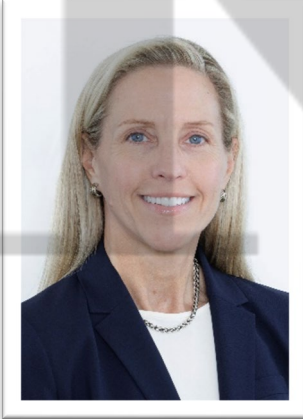


# **Title IX Compliance Updates**

**Massachusetts Charter Public School  
Association**

# Today's Presenters

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# AGENDA

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- Introduction
- Review of Title IX
- Definitions and Scope
- Jurisdiction
- Duty to Respond & Related Obligations
- Title IX Policy & Grievance Procedures
- Decision making & Appeals
- Training & Recordkeeping

**Disclaimer: This webinar does not constitute legal advice, and any actions taken based on the webinar should be done in consultation with legal counsel.**

# What is Title IX?

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:

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# Requirements for Title IX Compliance

- 1) Designate **Title IX Coordinator**
- 2) Adopt, publish, and implement a **nondiscrimination policy** (prohibiting discrimination on the basis of sex) AND **grievance procedures**
- 3) **Respond promptly and effectively** when school has knowledge of sex discrimination
- 4) Publish a **notice of nondiscrimination**
- 5) Ensure that relevant people are **trained** on their Title IX duties
- 6) Maintain appropriate **records**

## Title IX Definitions and Scope

- ❑ 2024 Regulations emphasize and clarify protections against discrimination and harassment based upon sexual orientation and gender identity, as well as discrimination based upon sex stereotypes, sex characteristics, and pregnancy and related conditions.
- ❑ **BUT** these protections have arguably always been included under the umbrella of discrimination based upon sex, particularly under MA law, and often are included in school policies as well.

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## Pre-Existing Protections under MA Law

- ❑ Schools are prohibited under state law (G.L. c. 76, §5; c. 151B; and c. 151C) from discriminating on the basis of sex
- ❑ MA Department of Elementary and Secondary Education (DESE) has also issued guidance on non-discrimination of students on the basis of gender identity. See: <https://www.doe.mass.edu/sfs/lgbtq/genderidentity.html>
- ❑ MA Pregnant Workers Fairness Act (PWFA)

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## Title IX Definitions

**Sex-based harassment\*** is a form of sex discrimination and means sexual harassment and other harassment on the basis of sex, including on the basis of sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity, that falls within one or more of the following categories:

- ❑ **Quid pro quo harassment:** When an **employee or agent of the School** conditions the provision of an aid, benefit, or service of the school on an individual's participation in unwelcome sexual conduct;
  - ❑ Can be employee-on-employee or employee-on-student, typically not student-on-student.
- ❑ **Hostile environment harassment:** unwelcome sex-based conduct that is subjectively and objectively offensive and is so severe or pervasive that it limits or denies a person's ability to participate in or benefit from the school's education program or activity; or
- ❑ Sexual assault, dating violence, domestic violence, or stalking (as defined by the regulations).

\*Note shift from 2020 focus on "sexual harassment" to broader concept of "sex discrimination" which includes sexual harassment.



# Hostile Environment

- ❑ Hostile environment elements:
  - ❑ **Unwelcome** sex-based conduct that,
  - ❑ Based on the **totality of the circumstances**, is so
  - ❑ **Subjectively\*** (to the particular individual involved) and **objectively** (to a reasonable person in same context) **offensive** and
  - ❑ So **severe** or **pervasive** that it
  - ❑ **Limits or denies a person's ability to participate in or benefit from** the School's education program or activity.
- ❑ **Climate and Culture:** Hostile environment can be created and affect someone who is not a "target" of the conduct. Example: "Jokes" overheard by others not involved in a particular conversation.

\*2020 regulations defined hostile environment as conduct so severe, pervasive, and **objectively** offensive that it **effectively denied** a person **equal access** to the school's education program or activity.

# Unpacking Hostile Environment

**“Severe”** – consider, for example:

- ❑ Whether conduct alleged was physical vs. verbal/written
  - ❑ Physical conduct more likely to be severe, but not always – consider the totality of the circumstances!
- ❑ Was conduct accompanied by threats or violence

**“Pervasive”** – consider, for example:

- ❑ Frequency/repetition
- ❑ Scope
- ❑ Widespread impact; multiple targets/complainants; climate & culture

# Unpacking Hostile Environment

“**Totality of the Circumstances**” involves similar analysis to “severe” and “pervasive” such as:

- ❑ Frequency, nature, and severity of alleged conduct
- ❑ Presence of threats or physical violence

But also includes consideration of, for example:

- ❑ Relationship between the parties
- ❑ Age and maturity of the parties
- ❑ Nature and context in which the conduct occurred (for example, on campus vs. off campus; in person vs. social media, etc.)
- ❑ Might also include consideration the **nature** of the school’s program and population of students served (e.g., therapeutic day or residential programs)

# Legal Challenges

Legal challenges have been brought in federal courts in several states resulting in a wave of preliminary injunctions blocking enforcement by the U.S. Department of Education (“USDOE”) of the 2024 Title IX amendments.

USDOE has pending appeals to several Circuit Courts of Appeal and the United States Supreme Court has declined to weigh in pending rulings from the Fifth and Sixth Circuits.

However, in several cases, courts have made clear that nothing in any of the pending litigation limits the ability of any particular school **to adopt or follow its own policies, or otherwise comply with applicable state or local laws or rules** regarding sex-based discrimination, **including the 2024 Title IX amendments.**

Rather, most of the present injunctive relief focuses on prohibiting **USDOE** from demanding compliance with the 2024 Title IX amendments.

## What do legal challenges to Title IX elsewhere mean here in Massachusetts?

Massachusetts public schools and private schools that receive federal financial assistance may adopt and/or maintain anti-harassment and anti-discrimination policies that are compliant with state and local laws, including policies that align with the 2024 Title IX amendments.

Again, Massachusetts law and DESE policies have included robust protections against sex-based discrimination for many years, including protections against discrimination/harassment based upon gender identity, sexual orientation, and pregnancy and related conditions.

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# Bullying vs. Civil Rights-Based Harassment

- Bullying under MA law (G.L. c. 71, § 37O):
    - **repeated** use by one or more students or by a member of a school staff including, but not limited to, an educator, administrator, school nurse, cafeteria worker, custodian, bus driver, athletic coach, advisor to an extracurricular activity or paraprofessional of a written, verbal or electronic expression or a physical act or gesture or any combination thereof, **directed at a victim** that:
      - (i) causes physical or emotional harm to the victim or damage to the victim's property;
      - (ii) places the victim in reasonable fear of harm to himself or of damage to his property;
      - (iii) creates a hostile environment at school for the victim;
      - (iv) infringes on the rights of the victim at school; or
      - (v) materially and substantially disrupts the education process or the orderly operation of a school.
- For the purposes of this section, bullying shall include cyber-bullying.

**Remember: Conduct may violate state and federal civil rights laws, including Title IX, even if it is not repeated and even if it is not targeted toward a particular individual.**

# Jurisdiction

**2024 Regulations:** A school has jurisdiction over (and an obligation to respond to) conduct that occurs in its education program or activity.

- ❑ Regardless of geographic location
- ❑ Regardless of whether the complainant is still a student or employee at the School

**2020 Regulations:** A school's jurisdiction over allegations of sexual harassment only extended to conduct that was alleged to have occurred against a person **in the United States** in the school's program or activities.

- ❑ No jurisdiction over school programs and activities outside of U.S. (such as foreign exchange programs)
- ❑ No jurisdiction over complaints by former students or employees

# A School's Duty to Respond

## Schools must:

- ❑ Provide full protection from **all forms** of sex-based discrimination and harassment;
- ❑ Take prompt and effective action to **end** any sex discrimination in its education programs or activities and to **prevent recurrence** and to **remedy its effects**;
- ❑ Provide supportive measures to complainants and respondents affected by conduct that may constitute sex discrimination; and
- ❑ **Promptly and effectively respond** to all complaints of sex discrimination with a fair, transparent, and reliable process that includes trained, unbiased decisionmakers to evaluate all relevant, permissible evidence.



# Prompt and Effective Action

## Means:

- ❑ To end harassment/discrimination
- ❑ Remedy any effects
  - ❑ Includes consideration of school climate and culture
- ❑ Prevent recurrence
  - ❑ Individuals (safety plan, student/employee discipline, restorative justice)
  - ❑ School-wide (review policies and practices; feedback from stakeholders)

# Employee Duties and Responsibilities

**Duty to Report:** All elementary and secondary school employees who are not confidential employees must notify the Title IX Coordinator when they have any information about conduct that reasonably may constitute sex discrimination under Title IX.

- ❑ There may be other reporting obligations in addition to Title IX (e.g., mandated reporting under G.L. c. 119, § 51A)
  - ❑ Confidential employees may still have reporting obligations as mandated reporters.

# Confidential Employees

- A “confidential employee” is an employee of the school
  - whose communications are **privileged or confidential under federal or state law** (this may include a school nurse or mental health professional when acting in connection with the provision of treatment); or
  - who the school has **designated** as a confidential employee.
- A confidential employee is **not required to report** allegations of sex discrimination to the **Title IX Coordinator**, but they **must explain** to any person who informs them of conduct that may constitute sex discrimination of:
  - the employee’s status as **confidential** and the circumstances under which the employee is not required to notify the Title IX Coordinator;
  - how to **contact the Title IX Coordinator** and how to **file a complaint**; and
  - **ways that the Title IX Coordinator may respond** (i.e., offering supportive measures or initiating an investigation or informal resolution).

# Basic Requirements for Grievance Procedures

- ❑ Treat complainants and respondents **equitably**
- ❑ **No conflicts of interest or bias** from Title IX Coordinators, Investigators, or Decisionmakers towards complainants and respondents
- ❑ **Presumption of non-responsibility** during grievance process
- ❑ Reasonably **prompt** timeframes
- ❑ Reasonable steps to **protect privacy** of parties and witnesses
- ❑ Objective evaluation of **relevant evidence**
- ❑ Prohibition against **retaliation**
  - ❑ A school must prohibit retaliation, including peer retaliation, and respond to allegations of retaliation in accordance with its Title IX policy and grievance procedures.



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# Grievance Procedures

1. Complaint
2. Initial review
3. Notice of Allegations
4. Party Responses to Notice of Allegations
5. Interviews and Evidence Collection
6. Distribution of Evidence
7. Party Responses to Evidence
8. Live Hearing\*
9. Written Determination
10. Appeal

# Complaint

- ❑ Oral or written
- ❑ May be filed by
  - ❑ Complainant
    - ❑ Student
    - ❑ Employee
    - ❑ Any person who was participating or attempting to participate in the school's education program or activity at the time of the alleged sex discrimination
  - ❑ Parent/Guardian/Legal Representative of Complainant
  - ❑ Title IX Coordinator
- ❑ Must objectively be understood as a request for the school to investigate the alleged conduct and determine whether it constitutes sex discrimination under Title IX.



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# Title IX Coordinator

## Designate

- “Each school must designate and authorize **at least one employee**, herein referred to as a Title IX Coordinator, to coordinate its efforts to comply with its responsibilities under Title IX and this part.”

## Notify

- **Provide name/title, office address, email address, and telephone number** to:
  - Students
  - Parents/Guardians/Legal Reps
  - Employees
  - Applicants for admission and employment
  - Unions and professional organizations holding collective bargaining or professional agreements with the school

## Publish

- Website
- Handbooks/Catalogs
- Announcements/Bulletins
- Application Forms
- Recruitment Materials

# Title IX Coordinator

- “A school must require its Title IX Coordinator, **when notified** of conduct that reasonably may constitute sex discrimination under Title IX or this part, to take the following actions to **promptly and effectively end** any sex discrimination in its education program or activity, **prevent** its recurrence, and **remedy** its effects:”
  - Treat the complainant and respondent **equitably**
  - Offer and coordinate **supportive measures** to complainant and respondent, as appropriate
  - **Notify** the complainant and respondent, as appropriate, of the grievance procedures and informal resolution process, if available and appropriate
  - In response to a complaint, **initiate the grievance procedures or the informal resolution process**, if available, appropriate, and requested by all parties
    - In the absence of a complaint or the withdrawal of any or all of the allegations in a complaint, and in the absence or termination of an informal resolution process, determine whether to initiate a complaint of sex discrimination in the capacity of Title IX Coordinator
  - Regardless of whether a complaint is initiated, take other appropriate prompt and effective steps, in addition to steps necessary to effectuate the remedies provided to an individual complainant, if any, to **ensure that sex discrimination does not continue or recur** within the school’s education program or activity.



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# Supportive Measures

- ❑ Included in both 2020 and 2024 regulations
- ❑ Purpose is to:
  - ❑ restore or preserve a party's access to the school's education program or activity, including to protect the safety of the parties or the school's educational environment; or
  - ❑ provide support during the grievance process or during the informal resolution process.
- ❑ Supportive measures must be:
  - ❑ individualized
  - ❑ offered as appropriate, as reasonably available, without unreasonably burdening a complainant or respondent,
  - ❑ non-punitive and non-disciplinary;
  - ❑ offered without fee or charge to the complainant or respondent; and
  - ❑ kept confidential.

# Supportive Measures

- ❑ Supportive measures may include, but are not limited to:
  - ❑ counseling
  - ❑ extensions of deadlines and other course-related adjustments
  - ❑ campus escort services
  - ❑ increased security and monitoring of certain areas of the campus
  - ❑ restrictions on contact applied to one or more parties
  - ❑ leaves of absence
  - ❑ changes in class, work, housing, or extracurricular or any other activity, regardless of whether there is or is not a comparable alternative
  - ❑ training and education programs related to sex-based harassment

## Initial Review

- ❑ Title IX Coordinator must review complaint and determine whether to open for investigation or dismiss.
- ❑ A complaint may be dismissed for the following reasons:
  - ❑ the alleged conduct, even if true, would not constitute sex discrimination under Title IX;
  - ❑ the school is unable to identify the respondent after taking reasonable steps to do so;
  - ❑ the respondent is not participating in the school's education program or activity and is not employed by the school;
  - ❑ the complainant voluntarily withdraws any or all of the allegations in the complaint, and the school determines that any remaining allegations would not constitute sex discrimination.

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# Investigation

- ❑ If the Title IX Coordinator determines the conduct alleged may constitute sex discrimination under Title IX, an investigation will be opened, an Investigator will be assigned, and a Notice of Allegations will be issued to the parties.
- ❑ Relevant Persons in an Investigation (ideally no overlap):
  - ❑ Complainant
  - ❑ Respondent
  - ❑ Title IX Coordinator
  - ❑ Investigator (anyone designated by school)
  - ❑ Decisionmaker (ideally not highest position at school)
  - ❑ Appeals Decisionmaker (someone other than Investigator and Decisionmaker; ideally at position higher than Decisionmaker)
  - ❑ Facilitator of informal resolution process (someone other than Investigator and Decisionmaker)

## Notice of Allegations

The Notice of Allegations informs the parties of the conduct alleged and the initiation of the school's Title IX grievance procedures, i.e., an investigation. Notice must include:

- ❑ Grievance procedures
  - ❑ Including presumption that the respondent is not responsible for the alleged sex discrimination until a determination is made at the conclusion of the school's grievance procedures for complaints of sex discrimination
- ❑ Sufficient information available at the time to allow the parties to respond to the allegations
  - ❑ Identities of the parties involved in the incident(s)
  - ❑ Conduct alleged to constitute sex discrimination
  - ❑ Date(s) and location(s) of alleged incident(s)
- ❑ Statement that retaliation is prohibited
- ❑ Statement that the parties are entitled to an equal opportunity to access the relevant and not otherwise impermissible evidence or an accurate description of this evidence

## Party Responses to Notice of Allegations

- Parties should be granted sufficient time to prepare a response to the Notice of Allegations prior to any initial interview conducted.

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# Informal Resolution

- ❑ At any time prior to determining whether sex discrimination occurred, a school may offer to the parties an informal resolution process, *unless*
  - ❑ the complaint includes allegations that an employee engaged in sex-based harassment of an elementary school or secondary school student; or
  - ❑ such a process would conflict with Federal, State or local law.
- ❑ Informal resolution is at all times voluntary, and a party may decline to participate or withdraw from participation at any time.
- ❑ A school that provides the parties an informal resolution process must, to the extent necessary, also require its Title IX Coordinator to take other appropriate prompt and effective steps to ensure that sex discrimination does not continue or recur within the school's education program or activity.

## Interviews and Evidence Collection

- ❑ Burden is on the school – not the parties – to conduct an investigation that gathers sufficient evidence to determine whether sex discrimination occurred
- ❑ Equal opportunity for the parties to present fact witnesses and other inculpatory and exculpatory evidence that are relevant and not otherwise impermissible
- ❑ Interviews may be conducted with parties, witnesses to the alleged conduct, and persons with information relevant to the allegation(s)
- ❑ Information gathered should concern the allegation(s) and the credibility of the person providing the information (to the extent credibility is both in dispute and relevant to evaluating one or more allegations of sex discrimination)



## Distribution of Evidence

- ❑ **Equal opportunity** for parties to **access** the **evidence** that is **relevant** to the allegations of sex discrimination and not otherwise impermissible, **or an accurate description** of this evidence.
- ❑ If the school initially provides a description of the evidence, the parties are entitled to an equal opportunity to access the underlying evidence upon the request of any/either party
- ❑ Evidence that is **impermissible**, i.e., not to be used or considered regardless of relevance, includes:
  - ❑ Evidence that is protected under a legally-recognized privilege, unless voluntarily waived
  - ❑ Evidence that relates to the complainant's sexual interests or prior sexual conduct, unless
    - ❑ offered to prove that someone other than the respondent committed the alleged conduct or
    - ❑ evidence about specific incidents of the complainant's prior sexual conduct with the respondent that is offered to prove consent to the alleged sex-based harassment.

## Party Responses to Evidence

- A school must provide a reasonable opportunity for the parties to respond to the evidence (or to the accurate description of the evidence).

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## Live Hearing

- ❑ Following an investigation, a school may, but need not, provide for a live hearing
- ❑ If a live hearing is conducted,
  - ❑ each party is entitled to an advisor who may be, but does not have to be, an attorney;
  - ❑ the parties may be physically present in the same location OR they may be physically present in separate locations with technology enabling the Decisionmaker and parties to simultaneously see and hear the speaker;
  - ❑ the school will create an audio or audiovisual recording or transcript, available to the parties for inspection and review;
  - ❑ at the request of a party, the school should provide reasonable accommodations, support services, and any necessary translations or interpreter services;
  - ❑ questions may be asked by the Decisionmaker or a party's advisor, but never by a party directly; and
  - ❑ questions asked must be relevant and not otherwise impermissible, as decided by the Decisionmaker prior to the question being posed.

## Written Determination

- ❑ Following an investigation or a live hearing, if a hearing is conducted, a written determination will be issued to the parties simultaneously indicating whether, based on an evaluation of the relevant information collected, Respondent's conduct violated Title IX.
- ❑ Standard of Evidence:
  - ❑ Preponderance of the evidence (“more likely than not”)

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## Written Determination

- ❑ The written determination must include:
  - ❑ a **description** of the alleged conduct opened for investigation;
  - ❑ information about the **policies and procedures** that the School used to evaluate the allegations;
  - ❑ the Decisionmaker's **evaluation** of the relevant and not otherwise impermissible evidence and **determination** whether sex discrimination or other conduct in violation of Title IX occurred;
  - ❑ when the Decisionmaker finds that sex discrimination or other conduct in violation of Title IX occurred, any **disciplinary sanctions** the School will impose on the Respondent, whether **remedies** other than the imposition of disciplinary sanctions will be provided by the School to the Complainant, and, to the extent appropriate, other students identified by the School to be experiencing the effects of the sex discrimination; and
  - ❑ the School's procedures for the Parties to **appeal** the written determination.

## Decisionmaking Considerations

- Who should be the decisionmaker?
  - Consider conflicts of interest – cannot be an employee that reports to or is subordinate to the Respondent.
  - Must have required training (e.g., grievance procedures, how to serve impartially, meaning of “relevance” with respect to evidence, and types of evidence that are impermissible)

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## Decisionmaking – Relationship to Student Discipline

- ❑ Disciplinary sanctions under Title IX not permitted prior to conclusion of grievance process.
- ❑ **Emergency Removal:** Title IX provides that nothing precludes a school from removing a respondent from the school's education program or activity on an emergency basis, provided that the school undertakes an individualized safety and risk analysis, determines that an imminent and serious threat to the health or safety of a complainant or any students, employees, or other persons arising from the allegations of sex discrimination justifies removal, and provides the respondent with notice and an opportunity to challenge the decision immediately following the removal.
  - ❑ Follow due process procedure under 603 CMR 53.07
  - ❑ Consider other due process requirements under IDEA and Section 504 (e.g. manifestation determination review, if applicable)

## Appeals – Bases for Appeal

Either party may appeal:

1. Dismissal of a Complaint; or
2. A determination of whether sex-based harassment occurred, on the following bases:
  - ✓ **Procedural irregularity** that would change the outcome;
  - ✓ **New evidence** that would change the outcome and that was not reasonably available when the determination or dismissal was made; and/or
  - ✓ **Conflict of interest or bias** on part of Title IX Coordinator, investigator or decisionmaker, either against complainants or respondents generally or any of the individuals involved, that would change the outcome.



## Appeals – Due Process

1. Provide **notice** to the parties, including notice of the allegations if such notice was not previously provided to the respondent;
2. Ensure that appeal procedures are **implemented equally** for the parties;
3. Ensure that the decisionmaker for the appeal **did not take part** in investigation of the allegations or dismissal of the complaint;
4. Ensure that the decisionmaker for the appeal has been **trained** as required by the Title IX regulations;
5. Provide the parties a **reasonable and equal opportunity to make a statement** in support of, or challenging, the outcome; and
6. Notify the parties of the **result** of the appeal and the **rationale** for the result (**in writing**).

# Training

- ❑ **All employees\*** must be trained on:
  - ❑ the School's obligation to address sex discrimination in its education program or activity;
  - ❑ the scope of conduct that constitutes sex discrimination under Title IX, including the definition of sex-based harassment; and
  - ❑ all applicable notification and information requirements required by the Title IX regulations.

\*The term "employees" includes individuals employed directly by the School as well as independent contractors, volunteers, advisors, and third-party agents who are performing roles that are directly involved in carrying out the School's Title IX duties, i.e., roles involving the responsibilities of Title IX Coordinators, Investigators, Decisionmakers, facilitators of an informal resolution process, and Appeals Decisionmakers.

# Training

- ❑ In addition to the training requirements for employees, all **Title IX Coordinators, Investigators, Decisionmakers, Appeals Decisionmakers**, and other persons who are responsible for implementing the School's grievance procedures or have the authority to modify or terminate supportive measures must be trained on the following topics to the extent related to their responsibilities:
  - ❑ the school's obligations to respond promptly and effectively upon receipt of information regarding conduct that may reasonably constitute sex discrimination in the school's education program or activity;
  - ❑ the school's grievance procedures, as described in this Policy;
  - ❑ how to serve impartially, including by avoiding prejudice of the facts at issue, conflicts of interest, and bias; and
  - ❑ the meaning and application of the term "relevant" in relation to questions and evidence, and the types of evidence that are impermissible regardless of relevance.
- ❑ Title IX Coordinators and their designees must also be trained on their specific responsibilities, including with regards to pregnancy and related conditions and the school's recordkeeping system.
- ❑ Facilitators of an informal resolution process must also be trained on the informal resolution process.

# Recordkeeping

- ❑ The school must maintain for a period of at least seven (7) years:
  - ❑ for each complaint of sex discrimination, records documenting the grievance procedures or the informal resolution process, as applicable, and the resulting outcome;
  - ❑ for each notification the Title IX Coordinator receives of information about conduct that reasonably may constitute sex discrimination under Title IX, records documenting the actions the school took to respond to the information; and
  - ❑ all materials used to train Title IX Coordinators, Investigators, Decisionmakers, Appeals Decisionmakers, facilitators of an informal resolution process, and all School employees. The school must make these training materials available upon request by members of the public.

# Questions?

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