

NEW TITLE IX REGULATIONS

May 12, 2020



INTRO/ HOUSEKEEPING/ DISCLAIMER

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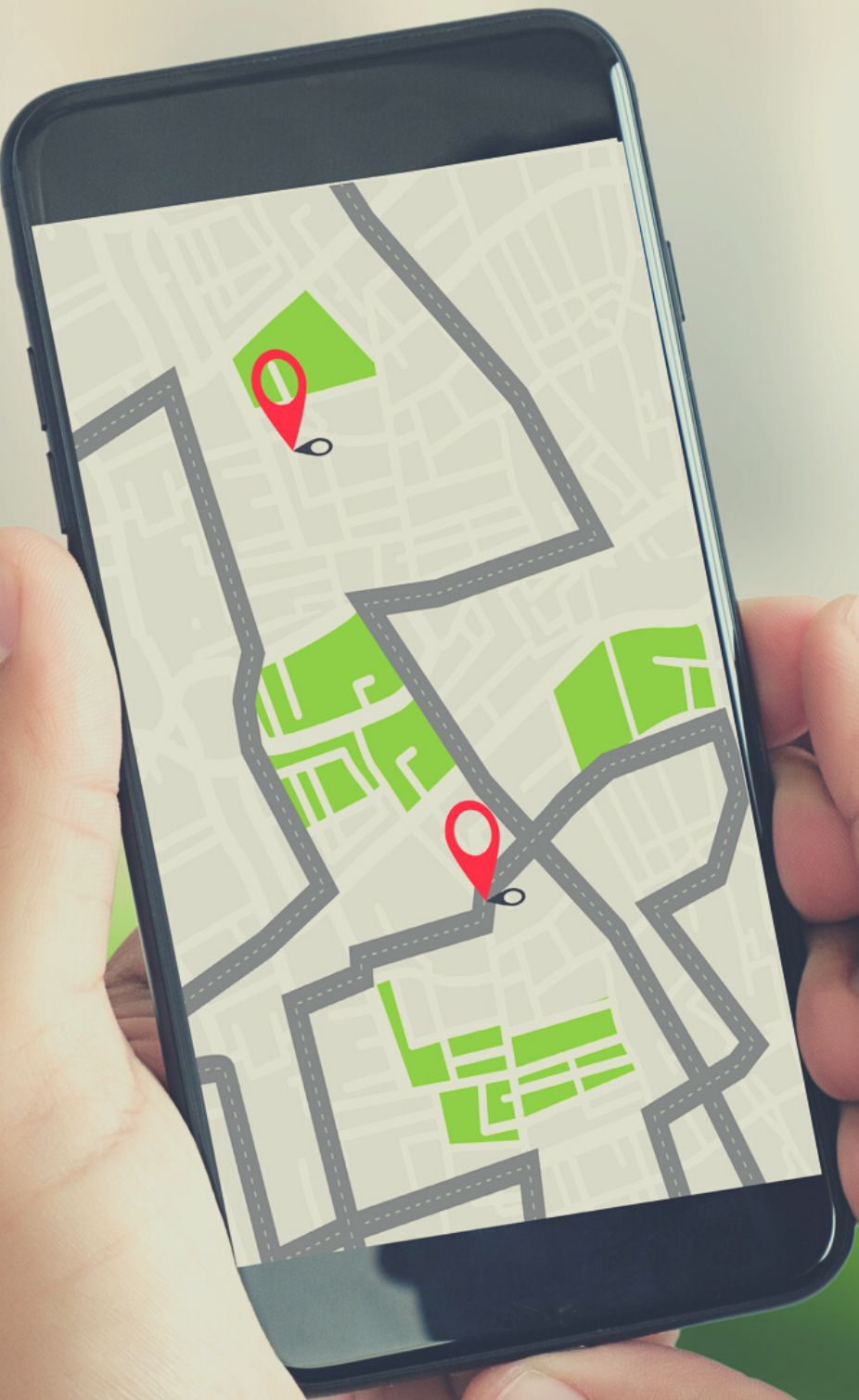
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PRACTITIONERS





HOW DID WE GET HERE?

- **September 2017-** New Guidance
- **November 2018-** Notice of Proposed Rule
- **May 6, 2020-** New Regulations

REGULATIONS VS. GUIDANCE

[The] final regulations represent the Department's interpretation of a recipient's legally binding obligations, rather than best practices, recommendations, or guidance... [and] focus on precise legal compliance requirements governing recipients. p. 18



How to Read the Regulations

- Preamble vs. Regulations

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DEFINED TERMS

- Actual Knowledge
- Complainant/Respondent
- Formal Complaint
- Sexual Harassment
- Supportive Measures
- Elementary and Secondary School
- Postsecondary Institution

THEMES

SIGNIFICANT CHANGES

- Actual Notice
- Responsible Employees
- Supportive Measures
- Training
- Conflicts of Interest
- Due Process Guardrails
- Formal Process/Informal Process
- Hearings
- Jurisdiction
- Advisors





Role of Title IX Coordinator

- Must be trained
- Must be CLEARLY identified
- Must make contact information prominent
 - EVERYWHERE
 - Including how to report during non-working hours
- Like 2001 Guidance, the final regulations incentivize districts to train employees
- Sexual Gratification vs. Sexual Exploration



Sexual Harassment

- **Conduct on the basis of sex that satisfies one or more of the following:**
 - **An employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct;**
 - **Unwelcome conduct determined by a reasonable person to be so severe, pervasive AND objectionably offensive that it effectively denies a person equal access to the recipient's education program or activity; or**
 - **"Sexual Assault," "Dating Violence," "Domestic Violence" or "Stalking" as defined in the Clery Act.**

Actual Knowledge

Actual knowledge for K-12 means notice of sexual harassment or allegations of sexual harassment to ANY EMPLOYEE (Responsible Employee)

- Teachers/Teaching Assistants
- Counselors
- Administrative Assistants
- Bus Drivers
- Coaches
- Cafeteria Workers
- Etc.

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JURISDICTION

Education Program or Activity

- **Locations, events, or circumstances (operations)**
- **district exercised substantial control**
 - **over both the respondent AND the context in which the sexual harassment occurs**
- **Includes online sexual harassment but it must be analyzed to determine if it occurs in education program or activity**
- **Does not create or apply a geographic test, does not draw a line between “off campus” and “on campus,” and does not create a distinction between sexual harassment occurring in person versus online.**

Supportive Measures

What

- defined term and intentional deviation from "interim measures" individualized services provided to a complainant or respondent that are non-punitive, non-disciplinary, and do not unreasonably burden the other party yet are designed to restore or preserve a person's equal access to education

- Non-disciplinary
- non punitive
- individualized services
- interactive process

Offered

- to complainant and respondent (can be refused)
- as appropriate
- as reasonably available
- without fee or charge

When

- promptly
- before or after the filing of formal complaint **OR**
- where no formal complaint has been filed



SUPPORTIVE MEASURES CONTINUED

Purpose:

- restoring or preserving equal access
- protecting safety
- deterring sexual harassment

Burden: remains on the district not the parties

Not: punitive or disciplinary

Confidential: as much as possible

Document: when provided, when not provided and why

Title IX Coordinator: ultimately responsible for effective implementation, but others can also implement

Examples: in section 106.3



Formal Complaint

- **Document (paper, email, or online submission)**
 - **Signed by Complainant (digital signature is okay) or Title IX Coordinator**
 - **Alleging sexual harassment, against the respondent AND requesting that institution investigate**
- **Complainant must be participating in, or attempting to participate in an education program or activity of the district with which the formal complaint is filed**



DISMISSAL OF A FORMAL COMPLAINT

MUST Dismiss if:

- Would not constitute sexual harassment as defined in regulations
- Did not occur in education program or activity
- Did not occur against a person in the U.S.
 - *May act under another provision of code of conduct

May Dismiss if:

- Complainant notifies Title IX Coordinator in writing that Complainant would like to withdraw formal complainant or allegations
- Respondent is no longer enrolled or employed by district
- Specific circumstances prevent the institution from gathering evidence sufficient to reach a determination

*Must promptly send written notice of dismissal and reasons for dismissal simultaneously to parties

Response to a Formal Complaint (Grievance Process)

- Treat parties equitably
- Require an objective evaluation of all relevant evidence (inculpatory and exculpatory)
- No conflict of interest or bias by Title IX Coordinator, investigator, decision-maker or facilitator of informal resolution process
- Trained Title IX Team
- Presumption that respondent is not responsible
- Include reasonably prompt time frames for process and appeals with written notice for limited extensions with good cause (may include absence of party, witness, or advisor, law enforcement activity or the need for language/accommodation of disability)
- Describe range of sanctions and remedies
- Standard of evidence (same for students and employees)
- Procedures and permissible bases for appeals
- Notice of allegations



Investigation of Formal Complaint

MUST

- Ensure that burden of proof and burden of gathering evidence with district, not parties (no medical or counseling records w/o written consent of party)
- Provide equal opportunity to present witnesses (including EXPERT), and inculpatory/exculpatory evidence
- Not restrict ability of either party to discuss the allegations or to gather/present relevant evidence
- Provide opportunity for both parties to have advisor (can be attorney and can restrict the extent to which advisor can participate in the process)
- Provide written notice of date, time, location, participants and purpose of all hearings, investigative interviews, or other meetings with sufficient time to prepare to participate
- Provide equal opportunity to inspect and review evidence obtained as part of investigation (even if not relied on)- sent to party AND advisor (electronic or hard copy) with 10 days to respond prior to completion of investigative report.
- Create investigative report that fairly summarizes relevant evidence
- Provide report to parties AND advisors 10 days prior to hearing for review and written response.



Hearings K-12

- **MAY provide hearing, but not necessary (ex: could offer high school and not elementary) unless State Law mandates live hearing.**
- **If a hearing is provided, it must comply with the regulations**



Hearings

- **Live Hearing -if using them (in same room or using technology in separate rooms- not only via telephone)**
 - **Permit ADVISOR to ask the other party and witnesses RELEVANT questions (including those challenging credibility)**
- **Cross-Examination**
 - **Directly, orally, in real time by ADVISOR**
 - **If a party or witness does not submit to cross-examination, the decision-maker(s) must not rely on any statement of that party or witness**
- **Recording (audio, visual, or transcript) made available to parties for inspection and review**
- **Written determination regarding responsibility and sanctions with rationale**
- **Decision provided to parties simultaneously**
- **Effective implementation of remedies (Title IX Coordinator)**

Questions?

- **WITH OR WITHOUT a hearing... AFTER District has sent the investigative report to the parties and BEFORE reaching a determination regarding responsibility Decision-maker(s) MUST:**
 - **Afford each party the opportunity submit written, relevant questions that a party wants to ask of any party or witness**
 - **Provide each party with the answers to written questions**
 - **Allow for additional, limited follow up questions from each party**
- **Decision Maker(s) must explain to the party proposing the questions any decision to exclude a question as not relevant**



INFORMAL RESOLUTIONS

May NOT:

- Be required/condition of enrollment or employment
- Be offered unless Formal Complaint is filed
- Be offered or facilitated when allegations of employee sexually harassing student

May:

- Be facilitated at any time after Formal Complaint and prior to determination regarding responsibility
- Expel if agreed to in Informal Resolution
- Provide Informal Resolution Process (NOT REQUIRED TO PROVIDE)

Must:

- Provide information regarding Informal Resolution Process in initial Notice of Allegations
- Provide parties written notice of informal resolution with
 - allegations
 - requirements of process (including what information/documents will be shared)
 - circumstances which presume Formal Complaint arising from same allegations
 - right to withdraw/resume grievance process
 - consequences-including records kept/shared
- Obtain voluntary, written consent
- Have reasonably prompt time frames



Emergency Removal

- **Conduct individualized safety and risk analysis**
- **Determine immediate threat to physical health or safety of any student or other individual**
- **Provide the respondent with notice and an opportunity to challenge the decision immediately following removal**



Burden of Proof

- **Discretion of School District**
- **Must be Consistent Throughout ALL Process ie. Employees and Students**
- **Campus / District Specific**

Training, Training, Training

REQUIRED

- Title IX Coordinator (robust), Investigators, Decision-Makers, Informal Resolution Facilitators, Appellate Decision-Makers
- Decision-Makers- training on technology issues
- At least 8 hours (assumed) of training with additional each subsequent year
- Responsible Employee Training (Highly Recommended)





**Title IX
Coordinator**



Investigator(s)



**Decision-
Maker(s)**



**Appellate
Member(s)**



**Informal
Resolution
Facilitators?**



**Responsible
Employees**



ROLE OF PARENTS / GUARDIANS

“While elementary and secondary school students retain less control over when disclosure of sexual harassment triggers the school’s mandatory response obligations, these students (with involvement of their parents as appropriate) do retain control over whether to accept supportive measures, and whether to also file a formal complaint.”



Deliberate Indifference

"Clearly unreasonable in light of the circumstances"

- **Must promptly offer supportive measures**
- **Cannot impose discipline without a formal process**
- **Must investigate allegations in a formal complaint**



OTHER

- **Retaliation**
- **ADA/IDEA/504 and Title IX**
- **Delay of Investigations Due to Law Enforcement**
- **Recordkeeping**
- **Confidentiality/Gag Orders**
- **Title VII and Title IX**
- **Current Open Investigations**
- **Online Harassment**
- **Advisors**
- **Due Process**
- **First Amendment/Academic Freedom**
- **Removal of Safe Harbor**



Positives

- **Flexibility**
- **"Will not Second Guess"**
- **Deliberate Indifference standard that will place institutions/school districts in violation is higher and clearer**

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ACTION ITEMS

- Meetings with leadership to explain needs and next step
- Begin identifying process and people
- Publication
- Training and implementation



Be Patient

There is a lot of work to be done, but it is most important that it is done correctly. Right NOT Rushed.



UPCOMING ICS EVENTS

- Virtual Certified Investigator Training
(July 23-24)
- Breakdown and Implementation of New Title IX Regulations
 - TBA
- Decision Maker/Adjudicator
 - TBA
- Title IX Coordinator
 - TBA

SAVE
THE
DATE