

# **TITLE IX TRAINING 2020**

**HAYDEN HEADLEY HOOKS**

**PERRY & WALTERS LLP**

**HHOOKS@PERRYWALTERS.COM**

# WHAT IS TITLE IX?

- **Part of the Education Act of 1972.**
- **Specific Language: No person in the United States, on the basis of sex, shall 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 20 U.S.C. § 1681.**
- **Applies to students and employees**
- **Money Damages Available**
- **Requires District to adopt a grievance procedure**

# AREAS WHERE TITLE IX MAY APPLY

Pre-employment  
Criteria

Employment  
Decisions

Sexual Harassment

Compensation

Discipline for Sexual  
Offenses

Pregnant Students

Athletics Funding

Classes and  
Extracurriculars

Admission to Gifted  
Programs

# WHY DOES THIS MATTER?

- **BECAUSE IT'S INCREDIBLY COMMON**
- **Data shows sexual assault is most prevalent among adolescents and school is most common location for peer-on-peer victimization.**
- **1 in 4 young women experience sexual assault before the age of 18.**
- **One study found 10 percent of children were targets of educator sexual misconduct by the time they graduated from high school.**
- **Nearly half (48 percent) of U.S. students are subject to sexual harassment or assault at school before they graduate high school (56 percent of girls and 40 percent of boys).**
- **CDC estimates that 1:6 boys and 1:4 girls are sexually abused before the age of 18.**
- **2018 study: 57.3 % of LGBTQ students were sexually harassed at school during the past year.**
- **Sexual harassment affects persons of color in significant numbers. Immigrant women are almost twice as likely to be victimized**
- **Students with disabilities are 2.9 times more likely to be sexually assaulted. More than 90 percent of all people with developmental disabilities will experience sexual assault.**

# WHY DOES THIS MATTER?

- **BECAUSE IT AFFECTS STUDENTS.**
- **87% of students who were harassed reported adverse effects**
- **37 % of girls did not want to go to school, 25 % of boys.**
- **Detrimental effects more likely to linger with females.**
- **Negative effects include missing school, dropping out of school, decreased productivity, trouble sleeping, lower grades, avoiding informal activities that enhance the educational experience, mental health problems, bullying, suicidal thoughts, future relationship difficulties.**
- **Only about half of all adolescent victims of peer-on-peer sexual assault will tell anyone about having been sexually harassed or assaulted and only 6 percent will actually report the incident to an official who might be able help.**

# WHY DOES THIS MATTER?

- **BECAUSE NOT TAKING IT SERIOUSLY CAN BE EXPENSIVE.**
- **Data gathered by Michael Patterson of Patterson Buchanan in Seattle & Portland and presented to the Council of School Attorneys in October 2016.**
- **Examples from Catholic Church sex lawsuits. 41 million in 2007 in a Catholic School Case. 8.5 million in a 2011 Episcopal School in Dallas case.**
- **Most cases are resolved by confidential settlements, but employee sex cases are by far the most expensive claims against school districts in recent years.**
- **Most cases with verdicts that exceed \$1 million involve ignoring indications that an employee may be abusing children.**

# NEW TITLE IX REGULATIONS

- **Came out in May 2020. Went into effect August 2020.**
- **Result of much public comment and debate about proposed regulations.**
- **Emphasize that Districts should take their Title IX responsibilities seriously.**
- **Districts should take actions in response to sexual harassment that are reasonably calculated to stop harassment and prevent recurrence. Districts cannot be guarantors that sexual harassment will never occur, but Districts will be held accountable for their response.**
- **Changes definition of sexual harassment**
- **Emphasis on prompt action.**
- **Already subject of much criticism on both sides**
  - **Efforts to Delay implementation have not been successful**
- **Title IX Responsibilities Expanded for District Employees**

# WHAT IS SEXUAL HARASSMENT?

- Employee conditions the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct (quid pro quo).
  - Must be an employee. Can be a one time incident
- Unwelcome conduct determined by a reasonable person to be so *severe, pervasive, AND objectively offensive* that it effectively denies a person equal access to their education program or activity
- Sexual assault, dating violence, domestic violence, or stalking (Clery Act).
  - Make sure these incidents have a connection to school



# HOW DID THE DEFINITION OF SEXUAL HARASSMENT CHANGE?

- **OLD DEFINITION (OCR Guidance)** • Unwelcome conduct • Determined by a reasonable person • To be severe, pervasive, or persistent, and to interfere with or limit a student's ability to participate in or benefit from school services, activities, or opportunities
- **NEW DEFINITION (Final Rule)** • Unwelcome conduct • Determined by a reasonable person • To be so severe, pervasive, and objectively offensive that it effectively denies a person's equal access to the recipient's education program or activity

# NOTICE OF TITLE IX

- **Coordinator(s) must be listed on District and school websites**
  - **Email address, mailing address, name and phone number published displayed on website.**
  - **Training materials must also be displayed on website.**
- **Must notify applicants for employment, students, parents or legal guardian, and employees of the protections of Title IX.**
- **Need to make sure that all employees know about the type of behavior covered by Title IX.**
  - **IMPORTANCE OF TRAINING**

# TITLE IX LIABILITY

- School district can be liable for actual knowledge of harassment if the school responds with deliberate indifference.
- Deliberate indifference: response that is clearly unreasonable in light of the known circumstances
- Can be liable when an investigation would have revealed harassment if an investigation had been conducted.
- When does the District know?
  - When any employee or official with authority:
  - Witnesses sexual harassment
  - Hears about sexual harassment or sexual harassment allegations from a complainant (i.e., a person alleged to be the victim) or a third party (e.g., the complainant's parent, friend, or peer)
  - Receives a written or verbal complaint about sexual harassment or sexual harassment allegations
  - Any other means.

# IMPORTANT CASES

## *Gebser v. Lago Vista School District, Supreme Court 1998.*

- Teacher makes inappropriate comments during book club and in class and ends up in sexual relationship with a student.
- Student does not report; comes to light when teacher and student are found having sex after other parents report inappropriate comments to their children.
- Court finds school district can't be held liable on a respondeat superior theory.
- School district must have notice of harassment and be deliberately indifferent to its existence.
- Because school district didn't have notice, no liability.

## *Davis v. Monroe, Supreme Court 1999.*

- Fifth grader alleges sexual harassment by another student. Student reports alleged harassment to teachers and a group of students approached principal with claims of harassment.
- Despite this complaints, school district took no steps to investigate or prevent their occurrence.
- Board acted with deliberate indifference since it ignored several complaints by the plaintiff and other students, and that the harassment in question was serious and systematic.

# GEORGIA CASES

## *J.F.K. v. Troup County School District, Georgia 2011.*

- **Teacher/cheerleading coach shows a lot of interest in one student that others notice, but no indication of anything physical or sexual. Father meets with administration on three occasions to ask teacher to leave son alone. Because “There [were] no reports or even hints that [the administration] was aware that [the teacher] was discussing sex, inappropriately touching [the student] offering [the student] some form of quid pro quo for sex, or using derogatory language to [the student] that related to sex or his gender,” there was no Title IX liability**

## *Conway v. Forsyth County School District, Georgia 2007*

- **Student alleges that teacher acted inappropriately. Other student witnesses dispute student's account and indicate student had a reason to fabricate allegations against teacher. District finds other witnesses more credible than student, but still issues letter of direction to teacher warning him to be careful going forward. Court finds that response was not deliberately indifferent.**

## *Sauls v. Pierce County School District, Georgia 2005*

- **Teacher had a consensual sexual relationship with a student who was over 16. Many of the encounters took place in her classroom. Teacher has previously been accused of having a similar relationship with another student, but when District investigated, both teacher and the student credibly denied. When school learns of allegations of relationship with second student, school reports to PSC and took steps to prevent contact between teacher and student.**
- **“Although...officials ultimately may have been ineffective in preventing...harassment ... they did not act with deliberate indifference.”**

## *Addison v. Clarke County School District, Georgia 2007*

- **Special education student harassed by another special education student on the bus. School District's response was appropriate—moved her to another bus, disciplined offending student, and increased monitoring of the offending student during the school day.**

# MORE GEORGIA CASES

## *Hackett v. Fulton County, 2002*

- School district did background check, but employee failed to disclose previous employer or the fact that he had been accused of misconduct with a student in the past.
- Previous complaint where teacher and another employee with whom he was romantically involved involving a student in a personal dispute between them.
- Teacher voted teacher of the year.
- Teacher approaches plaintiff about a fictional scholarship program that is an elaborate ploy to conduct sexual misconduct toward student. Student never told anyone. Harassment comes to light when another student approaches principal about scholarship program and associated inappropriate conduct.
- Court finds previous inappropriate involvement in personal life and fact that students had spent the night at teacher's home while on extracurricular trip not enough to give district notice and therefore, district is not liable under Title IX.

## *Doe as Next Friend of M.W. v. DeKalb County School District, 2018.*

- Custodian alleged to make a student uncomfortable by throwing a piece of candy at her rear end. Reported to principal who addressed it appropriately. District issued letter of reprimand and assigned custodian to a shift that would have him working when students were not present.
- Two years later, another student complains that the custodian made inappropriate comments. Principal follows protocol and noted this was the second time the employee had been accused. Employee again directed not to have contact with students and schedule was again modified to minimize student conduct.
- Custodian then sexually assaults a student off campus during the summer. That student enrolled at the school where the custodian was employed, and she was very uncomfortable. A friend reported the inappropriate behavior to her mother who calls principal. Employee allowed to resign and pled guilty to criminal charges. Court finds that giving the employee a second chance was not reasonable under Title IX.

# SPECIAL EDUCATION CASES

## *L.S. v. Tacoma School District, Washington District Court 2014*

- Two special education students who became friends and spent time outside of school. Male student becomes “increasingly infatuated” with female student and wanted to be around her as much as possible
- Teachers noticed and thought the male student may be taking it to far. One teacher noticed that the male student’s infatuation had made the female cry on at least one occasion.
- Teachers took steps to prevent male from contacting-parapro would escort one of the students between classes. Teachers met with the students’ parents and told the male student to stop calling the female student on the phone.
- Male threatens another student who he thought girl was dating. Male suspended for one day. Teacher reports serious concerns about male’s behavior to assistant principal. Principal meets with female. Teachers told not to let male leave their classroom or be unsupervised around females.
- Female student leaves classroom to use restroom. Student had come to her class even though he was supposed to be elsewhere. Male student follows her to restroom and forcibly rapes her.
- Court holds that a reasonable jury could conclude that the alleged rape was foreseeable, and that the School District’s inaction was a proximate cause.

## *M.J.G. v. School District of Philadelphia*

- ASD student who reports sexual harassment. School can’t verify, but still develops a safety plan for the student.
- Court finds school’s response unacceptable. School officials didn’t find allegations credible, but still took steps to prevent contact.
- No deliberate indifference.

# 2020 CASES

## *Karasek v. Regents of Univ. of California, 2020*

- Delayed response constitutes deliberate indifference only if it prejudices the plaintiff or if the delay was a “deliberate attempt to sabotage the plaintiff’s complaint or its orderly resolution.”

## *Doe v. Edgewood Indep. Sch. Dist., 964 F.3d 351, 361 (5th Cir. 2020)*

- Student sexually harassed by teacher. Becomes pregnant by him. School resource officer finds out and uses harassment as leverage to have sex with the student too. Court finds that school resource officer is not appropriate person to bind the school district with respect to policy and therefore school district did not have appropriate knowledge of harassment to trigger liability.

## *M.S. v. Susquehanna School District (Penn. 2020).*

- Assistant principal has relationship with 16 year old student. Rumors began to spread about relationship. School investigates, but finds no proof of relationship.
- Rumors later resurface and school gets police involved. Student confesses once police get involved. Court finds no liability even though AP who was involved in relationship knew about it.

## *Roussaw v. Mastery Charter High School, Penn. 2020.*

- Sexual assault was surreptitiously recorded. Principal learned of the incident the day it happened, but waited two weeks to tell victim’s family. Officials believed sexual assault was consensual, but the video was not.
- Evidence shows that even if school didn’t know about prior misconduct by this particular student, the school knew (1) about an incident when two students engaged in sexual intercourse in the stairwell and the male student was expelled (2) a situation where “sexual activity was so rampant among some students that girls had been found with sexual contracts stipulating to whom they wanted to lose their virginity and (3) an incident where a 7th grade student was sexually assaulted in the lunchroom.
- The Court found that “the fact that minor students were engaging in sexual intercourse, consensual or non-consensual, on school grounds and were exchanging virginity contracts constitutes severe, pervasive, and objectively offensive sexual misconduct.”



# 2020 CASES CONTINUED

## *Doe v. University of Kentucky 2020*

- Student alleges that consensual encounter with another student became nonconsensual. Reports to Title IX Coordinator. Coordinator prepares a no contact order that complainant alleges respondent violated. School investigated and found no violation. Title IX panel finds insufficient evidence of misconduct. Student claims that she was raped by another student. Court finds credible evidence of sexual harassment in that instance. Student fails to respond to University efforts to suspend him.
- Victim claims university failed to follow its procedures in resolving the complaints. Court holds that failure to follow policy alone is not a Title IX violation. Further, Courts will not second guess discipline decisions of schools.

## *Keel v. Delaware State 2020*

- College student raped by fellow college student. One of the sanctions was a no-contact order, but the Title IX Coordinator never followed through with the order. Rapist is supposedly suspended from school, but is instead allowed to continue his education remotely and runs into victim when they are both in the advisors' office.
- Court found that failure to carry out sanction (no contact order) violated Title IX and each department passing off responsibility once plaintiff raised the issue violated Title IX.
- **IMPORTANT TAKEAWAY:** Make sure you follow through—set reminders so you don't forget.

# WHO SHOULD BE THE TITLE IX COORDINATOR?

- **Someone who is Independent, Competent, Unbiased**
- **There may be a need for more than one with so much emphasis on being prompt-personnel/student coordinator**
- **Needs to be someone who is a prompt communicator.**
  - **Coordinator must be listed on District and school websites along with the**
  - **Email address, mailing address, name and phone number.**
  - **Most also notify applicants for employment, students, parents or legal guardian, and employees.**
- **Needs to be someone willing to become knowledgeable and to talk about policy with others.**

# TITLE IX CHANGES

- **Supportive Measures**
- **Need for fairness and neutrality**
- **Emphasis on due process**
- **Really need to have two investigations: how to appropriately respond to the complainant and how to deal with respondent.**
- **Divides up Title IX Responsibilities**

# HOW TO FULFILL YOUR TITLE IX RESPONSIBILITIES WELL

- Be fair and objective. Don't pre-judge.
- Be prompt.
- Be organized and thoughtful.
- Maintain Confidentiality and protect reputations.
- Don't Act with gender bias, prejudice or based on sex stereotypes
- Promptly investigate allegations of retaliation.

STEP ONE:  
Report of  
Prohibited  
Conduct

STEP ONE:  
Discuss  
Supportive  
Measures and  
Grievance Process

STEP THREE:  
Notice of  
Allegations

STEP FOUR:  
Begin  
Investigation

STEP FIVE:  
Informal  
Resolution

STEP SIX:  
Filing a Formal  
Complaint

STEP SEVEN:  
Formal  
Complaint  
Process

STEP EIGHT:  
Reaching a  
Decision

STEP NINE:  
Decisionmaker's  
Report

STEP TEN:  
Appeals

STEP ELEVEN:  
After the Appeal

# STEP ONE: TITLE IX COORDINATOR RECEIVES A COMPLAINT

- Title IX Investigator can receive a complaint of sexual harassment from anyone (not just victim). Can receive complaints in person, by mail, by telephone, by electronic mail, or by any other means that results in the Title IX Coordinator receiving the report. Report may be made at any time, including during non-business hours.
  - If employees know about harassment, they need to report and let Title IX Coordinator sort it out.
- First step is to meet with the reporter and find out the basic facts. If reporter is not the complainant, next step is to contact the complainant/victim. Make sure you have jurisdiction.
- Promptness is key

## STEP ONE CONTINUED...

- Discuss the formal complaint and grievance process. Talk through whether complainant wants a formal complaint to be filed.
- Should consider the complainant's wishes in deciding whether to file a formal complaint, but...
- Ultimate decision on whether to file a formal complaint rests with the Title IX Investigator/Coordinator. Coordinator should only initiate grievance process against the complainant's wishes if doing so is not clearly unreasonable in light of the known circumstances.



## **STEP TWO: SUPPORTIVE MEASURES**

- **New regulations require District to offer “victims” (word used is complainants) supportive measures**
- **Required even if formal complaint not initiated**
- **Non-disciplinary, non punitive individualized services offered as appropriate and as reasonably available without charge.**
- **Designed to restore or preserve equal access to school and provide safety at school.**
- **Should consider the complainant’s wishes in developing appropriate supportive measures and**

# POSSIBLE SUPPORTIVE MEASURES

Counseling

Extension of  
Deadlines

Campus  
Escorts

Modification of  
Duties

Schedule  
Changes

Leaves of  
Absence

No Contact  
Rules

Excused  
Absences

Increased  
Security

# STEP THREE: NOTICE OF ALLEGATIONS

- **Notice given simultaneously to both sides.**
- **Discusses the formal complaint process and informs the parties of the option of informal resolution.**
- **Provides a sufficiently detailed summary of the allegations**
  - **Identifies the parties**
  - **The conduct allegedly amounting to sexual harassment**
  - **Date and location of alleged harassment**
- **Notify the parties of the right to an advisor**
- **Notify the parties of the right to review and inspect evidence**
- **Remind all involved that knowingly making false statements or submitting false information is a discipline offense.**
- **Allow respondent sufficient time to prepare a response before any initial interview.**
- **Must include a statement that respondent is presumed innocent until a determination made at the end of the process by the decisionmaker.**

# STEP FOUR: BEGIN INVESTIGATION

- **Important to be objective—make sure you look at all evidence**
- **In conjunction with principal and other appropriate school officials, determine what temporary actions should be taken to keep the parties safe and facilitate a fair investigation.**
  - **Emergency removal/suspension allowed if, after an individualized safety and risk analysis has been conducted, an individual is determined to pose an immediate threat. Can also put employees on administrative leave.**
    - **Keep in mind 10 day requirement for discipline of students and employees**
    - **Must continue to serve special education students.**
    - **Employees need to be on paid suspension.**
- **Must ensure an objective evaluation of all relevant evidence**
- **Presumption of innocence in accused(respondent)**
- **If conduct is criminal, coordinate with law enforcement; delay may be appropriate while they sort it out.**

## **STEP FIVE: INFORMAL RESOLUTION**

- May be preferable because it is simpler, final and gives the parties control over the outcome
- But if you aren't able to reach an agreement then the process has been delayed.
- Using a neutral facilitator who won't take sides and will be compassionate may be beneficial.
- Make sure the parties know the limits of informal resolution.
- Find a just settlement that works with both parties.
- Not allowed for allegations of employee harassing student.

# STEP SIX: FILING A FORMAL COMPLAINT

- Formal Complaint is filed by Title IX Coordinator.
  - Prepare an investigative report that summarizes evidence at least 10 days prior to the hearing.
- Someone else serves as the Title IX Decisionmaker.
- Must give notice to respondent:
  - Notice of allegations
  - Notice of procedures
  - Must give all evidence to both sides
- District has the choice to provide a hearing, but even in the absence of a hearing, must provide each party the opportunity to submit written, relevant questions, to provide answers to these questions, and to allow follow up questions

# SHOULD THE DISTRICT HOLD AN IN-PERSON HEARING?

- Maybe in some circumstances with serious misconduct.
- Consider effect of in person hearing on complainant.
- Discipline Hearing is likely not a substitute for Title IX hearing/grievance process because of the problems with the timelines.
- Live hearings can be virtual or either party can request that the sides gather in separate rooms
- Must record the proceeding and give an audio recording or transcript upon request.

# STEP SEVEN: FORMAL COMPLAINT PROCESS

- Must remember to treat both complainants and respondents equally
  - Best way to do this is to follow the process
- Process must include an objective evaluation of all evidence. No deference should be given to the recommendations of the investigator.
- An objective evaluation involves making creditability determinations—deciding who you believe. Need to make sure that you aren't automatically leaning to one side and that respondent has a presumption of innocence.
- School must be prompt in resolving complaints, but should also allow temporary delays or extensions for good cause.



# FORMAL COMPLAINT PROCESS

- May consolidate formal complaints if:
  - Against more than one respondent
  - By more than one complaint
  - The allegations arise out of the same circumstances
- Must permit each party or their advisor to submit questions to other party and any witnesses.
- Importance of Confidentiality

# ACCESS TO EVIDENCE

- Must provide access to evidence early enough that each side can meaningfully respond to the accusations prior to the conclusion of the evidence.
- Must give both sides at least 10 days to submit a written response to the evidence before the Title IX Coordinator prepares an investigative report.
- Once investigative report is prepared, both parties must receive a copy for review and written response.
- Decision should not be reached by decisionmaker for at least 10 days after review of investigative report. During this time, both sides can submit questions and participate in the process.

# LEGAL PRINCIPLES TO KNOW IN RESOLVING FORMAL COMPLAINTS

- **Relevance: A fact that will help you reach a conclusion**
  - If a similar question is asked many times, it can be deemed irrelevant.
  - Off subject questions about past misconduct are irrelevant with a few exceptions
  - **Presumption of Innocence:**
    - Must assume that respondent is until proven more likely to be innocent than not
    - Part of importance on fairness
- **Some information is protected and cannot be forced to disclose.**
  - **Attorney-Client Privilege**
  - **Priest-Penitent Privilege**
  - **Doctor-Patient Privilege**
  - **Spousal Privilege**
  - Some of these privileges can be voluntarily waived, but if privileged info or records is disclosed, do not include it in your findings. If you can not ignore this evidence, decisionmakers should recuse themselves.
- **Need to make sure you respect 5<sup>th</sup> Amendment Rights**

# ADVISORS

- All parties are entitled to an advisor during the formal complaint process.
  - May not restrict the presence of the advisor or the choice of the advisor
  - Advisor may be, but is not limited, to an attorney.
- May place limits on Advisor's participation as long as limits apply equally to all parties.
- If an advisor refuses to comply with rules of decorum, may require a different advisor.
- Advisors can appear at live hearings and participate, even if their client does not.

# IF YOU HAVE A LIVE HEARING...

- School Districts can adopt rules of decorum for the hearings
- Ways to maintain order
  - Clearly explain the proceedings and expectations for the conduct of each party at the outset.
  - Enforce rules equally and compassionately
  - Take a break or adjourn/postpone if things get out of control.
- In person hearings require cross examinations, but refusal of a party to answer questions on cross examination should not be sole basis of determining responsibility.
- If a witness or party does not appear or testify at a hearing, you can not consider statements from the individual that does not appear (hearsay).

## STEP EIGHT: REACHING A DECISION

- Remedy for Title IX Violation is to restore or preserve equal access to schools for complainant
- Formal complaint process must describe the range of possible sanctions and remedies.
- The school must make disciplinary decisions “in the best interest of the...educational environment.”
- Burden of Proof: Recommend you follow preponderance of evidence standard
  - Means more likely than not to have occurred
  - More than 50% Chance

# REACHING A DECISION—WEIGH THE EVIDENCE

- Consider plausibility of the evidence: Does this make sense? Do I believe this testimony?
- Consider the demeanor of the witnesses
- Consider whether any corroborating evidence was offered
- Consider motivations of witnesses-Did they have a reason to lie?
- Consider whether respondent has been accused of similar behavior in the past
- No one factor should be determinative.
- Ask clarifying questions if you don't understand

# STEP NINE: DECISIONMAKER'S REPORT

- 1. Summary of Allegations
- 2. Summary of Procedures followed by District Officials investigating allegations
- 3. Findings of Fact
  - Include inculpatory and exculpatory evidence in report
- 4. Decision on Appropriate Outcome
  - Explanation of the rationale
  - Discipline sanctions to be imposed
  - Other remedial measures recommended
- 5. Summary of Appellate Procedures
  - Must make sure that findings are distributed to both sides at the same time.



# STEP TEN: APPEALS

- Appeal must be to a third person/body (Appeal Decisionmaker)
- Reasons to appeal:
  - Procedural irregularity that affected outcome
  - New evidence that could affect the outcome that was not reasonably available at the time the decision was made
  - Evidence of conflict of interest or bias in the Title IX Coordinator or Investigator that affected the outcome of the matter.
  - District may decide whether to allow an appeal based on the severity of the sanctions.
- Both sides may appeal

# HANDLING OF APPEALS

- Appeal Decisionmaker needs to understand why the parties are appealing
- Make sure appellate decision addresses all claims raised on appeal.
- Let policy and facts guide decision, not emotion, politics, or preconceptions.
- Choose thorough, detail-oriented appellate officers who are willing to receive training and willing to reverse other's decisions.
- Make sure backup appeal officer available in the event of a conflict of interest.
- This is the last chance to prevent litigation.
- Appeal Officer should be high ranking, a legal background is helpful
  - Board Members probably not the best choice.

# SCOPE OF QUESTIONING

- Questions about sexual behavior of complainant are not relevant UNLESS:
  - Used to prove that someone other than the respondent committed the alleged conduct
  - Concern specific incidents of behavior between the parties and are offered to prove consent
- Evidence of Prior Bad Acts
  - Can be offered by other party, but decisionmaker should consider whether the evidence is credible and determinative

# DISMISSING A COMPLAINT

- Must dismiss a formal complaint if allege conduct:
  - Is not sexual harassment (but investigate first to make sure )
  - Did not occur in the school
- But can still discipline under Code of Conduct even if not subject to Title IX
- May dismiss:
  - If complainant gives written notice of desire to dismiss
  - Respondent is no longer enrolled or employed
    - But exercise caution because you don't want to allow bad actors to float downstream.
  - Specific circumstances prevent the school from gathering sufficient info to reach a determination
- Must give simultaneous notice of dismissal to both sides

# BALANCING DISCIPLINE AND TITLE IX

- **Student Code of Conduct: more than 10 day suspension requires a hearing**
- **Grounds for disciplining a teacher**
  - **If more than 10 days without pay or if change to duties amount to a “demotion,” must have a hearing**
- **If you suspect that outcome of Title IX investigation will result in more than 10 day absence, then you need to have a hearing.**
- **Discipline and Title IX hearings can overlap, but have to get the written report together 10 days before the hearing—so that could be challenging. May lead to holding discipline hearing first and then having a written Title IX Grievance Resolution incorporating discipline imposed by hearing.**
- **In cases where there are questions of consensual sexual conduct, I would conduct the Title IX investigation first, and then hold discipline proceedings to avoid a violation.**

# BALANCING SPECIAL ED AND TITLE IX

- Don't forget students that fall into the “should have known” or “suspected” category for IDEA
  - Parents who have previously “expressed concern” in writing
  - Parents who have previously requested an evaluation—if they have provided a reason for requesting the evaluation
  - Students who have had concerns about their behavior discussed—kids who have gotten in trouble in the past for inappropriate behaviors.
- Stay Put would apply if the parent files a due process challenge.
- Manifestation Determinations are also required.

# STEP ELEVEN: AFTER THE APPEAL

- Decision of the appellate body is final
- Either side could file a lawsuit or bring an OCR complaint.
- Remember that Retaliation is Prohibited.
  - Retaliation includes disciplining a student for conduct that arises out of the same offense that led to the complaint
  - Title IX also allows for retaliation grievances.

# MAINTAINING RECORDS

- **Records must be maintained for seven years.**
- **Includes investigative files, appeals, resolution of complaints, and training materials**



# LET'S PRACTICE

- As you entered the room, you received your powerpoint presentation and inside was a role for you to play in your hypothetical. Information about your role should be on the other side. Please pair up in the designated individuals and complete the investigation form included in your packet.
- We'll give you ten minutes to complete, then we'll reconvene and see what we think the District should do.

**DON'T SKIP AHEAD**





# LESSONS FROM THE LETOURNEAU CASE.

- In 2002, Fualaau's family sued the Highline School District and the city of Des Moines, Washington, for emotional suffering, lost wages, and the costs of rearing his two children, claiming the school and the Des Moines Police Department had failed to protect him from Letourneau.
- Following a ten-week trial, no damages were awarded.
- Same result unlikely today.
- Importance of maintaining professional boundaries and being aware of odd situations.
- Predatory (Grooming) Behavior vs. Opportunistic behavior

# PROFESSIONAL BOUNDARIES CHECKLIST FROM MICHAEL PATTERSON AND DAVID AUSTIN

- Taking an Undue Interest in a Particular Student:
  - Having a "special" friend or a “special relationship” with a particular student.
  - Favoring certain students by giving them special privileges or inviting them to come to the classroom at non-class times.
  - Engaging in peer-like behavior with students.

# WARNING FLAGS/ EVIDENCE OF BOUNDARIES ISSUES

- Using Poor Judgment in Relation to a Particular Student:
  - Allowing him/her to get away with inappropriate behavior.
  - Being alone with the student behind closed doors.
  - Giving gifts or money to the student.
  - Being overly “touchy” with certain students.
  - Touching students for no educational or health reason.
  - Giving students rides in the educator’s personal vehicle, especially alone.
  - Frequent electronic communication or phone contacts with a particular student.
  - Becoming Involved in the Student’s Private Life.
    - Talking to the student about the educational practitioner’s personal problems to the extent that the adult becomes a confidant of the student when it is not the adult’s job to do so.
  - Initiating or extending contact with students beyond the school day.
  - Taking a particular student on outings, especially personal outings, away from protective adults.
  - Using e-mail, text-messaging, instant messaging, or social networking to discuss personal topics or interests with students.

- **Not Respecting Normal Boundaries:**
  - Invading the student's physical privacy (e.g., walking in on the student in the bathroom).
  - Inviting students to the teacher's home.
  - Visiting the student's home.
  - Asking the student to keep certain things secret from his/her parents.
- **Sexually Related Conduct:**
  - Engaging in sex talk with students (sexual innuendo, sexual banter, or sexual jokes).
  - Talking with a student about sexual topics that are not related to a specific curriculum.
  - Showing pornography to the student.
  - Hugging, kissing, or other affectionate physical contact with a student.

# QUESTIONS?

- Perry & Walters, LLP
- Albany, Georgia
- 229-439-4000
- [hhooks@perywalters.com](mailto:hhooks@perywalters.com)