

Responding to Sexual Harassment under the New Title IX Regulations



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What is Title IX?

- ❑ Title IX of the Education Amendments of 1972
 - ❑ Title IX is all of 37 words.
 - ❑ It prohibits discrimination based on sex in educational institutions that receive federal financial assistance.
- ❑ Harassment based on sex is a form of discrimination based on sex. This has been established in the law for a long time.
- ❑ Specific guidance on compliance has been limited, until now.
 - ❑ No officially adopted regulations addressing sexual harassment or school response
 - ❑ Primary guidance from court interpretations and "Dear Colleague" letters issued by the Department of Education (DOE).



New Regulations

- ❑ The Department of Education has developed and adopted new regulations governing a school's response to sexual harassment.
- ❑ Effective date: August 14, 2020, unless stopped by court order.
- ❑ There are two lawsuits already pending.
 - ❑ ACLU
 - ❑ 18 Attorneys General



The District Should Train *All* Employees



- ❑ All employees are potential reporters and **must** report.
- ❑ Districts should train **ALL employees** on this responsibility. If you do not use an outside trainer, then the T9C is likely going to be tasked with this training.



The New Regulations

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Definition: Sexual Harassment 34 CFR 106.30(a)

- ❑ Six Types of Sexual Harassment
 - ❑ Quid pro quo
 - ❑ Hostile environment
 - ❑ Sexual assault
 - ❑ Dating violence
 - ❑ Domestic violence
 - ❑ Stalking

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Definitions and Terminology: 34 CFR 106.30(a)

- ❑ Sexual Harassment = unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person's equal access to the recipient's education program or activity (i.e., quid pro quo, hostile environment, sexual assault, dating violence, domestic violence, stalking)



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Definitions: Quid Pro Quo

- ❑ *Quid pro quo*: When an employee conditions favorable treatment on the acceptance of unwelcome sexual attention.
- ❑ This definition applies only to actions of employees.
 - ❑ Teacher offers good grades to student.....



Definitions: Hostile Environment

- ❑ Conduct that it is so SEVERE, PERVASIVE **AND** OBJECTIVELY OFFENSIVE that it effectively DENIES a person EQUAL ACCESS to the program.
- ❑ What has changed from prior guidance?
 - ❑ OR → AND
 - ❑ LIMITS → DENIES
 - ❑ These changes are consistent with judicial interpretations but a departure from prior OCR guidance.
- ❑ This could be student-to-student conduct, employee-to-student conduct, or employee-to-employee conduct.
- ❑ **Note:** A lot of things happen in schools that are inappropriate and sexually oriented, but fall short of this definition.



Terminology

- ❑ **Complainant** = victim of sexual harassment
- ❑ **Respondent** = person accused of sexual harassment
- ❑ **Formal Complaint vs. "Report"** = report is verbal or in writing by *anyone* while a formal complaint may be initiated by complainant or T9C
- ❑ ***Actual Knowledge** = when *any* employee has knowledge
- ❑ **Substantial Control** = over both the alleged harasser and the context in which the harassment occurred
- ❑ **Education program or activity** = any academic, extracurricular, vocational or other education program operated by a district



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Complainant

- ❑ This term always refers to the victim of sexual harassment, even if someone else is the one who made the complaint.
- ❑ Parent complains that Child is being harassed. Parent has made the complaint, but Child is the “complainant.”
- ❑ Teacher reports that Student is being harassed. Teacher makes the Report, but Student is the “complainant.”



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Respondent

- ❑ This term refers to the person accused of sexual harassment.
- ❑ Note: these terms (Complainant, Respondent) apply even when there is a Report, but no Formal Complaint.
- ❑ Example: Mom complains that Billy is being harassed by a coach based on his sex. The T9C meets with mom and explains the Formal Complaint process. Mom does not want that. T9C also decides not to initiate Formal Complaint process.
- ❑ So there is no Formal Complaint, but there is a Report. Billy is the Complainant and Coach is the Respondent.



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Supportive Measures

- ❑ Supportive Measures = Non-disciplinary, non-punitive individualized services offered to Complainant or Respondent at no charge designed to “restore or preserve equal access to...the education program or activity without unreasonably burdening the other party” whether or not a formal complaint is filed.
- ❑ *Examples:*
 - ❑ Counseling.
 - ❑ Mutual restrictions on contact.
 - ❑ Modification of schedule.
 - ❑ Campus escort services.



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What does “actual knowledge” mean?

- ❑ This term is important because the school’s duty to respond arises only when it has “actual knowledge” of sexual harassment, or of allegations of conduct that, if true, would constitute sexual harassment.
- ❑ Under the regs, the school has “actual knowledge” when *any* employee of the school--*other than the actual perpetrator of the harassment*—has actual knowledge.
- ❑ What has changed?
 - ❑ Previously, actual knowledge was imputed to the school only when it was known by someone who had the authority to address it.
 - ❑ Now, it is *any* employee.



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Why the Change?

- ❑ DOE notes that with young children in K-12 schools, an adult is an adult.
 - ❑ K-12 students may not understand the distinctions between a para and a teacher, for example.
 - ❑ Regulation expanded to put the school on notice if *any* employee has actual knowledge.
- ❑ The standard for “actual knowledge” at the post-secondary level remains as it was—someone with authority to take corrective action.



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Is there “actual knowledge”?

- A. My fellow teacher and drinking buddy confides in me that he’s been “fooling around” with a student. He makes sure she gets an A and a college recommendation.
- B. Custodian witnesses an act of sexual harassment between students in the bathroom after school.
- C. Student confides in a teacher’s aide about what happened on the school field trip.

All three of these are examples of situations that, in the past, did not put the school on notice of “actual knowledge.” Now they do.



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What does “substantial control” mean?

- ❑ The school is not responsible for responding to allegations of sexual harassment unless the school had “substantial control” over the harasser and the “context.”
- ❑ Consider how this will be applied to:
 - ❑ extracurricular activities;
 - ❑ field trips;
 - ❑ out of town, overnight trips;
 - ❑ cyberbullying off campus.
- ❑ Scenario: Student engages in cyberbullying off campus and on the weekend.
 - ❑ Does the school have “substantial control”?
 - ❑ What about state law which gives schools the authority to discipline students for certain off campus cyberbullying?



Key Roles Outlined in Regulations

- ❑ Title IX Coordinator
- ❑ Investigator
- ❑ Decision Maker
- ❑ Facilitator
- ❑ Appeals Decision Maker



Practical Question: Who Should be the Title IX Coordinator?

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Overview

- ❑ The Title IX Coordinator (“T9C”) coordinates the district’s efforts to comply with Title IX of the Education Amendments of 1972.
- ❑ The new regulations set to take effect on August 14, 2020 significantly expand and change the role and responsibilities of the Title IX Coordinator (“T9C”) with regard to dissemination of information, training, setting standards, and conducting investigations.

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Role of Title IX Coordinator (T9C) Overview

- ❑ Every district must have **at least one**, and that person must be designated as and identified as the "Title IX Coordinator".
 - ❑ Must have authority to coordinate the school district's compliance efforts.
 - ❑ May investigate complaints, but may not be the "decision maker."
 - ❑ Must be referred to as the "Title IX Coordinator" in district policies and publications, including website.
 - ❑ A district must notify **all potential reporters** of sexual misconduct of the T9C's contact information: name/title, office and email addresses, and telephone number.



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Role of Title IX Coordinator (T9C) Overview

- ❑ There must be a district wide T9C, but subordinate T9C could also be designated at the individual campus level to assist with responding to reports of sexual harassment.
- ❑ T9C has specific responsibilities and authority in the report and formal complaint process.



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Practical Question: What constitutes a report of sexual harassment?

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Reporting

- ❑ Any person may report. Not just the alleged victim.
 - ❑ Can be verbal or written.
 - ❑ Can be made by mail, by telephone, or by email at any time (business or non-business hours) to the T9C or any employee.
 - ❑ T9C may also receive report from any employee who observes or receives notice of sexual harassment or alleged sexual harassment.
 - ❑ All employees need to know the designated person to whom they should turn over sexual harassment allegations.
 - ❑ Employee reporting requirement does not replace requirement to report child abuse to law enforcement and/or CPS.

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The Duty to Respond:

- ❑ If the district has “actual knowledge” of “sexual harassment” it “must respond promptly in a manner that is not deliberately indifferent.”
 - ❑ Actual knowledge = notice or awareness of sexual harassment or allegations of sexual harassment received by *any* employee.
 - ❑ The district’s response must not be “clearly unreasonable in light of the known circumstances.”



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Responding to a “Report”

- ❑ T9C must promptly contact a complainant to discuss:
 1. The Report
 2. Supportive Measures
 3. Process to file Formal Complaint
 4. Initial determination of whether allegations, if assumed true, meet the definition of sexual harassment.



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Timeliness and Eligibility

- ❑ Although reports of sexual harassment should be made in a timely manner, unlike other district grievances, a sexual harassment complaint can be made as long as the Complainant and Respondent are either or both still enrolled in the district or are the beneficiaries of the district's programs.
- ❑ Include years in all documentation to avoid confusion.



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Consider this....

- ❑ Dad calls A/P alleging his daughter was called a slut and tapped on the backside by a boy during school hours, at the school. *This is a Report of conduct that is sexual in nature.*
- ❑ T9C offers supportive measures and informs Dad of the Formal Complaint process.
- ❑ Dad just wants the behavior stopped and does not file a Formal Complaint.
- ❑ Boy admits conduct, but conduct falls short of the Title IX definition of "sexual harassment."
- ❑ Title IX process ends. May discipline in accordance with Student Code of Conduct but do not call it sexual harassment.

But What if....

- ❑ Dad decides to file a Formal Complaint.
- ❑ “The recipient must investigate the allegations in a formal complaint. If the conduct alleged in the formal complaint would not constitute sexual harassment as defined in 106.30 even if proved.... then the recipient must dismiss the formal complaint for purposes of sexual harassment under Title IX or this part; such a dismissal does not preclude action under another provision of the recipient’s code of conduct.” 34 CFR 106.45(b)(3)(i).

But What if the Conduct Went Further....

- ❑ During the meeting with T9C, dad alleges that the boy is also leaving sexually explicit notes in the student’s notebook, and sending sexually suggestive text messages and tweets.
 - Need to reevaluate the allegations under the definition of “sexual harassment”.
- ❑ Dad is not satisfied that supportive measures are enough and decides to file a Formal Complaint.

How does all this mesh with our Code of Conduct?

- ❑ The regulations restrict the use of “emergency removal” of a person from the educational program unless:
 - 1) there is an individualized safety/risk analysis;
 - 2) there is an immediate threat to the physical health or safety of the person to be removed or others; *and*
 - 3) the person removed is given notice and an opportunity to challenge the decision immediately after the removal.
- ❑ “Emergency removal” could include out of school suspension.
- ❑ **But remember:** This restriction applies only when the action is taken in response to “sexual harassment” as opposed to other violations of the SCC or employment policies.



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Step-by-Step Guide for T9C's Response to a Formal Complaint



Formal Complaint

- ❑ The regs distinguish a “report” from a “formal complaint.”
- ❑ A “formal complaint” is a printed document or electronic submission filed by a complainant that alleges sexual harassment and requests the recipient school investigate the allegation.
- ❑ 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 recipient with which the formal complaint is filed.



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How does the Formal Complaint process work?

- ❑ The district must respond to a Report promptly and equitably.
 - ❑ The T9C must promptly meet with the Complainant.
 - ❑ The T9C must explain the Formal Complaint Process and consider the wishes of the Complainant about pursuing it or not.
 - ❑ The T9C must offer “supportive measures.”
- ❑ After a Report is made, a Formal Complaint process may be initiated on that Report:
 - ❑ Only Complainant or the T9C can initiate.
 - ❑ T9C may initiate the process even when the Complainant chooses not to.



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Formal Complaint Considerations

- ❑ **Must** dismiss a Formal Complaint if the conduct alleged does not constitute "sexual harassment."
 - ❑ Does not preclude action under another provision of the district's code of conduct.
- ❑ **May** dismiss a Formal Complaint if:
 - ❑ Complainant notifies T9C in writing that the complainant wishes to withdraw the Formal Complaint.
 - ❑ Complainant is no longer enrolled or employed by the district.
 - ❑ Circumstances prevent the district from gathering sufficient evidence to make a determination.



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Responding: Benchmarks for Response to Formal Complaint of Sexual Harassment

1. Equal Access/Treatment
2. Objective Evaluation
3. Bias Free Training
4. Presumption of Innocence
5. Reasonable Time Frames
6. Description of Possible Outcomes
7. Standard of Evidence – Preponderance or Clear and Convincing
8. Appeal
9. Supportive Measures
10. Protection of Privilege



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1. Provide Written Notice

- ❑ Upon receiving a formal complaint, an institution must provide written notice to the known parties, including:
 - ❑ Description of the process, including informal resolution process
 - ❑ Allegations involved
 - ❑ Statement of presumed innocence of the respondent
 - ❑ The parties' right to an advisor of their choice (who may be an attorney)
 - ❑ Parties' right to inspect evidence relevant to the allegations
 - ❑ Notice any provision in the code of conduct that prohibits knowingly making false statements or providing false information.



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1. Provide Written Notice

- ❑ Must allow sufficient amount of time for respondent to prepare a response before any initial interview.
- ❑ Must be supplemented each time new allegations opened for investigation.



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2. Investigate Formal Complaint

- ❑ Investigations of Title IX grievances come with additional requirements.
- ❑ Investigations must:
 - Place the burden of proof and responsibility to gather evidence on the institution, not on the parties; and
 - Present an equal opportunity for parties to present witnesses and other evidence.

Note: the investigation must provide opportunities for the parties to present evidence, but the burden of proof remains on the institution to gather and present evidence



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2. Investigate Formal Complaint

- ❑ Permit parties to discuss allegations under investigation and gather relevant evidence.
- ❑ Provide parties with equal opportunity to have others present during any complaint proceeding.
- ❑ Provide advance written notice of all hearings, interviews, or other meetings to any involved party, with sufficient time for the party to prepare.



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2. Investigate Formal Complaint

- ❑ Provide equal opportunity to both parties to inspect and review evidence obtained as part of the investigation (including evidence which the institution does not intend to rely on), and send to each party the evidence at least 10 days before completion of the investigative report.
- ❑ Create an investigative report summarizing relevant evidence.
 - ❑ Must send a copy of the report to each side 10 days prior to the time of determination to permit them an opportunity to send a written response.



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3. Live Hearings

- ❑ Postsecondary institutions are required to hold live hearings as a component of the grievance process, **but for K-12, live hearings are optional.**



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4. Written Questions

- ❑ Whether or not a hearing takes place, district must:
 - ❑ Provide each party the opportunity after the investigation report is completed to submit written questions to be asked of another party or witness;
 - ❑ Provide each party with the answers;
 - ❑ Provide for limited written follow-up questions.



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A Note: “Rape Shield” Provision

- ❑ Questions and evidence about a complainant’s sexual predisposition or behavior are categorically not relevant to a Title IX Investigation, unless:
 - Evidence is offered to prove someone other than the respondent committed the alleged conduct
 - Evidence concerns the complainant’s prior sexual history with the respondent and is offered to prove consent.



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5. Determination of Responsibility

- ❑ The school's decision-maker in a Title IX proceeding cannot be the T9C or any investigator of the allegations.
- ❑ The decision-maker must issue a written determination of responsibility with:
 - ❑ Findings of fact;
 - ❑ Conclusions about whether the misconduct occurred;
 - ❑ Explanations of each conclusion; and
 - ❑ Any disciplinary sanctions or remedies being enacted
- ❑ Written copy of determination must be sent simultaneously with information on filing an appeal.



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6. Appeal

- ❑ A school must offer both parties an opportunity to appeal a determination of responsibility based on:
 1. Procedural irregularity that affected the outcome of the matter;
 2. Newly discovered evidence that could affect the outcome of the matter; and/or
 3. An employee involved in the investigation process with a conflict of interest or bias that affected the outcome of the matter.
- ❑ A school may offer an appeal on additional basis, as long as the appeal is offered equally to both parties.
- ❑ Appeal must be heard by a new decision-maker.



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Informal Resolution

- ❑ May offer informal resolution options, like mediation, as long as both parties give voluntary, informed, written consent.
- ❑ Cannot require a party waive their right to investigation or to participate in informal resolution as a condition of enrollment or employment.
- ❑ Cannot offer informal resolution until a formal complaint is filed and cannot ***ever*** offer informal resolution of allegations of sexual harassment by an employee against a student.
- ❑ Any party may withdraw from the informal resolution process and resume the grievance process at any point before an agreement is reached.

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Retaliation

- ❑ Retaliation is prohibited against any individual for the purpose of interfering with Title IX rights or because an individual has made a complaint or been involved with a Title IX investigation.
- ❑ Cannot charge an individual with a code of conduct violation not involving sex discrimination or sexual harassment but arising out of the same events as a report of sexual harassment, for the purpose of interfering with Title IX rights.
- ❑ An individual's exercise of a First Amendment right will not constitute retaliation.
- ❑ Charging an individual with a code of conduct violation for making a materially false statement in bad faith during a Title IX grievance proceeding does not constitute retaliation.



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Slide 47

HT12 really? no informal resolution until formal complaint filed...is this like the report vs. report thing? investigation vs. investigation?

Haley Turner, 7/9/2020

Investigating Title IX Sexual Harassment Reports

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Investigation vs. Investigation

- ❑ Investigation #1: Initial fact finding
 - In order to determine who made the report, the contents of the report, whether the alleged conduct could constitute “sexual harassment”, etc.
 - Likely conducted by a campus administrator.
 - Will determine what process should be used to respond to the report.
- ❑ Investigation #2: Title IX investigation
 - Investigation required following the filing of a Formal Complaint
 - The following slides will focus on Investigation #2, the formal Title IX investigation following a Formal Complaint.

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Key Investigation Steps

- ❑ Determine who will investigate
- ❑ Review board policies related to alleged conduct
 - *FFH (LOCAL) – Discrimination, Harassment, Retaliation*
 - *Student Code of Conduct*
 - *Employment policies/employee handbook*
- ❑ Consider whether interim actions are necessary to protect any person or to preserve the integrity of the investigation.
 - *Actions likely would have been taken by district following initial report.*



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Key Investigation Steps

- ❑ Interview the Complainant first, if possible
 - Get a clear understanding of what is being alleged, including *who, what, where, when, why.*
 - Serves as road map for rest of investigation
- ❑ Interview the person who made the report, if different than complainant.
- ❑ Interview witnesses
- ❑ Interview the Respondent



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Key Investigation Steps

- ❑ Obtain written, signed and dated statements from each person interviewed.
- ❑ Gather any relevant documentation or evidence:
 - Email or other correspondence or notes
 - Surveillance video, cell phone video
 - Electronic messages, posts to social media
- ❑ Prepare investigation report that will be provided to parties.
- ❑ Report to law enforcement, CPS, SBEC, etc., if required.



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Documentation Tips

- ❑ Notes should be thorough and detailed
- ❑ Include date, start/end times, location and names of people present
- ❑ Use exact quotes where possible
- ❑ Label rumors as rumors
- ❑ Avoid opinions of interviewer
- ❑ Recap notes with witness to confirm understanding
- ❑ Obtain a signature of any statement made by witness



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Interview Tips

To Record or Not?

- Probably NOT required to record but check your local policy
- No secret recordings! Keep recorder in plain view and advise the witness you are recording
- State the date, time, location and identify individuals present
- Label and secure the recording



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Interview Tips

- Be professional.
- Address concerns or reluctance of interviewee.
- Ask open-ended questions in a non-judgmental way.
- Ask witness to be clear about what is rumor or speculation and what was seen/heard.
- Ask witness to identify other witnesses.
- Discuss concerns about on-going interaction with the Respondent, if any.
- Encourage complainant to additional information as it becomes available.
- Obtain a written statement.
- Have another administrator or employee present to witness the interview where possible, especially in regard to Complainant and Respondent.



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Interview Tips

- Obtain copies of any documents identified or referenced by witness.
- Make no promises regarding confidentiality or the outcome of investigation.
- Interview all witnesses separately.
- Explain the process and reason for meeting.
- Be factual, avoid implication that Respondent is guilty or innocent, or that a decision has already been made.
- Ensure witness that s/he has right to be free from retaliation.
- Don't identify other witnesses/discuss the merits of the complaint.



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Interviewing the Respondent

- Generally, you will interview the Respondent after interviewing the complainant, victim, and any witnesses named by the complainant.
- Make a checklist of the specific allegations to cover in the interview with the Respondent.
- If the allegations are of a criminal nature and the accused refuses or has been advised not to respond, document efforts to interview the individual.



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Other Required Documentation

"...the recipient must document the basis for its conclusion that its response was not deliberately indifferent, and document that it has taken measures designed to restore or preserve equal access to the recipient's education program or activity. If a recipient does not provide a complainant with supportive measure, then the recipient must document the reasons why such a response was not clearly unreasonable in light of the known circumstances."

34 CFR 106.45(b)(10)(D)(ii).

- This may be documented in the investigation report or elsewhere.



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Rules of Thumb for Reaching a Conclusion

- Be sure to verify anything that can be verified - check the record and obtain corroborating statements.
- Review your school district's policies, procedures, and other relevant documents.
- Confer with legal counsel regarding the application of relevant law.



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Practical Scenarios

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Scenario 1: A student tells a counselor that she was offered a grade change by a teacher in return for giving him her cell phone number.



Scenario 1

- ❑ This is *quid pro quo* sexual harassment as defined by Title IX. The counselor should report this to the T9C. The T9C will prepare to reach out expeditiously to the student. She plans to offer supportive measures.
- ❑ What else should the T9C do?
- ❑ Action can be taken against the teacher prior to initiation of any Formal Complaint.
 - ❑ Must identify a relevant policy or rule violated in order to support this action.



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Scenario 2: A senior high school student confides in his good friend “the lunch lady,” as she’s affectionately known, that his girlfriend, a fellow student at the same high school, sometimes punches him or kicks him when she gets into a jealous rage. Student is adamant he does not want to file a complaint.



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Scenario 2

- ❑ Is there actual knowledge?
- ❑ Is there substantial control?
- ❑ Should the “lunch lady” report to the T9C?
- ❑ What should the T9C do?
- ❑ Could this constitute sexual harassment? Dating violence?
 - ❑ The term “dating violence” means violence committed by a person— (A) who is or has been in a social relationship of a romantic or intimate nature with the victim; and (B) where the existence of such a relationship shall be determined based on a consideration of the following factors: (i) The length of the relationship; (ii) the type of relationship; (iii) the frequency of interaction between the persons involved in the relationship.
- ❑ If the student does not want to file a formal complaint, is that the end of it?



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Record-Keeping Requirements



Record Keeping

- ❑ SEVEN YEAR RETENTION PERIOD for records of:
 1. each sexual harassment investigation;
 2. any appeal;
 3. any informal resolution; and
 4. training materials.
- ❑ Retention and publication of training materials:
 - ❑ Retain any materials used with T9C, investigators, decision makers, and any other person who facilitates an informal resolution process.
 - ❑ These materials must be publicly available on the district's website.



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Record-Keeping

- ❑ Maintain all documents from the Formal Complaint for seven (7) years:
 - ❑ The Determination;
 - ❑ Any Disciplinary Sanctions issued;
 - ❑ Remedies provided to the Complainant;
 - ❑ Any appeal; and
 - ❑ Any Supportive Measures implemented or if none were provided, the reasons why.



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Lets Remember!

- ❑ These regs change how OCR will evaluate a Title IX complaint but do not change the standard of legal liability for schools under Title IX.
- ❑ Liability of the district occurs only if:
 - ❑ 1) sexual harassment happened;
 - ❑ 2) the district knew about it; and
 - ❑ 3) the district responded with "deliberate indifference."
- ❑ Most of the lawsuits against districts cannot overcome the "deliberate indifference" hurdle. But this is not a phrase that educators should be using. Set your sights higher than that!



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Questions?



The information in this presentation was prepared by Walsh Gallegos Treviño Russo & Kyle P.C. It is intended to be used for general information only and is not to be considered specific legal advice. If specific legal advice is sought, consult an attorney.

