



Relationships



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Budgeting
and Staffing



Know-How



Results



Ohio Department of Higher Education

Title IX Investigator Training



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Overview

- 2020 Title IX Overview
- Obligations: Confidentiality, Publication of Policy, and Recordkeeping
- Title IX Procedures: Due Process, Hearings, and Alternative Resolution Processes
- Grievance Process: Biases in Investigations, Evidence, Standards of Proof, Interviewing, Report Writing
- Retaliation



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TITLE IX IN GENERAL

A brief history and explanation.



What is Title IX?

- Federal civil rights law that protects from discrimination based on sex in education programs or activities that receive federal funding assistance
- “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.”
- OCR enforces Title IX to ensure that institutions that receive federal financial assistance from ED comply with the law



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Pre-Title IX Claims

- No federal statutory prohibitions on sexual misconduct
- Victims relegated to filing
 - Criminal complaints
 - Civil claims
 - Assault
 - Intentional Infliction of Emotional Distress
 - Other



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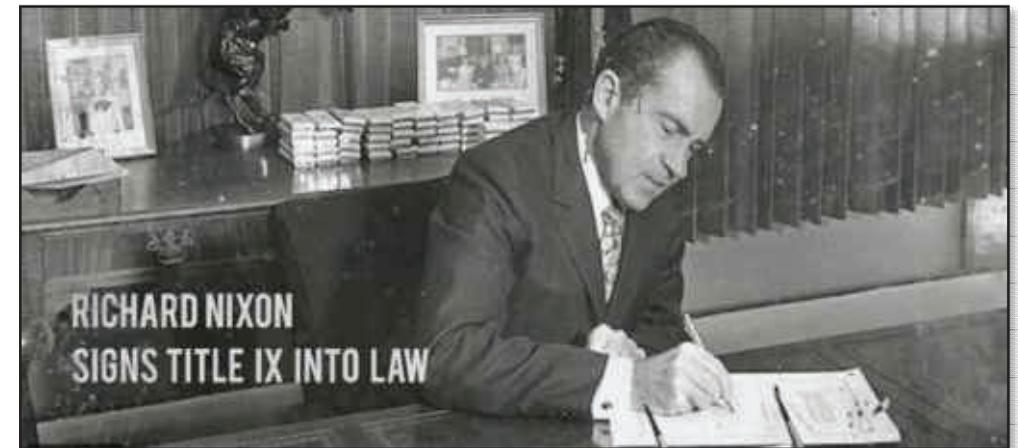
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Title IX & Title IX Regulations

- Title IX passed in 1972
- Simple statutory language: 20 USC §1681
- Simple regulations: 34 CFR §106
- Primary emphasis in 1970s: Gender equity in athletics



Source: Richard Nixon Foundation



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VAWA & VAWA Regulations

- Far more specific statutory language – 20 USC §1092(f)(8)
- Far more specific regulations – 34 CFR §668.46
- Targets cases of sexual assault, dating violence, domestic violence, or stalking



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VAWA & VAWA Regulations

- Profound impact on campuses
 - Training requirements for coordinators, investigators, and adjudicators
 - Advisor participation
 - Conflicts of interest prohibition for all involved in proceeding
 - Prohibition on retaliation



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VAWA Training Requirements

- 34 CFR § 668.46(k)(2)(ii): proceedings at institutions shall be conducted by officials, who, at a minimum, receive annual training on the issues related to dating violence, domestic violence, sexual assault, and stalking and on how to conduct an investigation and hearing process that protects the safety of victims and promotes accountability.
 - This training will provide you with the definitions of dating violence, domestic violence, sexual assault, and stalking
 - How to identify signs of abusive of behavior
 - Supportive measures for the complainant
 - Anti-retaliation policies

VAWA Training Requirements

Signs of Abusive Behavior



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- Telling you that you never do anything right
- Showing extreme jealousy of your friends or time spent away from them
- Preventing or discouraging you from spending time with friends, family members or peers
- Insulting, demeaning, or shaming you, especially in front of other people
- Insulting your parents or threatening to harm or take away your children or pets
- Intimidating you with weapons like guns, knives, bats, or mace
- Preventing you from making your own decisions, including about working or attending school
- Controlling your finances without discussion, including taking your money or refusing to provide money for necessary expenses
- Pressuring you to have sex or perform sexual acts you are not comfortable with
- Pressuring you to use drugs or alcohol
- Intimidating you through threatening looks or actions
- Destroying your belongings or your home



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VAWA Training Requirements

Protecting Safety of Victims and Promoting Accountability

- Assess risk of the complainant at the outset of the investigation and throughout the process
- Continually advise complainants the availability of supportive measures
- Ensure that sanctions or disciplinary determinations are adequate for the respondent in light of the actions determined to have occurred
- Equally apply sanctions or disciplinary determinations amongst students or faculty
- At conclusion of investigation, perform a high-level review to ensure procedures were accurately and equitably followed

Sub-Regulatory Guidance

- 2001 Revised Sexual Harassment Guidance
- 2011 Dear Colleague Letter
- 2014 Q&A
- 2015 Role of Title IX Coordinator
- 2016 Transgender Guidance
- Impact – “The Bad Boy List”



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Results

Respondent Litigation

- Negligent misrepresentation
- Intentional infliction of emotional distress
- Negligent infliction of emotional distress
- Breach of the implied covenants of good faith and fair dealing
- Invasion of privacy
- **BREACH OF CONTRACT**



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Recent Title IX Decisions



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- *Foster v. Board of Regents of the Univ. of Michigan, et al.* (6th Cir. 12/11/2020)
 - Affirmed Summary Judgment for Defendant. Plaintiff (off-site executive MBA) alleged deliberate indifference regarding a report of student sexual harassment. No Contact order was issued, which was violated multiple times. Plaintiff alleged U of M was deliberately indifferent in responding to these violations. 6th Circuit ruled U of M was not deliberately indifferent by increasing protections at each stage.
- *Doe v. Case W. Reserve Univ.* (N.D. Ohio 11/9/2020)
 - Denied Plaintiff's motion for TRO and preliminary injunction. Plaintiff (student) sought an injunction preventing the University from continuing a hearing under its sexual misconduct policy. Plaintiff alleged that the complainant tainted the hearing panel by testifying to confidential settlement discussions between herself and the plaintiff in her opening statement. The Court denied the motion stating Plaintiff failed to show a threat of irreparable harm if the hearing were to continue.
- *Wamer v. Univ. of Toledo* (N.D. Ohio 10/16/2020)
 - Former student alleged deliberate indifference after a report of sexual misconduct by a professor. Court found Plaintiff failed to state a deliberate indifference claim because no allegation that the University's post-notice action made her more vulnerable to further harassment.

Recent Title IX Decisions

- *Doe v. Univ. of Ky.* (6th Cir. 08/19/2020)
 - Reversed lower court’s award of summary judgment for defendant. Plaintiff was a former student at a community college in Lexington. Alleged UK was deliberately indifferent to the alleged sexual misconduct of a UK student. Respondent was held responsible but after 3 different hearings, each was overturned for deficiencies. 4th hearing found not responsible. Trial court ruled that Plaintiff was not a UK student. 6th Circuit reversed holding there is a dispute of fact whether or not she was denied the benefit of an education program or activity.
- *Kesterson v. Kent State Univ., et al.* (6th Cir. 07/23/2020)
 - Affirmed and reversed the lower court’s award of summary judgment for defendants. Dispute of fact regarding 1st Amendment claim. No dispute regarding deliberate indifference because coach and other employees were not “appropriate persons” under Title IX. While they had an obligation to report the allegations, their failure to do so did not constitute deliberate indifference.



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Trump Administration Impact

- 2017 repeal of 2016 transgender guidance
- 2017 repeal of 2011 and 2014 guidance/
reinstatement of 2001 guidance
- 2017 Q&A
- 2018 Notice of proposed
rulemaking
- Publication - May 19, 2020
- Effective August 14, 2020



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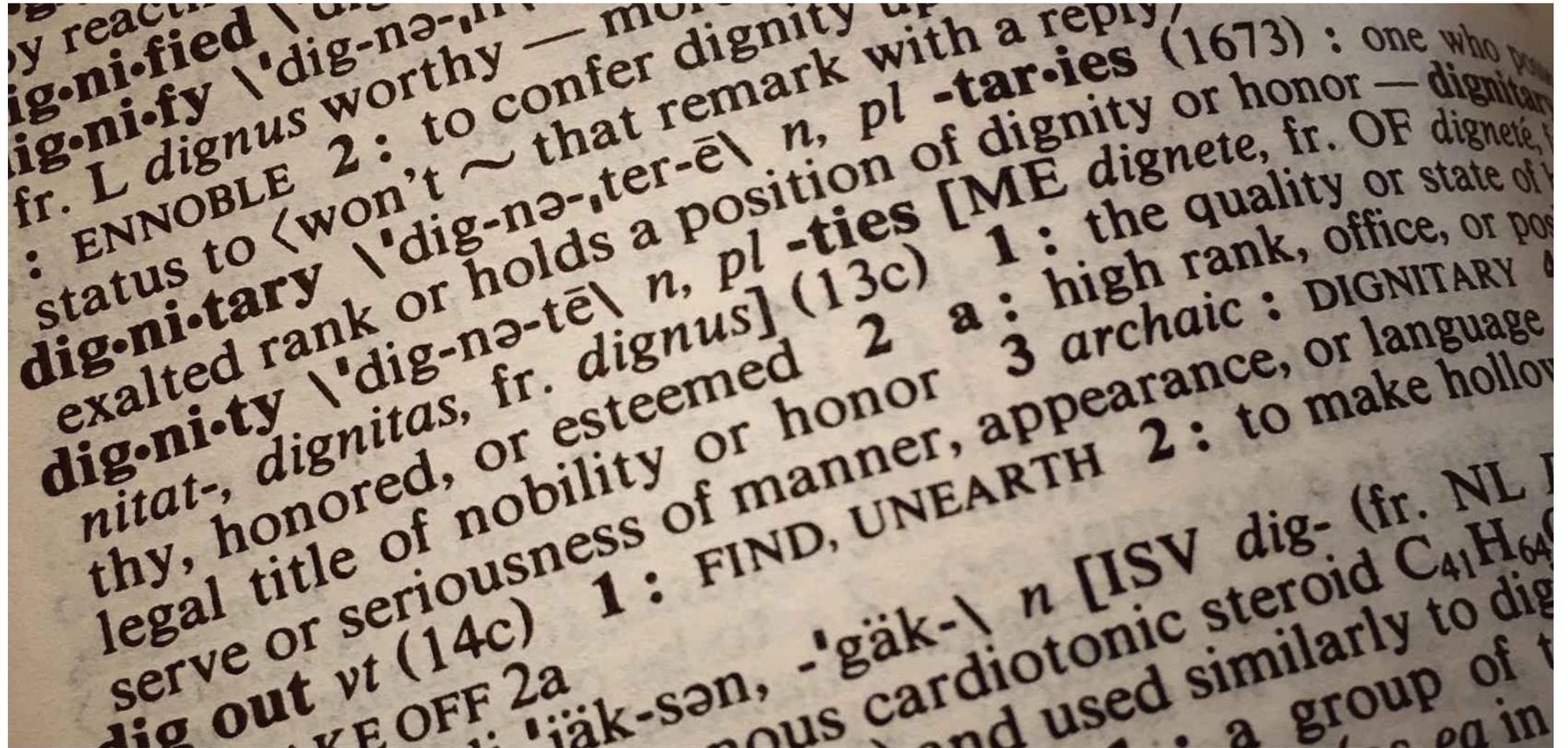


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Significant Definitions and Distinctions



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Standard of Liability Under New Title IX Regulations

- Deliberately indifferent - School's response to sexual harassment that is clearly unreasonable in light of known circumstances
- Choice between preponderance or clear and convincing evidence.
 - Clear and convincing raises the bar for what constitutes a violation
 - Choice of evidentiary standard can be without regard to standard employed in other campus disciplinary proceedings



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Results

Sexual Harassment

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
- (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)



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Results

Sexual Harassment - Continued

- Conditioning the provision of aid, benefit, or service on participation in sexual conduct:
 - Premising grades, grade promotion, enrollment in a program, recommendation letters, etc. on submission to sexual conduct
 - Can include conduct that is only “speech”, in other words, no actual sexual conduct need occur, if the speech is intended to compel conduct
 - *Quid pro quo* harassment need not be “severe, pervasive, and objectively offensive” to constitute sexual harassment



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Program or Activity

- Includes locations, events, or circumstances the School exercises substantial control over both the respondent and the context in which the sexual harassment occurs
- Also, any building owned or controlled by a student organization that is officially recognized by the School
 - Fraternities/sororities
 - Does not include study abroad

Actual Knowledge

- Notice of sexual harassment or allegations of sexual harassment to a School's Title IX Coordinator or any official who has *authority to institute corrective measures*
- Knowledge based on vicarious liability or constructive notice is insufficient to constitute actual knowledge
- Obligation to report sexual harassment or to inform a student about how to report sexual harassment, or having been trained to do so, does not qualify an individual as one who has authority to institute corrective measures on behalf of the recipient



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Results

Respondent vs. Complainant

- Complainant: an individual who is alleged to be the victim of conduct that could constitute sexual harassment
- Respondent: individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment



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Results

Report vs. Formal Complaint

- Report: informal
- Formal complaint: a document that is filed by a complainant or signed by the Title IX Coordinator alleging sexual harassment against respondent and requesting that the School investigate the allegation
- School has obligations in response to both reports and formal complaints



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Results

Supportive Measures

- Title IX Coordinator responsibility
- Free, individualized services designed to restore or preserve equal access to education, protect safety, or deter sexual harassment



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Results

Examples of Supportive Measures

- Counseling
- Extensions of deadlines
- Modifications of work or class schedules
- Changes in housing
- Campus escort services
- Increase monitoring of parts of campus
- Mutual restrictions on contact between individuals



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Case Scenario

- Tina is a full-time student, one evening she is out at a concert with friends.
 - The venue is not on campus, but in the downtown area of the city.
 - While at the concert, she is approached by a young man who recognizes her from class that they take together.
 - During the evening, he gropes her and pushes her into a corner and tries to insert his fingers into her vagina. She fights him off.
 - She then reports the incident to the bouncer who calls the police. Tina fills out a report with the police.
 - She does not know the name of the person who assaulted her. The police contact the college to find out names of the other students in Tina's classes.
 - Before the contact from the police, the campus was not aware of the incident.



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OBLIGATIONS

Confidentiality, Publication of Policy,
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Confidentiality

- The recipient must keep confidential the identity of any individual who has made a report or complaint of sex discrimination, including any individual who has made a report or filed a formal complaint of sexual harassment, any complainant, any individual who has been reported to be the perpetrator of sex discrimination, any respondent, and any witness
- The recipient must maintain as confidential any supportive measures provided to the complainant or respondent, to the extent that maintaining such confidentiality would not impair the ability of the recipient to provide the supportive measures



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Results

Recordkeeping

- Must maintain records of the following for seven years:
 - Sexual harassment investigation
 - Audio or audiovisual recording
 - Transcript
 - Disciplinary sanctions imposed
 - Remedies provided
 - Any appeal and result of appeal
 - Informal resolution process and result
 - All materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates the informal resolution process



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Results

Recordkeeping - Continued

- For each of the School's responses to sexual harassment, the School must also create and maintain for seven years records of:
 - Any actions, including supportive measures, taken in response to a report or formal complaint of sexual harassment
 - Basis for its conclusion that its response was not deliberately indifferent
 - That it has taken measures designed to restore or preserve equal access to School's education program or activity
 - If a recipient does not provide a complainant with supportive measures, then the recipient must document the reasons why such a response was not clearly unreasonable in light of the known circumstances. The documentation of certain bases or measures does not limit the recipient in the future from providing additional explanations or detailing additional measures taken.



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Publication

- Prominently display the contact information required to be listed for the Title IX Coordinator
- Publish grievance procedures
- Training materials publicly available on website



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TITLE IX PROCEDURES

School's duty to respond, informal resolution,
and the grievance process.

Initiation of Title IX Procedures

- Any person may report sex discrimination
- Reports trigger duty to respond and provide supportive measures, with or without formal complaint
- Must follow grievance process before disciplinary sanctions or other actions that are not supportive measures are implemented against a respondent



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Results

Emergency Procedures

- Emergency removal of students is allowed
 - Requires safety and risk analysis
 - Determines an immediate threat to the physical health and safety of others
 - Provides respondent with an opportunity to challenge the decision immediately after removal
- Administrative leave for non-student employees is permitted



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Results

Response to a Formal Complaint

- Triggered when a school has actual knowledge of sexual harassment in an education program or activity against a person in the United States
 - Must respond promptly
 - In a manner that is not deliberately indifferent
- Temporary delays are only permitted for good cause, such as
 - Law enforcement activities
 - Absence of party or witness
 - Absence of advisor of choice
 - Need to provide language assistance
 - Disability accommodations



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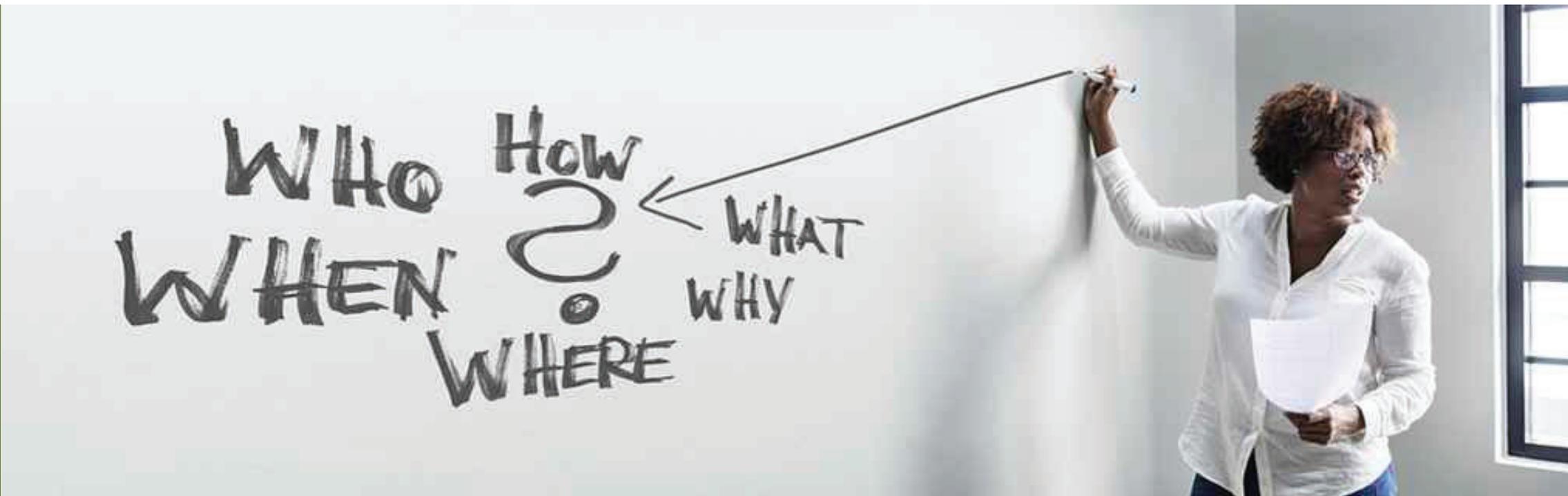
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INFORMAL RESOLUTION

An Option in Response to a Formal Complaint.

Informal Resolution

- Only available after filing formal complaint
- Not available where the respondent is an employee and complainant is a student
- Must be completely voluntary
- Prior to engaging need to obtain parties' voluntary written consent
- Provide parties in writing of:
 - Allegations
 - Rights
 - Requirements of informal resolution process
 - What will be confidential
- No conditions based on engaging or not engaging in informal resolution process
- Facilitator free of bias, conflicts of interest, and who has received special training
- At any time, parties can revert to formal complaint process



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Results

Grievance Procedures

- Process that is initiated by a formal complaint by an individual or Title IX Coordinator
- Complainants and respondents must be treated equitably
- Presumption that respondent is not responsible for alleged conduct
 - Respondent does not need to prove innocence



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Results

Beginning of Investigation-Written Notice to Parties

- Notice of the recipient's grievance process, including any informal resolution process
- Notice of the allegations of sexual harassment potentially constituting sexual harassment
- Subsequently, additional notice if investigation expands beyond allegations in original notice

Investigation

- Written notice of complaint provided to both parties
- Right to select advisor
- Institution bears the burden of gathering evidence
- Must still provide equal opportunity for parties to present witnesses and evidence
 - Expert witnesses
 - Inculpatory or exculpatory evidence
- Cannot restrict the ability of either party to discuss allegations under investigation or to gather and present relevant evidence



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Relevant Definitions

- **Incapacitation:** where a person lacks capacity to appreciate the fact that the situation is sexual, or cannot appreciate (rationally or reasonably) the nature and/or extent of the situation.
 - Based on physical or mental status – developmental disability or alcohol or drug use
 - Is a subjective determination based on all facts available because persons reach incapacitation at different points and as a result of different stimuli

* What definition does your policy say? Review.



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Relevant Definitions

- **Consent:** demonstrated through mutually understandable words and/or actions that indicate a willingness to engage in specific sexual activity
 - Must be knowing and voluntary (freely given)
 - Must be awake and have the capacity to reasonably understand the nature of her/his actions
 - May not use physical force, verbal threats, intimidation, or coercion as a method for obtaining consent
 - Prior consent does not imply current or future consent, even in the context of a relationship
 - May be withdrawn by either person at any time
- * What definition does your policy say? Review.



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Relevant Definitions

- **Coercion:** use of pressure to compel another individual to initiate or continue sexual activity against an individual's will. Words or conduct are sufficient to constitute coercion if they wrongfully impair another individual's freedom of will and ability to choose whether or not to engage in sexual activity

* What definition does your policy say? Review.



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Relevant Definitions

- **Force:** the use of physical violence and/or physical imposition to gain sexual access. Can include threats, intimidation (implied threats), and coercion that is intended to overcome resistance or produce consent

* What definition does your policy say? Review.



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Results

Investigative Report

- Report must summarize all relevant evidence
- Prepared in advance of hearing
- Sent to parties at same time
- Give parties at least 10 days to respond
 - Parties must have equal opportunity to respond in writing to the report
 - School must consider responses before finalizing investigative report
- Final investigative report must be circulated 10 days before any determination of responsibility or 10 days before hearing
- Title IX Coordinator can serve as investigator, but cannot be the ultimate decision-maker

Relevant Evidence



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EVIDENCE

- Questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant
- Exception: Unless such questions and evidence about the complainant's prior sexual behavior are offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or if the questions and evidence concern specific incidents of the complainant's prior sexual behavior with respect to the respondent and are offered to prove consent

Privileged Information

- Privacy of medical and psychiatric records
- School cannot access, consider, disclose party records that are maintained by a physician, psychiatrist, psychologist, or other professional for the purpose of treatment to that party without consent
- No information protected by legal privilege may be used during an investigation
- Parties can waive their own privileges if they want to



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Hearings

- Written notice of date, time, location, participants, and purpose of all hearings, interviews, or meetings, with sufficient time for the parties to prepare
- Must provide live hearings
- Schools must provide parties with an advisor if they do not have one, but advisors do not have to be lawyers
- Advisors must be allowed to conduct live cross-examinations of other parties and witnesses
- Comply with disability laws so that individuals with disabilities who participate in the grievance process are accommodated



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Live Hearings

- Hearings must have all parties physically present in the same geographic location or, at the School's discretion, any or all parties, witnesses, and other participants may appear at the live hearing virtually, with technology enabling participants simultaneously to see and hear each other
- Upon a party's request, entire hearing must be held with the parties located in separate rooms, with technology enabling everyone to see and hear each other in real time



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Cross Examination

- Cross-examination at the live hearing must be conducted directly, orally in real time by the party's advisor of choice and never by a party personally
- School has discretion to otherwise restrict the extent to which advisors may participate in the proceedings
- Questions must be relevant
- Decision-maker must decide if a question is relevant before the party or witness has to answer it and must explain any decision to exclude a question as not relevant



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Participation in Hearing or Cross-Examination

- If a party or witness chooses not to appear at the live hearing, or not to answer cross-examination, the decision-maker must exclude that party's or witness's statements and evaluate any evidence that doesn't involve those statements
- Decision-maker must not make inferences about the determination regarding responsibility based on the absence of a party or witness in the hearing or cross-examination

Case Scenario

- Greg is on the college basketball team, he is a reliable player and was close to his other teammates, but recently an assistant coach, Ken, has noticed some tension among the team and with Greg.
 - Greg has been isolating himself at practices.
 - The other starters have been taking cheap shots at Greg and trying to make him look bad in practice.
 - After a practice where there was pushing and shoving – Ken asks Greg to stay after to talk to him.
 - Ken lets Greg know what he has been observing and asks Greg what is going on. Greg refuses to talk.
 - Ken tells Greg that he could be cut from the starting lineup if he doesn't tell him what is going on.
 - Greg said he is having a disagreement with some of his teammates about what happened at a party a few weeks ago.
 - Doesn't want to go into details but him and his teammates are having a disagreement about what happened at a party a few weeks ago.
 - Doesn't want to give details, but they have a difference of opinion about how women should be treated.
 - Ken continues to press Greg and the only other information he learns is that there was alcohol and a party, and the teammates had their fun with the same girl.



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Recording the Hearing

- Schools must create an
 - Audio
 - Audiovisual recording
 - Transcript of any live hearing
- Recording must be made available for parties to inspect and review



Avoiding Decision-Maker Conflicts of Interest and Bias

- Must use independent judgment
- Cannot be the same person who conducted the investigation and cannot be the Title IX Coordinator
- Free from conflicts of interest or bias for or against complainants or respondents
- Must be impartial



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Impartiality

- Process must:
 - Require an objective evaluation of all relevant evidence, including inculpatory and exculpatory evidence – and provide that credibility determinations may not be based on person’s status as complainant, respondent or witness
 - Treat parties equitably
 - Include presumption that respondent is not responsible for alleged conduct until a determination regarding responsibility is made at conclusion of grievance process
 - Apply the standard of evidence uniformly for all complaints of sexual harassment



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Avoiding Conflicts of Interest and Bias



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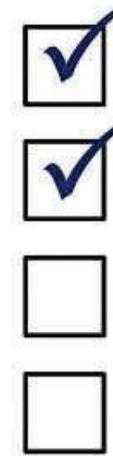


Results

- Consider relationship between investigators/decisionmakers and parties
- Either party has history of conflict, consider 3rd party investigator
- Adhere to investigation policies and procedures
- Maintain documentation of the investigation and relevance decisions
- Avoid pre-determined conclusions
- Revise hypothesis of events as evidence becomes known
- Be aware of personal biases
- “Show your work” in documenting the investigation and analysis of evidence and credibility
- Be thorough – don’t limit investigation to either party’s witnesses or evidence

Decision-Maker's Responsibilities

- Objectively evaluate all relevant evidence
- Weigh relevant evidence and decide whether it reaches the School's standard of evidence for sexual harassment allegations
- Reach conclusions about whether the respondent is responsible for the alleged sexual harassment
- Submit a written decision



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Written Decision



After the decision-maker weighs the relevant evidence, the determination must be written and include:

- Portion of School's policy that was violated
- Description of procedural steps that were taken by the school on the way to get to that point
- Finding of fact section
- Section that draws conclusions after applying the facts to the portion of the School's policy that applies



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Written Decision – Continued

After the decision-maker weighs the relevant evidence, the determination must be written and include:

- Statement and rationale for the ultimate determination of responsibility
- Any disciplinary sanctions that the school will impose on respondent
- Statement about whether the school will provide remedies to the complainant
- Statement and rationale for any remedies for the complainant, addressing how those remedies will restore or preserve equal access
- Statement of recipient's procedures
- Statement of parties' right to appeal the initial determination regarding responsibility and permissible bases for appeal



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Decision-Making

- School must send parties the written determination simultaneously with information regarding appeals
- Can set deadline for when appeal must be filed
- Title IX Coordinator is responsible for carrying out the remedies contained in the written decision



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Results

Mandatory Dismissals

- Must dismiss for lack of jurisdiction
 - Conduct does not meet definition of sexual harassment
 - Alleges sexual harassment that did not occur in the school's education program or activity
 - Alleges sexual harassment that did not occur in the United States



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Discretionary Dismissals

- School may dismiss a complaint:
 - At the request of the complainant
 - When respondent is no longer enrolled/employed
 - Specific circumstances prevent the recipient from gathering evidence sufficient to reach a determination regarding actions alleged in the formal complaint

Dismissal Procedures

- Both parties simultaneously and promptly notified whenever school dismisses formal complaint or any allegations
- Does not preclude action under another provision of School's code of conduct or other policies



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Results

Appeals

- Must offer both parties an opportunity to appeal
- Can appeal
 - After dismissal (whether mandatory or discretionary) before the grievance process
 - At the end of grievance process



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Results

Grounds for Appeals

- Procedural irregularity affected the outcome of the matter
- New evidence discovered not reasonably available at the time of the determination on responsibility or dismissal
- The Title IX Coordinator, investigator(s), or decision-maker(s) had a conflict of interest or bias for or against one of the parties that affected the outcome of the matter
- Institution may offer additional grounds for appeals so long as the grounds apply on an equal basis to the parties



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Appeal Decision-Maker

- The decision-maker for the appeal cannot be
 - The same person as the decision-maker who reached the determination regarding responsibility or dismissal
 - The Title IX Coordinator
 - The investigator
- Same standards that applied to the decision-maker in the initial determination apply to the decision-maker for appeals

Appeal Procedures

- School must
 - Notify the other party in writing when an appeal is filed and implement appeal procedures equally for both parties
 - Give both parties a reasonable, equal opportunity to submit a written statement in support of or challenging the outcome
- The decision-maker must issue a written decision describing the result of the appeal and the rationale for the result and provide the written decision simultaneously to both parties
- The determination about whether the respondent is responsible for the sexual harassment allegations becomes final after appeal



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Overview

- 2020 Title IX Overview
- Obligations: Confidentiality, Publication of Policy, and Recordkeeping
- Title IX Procedures: Due Process, Hearings and Alternative Resolution Processes
- Grievance Process: Biases in Investigations, Evidence, Standards of Proof, Interviewing, Report Writing
- **Retaliation**



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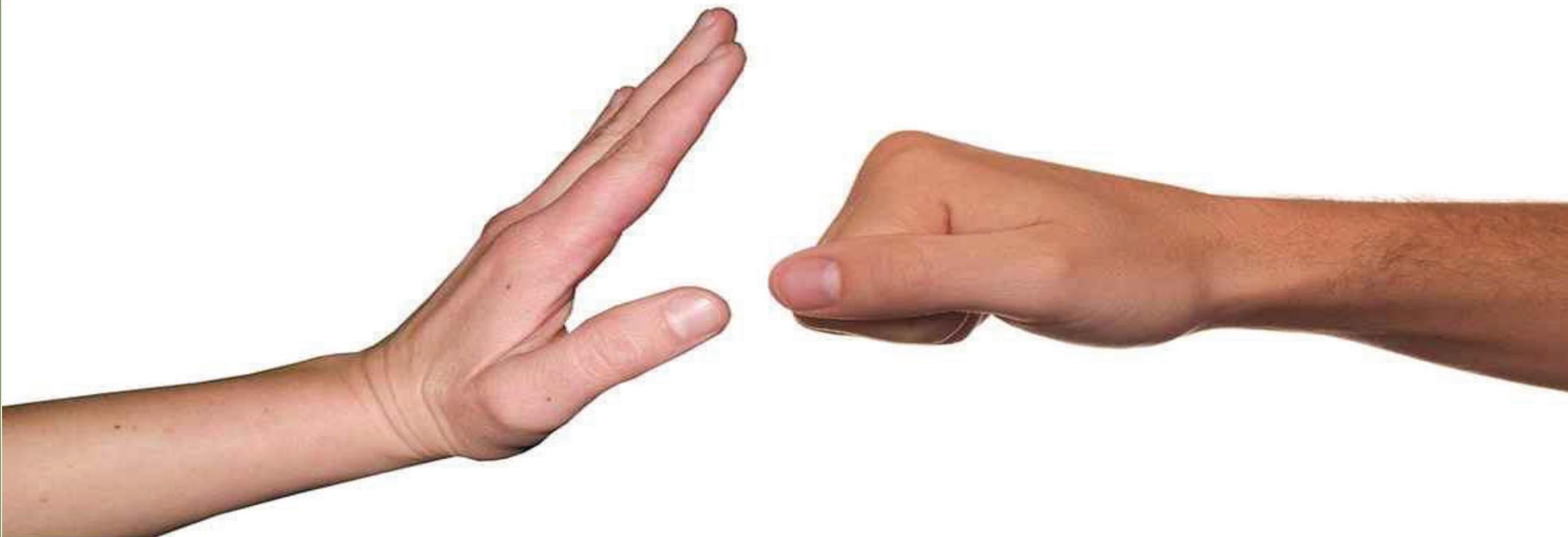
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RETALIATION

Clear Prohibition Against Retaliation

Retaliation

- No school or person may retaliate against anyone for exercising rights under Title IX
- Any person retaliated against can file a complaint with the School
 - The School must have procedures in place for prompt and equitable resolution of such complaints
 - Identities of the parties and witnesses must be kept confidential, unless required under other laws or in cases where disclosure is necessary to conduct grievance process
- Not retaliation for School to punish someone for making bad-faith, materially false statement during grievance process
- Engaging in protected speech under the First Amendment never constitutes retaliation



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