


Title IX


A Deeper Dive Into The Depths of Compliance

Anchor Bay School District
Tuesday, November 30, 2021

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Roadmap

- Title IX Overview/Review
- Navigating the Title IX Process
 - Notice
 - Supportive Measures
 - Investigation
 - Decision-Making, etc.
- Theory v. Application

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Definition of Sexual Harassment

- Sexual harassment is:
 - Conditioning an aid, benefit, or service on an individual's participation in unwelcome sexual conduct (*quid pro quo*)
 - Unwelcome sexual behavior determined by a reasonable person to be **so severe, pervasive, and objectively offensive** that it **effectively denies** a person equal access to a program or activity offered by the school district
 - "Sexual assault," "dating violence," "domestic violence," or "stalking," as defined by federal statutes known as the Clery Act and the Violence Against Women Act (VAWA)
- The US Department of Education defines sexual harassment under Title IX to include harassment based on sexual orientation and gender identity.

Key Terms

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

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

Actual Notice - Definition

- A school district is deemed to have actual notice of alleged sexual harassment if **any** school district employee believes an employee or student has been subjected to sex-based harassment
- This standard is **significantly broader** than the actual notice standard established in the *Gebser* and *Davis* cases

Title IX Coordinator's Duties

- To oversee the school district's compliance with Title IX
- To respond to any report of sexual harassment against any school district employee or student
- To oversee and/or participate in the resolution of any formal complaint of sexual harassment according to the school district's grievance procedure

Responding to Reports of Sexual Harassment

- Complaint v. Concern
 - Current Observations
- Reports of sexual harassment may be verbal or written and may be received at any time
- Upon receiving a report, the Title IX Coordinator must:
 - Contact Complainant as soon as practicable
 - Notify Complainant of his/her right to file a formal complaint and the grievance process
 - Discuss and implement "**supportive measures**"

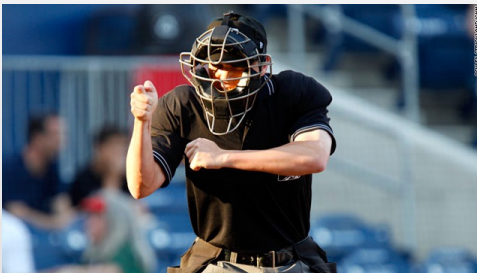
Contacting Complainant

- Keep in Mind:
 - At the K-12 level parents should be included
 - Complainant and parents may not be aware of the report prior to notice from the Title IX Coordinator
 - An in-person or virtual meeting may be preferable to a telephone conversation
 - The difficulty of describing the grievance process unless Complainant and parents are looking at the policy
 - A formal complaint followed by the grievance procedure may delay the imposition of disciplinary measures against a Respondent-student
 - "Supportive measures" can and should be implemented regardless whether a formal complaint is filed
 - It's a lot to take in, and no final decisions need be made during the first conversation
 - The importance of emphasizing Title IX's prohibition against retaliation
- **Take Notes!!**

Supportive Measures

- Title IX was enacted to prevent sex discrimination and harassment from adversely affecting access to educational opportunities
- Supportive measures should restore or ensure continued access to educational opportunities, must be free to Complainant, and may not be punitive or unreasonably burden Respondent
- Non-exclusive examples of supportive measures include: **no-contact orders, counseling, course modifications, schedule changes, transfers, increased security and monitoring**
- The Title IX Coordinator must consider, *but is not bound by*, Complainant's wishes

Temporary Removal



- The temporary removal of a Respondent-student is not a supportive measure
 - A Respondent-student may be removed based on an individualized assessment that he/she poses an immediate threat to the physical health or safety of Complainant or others
 - Due process must follow immediately
- A Respondent-employee may be placed on a temporary administrative leave

Disabled Students

- A disabled student's status as a Respondent does not waive or otherwise affect his/her protections under the IDEA, the ADA, or Section 504
- Generally, but subject to statutory exceptions, an IDEA or Section 504-eligible student may not be disciplined for misconduct that is a manifestation of his/her disability

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The Formal Complaint

- A formal complaint should describe the **who, what, why, where, and when**
- A formal complaint must be signed by Complainant or the Title IX Coordinator
- Formal Complaint forms [see next slide]

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- Respondents are **always** presumed innocent; or, more technically, not responsible for sexual harassment
- Respondents may not be sanctioned unless and until an investigation is completed and a final decision rendered
- **Why?**

Notice

- The Title IX Coordinator must notify Complainant and Respondent, in writing, when a formal complaint is filed
- Notice to Respondent must include:
 - a statement of the allegations in sufficient detail to permit Respondent to prepare a response
 - a statement Respondent is presumed not responsible until a final decision is rendered
 - the parties' right to inspect the formal complaint and all relevant evidence
 - the parties' right to be represented by an advisor, who may be an attorney
 - any provision of the Student Code of Conduct prohibiting false statements or representations
- Supplemental notice must be provided if new allegations arise during the course of the investigation
- Notice forms [see next slide]

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<p style="text-align: center;">INITIAL NOTICE TO COMPLAINANT-STUDENT (FOR RESPONDENT-STUDENT)</p> <p style="text-align: center;">(Date)</p> <p>(Parent(s) Name(s)) (Address)</p> <p>Re: Notice of Formal Title IX Complaint</p> <p>To the Parents of (Complainant's Name):</p> <p>This letter confirms (Complainant's name) is a Complainant in a formal complaint file under the School District's Title IX policy, (insert policy number/other reference). Please review (policy number/other reference) carefully, as it will govern the manner in which the formal complaint is investigated and resolved. The School District is required by law to presume Respondent is not responsible until the investigation is completed and a final decision is reached. Therefore, it is necessary to initiate an investigation. You may, if you wish, select an advisor to assist you with the investigation, and your advisor may be an attorney.</p> <p>(Name or I) will serve as the Investigator. The Investigator will, among other things, schedule an interview with (Complainant's name) to gather additional information and evidence concerning the formal complaint. The Investigator will notify you and (Complainant's name) before the interview and provide you will all relevant information necessary to prepare for the interview. Please recall that (insert reference) of the School District's Student Code of Conduct prohibits any student from making a false statement or providing false information to the Investigator. This prohibition applies equally to (Complainant's name), Respondent, and all other student witnesses. Furthermore, the School District's Title IX policy strictly prohibits retaliation by or against anyone for filing a formal complaint or participating in an investigation. The same anti-retaliation provision prohibits retaliation against witnesses. You should contact me immediately if you believe prohibited retaliation has occurred.</p> <p>Thank you for your attention to this matter. You may feel free to contact me if you have any questions or comments.</p> <p>© MJ School Policy Services Page 1 of 2</p> <p style="text-align: right;">MILLER JOHNSON Attorneys</p>	<p style="text-align: right;">Sincerely,</p> <p>© MJ School Policy Services Page 2 of 2</p> <p style="text-align: right;">MILLER JOHNSON Attorneys</p>
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INITIAL NOTICE TO RESPONDENT-STUDENT	
<p>(Date)</p> <p>(Parent(s) Name(s)) (Address)</p> <p>Re: Notice of Formal Title IX Complaint</p> <p>To the Parents of (Respondent's Name):</p> <p>Title IX prohibits discrimination on the basis of sex, including sexual harassment. A formal complaint of sexual harassment has been filed by (Complainant's name) against your (son/daughter), (name). The formal complaint alleges: (include a reasonably complete description of the formal complaint). The School District will investigate and resolve the formal complaint according to the School District's Title IX policy, which you may access (here insert hyperlink).</p> <p>At this point, the School District presumes (Respondent's name) is not responsible for sexual harassment. Therefore, it is necessary to initiate an investigation and reach a final decision according to the School District's Title IX policy. You may, if you wish, select an advisor to assist you during this process, and your advisor may be an attorney.</p> <p>(Name or I) will serve as the Investigator. The Investigator will, among other things, schedule an interview with you and (Respondent's name) to gather information and evidence concerning the formal complaint. The Investigator will notify you and (Respondent's name) before the interview and provide you and (Respondent's name) with all relevant information necessary to prepare for the interview. Please recall that (insert reference) of the School District's Student Code of Conduct prohibits any student from making a false statement or providing false information to the Investigator. This prohibition applies equally to (Respondent's name), Complainant, and all other student witnesses. Furthermore, the School District's Title IX policy strictly prohibits retaliation by or against anyone for filing a formal complaint or for participating in an investigation. You should contact me immediately if you believe prohibited retaliation has occurred.</p> <p>© MJ School Policy Services Page 1 of 2</p> <p>MILLER JOHNSON Attorneys</p>	<p>I have imposed a mutual no-contact order between Complainant and (Respondent's name), pending the completion of the investigation and until a final decision is reached. This means that, until a final decision is reached, (Respondent's name) may not contact or communicate with Complainant, directly or indirectly. (Notice of other supportive measures affecting Respondent). A violation of (the no-contact order or other restrictions) would violate (provision(s)) of the School District's Student Code of Conduct, the penalty for which ranges from (range). Similarly, the conduct alleged in the formal complaint, if it occurred, may violate (provision(s)) of the School District's Student Code of Conduct, the penalty for which ranges from (range). You may review the Student Code of Conduct by clicking (here insert hyperlink).</p> <p>Thank you for your attention to this matter. You may feel free to contact me if you have any questions or comments.</p> <p>Sincerely,</p> <p>© MJ School Policy Services Page 2 of 2</p> <p>MILLER JOHNSON Attorneys</p>

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INITIAL NOTICE TO RESPONDENT-EMPLOYEE	
<p>(Date)</p> <p>(Respondent-Employee's Name) (Address)</p> <p>Re: Notice of Formal Title IX Complaint</p> <p>To (Respondent-Employee's Name):</p> <p>Title IX prohibits discrimination on the basis of sex, including sexual harassment. A formal complaint of sexual harassment has been filed against you by (Complainant's name). The formal complaint alleges: (include a reasonably complete description of the formal complaint). The School District will investigate and resolve the formal complaint according to its Title IX policy, which you may access (here insert hyperlink).</p> <p>At this point, the School District presumes you are not responsible for sexual harassment. Therefore, it is necessary to initiate an investigation and reach a final decision according to the School District's Title IX policy. You may, if you wish, select an advisor to assist you during this process, and your advisor may be your union representative or an attorney.</p> <p>(Name or I) will serve as the Investigator. The Investigator will, among other things, schedule an interview with you to gather information and evidence concerning the formal complaint. The Investigator will notify you before the interview and provide you with all relevant information necessary to prepare for the interview.</p> <p>The School District's Title IX policy strictly prohibits retaliation by or against anyone for filing a formal complaint or for participating in an investigation. You should contact me immediately if you believe prohibited retaliation has occurred.</p> <p>You have been placed on temporary administrative leave, pending the completion of the investigation and until a final decision is reached. This means that, until a final decision is reached, you are not permitted on school district property and may not contact Complainant,</p> <p>© MJ School Policy Services Page 1 of 2</p> <p>MILLER JOHNSON Attorneys</p>	<p>directly or indirectly. (Notice of other supportive measures affecting Respondent). Any violation of (the no-contact order or other restrictions) may result in disciplinary action.</p> <p>Thank you for your attention to this matter. You may feel free to contact me if you have any questions or comments.</p> <p>Sincerely,</p> <p>© MJ School Policy Services Page 2 of 2</p> <p>MILLER JOHNSON Attorneys</p>

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Dismissals

- The Title IX Coordinator **must** dismiss a formal complaint if:
 - The allegations do not establish sexual harassment even if they are true
 - The allegations did not occur in connection with the school district's programs or services
 - The allegations did not occur in the United States
 - Need to document basis for dismissal
- The Title IX Coordinator **may** dismiss a formal complaint if:
 - Respondent's employment with or enrollment in the school district ends
 - Specific circumstances prevent the school district from gathering sufficient relevant evidence to reach a final decision (e.g., passage of time, unavailability of witnesses or other information)

Informal Resolution

- Once a formal complaint is filed, the school district may not informally resolve allegations of sexual harassment unless:
 - Complainant and Respondent have been advised of their rights and the circumstances in which informal resolution may preclude resumption of a formal complaint investigation
 - Complainant and Respondent have voluntarily consented to informal resolution, in writing
- Informal resolution may consist of the following, as well as other informal resolution procedures:
 - A written agreement, facilitated by the Title IX Coordinator or others
 - Restorative practices, See, e.g., MCL 380.1310c
 - Facilitated mediation
 - Arbitration, etc.
- Example letters [see next slide]

<p style="text-align: center;">EXAMPLE LETTER: INFORMAL RESOLUTION</p> <p style="text-align: center;">(Date)</p> <p>(Parent(s) Name(s)) (Address)</p> <p>Re: Informal Resolution of Title IX Complaint</p> <p>To the Parents of (Complainant/Respondent's Name):</p> <p>We recently discussed a proposal to informally resolve the pending formal Title IX complaint involving your (son/daughter), (name). Specifically, we discussed informal resolution by (insert short description of informal resolution process).</p> <p>The School District cannot informally resolve a formal Title IX complaint unless Complainant and Respondent have been advised of their rights, including circumstances in which Complainant may not resume the formal complaint investigation, and Complainant and Respondent have consented to informal resolution, in writing. In order to meet these conditions, you may access the School District's Title IX policy here (insert hyperlink). You may also contact me directly if you have any questions about your rights under the Title IX policy. Complainant may resume the formal complaint investigation unless he/she waives the right to do so in a written agreement reached as a result of the informal resolution.</p> <p>If you would like to attempt to informally resolve the formal Title IX complaint in the manner described in this letter, please countersign below and return this letter to my attention. If Complainant and Respondent both agree to informal resolution, in writing, I will contact you concerning next steps. Otherwise, the formal complaint investigation will continue as described in the School District's Title IX policy.</p> <p>You may feel free to call with any questions or comments.</p> <p style="text-align: right;">Sincerely,</p> <p>© MJ School Policy Services Page 1 of 2</p> <p style="text-align: right;">MILLER JOHNSON Attorneys</p>	<p>Signature(s) of Parent(s) of (Complainant/Respondent)</p> <p>Date</p> <p>© MJ School Policy Services Page 2 of 2</p> <p style="text-align: right;">MILLER JOHNSON Attorneys</p>
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Investigation - Overview

- Appointing the Investigator
- Fairness and Impartiality
- Respondent's Response
- Interviews and Information Gathering
- The Investigator's Report
- Questions, Responses, and Appeals



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Appointing the Investigator

- The Title IX Coordinator or designee may serve as the Investigator
- Consider the Pros and Cons:
 - The Title IX Coordinator is very familiar with the school district's Title IX policy, the requirements of Title IX, and has training and experience
 - The Title IX Coordinator's role as an impartial investigator may limit his/her ability to empathically support Complainant and Respondent
 - After the parties receive the Title IX Coordinator's investigative report, one or both may not view the Title IX Coordinator as impartial

Fairness and Impartiality

- Bias
 - The Investigator may not be biased
 - Bias is a predisposition or preconceived opinion that prevents a person from impartially evaluating facts that have been presented for determination; a prejudice
- Presumption of Innocence
 - Until the investigation is completed the Investigator must presume Respondent has not sexually harassed Complainant

Respondent's Response

- Respondent should be given an opportunity to submit a written response
- Respondent's response may help focus the investigation and highlight or identify relevant witnesses and information
- The School District may not require a response

Interviews and Information Gathering

- Interviewing Complainant and Respondent
 - Complainant and Respondent should be interviewed in every case
 - The interview must be preceded by written notice that gives the parties adequate time to prepare for the interview and:
 - identifies the date, time, and place of the interview
 - provides the interviewee with all relevant evidence (redacted per FERPA)
 - Example letters [see next slide]
 - The Investigator should create a written summary of the interview as soon as practicable

**EXAMPLE LETTER:
INTERVIEW SCHEDULED
(TO STUDENTS)**

[Date]

[Parent(s) Name(s)]
[Address]

Re: Notice of Investigative Interview

To the Parents of [Complainant/Respondent's Name]:

The interview of [Complainant/Respondent] has been scheduled on [date] at [time] at [location]. The relevant evidence gathered thus far is enclosed. Please note that any no-contact orders issued during this investigation remain in full force and effect.

You may feel free to call with questions or comments.


Sincerely,

[Name(s) of Parent(s) of Complainant/Respondent]

Signature(s) [of Parent(s) of Complainant/Respondent]

Date

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**EXAMPLE LETTER:
INTERVIEW SCHEDULED
(TO EMPLOYEES)**

[Date]

[Employee's Name]
[Address]

Re: Notice of Investigative Interview

To [Employee's Name]:

Your interview has been scheduled on [date] at [time] at [location]. The relevant evidence gathered thus far is enclosed. Please note that any no-contact orders issued during this investigation remain in full force and effect.

You may feel free to call with questions or comments.


Sincerely,

[Employee's Name]


Signature

Date

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Interviews and Information Gathering

- Interviewing Witnesses
 - Generally, all identified eye-witnesses should be interviewed
 - Questioning should cover the allegations, relationship to the parties, and the identification of other witnesses and information of which the parties may not be aware
 - The Investigator should create a summary of the interview as soon as practicable
- Securing Data, Documents, and Other Information

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Interviews and Information Gathering

- Relevant Evidence
 - Title IX does not assume Investigators will apply the Rules of Evidence like lawyers in a trial
 - Investigators should consider information "relevant" if it makes the existence of an allegation, or a response to an allegation, more or less likely
- Rape-Shield
 - Information about the sexual behavior or proclivities of Complainant is not relevant, by definition, unless it is about Complainant's sexual behavior with Respondent to prove consent
- Privileged Information
 - The Investigator may not seek, access, or rely on privileged information (e.g., medical records) without a party's written consent

The Investigative Report

- The Investigator must complete an investigative report within the timeline specified in the school district's Title IX policy
- The Title IX Coordinator may grant extensions (adjournments) for good cause
- The investigative report must fairly summarize the relevant evidence
- The Investigator should not resolve credibility issues, but should fairly summarize information that may bear on the Decision-Maker's resolution of credibility issues

Delivery of Investigative Report

- The Investigator must deliver the following documents to the Title IX Coordinator and simultaneously to the parties within the time specified in the District's Title IX policy
 - A cover letter – **Example [see next slide]**
 - The investigative report
 - Witness summaries (redacted per FERPA)
 - Other relevant information



**EXAMPLE LETTER:
TRANSMITTAL OF INVESTIGATIVE REPORT
(TO STUDENTS)**

(Date)

(Parent(s) Name(s))
(Address)

Re: Investigative Report

To the Parents of (Complainant/Respondent's Name):

I have enclosed the Investigator's investigative report. I have also enclosed the Investigator's summaries of the interviews of all witnesses, including Complainant and Respondent, and other relevant evidence. The School District considers the investigative report, interview summaries, and other relevant evidence private and confidential. Any disclosure of these documents by you, (Complainant/Respondent's name), or your advisor may result in legal consequences, including: disciplinary charges; allegations or claims of retaliation under the School District's Title IX policy; adverse inferences in this investigation; or, civil actions.

You may file a written response to the investigative report within seven (7) school days or ten (10) calendar days. You may also, if you wish, submit written questions for the Investigator to pose to the opposite party or any witness. The Investigator will either pose the question and provide you with a written response or explain why he/she declined to pose the question.

You may feel free to call with questions or comments

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**EXAMPLE LETTER:
TRANSMITTAL OF INVESTIGATIVE REPORT
(TO EMPLOYEES)**

(Date)

(Employee's Name)
(Address)

Re: Investigative Report

To (Employee's Name):

I have enclosed the Investigator's investigative report. I have also enclosed the Investigator's summaries of the interviews of all witnesses, including Complainant and Respondent, and other relevant evidence. The School District considers the investigative report, interview summaries, and other relevant evidence private and confidential. Any disclosure of these documents by you or your advisor may result in legal consequences, including: disciplinary charges; allegations or claims of retaliation under the School District's Title IX policy; adverse inferences in this investigation; or, civil actions.

You may file a written response to the investigative report within seven (7) school days or ten (10) calendar days. You may also, if you wish, submit written questions for the Investigator to pose to the opposite party or any witness. The Investigator will either pose the question and provide you with a written response or explain why he/she declined to pose the question.

You may feel free to call with questions or comments

Sincerely,

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Parties' Questions and Responses

- The parties, after receiving the investigative report, may submit written questions to the opposite party or witnesses and may, within the time permitted by the school district's Title IX policy, file a response
- Generally, the Investigator should submit written questions and provide responses. If the Investigator declines to submit a question, he/she must notify the party who submitted it with an explanation

The Decision-Maker

- The Decision-Maker determines whether Respondent sexually harassed Complainant.
- The Decision-Maker **may not** be the Title IX Coordinator or the Investigator
- The Decision-Maker:
 - Reviews all of the information collected during the investigation
 - Issues a decision concluding Respondent is or is not responsible for sexual harassment in violation of Title IX

Decision – Standard of Proof

- The standard of evidence may be “**a preponderance of the evidence**” or “**clear and convincing evidence**”
- Proof by a “**preponderance of the evidence**” means the evidence on one side of a question is more convincing than the evidence on the other side
 - This concept must be distinguished from the quantity of the evidence
 - In other words, for a variety of reasons, one witness may be more convincing than two others
- “**Clear and convincing evidence**” is a higher standard of proof
 - Evidence is “clear and convincing” if the evidence on one side of a question is highly and substantially more probable than the evidence on the other side

Decision - Credibility

- Credibility determinations may be based on a variety of factors, including:
 - Ability and capability to observe
 - Consistency with other known facts
 - Consistency over time
 - Relationship to parties
 - Others
- The Decision-Maker may not make credibility determinations based on a person's status as a Complainant or Respondent

Decision-Maker's Report

- Required Components
- The Decision-Maker's Report **must** be delivered to the parties and the Title IX Coordinator
 - Complainant's allegations
 - Procedural steps taken to resolve allegations
 - Site visits, or other methods used to gather evidence
 - Findings of fact
 - The application of the school district's Title IX policy and the school district's student code of conduct
 - A statement of and rationale for the result as to each allegation; including determinations of responsibility, disciplinary sanctions, whether Complainant will be provided remedies to restore or preserve his/her equal access to the school district's education programs and activities, and the procedure and bases for appeal

Appeals



- Complainant or Respondent may appeal the Decision-Maker's Decision
- Bases for Appeal:
 - Procedural irregularity affecting the outcome
 - Decision-Maker not aware of newly discovered evidence
 - Bias or conflict of interest on the part of the Investigator or Decision-Maker
 - How shown?

Resolving Appeals

- Appellate Officer must:
 - Review the appeal
 - Determine whether the appeal implicates one or more the bases for appeal
- If not, the appeal should be denied
- If so, the Appellate Officer must:
 - Review the entire record
 - Decide whether to grant the appeal, in whole or in part
 - Affirm or reverse the Decision, in whole or in part
 - If necessary, remand the Decision to the Investigator or Decision-Maker for further action
- Decision are not final until the appeal process is over or the time for taking an appeal has passed with no appeal

Retaliation

- Retaliation is broadly prohibited by the new regulations
- **“For the purpose of interfering with Title IX rights” or “because the person has participated or refused to participate in any manner in a proceeding under Title IX regulations”**
- Charges against an individual for SCC violations not involving sex discrimination or sexual harassment, but arising out of the same facts or circumstances, constitute retaliation IF the purpose is to interfere with any right or privilege secured by Title IX

Recordkeeping



- Records related to alleged sexual harassment must be maintained for a **minimum of seven (7) years**
 - All records ... investigation records, disciplinary sanctions, remedies, appeals, supportive measures, etc.
- Must document:
 - Why response was not deliberately indifferent
 - Measures were taken to restore or preserve equal access to educational program or activity
 - If no supportive measures provided, why that was not deliberately indifferent

Training

- Required for ALL staff (to identify and report sexual harassment)
- Required for Title IX Coordinator, investigators, and decision-makers (both initial and appeal)
- Maintain records for seven (7) years and **post training materials on website****
 - Attorney copyright considerations



