

TITLE IX – WHERE ARE WE?

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WHY ARE WE DISCUSSING THIS?

- August 2020 – Regulations went into effect for the first time governing the handling of sexual harassment complaints
- Lots of concerns regarding the process
- July 2022 – Proposed changes to 2020 regulations issued by US DOE significantly changing the process and scope of complaints to be addressed
- April 2024 – US DOE issued the “new” final regulations
 - Intended to become effective Aug. 1, 2024
 - The main concern was that these new regulations specifically included gender identity under the definition of sex.
- June 2024 -> Federal Court in Louisiana enjoins the new regulations in Louisiana, Mississippi, Montana, and Idaho. The 5th and 6th Circuit Court of Appeals rejected requests to stay the injunctions due to the litigates
- August 2024 – US Supreme Court rejects requests to stay the injunctions.

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WHAT DOES THIS MEAN?

- Until there is final resolution on the litigation regarding the “new” regulations, **Montana school districts must continue to implement the August 2020 regulations.**
- Montana school districts cannot implement the “new” regulations, and US DOE cannot enforce the “new” regulations in those states and other school districts subject to the injunctions.

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WHAT DO THE 2020 REGULATIONS GENERALLY ADDRESS?

- When and how should schools respond to sexual harassment allegations:
 - 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.
 - Prompt response that is not deliberately indifferent - Implementation of Grievance Process

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POLICY AND PROCEDURES

- The 2020 regulations require a district to notify stakeholders and publish on its website and in its handbooks and catalogs:
 - Title IX Coordinator contact information: Names, office addresses, emails, phone numbers.
 - General statement regarding nondiscrimination on the basis of sex.
 - DOES NOT HAVE TO BE THROUGH POLICY
- A district also must adopt and publish grievance procedures that provide for the prompt and equitable resolution of student and employee complaints alleging sex discrimination and a grievance process specific to sexual harassment allegations that meets certain minimum requirements.
 - This does not have to be through policy but has to be published!**

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GENERAL REQUIREMENTS THE GRIEVANCE PROCESS

- Provide for the "prompt and equitable" resolution of student and employee complaints.
- Treat complainants and respondents equitably.
- Require an objective evaluation of all relevant evidence.
- Require that Title IX Coordinator, Investigator, Decision Maker, or any other key player have no conflicts of interest or bias for or against complainants or respondents, and that all such individuals receive specified professional development.
- Include a presumption of "innocence" (not responsible) for respondents.
- Designate reasonably prompt time-frames for resolution and the range of possible disciplinary actions.
- Use either the "preponderance of the evidence" or "clear and convincing" standard and apply it equally to employee and student complaints.
- Provide complainant and respondent (and their parents/guardians) an equal opportunity to review any evidence obtained that is directly related to the allegations raised in a formal complaint.
- Address required procedural steps.

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GRIEVANCE PROCEDURES

- Districts should have them – **REVIEW THE GRIEVANCE PROCEDURES IN PLACE!!**
- KLO procedures are different than the MTSBA template.
- Pay attention to the timelines!
 - Many grievance procedures have a 60-day timeline, which requires a written determination within 60 days of receipt of complaint.
- Make sure grievance process is followed!

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TITLE IX COORDINATOR

- District must have at least one district-level Title IX Coordinator and can designate a Title IX Coordinator at each school. **This role cannot be outsourced.**
- The district-level or school-based Title IX Coordinator's overall responsibility is to coordinate compliance efforts by, among other things:
 - Developing materials and ensuring that professional development occurs for staff involved in Title IX efforts.
 - Creating systems to centralize records and gather relevant data.
 - Meeting with complainant and his or her parents/guardians once made aware of alleged sexual harassment (cannot be delegated to support staff).
 - Coordinating implementation of supportive measures.
 - Signing a formal complaint to initiate grievance process (cannot be delegated to support staff).

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INVESTIGATOR

- The Investigator carries out an investigation by conducting interviews of the involved individuals and witnesses, collecting documentary and other evidence, and drafting an investigative report.
- The 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

- The Decision Maker reaches the responsibility determination by applying the standard of evidence selected by the district: "**preponderance of the evidence**" or "clear and convincing."
- Neither the Title IX Coordinator nor Investigator may also be Decision Maker. However, Investigator may offer recommendations to Decision Maker.
- Districts can 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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HOW SHOULD SCHOOLS RESPOND TO SEXUAL HARASSMENT ALLEGATIONS?

- If a school has actual knowledge of sexual harassment allegations, the school must respond promptly and in a manner that is not deliberately indifferent (i.e., not "clearly unreasonable in light of the known circumstances").
- A school must offer "supportive measures" to the alleged victim (complainant) and follow a grievance process that meets certain minimum requirements before imposing discipline or other actions that are not supportive measures against an alleged perpetrator (respondent).
- A school may not continue with the grievance process in the absence of a formal complaint. There is no such thing as an "informal" process or investigation.

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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).
 - Receives a written report of the conduct from the alleged victim or anyone else.

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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 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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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.
- 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.
- **EVEN IF OUTSIDE JURISDICTION – OFFER SUPPORTIVE MEASURES.**

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WHAT ARE THE BASIC STEPS REQUIRED?

- District receives actual knowledge of conduct that may constitute sexual harassment.
- Title IX Coordinator meets with alleged victim (complainant) to discuss supportive measures and the process for filing a formal complaint.
- **If formal complaint is filed then:**
 - Written notice to complainant and alleged perpetrator (respondent) regarding the complaint and process.
 - Investigator conducts the investigation. Parties given opportunity to respond to evidence. Investigator prepares an investigative report; the parties and their parents/guardians review and respond to the report.
 - Decision Maker provides opportunity for involved individuals and their parents/guardians to engage in written question process. Decision Maker reviews all information and makes a written responsibility determination – an impartial determination as to whether the alleged conduct occurred – including sanctions.
 - Parties can appeal on a limited basis to appellate Decision Maker.

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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 available with or without the filing of a formal complaint.
- Must consider alleged victim’s wishes
- THIS IS NOT THE INVESTIGATION!

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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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SUPPORTIVE MEASURES

Supportive measures are temporary measures designed to ensure or restore a party’s equal access to the district’s educational programs or activities

- Supportive measures cannot burden the other party or be punitive
- They must be without a fee or charge
- They can include:
 - Counseling
 - Extensions of deadlines or other course-related adjustments
 - Changes to class schedules (be careful – cannot be seen as punitive)
 - Safety Plan
 - Increased security and monitoring of certain areas of district property
 - No contact between the parties

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FORMAL COMPLAINT → THE GRIEVANCE PROCESS

- No investigation of alleged sexual harassment may occur until after a formal complaint has been filed.
- THIS MEANS NO INVESTIGATION UNTIL AND UNLESS THERE IS A FORMAL COMPLAINT.
- The formal complaint must be filed by the complainant or his or her parent/guardian. It must describe the sexual harassment allegations.
- The formal complaint may be filed at any time as long as the complainant is "participating in or attempting to participate in the education program or activity" of the district at the time of filing (e.g., current student or employee).
- The Title IX Coordinator may initiate a formal complaint on his or her own if the decision is not clearly unreasonable in light of the known circumstances ("deliberately indifferent").

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WHEN MUST OR MAY A SCHOOL DISMISS A FORMAL COMPLAINT?

- A school may dismiss a formal complaint for purposes of Title IX "sexual harassment" under certain circumstances, including:
 - The alleged conduct, even if true, would not constitute sexual harassment.
 - The alleged conduct, even if true, did not occur in the school district's education program or activity.
 - The alleged conduct, even if true, did not occur against a person in the United States.
- A school may (discretionary) dismiss a formal complaint during the grievance process under certain circumstances, including:
 - The alleged perpetrator is no longer enrolled or no longer employed by the district.
 - The complainant and his or her parents/guardians notifies the Title IX Coordinator in writing that the formal complaint or any allegations therein are withdrawn.
 - Specific circumstances prevent the school district from gathering evidence sufficient to reach a determination regarding the formal complaint or allegations therein.

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POTENTIAL SITUATIONS WHERE TITLE IX COORDINATOR MAY NEED TO SIGN A FORMAL COMPLAINT

- Allegations involving staff member as the alleged perpetrator
- Allegations involving multiple complainants
- Allegations of multiple incidents over a period of time involving the same perpetrator
- Allegations against multiple perpetrators
- Allegations involving potential sexual harassment where complainant will not sign a formal complaint and not moving forward with the grievance process (i.e., investigation) would be deliberately indifferent given the severity of the allegations

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CRITICAL QUESTIONS FOR TITLE IX COORDINATOR

1. Do the allegations allege conduct within the district's education programs or activities?
2. Do the allegations actually allege conduct which could be sexual harassment?
If NO → Title IX does not apply
3. 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 SHOULD BE INVESTIGATED UNDER STANDARD INVESTIGATION PROCEDURES AND CAN BE ADDRESSED UNDER OTHER POLICY/CODE OF CONDUCT IF FOUND TO BE IN VIOLATION****

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INFORMAL RESOLUTION PROCESS

- Not Required
- **May be offered only 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 destroyed).
- 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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GRIEVANCE PROCESS AFTER A FORMAL COMPLAINT IS FILED

- ✓ Notice
- ✓ Investigation
- ✓ Party Review of Investigation Evidence and Report
- ✓ Written questions and answers
- ✓ Responsibility determination
- ✓ Appeal
 - Must have reasonably prompt time-frames for carrying out the grievance process.

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NOTICE

Once a formal complaint is filed, district must provide to the known parties, including parents/guardians:

- Written notice of the sexual harassment allegations in sufficient detail by including the identities of the involved individuals (if known), the conduct allegedly constituting sexual harassment, and the date and location of the incident (if known).
- A copy of the grievance procedures if not already provided.

The written notice also must:

- Include a statement that the alleged perpetrator ("respondent") is presumed not responsible for the alleged conduct and that a determination regarding responsibility is made at the conclusion of the grievance process.
- **No disciplinary action may be taken against an alleged perpetrator until after the grievance process is carried out.**
- Inform the involved individuals that they may have an advisor of their choice and have a right to inspect and review evidence.
- Inform the involved individuals of any code of conduct provision that prohibits knowingly making false statements or knowingly submitting false information during the grievance process.

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EMERGENCY REMOVAL AND ADMINISTRATIVE LEAVE

- A district may not sanction or remove a student except:
 - Emergency removal may occur if the 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 district may place an employee on administrative leave for the duration of the grievance process

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INVESTIGATION

- 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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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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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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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
 - If something is not relevant, should be noted but must still be shared
 - Allow 10 days for parties to review
 - Allow written response from parties within 10 days
 - Investigator may 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 is made regarding whether "sexual harassment" occurred
- Must be provided simultaneously to both parties
- Allow 10 days to review and submit a written response

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DECISION MAKER

- First step is facilitation of the written questions
 - Can be concurrent with investigation report review – check your grievance procedures!
 - If concurrent, possible party may object and claim inadequate process
- Next step is analysis of evidence and investigation report as well as responses by parties
- Final step is preparing the written determination

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WRITTEN QUESTIONS AND ANSWERS

- K-12 districts can either offer a hearing or provide an opportunity for the parties to sit as part of its grievance process.
- USE THE WRITTEN QUESTION PROCESS!**
- Decision Maker must:
 - Allow the involved individuals and their parents/guardians to submit written, relevant questions to ask the other party or witnesses.
 - Decision Maker must explain any decision to exclude a question as irrelevant.
 - The complainant's prior sexual behavior is not relevant unless offered to prove that someone acted with the intent to discriminate on the basis of sex, race, or gender identity. Consents to not defined in the regulations.
 - Provide each side with the answers to their questions.
 - Allow for additional, limited follow-up questions.
- Decision Maker CANNOT:
 - Require anyone to respond. Failure to respond or participants cannot be used against a party.
 - Issue the written determination until the parties have been offered the opportunity to submit written questions and the response period has passed.
 - Fail to consider any responses or other information submitted as part of the written determination – even if relevant. (2024) and should be noted in the written determination.

****BECAUSE OF THE CONCERNS ABOUT RELEVANCY IT IS RECOMMENDED TO SEEK LEGAL ADVICE DURING THE WRITTEN QUESTION PROCESS.**

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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 dismisses Title IX complaints 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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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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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).
- 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.
- District's procedures and permissible bases for complainant and respondent to appeal.

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WRITTEN DETERMINATION

- Determination **MUST** be provided to both parties in writing simultaneously
- Decision Maker(s) must authorize the determination.

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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

- An opportunity to appeal the responsibility determination or dismissal of a formal complaint must be offered if a party or his or her parents/guardians assert that:
 - A procedural irregularity affected the outcome.
 - New evidence may affect the outcome and was not previously reasonably available.
 - The Title IX Coordinator, Investigator, or Decision Maker had a conflict of interest or bias that affected the outcome.
- The Appellate Decision Maker may not be the initial Decision Maker, the Investigator, or the Title IX Coordinator.
- The Appellate Decision Maker must be trained!

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DETERMINATION ON APPEAL

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

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TRAINING

- Individuals designated as the "Title IX Team" - 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 all staff when to recognize and report sexual harassment.**

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TRAINING REQUIREMENTS

- Required professional development topics for individuals designated as the Title IX Team 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

- District must maintain certain records for 7 Years. 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.
 - This includes documenting why the district's response was not deliberately indifferent or "clearly unreasonable in light of the known facts".
 - Records of training providing and materials provided in training (including this PowerPoint).

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RELATION TO OTHER LAWS

- A district may not restrict rights protected under the U.S. Constitution, including the First, Fifth, and Fourteenth Amendments.
- The regulations set minimum requirements for Title IX compliance. State and local law may prescribe additional responsibilities related to a district's response to sexual harassment allegations. In cases of conflict, however, the regulations preempt state and local law.

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LESSONS LEARNED

- Recognition of sexual harassment – stop standard investigations when learning of misconduct!
- Freely give out supportive measures for anything hinting at sexual harassment
- Critically think about the standard of "Sexual Harassment" – cannot move forward if allegations even if true would not constitute sexual harassment.
- Remember the standard – deliberate indifference. Do something!
- Document, document, document.
- Train staff about recognizing potential "sexual harassment" and what to do.

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QUESTIONS?

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