

# Preventing and Addressing Student on Student Sexual Harassment, Assault and Dating Violence

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# Federal Law

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Title IX of the Education Amendments of 1972 - prohibits discrimination on the basis of sex in any federally funded education program or activity...

# Federal Law

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- US Department of Education adopted new regulations that went into effect on August 14, 2020.
- Codifies that sexual harassment, including sexual assault, dating violence, domestic violence, and stalking, are prohibited under Title IX.
- Requires schools to respond promptly and supportively to persons alleged to be victimized by sexual harassment; resolve allegations of sexual harassment promptly and accurately under a predictable, fair grievance process that provides due process protections to alleged victims and alleged perpetrators of sexual harassment; and effectively implement remedies for victims.
- Added specific, legally binding steps that schools must take in response to notice of alleged sexual harassment.

# Federal Law

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- Biden administration issued Q&A document last week offering further guidance/clarity on regulations
- Biden administration is reviewing the regulations and may propose amendments in May 2022 (which will then be followed by a public comment period) – current regulations are in effect until new regulations are formally adopted
- Biden administration has issued a Notice of Interpretation stating that Title IX's prohibition against discrimination on the basis of sex includes a prohibition against discrimination on the basis of sexual orientation and gender identity

# District of Columbia Law

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- DC Human Rights Act – prohibits discrimination on the basis of actual or perceived: race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, gender identity or expression, familial status, family responsibilities, political affiliation, source of income, or disability of any individual
- School Safety Omnibus Amendment Act - requires schools to take steps to prevent and address student sexual abuse by school staff and student-on-student acts of sexual harassment, sexual assault, and dating violence.

# Enforcement

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- U.S. Department of Education, Office of Civil Rights (OCR)
- U.S. Department of Justice, Civil Rights Division
- DC Office of Human Rights
- OSSE
- PCSB
- Individual Lawsuits
  - Different standards for liability under local and federal law
  - Actual knowledge and deliberate indifference vs. knew or should have known and reasonable steps to end harassment
- Public perception

# Must Haves

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- Title IX Coordinator
- Notice of Nondiscrimination
  - Include name and contact info for Title IX Coordinator
  - Publish on website and in all handbooks (staff, family, etc.)
- General Grievance Procedure for Complaints of Sex Discrimination (and other forms of discrimination)
  - Provide for prompt and equitable resolution of complaints of discrimination
  - Publish on website and in all handbooks (staff, family, etc.)
- Title IX Grievance Process for Formal Complaints of Sexual Harassment (Student on Student Sexual Harassment Policy)
  - Must meet explicit requirements of Title IX and School Safety Omnibus Amendment Act
  - Publish on website and in all handbooks (staff, family, etc.)

# Title IX Coordinator

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- Employee(s) designated to coordinate school's efforts to comply with Title IX – could designate more than one employee but should have a lead coordinator
  - Title IX coordinator must be visible to the school community – identified in notice of nondiscrimination and other prominent places
- The Title IX Coordinator's name or title, office address, email address and phone number must be provided to the following individuals:
  - Applicants for admission and employment;
  - Students;
  - Parents or legal guardians of students;
  - Employees;
  - All unions or professional organizations holding collective bargaining or professional agreements with the school.



# Title IX Coordinator

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Title IX Coordinator must be adequately trained or have necessary expertise to effectively serve in this role

- Training should occur regularly (all staff should receive some level of training)
- OCR resources – Letter to Title IX Coordinators and Title IX Resource Guide

# Title IX Coordinator

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Title IX Coordinator must have appropriate authority and support necessary to carry out duties. For example,

- Must be notified regarding all reports and complaints raising Title IX issues
- Responsible for coordinating responses to all complaints – could include monitoring outcomes, identifying and addressing any patterns and assessing effects on the campus climate
- Must be knowledgeable about all relevant policies and should be involved in drafting and revising such policies

# Definitions

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Allegation means an assertion that someone has engaged in sexual harassment.

Complainant means an individual who is alleged to be the victim of conduct that could constitute sexual harassment.

- This is the person that experienced the alleged sexual harassment
- Considered a “complainant” even if they don’t file a formal complaint

Reporter means the person who reports an allegation of sexual harassment to the school.

- This may be the complainant or may be someone else (“third party reporter”).

# Definitions

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Report means an allegation of sexual harassment shared with the school but not yet submitted as a formal complaint.

Formal complaint means a document filed by a complainant, complainant's parent/guardian or by the Title IX coordinator alleging sexual harassment against a respondent and requesting that the recipient investigate the allegation of sexual harassment.

Respondent means an individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment.

# Definitions

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Retaliation is intimidation, threats, coercion, or discrimination, including charges against an individual for code of conduct violations that do not involve sex discrimination or sexual harassment, but arise out of the same facts or circumstances as a report or complaint of sex discrimination, or a report or formal complaint of sexual harassment, for the purpose of interfering with any right or privilege secured by Title IX.

Title IX Grievance Process means the school's process for addressing formal complaints of sexual harassment under Title IX.

- Schools are not required to title their policies in this way but should understand the differences between the general grievance process required for responding to complaints of sex discrimination and the specific grievance process required for responding to formal complaints of sexual harassment.

# Definitions

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Supportive measures means non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, and without fee or charge to the complainant or the respondent before or after the filing of a formal complaint or where no formal complaint has been filed. Such measures are designed to restore or preserve equal access to the recipient's education program or activity without unreasonably burdening the other party, including measures designed to protect the safety of all parties or the recipient's educational environment, or deter sexual harassment. Supportive measures may include 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 or housing locations, leaves of absence, increased security and monitoring of certain areas of the campus, and other similar measures.

- goal is to stop behavior, prevent re-occurrence, remedy effects
- protect complainant and others during investigation
- must respect complainant's wishes but cannot unreasonable burden the other party

# Common Supportive Measures

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Mutual restrictions on contact between complainant and respondent

Provide counseling to complainant and/or respondent

Referral for victim support organizations

Academic supports/accommodations (such as extensions of deadlines, tutoring, etc.)

Schedule modifications

Campus escort; increased supervision/security on certain parts of campus

School-wide interventions, training, education

Revision of policies and procedures or dissemination of existing policies and procedures

Cannot unreasonably burden complainant or respondent (prior to formal investigation)

# Sexual Harassment Definition – Title IX

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Three categories of sexual harassment:

- A school employee conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct
  - Quid pro quo sexual harassment – school employee offers something in exchange for sexual conduct
- Unwelcome conduct on the basis of sex 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
- “Sexual assault,” “dating violence,” “domestic violence,” or “stalking”
  - Definitions from Clery Act and Violence Against Women Act



# Sexual Harassment under Title IX

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Was the conduct severe, pervasive, and objectively offensive?

- The more severe, the less repetition needed; physical/accompanied by threats or violence = severe
- Pervasive – look for frequency, intensity, duration
- Objectively offensive – would a reasonable person consider the conduct offensive?

# Sexual Harassment under Title IX

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Was complainant effectively denied equal access to school's education program or activity as a result of unwelcome conduct?

- Must evaluate “whether a reasonable person in the complainant’s position would be effectively denied equal access to education compared to a similarly situated person who is not suffering the alleged sexual harassment.
- Complainant does not need to have already suffered loss of education before being able to report sexual harassment
- Complainant does not need to have dropped out of school, failed a class, had a panic attack, or otherwise reached a breaking point or exhibited specific trauma symptoms
- Does not require that a complainant’s total or entire educational access has been denied
- No concrete injury is required

# Sexual Harassment under Title IX

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Examples of situations that constitute denial of equal access:

- Complainant is skipping class to avoid respondent;
- Decline in complainant's grades;
- Complainant is having difficulty concentrating in class;
- Complainant stops participating in particular school activities;
- Complainant is bed-wetting or crying at night due to sexual harassment.

# Sexual Harassment Definition – DC Law

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Any unwelcome or uninvited sexual advances, sexual favors, sexually motivated physical conduct, stalking, or other verbal or physical conduct of a sexual nature that can be reasonably predicted to:

- Place the victim in reasonable fear of physical harm to his or her person;
- Cause a substantial detrimental effect to the victim's physical or mental health;
- Substantially interfere with the victim's academic performance or attendance at school; or
- Substantially interfere with the victim's ability to participate in, or benefit from, the services, activities, or privileges provided by a school.

# Sexual Harassment

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- Sexual harassment/discrimination can occur between members of the same sex
- Title IX's sex discrimination prohibition may extend to claims of discrimination based on gender identity or failure to conform to stereotypical notions of masculinity or femininity
  - Definitely covered by DC Human Rights Act
- Schools should investigate and resolve allegations of sexual or gender-based harassment of LGBTQ students using the same procedures and standards that it uses in all complaints involving sex-based harassment.

# Sexual Assault Definition

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- Title IX defines sexual assault as an offense classified as a forcible or nonforcible sex offense under the uniform crime reporting system of the Federal Bureau of Investigation.
  - Forcible sex offenses include any sexual act, including rape, sodomy, sexual assault with an object, or fondling “directed against another person, without the consent of the victim including instances where the victim is incapable of giving consent.
  - Nonforcible sex offenses include incest and statutory rape.
- Title IX does not require that schools use a particular definition of “consent”; DC law does have a particular definition of “consent”
- DC law defines sexual assault as any of the following offenses:
  - First degree sexual abuse
  - Second degree sexual abuse
  - Third degree sexual abuse
  - Fourth degree sexual abuse
  - Misdemeanor sexual abuse
  - Attempts to commit any of these offenses

# Definition of Consent

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Under DC law, “consent” means:

words or overt actions indicating a freely given agreement to a physical act or contact within the course of an interpersonal relationship. Consent to a physical act or contact may be initially given but withdrawn at any time. Lack of verbal or physical resistance or submission by the victim due to his or her mental or physical incapacitation or impairment, or the use of force, threats, or coercion shall not constitute consent. Past words or actions indicating freely given agreement to a past physical act or contact shall not constitute consent to a future physical act or contact.

# Dating Violence Definition

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- Title IX defines dating violence as violence committed by a person—
  - who is or has been in a social relationship of a romantic or intimate nature with the victim; and
  - where the existence of such a relationship shall be determined based on a consideration of the following factors:
    - The length of the relationship.
    - The type of relationship.
    - The frequency of interaction between the persons involved in the relationship.
- DC law defines dating violence as abusive or coercive behavior where a dating partner uses threats of, or actually uses, physical, emotional, economic, technological, or sexual abuse to exert power or control over a current or former dating partner.
- Dating partner is defined as any person who is involved in a relationship with another person that is primarily characterized by social interaction of a sexual, romantic, or intimate nature, whether casual, serious, or long-term.



# What triggers school's duty to respond?

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- Title IX
  - School must respond when: (1) the school has actual knowledge of sexual harassment; (2) that occurred within the school's education program or activity; (3) against a person in the United States.
- School Safety Act/DC Human Rights Act
  - School must respond when it knows or reasonably should know of student on student acts of sexual harassment, sexual assault or dating violence

# Duty to Respond – Title IX

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- Actual knowledge = notice to any school employee that sexual harassment might have occurred
- Education program or activity includes locations, events, or circumstances over which the school exercised substantial control over both the respondent and the context in which the sexual harassment occurs
  - Buildings or other locations that are part of the school's operations, including remote learning platforms;
  - Off-campus settings if the school exercised substantial control over the respondent and the context in which the alleged sexual harassment occurred (e.g., a school field trip to a museum).
  - Sexual harassment that takes place in settings outside of the United States is not covered under Title IX.
- Title IX's requirements do not apply to alleged sexual harassment that occurs outside of the school's education program or activity BUT there is nothing stopping schools from adopting policies that address such allegations or offering supportive measures to the victim

# Duty to Respond – DC law

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- School Safety Act requires an investigation anytime the school *knows or should know* of acts of sexual harassment, assault and/or dating violence
  - What if complainant does not want a formal investigation?
- DC Human Rights Act requires schools to take actions reasonably calculated to end conduct resulting in a hostile environment when it *knows or should have known* about the conduct
- Know or Should have Known
  - Schools will be responsible for addressing harassment that is in plain sight, is widespread or is well known to students and staff (for example, occurs in hallways, during classes or nonacademic/extracurricular activities, or through graffiti in public areas)
  - Schools will be responsible for investigating incidents that it becomes aware of
  - Schools will be responsible for what responsible employees know or should have known
- In practice, maybe not that different from Title IX's "actual knowledge" trigger

# Title IX - What response is required?

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Title IX distinguishes between reports and formal complaints, with different responses required for each

## Report:

Anyone can make a report

- School must “respond promptly in a manner that is not deliberately indifferent”
- School is deliberately indifferent if its response is clearly unreasonable in light of the circumstances
- Title IX Coordinator contacts complainant to discuss supportive measures and explain process for filing formal complaint

## Formal Complaint:

Only Complainant, Complainant's Parent or Title IX Coordinator can make a formal complaint

- School must offer supportive measures to complainant
- School must follow the Title IX grievance process to investigate allegation of sexual harassment
- If sexual harassment is found to have occurred, school must provide remedies to the complainant that are designed to restore and preserve equal access to the school's education program and activities

# Responding to Reports

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- All reports go immediately to Title IX Coordinator
- Upon receipt of report, Title IX Coordinator must promptly contact complainant:
  - Explain the process for filing a formal complaint to complainant
    - Complainant's wishes should be respected unless the Title IX Coordinator determines that initiating an investigation over the wishes of the complainant is not clearly unreasonable in light of the known circumstances.
  - Promptly discuss supportive measures with complainant
    - Inform complainant of availability of supportive measures with or without filing of a formal complaint
    - Consider complainant's wishes with respect to supportive measures
    - Coordinate effective implementation of supportive measures accordingly
    - Maintain confidentiality of supportive measures to the maximum extent possible

# Responding to Reports

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- Title IX Coordinator determines whether to proceed with formal complaint if complainant doesn't initiate process
- Notify appropriate law enforcement agencies if it is determined that the behavior cannot be safely and appropriately handled through school-based disciplinary action.
  - Notify MPD/CFSA if mandatory reporting requirements are triggered.
- Must treat complainants and respondents equitably
  - Cannot discipline respondent without formal investigation following specific procedures required by Title IX regulations except on an emergency basis (see next slide)

# Emergency Removal of Respondent

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School may remove a respondent on an emergency basis if:

- It 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.

Emergency removal should be followed by formal complaint and resulting investigation

# Responding to Formal Complaint

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If a formal complaint is submitted an investigation must be completed pursuant to Title IX (and School Safety Act) requirements

Supportive measures still made available to complainant



# Responding to Formal Complaints

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- Title IX Coordinator may offer and facilitate informal resolution options if both parties give voluntary, informed, written consent
- Title IX Coordinator must provide information to complainants and respondents upon receipt of formal complaint
- Formal investigation initiated
- Burden of proof and burden of gathering evidence sufficient to reach a determination is on the school

# Who Can Make a Formal Complaint

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Formal complaints can only be made by complainant or complainant's parent and Title IX Coordinator

Formal complaint can only be made if complainant is participating in or attempting to participate in the school's education program or activity at the time they file the formal complaint

- If complainant has withdrawn but expresses desire to re-enroll then they are attempting to participate
- If complaint has graduated but intends to participate in alumni programs/activities then they are attempting to participate

Title IX Coordinator may decide to make a formal complaint even if the complainant is no longer associated with the school

If complainant is no longer associated with the school, Title IX would not apply, and school would not be required to follow Title IX grievance process before disciplining respondent (would need to afford discipline due process)

Schools must at least provide supportive measures to complainant if respondent is no longer enrolled at the school; may dismiss a formal complaint but not required to

# Responding to Formal Complaint – Informal Resolution

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Informal Resolution may be used, but is not required, in response to formal complaints of student-on-student harassment

- mediation, restorative justice, etc.
- only available when formal complaint is filed
- may be offered so long as both parties give voluntary, informed, written consent
- cannot be required as a condition of enrollment
- cannot be conditioned on the waiver of right to an investigation
- goal of informal resolution (and investigation process) is to protect the safety of complainants and promote accountability

# Investigation Policy Requirements: School Safety Act

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- Statement prohibiting student-on-student acts of sexual harassment, sexual assault and dating violence;
- Statement acknowledging that when the school knows or reasonably should know of such acts the school will take immediate and appropriate action to investigate;
- Protocols for the school's response to allegations of such acts, including procedures to:
  - Stop such acts, prevent their recurrence and address their effects regardless of whether there is a criminal investigation;
  - Refer complainants to services and advocacy organizations;
  - Provide information to complainants regarding the investigation process;
  - Use of discipline;
  - Protect confidentiality.

# Investigation Policy Requirements: School Safety Act

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- The school's plan to comply with and inform students of their rights pursuant to other relevant laws (Title IX ; the Scott Campbell, Stephanie Roper, Wendy Preston, Louarna Gillis, and Nila Lynn Crime Victims' Rights Act ; the DC Human Rights Act ), including procedures for:
  - Protecting complainants as necessary during an investigation;
  - Having a process for prompt, fair and impartial investigations of student complaints.
  - School officials who conduct these investigations must receive annual training on the following:
    - Issues related to student-on-student acts of sexual harassment, sexual assault and dating violence;
    - How to conduct an investigation that protects the safety of complainants and promotes accountability.
- The complainant and accused must have the right to have an advisor/advocate of their choice during the investigation and any related discipline proceeding;
- The investigation procedure must establish a standard for resolving complaints;
- Both the complainant and accused must be notified in writing of the following:
  - The result of the investigation and any related disciplinary proceeding;
  - The process for appealing decisions made if such a process is available;
  - Any change to the result;
  - When the decision becomes final.

# Investigation Policy Requirements: School Safety Act

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- Protocol for identifying appropriate counseling and intervention strategies for students alleged to have committed acts of student-on-student acts of sexual harassment, sexual assault and dating violence, including guidelines for making referrals to CFSA if there is reason to believe the student may be a victim of abuse
- Statement about how the policy will apply to student-on-student acts of sexual harassment, sexual assault and dating violence that occur at school, school events, and activities over social media, and during travel to and from school, school events, and activities
- List of appropriate resources, services and information for students and families affected by student-on-student acts of sexual harassment, sexual assault and dating violence, including school-based supports.

# Investigation Policy Requirements: Title IX

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- Include an explanation of how a complaint may be filed;
- Include the name and/or title, office address, email address and telephone number of individual(s) with whom complaints may be filed;
- Describe the process for adequate, reliable and impartial investigation of complaints, including the designation of an impartial investigator and decision maker, the opportunity for both parties to present witnesses and other evidence, the right of both parties to inspect and review any evidence obtained, objective evaluation of all relevant evidence by the investigator and decision maker, including inculpatory and exculpatory evidence, and avoiding credibility determinations based on a person's status as a complainant, respondent, or witness;
- Provides parties with the same opportunity to select an advisor of the party's choice who may be, but need not be, an attorney;

# Investigation Policy Requirements: Title IX

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- Provides written notice of any investigative interviews, meetings, or hearings;
- States whether the school has chosen to use the preponderance of the evidence standard, or the clear and convincing evidence standard;
- Regardless of whether a hearing is held, provide an investigative report that fairly summarizes the evidence to both parties with each party having at least 10 days to respond and/or submit written, relevant questions that a party wants asked of any party or witness, provides each party with the answers, and allows for limited follow-up questions from each party. Rape shield protections must be included for complainants deeming irrelevant questions and evidence about a complainant's prior sexual behavior unless offered to prove that someone other than the respondent committed the alleged misconduct or offered to prove consent;
- Presumes that the respondent is not responsible for the alleged conduct until a decision is reached at the end of the investigation process;



# Investigation Policy Requirements: Title IX

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- Provides written notice to all parties of the allegations at issue and the investigation process – notice must include a statement that the respondent is presumed not responsible for the alleged conduct until a final decision is reached;
- Designates reasonably prompt time frames for major stages of the complaint process with allowance for short-term, good cause delays or extensions of the time frames
  - No part of the process can be open-ended
  - 60-day timeline prior to appeal is recommended but not required
  - Good cause extensions include, but not limited to, the absence of a party, party's advisor, or witness; concurrent law enforcement activity; need for language assistance or disability accommodations; etc.
- Provides for written notice of the outcome of the complaint that identifies the allegations in the formal complaint, describes all procedural steps taken. Includes findings of facts and conclusions about the application of the school's code of conduct, states the decision reached on each allegation and the rationale for that decision, and explains the procedures and permissible bases for appeals;

# Investigation Policy Requirements: Title IX

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- Allows for dismissal of a formal complaint or allegations therein if the complainant informs the Title IX Coordinator in writing that the complainant desires to withdraw the formal complaint or allegations therein, if the respondent is no longer enrolled at the school, or if specific circumstances prevent the school from gathering sufficient evidence to reach a determination. Schools must give the parties written notice of a dismissal (mandatory or discretionary) and the reasons for the dismissal;
- Allows the opportunity for appeal and provision for written notice of the outcome of the appeal;
- Includes assurance that school will take steps to prevent, remedy or otherwise correct harassment and/or discrimination, if necessary - remedies, must be designed to maintain the complainant's equal access to education and may include supportive measures; however, remedies need not be non-disciplinary or non-punitive and need not avoid burdening the respondent;
- Describes the range, or list, the possible remedies a school may provide a complainant and disciplinary sanctions a school might impose on a respondent, following determinations of responsibility;

# Investigation Policy Requirements: Title IX

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- Describes the range of supportive measures available to complainants and respondents;
- Includes assurance that the school will not retaliate against an individual who files a report or complaint, testifies, assists, participates or refuses to participate in an investigation, proceeding or hearing;
- Includes a confidentiality provision.

# Investigator and Impartial Decision Maker

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- Can be school officials
- Cannot have conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent
- Must avoid prejudgment of the facts at issue
  - Presumption that respondent is not responsible for alleged harassment – but can't assume complainant is lying or that harassment did not occur
- Decision maker cannot be the same person as the Title IX Coordinator or investigator

# Investigator and Impartial Decision Maker

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- All Title IX personnel involved in the informal resolution process and/or reporting and investigation processes must have adequate training and expertise
  - School Safety Act requires training on the following:
    - Issues related to student-on-student acts of sexual harassment, sexual assault and dating violence;
    - How to conduct an investigation that protects the safety of complainants and promotes accountability.
  - Title IX requires training on the following:
    - The definition of sexual harassment;
    - The scope of the school's education program or activity;
    - How to conduct an investigation and grievance process including hearings, appeals, and informal resolution processes that protects the safety of complainants and promotes accountability;
    - How to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias; and
    - Issues of relevance, including when questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant.

# Information for Complainants

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- The investigation process and informal resolution process including a statement that the respondent is presumed not responsible for the alleged conduct and that a determination regarding responsibility is made at the conclusion of investigation process;
- The allegations including sufficient details known at the time including the identities of the parties involved in the incident, the conduct allegedly constituting sexual harassment, sexual assault and/or dating violence, and the date and location of the alleged incident, if known;
- The complainant's right to have an advisor of his/her choice who may be, but is not required to be, an attorney;
- The right to inspect and review evidence;
- The prohibition against knowingly making false statements or knowingly submitting false information during the investigation process; and
- Available services and advocacy organizations, about the investigation process, about their rights under Title IX of the Education Amendments of 1972, the District of Columbia Human Rights Act of 1977, and crime victims' rights.

# Information for Respondents

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- The investigation process and informal resolution process including a statement that the respondent is presumed not responsible for the alleged conduct and that a determination regarding responsibility is made at the conclusion of investigation process;
- The allegations including sufficient details known at the time including the identities of the parties involved in the incident, the conduct allegedly constituting sexual harassment, sexual assault and/or dating violence, and the date and location of the alleged incident, if known;
- The respondent's right to have an advisor of his/her choice who may be, but is not required to be, an attorney;
- The right to inspect and review evidence; and
- The prohibition against knowingly making false statements or knowingly submitting false information during the investigation process.

# Formal Complaint Investigation

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Designation of investigator and decision-maker

## Timelines

- Provide periodic updates to parties as investigation proceeds
- Extensions permitted for good cause and providing notice to parties when timelines are extended
- Investigation period
  - Investigative report completed
  - All evidence gathered must be provided to each party at least 10 days prior to completion of investigative report so that parties can respond in writing
- Suggested timeline – 30 days total for investigation
  - All evidence gathered and provided to parties by day 15
  - Parties respond to evidence by day 25
  - Investigative report completed by day 30



# Formal Complaint Investigation

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## Timelines Continued

- Decision making
  - Investigative Report shared with both parties and decision maker at conclusion of investigation
  - Both parties have at least 10 days to respond to investigative report before a decision is rendered
    - Each party may submit written, relevant questions that they want to ask the other party or any witness
    - Decision maker must gather responses to those questions and provide responses in writing to each party
    - Additional time (I suggest 3 days) permitted to submit additional, limited follow up questions
  - Decision maker reviews all evidence gathered through investigative report and responses from each party and makes a determination as to responsibility for the alleged conduct
  - Written decision issued to both parties

# Formal Complaint Investigation

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## Timelines Continued

- Appeal
  - Designation of independent decision maker
  - Both parties given time to make an appeal (I suggest no more than 30 days)
  - Both parties given notice of appeal and opportunity to respond (I suggest no more than 10 days)
  - I suggest borrowing timelines for appeal from Bullying Prevention Act
    - 30 days to complete secondary investigation with extension of up to 15 days permitted for good cause
  - Written decision to both parties

# Evidence

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School bears burden of gathering evidence

Must consider all relevant evidence, including inculpatory (tends to show a person's involvement in an act) and exculpatory evidence (tends to show a person's innocence)

Investigation must include as necessary:

- Interviewing witnesses (coordinate with MPD if they are involved)
- Obtaining documents
- Allowing both parties to present any evidence, including witnesses

Evidence is relevant if:

- it has any tendency to make a fact more or less probable than it would be without the evidence; and
- the fact is of consequence in determining the action.

# Interviewing Witnesses

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Start with complainant to gather as much information/detail as possible

- (who, what, when, where) - ask for details
- Ask if the complainant knows of any witnesses

Additional interviews

- Respondent
- Any named witnesses
- Anyone named by any witness

Collection of any other evidence (incident reports, videos, school records, etc.)

Offer complainant and respondent opportunity to present evidence

Keep detailed notes of all conversations/interviews/records reviewed, etc.

Respondent and complainant must be provided written notice if they are invited to participate in investigative process – written notice when scheduling their interviews

- Must include date, time, location, participants and purpose

# Interviewing Witnesses

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- Goal is to learn facts/establish a timeline/fill in any gaps
- Start with open ended questions (What happened? Who was there?)
- End with specific yes or no questions related to the allegations in the complaint
- Avoid leading questions
- Avoid argumentative/accusatory questions
- Keep questions short/straight forward
- Rapport, eye contact, active listening
- Avoid commentary/judgments
- Don't label allegations as sexual harassment/misconduct but rather refer to specific behavior alleged
- Maintain confidentiality as much as possible
- Remind witnesses or anyone else involved that they shouldn't talk about this with anyone else
- Remind witnesses that retaliation is prohibited

# Witness Credibility

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Credibility determinations will not be based on a person's status as a complainant, respondent, or witness

Inaccurate memory doesn't necessarily mean a witness is not credible, but could raise questions about credibility

- Title IX regulations are intended to protect a party from being unfairly judged due to an inability to recount each specific detail of an incident in sequence

Consistency and corroboration are biggest factors

- Focus on relevant inconsistencies

# Witness Credibility

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Factors to consider\*:

- Corroborating evidence
- Logic/internal and evidentiary consistency
  - Does this make sense?
  - Consistency of story; consistency with other evidence
- Inherent plausibility – is the evidence more likely than the alternative?
- Factual detail vs. general allegations or denials with no supporting detail
- Non-cooperation
  - Short, abrupt answers or refusal to answer

\*Adapted from ATIXA

# Cross Examination

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- Live hearing/cross examination not required – can be accomplished through exchange of written, relevant questions
- Decision-maker will make determinations about what questions are relevant – must explain to the party proposing the questions any decision to exclude a question as not relevant
  - May exclude questions that are duplicative or repetitive
  - Questions about any party's medical, psychological, or similar records not permitted without consent
  - Questions about other records protected by a legally recognized privilege not permitted without consent
- Questions and evidence about the complainant's sexual predisposition or prior sexual behavior (behavior unrelated to the alleged harassment) are not relevant, 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.



# Burden of Proof

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## Clear and convincing

- evidence establishes that the allegation is substantially more likely than not true; highly probably that the allegations are true

## Preponderance of the evidence

- More likely to be true than not
- greater than 50% chance that the claim is true

# Written Decision

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- Summary of the allegations;
- Summary of the course and outcome of the investigation including any notifications to the parties, interviews with parties and witnesses, and other methods used to gather evidence;
- Findings of fact supporting the determination;
- Conclusions regarding the application of the policy and code of conduct to the facts;
- A statement of, and rationale for, the result as to each allegation, including a determination regarding responsibility, any disciplinary sanctions to be imposed on the respondent, and what other supportive measures will be made available to the complainant;
  - Cite concrete reasons for conclusions
- Information about the procedures for appeal.

# Written Decision

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Sufficient vs. insufficient evidence

Even where there are no findings to substantiate what the complaint alleges, consider what steps can be taken to be responsive to the complainant's concerns

Decision should be written objectively to show impartiality – use objective, concrete language

Decision should, when possible, acknowledge complainant concerns and express empathy for them even when a finding does not substantiate them

Decision should reiterate school's commitment to providing a safe, nurturing educational environment free from harassment, discrimination, etc...

# Decision Making

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Decision maker must determine:

- Whether or not the conduct occurred;
- Whether the conduct constitutes sexual harassment, sexual assault and/or dating violence; and
- If so, what actions the school will take to end the conduct, eliminate any hostile environment, and prevent its recurrence.
  - Supportive measures for both respondent and complainant
  - Disciplinary action
  - Consider the following when determining next steps:
    - The age and level of understanding of the student(s) involved
    - The facts and surrounding circumstances
    - The nature of the behavior
    - Past incidents or past or continuing patterns of behavior
    - The relationships between parties involved
    - The context in which the incidents occurred

# Decision Making: Remedies

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No particular remedies are required by law – schools are free to make decisions that are in the best interest of the educational environment

When sexual harassment is found to have occurred, the school must provide remedies to the complaint that are designed to restore or preserve equal access to the school's education program or activity

- This can include supportive measures for complaint and/or disciplinary or punitive measures for respondent

Remedies can burden respondent; should not burden complainant

# Appeal

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Either party may appeal the dismissal of a formal complaint and/or the determination regarding responsibility

Grounds for appeal may include:

- Procedural irregularity that affected the outcome of the matter (i.e., a failure to follow the institution's own procedures);
- New evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter;
- The Title IX Coordinator, investigator(s), or decision-maker(s) had a conflict of interest or bias for or against an individual party, or for or against complainants or respondents in general, that affected the outcome of the matter.

Written Decision must include:

- Outcome of the appeal
- Rationale for the result
- Any change to the result of the initial investigation
- When results become final

# Record Keeping

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Title IX now explicitly requires schools to maintain the following documents for a period of at least 7 years:

- Records of each sexual harassment investigation, including any determination of responsibility; any audio or audiovisual recording or transcript; any disciplinary sanctions imposed on the respondent; and any remedies provided to the complainant;
- Records of any appeal and the result of that appeal;
- Records of any informal resolution and the results of that informal resolution;
- All materials used to train Title IX coordinators, investigators, decision-makers and any person who facilitates an informal resolution process (Title IX also requires schools to make these training materials publicly available on its website or, if it does not have a website, make them available for inspection by the general public upon request);
- Records of any actions, including any supportive measures taken in response to a report or formal complaint of sexual harassment.

# School Safety Act Training Requirements

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Staff training beginning in the 2020-2021 SY:

- At time of hiring and at a minimum every two years thereafter
- Training must use evidence-based standards and be developed in consultation with community-based sexual violence and abuse experts.
- Training must address the following topics:
  - Identifying, responding to, and reporting student-on-student acts of sexual harassment, sexual assault, and dating violence
  - Mandatory reporting requirements
  - Communicating universal prevention techniques to students that increase their ability to set and communicate about appropriate boundaries, respect boundaries set by others, and build safe and positive relationships
  - Receiving reports and disclosures from students regarding student-on-student acts of sexual harassment, sexual assault, and dating violence in a supportive, appropriate and trauma-informed manner



# School Safety Act Training Requirements

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Parent “information” beginning in the 2020-2021 SY:

must provide information for parents on recognizing the warning signs of student-on-student acts of sexual harassment, sexual assault, and dating violence as well as effective, age appropriate methods for discussing such topics with students

# Resources

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- OCR Resources for Title IX Coordinators can be found [here](#)
- OSSE Resources re: School Safety Act can be found [here](#)
- OSSE Resource Guide for Training to Comply with School Safety Act can be found [here](#)
- National Center on Safe Supportive Learning Environments: Safe Place to Learn resources can be found [here](#)
- [ATIXA](#) – professional association for Title IX coordinators and administrators

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**THANK YOU**

