

October 13, 2020

Presented By:  
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**ECB&S** | Engler Callaway  
Baasten & Sraga, LLC

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Why do we need Title IX training?

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*"The final regulations obligate recipients to respond promptly and supportively to persons alleged to be victimized by sexual harassment, resolve allegations of sexual harassment promptly and accurately under a predictable, fair grievance process that provides due process protections to alleged victims and alleged perpetrators of sexual harassment, and effectively implement remedies for victims."*

**August 14, 2020**

- Update to Department of Education's 1975 regulations implementing Title IX
- Supersedes existing DOE guidance and "Dear Colleague Letters"

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**All employees have obligations under Title IX**

- “Eyes and ears”
- Title IX response applies any time NSSEO has *actual knowledge* of sexual harassment or allegations of sexual harassment
- Can be *any* employee
- Extends to activities under NSSEO control

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What programs are under NSSEO control?

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What is sexual harassment?

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### For purposes of Title IX...

*Sexual harassment* means conduct on the basis of sex that satisfies one or more of the following:

- (1) 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;
- (2) Unwelcome conduct determined by a reasonable person to be so *severe, pervasive, and objectively offensive* that it effectively denies a person equal access to the recipient's education program or activity; or
- (3) "Sexual assault," "dating violence," "domestic violence," or "stalking"

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Is this sexual harassment?

- A fourth-grade boy taunts a girl classmate on several occasions, calling her a stupid, f\*\*\* bitch
- Would it make a difference if the girl's parents shared with administration that their daughter cannot concentrate in class, is in constant fear of the boy's next verbal barrage and is consumed with thinking about how she will defend herself?

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Is this sexual harassment?

- A kindergartener in a district-run before school care program has made a game of touching older students' private areas

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**Is this sexual harassment?**

- A high school teacher agrees to provide academic support after school to a student who is struggling in class. The District learns that the teacher starts the sessions by giving the student a relaxing shoulder massage. The student resisted these massages at first, but the teacher told the student that unless the student was in an appropriately "relaxed" state, it was just a waste of the teacher's time to try and provide academic help.

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**Sexual Harassment in a Special Education Setting**

- A. has ADHD, emotional disturbance, a communication disorder, muscular dystrophy and arthritis
- IEP notes A. craves "any kind of positive attention" and that A. has difficulty reading social cues
- On a nature hike field trip, a group of boys, functioning at a higher cognitive level than A., tell A. to "flash" them and explain it's something girls like to do
- A. asks a teacher why girls like to "flash"
- On a subsequent field trip, the same group of boys talks A. into playing "strip poker" consisting of A. and the boys exposing body parts
- Bus driver notes change in group's behavior and unusual movements

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**Am I on notice of sexual harassment?**

- Employee overhears a student mention that another student is absent because her boyfriend beat her up?

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Am I on notice of sexual harassment?

- Students are talking about "sexting" pictures circulating on social media of another student?

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Am I on notice of sexual harassment?

- Student tells bus driver he doesn't want to sit next to another student because she keeps hugging him?

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Am I on notice of sexual harassment?

- Student has cognitive disabilities as a result of a traumatic brain injury
- She complains that four boys are "bothering" her

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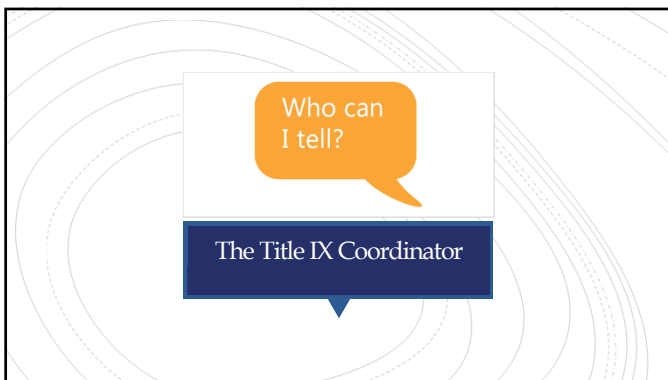
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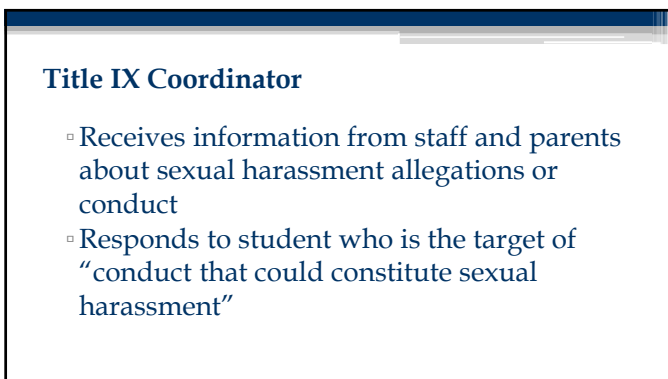
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**Title IX Coordinator**

- Title IX Coordinator **MUST** offer supportive measures
  - Individualized services
  - Designed to restore or preserve equal access to the education program or activity without unreasonably burdening the other party
  - Maintained confidentially
  - Complainant's choice

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**Title IX Coordinator**

- Title IX Coordinator **MUST** explain the formal complaint procedure
  - Receives the complaint
- Title IX Coordinator will implement any remedial measures following investigation and determination

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Complaint Procedure

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**Investigator**

- Interviews parties and witnesses to provide a written report for decisionmaker consideration
- Assumes “the burden of gathering evidence sufficient to reach a determination regarding responsibility”

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**A Note on Impartiality**

- Investigator (and Decisionmaker) must be free of bias and conflict of interest
  - Do not assume one party is more credible
  - Do not prejudge witnesses or facts
  - Do not assume investigator report is perfect
  - Do not rely on stereotypes in place of objective facts
  - Do not let personal relationship influence evaluation of facts (or step aside if you cannot accomplish that)
  - May be appropriate to consider age and impact of trauma on parties/witnesses in evaluating evidence

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**Investigator**

- Provides an equal opportunity for the parties to present witnesses
- Allows parties to have an advisor present in any meetings
- Provides parties written notice of the time and date of investigative interviews
- Provides the parties with the opportunity to review and inspect the evidence and the opportunity to respond prior to conclusion of investigation

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**Investigator**

- Sends a draft investigation report to each party and give the parties 10 days to submit a written response
- Sends final investigation report that fairly summarizes relevant evidence to the parties

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How is this process different from our existing UGP?

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**Grievance Procedure**

- Consistency with UGP:
  - Need to provide a standard of evidence (UGP provides preponderance of the evidence standard)
  - Need to allow for appeal

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**Grievance Procedure**

Areas of difference:

- “Reasonably prompt” timeframes
- Describes range of possible disciplinary sanctions and remedies
- Must allow parties to discuss the allegations with others and to gather and present relevant evidence

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**Grievance Procedure**

- Allows for unilateral dismissal of complaint if conduct alleged would not constitute sexual harassment or occurred outside of the education program
- Allows complainant to withdraw formal complaint

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**Grievance Procedure**

- Mediation/informal resolution may be offered after a formal complaint had been filed
- Not available if allegations involve an employee
- Parties must agree to participate and can withdraw anytime

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**Grievance Procedure**

- Provide notice to the parties of the allegations with sufficient detail to allow for response
  - Identities of the parties involved
  - Conduct allegedly constituting sexual harassment
  - Date and location of the incident
  - Amend if additional allegations come to light in investigation

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**Grievance Procedure**

- Include: “Respondent is presumed not responsible for this conduct. A determination regarding responsibility will be made at the conclusion of the grievance procedure.”
- Notify parties of their right to involve an advisor in the investigation

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Investigation Basics

The slide features a dark blue rectangular box with the text "Investigation Basics" in white. The box is set against a background of light blue and white concentric circles and lines, creating a ripple effect.

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**Investigation Basics**

The objective of the investigation is to improve the factual basis of decision making

- The solid foundation to guide application of the policy



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**Investigation Basics**

- Gather and review all relevant documents prior to beginning interviews.
- Identify key initial witnesses and order of interviews.
- Determine appropriate place for conducting interviews.
- Consider developing a template of interview questions.
- Take copious and clear notes during interviews.

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**General Rules For Conducting Interviews**

- Explain process
- Full, truthful cooperation is expected
- Discuss limits on confidentiality
- Opportunity to provide his/her side
- Explain that you are only interested in information in which they had first-hand knowledge; the interviewee should not provide answers based upon rumor or received from a third party
- Remind the interviewee of anti-retaliation protections
- Advise the interviewee that if s/he recalls any other pertinent information, report such information to you directly

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**Considerations in Evaluating Relevance**

- Does the information relate to the allegations?
- Does the witness have personal knowledge of the facts?
- Does the version of event corroborate others?
- Is there contemporaneous documentation that is consistent with the statement?
- Does the witness have a motivation not to be truthful?
- Did the witness independently recall details or only after consulting documentation?



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**Investigation Basics**

- Determine the extent of personal knowledge, as opposed to hearsay.
- Have the witness identify any other likely witnesses and any relevant documents.
- Ascertain the basis for the concern of any witness who "doesn't want to get involved."

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**Investigation Basics**

Ask open-ended questions

Who?    What?    When?    Where?    How Often?

Follow up until you are certain you have no more questions

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### A Note on Due Process



- Both parties must be given equal opportunity to inspect and review evidence obtained in the investigation
  - Consider at what stage that is appropriate
  - Do you need to test a party's recall or the truth of a statement against information you received from another source? Or can you directly confront the party with the evidence?

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### Investigation Basics



Do not reach a conclusion until all witnesses have been fully interviewed and all pertinent documents reviewed.



If you are declining to interview a witness, document why.

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### Investigation Basics

-  Take complete and clear notes.
-  Collect copies of all relevant documents.
-  Inform individuals who have relevant documents to retain the documents; consider sending a "preservation" memorandum.

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### Investigation Basics

**DON'T**

- Doodle or make notes on extraneous matters.
- Summarize interviews with conclusory language in your notes; do write down details given by the interviewees to summarize in the investigation report.
- Memorialize conclusions about credibility and/or findings or make recommendations in your notes; do memorialize conduct or behavior from which you would draw such conclusions or make such recommendations in the investigation report.



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## Investigation Report

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### Investigation Report

**General Outline Of Report:**

- 1. Complaint:**
  - Date received and applicable procedures/timelines.
  - Allegations in complaint.
- 2. Investigation:**
  - Documents or other evidence (*e.g.*, recordings, pictures) collected and reviewed.
  - Interviews conducted (*e.g.*, staff, students, other involved individuals).

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**Investigation Report**

3. **Summary:**

- Summarize evidentiary determinations.
- If not relying on evidence, consider providing an explanation of what evidence has been excluded and why.
- Draft summary and evidence must be provided to the parties.
- 10 days to respond in writing, e.g.,
  - Should have interviewed this person, should have considered this fact, improperly giving too much significance to this fact, misstated this evidence, etc.

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**Investigation Report**

4. **Final Report:**

- Fairly summarizes relevant evidence
  - Can be a roadmap for the decision but avoid making findings
  - Consider specifically addressing any response from the parties in the final report
- Provide to each party and their advisor

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The Decision

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**The Decision**



- Allow 10 days from receipt of final report for parties to submit written, relevant questions
- Obtain answers to follow up questions from any party or witness
- Allow limited follow up questions

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**The Decision**

Must include:

- Identification of the allegations
- Description of procedural steps taken, including notices provided and interviews
- Findings of fact
- Conclusions regarding the policy
- Explanation for findings
- Determination of responsibility and disciplinary sanctions
- Identification of any other remedies for complainant
- Appeal process

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**The Decision**



Provide to the parties simultaneously



Involve Title IX Coordinator to implement any remedies

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## A Note on Appeals

- Basis for appeals include:
  - Procedural irregularity
  - New evidence that was not reasonably available at the time a decision was made that could affect outcome
  - Conflict of interest
  - Other bases as determined by policy
- Available to all parties
- Written process

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QUESTIONS?



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