

# TITLE IX INVESTIGATIONS: BEST PRACTICES AND HOW TO AVOID COMMON MISSTEPS

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# THE LAW



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# 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.*
  - Applies to any educational institution that receives federal financial assistance
  - Intended to prevent unlawful discrimination and to provide remedies for the effects of past discrimination

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# TITLE IX'S BROAD PROTECTIONS

- Protects ALL students from sex discrimination
  - No age limit; elementary to high school students are protected
  - Includes male, female, straight, gay, lesbian, bisexual, and transgender students
  - Claims may be based upon gender identity or failure to conform to stereotypical notions of masculinity or femininity
  - “Same sex” discrimination claims should be handled with same procedures as opposite sex complaints

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# INVESTIGATIONS



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# PURPOSE OF INVESTIGATION

- Gather relevant facts and relevant evidence
- Provide basis for decisions on what action, if any, to take
- Establish expectations for behavior
- Provide reassurance misconduct will be taken seriously
- Investigation different than law enforcement investigation
- Enforce and comply with your policies and procedures! It's part of your obligation and best practice to avoid liability.

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# THE NEED FOR A PROMPT INVESTIGATION: THE OCR 60 DAY RULE

- OCR states “a typical investigation takes approximately 60 calendar days”
  - This is your benchmark!
- However, OCR understands timing “will vary depending on the complexity of the investigation and the severity and extent of the harassment”
  - Timeline may be extended if needed due to law enforcement interlude;  
document basis for extending timeline
- Timeline is applicable during school year

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# THE INVESTIGATION PROCESS

- Determine who should investigate the complaint
- Determine the order in which the interviews will be conducted
- Determine how the information obtained during the interviews from the complainant, alleged harasser, and witnesses will be documented
- Ask open ended questions – who, what, where, when, why, and how
- Follow the same protocol with witnesses, including offering assurances against retaliation



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# INVESTIGATION ERRORS TO AVOID

- Failure to interview students or other eyewitnesses involved in the incident
- Failure to rule out other suspects or explanations
- Unreasonable delays
- Careless errors in facts or reports suggesting lack of focus or negligent investigation
- Hasty interviews with accused
- Decisions or discipline not congruent with known facts or actual or potential harm

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# RETALIATION

- During and following the investigation it is critical to guard against retaliation
- Any acts of reprisal, intimidation, discrimination or harassment for coming forward with a complaint could be considered retaliation
- Make sure there is an anti-retaliation policy in place and that everyone participating in the investigation (i.e., complainant, alleged harasser, witnesses, etc.) are on notice

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# TITLE IX INVESTIGATIONS: CASE STUDIES



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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
  - School immediately initiated an investigation

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# HIGH SCHOOL CASE STUDY

- Fall of 2011
  - By January 20, teacher placed on paid administrative leave and police contacted
  - Teacher resigned the next week and is criminally charged

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## **CASE STUDY: INTERIM REMEDIAL MEASURES**

1. 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
2. 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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## DISCIPLINE OF OTHER STUDENTS

3. January 25 – Mom presents names of students harassing her son
4. Principal advises student to stay off social media, and instructs assistant principal to speak with harassing students. Assistant principal reprimands students and tells them to leave student victim alone.

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## STUDENT VICTIM DISCIPLINED

5. February 2 – Student victim suspended for chewing tobacco, as observed by a coach
6. Student victim also suspended, along with other students, for viewing and showing naked pictures of female student that were on the Internet
7. Mom appeals tobacco incident, which is ultimately expunged due to investigative errors



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## WHAT HAPPENS NEXT

8. 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.
9. 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.
10. 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

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## STUDENT NOT IN SCHOOL

11. 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...
12. In March of third year of high school, student arrested for DUI and spends 72 days in jail
13. Student returns to original high school in senior year, drops out and never graduates

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## **ADDITIONAL REMEDIAL STEPS**

14. Earlier in the first year, the original high school principal 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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# COURT FINDINGS

- No retaliation or hostile environment
  - Student did not engage in protected conduct because engaging in sex with a teacher is not protected conduct
  - District only took adverse action against student for chewing tobacco and viewing pictures of a naked female student, based on “...a good faith belief, formulated through a reasonable reliance on particularized facts...”
  - District did not ignore harassment and bullying by others
  - Recommendations that student change class, schools, etc., do not constitute adverse actions

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# COURT FINDINGS

- No Title IX violation
  - Claims not because of student's sex, but because student had sex with a teacher
  - No evidence of disparate treatment of student victim
- Case dismissed by federal court, W.D. Michigan

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# COURT FINDINGS

- Affirmed by Sixth Circuit Court of Appeals
  - 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
  - No Title IX Violation
    - 22 remedial measures cited by Defendant
    - No deliberate indifference
  - No State Law Claim

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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 to 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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# TITLE IX SETTLEMENTS: MICHIGAN K-12 SCHOOLS

- Forest Hills School District: \$600,000 settled 2015
- Lansing School District: \$405,000 – two different cases, settled 2017
- Lakewood School District: \$575,000 settled 2017
- Other cases still pending
- Lessons Learned?
  - Facts and circumstances analysis
  - Train, train, train staff!
  - Develop an internal team of trained and experienced individuals to conduct investigations and monitor remedial measures and outcomes



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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?

- If you get a complaint – consider implementing appropriate interim measures
- Utilize mixed gender teams, if possible, to conduct your investigation
- Complete your investigation in a timely manner – 60 days is the goal
- Take appropriate remedial action if a violation of your policies is found
- Appropriately communicate your findings
- Document your findings and remedial action
- Develop a public communications/relations strategy

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# QUESTIONS?



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# THANK YOU

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