to be provided and who that will be.
- Determine the scope of party advisors' role and involvement – equally applicable to both parties. Have available potential advisors to serve in this role.
- Assure arrangements for creation of a verbatim record.
- Determine if hearing will occur in one location or separated upon request and assure that appropriate technological and other arrangements are made.
- Facilitate preparation of findings of fact and determinations – assure transmission is timely.

Hearing Examiner's Referral to Decisionmaker

Preparing for Decisionmaker Actions

- Review timelines applicable to decisionmaker:
 - For written exceptions from the parties
 - For hearing examiner or committee response to proposed findings/recommendations that differ
 - For issuing decision after party input concludes
- Facilitate preparation of report – adopt hearing findings/recommendations or, if modified, include explanation.
- Assure timelines for transmission of final decision to parties.
- Notification of appeal basis:
 - Procedural irregularity
 - New evidence not reasonable available previously that is material
 - Alleged bias of any personnel involved.

After the Final Decision

- Matter must now be administered.
- Disciplinary action – identify responsible official for pursuing depending on the nature of discipline and who is subject to it.
- Review preliminary measures:
 - Administrative leave
 - Supportive measures
 - Campus or community resources to support those involved as needed

THANK YOU.



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