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Title IX: Nuts and Bolts

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OVERVIEW

PART 1
What is Title IX?

PART 2
What is Required by Title IX?

PART 3
Title IX Procedures

PART 4
What's next?


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WHAT IS TITLE IX?

"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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WHAT DOES THAT MEAN?


- Educational programs and activities that receive federal funds must operate in a nondiscriminatory manner.
 - Sex-based harassment and sexual misconduct
 - Athletics
 - Counseling/Tutoring
 - Treatment of pregnant and parenting employees
 - Discipline
 - Single-sex education
 - Employment
- Retaliation against any person for opposing an unlawful educational practice or policy, or against someone who has made charges, testified or participated in any complaint action under Title IX is prohibited.

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WHEN DOES TITLE IX APPLY?

Title IX applies where the District has **actual knowledge** of an allegation of sexual harassment experienced by an **individual in the educational program/activity**. The District cannot act with **deliberate indifference** to that notice.



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ACTUAL KNOWLEDGE


A report to ANY elementary or secondary school employee

- ALL employees must be trained to immediately communicate any report of conduct that would meet the definition of harassment to Title IX Coordinator

A report to the Title IX Coordinator made at any time via any method of communication

A report made to any District official who has authority to institute corrective measures


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EDUCATIONAL PROGRAM OR ACTIVITY

- The District is only required to address sexual harassment in the education program or activity, which is:
 - Any location, event, or circumstance over which the District exhibits **substantial control over both the alleged harasser and the context in which the harassment occurred**

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DO WE HAVE TITLE IX "JURISDICTION"?

- Is the allegation a potential violation of our Title IX policy?
- Did the incident occur in an "educational program or activity?"
 - Places, circumstances, events where the school has substantial control over BOTH the Respondent AND the context in which the harassment occurs
 - Any building owned by school or controlled by an official organization
- Did the incident happen in the United States?
- Answer: Yes, proceed with Title IX processes

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DO WE HAVE TITLE IX "JURISDICTION"?

What if Title IX does not apply?



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DO WE HAVE TITLE IX "JURISDICTION"?


- If not Title IX, the allegations/behavior can still be addressed under other policies

Institutional discrimination policies – BPs/APs, Student Conduct, CBAs, etc...
Professionalism/Discipline standards

- We still have an ethical duty to respond


Provide outreach with supportive resources to impacted parties
Assess if there is an action needed to keep community safe
Look for patterns/concerns...

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WHAT IS DELIBERATE INDIFFERENCE?


A response to notice of sexual harassment that is clearly unreasonable in light of the known circumstances



The new regulations set out the required response to notice within the context of:

- Protecting 1st Amendment rights
- A presumption of non-responsibility of the accused
- Provision of supportive measures

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AVOIDING DELIBERATE INDIFFERENCE

Title IX Coordinator must PROMPTLY contact every Complainant (whether formal complaint or not) to discuss:

- Wishes regarding supportive measures
- That supportive measures are available with or without filing a formal complaint
- The process for filing a formal complaint


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AVOIDING DELIBERATE INDIFFERENCE

1	2	3	4	5
Treat Complainants and Respondents equitably	Provide supportive measures in all cases	Investigate every instance of formal complaint	Use procedures set out in the regulations	Provide Complainant remedies if Respondent is found to have responsibility

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NOTICE = RESPONSIBILITY




- Even if no formal complaint filed, Title IX Coordinator **MUST** initially:
- Contact Complainant to discuss supportive measures
- Consider the Complainant's wishes with respect to supportive measures
- Inform Complainant of the availability of supportive measures with or without the filing of a formal complaint
- Explain the process to file a formal complaint

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SUPPORTIVE MEASURES

Supportive measures are non-disciplinary, 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 formal complaint has been filed.



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SUPPORTIVE MEASURES

- Counseling
- Class modifications
- Schedule changes
- Assignment location
- Increased monitoring or supervision
- Designed to restore or preserve equal access to education program or activity
- Do not unreasonably burden either a Complainant or Respondent

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SUPPORTIVE MEASURES


- **Do not** sanction or discipline Respondent in any way until grievance procedure has been followed
- Do not completely remove a student Respondent from an activity as a supportive measure for complainant
- UNLESS there is need for an emergency removal; which can only happen if necessary to protect an individual from IMMEDIATE THREAT TO PHYSICAL HEALTH OR SAFETY


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DEFINING SEXUAL HARASSMENT

- Conduct on the basis of sex that meets one or more of the following:
 - A District employee conditions the provision of an aid, benefit, or service of the district on an individual's participation in unwelcome sexual conduct;
 - Unwelcome conduct that a reasonable person would find to be so severe, pervasive, and objectively offensive that it "effectively denies a person equal access" to the District's education program or activity;
 - Sexual assault, dating violence, domestic violence, or stalking.

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 **DEFINING SEXUAL HARASSMENT**



District employee conditions the provision of an aid, benefit, or service of the district on an individual's participation in unwelcome sexual conduct.

- Defined as "quid pro quo" harassment:
- Does not require a severe, pervasive, and objectively offensive analysis
- By its very terms, it will deny access to the program

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 **DEFINING SEXUAL HARASSMENT**


Unwelcome conduct that a reasonable person would find to be so severe, pervasive, and objectively offensive that it "effectively denies a person equal access" to the District's education program or activity.

This type of "hostile environment" harassment requires the unwelcome sexual conduct to be:

- Severe AND
- Pervasive AND
- Objectively offensive

Such that the victim is denied equal access to the District's programs and activities – but must also be narrowly tailored to protect 1st Amendment rights

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 **HOSTILE ENVIRONMENT – TOTALITY OF CIRCUMSTANCES**


Consider:

- How frequent is this occurrence?
- Who knows about it?
- Is it "common knowledge?"
- What is the relationship between the parties?
- Is there a power differential?
- Where did this occur?
- How big is the school? Department?
- What was the impact of this on the Reporting Party's schooling/job?
- Reporting Party's response (snowflake vs. boulder)
- Consider academic freedom and 1st Amendment rights

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DEFINING SEXUAL HARASSMENT SEXUAL VIOLENCE

- Offenses based on violence (sexual assault, dating violence, domestic violence, stalking):
 - Does not require severe and pervasive analysis
 - When it occurs, equal access is denied
 - Like Element 1, it is per se actionable



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DEFINING SEXUAL HARASSMENT: SEXUAL VIOLENCE

SEXUAL ASSAULT

Any sexual act (forcible or non-forcible) with another without consent or where the individual cannot consent because of age or incapacitation.


STALKING

A course of conduct directed at a specific person on the basis of sex that would cause a reasonable person to fear for the person's safety or the safety of others, or to suffer substantial emotional distress.

DATING VIOLENCE

Violence committed, on the basis of sex, by a person who is or has been in a social relationship of a romantic or intimate nature with a Complainant. The existence of the relationship is determined based on a consideration of the following factors: length of relationship, type of relationship, and frequency of interaction between persons involved.

Dating violence includes, but is not limited to, sexual or physical abuse or the threat of such abuse. Dating violence does not include acts covered under the definition of domestic violence.




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DEFINING SEXUAL HARASSMENT: SEXUAL VIOLENCE


DOMESTIC VIOLENCE

Conduct, on the basis of sex, that includes the requisite components of felony or misdemeanor crimes of violence committed by:

- Current or former spouse or intimate partner;
- Person with whom child(ren) are shared;
- Person who is cohabitating with or has cohabitated with Reporting Party as a spouse or intimate partner;
- A person similarly situated to a spouse of the Reporting Party under California law; or
- Any other person, against an adult or youth, who is protected from that person's acts under California law.



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OTHER SEXUAL MISCONDUCT

- Video or audio taping of sexual activity without consent
- Letting someone watch without getting permission from partner
- Exposing oneself
- Voyeurism
- Disseminating a sexual photo/video without consent
- Knowingly exposing someone to or transmitting an STI
- Sexual bullying
- And more*

Was it sexual? Was it nonconsensual?

NOTE: Might have to be dismissed under Title IX but can be adjudicated under other policies

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HYPOTHETICAL SITUATIONS

Example #1: Sally and Richard have a long history of interpersonal conflict. Sally works in the same department as Richard and is only of only the few women in the department. Sally tells you that Richard singles her out in from of her colleagues and intentionally gives her harder assignments.

Is there any basis for Sally to file a Title IX complaint?

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HYPOTHETICAL SITUATIONS

Example #2: Sarah is a high school student and is enrolled in a theater class taught by Mr. Green, a relatively new teacher with the District. Mr. Green's classes are very popular among students as he has a reputation for being "down to earth" and "relatable." This year, Mr. Doe selected an Avant Garde play for the school theater production and Sarah is cast as a lead female role.

The entire class puts on a great performance. After the conclusion of the performance, but before the curtain is drawn, Sarah takes the stage again and begins thanking Mr. Green for his leadership during the production. Mr. Green is still sitting in the audience and he feels a rush of pride to hear Sarah's speech. After a few minutes of "thank yous" however, Sarah begins to tell the audience of Mr. Green's "hands-on" teaching style, including an incident wherein he made comments about Sarah's physical appearance in front of her classmates, took her to dinner to discuss her career goals, and told her that her "sexy ethnic look" would allow her to act in a large variety of roles. Sarah's speech ended and the curtains were drawn.

You are a school administrator who watched the performance and heard Sarah's "thank you" speech. What do you do?

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 **HYPOTHETICAL SITUATIONS**

Example #3: Ms. Hernandez graduated in the class of 2000. At that time there was a complaint about a teacher that led nowhere. The teacher is still employed by the District. When questioned back in high school, Ms. Hernandez spoke in favor of the teacher and said nothing ever happened.

Nineteen years later Ms. Hernandez called her high school counselor who has now reported to you their telephone conversation including that Ms. Hernandez has felt guilty for all these years because when she was in high school, she had a sexual relationship with the teacher and has evidence to prove her claim.

What should you do? Is this a Title IX Complaint?

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 **HYPOTHETICAL SITUATIONS**

Example #4: Sarah is a high school student at a District high school. Sarah has been dating Sam for about a year. Sarah and Sam live close by to each other and often drive to campus together. They are often seen in the parking lot walking to classes in the mornings.

One morning, Sarah is seen getting out of her friend Michelle's car, crying and using crutches. Sarah looks very upset and her friend Michelle looks concerned for Sarah. That same day, Michelle speaks with a school counselor and tells her about Sarah's injuries. Michelle also tells the counselor that Sarah is dating Sam and she has seen Sam yell at Sarah before.

What should you do? Is this a Title IX Complaint?


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 **RETALIATION IS PROHIBITED**

Intimidation, harassment, or reprisal against a person who has reported a problem, filed a complaint, participated (or chosen not to participate) in any manner in an investigation, hearing or other district resolution procedure.



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RETALIATION

Do not take any adverse action against any person for the purpose of interfering with rights under Title IX or because the person participated or **refused to participate** in a Title IX proceeding

Keep the names of all individuals involved confidential except as necessary to investigate (parties have right to know names)


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RETALIATION

- Beware of disciplining for a non-harassment code of conduct violation where you learned of the violation via the sexual harassment complaint—it can be done, but should be for an infraction which you typically would discipline
- Someone other than the investigator or decisionmaker should process any such discipline and should know as little as possible about the Title IX Complaint


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RETALIATION

Disciplining a student based on a code of conduct violation for making a materially false statement in bad faith during the investigation of a complaint does not constitute retaliation.


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TITLE IX PERSONNEL

- Reporting Structure
 - o Superintendent
 - o Multiple campuses
- Title IX Coordinator(s)
- Deputy Title IX Coordinator(s)
 - o Human Resources
 - o Student Affairs

- Investigator(s)
 - o Internal vs. External
- Decision-Maker(s)
- Appellate Officer(s)
- Informal Resolution Facilitator(s)





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THE TITLE IX COORDINATOR AND DEPUTY COORDINATOR

- **At least one employee must be designated as the Title IX Coordinator**
- Should be an administrator with authority to recommend and implement policy change
- Needs to have the ability to coordinate, implement, and enact throughout the organization
- Known throughout campus/ District as the reporting point for complaints/concerns

- Contact for governmental agencies about claims (DOE, OCR, etc.)
- Effectuates the Title IX Process: Assignment of cases and investigations and/or informal resolutions
- Stays abreast of federal, state, and local Title IX requirements
- Oversight of Title IX training requirements
- Deputy stands in and supports Coordinator

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WHAT DOES THE LAW REQUIRE?




INVESTIGATORS

- Cannot be the Title IX Coordinator
- Conducts fair, reliable, thorough impartial **fact-finding** investigations
- Allegations of sexual misconduct / violations of Title IX
- Drafts investigatory report summarizing evidence gathered

DECISION-MAKERS

- Cannot be Title IX Coordinator or Investigator
- Reviews investigatory report
- Drafts a decision outlining rationale for findings
- Determines appropriate sanctions

APPELLATE OFFICER

- Not Coordinator, Investigator, or Decision-Maker
- Determines if it meets grounds for appeal
- Reviews documents
- Not a re-litigation of facts

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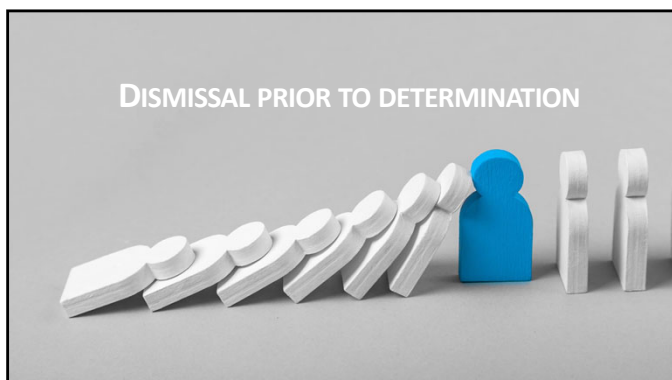
WHAT DOES THE LAW REQUIRE?

TRAINING

- All levels must be trained: Coordinators, Investigators, Decision-Makers, Appellate Officers, Informal Resolution Officers
- Training must promote impartiality
- Training must be posted on website
- Training documents must be maintained for 7 years – only have to post most recent
- Definition of sexual harassment
- Scope
- Investigation processes and procedures
- Issues of relevance (evidence, questioning, and decision-making)
- How to use Live Hearing technology (if applicable)

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DISMISSAL PRIOR TO DETERMINATION



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MANDATORY DISMISSAL OF FORMAL COMPLAINTS


- The complaint does not state an allegation of sexual harassment, even if all facts are found to be true
- The sexual harassment, even if it did occur, did not occur in a District program or activity
- The sexual harassment did not occur against a person in the United States



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Permissive Dismissal

- If the Complainant notifies the Title IX Coordinator that s/he wants to withdraw the complaint
- If the Respondent's employment or enrollment with the District ends
- If circumstances, such as several years between the conduct and the complaint or a Complainant's refusal to cooperate, prevents the gathering of evidence sufficient to render a determination



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**TITLE IX APPLIES!
NOW WHAT?**


- Title IX Coordinator sends outreach to parties
- Supportive measures are offered and provided
- Engage in initial assessment for emergency removal or administrative leave



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FORMAL COMPLAINT


- All parties must be noticed in writing and provided the following information:
 - Plead with specificity – detailed information about sexual harassment allegations including the specific time, date, location, and identities of those involved.
- Information regarding the grievance process, including the right to an informal resolution
- A statement that the Respondent is presumed not responsible and determinations of responsibility are only made at the end of the process




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FORMAL COMPLAINT

- o Right to an advisor of their choice
- o Ability to conduct evidence review prior to the completion of the investigative report
- o Applicable policies that require truthful information
- o Information regarding reporting to law enforcement and OCR
- o Information regarding preservation of evidence
- o Notice that additional allegations can be added later if found




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INFORMAL RESOLUTION

- Not allowed unless there has been a formal complaint filed
- Not allowed for a complaint alleging an employee harassed a student
- Allowed at any time during formal complaint process if:
 - Both parties have been provided written notice of their rights
 - Both parties written voluntary consent is obtained




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INFORMAL RESOLUTION

- Title IX Coordinator will facilitate the process
- Alternative to the formal grievance procedure
- There can be no conditions placed on the parties in exchange for their consent & either party can withdraw consent at any time (revert to the formal grievance procedure)
- Must be equitable process
- Mediated by neutral third party



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INFORMAL RESOLUTION

- Both parties must be notified, in writing, of the informal resolution process, to include:
 - The allegations made in the formal complaint
 - The requirements of the informal resolution process
 - What elements of the process will remain confidential (or not)


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CONDUCTING INVESTIGATIONS: THE INVESTIGATOR

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NO CONFLICT OF INTEREST

- Investigator must not have a conflict of interest...
 - Against the specific Complainant or Respondent or
 - Against Complainants or Respondents in general
- If you have a conflict of interest, notify the Title IX Coordinator immediately
- Outside investigators are frequently used for this reason

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BASIC PREMISES: INVESTIGATORS

- Meet the timeline set out in the District's policy (60 school days of receipt of formal complaint)
- If there is a temporary delay for good cause, provide written notice to both parties explaining the reason for the delay
- District administrative needs DO NOT create good cause for a temporary delay

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Reasons that may create a good cause delay in completion:


- Concurrent law enforcement activity
- Witness availability
- A pandemic-related reason (illness, unavailability)
- District breaks
- Absence of a party
- Availability of a party's advisor
- Need for language assistance or ADA accommodations



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INVESTIGATION BASICS

- Burden of proof is on the District
- No restrictions are placed on the rights of the parties to discuss allegations or gather/present evidence
- Both parties have the same opportunity to have be present during interviews
- Both parties provided with written notice of date, time, participants, purpose, and location of each investigative interview with sufficient time allowed to prepare



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INVESTIGATION BASICS

All evidence is provided to the parties, and any attorney/advisor, by sending the evidence to the parties in an electronic or hard copy format and allowing the parties 10 days to submit a written response

- Provide both parties an equal opportunity to inspect and review evidence gathered as part of the investigation that is *directly related* to the allegations raised in the formal complaint
- Including evidence you do not intend to rely on when drafting the investigation report



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INVESTIGATING THE COMPLAINT

You must gather the relevant evidence:

- Do not require or rely on the parties to provide you evidence
- You may not require a party to provide evidence (documentary or verbal) that would be legally protected under attorney-client privilege, doctor-patient privilege, spousal privilege (e.g., cannot require outside counseling records)



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INVESTIGATING THE COMPLAINT



Both parties must have equal opportunity to present witnesses and evidence


- Interview both parties
- Ask both parties to provide any documents they think are relevant
- Ask both parties who else they think you should talk to and then interview the witnesses identified by the parties



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INVESTIGATING THE COMPLAINT

- Do not restrict either party's ability to discuss the allegations or gather and present evidence
- If allowing others to be present during an interview (such as an advisor), must allow both parties the same opportunity
 - You may restrict the extent to which the advisor can participate, so long as restrictions apply to both parties



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WRITTEN INVESTIGATION REPORT

- Write investigation report summarizing all steps and evidence (no determination of responsibility)
- Be sure to consider the written responses to the evidence that was provided by the parties when finalizing the written investigative report
- The written investigation report must fairly summarize the relevant evidence and be provided to parties and attorney/advisor at least 10 days before any determination of responsibility is completed



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DECISION MAKERS



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BASIC PREMISES: DECISION MAKERS

- Decision maker CANNOT be the Title IX Coordinator or the investigator
- Objectively evaluate all available evidence, both inculpatory and exculpatory
- Weigh the evidence using a preponderance of the evidence standard adopted by the District (i.e., The evidence must show that its *more likely than not* that the respondent is responsible for the alleged conduct)

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AFTER THE INVESTIGATION

After the written investigation report is provided by the investigator and BEFORE a determination of responsibility is made:

- a) Both parties must be given the opportunity to submit relevant written questions that he/she wants asked of any party or witness
- b) Must provide each party with the answers, AND
- c) Allow for limited follow up questions from the parties

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WRITTEN QUESTIONS

- If a question is excluded by the decision maker, the decision maker must explain why the question is not relevant
- Complainant's sexual history or predisposition is NOT RELEVANT unless:
 - offered to establish that someone else committed the acts complained of
 - Offered to establish consent with the specific respondent

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ISSUING A DETERMINATION

Using the preponderance of evidence standard to review the evidence, issue a written determination that includes the following:


- List of the allegations
- Description of the procedural steps taken from receipt of the formal complaint through determination (include dates of notices, interviews, etc.)
- Findings of fact that support the determination
- Application of the code of conduct to the facts and conclusions of same

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ISSUING A DETERMINATION

- Statement of and rationale for the determination as to each allegation, including:
 - Determination of responsibility
 - Any disciplinary actions
 - Whether remedies to restore or preserve equal access to the educational program or activity will be provided to complainant
- Include procedures and information regarding the permissible basis for appeal

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REMEDIES

- If the determination is that the Respondent is responsible for the conduct, then determine the remedies that will restore or preserve equal access to the education program or activity
 - Same types of things as supportive measures except that they can be punitive toward Respondent once responsibility has been determined

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APPEALS

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APPEALS

- Appeals cannot be heard by the Title IX Coordinator, the investigator, or the decision maker
- Appeals must be offered to both parties equally
- Appeals are **mandatory** in the following circumstances:
 - A procedural irregularity affected the outcome
 - Availability of new evidence that was not reasonably available at the time of the determination that could affect outcome

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APPEALS

(Mandatory appeals cont'd):

- Conflict of interest on the part of the Title IX Coordinator, investigator, or decision maker that affected the outcome
- Appeals may also be heard for other reasons as determined by District policy/regulation

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APPEALS

- Written notice that an appeal has been submitted must be provided to both parties
- Both parties must have an equal opportunity to submit a written statement in support of, or challenging, the determination by the decision maker

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A FEW MORE
IMPORTANT THINGS


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RECORDS RETENTION

- All records of any action related to sexual harassment complaints must be maintained for a minimum of 7 years, including records that substantiate remedies and supportive measures provided
- Training materials used to train Title IX Coordinators, decision makers and investigators must be posted on the District's website

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RECORDS RETENTION

For each response to a complaint; formal or informal; the District must create and maintain for 7 years, a record that:

- documents the basis for the District's conclusion that its response was not deliberately indifferent,
- documents that it has taken measures designed to restore or preserve equal access to the District's education program or activity

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RECORDS RETENTION

If the District did not provide a Complainant with supportive measures, then the District must document the reasons why such a response was not clearly unreasonable in light of the known circumstances.

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WHAT'S NEXT?

DOE released Notice of Proposed Rule Making on June 13, 2020.

We are in the 60-day public comment period.

* See the Summary Chart and outline for complete list of proposed changes.

Some key changes:

- o Expanded definition of sexual harassment
- o Federal protections for LGBTQ+ (include gender identity and sexual orientation)
- o Additional protections for pregnant students/employees
- o Significant for K-12 districts, the investigator and decision-maker no longer need to be separate.

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Thank you!

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