

Investigation Procedures A to Z



Ingham Intermediate School District

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CLARK HILL

TOPICS TO BE COVERED

- Recognizing the Need to Investigate (When)
- Understanding the Purpose of an Investigation (Why)
- Best Investigator (Who)
- Preparation (What)
- Order/Place of Interviews (Where)
- Conducting Effective Interviews (How)
- Documentation Requirements/Best Practices
- Informal Investigations
- Points to Remember/Prevention Tips



YOU ARE AGENTS OF THE BOARD

- As members of the District Administrative team, you are an agent of the School Board.
- What you say - don't say, do - don't do, binds your employer the school district.
- Under Title IX, can be deemed to have "actual knowledge."
- Your actions create or reduce liability exposure for the District/School Board/possibly yourself.



LEGAL PRINCIPLE OF AGENCY

- **There is a rhyme and reason for all these 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, if not more importantly, 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.

LEGAL PRINCIPLE OF AGENCY

- When an Administrator receives information about a 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 Administrators are absolutely critical in protecting the district against potential liability exposure.



CORE COMPETENCY

In today's world, being able to effectively conduct an effective investigation, is a core competency for a building administrator.



UNDERSTANDING THE PURPOSE (WHY)

- **Why have policies and procedures?**
- **It's the right thing to do – a student's well-being or an employee's job is on the line**
- **Obtain information that may assist the District in defending against future claims**
- **Act of investigating may assist the District in avoiding liability!!!**
 - One of the few situations under the law in which actions taken by the school *after* alleged misconduct has occurred may absolve the school of, or limit, its liability – **VERY IMPORTANT**

RECOGNIZING THE NEED TO INVESTIGATE (WHEN)

- **Many Circumstances May Prompt an Investigation**
 - A formal (or informal) complaint
 - Co-worker/student reports of questionable conduct
 - Employee/student misconduct including violation of rules or policies
 - Theft or suspected theft
 - Drug use or activity
 - Workplace accidents
 - Student allegations / Student disclosures
 - Anonymous complaints



BEST INVESTIGATOR (WHO)



- **Internal or External Investigator**
- **Skill-Set to Conduct the Investigation**
 - Ability to judge credibility / Viewed as credible / Common sense
 - Effective interviewing skills / Ability to think on their feet and ask follow-up questions
 - Ability to be impartial, objective, non-judgmental, and understanding
 - Ability to determine the scope of the investigation / decipher what's relevant
 - Knowledge of school policies / employment or other issues
 - Time to conduct a prompt and thorough investigation
 - Ability to make a decision (ex: Title IX) - Have to be tough, but fair

PREPARATION (WHAT)

- **Clear understanding of the allegations**
 - Do not make any assumptions about the truth of the allegations
- **Gather relevant written policies, contracts, handbooks, rules**
 - If a bullying, discrimination or harassment case, make sure to collect all applicable policies, rules and forms
 - Review all relevant collective bargaining provisions
- **Determine what evidence is relevant and necessary**
 - What are you are trying to prove? – Develop a plan
 - What documentation do you need? (Emails, phone records, videos, etc.)
- **Consult with others (Administration, HR, Board or Legal)**
 - Need to understand objectives

PREPARATION (WHAT)

- **Review specific contract provisions**

- Probationary Employee
- Probationary Teacher
- Definitions of Discipline
- Progressive Discipline Language
- Restrictions on Employee files
- Language expunging disciplinary reports
- Restrictions Concerning Complaint Handling and Investigations
- Grievance / Arbitration Process & Powers



- **Review BOE policies**

- Anti-Harassment, Discrimination, Title IX, Bullying, Acceptable Use / Technology
- Athletic Code of Conduct

PREPARATION (WHAT)

- **Be aware of the rights of the person you are interviewing**
 - Right to representation / adviser
 - NO Right to Attorney (unless criminal charges pending – *Garrity* Notice, or Title IX investigation)
 - Weingarten rights – check collective bargaining agreement
 - How to handle waiver of right to union representation
 - Prior notice to union representative
 - Understand the Role of Union Rep beforehand
- **Be aware of any applicable timelines**
- **Make any necessary preliminary decisions**
 - Should employee be placed on leave? Paid or Unpaid?
 - Should student be removed via Emergency Removal?
- **Report to Law Enforcement?**



PREPARATION (WHAT)

- **Investigate Promptly – won't get better with time**
 - Avoid unnecessary delay
 - Whenever possible, begin the investigation immediately
 - Prevents collaboration / forgetfulness
 - Continue the investigation without delay (if delay, document it and notify the parties)
 - Work diligently to conclude the investigation as quickly as possible

- **Give minimal notice of interview(s)**
 - Title IX: notice to parties = 24-48 hours



PREPARATION (WHAT)

- **Determine order of interviews**
 - Complainant
 - Subject of the complaint – get the facts
 - Witnesses for Complainant
 - Respondent
 - Respondent witnesses
 - Follow up interviews (if necessary)
- **Don't "wing it"**
- **Prepare open-ended, unbiased questions**
 - Have an outline
 - Review questions with HR or legal counsel
 - Have copies of BOE policy / handbook available



PLACE/ORDER (WHERE)

- Select interview space
- On-site or off-site?
- Is it private?
- Is it quiet?
- Interruptions likely?
- Place to write?

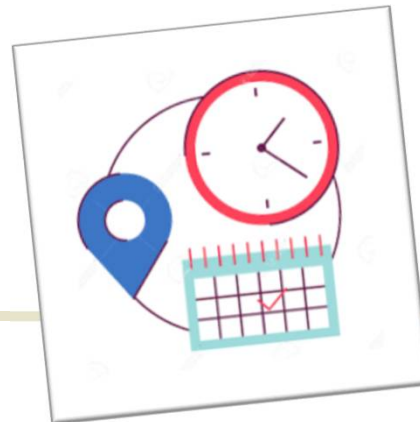


TITLE IX: WRITTEN NOTICE TO PARTIES

1. The actual allegations and facts that would constitute sexual harassment.
2. The presumption of innocence.
3. A statement that the parties are entitled to adviser of their choice.
4. A statement that the parties can request to inspect and review certain evidence.
5. Information regarding the code of conduct and false statements.

TITLE IX: WRITTEN NOTICE TO PARTIES

- Include notice to the parties of the school's grievance process, which must comply with the 10 items under Final Rule.
- Whether there is an opportunity to engage in informal resolution. (excluding when Respondent is an adult).
- The school has to provide written notice of the date, time, location, participants, and purpose of all hearings, interviews, or other meetings, with sufficient time for the party to prepare.



COMPLAINANT INTERVIEW

- **Interviewing the complainant**
 - Explain the purpose of the interview and the District's commitment to enforcing its policies and complaint procedure including the prohibition against retaliation, if applicable.
 - If the complainant is not familiar with you, introduce yourself, and try to put him/her at ease.
 - Explain that the information from the complainant will be shared with others on a need to know basis so that the complainant understands that the information will not be held strictly confidential.

COMPLAINANT INTERVIEW

- **Interviewing the complainant**

- Obtain information from the complainant about the incidents upon which the complaint is based.
- Obtain detailed information about each incident by eliciting the six “Ws” and one “H”: who, what, when, where, why, witnesses and how.
 - Ask the complainant if he/she has any notes or other documentary evidence (*i.e.*, text messages, social media, etc.).
- Obtaining the details or specifics of each incident is critical because the factual basis for complaint will determine the scope of the investigation.



UNDERSTAND THE CONTEXT

- **Interviewing the complainant**
 - Obtain information about the complainant's response to the reported behavior, if any
 - Obtain information about the prior interactions or relationship between the complainant and alleged respondent/accused, including whether there are prior unreported incidents or prior interactions of a similar nature.
 - Obtain information about the individuals with whom the complainant discussed the conduct with before reporting the conduct.

FULLY EXPLORE FACTS AND SCOPE OF KNOWLEDGE

- **Interviewing the complainant**

- If the complainant did not immediately report the incidents, ask why.
- Ask the complainant what action he/she would like the District to take to resolve the complaint.
- Ask who he/she thinks you should interview. If the reason for interviewing a suggested individual is not immediately apparent, ask why.
- Before concluding the interview, ask the complainant if there is any other information that he/she would like to share or believes is relevant to the complaint.
- Ask the complainant to keep the investigation and information discussed during the interview confidential (exception: T9 "Gag Orders").
- Encourage the complainant to contact you during the investigation if he/she has any questions or concerns about retaliation. Provide BOE policy.

PREPARATION (WHAT)

- **Witnesses identified by the Complainant**
- **Review tangible evidence relevant to the investigation that you have obtained (e.g., social media; emails; surveillance tapes)**
 - Corroboration
 - Relationship to Complainant/credibility analysis
 - Do homework before confronting the Respondent/Accused



PREPARATION (WHAT)

- **The Respondent**

- Rebuttal
- His/her side of the story
- Afford an opportunity to lie
(ex: Have you ever contacted X on social media?)
- Collect any documentary evidence



- **Rebuttal witnesses identified by the Respondent**

- Corroboration
- Relationship to Respondent/credibility analysis

- **Do you need to go back to the Complainant?**

INTERVIEW RESPONDENT/ACCUSED

- **Inform of District policy and expectation of conduct.**
- **Discuss the incidents that form the basis of the complaint and ask the Respondent/accused to respond as you identify each incident.**
 - When discussing the incidents, disclose all of the details provided by the complainant and do not omit information.
 - Obtain detailed information from the respondent/accused by eliciting the six "Ws" and one "H": who, what, when, where, why, witnesses and how.
 - Obtain all documentation or other evidence the Respondent/accused has supporting the response to the allegations.

INTERVIEW RESPONDENT/ACCUSED

- Obtain information about his/her prior interaction with the complainant.
- If the Respondent/accused claims the allegations are false, ask why the complainant would lie or has reason to fabricate the allegations.
- Ask who he/she thinks you should be interview. If the reason for interviewing a suggested individual is not immediately apparent, ask why.



INTERVIEW RESPONDENT/ACCUSED

- Before concluding the interview, ask if there is any other information that he/she would like to share or believes is relevant to the investigation.
- Ask to keep the investigation and information discussed during the interview confidential (ex: T9 "Gag Orders").
- Encourage him/her to contact you during the investigation if he/she has any questions.
- Reiterate the District's policy against retaliation. Provide BOE policy.



CONDUCTING INTERVIEWS IN GENERAL (HOW)

- **Explain the confidentiality rules that apply; but cannot guarantee 100%**
 - Only disclose when necessary; “need to know” basis
 - Request the same of interviewee
- **Explain the rules against retaliation**
 - Very important
 - Fear of retaliation may cause witnesses to clam up
 - Tolerating retaliation may give rise to liability
- **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 – sign and date statement

CONDUCTING INTERVIEWS IN GENERAL (HOW)

- Take verbatim notes
- Ask open-ended and non-leading questions that cannot be answered with a simple “yes” or “no”



Example:

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

Response: Yes.

Leading: You were probably angry when Jenny said that about you.

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

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

Follow-up: WHY?

CONDUCTING INTERVIEWS IN GENERAL (HOW)

- **Carefully listen to the answers; follow up if needed.**
 - Don't be glued to your outline; be flexible.
- **REMEMBER - Clarify conflicting or confusing information.**
 - Are you saying...
 - Do you mean...
- **Did they answer the question – if not ask again!**
- **Watch for non-verbal behaviors and note them.**
- **Always provide BOE policy and make sure to explain it.**
- **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?”

CONDUCTING INTERVIEWS IN GENERAL (HOW)

- **Witness interviews (Complainant / Respondent)**
 - 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, how questions



COMMON MISTAKES MADE DURING 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 yesterday with Sue?"

COMMON MISTAKES MADE DURING 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 100% confidentiality.**
- **Demonstrating bias.**
 - *e.g.* – suggesting to the Complainant that you are not taking the Complaint seriously.
 - *e.g.* – suggesting to the Respondent/accused that you do not believe the Complainant.
- **Failing to document the interview.**
- **Failing to sign and date each witness statement.**

HOW DO YOU ASSESS CREDIBILITY OF PARTIES/WITNESSES?

- **Through Corroboration!**
- **If there are conflicting versions of events, and credibility must be assessed, consider:**
 - Whether the party / witness is believable and whether the account provided makes sense. (*Plausibility*)
 - Did the party / witness appear to be telling the truth? (*Demeanor*)
 - Did the party / witness have a reason to lie? (Status [*i.e.*, alternative ed. student] is not a reason to lie.) (*Motive*)
 - Do other witness accounts or documentary evidence back up the party's / witness' account? (*Corroboration*)
 - What is reputation of party / witness for trustworthiness and veracity? (*Past Record*)

ROADBLOCKS DURING AN INVESTIGATION

- **If a party is uncooperative:**

- Encourage participation by explaining the investigation process, answering any questions, and reiterating the prohibition against retaliation (if applicable)
- Provide BOE policy
- Enlist union rep in explaining need to respond
- An employee can be compelled to cooperate in an investigation and it is appropriate to discipline employees who refuse to cooperate
- Student / Title IX considerations



ROADBLOCKS DURING AN INVESTIGATION

- **If a witness is uncooperative:**

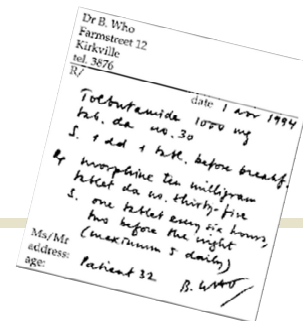
- Try to determine reason for lack of cooperation
- Often concerned about how it will look to peers
- Witness can be uncomfortable and afraid of retaliation
- Don't want to get involved
- Nothing will change anyway



- **Reassure witness that they are doing the right thing.**
- **Provide reassurance about how to handle actual or perceived retaliation – give names and numbers of who to contact if retaliation is suspected. Give BOE policy.**

DOCUMENTATION IS KEY!

- **Recording the Information collected during an Investigation:**
 - Determine at the outset how information will be documented
 - Options to document interviews include:
 - Handwritten notes
 - Typed summaries for signature by the witness
 - Allow witness to make changes before signing
 - Statements written by each witness
 - Tape record?
 - If handwritten notes are used, before concluding the interview, review notes with witness to ensure all information was captured accurately
 - Ask witness to initial notes
 - Handwritten notes should be legible



DOCUMENTATION IS KEY!

- **Create a separate (confidential) file for the investigation**
- **The file should include all documents and other information gathered during the investigation**
 - The allegation/complaint
 - Notes
 - Evidence of all contacts or attempts to contact witnesses
 - Documents and physical evidence
 - Witness statements
 - Investigation Report
 - Documentation that parties received the outcome
 - **Title IX Considerations**



COMMUNICATIONS LOG

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

MAKE A DECISION (EXCEPT TITLE IX)

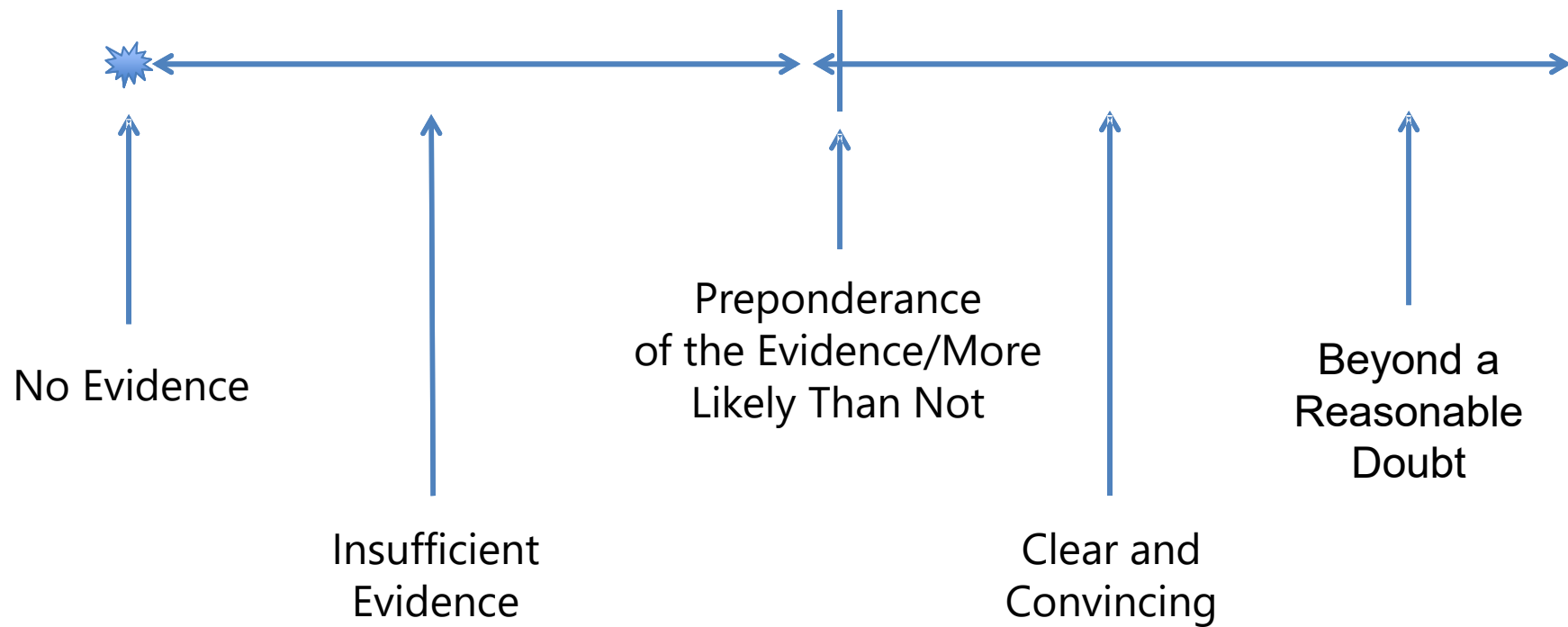
- **Make a Determination**

- Review all of the evidence, including witness interviews
- If necessary, follow up with additional interviews or other activity needed to conduct an adequate investigation
- 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).
- Consider and weigh all the evidence and make a decision . . . Based on???

WHAT IS YOUR BURDEN OF PROOF??

EVIDENCE THRESHOLDS

Evidentiary Standards



PUT IT ALL TOGETHER

- **Remediation**

- Determine what, if any, correction action or remedial measures are necessary
- Always consider policies and practices
- Avoid a Discrimination Argument – “You treated me different!”

- **Consider/Discuss how to organize and prepare the Investigation Report**

- **Prepare the Investigation Report**



INVESTIGATION REPORT

- **The Investigation Report**

- **The investigation report is the one comprehensive document summarizing the investigation, which includes:**
 - Background information
 - An explanation of the situation prompting the investigation
 - How the investigation was carried out
 - Witnesses interviewed
 - Documentary evidence reviewed
 - Conclusions and basis for findings and discipline recommendation
 - Consider attaching significant documents to report



TITLE IX INVESTIGATION REPORT REQUIREMENTS

- Investigator needs to prepare a written investigative report on the allegations of the formal complaint.
- A school has to give the parties at least 10 days to respond to the report and supporting evidence in writing. If a response is submitted, the investigator must consider that response before finalizing the investigative report.
- The investigative report can then be finalized and provided to the parties and decision-maker.



INVESTIGATION REPORT

- **Writing the report**

- If creating a first person statement, use the exact words used by the witness.
- If providing a summary with quotes, assure that the information in quotes is in the witness's exact words.
- Make sure you know how to contact the witness in the future if needed.
- Remember to date each document and place page numbers on each page.

- **Witness Statements**

- Dated
- Signed
- Legible



INVESTIGATION 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?

OUTCOME TO PARTIES

- **The outcome of an investigation should be communicated to the party(ies) in writing**
- **Deliver outcome simultaneously!**
- **What should be in outcome letters:**
 - Summary of Allegations
 - Summary of Investigation
 - Summary of Findings
 - Any sanctions/remedial measures to be taken
 - Protection against retaliation (if applicable)
 - Appeal?



TITLE IX DETERMINATION REQUIREMENTS

- **An elementary or secondary school must give the parties equal opportunity to submit relevant, written questions to each other, before the decision-maker reaches a determination. *(i.e. second 10 day requirement under Title IX Final Rule)*.**
- **The decision-maker must then ask the questions to the party and record the answers, unless the decision-maker determines the questions are not relevant to the investigation.**
- **Questions and evidence about a complainant's prior sexual history are not relevant, with two limited exceptions:**
 - Offered to prove that someone other than the respondent committed the alleged misconduct; or
 - Offered to prove consent.

TITLE IX DETERMINATION REQUIREMENTS

- **After the evidence has been weighed, the determination has to be written. It must include:**
 1. The portion of the school's policies that was violated.
 2. A description of the procedural steps that were taken by the school on the way to getting to that point.
 3. A findings of fact section.
 4. A section that draws conclusions after applying the facts to the portion of the school's policy that applies.
 5. A statement and rationale for the ultimate determination of responsibility.

TITLE IX DETERMINATION REQUIREMENTS

6. Any disciplinary sanctions that the school will impose on the respondent, and state whether the school will provide remedies to the complainant.
7. A statement and rationale for any remedies for the complainant, addressing how those remedies will restore or preserve equal access.
8. A statement of the recipient's procedures, a statement that the parties have a right to appeal the initial determination regarding responsibility, and the permissible bases for appeal.

INFORMAL INVESTIGATIONS

- Some minor incidents can be resolved through confrontation and/or intervention.
- Restorative Justice/Circles/Mediation.
- OCR endorses and encourages informal resolution, and we believe it is a best practice, when voluntary. Check BOE policies.
- Title IX Considerations.



INFORMAL INVESTIGATION PROCEDURE

- Advising the student about how to communicate the unwelcome nature of the behavior to the accused.
- Distributing a copy of relevant BOE policies (anti-harassment / bullying / Title IX policy) as a reminder to the parties that the conduct is prohibited and the consequences for engaging in the prohibited conduct.
- If both parties agree, the Title IX / Compliance Officer (or designee) may arrange and facilitate a meeting between the parties to work out a mutual resolution.
- Other remedies as appropriate.

INFORMAL INVESTIGATION PROCEDURE

- **Just because it's informal, doesn't mean you can skip formal documentation!**
 - Document student's willingness to forgo filing a formal complaint.
 - Document discussions with both parties and parents/union (if applicable).
 - Document actions taken to remedy the complaint.
 - Document any discipline imposed as a result.
 - Follow up via written correspondence.
 - Keep Title IX Coordinator / Compliance Officer "in the loop" to assure procedures are followed.
 - **Title IX:** Supportive measures must still be considered!

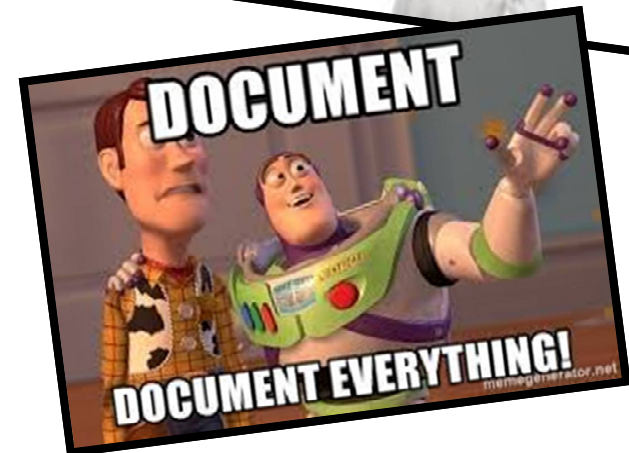
INVESTIGATION ERRORS TO AVOID

- Failure to interview witnesses or eyewitnesses involved in the incident.
- Failure to rule out other suspects or explanations.
- Unreasonable (and undocumented) delays.
- Careless errors in facts or reports suggesting lack of focus or negligent investigation.
- Hasty interviews with complainant or respondent.
- Decisions or discipline not congruent with known facts or actual or potential harm or consistent with similar situations.
- Failure to notify parties of results in writing.
- **WORST ERROR = PROCEDURAL ERROR!!**



POINTS TO REMEMBER

- Preparation is the key
- Investigate promptly
- Listen to both sides
- Consider alternative explanations
- Make sure questions are understood
- Get answers
- Ensure confidentiality when possible
- Document everything



PREVENTION TIPS

- Administrators should be trained to document any complaint and to document their action, decision-making and investigation of that complaint. If the Administrator decides to take no action, their reasons for their decision should be adequately explained and documented.
- Principals, assistant principals, site supervisors and other administrators should be encouraged to involve the central office administrators (or legal counsel) if they have any questions or doubts about how to proceed in an investigation.
- The school district should train all administrative staff regarding investigations and documentation procedures and the school district's board policies and expectations. All training sessions should be well documented.

PREVENTION TIPS

- Send a clear and consistent message that complaints will be promptly investigated and addressed.
- Review district's policies and procedures for consistency, procedure and definitions. Use these to your advantage, especially new definitions under **Title IX!**
- Investigate **PROMPTLY**. Establish who is in charge of investigating allegations, and what is the procedure for filing a complaint. Keep your chain of command informed.
- Do not ignore behavior or make assumptions it will stop, it was a "one time incident" or it is not a violation of Board policy or the Code of Conduct.

QUESTIONS?



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- School law issues are complex and fact specific; when in doubt, consult with your legal counsel!

THANK YOU!



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