

Part 3

Policy and Procedures Requirements

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Designation of Title IX Coordinator

- To coordinate compliance with Title IX
- Name or title, office address, email address, and telephone number must be made available to:
 - Applicants (student and employee)
 - Students
 - Parents/Legal Guardians
 - Employees
 - Unions and/or professional organizations holding collective bargaining or professional agreements with school district



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Title IX Coordinator - Publication of Contact Information

 Identification and contact information must be prominently displayed on school district's website and in each handbook or catalog made available to applicants, students, parents/legal guardians, employees, and all unions or professional organizations holding collective bargaining or professional agreements with the school district



Prohibition of Sex Discrimination

- · Ensure no sex discrimination in treatment of parties during sexual harassment investigation
 - NO different treatment on basis of sex, for example:
 - · Investigating complaints of sexual harassment brought by females but not males



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Equitable Treatment

- · Hinges of fair process and Resulting Outcome
- Procedure should specify:
 - Remedies to Complainant and disciplinary sanctions against Respondent only if determination of responsibility after fair process
- Remedies restore or preserve equal access
- · Remedies may include "supportive" measures, but may also be disciplinary, punitive, and burdensome toward respondent



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Equitable Treatment does not prohibit Emergency Removals or Administrative Leave

- Emergency Removal
 - Respondent removed if immediate threat
 - Requires safety and risk analysis
 - Requires notice and opportunity to challenge
 - No modification of rights afforded students with disabilities
- · Administrative Leave
 - May place employee respondent on leave during pendency of investigation
 - No modification of rights afforded individuals with disabilities



Objective Evaluation of Relevant Evidence

- Procedure must call for objective evaluation of relevant evidence, including:
 - inculpatory tends to show responsibility
 - exculpatory tends to show no responsibility
- No prejudgment
- Credibility determinations based on evidence, not assumptions



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What is "Relevant" Evidence?

- Evidence is relevant if it has a tendency to make a fact more or less probable and is of consequence to making a determination
- \bullet Should not consider if probative value substantially outweighed by:
 - · danger of unfair prejudice
 - confusing the issues
 - misleading the fact finder
 - · causing undue delay or waste of time
 - needlessly cumulative



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Evidence of Complainant's Prior Sexual Predisposition or Behavior Not Relevant

- Such questions and evidence not relevant unless
 - Offered to prove someone other than respondent committed the alleged conduct
 - Involve incidents of prior sexual behavior with respect to respondent and offered to prove consent by complainant



Standard of Evidence

- Procedure <u>must</u> state one of two available standards of evidence to be used in determining responsibility
 - Preponderance of the evidence
 - · More probable than not
 - Clear and convincing evidence
 - · Highly probable or probably certain



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Conflict of Interest, Bias, and Impartiality

- Title IX Coordinator, Investigator, Decision-Maker, and Informal Resolution Facilitator must not have a conflict of interest or bias against complainants or respondents generally or an individual party specifically
- Must also be without bias as to sex, race, ethnicity, socioeconomic status, or other characteristics



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Presumption Respondent Not Responsible

- Procedure must state inherent presumption that respondent not responsible
- Presumption not intended to impart unfair advantage
- · Benefit to both parties
 - Increased legitimacy of findings of responsibility for Complainants
 - Assures Respondent (and Complainant) a fair and impartial grievance process



Supportive Measures

- Grievance procedure should describe range of supportive measures available to complainants and respondents that cannot burden either party
- Obligation to offer supportive measures to Complainants, including interactive discussion to determine appropriate supportive measures
- Incentivizes making supportive measures available to Respondents



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Range of Disciplinary Sanctions and Remedies

- Grievance procedure should describe range of possible disciplinary sanctions and remedies
- School Districts to determine whether procedure will include a specific list or only a range of possible sanctions



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Privileged Information

- Grievance procedure cannot require or allow use of questions or evidence subject to legally recognized privilege without consent, including
 - · Attorney-client privilege
 - Doctor-patient privilege
 - Spousal privilege



Time to Complete Grievance Process

- · "reasonably prompt" but no set time-frames
- School district should determine reasonable time-frames and include in the procedure
- Procedure should also allow for temporary delays or limited extensions of time for good cause
 - If delay, written notice should be provided to parties with reasons



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Appeal Procedure and Basis for Appeal

- · Must include Appeal Process in procedures
 - Both parties have right to appeal
- Should be offered on at least three of the following bases:
 - $\,{}^\circ\,$ Procedural irregularities that affected the outcome;
 - New evidence not reasonably available when determination was made that could have affected outcome
 - · Conflict of interest or bias that affected the outcome



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Training Requirements - Title IX Coordinators Investigators, and Decision Makers (and informal resolution process facilitator if different from Title IX Coordinator)

- Must be trained on the following:
 - definition of sexual harassment
 - scope of the school district's education program or activity;
 - how to conduct the full investigation and grievance process
 - how to serve in their respective roles in an impartial manner

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Training Requirements - Decision-Makers

- Decision-Makers must also be trained on the following:
 - issues of relevance of questions and evidence, including when questions and evidence about the complainant's sexual predisposition or prior sexual behavior are *not* relevant
 - technology for live hearings (if applicable)



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Training Requirements - Investigators

- Investigators must also be trained on:
 - issues of relevance to create an investigative report that fairly summarizes the evidence



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Grievance Process From Report to Conclusion

Reporting Sexual Harassment

- Any person may report sexual discrimination or harassment by any means that results in Title IX Coordinator receiving the report, such as:
 - In person
 - Mail or email
 - Telephone
- Need <u>not</u> be during business hours



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Title IX Coordinator's Obligation

- Contact complainant to determine facts and discuss availability of supportive measures
- Inform complainant of right and process to file formal complaint



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What if Complainant refuses to file formal complaint? Option A - Close w/o action

- Provide supportive measures as appropriate (measures must remain confidential)
- Document reasons response is not deliberately indifferent
- Document measures taken to preserve and restore equal access to programs or activities
- If no supportive measures document reasons the response was not clearly unreasonable
- Maintain confidential report for 7 years



What if Complainant refuses to file formal complaint? Option B - Open Investigation

- Title IX Coordinator has authority to sign and file formal complaint even where complainant opts not to move forward
 - Report sufficient to impart knowledge that any person is sexually harassing or assaulting students or implies a pattern of sexual harassment by person in position of authority
- Avoid deliberate indifference err on side of caution



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Initiation of Investigation

- Initiated immediately upon receipt of formal complaint – either by complainant or Title IX Coordinator
- Title IX Coordinator reviews complaint, issues required notices, and issues dismissals if appropriate
- Investigator <u>not</u> Title IX Coordinator investigates the Complaint



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Notice - Required Components

- Title IX Coordinator immediately provides parties a copy of the grievance procedure and written notice of the following;
 - Details of allegations
 - Presumption Respondent not responsible
 - Right to advisor/attorney of their choosing
 - Right to inspect and review evidence
 - Prohibition against false statements or submission of false information during the grievance process



Expanded Allegations - Notice

 If during course of investigation district decides to investigate allegations not included in the first notice, subsequent notice detailing the new allegations must be provided to both parties



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Retaliation Prohibited

• To address concerns by commenters (on the proposed regulations) of possible retaliation by respondents resulting from receipt of detailed notice of allegations, ED added to regulations a specific prohibition against intimidation, threats, coercion, or discrimination of any individual with a purpose of interfering with any right or privilege secured by Title IX



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Notice - Recommended Components

- Prudent to include other required components of grievance procedure in the notice, including:
 - Prohibition against retaliation
 - $^{\circ}\,$ Notice of equitable treatment
 - Notice that Title IX Coordinator may consolidate formal complaints as appropriate
 - Notice that employee may be placed on administrative leave during pendency of grievance process



Dismissal of Formal Complaint - Mandatory

- After review of formal complaint, Title IX Coordinator must dismiss if one of the following apply:
 - Conduct, even if true, would not constitute "sexual harassment" as defined in the regulations
 - Conduct did not occur in school district's educational program or activity
 - Conduct did not occur against person in the U.S.
- Dismissal does not preclude disciplinary action under other provisions of school district's code of conduct



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Dismissal of Formal Complaint - Discretionary

- After review of formal complaint, Title IX Coordinator may dismiss if one of the following apply:
 - Complainant wishes to withdraw the complaint
 - Respondent no longer enrolled or employed
 - Specific circumstances prevent ability to gather evidence sufficient to reach a determination



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Notice of Dismissal

 Upon dismissal – whether mandatory or discretionary – Title IX Coordinator must provide notice of the dismissal with specific reasons to the Complainant and Respondent simultaneously



Investigation Requirements

- Ensure burden of proof and burden of gathering evidence rests on Title IX Coordinator and Investigator, not the parties
 - Cannot access medical/psychological treatment records without consent
- Provide equal opportunity to both parties to present witnesses (fact and expert), submit relevant written questions for other party/witness to answer, and present evidence (inculpatory and exculpatory)



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Investigation Requirements - Continued

- Cannot restrict either party to disclose allegations under investigation or to gather and present relevant evidence
 - Allows parties to garner emotional support and gather evidence
 - · Public criticism of process permissible
- · Does not permit discussion of information outside of allegations - such as evidence, investigative summaries,
- · Does not permit redisclosure of information subject to **FERPA**



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Investigation Requirements - Continued

- · Questions and evidence of complainant's sexual predisposition or prior sexual behavior not permitted unless such questions and evidence are

 - 1. to prove that someone other than the respondent committed the conduct alleged in the complaint, or 2. if the questions and evidence concern specific incidents of prior sexual behavior with respect to the respondent and are offered to prove consent (of the complainant)



Investigation Requirements - Continued

- Provide parties same opportunity to have advisor present during any proceeding, meeting, or interview
 - Advisor may (but is not required to) be an attorney
 - Cannot limit choice or presence of advisor
 - May establish restrictions as to extent to which advisor may participate, provided restrictions apply equally to both parties



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Investigation Requirements - Continued

- Provide written notice of date, time, location, participation, and purpose of all proceedings, meetings, or interviews with sufficient time for party to prepare to participate
- Provide equal opportunity for both parties to review all evidence obtained with opportunity to respond
 - Must be given at least ten days to respond



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Investigation Requirements - Continued

 Create investigative report that fairly summarizes relevant evidence and, at least ten days prior to hearing (if applicable) or other time of determination as to responsibility, send to each party and the party's advisor for review and written response



Hearings (If Applicable)

- · Post-secondary institutions are required to provide for a live hearing. Hearings are not required for elementary and secondary schools.
- · Elementary and secondary schools could opt to add a live hearing requirement to its grievance procedure,
 - if opt to do so, information related to the hearing process may be found at 34 C.F.R. § 106.45(b)(6)(1) and in the Preamble at pages 30,312-30,362.



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Written Questions

- After investigative report sent to parties, and before reaching a determination, each party has seven (7) calendar days to submit written, relevant questions to be answered by another party or witness
 Irrelevant questions regarding Complainant's sexual predisposition or history must be denied by decision-maker with reasons provided to requesting party
- · Decision-maker must provide answers to questions to both parties
- · Additional time for follow-up questions must be allowed



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Determinations Regarding Responsibility

- Upon conclusion of question and answer period, decision-maker must issue a written determination regarding responsibility
- · Decision-Maker cannot be the Title IX Coordinator or the Investigator
- Must apply the standard of evidence selected by the School District



How to Determine if Severe, Pervasive, and Objectively Offensive?

- Evaluate from perspective of a "reasonable person standing in the shoes of complainant"
 - Consider the student's age, disability status, and other characteristics
 - How often or how wide-spread was the conduct?
 - $^{\circ}$ Should not shrug off unwelcome conduct as simply "boys being boys" or make other similar assumptions based on bias or prejudice



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What does "effectively deny a person equal access" mean?

- Equal access is what we are looking at, not a total or entire denial of education
- Measured against a person who has not been subjected to sexual harassment
 - Examples:
 - Skipping class to avoid harasser
 Decline in GPA
 Difficulty concentrating
- · NO concrete injury is required



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Written Determination

- Required Components
 - Identification of the allegations
 - Description of procedural steps
 - Findings of fact supporting the determination
 - ^o Conclusions regarding the application of the school district's code of conduct to the facts



Written Determination

- Required Components (cont'd):
 - Statement of and rationale for result as to each allegation, including determination of responsibility, disciplinary sanctions, and remedies to restore or preserve equal access to complainant
 - Appeal procedure with permissible bases
- Must provide to both parties, in writing, simultaneously



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Appeal

- Both parties have right of appeal on following bases:
 - Procedural irregularity
 - New evidence unavailable previously
 - Conflict of interest or bias
 - Any other bases as determined by school district pursuant to adopted procedure



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Action Steps upon Appeal

- Notify other party and implement appeal process equally for both parties
- Ensure decision-maker on appeal is <u>not</u> the same person as decision-maker or investigator during process or the Title IX Coordinator
- Ensure compliance with standard of evidence
- Give both parties reasonable opportunity to submit written statement
- Issue written decision simultaneously to both parties describing result of appeal and rationale for result



Informal Resolution

- Cannot require participation, but may facilitate an informal resolution process at any point prior to a determination provided that Title IX Coordinator:
 - Provides notice of process, including rights and consequences
- Obtain voluntary, written consent
- Does not involve allegations that employee sexually harassed a student
- Note Title IX Coordinator may act in capacity as informal resolution facilitator



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Record Keeping

- The following information must be maintained for seven (7) years:
 - Each sexual harassment investigation file, including all evidence
 - · Any appeal and result therefrom
 - Any informal resolution and result therefrom
 - Information regarding supportive measures taken in response to a report or formal complaint of sexual harassment



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Training Materials - Record Keeping

- All materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process (if different from Title IX Coordinator).
- A school district must make these training materials publicly available on its website; or, if the school district does not maintain a website, the school district must make these materials available upon request for inspection by members of the public





Time for Checklists!



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Thank You!!