TITLE IX

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Title IX: New Regulations

- On May 19, 2020, the Secretary of Education amended the regulations implementing Title IX of the Education Amendments of 1972.
- These new regulations take effect on August 14, 2020.
- The updates contain many substantial and procedural changes, including new definitions, mandated training for all Title IX officials, a formal grievance process, and multi-investigator models.

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Background Overview

- What is Title IX?
  - Federal Civil Rights Statute that prohibits discrimination on the basis of sex in education programs and activities that receive Federal financial assistance.
- What are the objectives of Title IX?
  - 1) To avoid the use of Federal resources to support discriminatory practices;
  - 2) To provide individual citizens effective protection against those practices.
    - *Cannon v. University of Chicago, Supreme Court, 1979*

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The Final Regulations

- The regulations have the full effect of law and override any past guidance.
- These regulations are legally binding and therefore provide the mechanisms that schools must use to respond to allegations of sexual harassment.

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Key Terms

- Complainant – individual who makes complaint of Title IX Incident (formerly alleged victim)
- Respondent – individual who is accused of committing Title IX Incident (formerly alleged perpetrator)
- Recipient – Recipient of Federal Funds who Title IX applies to; will be used interchangeably with "school" or "entity"

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Training Requirements

- All employees at K-12 schools are required to report Title IX sexual harassment.
    - Additionally, employee reporting requirements under the CPSL and School Code are still in effect.
- Title IX officials at a school must receive training on Title IX and its regulations.
- The training includes the definition of sexual harassment, how Title IX applies to the school's programs and activities, how to conduct a formal Title IX grievance process, and how to be an impartial decisionmaker including how to avoid prejudgment of the facts at issue, conflicts of interest, and bias.

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Discrimination on the Basis of Sex: Defined

Sexual harassment is defined as:

1. Quid Pro Quo Harassment: An employee of the School conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct.
2. Unwelcome conduct determined by a reasonable person to be so severe, pervasive, **and** objectively offensive that it effectively denies a person equal access to the recipient's education program or activity;
3. "Sexual assault" as defined in the 20 U.S.C. 1092(f)(6)(A)(v),
4. "Dating violence" as defined in 34 U.S.C. 12291(a)(10),
5. "Domestic violence" as defined in 34 U.S.C. 12291(a)(8), or
6. "Stalking" as defined in 34 U.S.C. 12291(a)(30)

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Sexual Assault: Defined

- Sexual Assault is defined as an offense that meets the definition of Rape, Fondling, Incest or Statutory Rape as defined in the FBI's Uniform Crime Reporting System.

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Dating Violence: Defined

- Dating violence is defined as violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the victim. The existence of such a relationship shall be determined based on the reporting party's statement and with consideration of the length of the relationship, the type of relationship, and the frequency of interaction between the persons involved in the relationship.
- For the purposes of this definition dating violence includes, but is not limited to, sexual or physical abuse or the threat of such abuse.
- Dating violence does not include acts covered under the definition of domestic violence.

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Domestic Violence: Defined

- A felony or misdemeanor crime of violence committed
- by a current or former spouse or intimate partner of the victim.
- by a person with whom the victim shares a child in common.
- by a person who is cohabitating with, or has cohabitated with, the victim as a spouse or intimate partner.
- by a person similarly situated to a spouse of the victim under the domestic or family violence laws of the jurisdiction in which the crime of violence occurred.
- by any other person against an adult or youth victim who is protected from that person's acts under the domestic or family violence laws of the jurisdiction in which the crime of violence occurred.

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Stalking: Defined

- Engaging in a course of conduct directed at a specific person that would cause a reasonable person to
  - fear for the person's safety or the safety of others; or
  - suffer substantial emotional distress

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Educational Program or Activity: Defined

- Only includes incidents that occur in the United States during district-owned or district-sponsored activities such as educational trips organized by the district
- Includes locations, events, or circumstances over which the School exercised substantial control over both the respondent (alleged perpetrator) and the context in which the harassment occurred.

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Incidents Off School Grounds

- Title IX obligations will extend to incidents that do not occur in the school building if:
  - **The incident occurs as part of the school's operations. 20 U.S.C. 1687; 34 CFR 106.2 (h); or**
  - **The school exercised substantial control over the respondent (alleged perpetrator) and the context of the alleged sexual harassment that occurred off of school grounds; or**
  - If the incident occurred at an off-campus building owned or controlled by a student organization recognized by a postsecondary institution

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Reminder

- The regulations do not limit a school from addressing conduct outside of the previous definitions
- A school can and should ensure that even when an incident does not meet the definition of sexual harassment under Title IX, there are no other laws or school policies/code of conduct violations
  - Bullying
  - Other tiered offense
  - Misconduct

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Response to Sexual Harassment

- A school with actual knowledge of sexual harassment in an education program or activity of the recipient against a person in the United States, must respond promptly in a manner that is not deliberately indifferent.
- Actual knowledge is notice of sexual harassment or allegations of sexual harassment to a recipient's Title IX Coordinator or any official of the School who has authority to institute corrective measures or an **any employee of the school**

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School Liability

- A school will be found liable under Title IX if the school had actual knowledge of the incident and was deliberately indifferent in its response
  - Deliberate Indifference: A school acts with deliberate indifference only when it responds to sexual harassment in a manner that is clearly unreasonable in light of the known circumstances
    - A school who acts with deliberate indifference when they have actual knowledge will be found to commit intentional discrimination
  - A recipient is deliberately indifferent only if its response to sexual harassment is clearly unreasonable in light of the known circumstances

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Title IX: Personnel

- These roles must be filled by different individuals
- Designated Title IX Personnel dealing with a complaint must be free of conflicts of interest regarding parties to the complaint

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How to Report Sexual Harassment

- School Policy must provide guidelines for how to report incidents of Sexual Harassment
  - Note: failure to follow exact guidelines does not free school of obligations
- Public Website must contain the name and contact information for the Title IX Coordinator
- District Policy must be published on school website and within code of student conduct/code of employee conduct
- These should be provided and accessible to all who are entitled to Notice of Provisions
  - Students, Employees, Contractors, Parents, etc.

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Formal Complaint

- Defined as: document filed by a complainant or signed by the Title IX coordinator alleging sexual harassment against a respondent and requesting that the school investigate the allegations of harassment:
  - The complaint must state :
    - At the time of filing, the complainant must be participating in or attempting to participate in the education program or activity of the school
    - May be filed in person, by mail, by email, by any additional method designated by the school
- Absent a written document signed by the complainant alleging sexual harassment and requesting and investigation, the investigation process may not begin.

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Third Party Complaints

- A third party may still make an allegation of sexual harassment on behalf of another to the Title IX Coordinator
- In this incident, if the alleged victim (would be complainant) does not come forward to file a formal complaint, the complaint can be filed and signed by the Title IX coordinator to initiate an investigation and adjudication of sexual harassment allegations
- However, the regulations prohibit retaliation against any person exercising rights under Title IX **including the right to not to participate in a Title IX grievance process**

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Response to Sexual Harassment

- Once a school has actual knowledge of sexual harassment or a report of sexual harassment, the school must immediately respond:
  - The response must be prompt
  - The initial complaint and response must be confidential
  - The response, via the Title IX Coordinator, must provide immediate supportive measures
  - Must initiate the grievance/investigation process

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Supportive Measures

- Defined as: individualized services reasonably available that are non-punitive, non-disciplinary, and not unreasonably burdensome to the other party while designed to ensure equal educational access, protect safety, or deter sexual harassment.
- Such measures are designed to restore or preserve equal access to the education program or activity without unreasonably burdening the other party, including measures designed to protect the safety of all parties or the recipient's educational environment, or deter sexual harassment.
  - Examples:
    - Counseling, extensions of deadlines or other course-related adjustments, modifications of work or class schedules, safety plan, review of IEP/504 Plan where applicable
- The school must maintain as confidential any supportive measures provided to the complainant or respondent, to the extent that maintaining such confidentiality would not impair the ability of the recipient to provide the supportive measures.

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Supportive Measures

- The final regulations do prescribe that a recipient's Title IX Coordinator must remain responsible for coordinating the effective implementation of supportive measures.
- "The Title IX Coordinator must serve as the point of contact for the affected students to ensure that the supportive measures are effectively implemented so that the burden of navigating paperwork or other administrative requirements within the recipient/school's own system does not fall on the student receiving the supportive measures".
- Regulations require that the grievance process describes the range of supportive measures available.
- **May or may not continue after a finding of non-responsibility**
- Document: If a recipient/school does not provide a complainant with supportive measures, then they must document the reasons why such a response was not clearly unreasonable in light of the known circumstances.

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Emergency Removal as Supportive Measure

- Schools are authorized to remove a respondent from the school's education programs or activities on an **emergency basis**, with or without a grievance process pending, as long as notice and opportunity to challenge the removal is given to the respondent following the removal.
  - Consult with Solicitor prior to emergency removal under Title IX
- The decision to initiate an emergency removal will also be evaluated under the deliberate indifference standard.

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Emergency Removal

- An emergency removal may be appropriate when there is **an immediate threat to the physical health or safety of any students or other individuals arising from the allegations of sexual harassment.**
- Prior to the emergency removal, a school must
  - 1. Conduct an individualized safety and risk analysis
    - Must be more than a "generalized, hypothetical, or speculative belief that the respondent may pose a risk to someone's physical health or safety" and
    - Must be individualized with respect to the particular respondent and must examine the circumstances "arising from the allegations of sexual harassment"
  - 2. Determines that an immediate threat to the physical health or safety of any student or other individual arising from the allegations of sexual harassment justifies removal, and
  - 3. Provides the respondent with notice and an opportunity to challenge the decision immediately following the removal.

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Informal Resolution Process

- Informal resolution process **may** be offered so long as both parties give voluntary, informed written consent to participate in informal resolution. A party can decide at any time before final determination to no longer proceed with the informal resolution process.
  - This is not an available option for claims involving sexual harassment by an employee against a student
  - This must be managed by an informal resolution facilitator who must be trained, unbiased and impartial
  - May not be offered unless a formal complaint is filed
- An informal resolution may include arbitration, mediation, or restorative justice – these options are left intentionally broad and flexible

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Informal Resolution Process

- No requirement that a school establish or offer an informal resolution process
- It is available if and only if:
  - A formal complaint has been filed
  - School determines that informal resolution is appropriate
  - Both parties provide fully informed, voluntary, written consent for informal resolution

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The Investigation

- Schools must now determine which standard of proof they will require for claims of sexual harassment:
  - Preponderance of the evidence: "More likely than not" to have occurred.
  - Clear and convincing evidence: Higher than Preponderance of the evidence, but less than beyond a reasonable doubt. This standard requires that the event alleged is "highly probable"
- Schools are likely currently using the preponderance of the evidence standard

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The Key Players – Title IX Coordinator

- Employee designated to ensure compliance with regulations and receive complaints
  - Must identify the Name, Title, Office Address, Email address, and telephone number of this employee on the school's website and post all Title IX materials
  - Monitor schools compliance with Title IX
  - Ensure training is provided
  - Coordinate investigations and resolutions of reports
  - Ensure appropriate actions to eliminate sexual harassment to prevent recurrence
  - Review efforts to ensure the educational setting is free from sexual harassment

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Title IX Coordinator Continued

- Contacts each complainant to discuss supportive measures
- Considers the complainants wishes regarding such measures
- Explains formal complaint process to complainant
- Treats complainants and respondents equitably
- Implement remedies where there is a founded case of sexual harassment
- May impose disciplinary sanctions

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Title IX Coordinator Continued

- The Title IX Coordinator may (and should) have a trained designee/designees who have the skill and ability to execute the duties of the Title IX Coordinator in the event that the Title IX Coordinator is unable to do so
- Title IX Coordinators should not have other job duties that may create a conflict of interest
  - Example: Coach, Solicitor

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Investigator

- Assigned by the Title IX Coordinator
  - Impartial, unbiased and free from conflicts
  - Oversees prompt gathering of facts based on the filing of the formal complaint
  - Communicates with all participants throughout the investigation
  - Provides notice of delay
  - Understands "relevance" and "standard of proof" in order to create a report that summarizes relevant evidence

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Decision Maker

- Must understand (via training) how to accurately evaluate the relevant evidence
  - Evidence is relevant if:
- Must use independent judgment
- Must be free from conflicts of interest, or bias for or against complainants or respondents and receive special training on impartiality

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Initiating the Investigation

- When a school begins an investigation, it must provide both the complainant and respondent with notice
  - Schools Grievance Process
  - Must include whether there is an opportunity to engage in informal resolution; if this is an option it must be included in initial notice
- Initial Notice must contain:
  - Key details of alleged sexual harassment of incident (date/location; alleged misconduct; who was involved
  - Statement that the respondent is presumed not responsible and can only be found to be responsible following investigation process

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Initial Notice

- Initial Notice must also contain:
  - Parties are entitled to an advisor of their choice
    - Can be attorney but does not have to be
  - Parties may request to inspect and review all evidence
  - Must contain information regarding prohibition against providing false statements or providing false evidence
- Initial Notice **must** be provided prior to the initiation of and investigation, and give respondent sufficient time to prepare before an investigatory interview

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Mandatory Dismissals of Complaints

- A school must dismiss a complaint if:
  - Conduct described does not meet definition of sexual harassment;
  - Conduct alleged did not occur in the school's education program or activity;
  - Conduct alleged did not occur in the United States

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Discretionary Dismissals

- A school **may** dismiss a complaint or some allegations if:
  - Complainant wishes to withdraw formal complaint or some allegations
  - If respondent is no longer enrolled or employed by school
  - Or if school is prevented from gathering evidence sufficient to reach a determination about allegations
- But may still proceed

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Dismissal Process

- When a complaint is dismissed in its entirety or in part, the school must promptly send written notice of the dismissal and the reason for dismissal to the parties
- Both parties have a right to appeal this decision
- Must include appeal process in dismissal notice

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Investigation

- Gathering Evidence:
  - Witness interviews and statements
  - Review of video footage
  - Review of screen shots that may be relevant
  - May review outside reports if they are provided, but school does not otherwise have right to access such reports (medical report, police report, etc.)
  - Any other evidence that either party provides
- Both parties must be given the opportunity to provide evidence, have access to an adviser, and participation of adviser for any meetings or hearings

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Investigation Process continued

- School must provide written notice, including date, time, location, participants, and purpose of all hearings, **interviews,** or other meetings, with sufficient time for the party to prepare.
- School must also provide equal opportunity for parties and advisors to inspect and review evidence obtained by the school as part of its investigation if the information is directly related to the allegation raised in the formal complaint and a right to respond to the evidence

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Investigative Report

- Must be prepared after investigation
- No requirement on length; but must summarize all steps taken during interview process
- Report cannot be issued until the evidence sharing has occurred
  - And parties given at least ten (10) days to respond to evidence in writing
  - If a written response to the evidence is provided, this must also be included in the investigation, and summary of such included in the report
- After these steps have occurred then report can be provided to the parties at least ten (10) days prior to the determination of any responsibility, or 10 days prior to hearing, if hearing occurs

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Hearings

- Elementary and secondary schools have option but NOT obligation to hold a hearing
  - If no hearing, parties must be given opportunity to submit relevant, written questions to each other, before the decision maker reaches a determination
  - If a question is provided and a decision maker chooses not to ask that question, the decision maker must state why he/she opted not to ask that question (why it was not deemed to be relevant to the hearing)
  - Questions and evidence about a complainant's prior sexual history are **not** relevant, with two limited exceptions:
    - Where information is offered to prove that someone other than respondent committed sexual harassment
    - Or it related to sexual behavior between complainant and respondent and is offered to prove consent

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Hearings

- If a hearing is held:
  - Decision-Maker acts as hearing officer
  - Both parties have opportunities to tell their side of the story
  - Cross examination by advisor is allowed but a party cannot at any point cross examine the other party
    - Because parties cannot cross examine, if a party comes to hearing without advisor, school must provide one, free of charge for purposes of cross examination (does not have to be a lawyer)
    - Decision Maker must determine if a question is relevant before other party must answer
  - If a party requests it, the hearing must occur with parties in separate rooms, with technology enabling access for all involved to see and hear each other

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Hearings

- Cannot require participation in hearing by party or witness
- If party opts out of hearing, or opts to not respond to cross examination
  - Decision maker must exclude these statement, or witnesses
  - Decision maker cannot draw inference as to the effect of party or witness's refusal to participate
- Hearings may be held virtually
  - Decision-Maker must be trained on relevant technology for virtual hearings
- Schools must create an audio, audiovisual, or written transcript of any hearing and make it available to parties for review and inspection

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Decision Making

- After hearing, or in the event of a school that does not hold hearing process the decision-maker must:
  - Weigh the relevant evidence and decide whether it meets the school's standard of evidence for sexual harassment allegations
- Types of evidence:
  - Inculpatory – shows or tends to show a person's involvement in an act or evidence that can establish guilt
  - Exculpatory – evidence that shows a person's innocence

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Relevance Determination

- Evidence is relevant if it has any tendency to make a fact more or less probable than it would be without the evidence and the fact is of consequence in determining the outcome
  - It will relate directly to the allegation, or a part of the allegation
  - Information protected by a privilege is not relevant (attorney-client privilege, etc.)

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Credibility Determinations

- Decision-Makers must make credibility determinations:
  - Observe any inconsistencies in witnesses statements (or consistencies)
  - Consider bias or motive to lie
  - Probability or improbability of occurrence given all of the facts/evidence

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Decision

- Decision must be in writing and must include:
  - Portion of school's policy or policies that have been violated
  - Procedural steps taken to investigate and reach a decision
  - Finding of Fact section
  - Conclusion section that relies on the facts and the relevant policy or policies (Title IX/Non-Discrimination Policy)
  - Statement and rationale for determination of responsibility
  - Disciplinary sanctions that school will impose on respondent and remedies available to complainant to restore or preserve complainants access to education

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Decision Continued

- Disciplinary sanctions that school will impose on respondent and remedies available to complainant to restore or preserve complainant's access to education
  - Remedies may include a one-way no-contact order that would prohibit participation in clubs and teams with the complainant
- A statement as to the rationale for any remedies for the complainant addressing how this remedies will restore or preserve equal access
- A statement of the school's procedures, a statement that there is a right to appeal, and the permissible basis for appeal

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Decision

- Must be sent to both parties simultaneously with information regarding how to appeal
  - Must be in writing
  - Must include name and contact information of appeal officer (cannot be Title IX coordinator, investigator, or decision-maker)
- A decision is final if parties do not appeal or at the conclusion of the appeal process
  - School has discretion to set appeal deadlines
- Title IX coordinator is responsible for ensuring remedies stated within decision are carried out

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Appeals

- Both parties have the right to appeal
- Appeals can be taken:
  - After dismissal before the grievance process whether mandatory or discretionary
  - After a final decision is made at the conclusion of the grievance process
- Appeals may be taken as the result of:
  - A procedural irregularity that affected the outcome
  - New evidence has been discovered that was not discoverable prior
  - A conflict of interest affected the outcome
  - Additional grounds determined by the school so long as they apply on an equal basis

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Appeal Process

- If party files an appeal then both parties must be notified in writing
- Both parties have opportunity to submit a written statement supporting or challenging outcome
- After reviewing written statements the appeal officer must issue a written statement affirming or overturning the decision-makers decision
  - Written statement must be sent simultaneously to parties
- Following this written response – the decision is final

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Record Keeping

- The following must be maintained for **Seven (7) Years:**
  - Records of investigation
  - Records of appeal and materials associated with appeal
  - Records of informal resolution process
    - Notices proceeding informal resolution
  - Records of materials used to train Title IX coordinators, investigators, decision makers, and any person who facilitates informational resolution processes
  - Records of supportive measures provided
    - Even when school offers supportive measures to complainant when the complainant declines supportive measures or declines formal complaint
    - Must also include statement as to why school was not deliberately indifferent in offering of supportive measures

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Prohibition Against Retaliation

- No recipient or other person shall intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by Title IX or its implementing regulations, or because the individual has made a report or complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing under Title IX or its implementing regulations.

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Retaliation

- Any person retaliated against can file a complaint with the school and the school shall have procedures in place for prompt and equitable resolution of complaints
  - Can be similar to Title IX investigation process
- Schools should keep the identities of parties and witnesses confidential, unless disclosure is required under other laws or is necessary to conduct grievance process

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Retaliation Example

- If a school charges a person with code of conduct violation for purpose of discouraging the person from pursuing a sexual harassment report or formal complaint
- If a code of conduct charge is for a violation unrelated to sexual harassment yet arises from the same facts as a sexual harassment allegation, that may be prohibited retaliation
- It is not retaliation for a school to punish someone for making a bad-faith statement during the Title IX grievance process

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The Title IX Process Must be Free from Bias

- All Title IX Key Players must be trained on and act in a manner that is free from bias
  - All reports of harassment must be received and responded to under the school's relevant policies
  - Treatment of a complainant or respondent may constitute discrimination under Title IX depending on the response provided
  - Sex-Based biases, stereotypes, and generalizations should be examined and reflected upon during grievance process
    - Example: Boys will be boys stereotypes, etc.
  - Treatment of complainants and/or respondents due to gender-based stereotypes is discrimination under Title IX

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Bias Continued

- Sexual harassment can occur even if complainant and respondent are of the same sex
- Sexual harassment can occur even if a prior relationship existed between the parties

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Recap and To-Do List

- 1) Incident Report/Complaint received by Title IX Coordinator
- 2) Report reviewed by Title IX Coordinator and Title IX Coordinator or Designee makes contact with Complainant (if known) and parent or legal guardian (if applicable)
  - Note – all mandated reporting requirements, and reporting to law enforcement requirements still apply here
- 3) Title IX Coordinator promptly contacts complainant confidentially to discuss
  - Supportive measures, and complainants wishes regarding the same
  - Process for filing a formal complaint
  - Review any other applicable policies in place

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Recap and To-Do List

- 4) Implement immediate supportive measures
- 5) If a formal complain is received by the school from the complainant or complainant's parent/guardian:
  - Review to determine if mandatory or discretionary immediate dismissal is appropriate
  - If non-dismissal, remind complainant of grievance process and provide informal resolution process if appropriate
- 6) Notify respondent and respondent's parents of filing of the complaint; explain grievance process; offer any necessary supportive measures; discuss any interim-safety plans

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Recap and To-Do List

- 7) Determine if either or both parties want to voluntarily engage in the informal resolution process .If so:
  - Identify informal resolution facilitator (must be trained, neutral, and impartial)
  - Provide information of informal resolution facilitator to both parties to ensure no objection
  - Receive written consent that both parties are voluntarily engaging in this process; reminder that they may change their mind at any point prior to the conclusion of informal resolution process

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Recap and To-Do List

- 8) If the parties do not wish to engage in the informal resolution process then begin the formal investigation into the incident and issue the Notice of Investigation
  - Determine who the investigator is and provide this information to parties in the Notice of Investigation
- 9) Title IX Coordinator to provide investigator with all relevant information including contact information for parties and any currently known witnesses

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Recap and To-Do List

- 10) Investigator Collects all evidence, completes interviews, etc. and shares investigation report with parties simultaneously
  - Parties are provided with ten (10) days to provide a written response
  - Issue final investigation report after receiving any written responses and provide parties with final report at least ten (10) days prior to a hearing or exchange of written questions
- 11) Decision-maker to conduct hearing or render a decision after opportunity for exchange of written questions

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Recap and To-Do List

- 11) Decision-Maker to draft outcome determination letter and deliver the letter to complainant and respondent at the same time
  - Outcome determination letter must include appeal rights
- 12) Implement corrective measures/remedies
- 13) Process Appeal if one is filed
- 14) Issue appeal decision and that the decision is final
- 15) Preserve all documents and reports, etc. for a period of seven (7) years

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To-Do

- Update Policies
  - Determine hearing process
  - Determine standard of proof
  - Identify Title IX Coordinator, Investigator(s), Decision-Maker(s), Appeal Officer(s)
- Ensure that Policy and Training Materials are Available on Accessible Website; train necessary staff
- Create any necessary forms - for example:
  - Formal Complaint Form
  - Informal Resolution Form
  - Investigation Form
  - Decision-Maker Form
  - Appeal Form
- Establish record keeping process

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Thank You

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