

The Fine Line of Title IX: Title IX for HR Teams and School Leaders

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Today's To Do List:

- Discuss District/School obligation under TIX.
- Overview of Title IX regulations related to Title IX investigations and 2020/2024/2025 changes.
- Title IX Investigation Process
- Discuss Investigator Role and Conflicts of Interest.
- **Credibility Determinations**

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District/School Obligation under TIX

Stop the Reported Conduct

Prevent it Recurrence

Remedy its Effects

Hold Accountable through

Corrective or Disciplinary

Action those responsible for

conduct

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District/School Obligation to Respond Under TIX

- The District must respond promptly to Title IX sexual harassment in a manner that is not deliberately indifferent, which means in a way that is not clearly unreasonable in light of the known circumstances.

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NEW 2020/2025 Title IX Regulation Changes

- Regulations originally took full effect on August 14, 2020.
- Replaced by 2024 regulations.
- Reverted back to 2020 regulations in January 2025.
- Department of Education released **2083 pages of regulations and guidance to review in May 2020.**
- Extremely prescriptive changes focusing primarily on due process for Respondents through “grievance process requirements”.
- Regulations amend the Code of Federal Regulations and are enforceable by OCR.
- 2011 Obama administration changes to Title IX were “guidance”

The **NOW OLD** 2024 Title IX Regulation Related to Sexual Harassment(K-12): Highlights

- Broader definition of sexual harassment: Includes conduct that is "sufficiently severe or pervasive".
- Clarification on special education interaction with Title IX.
- Training requirements.
- Clarification of prohibition on discrimination based on pregnancy: Includes current, potential, or past pregnancy or related conditions
- Support for LGBTQ+ students: Confirms protections for LGBTQ+ students
- Improved reporting process: Makes it easier for complainants to report sexual harassment
- Support for parents and guardians: Supports the rights of parents and guardians to file a Title IX complaint on behalf of a minor student.
- Clear communication of nondiscrimination policies: Requires schools to clearly inform key people of their nondiscrimination policies and procedures
- Prohibition of sharing personal information: Prohibits schools from sharing confidential personal information during the TIX process, except as allowed by law.

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How did the January 2025 change Impact Your School/District?

- Revision of policies? **Check to see. A-0300/A-0331**
- Specific definitions for sexual assault, stalking, dating/domestic violence, sexual harassment. **(All the same, except sexual harassment)**
- Extensive training required of investigators, Title IX Coordinators and decision-makers. **(No significant change)**
- Training must be posted on the District's website. **(No change.)**
- Must adopt the codified definition of sexual harassment. **(Must update your definition.)**
- Must conduct investigation based on **prescriptive** requirements in the regulations. **(No significant change for K-12 from 2025/2020.)**

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Sexual Discrimination/Harassment under Title IX - Now

- Any District employee engaging in *Quid Pro Quo* harassment;
- Any instance of **sexual assault** (as defined in the Clery Act), dating violence, domestic violence, or stalking as defined in the Violence Against Women Act (VAWA);
- Any unwelcome conduct that a reasonable person would find so **severe, pervasive, and objectively offensive** that it denies a person equal educational access. **(SPOO)**



Evaluating Sexual Harassment

- **Remember:**
- Sexual Harassment is evaluated in the manner in which it was received, not the manner in which it was intended.
- **The question:**
- Would a reasonable person, under the same or similar circumstances, receive the conduct in the same manner?



Prohibitions on Retaliation

- ▶ No school or person may intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by Title IX,
- ▶ or because the individual has made a report or complaint, testified, assisted, or participated or refused to participate in any manner in a Title IX investigation, proceeding, or hearing.



Supportive Measure Requirements

- ▶ **Applies to both complainant and respondent, before or after the filing of a formal complaint, or where no formal complaint has been filed.**
- ▶ Measures are designed to **restore or preserve access to the recipient's education program or activity**, without unreasonably burdening the other party; protect the safety of all parties and the recipient's educational environment; and deter sexual harassment.
- ▶ **May include** counseling, course-related adjustments, modifications of work or class schedules, campus escort services, increased security and monitoring of certain areas of campus, and mutual restrictions on contact between the parties.



- **Supportive Measures**
- **Offered to both Complainant and Respondent**
- **Referral to Counseling and/or medical**
- **No Contact Orders issued**
- **Academic Accommodations**
- **Transfer classes/schools**
- **Job Modification**
- **Increased Monitoring, Supervision, Security**

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• Investigation Process Checklist

- Procedures include:
 - Complaint;
 - Intake;
 - Dismissals of complaints/allegations, *if/when warranted*;
 - Determination of need for accommodations, i.e. special education/504
 - Written Notice of Allegations;
 - Informal Resolution Consideration, *if/when warranted*;
 - Interviews;
 - Inspection of evidence/records & draft report;
 - Process draft report to parties for inspection, questions and response;
 - Final report and evidence;
 - Appeals.
 - Implementation of Sanctions.
 - Implementation of Remedies.

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■ Determining _____ Title _____ IX Jurisdiction

- Two-pronged test:
 - Does the District have control over the harasser; and
- Does the District have control over the context of the harassment (on our property, in our programs, on land we lease or control, or at events we sponsor).
- The District reserves the option to take jurisdiction of off-campus misconduct when deemed necessary due to the involvement and/or impact on students and/or employees, i.e. social media, AI generated content



• Notice of Allegations

- Initiates the investigation process.
- Must be comprehensive of all allegations or you must re-issue and begin the process again.
- Must be in writing and state all rights afforded to the Parties. (use template)
- Provided simultaneously to both parties.
- Parties may respond to the allegations in writing (not mandatory).
- Notifies parties of right to present relevant witnesses and evidence.
- Notify parties that the Respondent is presumed not responsible.

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- Standard of Evidence

- The **PREPONDERANCE OF EVIDENCE** standard in reviewing evidence and determining if a violation of District Policy has occurred.

“More likely than not”

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• Credibility Determinations

- The most reliable credibility factors (Gold Standard) when you're struggling
 - to decide who is telling the truth:
 - **Corroboration** - witness testimony, text message or email exchanges, video or photo evidence, also assessing reliability of testimony with a witness's recollection of events
 - **Consistency** - Is there witness testimony or physical evidence that is consistent with the complainant's testimony? Or are there inconsistencies that make you doubt credibility?
 - **Inherent plausibility** - Does the testimony make sense? Which version of the events seems more plausible? Is there a plausible reason for inconsistencies (ex., a student has left out part of the story to protect a friend from getting in trouble)?
 - **Motive to falsify** - Is there motivation to lie (fear of retaliation, a witness who wants to protect someone, etc.)?
 - **Material omission** - Did someone omit something that was important, despite having an opportunity to provide the information?

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• Credibility Pitfalls

- **Confirmation bias** - you know the parties, or you stop investigating because of investigator bias - you've decided that you think something happened in a certain way. There may also be internal bias to get the investigation completed.
- **Making a determination** - then conducting your investigation in a manner that supports your determination.
- **Incomplete Investigation** - you have not talked to all the witnesses or obtained enough information. You will need to ask more questions or talk to more witnesses.

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• Review of Report & Inspection Evidence

- An Investigation Report will be drafted and sent electronically to the Parties, accompanied by relevant evidence.
 - Parties have **ten (10)** school days to respond to the Report in writing, and provide additional evidence, should they choose to do so. Any responses will be included in the final report.
 - Parties may pose questions in writing to the other Party to be submitted with any response to the draft report.
 - Questions and answers, if provided, will be included as appendices
- The final report/evidence submitted to the parties.

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Responsibility Determinations & Sanctions

- The Decision-Maker may be provided with documentation of the Respondent's conduct history, prior to the Decision-Maker issuing a decision.
- The Decision-Maker will issue a written decision to include:
 - A determination that a violation of policy has or has not occurred; and
- A list of the allegations; and

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- Responsibility Determinations & Sanctions cont.
 - A description of the procedural steps taken from the receipt of the formal complaint through determination; and
 - Findings of fact supporting the determination; and
 - Conclusions regarding application of policies to the facts; and
 - A statement of and rationale for the results of each allegations, including sanctions to be imposed on Respondent; and any remedies afforded to the Complainant, and
 - Notice of the right to appeal the determination.



SANCTIONS, if policy violation is

- found:
 - Employees:
 - Reprimand/Warning (oral/written) through
 - Suspension, demotion, or involuntary termination/dismissal.
 - Mandatory training
 - Leave without pay
 - Students:
 - Warning (verbal or written),
 - Disciplinary Probation,
 - Restricted Privileges or Activities,
 - Community Service,
 - Counseling,
 - Evaluation,
 - Suspension, Expulsion

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REMEDIES, if policy violation is found:

- District must implement any steps or actions designed to restore or preserve equal access to the District's educational programs.
- **May** including individualized services.
 - Imposed as deemed appropriate to the individual facts and circumstances of each case.

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- Can Parties Appeal?
- YES
 - When a Title IX complaint or allegation in a complaint is dismissed; and/or
- From the Decision-Maker's determination;
- Both Parties have the right to appeal.
- Time periods & requirements specified in SOPs.



• Allowable Basis for Appeal

- New facts and evidence, not reasonably available at the time of the determination, which may impact the outcome of the investigation.
- Evidence that the Investigator or Decision-Maker had a **conflict of interest or bias** for, or against a party, which affected the outcome of the investigation.
- Evidence that **investigation procedures** were not followed during the course of the investigation.

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What about Special Education Students?

- Special Education students can be found responsible under Title IX.
- IDEA and Title IX are two voluminous and parallel running federal laws.
- Always check to see if the student is a special education student.
- If a student has an IEP, notify the case manager that the student is a party to a Title IX investigation.
- Determine if accommodations are required for the student to meaningfully participate in the investigation.
- Proceed with investigation.
- If special education student found responsible, must conduct an MDR prior to the administration of sanctions.

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Interviewing Special Education Students

- Check with the case manager - are they able to comprehend the questions and answer appropriately?
- Do they have the cognitive capacity to participate in an investigation?
- Do they need a social worker or other support to participate in an investigation?
- Did the student have the capacity to consent to the conduct?
- Does the student have the capacity to understand consent?
- What is the student's disability?
- What about adults requiring accommodations?

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What is Informal Resolution?

- **An option for resolving a formal complaint that does not involve a full investigation.**
- **Methods (mediation, restorative justice, facilitation, etc.) used vary depending on circumstances and wishes of the Parties.**
- **In some cases, it may be used as an alternative to proceeding with investigation and determination.**
- **Cases involving a student Complainant vs an Employee Respondent are not eligible for informal resolution.**



Informal Resolution

May be offered in certain matters

- Both parties must agree in writing to participate.
- May include training, restrictions, etc.
 - Be sure Parties understand that Informal Resolution concludes their case, but supportive measures may be ongoing.
- Talk it over with Title IX Coordinator.

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Training Requirements

- Section 106.8(d)(2) requires all investigators, decision-makers, and other persons responsible for implementing the recipient's grievance procedures or who have the authority to modify or terminate supportive measures to also be trained on the recipient's obligations; the recipient's grievance procedures, and if applicable, how to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and

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How to Work through Implicit Bias in Title IX Investigations?

- Become aware of your biases so that you can interrupt them.
- Check yourself with a neutral party.
- Be careful about trying to match your facts to your bias.
- Study and teach colleagues about implicit bias.
- Isolate and track instructional practices that interrupt, or promote, bias.
- Look out for tone policing - emphasis becomes on *how* something was said, not *what* was said.
- Tune into implicit bias in your school.
- Recognize implicit bias in yourself and in others.
- Know that people can counteract their biases - just do not go too far in the other direction.
- Participate in and encourage dialogue about implicit bias and its effects.

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Trauma informed Interviews and Investigations

- A trauma-informed approach means recognizing trauma, understanding how, what, where and when to ask questions, and importantly, employing techniques and strategies that support a process that mitigates or reduces the possibility of re-traumatization.
- When gathering evidence during the investigation of sexual harassment or sexual assault, you will have to ask sensitive, difficult and intimate questions of parties and witnesses.
- Do not make Parties tell their stories multiple times.
- Parties and witnesses may find these questions difficult to answer due to trauma - either past trauma or the trauma of the incident they have reported.
- The phrasing of questions during interviews is important. Depending on how a question is asked, it might be perceived by a Complainant as blaming them for their actions, or for what they may be unable to recall.
- Try cognitive interviewing techniques to aid memory and accuracy: recall everything, reverse the order, change perspective and reinstate the context.

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Trauma informed Interviews and Investigations cont.

- Instead of
- “Did you say no?”
- Ask
- “What are you able to recall doing or saying during the incident?”
- Instead of
- “Why did you...”
- Ask
- “Explain to me...”
- Instead of
- “What happened first?”
- Ask
- “Where do you want to begin? What happened next?”
- More examples at: <http://www.theiacp.org/sites/default/files/2020-06/Final%20Design%20Successful%20Trauma%20Informed%20Victim%20Interviewing.pdf>



Title IX Due Process

- Procedural
- Substantive
- Substantive due process asks the question of whether the government's deprivation of a person's life, liberty or property is justified by a sufficient purpose.
- Procedural due process, by contrast, asks whether the government has followed the proper procedures when it takes away life, liberty or property.



Title IX Due Process Continued

- Title IX regulations have built in procedural and substantive due process rights, which are reflected in your policy and standard operating procedures.
- Follow your policy and SOPs and you will provide due process.
- Be reasonable - just be equitable.
 - If a party requests an extension and it is reasonable - provide to both parties.
 - Due Process = Fair Procedures
- **Notice** of the proposed action and the **grounds asserted** for it. Opportunity to present reasons why the proposed action should not be taken. The **right to present evidence**, including the right to call witnesses.

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Bottomline:

- Reports must be clearly written and understandable.
- Title IX coordinator should review the report before it is processed to the parties or the decision-maker.
- Reports should be written in a neutral and objective manner - must avoid any appearance of bias.
- Reports should provide decision-maker with all exhibits and information necessary to make a fair and neutral decision.
- Reports can be used in future litigation, so think of your report as Exhibit A.
- If you can do a Title VII investigation - Do it!

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