

# TITLE IX

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## 2020 UPDATE TO REGULATIONS

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## TITLE IX

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- Title IX Regulations (Published May 6, 2020; Effective August 14, 2020) regarding sex discrimination, sexual harassment, and sexual assault.
  - Both Employee and Student Complaints

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## SEXUAL HARASSMENT

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• **What does Title IX really mean?**




**It isn't just sports...**

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## SEXUAL HARASSMENT

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Title IX of the Education Amendments of 1972 protects people from discrimination based on sex in education programs or activities that receive Federal financial assistance. Title IX states that:

*No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.*

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## SEXUAL HARASSMENT

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# #MeToo

**The national movement to highlight sexual harassment, abuse, and misconduct.**

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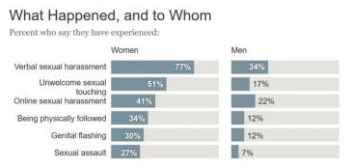
## SEXUAL HARASSMENT

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- ❖ A 2018 Survey demonstrated that 81% of women and 43% of men had experienced some form of sexual harassment, including 38% of women who have experienced sexual harassment in the workplace.

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## SEXUAL HARASSMENT



<https://www.nytimes.com/2018/02/21/upshot/pervasive-sexual-harassment-why-me-too-took-off-poll.html>

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## SEXUAL HARASSMENT

- ❖ Nearly 50% of grade 7-12 students reported experiencing sexual harassment since 2011.
- ❖ Yet, OCR noted in 2014 that 67% of school districts had zero records of allegations of sexual harassment.



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## SEXUAL HARASSMENT

K-12 Title IX sexual harassment is an emerging trend.

Colleges and universities have struggled with enforcing the Title IX requirements over the last decade.

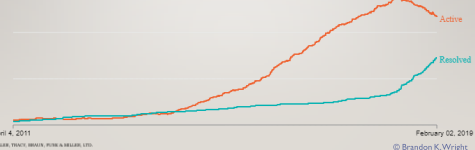
*What lessons can we learn?*



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## SEXUAL HARASSMENT

Increase in Ed Department Open Title IX Investigations from 2011 to 2019:



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## PRESS POLICY UPDATES

- PRESS released policy updates on August 7, including:
- New 2:265 – Title IX Sexual Harassment Grievance Procedure
- New 2:265-AP1 – Title IX Sexual Harassment Response
- New 2:265-AP2 – Formal Complaint Grievance Process
- New 2:265-E1 – Title IX Glossary
- Updates to 2:260, 5:20, 7:20



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## TERMS USED IN REGULATIONS

- Respondent = Accused
- Complainant = Victim/Accuser
- Recipient = School receiving federal funds



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### WHAT IS SEXUAL HARASSMENT?

- Any instance of *quid pro quo* harassment by a school employee;
- Any unwelcome conduct that a reasonable person would find so severe, pervasive, AND objectively offensive that it denies a person equal educational access;
- Any instance of sexual assault (Clery Act), dating violence, domestic violence, or stalking (defined by VAWA).

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### WHAT IS SEXUAL HARASSMENT?

- Any instance of *quid pro quo* harassment by a school employee:
- PRESS 2:265: "A District employee conditions the provision of an aid, benefit, or service on an individual's participation in unwelcome sexual conduct."

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### WHAT IS SEXUAL HARASSMENT?

- Any unwelcome conduct that a reasonable person would find so severe, pervasive, AND objectively offensive that it denies a person equal educational access:
- PRESS 2:265: "Examples of sexual harassment include, but are not limited to, touching, crude jokes or pictures, discussions of sexual experiences, teasing related to sexual characteristics, spreading rumors related to a person's alleged sexual activities, rape, sexual battery, sexual abuse, and sexual coercion."

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### SEXUAL HARASSMENT

**What is "unwelcome"?**  
Put yourself in the position of the alleged harasser and ask:

- ❖ Would you want your behavior to appear on the evening news?
- ❖ Is there a difference in status or power between you two?
- ❖ Would you behave the same way if a family member were standing next to you?
- ❖ Would you want someone else to act this way toward your spouse or significant other?

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### SEXUAL HARASSMENT

**Why people don't report....**

- FEAR OF RETALIATION
- FEAR OF HUMILIATION
- FEAR OF BEING LABELED A TROUBLE MAKER
- ADVISED: IGNORE IT, IT WILL GO AWAY
- DENIAL: YOU'RE OVER REACTING
- TOLD THEY SHOULD BE FLATTERED BY IT
- BLAMED FOR HIS OR HER BEHAVIOR
- FEAR OF BEING OSTRACIZED
- REACTIONS OF HUSBANDS/WIVES OR FRIENDS
- FEAR OF CAREER DAMAGE
- FEAR OF JOB LOSS
- UNAWARE OF RIGHTS

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### SEXUAL HARASSMENT

*A high school girl reports to a teacher that her ex-boyfriend is spreading rumors about her sexual activity on social media.*

**Is this a Title IX issue?**  
**Do you institute your Title IX protocol?**

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## SEXUAL HARASSMENT

*A male student has an iPhone case with a photo of a bikini model on it, which makes other students uncomfortable.*

**Is this a Title IX issue?  
Do you institute your Title IX protocol?**

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## SEXUAL HARASSMENT

*A girl goes on a date after a school basketball game off-campus/after-hours with a male high school classmate and reports to the guidance counselor that she was touched.*

**Is this a Title IX issue?  
Do you institute your Title IX protocol?**

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## SEXUAL HARASSMENT

*A 15 year-old girl agrees to meet up with a 19-year-old in the bathroom to have sex.*

**Is this a Title IX issue?  
What if the male student has done this to 2 other girls and the school knows?  
What if in the past 4 years there were 4 prior incidents of unwanted sex on campus?  
What if they are both 15?**

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## SEXUAL HARASSMENT

*A student reports to a teacher that two other students are engaged in sexual activity in a storage room at school. The teacher stops the activity, and when both students reports that the activity was “consensual”, the teacher warns them to never do it again at school.*

**Is this a Title IX issue?**

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## SEXUAL HARASSMENT

*A transgender student is complaining to the guidance counselor about teasing and social media comments about their desire to use a particular restroom.*

**Is this a Title IX issue?**

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## PREVENTION AND RESPONSE

- Age-appropriate content related to sexual abuse awareness, teen dating violence, and student social/emotional development.
- Training for school staff.
- Notification (as noted below) of policy and Title Coordinator contact information.

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## SEXUAL HARASSMENT

### PA 101-418 (Effective January 1, 2020):

Sec. 10-20.69. *Policy on sexual harassment.* Each school district must create, maintain, and implement an age-appropriate policy on sexual harassment that must be posted on the school district's website and, if applicable, any other area where policies, rules, and standards of conduct are currently posted in each school and must also be included in the school district's student code of conduct handbook.



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## SEXUAL HARASSMENT

One in seven teens report that they are sending sexts, and one in four are receiving sexts, according to a study of over 110,000 teens from around the world published in February 2018, in [JAMA Pediatrics](#).



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## SEXUAL HARASSMENT

[www.thatshotcool.com](http://www.thatshotcool.com)



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## SEXUAL HARASSMENT

### C.R. v. Eugene Sch. Dist. 4J, 835 F.3d 1142, 1145 (9th Cir. 2016), cert. denied, 137 S. Ct. 2117 (2017):

"Because the harassment happened in such close proximity to the school, administrators could reasonably expect the harassment's effects to spill over into the school environment. Simply seeing their harassers in the hallway could well be disruptive for affected students. Similarly, a student who is routinely subject to harassment while walking home from school may be distracted during school hours by the prospect of the impending harassment. A student's ability to focus during the day could be impaired by intrusive worries about whether she or he would once again face uncomfortable and sexually intimidating comments immediately after school lets out..."



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## NOTICE

- K-12 schools must respond whenever ANY employee has notice of sexual harassment, including allegations of sexual harassment.
- The notice can come from the complainant themselves as well as any third party, including parents and guardians.



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## NOTICE

- A person may make a report to the Title IX Coordinator, Nondiscrimination Coordinator, Building Principal, Assistant Building Principal, Dean of Students, a Complaint Manager, or any employee with whom the person is comfortable speaking. A person who wishes to make a report may choose to report to a person of the same gender.
- School employees shall respond to incidents of sexual harassment by promptly making or forwarding the report to the Title IX Coordinator. An employee who fails to promptly make or forward a report may be disciplined, up to and including discharge.
- Using "or any employee with whom the Complainant is comfortable speaking" ensures Title IX compliance because Title IX deems "any employee" of an elementary or secondary school who has notice of sexual harassment or allegations of sexual harassment to have actual knowledge. Therefore, a report to any employee triggers a district's duty to respond. 34 C.F.R. §106.30.



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## SEXUAL HARASSMENT OCCURRING IN A SCHOOL'S "EDUCATION PROGRAM OR ACTIVITY"

- Title IX applies to persons in the United States with respect to education programs or activities that receive Federal financial assistance.
- "Program or activity" includes locations, events, or circumstances over which the school exercised substantial control over both the respondent and the context in which the sexual harassment occurred.



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## TITLE IX COORDINATOR

- Contact information for Title IX Coordinator (which includes: name or title, office address, e-mail address, and telephone number) must be provided to students, employees, applicants for admission and employment, parents or legal guardians of elementary and secondary school students, all unions.



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## TITLE IX COORDINATOR

- Contact information for Title IX Coordinator must also be prominently displayed on the school website.
- Schools should also publish the materials used to train Title IX Coordinators, investigators, decision-makers, and persons who facilitate informal resolutions on the school's website or be prepared to make materials available upon request for inspection by members of the public.
  - Be aware of this when hiring outside consultants for this training—the school will need to secure permission from the consultant to publish the training materials.



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## TITLE IX PERSONNEL

- Title IX Personnel includes the Coordinator, investigators, decision-makers, and people who facilitate any informal resolution process.
  - All personnel are required to be "free from conflicts of interest or bias against complainants or respondents."



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## TITLE IX PERSONNEL

- Under PRESS 2:265-AP2:
- Title IX Coordinator may serve as investigator OR another trained person can serve as investigator.
- *Advice: Keep it separate when feasible.*



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## TITLE IX PERSONNEL

- Under PRESS 2:265-AP2:
- "The Superintendent or designee acts as the **Initial Decision-Maker** for all Formal Title IX Sexual Harassment Complaints, unless it involves allegations against the Superintendent or designee or against a Board Member. In such cases, an outside consultant, e.g., an attorney or retired school administrator, acts as the Initial Decision-Maker."



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## TITLE IX PERSONNEL

- Under PRESS 2:265-AP2:
- **Appellate Decision-Maker** – An individual or group, e.g., a Board-appointed appeal examiner or the Board, which reviews an appeal of the Initial Decision-Maker's determination regarding responsibility or a dismissal of a Formal Title IX Sexual Harassment Complaint. The Appellate Decision-Maker cannot be the same person as the Initial Decision-Maker, the Investigator, or the Title IX Coordinator. The Appellate Decision-Maker must be free from conflicts of interest or bias against complainants and respondents generally or against an individual Complainant or Respondent, and must be trained to serve impartially.



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## TITLE IX PERSONNEL TRAINING

- Training of Title IX personnel must include training on:
  - the definition of sexual harassment in the Final Rule,
  - the scope of the school's education program or activity,
  - how to conduct an investigation and grievance process including hearings, appeals, and informal resolution processes, as applicable,
  - and how to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias.
- Schools must ensure that decision-makers receive training on any technology to be used at a live hearing, if applicable.



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## TITLE IX PERSONNEL TRAINING

- A school's decision-makers and investigators must receive training on issues of relevance, including how to apply the rape shield protections provided only for complainants.



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## RELEVANCE

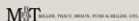
- **Federal Rule of Evidence No. 401 - Test for Relevant Evidence.**
- Evidence is relevant if:
  - (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and
  - (b) the fact is of consequence in determining the action.



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## RAPE SHIELD PROTECTIONS

- Rape shield laws deem irrelevant questions and evidence about a complainant's prior sexual behavior unless offered to prove that someone other than the respondent committed the alleged misconduct or offered to prove consent.
- Illinois courts have held that a defendant's right to confrontation doesn't include a right to present irrelevant evidence such as the victim's reputation and sexual acts with other people.



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## IMPARTIALITY

- The decision-maker(s) should not be the subordinates of the Title IX Coordinator.



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## IMPARTIALITY

- A “conflict of interest” occurs if, within a particular decision-making context, an individual is subject to two coexisting interests that are in direct conflict with each other and the decision-making process is disrupted or compromised in a manner that affects the integrity or the reliability of the outcomes.

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## IMPARTIALITY

- Illinois “Sample” Jury Instructions:
- *It is your duty to resolve this case by determining the facts based on the evidence and following the law. Your decision must not be based upon speculation, prejudice, or sympathy. Each party should receive your same fair consideration.*

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## IMPARTIALITY

- Illinois “Sample” Jury Instructions:
- *Facts may be proven by evidence or reasonable inferences drawn from the evidence. Evidence consists of the testimony of witnesses you will hear and of exhibits you will read. You should consider all the evidence without regard to which party produced it. You may use common sense gained from your experiences in life, in evaluating what you see and hear during the investigation.*

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## IMPARTIALITY

- Illinois “Sample” Jury Instructions:
- *In evaluating the credibility of a witness, you may consider that witness' ability and opportunity to observe, memory, manner, interest, bias, qualifications, experience, and any previous inconsistent statement or act by the witness concerning an issue important to the case.*

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## IMPARTIALITY

- Illinois “Sample” Jury Instructions:
- *You should not do any independent investigation or research on any subject relating to the case. What you may see or hear outside the investigation is not evidence.*

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## RESPONSE REQUIREMENT STANDARD

- Schools must respond promptly to Title IX sexual harassment in a manner that is not deliberately indifferent, which means “a response that is not clearly unreasonable in light of the known circumstances.”
- PRESS Procedure indicates 90 school business days (a significant change from prior 30 school day time frame).

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## RESPONSE REQUIREMENTS

- Schools must offer supportive measures to the complainant.
- Title IX Coordinator must promptly contact the complainant confidentially to discuss supportive measures whether the complainant chooses to file a formal complaint or not and must explain the process for filing a formal complaint.

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## COMPLAINANT CHOICE

- A complainant's wishes with respect to whether the school investigates (choosing not to file a formal complaint) should be respected unless the Title IX Coordinator determines that signing a formal complaint to initiate an investigation over the wishes of the complainant is not clearly unreasonable in light of the known circumstances.
  - If the Title IX Coordinator decides to sign a formal complaint against the wishes of a complainant, the school needs to document the reasons why that decision was not clearly unreasonable and how the recipient believes that it met its responsibility to provide that complainant with a non-deliberately indifferent response.

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## SUPPORTIVE MEASURES

- Supportive measures are individualized services reasonably available that are non-punitive, non-disciplinary, and not unreasonably burdensome to the other party while designed to ensure equal educational access, protect safety, or deter sexual harassment.
- A school's selection of supportive measures and remedies will be evaluated based on what is not clearly unreasonable in light of the known circumstances.

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## SUPPORTIVE MEASURES

- Examples in PRESS:
  - The District may provide counseling, extensions of deadlines or other course-related adjustments, modifications of work or class schedules, campus escort services, mutual restrictions on contact between the parties, changes in work locations, leaves of absence, increased security and monitoring of certain areas of the campus, and other similar measures to Complainants and/or Respondents.

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## EMERGENCY REMOVAL OF RESPONDENT (STUDENT)

- Before removing a Respondent-student on an emergency basis, conducts an individualized safety and risk analysis to determine whether removal is justified by an immediate threat to the physical health or safety of any student or other individual arising from the sexual harassment allegations. See 4:190-AP2, Threat Assessment Team (TAT).
- If the Respondent-student is removed on an emergency basis:
  - Provides the Respondent-student with written notice and an opportunity to challenge the decision immediately following the removal; and
  - Follows requirements set forth in 105 ILCS 5/10-22.6.

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## EMERGENCY REMOVAL OF RESPONDENT (EMPLOYEE)

- If the Respondent is identified and is a non-student employee, in conjunction with the Assistant Superintendent for Human Resources, considers whether the Respondent-employee should be placed on administrative leave in accordance with 34 C.F.R. §106.44(d), relevant District policies and procedures, and any applicable collective bargaining agreements.

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## DISMISSING FORMAL COMPLAINTS

- If the allegations in the formal complaint do not meet the definition of sexual harassment or did not occur in the school's education program or the activity was not against a person in the United States, the school **must** dismiss the allegations under Title IX, but the school can still address the allegations in any manner appropriate under the school's own code of conduct.
- At the time of filing a formal complaint, a complainant must be participating in or attempting to participate in the education program or activity of the school with which the formal complaint is filed.

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## DISMISSING FORMAL COMPLAINTS

- Schools have the discretion to dismiss a formal complaint or allegations therein if the complainant informs the Title IX Coordinator in writing that the complainant desires to withdraw the formal complaint or allegations therein.
- Schools also have the discretion to dismiss if the respondent is no longer enrolled or employed by the school or if specific circumstances prevent the school from gathering sufficient evidence to reach a determination.
- **A school must give the parties written notice of a dismissal (mandatory or discretionary) and the reasons for the dismissal.**

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## GRIEVANCE PROCESS-NOTIFICATION REQUIREMENTS

- A school must investigate the allegations in any formal complaint and send written notice to both the complainant and respondent of the allegations upon receipt of a formal complaint.
- Schools must send written notice of any investigative interviews, meetings, or hearings.

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## GRIEVANCE PROCESS-NOTIFICATION REQUIREMENTS

- Schools must send the parties, and their advisors, evidence directly related to the allegations, in electronic format or hard copy, with at least 10 days for the parties to inspect, review, and respond to the evidence.
- Schools must send the parties, and their advisors, an investigative report that fairly summarizes relevant evidence, in electronic format or hard copy, with at least 10 days for the parties to respond.

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## EVIDENCE GATHERING

- The burden of gathering evidence and the burden of evidence is on the school, not the parties.
- Schools must provide equal opportunity for the parties to present fact and expert witnesses and other inculpatory and exculpatory evidence.
- Parties must have the same opportunity to select an advisor of the party's choice who may be, but need not be, an attorney.
- Schools must not restrict the ability of the parties to discuss the allegations or gather evidence (e.g., no "gag orders").

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## CROSS-EXAMINATION

- K-12 schools have the option for "live hearing with cross-examination."

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## INVESTIGATION

- With or without a hearing, after the school has sent the investigative report to the parties and before reaching a determination regarding responsibility, the decision-maker(s) must afford each party the opportunity to submit written, relevant questions that a party wants asked of any party or witness, provide each party with the answers, and allow for additional, limited follow-up questions from each party

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## SUBMITTED QUESTIONS

- Decision-makers must explain their reasons for excluding any irrelevant proposed questions.

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## GRIEVANCE PROCESS

- An objective evaluation of all relevant evidence, inculpatory and exculpatory is required for the grievance process.
- Credibility determinations based upon a person's status as complainant, respondent, or witness must be avoided.
- There must be a presumption that the respondent is not responsible for the alleged conduct until a determination regarding responsibility is made at the conclusion of the grievance process.

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## GRIEVANCE PROCESS


- The grievance process should include reasonably prompt time frames for conclusion of the grievance process, including appeals and informal resolutions, with allowance for short-term, good cause delays or extensions of the time frame.

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## GRIEVANCE PROCESS

- A school must notify the complainant of the range, list, or possible remedies that a school may provide.
- A school must notify the respondent of the disciplinary sanctions a school might impose on the respondent following a finding of responsibility.
- A school's grievance process must state whether the school has chosen to use the preponderance of the evidence standard ~~or the clear and convincing evidence standard~~ for all formal complaints of sexual harassment (including those where employees are respondents).

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## GRIEVANCE PROCESS

- Preponderance of the evidence is one type of evidentiary standard used in a burden of proof analysis. Under the preponderance standard, the burden of proof is met when the party with the burden convinces the fact finder that there is a greater than 50% chance that the claim is true.

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## GRIEVANCE PROCESS

- The grievance process must describe the school's appeal procedures.
- The grievance process must not use, rely on, or seek disclosure of information protected under a legally recognized privilege, unless the person holding such privilege has waived it.
- Any provisions, rules, or practices other than those required by the Final Rule that a school adopts as part of its grievance process for handling formal complaints of sexual harassment, must apply equally to both parties.

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## INFORMAL RESOLUTION

- Informal resolution may not be used to resolve an allegation that an employee or staff member sexually harassed a student.

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## INFORMAL RESOLUTION

- A school has the discretion to choose to offer and facilitate informal resolution options, such as mediation or restorative justice, as long as both parties give voluntary, informed, written consent to attempt informal resolution.

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## INFORMAL RESOLUTION LIMITS

- A school may not require for admission, enrollment, or employment, waiver of the right to a formal investigation and adjudication of formal complaints of sexual harassment.
- A school may not offer an informal resolution process unless a formal complaint it filed.

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## INFORMAL RESOLUTION

- If parties agree to participate in an informal resolution process, either may withdraw from the process at any time and resume the grievance process through the formal complaint process as long as it is prior to agreeing to a resolution.

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## THE DECISION

- The decision-maker (who cannot be the same person as the Title IX Coordinator or the investigator) must issue a written determination regarding:
  - Responsibility with findings of fact,
  - Conclusions about whether the alleged conduct occurred,
  - Rationale for the result as to each allegation,
  - Any disciplinary sanctions imposed on the respondent, and
  - Whether remedies will be provided to the complainant.
- The written determination must be sent simultaneously to the parties along with information about how to file an appeal.

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## APPEALS

- The school must offer both parties an appeal from a determination regarding responsibility.
- The school must also offer both parties an appeal if the school dismisses a formal complaint or any allegations therein, as well as the following bases:
  - Procedural irregularity that affected the outcome of the matter;
  - Newly discovered evidence that could affect the outcome of the matter, and/or
  - Title IX personnel had a conflict of interest or bias, that affect the outcome of the matter.
- A school may offer an appeal equally to both parties on additional bases as well.

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## DISCIPLINE

- Discipline may only follow an investigation and a finding of responsibility.

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## REMEDIES

- Remedies are required to be provided to a complainant when a respondent is found responsible. The remedies must be designed to maintain the complainant's equal access to education and may include the same individualized services described as supportive measures.
- Remedies after a finding of fault may be disciplinary, punitive, and may burden the respondent.

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## RECORD-KEEPING

- Schools are required to retain all records regarding a Title IX proceeding for seven years (starting at the date of creation), including proceedings where there was not a finding of responsibility or the formal complaint or allegations therein were dismissed.

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## RETALIATION

- Retaliation is expressly prohibited.
- Individuals may not be charged with code of conduct violations that arise out of the same facts or circumstances as a report or formal complaint of sexual harassment for the purpose of interfering with any right or privilege secured by Title IX.

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## RETALIATION

- The exercise of rights protected under the First Amendment does not constitute retaliation.
- The school must keep confidential the identity of complainants, respondents, and witnesses, except as permitted by FERPA, required by law, or as necessary to carry out a Title IX proceeding.

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## RETALIATION

- A code of conduct charge for an individual making a materially false statement in bad faith in the course of a Title IX grievance proceeding does not constitute retaliation.
- A determination regarding responsibility, alone, is not sufficient to conclude that any party made a bad faith, materially false statement.



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## TITLE IX

- Title IX Regulations (Published May 6, 2020; Effective August 14, 2020) regarding sex discrimination, sexual harassment, and sexual assault.
  - Adopt PRESS Policy (and Procedures) ASAP
  - Handbooks – any need to update, particularly contact info?
  - Title IX Coordinator + Publish Contact Info
  - Grievance and Complaint Investigation Procedures
  - Both Employee and Student Complaints
  - **TRAINING, TRAINING, TRAINING**



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