Title IX – A Refresher

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Is there anything new?

- The regulations that went into effect in August 2020 REMAIN IN EFFECT . . . *for now* . . .
- OCR released a "Notice of Interpretation" in June 2021 stating that it will interpret "sex" under Title IX to include sexual orientation and gender identity
- OCR released a Q&A on the regulations in July 2021 reiterating the requirements

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What do the Title IX regulations require?

- Generally, the regulations require a school or district to respond "promptly" and not in a "deliberately indifferent" manner (i.e., not "clearly unreasonable in light of the known circumstances") when it has "actual knowledge" of "sexual harassment" in its "education program or activity" against a person in the United States.
- Only applies to conduct that occurred on or after August 14, 2020

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Initial Steps for Compliance

- Internally identify individuals for different roles. Districts MUST specifically identify Title IX Coordinator on your website and handbooks at a minimum!
- Adopt and publish Notice of Non-Discrimination – update your policies and handbooks.
- Adopt Grievance Procedures.
  - Do not have to be in policy BUT should be available on website and in person.

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"Sexual Harassment" is conduct on the basis of sex that is…

Category 1

- Quid pro quo harassment by a school employee to a student – the employee conditions some type of aid, benefit, or service on the student's participation in unwelcome sexual conduct

Category 2

- "Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive [AND] that it effectively denies a person equal access to the recipient's education program or activity"

Category 3

- Other conduct defined by federal law:
  - Sexual assault
  - Dating violence
  - Domestic violence
  - Stalking

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"Unwelcome Conduct"

- Severe, Pervasive and Objectively Offensive as determined by Reasonable Person

  AND

- "Effectively denies a person's right to equal access to its education program or activity"
  - Determined in comparison to similarly situated person not suffering alleged sexual harassment
  - No actual loss required but could be shown by school avoidance, academic decline, behavior issues, quitting team/activity

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Sexual Assault

- **Sexual Assault:** An offense that meets the definition of rape, fondling, incest or statutory rape as used in the FBI's Crime Reporting system. A sex offense is any sexual act directed against another person, without the consent of the victim, including instances where the victim is incapable of giving consent.
- **Rape:** The penetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person, without the consent of the victim.
- **Fondling:** The touching of the private body parts of another person for the purpose of sexual gratification, without the consent of the victim, including instances where the victim is incapable of giving consent because of his/her age or because of his/her temporary or permanent mental incapacity.
- **Incest:** Sexual intercourse between persons who are related to each other within the degrees wherein marriage is prohibited by law.
- **Statutory Rape:** Sexual intercourse with a person who is under the statutory age of consent.

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Consent

Consent:

- U.S. DOE chose not require educational institutions to adopt a particular definition of consent with respect to sexual assault.

What does this mean?

- Create/use a definition of consent that makes sense to you and your district. Make sure you can 1) explain it and 2) apply it.
- Make sure to include situations where consent cannot be obtained/given (i.e. coercion, incapacitation) and clearly define those situations.

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Domestic Violence

- **Domestic Violence: 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; or
- 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

- **Stalking: 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.**
- **For purposes of this definition:**
- **Course of conduct** means two or more acts, including, but not limited to, acts in which the stalker directly, indirectly, or through third parties, by any action, method device, or means follows, monitors, observes, surveils, threatens, or communicates to or about, a person, or interferes with a person's property.
- **Substantial emotional distress** means significant mental suffering or anguish that may, but does not necessarily, require medical or other professional treatment or counseling.
- **Reasonable person** means a reasonable person under similar circumstances and with similar identities to the victim.

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Jurisdiction -- "Education program or activity"

- **Education program or activity**
  - Locations, events, circumstances (operations) over which the district exercised substantial control – fact dependent
    - Over both the respondent AND the context in which the sexual harassment occurs.
- Includes online sexual harassment but it must be analyzed to determine if it occurs in education program or activity. DO NOT FORGET REMOTE LEARNING!!
- Does not create or apply a geographic test, does not draw the line between "off-campus/property" and "on campus/property", and does not create a distinction between sexual harassment occurring in person versus online.

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Process Simplified

- Staff member receives actual knowledge of conduct that may constitute sexual harassment.
- Title IX Coordinator meets with alleged victim to discuss supportive measures and the process for filing a formal complaint.
- If formal complaint is signed by complainant or Title IX Coordinator:
  - Investigator conducts the investigation – interviews individuals and parties, collects evidence, gives parties opportunity to review evidence, prepare investigation report and gives parties opportunity to review.
  - Decision-maker provides opportunity for parties to prepare written questions to be answered by the other side. Decision-maker reviews all materials and makes a written responsibility determination – an impartial determination as to whether the alleged conduct occurred – including sanctions.
  - Appellate decision-maker reviews any appeals made.

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Title IX Coordinator

- District must have at least one Title IX Coordinator – cannot be outsourced
- Responsibility is to coordinate compliance efforts by, among other things:
  - Coordinate training for Title IX Team and all employees
  - Coordinate response to all complaints involving Sexual Harassment
  - Provide and track Supportive Measures
  - Monitor investigations, resolutions, outcomes, remedies and sanctions
  - Monitor patterns and trends
  - Avoid Conflicts of Interest and biases Update Policies and Procedures
  - Recordkeeping

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Investigator

- Investigator carries out an investigation by conducting interviews of the involved individuals and witnesses, collecting documentary and other evidence, and drafting an investigative report.
- Title IX Coordinator may serve as Investigator, but the person cannot have a conflict of interest or bias.
- Districts can outsource the investigation.

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Decision Maker

- Decision Maker reaches the responsibility determination by applying the standard of evidence selected by the district: "**preponderance of the evidence.**"
- Neither the Title IX Coordinator nor Investigator may also be Decision maker. However, Investigator may offer recommendations to Decision maker.
- Districts may outsource this role.

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Appellate Decision Maker

- A different decision maker must be assigned to handle any appeals of the decision maker's determination.
- Appellate Decision Maker cannot be Title IX Coordinator, Investigator, or Decision Maker.
- Districts can outsource this role.

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Checklist of Process

- ✓Knowledge of Allegations
- ✓Initial Meeting
- ✓Formal Complaint
- ✓Notice
- ✓Investigation
- ✓Decision Maker
- ✓Appeal

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Actual Knowledge

- A school or district has **actual knowledge** when notice or allegations of sexual harassment are reported to any school employee; or any employee personally observes such behavior. A school or district employee includes Title IX Coordinator, administrators, teachers, teacher's aides, bus drivers, cafeteria workers, counselors, school resource officers, maintenance staff workers, or any other employee.
- Actual knowledge is met when any employee:
  - Witnesses the conduct.
  - Hears about the conduct from the alleged victim or anyone else (e.g., parent, friend, peer, anonymous reporter, news article).
  - Receives a written report of the conduct from the alleged victim or anyone else.
- Staff members MUST report to Title IX Coordinator
- Actual knowledge not inferred if only school staff member that has knowledge is the respondent.

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Initial Meeting

With actual knowledge:

- Title IX Coordinator must "promptly" contact the alleged victim and his or her parents/guardians to discuss the availability of and consider their wishes regarding supportive measures.
- Supportive measures are not punitive and could include:
  - Counseling.
  - Extensions of deadlines or other course-related adjustments.
  - Changes to class schedules.
  - Increased monitoring/security of certain areas.
- Supportive measures are available with or without the filing of a formal complaint
- Must consider alleged victim's wishes

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Initial Meeting

- Title IX Coordinator must go through process for filing a Formal Complaint.
  - Complaint does not have to be completed that day.
- Title IX Coordinator should provide copy of Grievance Procedures and go through them. Consider highlighting:
  - Respondent is presumed to not be responsible until the process is complete
  - Mandatory dismissal provisions
  - No disciplinary action against the respondent can occur until the process has completed which could take some time.
  - Process – reviewing evidence, investigation report, written questions
- Consider discussing informal resolution - cannot be used if the respondent is a staff member

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Formal complaint

- No investigation of alleged sexual harassment may occur until after a formal complaint has been signed.
- Must be signed by alleged victim or his or her parent/guardian OR
- Title IX Coordinator may sign a formal complaint and investigation on his or her own if the decision is not clearly unreasonable in light of the known circumstances (e.g., alleged perpetrator may pose an ongoing safety threat).

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Critical Questions for Title IX Coordinator

1. Do the allegations actually allege conduct which could be sexual harassment?

If NO ➔ Title IX does not apply

2. If the alleged conduct is sexual in nature, even if true, is it sexual harassment as that term is defined?

If NO ➔ Mandatory Dismissal even if Formal Complaint is signed

****CONDUCT AT ISSUE MAY BE ADDRESSED UNDER OTHER POLICY/CODE OF CONDUCT****

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Informal resolution process

- Not Required
- May be offered after a formal complaint has been filed.
  - Look at grievance procedures for process.
  - Must obtain voluntary, written consent from parties to participate in informal resolution after sharing:
    - The allegations.
    - The requirements of the informal resolution process.
    - Any consequences resulting from participation in the informal resolution process (e.g., records that will be maintained or could be shared).
- Anyone may withdraw from the informal resolution process and resume the grievance process with respect to the formal complaint.
- **BUT Informal Resolution cannot be offered if the alleged perpetrator is an employee.**

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Dismissal of Formal Complaint

- **Required Dismissal**
  - Would not constitute Sexual Harassment under Title IX regulations
  - Did not occur in education program or activity
  - Did not occur against a person in the U.S.
- **Permissive Dismissal**
  - Complainant notifies Title IX Coordinator in writing that Complainant would like to withdraw Formal Complaint or allegations
  - Respondent is no longer enrolled or employed by institution
  - Specific circumstances prevent the district from gathering evidence sufficient to reach a determination
- **If Dismissed:**
  - Must Promptly send written notice of dismissal and reasons for dismissal simultaneously to parties
  - May proceed with disciplinary process outside of Title IX

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Notice of Allegations

- Notice of Grievance Process (including informal resolution process if one exists)
- Allegations potentially constituting Sexual Harassment
  - Identities of the parties
  - Conduct constituting Sexual Harassment
  - Date of incident
  - Location of incident
- Statement: Respondent presumed not responsible and responsibility is determined after Grievance Process
- Right to Advisor of Choice
- Code of Conduct provision(s) prohibiting false statements or false information in process

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Emergency removal and administrative leave

- May not sanction or remove a student except:
  - Emergency removal may occur if the school district has (1) undertaken an individualized safety and risk analysis; (2) determined that an immediate threat to the physical health or safety of a student or other individual arising from the allegations justifies removal; and (3) provided the alleged perpetrator with notice and an opportunity to challenge the decision immediately following the removal.
- A school district may place an employee on administrative leave for the duration of the grievance process

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Investigation
What must the investigator do?

- Provide an equal opportunity for the involved individuals to present witnesses (including fact and expert witnesses) and other inculpatory and exculpatory evidence. Privilege considerations apply.
- Provide an equal opportunity to the involved individuals and their parents/guardians to inspect and review evidence and respond prior to completing the investigative report.
- Create an investigative report that fairly summarizes relevant evidence and share with the involved individuals and their parents/guardians for review and response.

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Avoiding Bias or Conflict

- Avoid prejudgment of facts
- Keep an open mind as a decision-maker and actively listen to all the facts presented
- Avoid sex stereotypes
- Based upon the facts of each case
  - No *per se* prohibited conflicts of interest in using employees or administrative staff or based upon professional experiences or affiliations of decision-makers and other roles in the grievance process.

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Relevancy

- Role of Investigator is to determine whether information is RELEVANT
- Something is relevant if it has value in proving or disproving a fact at issue

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General Issues of Relevancy

Here is what we know is NOT relevant under the regulations:

- Information protected by a legally recognized privilege
- Evidence about complainant's prior sexual history – unless such questions/ evidence about the complainant's prior sexual behavior are offered to prove that someone other than the respondent committed the conduct or if the questions/evidence concern specific incidents of the complaint's prior sexual behavior with respect to the respondent and are offered to prove consent.
- Party's medical, psychological, and similar records unless voluntary written consent

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Conducting the Investigation

- Identify parties and witnesses
- Set up interviews (note that individuals can refuse to participate)
- Develop questions for parties and witnesses
- Interview parties and witnesses – take notes!
- Gather evidence – internal (i.e., district sources) and external (parties and witnesses)
- Determine any follow-up

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Credibility

- Role of Investigator is to assist with credibility determination but not actually make ultimate determination
- Ask questions to test a witness's memory
- Identify where a witness may corroborate or contradict previous statements, or other witnesses, and physical evidence
- Gather facts on credibility to assist decision maker
- Consider impact of potential trauma

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Inspection and Review of Evidence

- **Provide ALL Evidence to both parties**
  - Include everything directly related to allegations
  - Allow 10 days to review
  - Allow written response
  - Follow up where necessary
  - Consider responses when preparing report

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Written Investigation Report

- Summarize **facts**
- Assess **credibility** for decision-maker
- No determination
- Provide to parties and advisors
- Allow 10 days to review

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Decision Maker

- First step is facilitation of the written questions
  - Can be concurrent with investigation report review
- Next step is analysis of evidence and investigation report as well as responses by parties
- Final step is preparing the determination of responsibility written report

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Written Questions and Answers

- A school must use written questions and answers as part of its grievance process.
- Decision-maker must:
  - Allow the involved individuals and their parents/guardians to submit written, relevant questions to ask the other side (including witnesses).
  - Decision-maker must explain any decision to exclude a question as irrelevant.
    - The alleged victim's prior sexual behavior is not relevant unless offered to prove that someone other than the alleged perpetrator committed the alleged conduct, or to prove consent. Consent is not defined in the regulations.
  - Provide each side with the answers to their questions.
  - Allow for additional, limited follow-up questions.

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Role of Decision Maker

- Conduct an *independent*, objective evaluation of all relevant evidence—including both inculpatory and exculpatory evidence
- If this has not occurred previously by the Title IX Coordinator, mandatorily dismiss Title IX complaint that do not rise to the level of "sexual harassment," did not occur in the [district's] education program or activity, or did not occur against a person in the USA"

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Relevancy

Ultimate determination of relevance is the Decision-maker's even if the investigator determines something is not relevant.

This means that the Decision-maker must look at EVERYTHING (both what investigator determined to be relevant and what is directly related to the complaint) and then make an independent determination on relevancy.

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Credibility

- Accuracy and reliability – not about truthfulness.
  - Think of it as the source plus the content plus the plausibility.
  - Consider whether there is a reason or motive to lie.
- Decision-maker is ultimately responsible to make this determination – consider determinations by investigator but come to independent determination.
- Primarily look at corroboration and consistency – try to not focus on irrelevant inconsistencies.

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Decision-Makers Must Be Impartial and free of Conflicts

- Decision-makers "may not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent"
- Decision-makers must avoid prejudgment of the facts at issue

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Analyzing the Elements

- To make a determination of responsibility, there must be evidence to show that it is more likely than not that **each and every** element of the Title IX policy regarding sexual harassment is met.

- Review the definition
- Break down the definition into elements by making a checklist
- Re-read the definition.
  - Have you accounted for all of the language in the definition?
- Are there any definitions that should be included in your element checklist?
- Sort evidence according to element

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Making Written Determination

- Determination must be based upon the actual facts, opinions and circumstances explained in the investigation report, submitted by the parties in response to the evidence and investigation report, and submitted by the parties during the questioning process.
- Do not use "outside" evidence.
- The question of a violation of the policy is separate from factors that aggravate or mitigate the severity of the violation.

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Written Determination

- Written determination **must** include:
  - Identification of the allegations potentially constituting sexual harassment
  - A description of the procedural steps taken from the receipt of the formal complaint through the determination, including any notifications to the parties, interviews with parties and witnesses, site visits, methods used to gather other evidence, and hearings held
  - Findings of fact supporting the determination
  - Conclusions showing the application of the policy to the facts (i.e., showing how the facts support/do not support the elements of the policy)

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Written Determination (cont.)

- A statement of, and rationale for, the results as to each allegation, including determination regarding responsibility (i.e., application of the standard of proof to the conclusions)
- Any disciplinary sanctions the recipient imposes on the respondent, and
- Remedies designed to restore or preserve equal access to the recipient's education program or activity will be provided by the recipient to the complainant
- Institution's procedures and permissible bases for complainant and respondent to appeal

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Written Determination (cont.)

- Decision-maker(s) must author the determination.
- Determination MUST be provided to both parties in writing contemporaneously

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Remedies

- There are no particular remedies required if a determination of responsibility is made
- Must be "designed to restore to preserve equal access to the [school's] education program or activity"
- Can be punitive, i.e., discipline, and can burden respondent
- Can be the same as supportive measures or can look different

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Discipline

- If there has been a finding of responsibility, follow due process procedures in state law and Board Policy
  - Notice of possible discipline (student discipline follow policy - suspension/expulsion - or staff member discipline – follow policy or CBA)
  - Opportunity to respond to the allegations/proposed discipline
    - Only Board hearings required under MT law are for expulsion and termination (CBA may require hearing as part of grievance process for staff member discipline)
  - Procedures for students with disabilities are still applicable

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Appeal

- Appeal of the responsibility determination or dismissal of a formal complaint must be offered and explained in notice of determination.
- The Decision Maker on appeal cannot be the initial Decision Maker, the Investigator, or the Title IX Coordinator.

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Bases for Appeal

- Procedural irregularity that affected the outcome of the matter
- New evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter
- The Title IX Coordinator/investigator/decision-maker(s) had a conflict of interest or bias for or against complainants or respondents generally or the individual complainant or respondent that affected the outcome
- A district may offer an appeal equally to both parties on additional bases – NOT RECOMMENDED

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Determination on Appeal

- Both parties have right to submit statement in support of or challenging the appeal
- Written decision must describe the result and rationale
- Written decision must be provided simultaneously to parties

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Training

- Individuals designated as a Title IX Coordinator, Investigator, Decision Maker, Appellate Decision Maker or Facilitator of an informal resolution process MUST be trained.
- Training materials must be made publicly available via district website.
- Train staff when to recognize and report sexual harassment

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Training Requirements

- Required professional development topics for individuals designated as a Title IX Coordinator, Investigator, Decision-maker, or Facilitator of an informal resolution process include:
  - Definition of sexual harassment.
  - Scope of the school district's education program or activity.
  - How to conduct an investigation and grievance process.
  - How to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias.
  - Relevance determinations, both for questions and evidence, and for information to be included in investigative report.

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Retaliation

- "Intimidation, threats, coercion, or discrimination, including charges against an individual for code of conduct violations that do not involve sex discrimination or sexual harassment, but arise out of the same facts or circumstances as a report or complaint of sex discrimination, or a report or formal complaint of sexual harassment, for the purposes of interfering with any right or privilege secured by Title IX"
- Beware of disciplining a student involved in a Title IX complaint process for any other reason – seek legal counsel!

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Recordkeeping Requirements

- Must maintain certain records for a seven-year period. Examples of required recordkeeping include:
- Investigation, appeal, and informal resolution records.
- Records of any actions – including any supportive measures – taken in response to a report of formal complaint of sexual harassment.
  - You MUST document why its response was not deliberately indifferent or "clearly unreasonable in light of the known facts".
- Records of training materials.

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Sex Discrimination

- Title IX Coordinator responsible for complaints of other sex discrimination
  - Pregnancy, different treatment on the basis of sex, equity in activities
- Complaints should follow Uniform Grievance Procedure not Title IX Sexual Harassment Grievance Procedures

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Practice Pointers

- Recognition of Sexual Harassment – any hint allegations are sexual treat as sexual harassment initially
- Always start with Supportive Measures if there is any hint the allegations are sexual in nature
- Remember the standard – Deliberate Indifference
- Critically think about the standard of "Sexual Harassment"
- Document, document, document

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Questions?

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