

New Title IX Regulations:

What Do K-12 Schools Need to Know

Today's Presenters

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About this presentation

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- What is Title IX?
- How are the new rules different than the old rules?
- What steps must we take in response to allegations of sexual harassment?
- What steps may we take in response to allegations of sexual harassment?
- Who is responsible for taking these steps?
- Are there any limitations to the application of Title IX?
- How does Title IX interact with other laws, like the Massachusetts student discipline laws or laws about student privacy?

What is Title IX?

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PUBLIC LAW 92-318—JUNE 23, 1972

TITLE IX—PROHIBITION OF SEX DISCRIMINATION

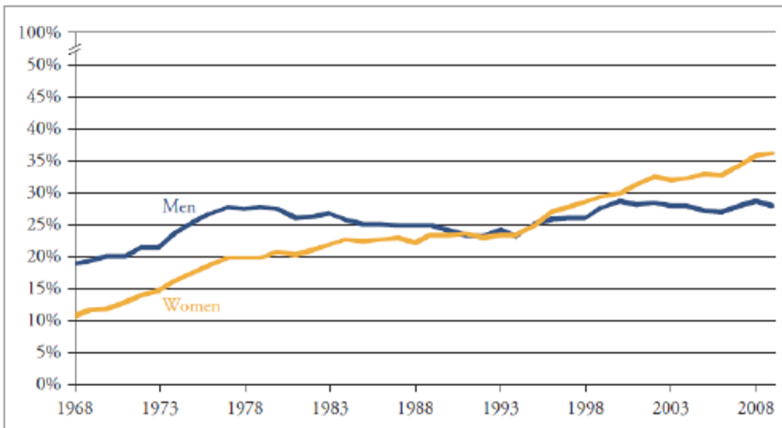
SEX DISCRIMINATION PROHIBITED

SEC. 901. (a) No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance, except that: ...

Success of Title IX

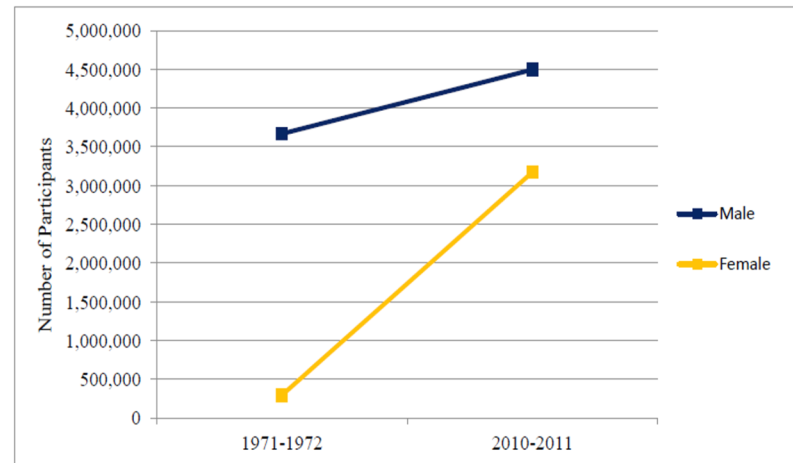
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Percent of Adults Age 25-34 with a Bachelor's Degree or Higher



Source: Women in America: Indicators of Social and Economic Well-Being, White House Council on Women and Girls

Male and Female Participation in High School Athletics



Source: 2010-11 High School Athletics Participation Survey, The National Federation of State High School Associations

U.S. Department of Justice, *Equal Access to Education: Forty Years of Title IX*, 3 (2012)

1997 – Sexual Harassment Prohibited

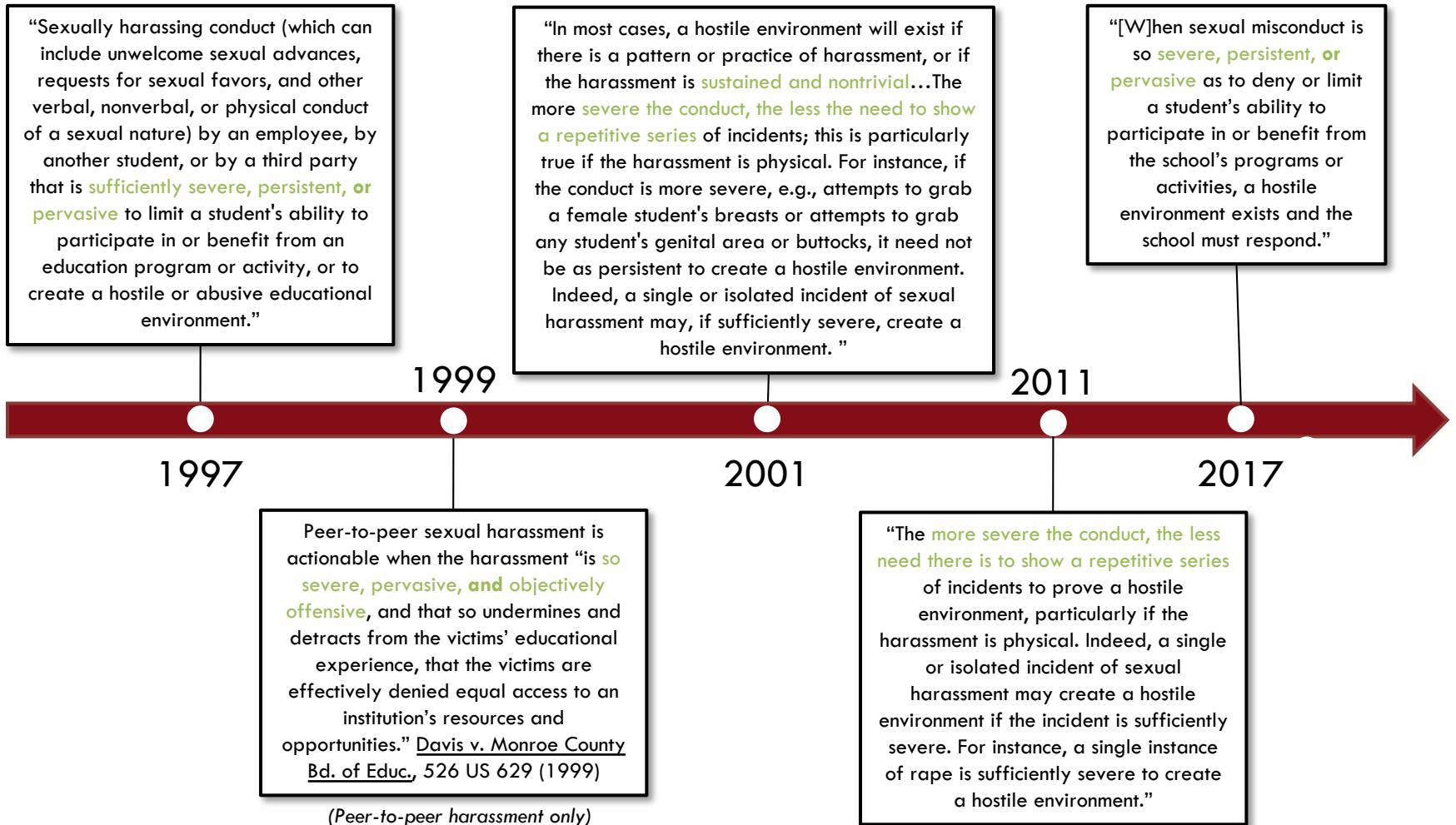
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“Under Title IX of the Education Amendments of 1972 (Title IX) and its implementing regulations, no individual may be discriminated against on the basis of sex in any education program or activity receiving Federal financial assistance. **Sexual harassment of students is a form of prohibited sex discrimination** under the circumstances described in the Guidance.”

U.S. Department of Education, Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties (1997)

History of “Sexual Harassment”

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Current Definition of “Sexual Harassment”

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“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’ as defined in 20 U.S.C. 1092(f)(6)(A)(v), ‘dating violence’ as defined in 34 U.S.C. 12291(a)(10), ‘domestic violence’ as defined in 34 U.S.C. 12291(a)(8), or ‘stalking’ as defined in 34 U.S.C. 12291(a)(30).”

34 CFR 106.30

PRACTICE TIP: *Even if conduct does not constitute “sexual harassment” under Title IX, it may still warrant disciplinary action under the school’s standards of conduct and discipline policy.*

Required Response

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“A recipient with **actual knowledge** of sexual harassment in an education program or activity of the recipient against a person in the United States, must respond promptly in a manner that is not **deliberately indifferent**.”

34 CFR § 106.44

“**Actual knowledge** means notice of sexual harassment or allegations of sexual harassment...to **any** employee of an elementary and secondary school.”

34 CFR § 106.30

“A recipient is **deliberately indifferent** only if its response to sexual harassment is clearly unreasonable in light of the known circumstances.”

34 CFR § 106.30

“Using the **deliberate indifference** standard, adapted in these final regulations by **specifying actions** that every recipient must take in response to every instance of actual knowledge of sexual harassment, ensures that recipients respond to sexual harassment by offering supportive measures designed to restore or preserve a complainant’s equal educational access without treating a respondent as responsible until after a **fair grievance process**.”

85 Fed. Reg. 30026, 30034 (May 19, 2020)

Who is Involved?

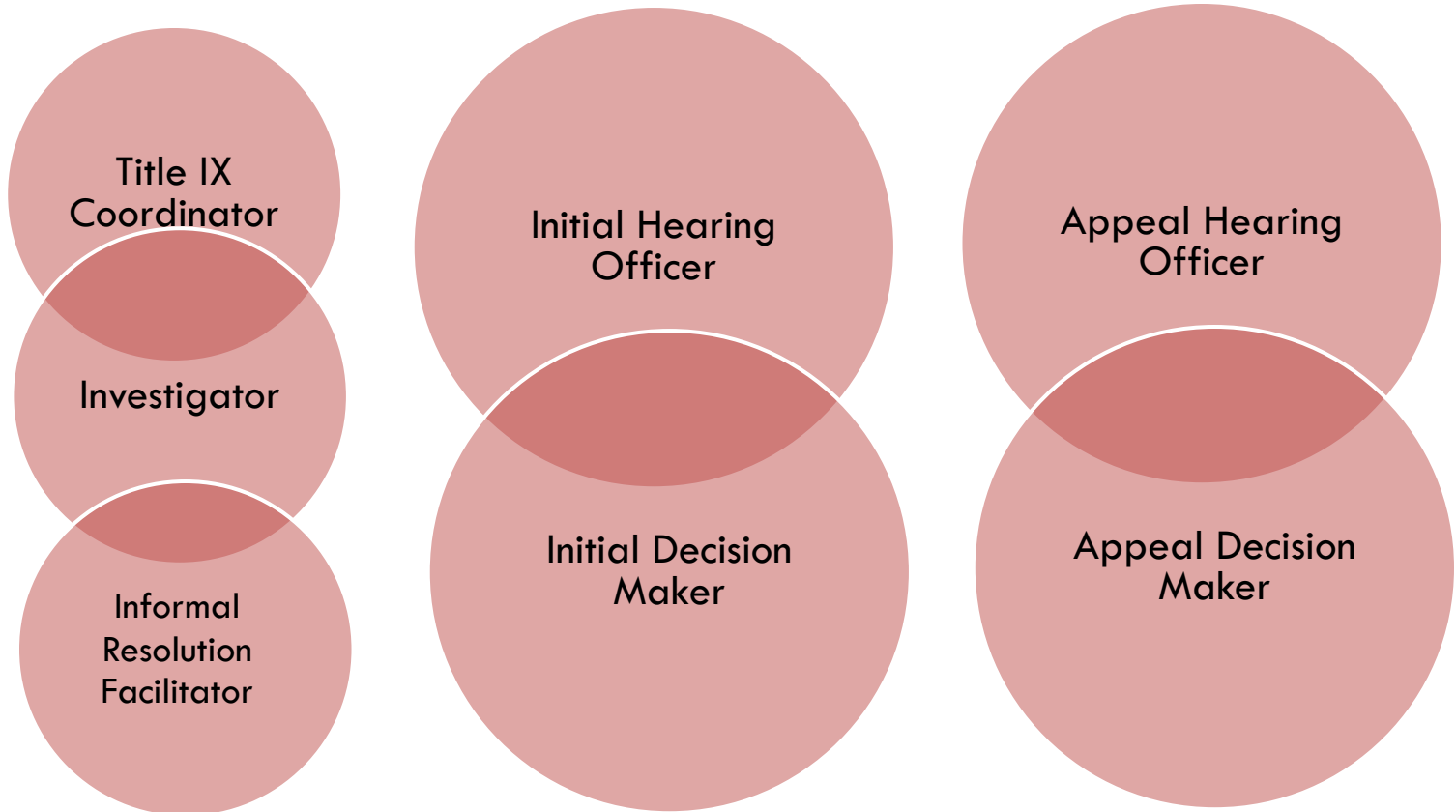
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- ❑ Title IX Coordinator
- ❑ Investigator
- ❑ Hearing Officer
- ❑ Initial Decision-Maker
- ❑ Appeal Decision-Maker
- ❑ Someone who navigates the informal resolution procedure

Must ensure that none of these individuals “have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent.” 34 CFR 106.45(b)(1)(iii).

Permissible Shared Roles

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Title IX Coordinator

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Designate

- “Each recipient must designate and authorize at least one employee to coordinate its efforts to comply with its responsibilities under this part, which employee must be referred to as the ‘Title IX Coordinator.’” 34 CFR § 106.8.

Notify

- Students
- Families
- Employees
- Unions

Display

- Handbooks
- Website

PRACTICE TIP: consider including in Title-IX compliant policy, which all schools must adopt and disseminate

Process – Upon Actual Knowledge

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1. Determine if emergency removal is appropriate
2. Determine if Title IX applies
 - a. If yes, proceed under these rules.
 - b. If no, consider whether discipline is appropriate under normal discipline processes.
3. Contact complainant
 - a. Supportive measures (with or without filing formal complaint)
 - b. Explain process of filing formal complaint
4. Formal complaint
 - a. Title IX coordinator may initiate
 - b. Complainant may initiate
5. Notice to parties

Process – Upon Actual Knowledge

(Continued)

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6. Investigation* (*subject to right to informal resolution)
7. Complete investigative report
8. Adjudication (hearing optional under Title IX; if suspension considered, required under Massachusetts Student Discipline Law)
9. Written decision
10. Offer appeal

Step 1: Consider Emergency Removal or Administrative Leave

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- **MA Law:** “Nothing in 603 CMR 53.00 shall prevent a principal from removing a student from school temporarily when a student is charged with a disciplinary offense and the continued presence of the student **poses a danger to persons or property, or materially and substantially disrupts the order of the school.**” 603 CMR 53.07(1).
- **Title IX:** “Nothing in this part precludes a recipient from removing a respondent from the recipient’s education program or activity on an emergency basis, provided that the recipient undertakes an individualized safety and risk analysis, **determines that an immediate threat to the physical health or safety of any student or other individual** arising from the allegations of sexual harassment justifies removal, and provides the respondent with notice and an opportunity to challenge the decision **immediately** following the removal.” 34 CFR 106.45(c).

Step 1: Consider Emergency Removal or Administrative Leave

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Opportunity to Challenge Emergency Removal

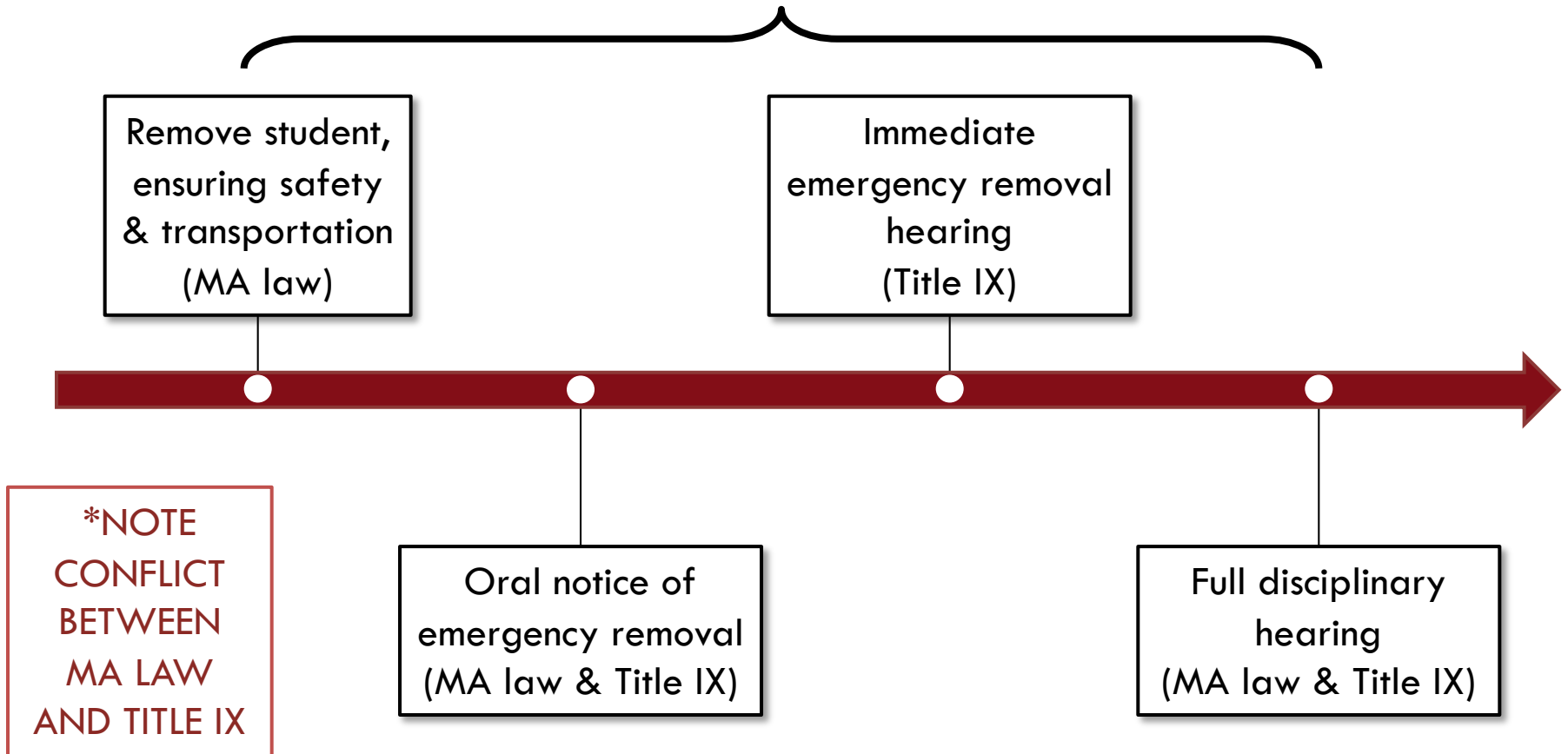
- “Immediately”
- May place “burden of proof on the respondent to show that the removal decision was incorrect.” 85 *Fed. Reg.* 30026, 30235 (May 19, 2020).
- Opportunity “to be heard.”
- Same individuals participating in investigation may participate in this hearing, provided it does not result in bias

Step 1: Consider Emergency Removal

(Continued)

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2 days* (MA law) (or longer upon agreement of parent, student, and principal)



Step 2: Determine if Title IX Applies

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PUBLIC LAW 92-318—JUNE 23, 1972

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Step 2: Determine if Title IX Applies

(Continued)

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1. In the United States
2. Discrimination (including sexual harassment)
3. Within “education program or activity”
 - a. Substantial School Control: “[L]ocations, events, or circumstances over which the [school] exercised substantial control over both the respondent and the context in which the sexual harassment occurs.” 34 CFR § 106.44(a).
 - b. On or Off Campus: Does “not impose a geographic test or draw a distinction between on-campus misconduct and off-campus misconduct.” 85 Fed. Reg. 30026, 30198 (May 19, 2020).
 - c. Cyber Harassment: “[M]ay certainly include computer and internet networks, digital platforms, and computer hardware or software owned or operated by, or used in the operations of, the [school]...For example, a student using a personal device to perpetrate online sexual harassment during class time may constitute a circumstance over which the recipient exercises substantial control.” 85 Fed. Reg. 30026, 30202 (May 19, 2020).

Must dismiss if determination made that Title IX does not apply (see slide 25)

Step 3: Contact Complainant

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- Discuss the availability of **supportive measures***, with or without a formal complaint
 - *See next slide
- Consider complainant's wishes with respect to supportive measures
- Explain process for filing a formal complaint

Supportive Measures

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- ❑ Non-disciplinary, non-punitive
- ❑ Free
- ❑ Must be provided to complainant, unless documented reason not to provide is not clearly unreasonable
- ❑ May be provided to respondent
- ❑ “Designed to restore or preserve equal access to recipient’s education program or activity without unreasonably burdening the other party.”
- ❑ Examples: counseling, extensions of deadlines or other course-related adjustments, modifications of work or class schedules, campus escort services, mutual restrictions on contact between the parties, changes in work locations, leaves of absence, increased security and monitoring of certain areas
- ❑ Maintain confidential to the extent possible

Step 4: Formal Complaint

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- Only alleged victim and Title IX Coordinator may file
- Respect complainant's wishes, but avoid acting with deliberate indifference
- Factors for Title IX Coordinator to consider: whether a complainant's allegations involved violence, use of weapons, or similar factors; situations involving threats or serial predation. *85 Fed. Reg. 30026, 30217-218 (May 19, 2020)*.

Step 5: Written Notice

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- ❑ Grievance process
- ❑ Informal resolution process
- ❑ Allegations, with sufficient details known at the time and with sufficient time to prepare a response before any initial interview
- ❑ Statement that respondent is presumed not responsible for the alleged conduct and that a determination regarding responsibility is made at the conclusion of the grievance process
- ❑ Right to advisor of their choice, who may, but is not required to be, an attorney
- ❑ Right to inspect and review evidence obtained in investigation and that is directly related to allegations in the formal complaint, including evidence that school does not intend to rely on
- ❑ Notice that evidence will be sent at least 10 days prior to completion of investigative report
- ❑ Provision in policy prohibiting false statements or submitting false information
- ❑ Optional: informal resolution process (if not included in notice, cannot offer later)

Step 6: Investigation

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- ❑ Burden of proof and burden of gathering evidence is on school
- ❑ Equal opportunity to parties to present witnesses (fact and expert)
- ❑ Gag orders prohibited
- ❑ Right to advisor of choice at all meetings
- ❑ Written notice required for all interviews and other meetings and hearings
- ❑ Right to review evidence

Dismissal

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Mandatory

If Title IX does not apply

See Step 2

Optional

Complainant notifies Title IX Coordinator, in writing, of wish to withdraw complaint

Respondent no longer enrolled at or employed by school

Specific circumstances prevent gathering sufficient evidence

Step 7: Investigative Report

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- Must “fairly summarize relevant evidence”
 - Evidence about complainant’s sexual predisposition or prior sexual behavior are not relevant, unless they are offered to prove: (a) that someone other than respondent committed the alleged conduct; or (b) consent, provided the evidence is about specific incident of the complainant’s prior sexual behavior with respect to the respondent
- Does not include a decision about responsibility
- Sent to parties and advisors, if any, at least 10 days before adjudication

Step 8: Adjudication

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- If suspension is not on the table: hearing is not required, either under state law or Title IX
 - Written, relevant questions
 - At least 10 days after investigative report
 - Provide each party with answers
 - Provide opportunity for additional, limited follow up questions
- If suspension is a possibility: hearing required, under state law
 - Massachusetts student discipline law

Step 9: Written Decision

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Preponderance of the Evidence

Conclusion that a fact is more likely than not to be true (or, more than a 50% chance a fact is true)

Clear and Convincing Evidence

- “An ‘intermediate standard’ between preponderance of the evidence and the criminal beyond a reasonable doubt standard”
- “Usually employs some combination of the words ‘clear,’ ‘cogent,’ ‘unequivocal,’ and ‘convincing”

Step 9: Written Decision

(Continued)

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Required Components

Title IX

- Identification of allegations
- Description of procedural steps
- Findings of fact
- Conclusions about application of code of conduct
- Statement of result of each allegation
- Rationale for the result of each allegation
- Disciplinary sanctions imposed on respondent
- Whether remedies designed to restore or preserve equal access will be provided to complainant
- Appeal process

Massachusetts Student Discipline Law: Short-Term Suspension

- Determination and reason for it
- If student suspended, type and duration of suspension
- Opportunity to make up assignments and other school work

Massachusetts Student Discipline Law: Long-Term Suspension

- Identify the disciplinary offense
- Date on which the hearing took place
- Participants at the hearing
- Length and effective date of suspension, as well as a return date
- Notice of opportunity to receive education services
- Right to appeal
- Appeal process

Step 10: Appeal

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- Both parties may appeal based on:
 - Procedural irregularity
 - New evidence
 - Conflict of interest or bias
 - Other grounds if permitted by the school and offered equally to both parties
- Respondent may appeal suspension if long-term suspension imposed
 - Apply Massachusetts student discipline law to conduct of the hearing and student's rights at the hearing

Informal Resolution

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- Both parties must agree
- Right to withdraw – both parties
- Not available re: allegations of employee-student sexual harassment
- Notice required
- Hearing still required if suspension considered under MA law

Required Training

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- Title IX Coordinators, Investigators, Decision-Makers, Informal Resolution Facilitators
 - Title IX definition of “sexual harassment”
 - Scope of “education program or activity”
 - How to conduct investigation
 - How to conduct grievance process
 - Hearings
 - Appeals
 - How to apply definitions with respect to consent (or absence or negation of consent) consistently and impartially
 - Informal resolution process
 - How to serve impartially
 - No prejudging facts
 - Avoid conflicts of interest
 - Avoid bias

Required Training

(Continued)

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□ Decision-Makers

- Technology used at live hearings

- Issues of relevance of questions and evidence

 - Including when questions and evidence about complainant's sexual predisposition or prior sexual behavior are not relevant

□ Investigators

- Issues of relevance so they can create investigative reports that fairly summarize relevant evidence

Optional Training

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- ❑ SUGGESTED: train all staff about how to report sexual harassment
- ❑ Training about how to conduct individualized safety and risk assessments to determine if emergency removal is appropriate
- ❑ Implicit or unconscious bias training
- ❑ Training decision-makers about how to assign weight to relevant evidence
- ❑ Training about how to collect and/or evaluate evidence
- ❑ Any other education or training that the school believes serves the needs of its community

Recordkeeping

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- 7 years
- Case files
 - Investigation materials
 - Determination regarding responsibility
 - Audio or audiovisual recording or transcripts of hearings
 - Disciplinary sanctions imposed on respondent
 - Records of remedies provided to complainant designed to restore or preserve equal access to education program or activity
 - If no supportive measures provided to complainant, documentation about why it was not clearly unreasonable in light of the known circumstances
 - Records of other actions taken in response to a report or formal complaint
 - Documentation of basis for conclusion that response was not deliberately indifferent
 - Appeals and results of appeals
- Training materials (must also be publicly available on website)

Other Legal Considerations

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- Massachusetts student discipline regulations
- Massachusetts bullying statute and regulations
- Individuals with Disabilities in Education Act
- Section 504 of the Rehabilitation Act

Questions?

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