TITLE IX: The Final Rule

Northville Public Schools

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DON'T SHOOT THE MESSENGER!

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TITLE IX FINAL RULE

- Released on May 6, 2020
- Effective August 14, 2020
- Applies to ALL K-12 Schools
- Legal Challenges to Final Rule? Stay tuned . . .
- In any event, be prepared to "hit the ground running" during the 2020-2021 school year.

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WHAT IS TITLE IX OF THE EDUCATION AMENDMENTS OF 1972?

- No person in the United States shall, on the basis of sex, be excluded from participation, or denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.
  20 U.S.C. § 1681, *et seq*.

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TITLE IX'S STUDENT PROTECTIONS

- **PROTECTS ALL STUDENTS**
  - Elementary → High School
  - Male + female + straight + gay + lesbian + bisexual + transgender + questioning students.
  - Gender Identity claims
    - Failure to conform to stereotypical notions of "masculinity" or "femininity."
  - "Same sex" discrimination claims must be handled with same procedures as opposite sex claims.

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TITLE IX IS MORE THAN ATHLETICS

- **TITLE IX PROTECTS STUDENTS IN ALL:**
  - Academics and Education
  - Extracurricular and Athletic Programs
  - Other programs of the school:
    - in a school's facilities;
    - on a school bus; and
    - at a class or training program sponsored by the school at another location, or elsewhere. (*i.e.*, field trip)

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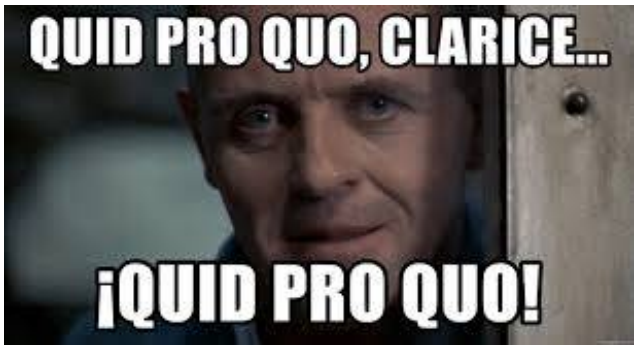
DEFINITION OF SEXUAL HARASSMENT

- "*Quid Pro Quo*" harassment by a school employee.
- 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 school's education program or activity.
- "Sexual assault," "dating violence," "domestic violence," or "stalking" as those terms are defined under other Federal laws called the Cleary Act and the Violence Against Women Act.



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SEXUAL HARASSMENT – WHAT CHANGED?

OLD DEFINITION (OCR Guidance)

- Unwelcome conduct
- Determined by a reasonable person
- To be severe, pervasive, **or** persistent, and to **interfere with or limit** a student's ability to participate in or benefit from school services, activities or opportunities

NEW DEFINITION (Final Rule)

- Unwelcome conduct
- Determined by a reasonable person
- To be so severe, pervasive, **and** objectively offensive that it **effectively denies** a person's equal access to the recipient's education program or activity

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VAWA "BIG FOUR"

- **Sexual Assault**
  20 U.S.C. 1092(f)(6)(A)(v)
- **Domestic Violence**
  34 U.S.C. 12291(a)(8)
- **Dating Violence**
  34 U.S.C. 12291(a)(10)
- **Stalking**
  34 U.S.C. 12291(a)(30)

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WHEN DOES A SCHOOL HAVE NOTICE?

- Once a school has actual knowledge of sexual harassment or allegations of sexual harassment, the school has to respond and take action.
- A school has actual knowledge when the school has notice that a person may have been victimized by sexual harassment.
- Any person, whether the alleged victim or a parent, friend, or bystander, has the right to report sexual harassment to put the school on notice.
- And sometimes school personnel will personally witness sexual harassment.

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ACTUAL KNOWLEDGE AND SCHOOL PERSONNEL

- The Title IX Coordinator(s) for the school district.
- Schools have to provide the contact information for the Title IX Coordinator(s).
- Other people within the school who have authority to institute corrective measures. This could vary from school to school, but always includes the Title IX Coordinator(s).
- In elementary and secondary schools, telling any school employee always puts the school on notice.

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ACTUAL KNOWLEDGE – WHAT CHANGED?

OLD RULE (OCR Guidance)

- A school has a responsibility to respond promptly and effectively if a school **knows or should have known** about sexual harassment

NEW RULE (Final Rule)

- A school with **actual knowledge** of sexual harassment in a program or activity against a person in the United States must respond promptly and in a manner that is not deliberately indifferent

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WHEN IS A DISTRICT ON NOTICE?

- **District is on notice if a "responsible employee" knew or in the exercise of reasonable care should have known about sexual discrimination.**
  - A responsible employee includes "any employee who has the authority to take action to redress sexual violence; who has been given the duty of reporting incidents of sexual violence or any other misconduct by students to the Title IX Coordinator or other appropriate school designee, **or whom a student could reasonably believe has this authority or duty**."

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ARE YOU A R.E.?

- Superintendent
- Principal
- Assistant Principal
- Title IX Coordinator

- Teacher?
- Counselor?
- BOE Member?
- Janitor/Cafeteria?

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RESPONSIBLE EMPLOYEE

- **Whether an employee is a responsible employee depends on factors such as "age and education level of the student, the type of position held by the employee, and consideration of both formal and informal school practices and procedures."**
- **OCR:**
  - It might be reasonable for an elementary student to believe that a custodial staff person or cafeteria staff person is an appropriate person for the student to approach with a complaint, but that a high school student should know that these employees would not have the authority to act. Thus, high school students would be expected not to take their complaints of sexual discrimination to custodial staff or cafeteria employees.

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DELIBERATE INDIFFERENCE – WHAT CHANGED?

OLD DEFINITION (OCR Guidance)

- The school must take immediate action to eliminate the sexual harassment or sexual violence, prevent its recurrence, and address its effects

NEW DEFINITION (Final Rule)

- Failure to respond reasonably in light of known circumstances

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NEW POLICY AND PROCEDURE REQUIREMENTS

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WRITTEN GRIEVANCE PROCEDURES

- Schools must have a written grievance procedure for dealing with sexual harassment which must abide by the new regulations.
- The grievance procedures themselves can't discriminate on the basis of sex, and any additional provisions that a school adds must apply equally to complainants and respondents.
- Written grievance procedures need to include 10 specific items.
- Adopt as an Administrative Regulation/Procedure rather than as part of BOE Policy to allow for changes without BOE approval.

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REQUIREMENT 1: TREAT PARTIES EQUITABLY

- The school's grievance process must treat complainants and respondents equitably by providing remedies to a complainant if a respondent is found responsible, and by following the prescribed grievance process imposing discipline on a respondent.
- The remedies for a complainant have to be designed to restore or preserve equal access to the school's education program or activity.
- Unlike supportive measures in place with or without a grievance process pending, a complainant's remedies CAN be punitive or disciplinary against the respondent.

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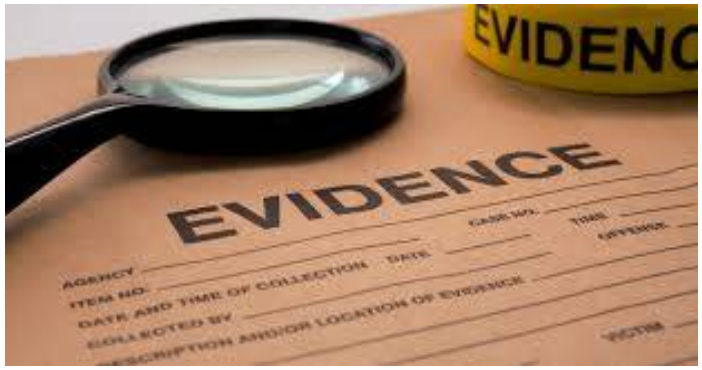
REQUIREMENT 2: OBJECTIVE EVALUATION OF EVIDENCE

- The school's grievance process must ensure an objective evaluation of all relevant evidence – including inculpatory and exculpatory evidence.
- Credibility determinations can't be made on the basis of a person's status as a complainant, respondent, or witness.



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REQUIREMENT 3: TRAINING; NO CONFLICTS OF INTEREST

- The individuals involved in the process – like the Title IX Coordinator, investigators, decision-makers, or facilitators of informal, voluntary resolution efforts – must not have any bias or conflict of interest.
- These individuals must also be trained. The materials used to train Title IX personnel can't rely on sex stereotypes, must promote impartial investigations and adjudications, and must be posted on each school's website (and if a school does not maintain a website, make them available for public inspection upon request).
- Investigator cannot be decision-maker. Decision-maker cannot be investigator or Title IX Coordinator. Appellate person/body cannot be anyone involved previously.

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REQUIREMENT 4: PRESUMPTION OF INNOCENCE

- Under the school's grievance procedures, the respondent must be presumed not responsible, so that any finding of responsibility only comes at the conclusion of a grievance process.

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REQUIREMENT 5: REASONABLY PROMPT TIMEFRAMES

- **The grievance process must include reasonably prompt timeframes for resolving formal complaints of sexual harassment.**
  - Recall prior guidance 60 days. Best practice = 60 days or less
- **Temporary delays are permitted only for good cause. Good cause can include law enforcement activities, the absence of a party or witness, the absence of a party's advisor of choice, or the need to provide language assistance or accommodation of disabilities.**

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REQUIREMENT 6: DESCRIPTION OF RANGE OF OUTCOMES

- The grievance process must describe or list the range of possible remedies and disciplinary sanctions that could occur following a determination of responsibility.

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RANGE OF OUTCOMES?

- **Possible disciplinary sanctions:**
  - Suspension up to and including permanent expulsion

- **Possible remedies:**
  - AKA: Remedial Measures
    - No Contact Order (for both parties)
    - Change in classroom, lunchroom, bus, locker assignment
    - Restorative Justice, if applicable

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REQUIREMENT 7: STANDARD OF EVIDENCE

- The grievance process must state which standard of evidence the school will use to reach a determination regarding responsibility, to be used for all sexual harassment proceedings.
- Schools can choose between the preponderance of the evidence standard and the clear and convincing evidence standard.
- Whichever standard the school chooses, it has to use that standard for all formal complaints of sexual harassment, whether the respondent is a student, or employee, including a faculty member.
- All sexual harassment proceedings must have the same standard of evidence.

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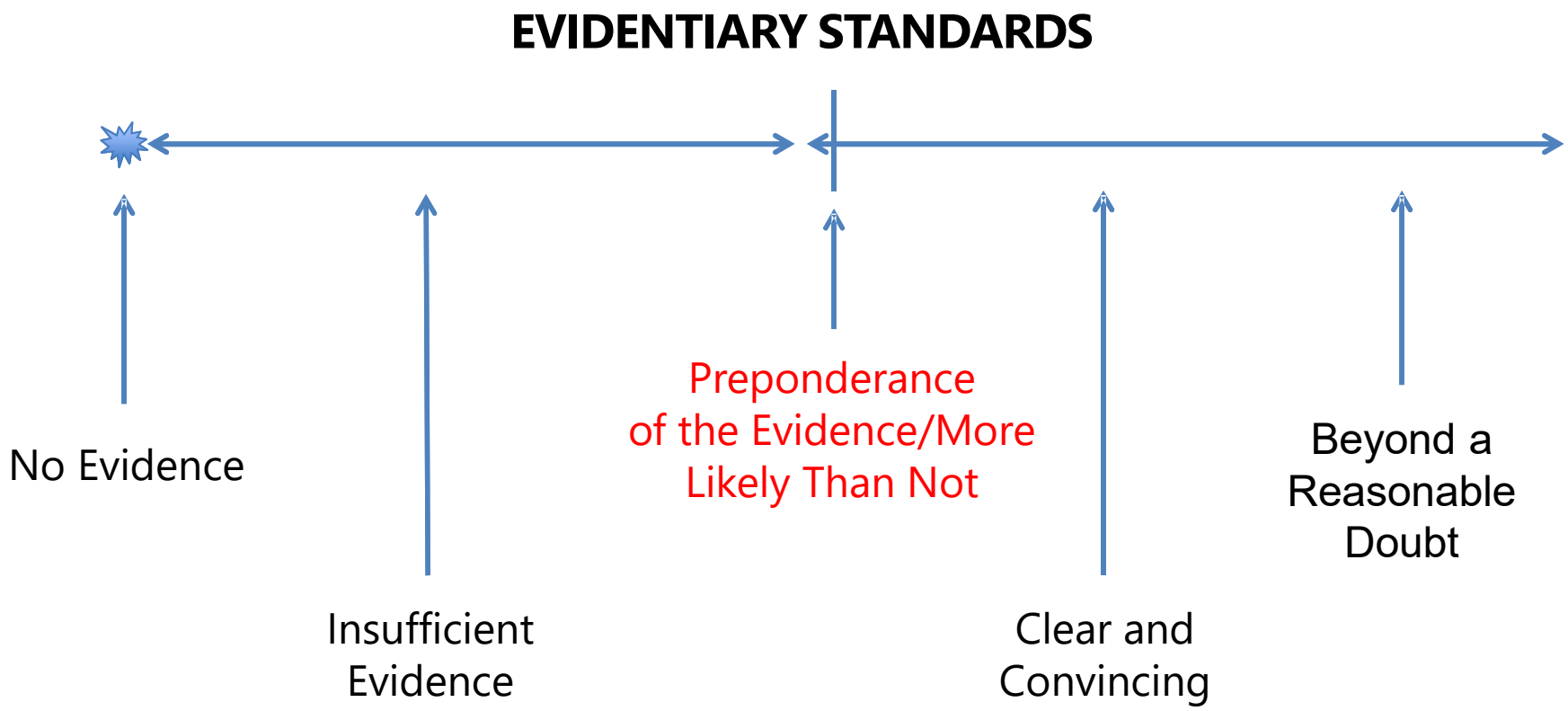
EVIDENCE THRESHOLDS



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REQUIREMENT 8: RIGHT TO APPEAL

- The grievance procedures the have to contain the right to appeal the result of a grievance process, and information about how to invoke the right to appeal.
- Schools must offer an appeal to every party on certain bases, and schools also have the option to expand the bases on which an appeal may be taken, as long as they apply those bases equally to both parties.

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APPEALS – WHAT CHANGED?

OLD REQUIREMENTS (OCR Guidance)

- Not required
- Must be provided equally to both parties, if provided
- No limitation on basis for appeals, if provided
- No requirement that the decisionmaker on appeal be different from investigators/ decisionmakers in other phases of the process

NEW REQUIREMENTS (Final Rule)

- Must offer to both parties for dismissals and final determinations in the following circumstances:
  - Procedural irregularity
  - New evidence not reasonably available
  - Conflict of interest against Title IX Coordinator, investigator, decisionmaker
- Can offer for other reasons on equal terms
- Different decisionmaker

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REQUIREMENT 9: DESCRIPTION OF RANGE OF SUPPORTIVE MEASURES

- The school's grievance process must describe the range of supportive measures available to complainants and respondents.

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SUPPORTIVE MEASURES – WHAT CHANGED?

OLD TERM (OCR Guidance)

- Used terms such as "interim measures" or "interim steps" to describe measures to help a complainant maintain equal educational access
- Implied only available during pendency of investigation, did not mandate offering them, not clear if could be punitive or disciplinary, and did not clarify if available to respondents

NEW TERM (Final Rule)

- **Non-punitive**, individualized services, offered as appropriate and without charge to a complainant or a respondent before or after the filing of a formal complaint, or where no complaint has been filed (34 C.F.R. 106.30(a))
- Should be designed to restore or preserve equal access to the education program or activity without "unreasonably" burdening the other party

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WHAT ARE SUPPORTIVE MEASURES?

- Supportive measures are free, individualized services designed to restore or preserve equal access to education, protect safety or deter sexual harassment.
- There doesn't need to be a formal complaint for an alleged victim to receive supportive measures.
- Supportive measures support a student, and they aren't punitive or disciplinary with respect to another student.
- Supportive measures don't unreasonably burden any other person.
- The Title IX Coordinator is responsible for implementing and monitoring supportive measures.
- Still the implication to "err" on the side of the victim as "school always has to consider the alleged victim's wishes when it comes to requests for supportive measures.

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SUPPORTIVE MEASURES

- **Examples:**
  - No Contact Orders (both ways)
  - Counseling
  - Extensions of deadlines for assignments/tests
  - Changes in classroom/lunchroom/bus assignments
  - Increased Monitoring and Supervision
  - Assigning a "safe" person

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REQUIREMENT 10: PRIVILEGES

- The school's grievance process must explain that no information protected by a legal privilege, such as the attorney-client privilege or the doctor-patient privilege, can be used during an investigation unless the person holding that privilege has waived it.
- Neither a party nor the school is allowed to seek, permit questions about, or allow the introduction of evidence that is protected by a recognized privilege.
- Individuals can always opt to waive their own privileges, if they want, but they don't have to.

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MANDATORY DISMISSALS

- **A school must dismiss a complaint:**
  - that does not describe conduct that meets the definition of sexual harassment;
  - that alleges sexual harassment that did not occur in the school's education program or activity;
  - that alleges sexual harassment that did not occur in the United States at all.
- **Schools can still address these complaints under their code of conduct, even if the misconduct is not sexual harassment under Title IX.**

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DISCRETIONARY DISMISSALS

- **A school <u>may</u> dismiss a complaint:**
  - if the complainant notifies the Title IX Coordinator in writing that the complainant wishes to withdraw the formal complaint or some of its allegations;
  - if the respondent is no longer enrolled or employed by the school; or
  - if specific circumstances prevent the school from gathering evidence sufficient to reach a determination about the allegations.

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DISMISSAL PROCEDURES

- Whenever a school dismisses a formal complaint, or any allegations in it, the school has to promptly send written notice of the dismissal and the reasons to the parties.

- Both parties have the right to appeal a school's dismissal decisions.

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INFORMAL RESOLUTION

- **Schools can offer informal resolution in appropriate cases.**
  - Exception: Where the respondent is an employee of the school.
- **Informal resolution may only be attempted if each party enters the process completely voluntarily.**
- **A school can never force, threaten, or require any party, complainant or respondent, into going into informal resolution.**
- **If informal resolution proceeds, the school must provide a facilitator who is free from conflicts of interest or bias, and who has received special training.**
- **The school still needs to provide complainants and respondents with notice of the allegations, notice of their rights, information about whether an informal process is confidential, and about withdrawing from the process.**

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DOCUMENTATION REQUIREMENTS DURING FORMAL INVESTIGATION

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FORMAL COMPLAINT

- Defined as a document filed by a complainant or signed by the Title IX Coordinator alleging sexual harassment against a respondent and requesting that the recipient investigate the allegation of sexual harassment. 34 C.F.R. § 106.30(a).

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TERMINOLOGY: COMPLAINANT, RESPONDENT

- **Apply to parties in both *reports* and *formal complaints* of sexual harassment**
- **Complainant: A person who is alleged to be the victim of conduct that could constitute sexual harassment**
  - NOT a third party who reports alleged sexual harassment perpetrated against someone else
  - NOT the Title IX Coordinator, even if the TIXC "signs" a formal complaint
- **Respondent: A person who has been reported to be the perpetrator of conduct that could constitute sexual harassment**

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NEW: INITIAL RESPONSE

34 C.F.R. 106.44(a), .30(a)

- **Must treat complainants and respondents equitably**
  - Offer supportive measures to both
  - Follow a grievance process before disciplining or sanctioning respondent

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NEW: INITIAL RESPONSE

34 C.F.R. 106.30(a), .44(a)

- **Title IX Coordinator must promptly, even if no formal complaint is filed:**
  - Contact the complainant to discuss the availability of "supportive measures"
  - Consider the complainant's wishes with respect to supportive measures
  - Inform the complainant of the availability of supportive measures with or without the filing of a formal complaint
  - Explain the process for filing a formal complaint

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EMERGENCY REMOVAL / ADMIN LEAVE

Immediate emergency removal (34 C.F.R. 106.55(c))

- Based on an individualized safety and risk analysis
- Necessary to protect a student or other individual from **immediate threat** to **physical health or safety**
- **Notice, opportunity to challenge** provided "immediately" provided the removal
- Consider other laws, e.g., "change in placement" under IDEA

Employee administrative leave (34 C.F.R. 106.44(d))

- Not prohibited
- Consider state law, board policy, handbooks, and bargaining agreements

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WRITTEN NOTICE TO THE PARTIES

- When the school begins an investigation, it has to provide the parties with written notice of certain information.
- It has to give notice to the parties of the school's grievance process, which must comply with the 10 items listed before.
- It also has to include whether there is an opportunity to engage in informal resolution. Schools don't have to offer informal resolution processes, but if they choose to, it's important that they are mentioned in this initial notice.

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DETAILS OF WRITTEN NOTICE

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

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GATHERING EVIDENCE: SCHOOLS AND PARTIES

- The school has to provide written notice of the date, time, location, participants, and purpose of all hearings, interviews, or other meetings, with sufficient time for the party to prepare.
- The school must also provide equal opportunities for the parties and their advisors to inspect and review the evidence obtained by the school as part of its investigation, if the information is directly related to the allegations raised the formal complaint.
- The school also has to give the parties a meaningful opportunity to respond to the evidence after the school has provided it.

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GATHERING EVIDENCE: SCHOOLS AND PARTIES

- The school must provide an equal opportunity for the parties to have witnesses and evidence as well as inculpatory or exculpatory evidence.
- The school can't restrict the ability of either party to discuss the allegations under investigation, or to gather and present relevant evidence. (i.e. No Gag Orders)
- The school has to provide the same opportunities to the parties to have others present during the grievance proceedings, including access to an adviser of choice for any meetings or hearings.

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INVESTIGATIVE REPORTS

- After gathering evidence, the school needs to prepare a written investigative report on the allegations of the formal complaint.
- A school has to give the parties at least 10 days to respond to the evidence in writing. If a response is submitted, the school must consider that response before finalizing the investigative report.
- The investigative report can then be finalized and provided to the parties.
- That report must be circulated to the parties at least another 10 days before any determination of responsibility, or 10 days before a hearing, if a hearing happens.

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HEARINGS

- **For elementary and secondary schools, the school has the option, but never the obligation, to hold a hearing.**
- **Even without a hearing, the elementary or secondary school must give still the parties equal opportunity to submit relevant, written questions to each other, before the decision-maker reaches a determination. *(i.e. second 10 day requirement on previous slide).***
- **Questions and evidence about a complainant's prior sexual history are not relevant, with two limited exceptions:**
  - Offered to prove that someone other than the respondent committed the alleged misconduct; or
  - Offered to prove consent.

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IF YOU OFFER A LIVE HEARING . . .

- **Some Requirements to Note:**
  - Parties advisors must be allowed to cross-examine the parties. The parties themselves cannot be allowed to personally cross-examine.
  - Cross-examination questions must be relevant, and decision-makers must decide if a question is relevant BEFORE the other party or witness has to answer it.
  - If any party requests it, the entire hearing must be held with the parties located in separate rooms, with technology enabling everyone to see and hear each other.
  - Parties cannot be forced to answer questions or participate in grievance process. If a party or witness refuses, no inferences can be made about the determination regarding responsibility based on the fact a party or witness didn't come to the hearing or refused to answer questions.
  - Schools must create an audio or audiovisual recording or transcript of the hearing and make it available to the parties.

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DECISION-MAKING: OBJECTIVE AND UNBIASED

- The school's decision-maker needs to objectively evaluate the relevant evidence and reach conclusions about whether the respondent is responsible for the alleged sexual harassment.
- A school's decision-maker needs to use independent judgment, so the decision-maker cannot be the same person who conducted the investigation, and cannot be the school's Title IX Coordinator.
- Who are the decision-makers?
- Decision-makers must be free from conflicts of interest or bias for or against complainants or respondents, and must receive special training about how to be impartial and how to decide what evidence is relevant.
- The decision-maker will weigh the relevant evidence, decide whether it meets the school's standard of evidence for sexual harassment allegations and issue the written determination to both parties (i.e. outcome letters).

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HOW TO BE IMPARTIAL

- **Impartial = Neutral = Unbias**
- **You must not have any bias towards either party or special relationship with either party.**
  - Do not make assumptions about the evidence before interviewing a party or a witness. *"John doesn't seem like that type of person."*
  - *"Jane probably shouldn't have been wearing that."*
  - *"Alex is a troublemaker."*
  - Even if you *think* you know the answer to something, ask the question anyway.
- **Allow each party the opportunity to present "their side" of the story.**
- **Avoid making statements that could lead a party or witness to believe you are bias or impartial.**
- **Seek advise/counsel from others (note: confidentiality considerations). If you consulted with at least one other person prior to a final determination, the less opportunity for a party to allege you were bias or impartial.**

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WHAT IS RELEVANT EVIDENCE?

- **Michigan Rules of Evidence define "Relevant evidence" as:**
  - "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.
- **Although your investigation does not take place in a courtroom, you need to determine what evidence is relevant to an investigation and what is not.**
- **Evidence includes both written and oral evidence (i.e. witnesses).**
- **An investigator has the ability to exclude evidence that is not relevant, but before doing so, you should review the evidence and be prepared to explain why it is not relevant to the investigation.**

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DECISION-MAKING: WRITTEN DECISIONS (AKA: OUTCOME LETTERS)

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

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DECISION-MAKING: WRITTEN DECISIONS (AKA: OUTCOME LETTERS)

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

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DECISION-MAKING: AFTER THE DECISION

- The school must send the written determination to the parties simultaneously, along with information about how to appeal the determination.
- A school has discretion to set deadlines for when an appeal must be filed, bearing in mind the obligation to conclude the entire grievance process and bring resolution to the situation for both parties, within a reasonably prompt timeframe.
- The Title IX Coordinator is responsible for carrying out the remedies contained in the written decision.

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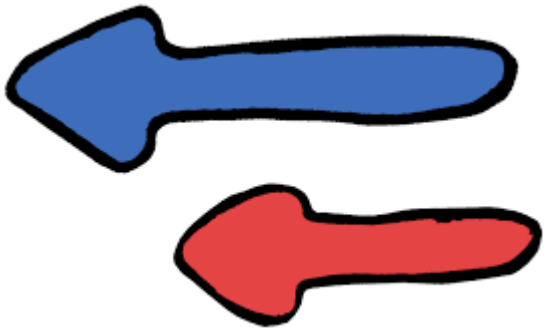
APPEALS

- **A school has to offer both parties an opportunity to appeal.**
- **Appeals can be taken from two different steps in the process.**
  - After a dismissal before the grievance process, whether mandatory or discretionary.
  - At the end of the grievance process.



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GROUNDS FOR APPEAL

1. A procedural irregularity affected the outcome of the matter.
2. New evidence has been discovered that was not reasonably available at the time of the determination on responsibility or dismissal.
3. A conflict of interest on the part of a Title IX Coordinator, an investigator who compiled evidence, or a decision-maker, and the conflict of interest affected the outcome.
4. Schools can offer additional grounds for appeals, if they want to, so long as the grounds apply on an equal basis to the parties.

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APPELLATE PROCESSES

- The recipient has to notify the parties in writing and implement appeal procedures equally.
- Both parties must have equal opportunity to submit a written statement supporting or challenging the outcome.
- The person or body who decides the appeal cannot be the same person who reached the determination regarding responsibility, or the same person as the investigator or Title IX Coordinator.
- After considering the parties' written statements, the decision-maker on appeal has to issue a written decision and send it to the parties simultaneously.
- The school's determination about whether the respondent is responsible for the sexual harassment allegations becomes final after appeal.

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OTHER REQUIREMENTS: RECORDKEEPING

This duty extends for 7 years, and includes several categories of documents:

1. Records of a school's investigation.
2. Records of any appeal and the materials associated with an appeal.
3. Records of any informal resolution process.
4. All materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution. These materials also have to be posted on a recipient's website, or mace available for public inspection if the recipient doesn't have a website.
5. Records of the supportive measures that they took in response to a report or complaint of sexual harassment.

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OTHER REQUIREMENTS: RECORDKEEPING

106.45(b)(10)

- **Records related to alleged sexual harassment must be maintained for a minimum of 7 years**
  - Investigation records
  - Disciplinary sanctions
  - Remedies
  - Appeals
  - Records of any actions taken, including supportive measures
- **Must document for every instance:**
  - Why response was not deliberately indifferent
  - That measures were taken to restore or preserve equal access to the educational program or activity
  - If no supportive measures provided, why that was not deliberately indifferent

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OTHER ISSUES: RETALIATION

- No school or person is allowed to retaliate against anyone for exercising rights under Title IX.
- Any person retaliated against can file a Complaint with the school and the school must have procedures in place for the prompt and equitable resolution of such complaints.
- The school should keep the identities of parties and witnesses confidential, unless disclosure of someone's identity is required under other laws or is necessary in order to conduct the grievance process.

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RETALIATION: CODE OF CONDUCT ISSUES

- If a school charges a person with a code of conduct violation for the purpose of discouraging the person from pursuing a sexual harassment report or formal complaint, or exercising any other Title IX rights, that's retaliation.
- 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.

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NON-RETALIATORY CONDUCT

- **It is NOT retaliation for a school to punish someone for making a bad-faith, materially false statement during a Title IX grievance process.**
  - Note: The school cannot draw a conclusion of bad faith based on the outcome of the case or on the basis of a party's refusal to participate in the grievance procedure or to answer questions.
- **The anti-retaliation provision in the final regulations also expressly states that engaging in protected speech under the First Amendment never constitutes retaliation.**

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OTHER ISSUES: 1ST AMENDMENT

- **The OCR can never require a school to violate the First Amendment.**
- **When OCR investigates a school for possible Title IX investigations, OCR will never view a school's attempt to suppress free speech as an appropriate response to sexual harassment.**
  - Remember: it is a fact-and-circumstance analysis as to whether speech is protected under the First Amendment.
  - Generally, the speech must be "substantially disruptive" to the educational environment to be deemed unprotected.

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OTHER ISSUES: FIRST AMENDMENT

- **Schools must not restrict rights protected under the U.S. Constitution, including the First Amendment, Fifth Amendment, and Fourteenth Amendment, when complying with Title IX**
  - OCR: It is not enough to be offended by content of speech
  - OCR will never view attempts to suppress free speech as an appropriate response to sexual harassment
  - A school can never rely on restricting First Amendment protected speech as a way to show that the school was not deliberately indifferent to sexual harassment
- **The exercise of rights protected under the First Amendment does not constitute retaliation**

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TO-DO CHECKLIST

- ✓ Revise Title IX Board Policy
- ✓ Adopt Title IX Grievance Procedures
- ✓ Post this training PowerPoint on your website
- ✓ Create Model Templates:
  - ✓ Initial Written Notice to Parties
  - ✓ Investigation Report Outline
  - ✓ Final Determination Letter to Parties
- ✓ Train your Staff! (All-Staff PPT)
- ✓ Train your Board of Education (think: Appeals)
- ✓ Clark Hill can help with ALL of the above!

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QUESTIONS?

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PLEASE NOTE

This presentation does not constitute legal advice nor create an attorney client relationship.

It contains general recommendations and information and should not be relied upon for any specific purpose without consultation with legal counsel and in the context of specific facts and circumstances.

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THANK YOU!

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