

# The Title IX New Regulations:

## What School Districts Must Know Before August 14, 2020!

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# Agenda

- Effect of Title IX Final Rule/New Regulations
- “To Do” List Before August 14, 2020
- Overview of Requirements: Top 10 Issues
- Revisit “To Do” List

# *“To Do”* List Before August 14, 2020

- Review existing compliance officer titles & include “Title IX Coordinator” where appropriate
- Prepare and Approve “Interim” Policy and Regulations
- Determine Title IX Team:
  - Title IX Coordinator, Investigators, Facilitator of Informal Resolution Process, Advisors, Hearing Officer/Decision Maker, Decision Maker for Appeals, etc.
- Train Administrators Listed Above
- Train Employees on Reporting Responsibilities
- Post Most Current Title IX Training Materials On Website
- Update District Website via Title IX and California Law

# Effect of New Title IX Regulations

- **1. Focus on Regulations and Guidance**
  - Regulations have full force and effect of law
  - OCR 2001 and Prior OCR 2017 Guidance
- **2. Overall Intent of Changes**
  - “strengthen Title IX protections for survivors of sexual misconduct”  
... “also provide due process protections to students facing accusations of sexual misconduct”
- **3. Consider California Law**
  - Be wary of “national” advice, but watch for preemption of state law
- **4. K-12 vs. Post-Secondary Institutions**
  - Some overlap, but key differences (e.g. required/optional hearings)
- **5. Court Challenges**
  - Complaints challenging new regulations filed, but no injunction yet

# Overview of Requirements: Top Ten Issues

- 1. Title IX Personnel
- 2. Sexual Harassment
- 3. Supportive Measures
- 4. Emergency Removal
- 5. Informal Process
- 6. Investigation
- 7. Hearings/Cross-examinations
- 8. Finding
- 9. Appeals
- 10. Retaliation

# 1. Title IX Team

- **1. Title IX Coordinator**
  - Oversees Title IX compliance, accepts initial complaint, implements remedies
- **2. Investigator(s)**
  - Investigates the complaint and provides written findings
- **3. Decision Maker/Potential Hearing Officer**
  - Conducts hearing, facilitates “cross-examination” & renders decision
- **4. Appeal Decision Maker**
  - Addresses appeal requests & renders decision
- **5. Informal Process Facilitator**
  - If informal process is feasible, likely a separate facilitator

## 2. Sexual Harassment Defined

Conduct on the ***basis of sex*** under one of following:

- **1. Quid Pro Quo Harassment**
  - Employee conditioning any educational opportunity or benefit on the participation in unwelcome sexual conduct
- **2. Hostile Environment Sexual Harassment**
  - Unwelcome conduct that a reasonable person finds to be so severe, pervasive ***and*** objectively offensive that effectively denies equal educational access
- **3. “Sexual Acts”**
  - Sexual assault (Clery Act), dating violence, domestic violence, or stalking (VAWA)

# 3. Supportive Measures

- **1. Requirement to Offer**
  - Must be offered to anyone as soon as institution has notice of possible Title IX issue
- **2. Avoid Burden on Parties**
  - Non-punitive, non-disciplinary, and not unreasonably burdensome to the other party
- **3. Individualized**
  - Ensure equal educational access, protect safety or deter sexual harassment
- **4. Examples**
  - Counseling, course-related adjustments, modify schedule, escort, increased security and monitoring, mutual restrictions on contact between the parties, voluntary independent study, etc.



## **4. Emergency Removal**

- **1. Institution may remove respondent**
- **2. Undertake individualized safety and risk analysis**
- **3. Analysis reveals immediate threat to the physical health or safety of individual**
- **4. Notice to respondent**
- **5. Opportunity to challenge decision immediately following the removal**
- **6. Cannot modify rights under IDEA, Section 504, or ADA**

# 5. Informal Resolution Process

- **1. Optional Process**
  - May use informal resolution process on a case-by-case basis
- **2. Informed, Mutual Consent**
  - Both parties must give voluntary, informed, and written consent but cannot be required as a condition of enrollment/employment
- **3. Right to Withdraw from Informal Process**
  - Either party can withdraw from informal resolution process at any time and resume formal process
- **4. Not Suitable for Student vs. Employee Matters**
  - No informal resolution process for allegations that employee harassed a student

# 6. Investigations

- **1. Written Notice to Both Parties**
  - Of investigation, allegations, potential policy violations, all interviews, changes in process, meetings, hearings, appeals, decisions, etc.
- **2. Trained Investigator**
  - Should not be decision maker/hearing officer or appeal officer
- **3. Equal Treatment**
  - Both parties have equal opportunity for advisor, no credibility determinations based on role, provide same opportunity to present and consider evidence
  - No orders to restrict discussing allegations or to gather evidence
- **4. Evidence Requirements**
  - Investigator has burden to gather evidence & provide evidence to both parties with 10 days to review and comment

## 6. Investigations, continued

- **5. Burden of Proof**
  - Preponderance of the Evidence or Clear & Convincing Evidence
- **6. Investigation Report Requirement**
  - Report provided to both parties with 10 days to review & respond
- **7. Presumption Like “Innocent Until Proven Guilty”**
  - Must presume respondent is *not responsible* for the alleged conduct
- **8. Dismissal Requirement**
  - Must dismiss if allegations do not meet the definition of sexual harassment, or conduct occurred outside of program or activity, or conduct did not occur against person in US
  - May dismiss if **complainant** requests, respondent is not enrolled/employed or circumstance prohibit gathering of sufficient evidence

# 7. Cross-Examination & Optional Hearing

- **1. Cross-Examination without a Hearing**
  - If a hearing is not used, parties allowed to submit written questions
  - If questions are not asked, provide notice in writing with the reason
- **2. Rape Shield Protections**
  - Evidence about complainant's prior sexual behavior is irrelevant unless offered to prove someone else committed the conduct
- **3. Optional Live Hearing (Not Expulsion Hearing)**
  - **Separate Room Virtual Option**
    - At request of either party, can separate the parties with technology
  - **Cross-Examination through the Investigation**
    - Each party's advisor may ask other party and witnesses relevant, follow-up and credibility questions
    - Failure to be at hearing for cross-exam eliminates certain evidence

# 8. Decision After Hearing

- **1. Decision Maker Determines Responsibility**
  - Cannot be the Title IX Coordinator or investigator
  - Must be trained to rule on relevant questions and weigh evidence
  - Understands the “preponderance of the evidence” or “clear and convincing evidence” standard
- **2. Written Decision**
  - Includes the findings of fact, conclusion, rationale, disciplinary sanction, remedies to the complainant, how to file an appeal

# 9. Appeals

- **1. Equal Opportunity**

- Both parties must have opportunity to appeal the determination of responsibility or the dismissal of a formal complaint or allegations
- This is separate from an appeal to COE after an expulsion order

- **2. Bases for Appeal**

- Procedural irregularity that affected the outcome;
- New evidence that was not reasonably available & could have affected outcome; or
- Conflict of interest or bias generally or specifically by Title IX Coordinator, investigator, decision-maker
- May include other bases for appeal if both parties have equal right to use

# 10. Retaliation

- **1. Code of Conduct v. Title IX**

- Retaliation includes pursuing “Code of Conduct” violation based on the same facts alleged in a formal Title IX complaint in order to interfere with a party’s Title IX rights; a fact specific analysis

- **2. Breach of Confidentiality**

- Keep complainant, respondent, and witness confidential unless required by law “or as necessary to carry out Title IX proceeding.”

- **3. First Amendment**

- Parties exercising 1<sup>st</sup> Amendment rights is not retaliation

- **4. False Statement Charge**

- Recipient charging individual with making a false statement in bad faith during Title IX process is not retaliation
- Responsibility not sufficient to conclude bad faith false statement



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# Question & Answer Session