

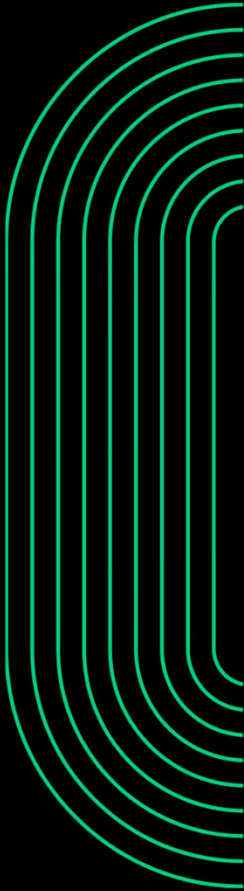


Title IX Policy and Procedure Requirements

Eastpointe Community Schools

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What is Title IX of the Education Amendments of 1972?

No **person** in the United States shall, **on the basis of sex**, be excluded from participation, or denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.

20 U.S.C. § 1681, *et seq.*



Title IX's Protections

Protects ALL students



- Elementary → High School
- Male + female + straight + gay + lesbian + bisexual + transgender + questioning students
- *Gender Identity claims/LGTBQ Students*
 - Failure to conform to stereotypical notions of “masculinity” or “femininity”
- “Same sex” discrimination claims must be handled with same procedures as opposite sex claims

Title IX is More Than Athletics

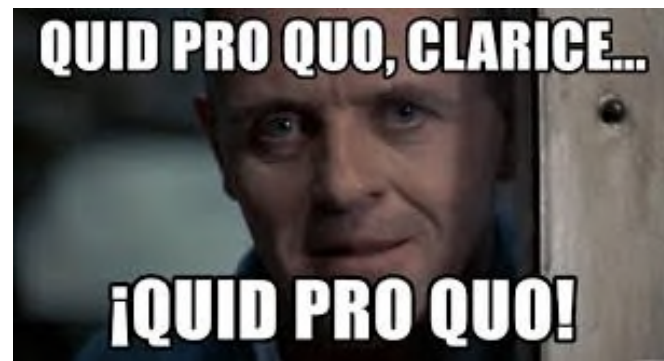
Title IX protects students in all Sparta's Programs and Activities:

- Academics and Education
- Extracurricular and Athletic Programs
- Other programs or activities of the school:
 - in a school's facilities;
 - in classrooms (including virtual);
 - on school transportation; and
 - at an activity or program sponsored by the school at another location or where the school has substantial control over the students (i.e., field trips, sporting events)



2020 Final Rule Definition of Sexual Harassment

- "Quid Pro Quo" harassment by a school employee.
- 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 school's education program or activity.
- "Sexual assault," "dating violence," "domestic violence," or "stalking" as those terms are defined under other Federal laws called the Clery Act and the Violence Against Women Act (rape, sodomy, fondling, criminal sexual assault, incest).



Is It Title IX Sexual Harassment?

- **SEVERE:**
 - *Causing discomfort or hardship*
 - *Very painful or harmful*
 - *Requiring great effort or a great degree*
 - *Physical vs. Verbal?*
- **PERVASIVE:**
 - *Existing in or spreading through every part of something*
 - *Happening more than one time*
 - *Extensive, Widespread, Prevalent*
- **OFFENSIVE:**
 - *Objective requirement*
 - *Causing displeasure or resentment*
 - *Disrespectful, derogatory, insulting*



Is It Title IX Sexual Harassment?

Going to require individual case-by-case analysis by frontline Administrators first.

- **Single, isolated, events = unlikely, but not impossible (e.g., rape)**
 - Butt smack in hallway/horseplay between same sex students
 - Single inappropriate comment/communication
 - Verbal allegations only = unlikely, but not impossible
 - Mutual sexual conduct/communication (consent = not Title IX)
- **Severe, pervasive AND objectively offensive**
- **Effectively denies equal access to education**
 - Drop out/withdrawal from program or activity
 - Increased absences
 - Decline in grades
 - Increased emotional or academic supports



If Not Title IX, What Is It?

- **Bullying/Cyberbullying?**
- **Other discrimination/harassment?**
- **Student Code of Conduct Offenses?**
 - Inappropriate Displays of Affection
 - Undesirable Physical Conduct
 - Sexual Misconduct
 - Profanity/Obscenity
 - Inappropriate Conduct/Communication (Teasing/Disorderly Conduct)
 - Acceptable Use Violation/Technology Abuse



If Not Title IX, What Is It?

STATE LAW = ELLIOT-LARSEN CIVIL RIGHTS ACT (ELCRA)

"Sexual harassment" is defined under Michigan law as unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature, when:

- Submission to such conduct is made either implicitly or explicitly a term or condition of an individual's employment, or status in a class, educational program, or activity;
- Submission or rejection of such conduct by an individual is used as the basis for employment or educational decisions affecting such individual;
- Such conduct has the purpose or effect of **interfering** with the individual's work or educational performance; of creating an intimidating, hostile, **or** offensive working, and/or learning environment; or of **interfering** with one's ability to participate in or benefit from a class or an educational program or activity.

ELCRA also prohibits discrimination/harassment against students and staff based on gender identity, gender expression and sexual orientation.

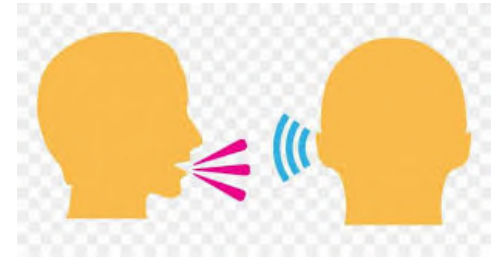


When Does a School Have Notice?

- Once a school has actual knowledge of sexual harassment or allegations of sexual harassment, the school has to respond and take action.
- A school has actual knowledge when the school has notice that a person may have been victimized by sexual harassment.
- Any person, whether the alleged victim or a parent, friend, or bystander, has the right to report sexual harassment to put the school on notice.
- And sometimes school personnel will personally witness sexual harassment.



Actual Knowledge and School Personnel



- BOE Members
- The Title IX Coordinator(s) for the school district
- Other people within the school who have authority to institute corrective measures. This could vary from school to school, but always includes the Title IX Coordinator(s).
- In elementary and secondary schools, telling any school employee always puts the school on notice.
 - Ex: Teacher, Paraprofessional, Secretary, Custodian

Title IX Policy and Procedure Requirements



Who Are the Title IX Players?

- Title IX Coordinators
- Investigators: Title IX Coordinators, Central Office Admins, Principals, Assistant Principals, Athletic Director
- Decision-Maker: **NOT** Title IX Coordinator, **NOT** Investigating Administrator
- Appeal: BOE? Committee appointed by the BOE?
- Informal Resolution Facilitators: Administrator, School Counselor, School Social Worker
- Legal counsel may be consulted at any/all stages of Title IX Grievance Procedure; legal counsel may be assigned or designated as Investigator, Decision-Maker or Appeal Officer



Written Grievance Procedures

- Schools must have a written grievance procedure for dealing with sexual harassment which must abide by the new regulations
- The grievance procedures themselves can't discriminate on the basis of sex, and any additional provisions that a school adds must apply equally to complainants and respondents
- Written grievance procedures need to include **10 specific items**



Requirement 1: Treat Parties Equitably

- The school's grievance process must treat complainants and respondents equitably by providing remedies to a complainant if a respondent is found responsible, and by following the prescribed grievance process imposing discipline on a respondent.
- The remedies for a complainant have to be designed to restore or preserve equal access to the school's education program or activity.
- Parties have a right to an “advisor” throughout the Grievance Procedure (can be an attorney or 3rd party)



Requirement 2: Objective Evaluation of Evidence

- The school's grievance process must ensure an objective evaluation of all relevant evidence – including inculpatory and exculpatory evidence.
- Credibility determinations can't be made on the basis of a person's status as a complainant, respondent, or witness.



Requirement 3: Training; No Conflicts of Interest

- The individuals involved in the process – Title IX Coordinator, investigators, decision-makers, appeal or facilitators of informal, voluntary resolution efforts – must not have any bias or conflict of interest.
- These individuals must also be trained. The materials used to train Title IX personnel can't rely on sex stereotypes, must promote impartial investigations and adjudications, and must be posted on each school's website (and if a school does not maintain a website, make them available for public inspection upon request).
- Investigator cannot be decision-maker. Decision-maker cannot be investigator or Title IX Coordinator. Appellate person/body cannot be anyone involved previously.



Requirement 4: Presumption of Innocence

- Under the school's grievance procedures, the respondent must be presumed not responsible, so that any finding of responsibility only comes at the conclusion of a grievance process.



Requirement 5: Reasonably Prompt Timeframes

- The grievance process must include reasonably prompt timeframes for resolving formal complaints of sexual harassment.
 - Prior OCR guidance 60 days.
- Temporary delays are permitted only for good cause. Good cause can include law enforcement activities, the absence of a party or witness, the absence of a party's advisor of choice, or the need to provide language assistance or accommodation of disabilities.
- Some timeframes are proscribed (Investigation Report, Decision-Maker).



Requirement 6: Description of Range of Outcomes

- The grievance process must describe or list the range of possible remedies and disciplinary sanctions that could occur following a determination of responsibility.



Range of Outcomes?

- **Possible disciplinary sanctions:**

- Suspension up to and including permanent expulsion
- Discipline up to and including termination



- **Possible remedies:**

- AKA: Remedial Measures
 - No Contact Order (for both parties)
 - Change in classroom, lunchroom, bus, locker assignment
 - Restorative Justice, if applicable
 - Job Transfer/Reassignment
 - Supportive measures to be continued after investigation



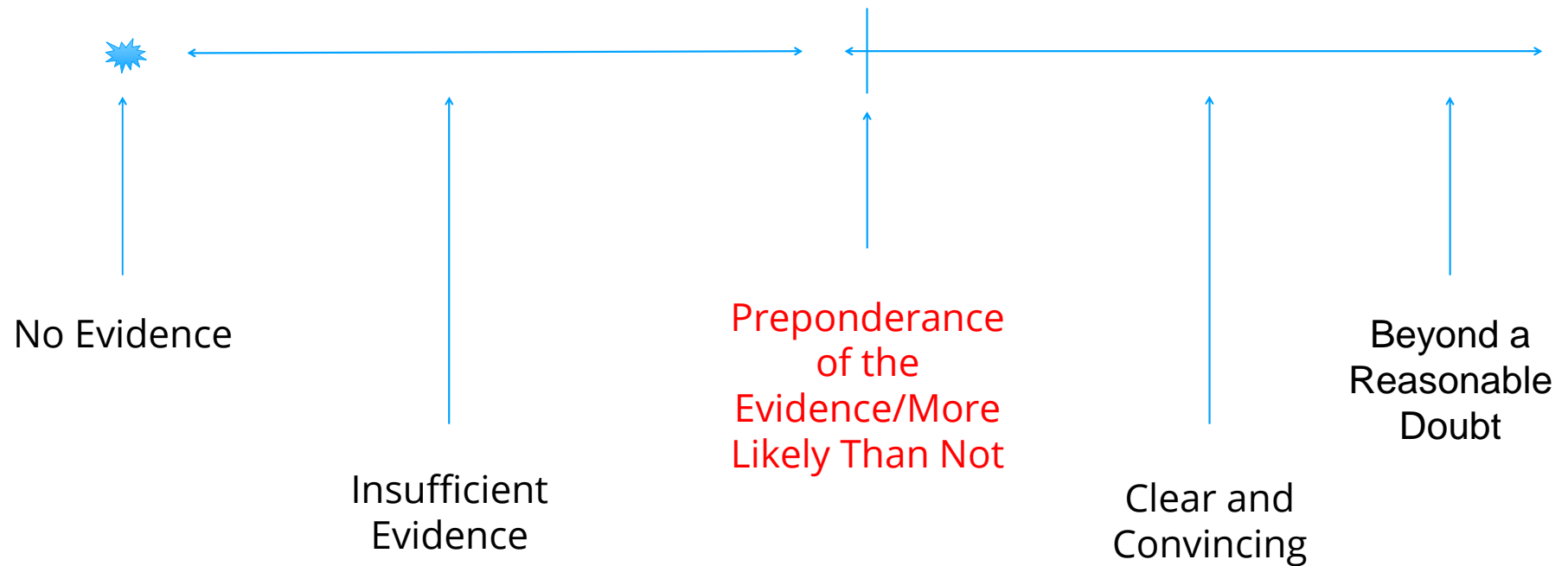
Requirement 7: Standard of Evidence

- The grievance process must state which standard of evidence the school will use to reach a determination regarding responsibility, to be used for all sexual harassment proceedings.
- Schools can choose between the **preponderance of the evidence** standard and the clear and convincing evidence standard.
- Whichever standard the school chooses, it has to use that standard for all formal complaints of sexual harassment, whether the respondent is a student or employee, including a faculty member.
- All sexual harassment proceedings must have the same standard of evidence.



Evidence Thresholds

EVIDENTIARY STANDARDS



Requirement 8: Right to Appeal

- The grievance procedures have to contain the right to appeal the result of a grievance process, and information about how to invoke the right to appeal.
- Schools must offer an appeal to every party on certain bases, and schools also have the option to expand the bases on which an appeal may be taken, as long as they apply those bases equally to both parties.



Appeal Rights

1. A procedural irregularity affected the outcome of the matter.
 2. New evidence has been discovered that was not reasonably available at the time of the determination on responsibility or dismissal.
 3. A conflict of interest on the part of a Title IX Coordinator, an investigator who compiled evidence, or a decision-maker, and the conflict of interest affected the outcome.
 4. Schools can offer additional grounds for appeals, if they want to, so long as the grounds apply on an equal basis to the parties.
- Very different than other appeals (“dissatisfied with decision”).



Requirement 9: Description of Range of Supportive Measures

- The school's grievance process must describe the range of supportive measures available to complainants and respondents.



What Are Supportive Measures?

- Supportive measures are free, individualized services designed to restore or preserve equal access to education, protect safety or deter sexual harassment.
- There doesn't need to be a formal complaint for an alleged victim to receive supportive measures.
- Supportive measures support a student, and they aren't punitive or disciplinary with respect to another student.
- Supportive measures don't unreasonably burden any other person.
- The Title IX Coordinator is responsible for implementing and monitoring supportive measures.
- Still the implication to "err" on the side of the victim as school always has to consider the alleged victim's wishes when it comes to requests for supportive measures.



Supportive Measures

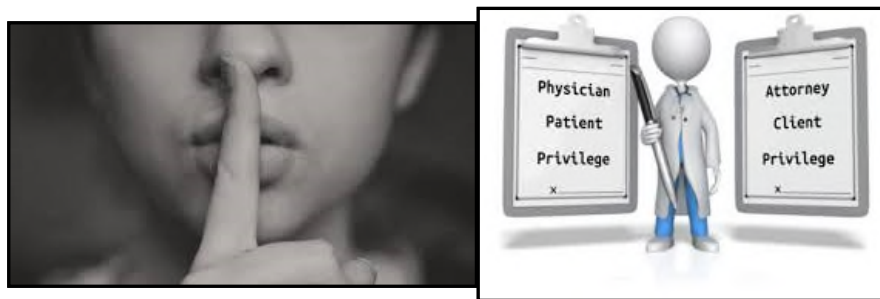
Examples:

- No Contact Orders (both ways)
- Counseling
- Extensions of deadlines for assignments/tests
- Changes in classroom/lunchroom/bus assignments
- Increased Monitoring and Supervision
- Assigning a “safe” person
- Administrative Leave/Temporary Transfer



Requirement 10: Privileges

- The school's grievance process must explain that no information protected by a legal privilege, such as the attorney-client privilege or the doctor-patient privilege, can be used during an investigation unless the person holding that privilege has waived it.
- Neither a party nor the school is allowed to seek, permit questions about, or allow the introduction of evidence that is protected by a recognized privilege.
- Individuals can always opt to waive their own privileges, if they want, but they don't have to.



Mandatory Dismissals

A school **must** dismiss a complaint:

- that does not describe conduct that meets the definition of sexual harassment;
 - that alleges sexual harassment that did not occur in the school's education program or activity;
 - that alleges sexual harassment that did not occur in the United States at all.
-
- Schools can still address these complaints under their code of conduct, even if the misconduct is not sexual harassment under Title IX.



Discretionary Dismissals

A school may dismiss a complaint:

- if the complainant notifies the Title IX Coordinator in writing that the complainant wishes to withdraw the formal complaint or some of its allegations;
- if the respondent is no longer enrolled or employed by the school; or
- if specific circumstances prevent the school from gathering evidence sufficient to reach a determination about the allegations.



Dismissal Procedures

- Whenever a school dismisses a formal complaint, or any allegations in it, the school has to promptly send written notice of the dismissal and the reasons to the parties.
- Both parties have the right to [appeal](#) a school's dismissal decisions.
- *Appeal limited to determining whether appeal is timely, dismissal was appropriate or to remand back for additional investigation.*



Informal Resolution

- Schools can offer informal resolution in appropriate cases.
 - *Exception:* Where the respondent is an employee of the school.
- Informal resolution may only be attempted if each party enters the process completely voluntarily.
- A school can never force, threaten, or require any party, complainant or respondent, into going into informal resolution.
- If informal resolution proceeds, the school must provide a facilitator who is free from conflicts of interest or bias, and who has received special training.
- The school still needs to provide complainants and respondents with notice of the allegations, notice of their rights, information about whether an informal process is confidential, and about withdrawing from the process.



DOCUMENTATION AND OTHER REQUIREMENTS DURING FORMAL INVESTIGATION



Formal Complaint

- Defined as a document filed by a complainant or the Title IX Coordinator alleging sexual harassment against a respondent and requesting that the recipient investigate the allegation of sexual harassment. 34 C.F.R. § 106.30(a).
- Actually signed by the Complainant or Title IX Coordinator



Terminology: Complainant, Respondent

- Apply to parties in both **reports** and **formal complaints** of sexual harassment
- Complainant: A person who is alleged to be the victim of conduct that could constitute sexual harassment
 - NOT a third party who reports alleged sexual harassment perpetrated against someone else
 - NOT the Title IX Coordinator, even if the TIXC “signs” a formal complaint
- Respondent: A person who has been reported to be the perpetrator of conduct that could constitute sexual harassment



Initial Response

34 C.F.R. 10630(a), .44(a)



- Title IX Coordinator must promptly, even if no formal complaint is filed:
 - Contact the complainant to discuss the availability of “supportive measures”
 - Consider the complainant’s wishes with respect to supportive measures
 - Inform the complainant of the availability of supportive measures with or without the filing of a formal complaint
 - Explain the process for filing a formal complaint



Emergency Removal / Admin Leave

Immediate Emergency Removal (34 C.F.R. 106.55(c))

- Based on an individualized safety and risk analysis
- Necessary to protect a student or other individual from **immediate threat to physical health or safety**
- **Notice, opportunity to challenge** provided “immediately” following the removal
- Consider other laws, e.g., “change in placement” under IDEA

Employee Administrative Leave (34 C.F.R. 106.44(d))

- Not prohibited
- Consider state law, board policy, handbooks, and bargaining agreements



Written Notice to the Parties

- When the school begins an investigation, it has to provide the parties with written notice of certain information.
- It has to give notice to the parties of the school's grievance process, which must comply with the 10 items listed before.
- It also has to include whether there is an opportunity to engage in informal resolution. Schools don't have to offer informal resolution processes, but if they choose to, it's important that they are mentioned in this initial notice.



Details of Written Notice

1. The actual allegations and facts that would constitute sexual harassment.
2. The presumption of innocence.
3. A statement that the parties are entitled to advise of their choice.
4. A statement that the parties can request to inspect and review certain evidence.
5. Information regarding the code of conduct and false statements.



Gathering Evidence: Schools and Parties



- The school has to provide written notice of the date, time, location, participants, and purpose of all hearings, interviews, or other meetings, with sufficient time for the party to prepare.
- The school must also provide equal opportunities for the parties and their advisors to inspect and review the evidence obtained by the school as part of its investigation, if the information is directly related to the allegations raised the formal complaint.
- The school also has to give the parties a meaningful opportunity to respond to the evidence after the school has provided it.

Gathering Evidence: Schools and Parties

- The school must provide an equal opportunity for the parties to have witnesses and evidence as well as inculpatory or exculpatory evidence.
- The school can't restrict the ability of either party to discuss the allegations under investigation, or to gather and present relevant evidence. (i.e. No Gag Orders)
- The school has to provide the same opportunities to the parties to have others present during the grievance proceedings, including access to an adviser of choice for any meetings or hearings.



Investigative Reports

- After gathering evidence, the school needs to prepare a written investigative report on the allegations of the formal complaint.
- A school has to give the parties at least 10 days to respond to the evidence in writing. If a response is submitted, the school must consider that response before finalizing the investigative report.
- The investigative report can then be finalized and provided to the parties.
- That report must be circulated to the parties at least another 10 days before any determination of responsibility, or 10 days before a hearing, if a hearing happens.



Hearings (Live or Written)

- For elementary and secondary schools, the school has the option, but never the obligation, to hold a hearing.
- Even without a hearing, the elementary or secondary school must give still the parties equal opportunity to submit relevant, written questions to each other, before the decision-maker reaches a determination. (*i.e. second 10 day requirement on previous slide*).
- Questions and evidence about a complainant's prior sexual history are not relevant, with two limited exceptions:
 - Offered to prove that someone other than the respondent committed the alleged misconduct; or
 - Offered to prove consent.



Decision-Making: Objective and Unbiased

- The school's decision-maker needs to objectively evaluate the relevant evidence and reach conclusions about whether the respondent is responsible for the alleged sexual harassment.
- A school's decision-maker needs to use independent judgment, so the decision-maker **cannot** be the same person who conducted the investigation and cannot be the school's Title IX Coordinator.
- Decision-makers must be free from conflicts of interest or bias for or against complainants or respondents and must receive special training about how to be impartial and how to decide what evidence is relevant.
- The decision-maker will weigh the relevant evidence, decide whether it meets the school's standard of evidence for sexual harassment allegations and issue the written determination to both parties.



Decision-Making: Written Decisions (AKA: Outcome Letters)

After the evidence has been weighed, the determination has to be written. It must include:

1. The portion of the school's policies that was violated.
2. A description of the procedural steps that were taken by the school on the way to getting to that point.
3. A findings of fact section.
4. A section that draws conclusions after applying the facts to the portion of the school's policy that applies.
5. A statement and rationale for the ultimate determination of responsibility.



Decision-Making: Written Decisions (AKA: Outcome Letters)

6. Any disciplinary sanctions that the school will impose on the respondent, and state whether the school will provide remedies to the complainant.
7. A statement and rationale for any remedies for the complainant, addressing how those remedies will restore or preserve equal access.
8. A statement of the recipient's procedures, a statement that the parties have a right to appeal the initial determination regarding responsibility, and the permissible bases for appeal.



Appellate Processes

- The school has to notify the parties in writing and implement appeal procedures equally
- Both parties must have equal opportunity to submit a written statement supporting or challenging the outcome to the Title IX Coordinator
- The person or body who decides the appeal cannot be the same person who reached the determination regarding responsibility, or the same person as the investigator or Title IX Coordinator
- After considering the parties' written statements, a written decision is issued and send to the parties simultaneously
- Appeal person/body may have access to the investigation report, final determination letters and relevant evidence to review/consider.
- Determination becomes **final** after appeal decision is made



Other Requirements: Recordkeeping

This duty extends for 7 years, and includes several categories of documents:

1. Records of a school's investigation.
2. Records of any appeal and the materials associated with an appeal.
3. Records of any informal resolution process.
4. All materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution. These materials also have to be posted on a recipient's website, or made available for public inspection if the recipient doesn't have a website.
5. Records of the supportive measures that they took in response to a report or complaint of sexual harassment.



Other Requirements: Recordkeeping

106.45(b)(10)

- Records related to alleged sexual harassment must be maintained for a minimum of 7 years
 - Investigation records
 - Disciplinary sanctions
 - Remedies
 - Appeals
 - Records of any actions taken, including supportive measures
- Must document for every instance:
 - Why response was not deliberately indifferent
 - That measures were taken to restore or preserve equal access to the educational program or activity
 - If no supportive measures provided, why that was not deliberately indifferent



Don't Forget About Retaliation

- No school or person is allowed to retaliate against anyone for exercising rights under Title IX.
- Any person retaliated against can file a complaint with the school and the school must have procedures in place for the prompt and equitable resolution of such complaints.
- The school should keep the identities of parties and witnesses confidential, unless disclosure of someone's identity is required under other laws or is necessary in order to conduct the grievance process.



QUESTIONS?



Thank You



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