

# 2020 Title IX CHANGES-WHAT YOU NEED TO KNOW NOW



**POMS**



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NEW MEXICO ASSOCIATION OF SCHOOL BUSINESS OFFICIALS

# The New Title IX

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Regulations - effective August 14, 2020. Changes include:

- New terminology, policy and notice requirements
- Limitations on jurisdiction
- Optional burdens of proof; choose now!
- Revised Title IX Coordinator responsibilities
- Revised investigation procedures
- Expanded hearing rights options for K-12 hearings
- New rules for appeals
- Expanded training requirements and record keeping

# New Definitions

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**“Sexual Harassment”- means conduct on the basis of sex that satisfies one or more of the following:**

- **A school employee conditioning education benefits on participation in unwelcome sexual conduct (i.e., *quid pro quo*); or**
- **Unwelcome conduct that a reasonable person would determine is so severe, pervasive, and objectively offensive that it **effectively denies** a person equal access to the school's education program or activity; or**
- **Sexual assault (as defined in the Clery Act), dating violence, domestic violence, or stalking as defined in the Violence Against Women Act (VAWA).**

## NEW Definitions, cont'd.

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“**Complainant**” means an individual who is alleged to be the **victim of conduct that could constitute sexual harassment**. The Final Rule expressly recognizes the legal rights of parents and guardians to act on behalf of parties (including by filing formal complaints) in Title IX matters.

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

## NEW Definitions, cont'd.

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- **“Education program or activity”** - locations, events, or circumstances **over which the school exercised substantial control over both the alleged harasser and the context in which the sexual harassment occurs (and must be against a person in the United States)**, and also includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution.
- “Supportive measures”** means non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, without fee or charge,

# Supportive Measure Requirements

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- **to the complainant or respondent, before or after the filing of a formal complaint or where no formal complaint has been filed.**
- Measures are designed to **restore or preserve access to the recipient's education program or activity**, without unreasonably burdening the other party; protect the safety of all parties and the recipient's educational environment; and deter sexual harassment.
- **May include** counseling, course-related adjustments, modifications of work or class schedules, campus escort services, increased security and monitoring of certain areas of campus, and mutual restrictions on contact between the parties.

## NEW Definitions, cont'd.

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- **“Formal complaint”** means a document **filed** by a **complainant** or **signed** by the Title IX Coordinator alleging sexual harassment against a respondent **and requesting that the school investigate the allegation of sexual harassment.**
- **At the time of filing a formal complaint, a complainant must be participating in or attempting to participate in the education program or activity of the school with which the formal complaint is filed.**

## *NEW Definitions-Title IX Coordinator; Notice of Coordinator and Contact Info*

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- “Title IX Coordinator”- **At least one person designated and authorized** by a District to coordinate its efforts to comply with Title IX **and must be** designated by that title.
- **Applicants for admission and employment, students, parents or legal guardians of Grades 1-12 students, employees, and all unions,** must be annually notified of the name or title, office address, electronic mail address, and telephone number of the employee or employees designated **as the Title IX Coordinator.**
- **Website must include the contact information.**



# New District Policy Requirements

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**The policy must address how notice of the nondiscrimination policy and grievance procedures will be made, including how to file or report sexual harassment and how the recipient will respond, and must be given to:**

- applicants for admission and employment;
- students;
- parents or legal guardians;
- unions or professional organizations holding agreements with the District, and
- notice to the same groups must contain the Title IX Coordinator's name or title, email address, office address, and telephone number.

# New Policy Requirements, cont'd.

Notice of a District's non-discrimination policy must include,

- statement that the recipient does not discriminate on the basis of sex in the education program or activity that it operates, and that it is required by Title IX and its regulations not to discriminate in such a manner;
- the requirement that prohibition on discrimination in the education program or activity applies to employment;
- Statement that inquiries about the application of Title IX and its regulations to the District may be referred to the designated Title IX Coordinator, to the Assistant Secretary of the federal Department of Education, or both; and
- both the notice of nondiscrimination and the Title IX Coordinator's contact information must be published on District websites and in any handbook provided students, parents/guardians, applicants, unions and professional organizations have agreements with a District.

# New Procedures for Complaint Intake and Investigation

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- **Who Can Complain?- Any person may report sex discrimination, including sexual harassment** (whether or not the person reporting is the person alleged to be the victim of conduct that could constitute sex discrimination or sexual harassment) but the term “complainant” means the **victim**.
- **How? - In person, by mail, telephone, or by electronic mail**, using the contact information listed for the Title IX Coordinator, **or by any other means** that results in the Title IX Coordinator receiving the person’s verbal or written report.

# More About Complaints

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- A complaint report **may be made at any time (including during non-business hours)** by using the telephone number or electronic mail address, or by mail to the office address, listed for the Title IX Coordinator.
- The District **must treat a person as a complainant any time it has notice that the person is alleged to be the victim of conduct that could constitute sexual harassment** (regardless of whether the person themselves reported, or a third party reported the sexual harassment), **and irrespective of whether the complainant ever chooses to file a formal complaint.**

# Title IX Required Training

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Title IX Coordinators, investigators, decision-makers and people who facilitate any informal resolution process, must be free from conflicts of interest or bias for or against complainants or respondents.

Training of Title IX personnel must include training on

- the new rule's definition of sexual harassment and 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, as applicable,
- and how to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias,
- training on any technology to be used at a live hearing.
- decision-makers and investigators must receive training on issues of relevance, including how to apply the rape shield protections provided only for complainants.

# More Training

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Decision makers must be trained

- on a presumption that the respondent is not responsible for the alleged conduct until a determination regarding responsibility is made at the conclusion of the grievance process.
- Materials used to train Title IX personnel must be posted on websites, if any, or make materials available for members of the public to inspect.

# Mandatory Response to Reports of Sexual Harassment

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## A District **MUST**

- respond promptly in a manner that is not deliberately indifferent, i.e., in a way that is not clearly unreasonable in light of the known circumstances;
- Offer supportive measures to the complainant (victim);

# Mandatory Response MUST Do's

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## Coordinator must

- promptly contact the complainant/victim to discuss the availability of supportive measures, consider the complainant's wishes with respect to supportive measures, inform the complainant of the availability of supportive measures **with or without the filing of a formal complaint**, and explain to the complainant the process for filing a formal complaint.



# Coordinator Responsibilities



- **Describe or list the possible disciplinary outcomes and remedies that may be implemented following a determination of responsibility**
- Notify respondent of any provision in the code of conduct that prohibits knowingly making false statements or providing false information in the grievance process.

# Formal Hearing Decision

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- The investigator and the Coordinator **cannot be** the decision makers.
- The written decision must include
  - the allegations that could constitute sexual harassment
  - all procedural steps from receipt of the complaint to the determination
  - the factual findings
  - The conclusions applying the facts found to the code of conduct
  - a statement of the rationale for the result found for each allegation, the determination of responsibility, any sanctions and any remedy needed to restore or preserve equal access to the educational program or activity for the complainant and
  - the bases and procedures for an appeal.

# Qualifications of the Appellate Decision-maker

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- The appellate “decider” **cannot be** the Coordinator, investigator, or initial decision maker,
- Cannot have a conflict of interest or bias against complainants and respondents generally or the particular complainant and respondent, and
- Must be trained to same level as Coordinator and Hearing level decision maker.

# Prohibitions on Retaliation

- No school or person may intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by Title IX, or because the individual has made a report or complaint, testified, assisted, or participated or refused to participate in any manner in a Title IX investigation, proceeding, or hearing.

# Prohibitions on Retaliation, cont'd.

- 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, constitutes retaliation.**
- Complaints alleging retaliation may be filed according to the grievance procedures for sex discrimination that schools must adopt and publish.

# What Does **Not** Constitute Retaliation?

- The exercise of rights protected by the First Amendment does not constitute retaliation. (No party can be prohibited from discussing the allegations or gathering evidence).
- Charging an individual with a code of conduct violation for making a materially false statement in bad faith in the course of a grievance proceeding under this part does not constitute retaliation; provided, however, that a determination regarding responsibility, alone, is not sufficient to conclude that any party made a bad faith materially false statement.

# Title IX and Confidentiality

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Districts must keep confidential the identity of complainants, respondents, and witnesses, **except as may be permitted by FERPA, or as required by law, or as necessary to carry out a Title IX proceeding.**

# Summary

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- New definitions narrow definition of sexual harassment and scope of investigations
- New requirements for interim measures of support
- Adds a presumption of innocence standard
- Narrows conduct that is considered retaliation
- New training and recordkeeping requirements
- Defined hearing and appeal requirements



# Summary

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- Does not change other Title IX definitions or requirements
- Does create different definitions and standards for Title IX and Title VII investigations and therefore different policies

# QUESTIONS?



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