

## 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

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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
- 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



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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



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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**

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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 – not 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



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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



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## 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, etc.
- 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 offered
  - 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)



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### 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



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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



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## 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?
  - 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
  - Conclusions regarding the application of the school district’s code of conduct to the facts



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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 not 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



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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



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## Time for Checklists!



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## Thank You!!

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