

Is your K-12 District Ready? A Review and Facilitated Discussion of the Implications of Pending Title IX Regulations.

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K12T9



A dark stage with two spotlights shining down on a wooden floor. The text "Setting the Stage" is centered in the middle of the image.

Setting the Stage

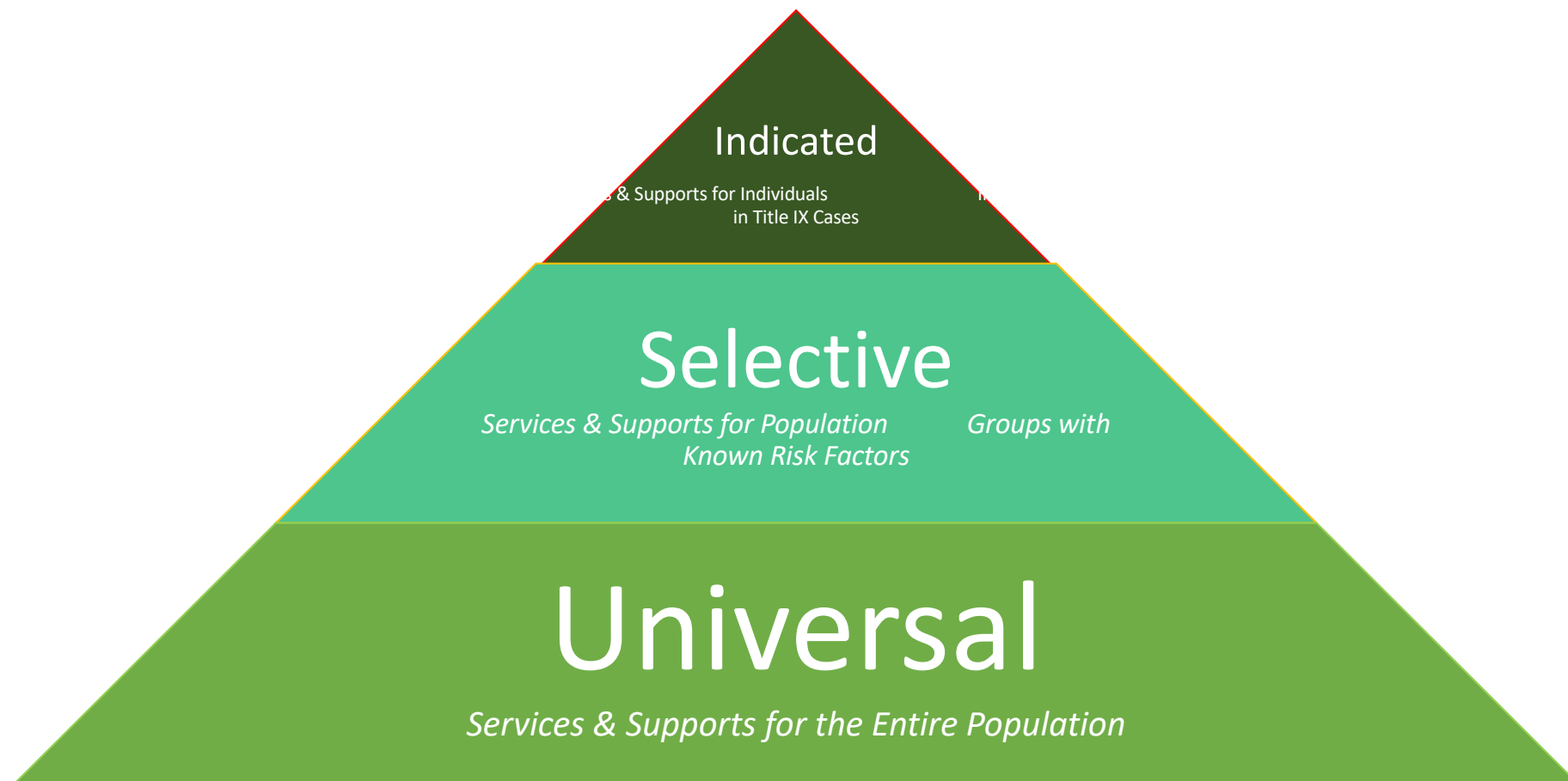
K12T9

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1. Infrastructure
2. Practices
3. Compliance



Guiding Questions for Our Discussion



Guiding Questions

1. What *effect(s)*, if any, will the new regulation have on your K12T9 infrastructure, practices, and compliance?
 - a) What are the *facilitators* of implementation and compliance in your District?
 - b) What are the *barriers* to implementation and compliance in your District?

The Pending Regulations



When?



Let's Get into the Pending Regulations




Regulations

1 – Changing the Definition of Harassment




1. “Unwelcome conduct ~~of a sexual nature~~ **on the basis of sex** that is so severe, pervasive, ~~or~~ **and** objectively offensive that it ~~limits~~ **effectively denies** a person equal access to educational programs and activities.”


2 – Changing the Case Resolution Timeline

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1. The proposed regulations change previous timeline guidance for the investigation and remediation of Title IX cases from “60-days” to “a reasonably prompt timeframe”.


3 – Change to definition of what constitutes “Notice”

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1. The proposed regulations change the definition of what constitutes “notice”, that is, what needs to happen for a District/School to be legally required to respond to a Title IX case.
 2. The proposed regulations stipulate that “actual notice” is required – that is, a formal, written complaint that is submitted to the Title IX Coordinator.

4 – Changes to the definition of a “Responsible Employee”

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1. The proposed regulations designate all K-12 “teachers” as “responsible employees” (i.e., are required to report allegations of Title IX to their District’s Title IX Coordinator) when the conduct is student-to-student only.
 2. The regulations do not address if non-teacher (i.e., non-certificated) personnel would also be considered “responsible employees” (e.g., social workers, nurses, credentialed personnel in the classroom, and others).

5 – Adds guidelines on “Informal Resolutions”


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1. The regulations call for the following elements in response to “informal reports” and for “informal resolution” procedures:
 - a) Informal resolution will require detailed notice to involved parties, including specific details around allegations.
 - b) The regulations call for Districts/Schools to clarify specific informal resolution protocols in their policy and administrative regulations.
 - c) The specific criteria which would preclude an informal resolution, although it’s been noted that there’s no clarification on the precluding criteria in the proposed regulations.
 - d) Requires that Districts/Schools make clear to parties the anticipated consequences of parties’ participation in informal resolution processes.

6 – Requires Separation of Roles in K-12 Title IX Investigation & Findings:

The regulations mandate new separation of roles. The regulations contemplate three roles:

1. The Title IX Coordinator
2. The Investigator
3. The “Decision-Maker” (the person who makes the final determination on the allegations)
4. The “Decision-Maker” cannot be the Coordinator or Investigator.
5. Note: Brett Sokolow of ATIXA notes that a Coordinator can serve as an investigator if resources do not permit a separation of those functions, but that it is far better to create a separation, if possible.
6. Note: If a District has an internal appeals process, the appellate decision-maker cannot be any of the three persons above.


7 – Changes to Guidelines on “Supportive Measures” (AKA “interim measures”)

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1. Any “supportive measure” may “not unreasonably burden” any party, and that any “supportive measure” cannot be disciplinary or punitive.
 2. The use of suspensions as “supportive measures” are allowed, but only after a documented, rigorous “risk analysis” that stipulates a safety concern.
 3. Note: Risk assessments must be conducted in compliance with a District’s special education processes.

8 –New Guidelines Around “Notice to Parties”

1. The proposed regulations require that the responding party receive advance, written notice of the allegation(s) and be provided “sufficient time to prepare a response” before an interview can be conducted.
2. In the case of a formal, written complaint, the proposed regulations require notice to the reporting and responding parties to include:
 - a) The identity of the parties.
 - b) The allegation(s), with reference to policy violation(s).
 - c) The date and location of the alleged misconduct.
3. NOTE: There must be “sufficient time” to prepare a response, although there’s no specific guidance on the amount of time. Experts differ on this, and we have heard a minimum of three school days and a maximum of ten. This requirement applies to all interviews, meetings, and appeals, if applicable.


9 – Requires Access to an “Advisor of Choice” for Parties

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1. The proposed regulations require that parties have an “advisor of choice” during the investigation and remediation processes. Advisors may be present at interviews, meetings, and appeals, if applicable.
 2. An “advisor of choice” could be anyone selected by the involved party – a parent/guardian/caregiver, an attorney, a teacher or other adult at school, a friend, etc.
 3. If the student doesn’t choose an advisor, the District must select one who is “aligned with the party.”
 4. iThe proposed regulations do not provide guidelines on the nature or extent of the advisor’s participation in an interview, meeting, and/or appeals processes.


10 – Clarifies “Burden of Proof”

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1. The proposed regulations stipulate that the “burden of proof” is on the District/School, not the involved parties.
 2. The proposed regulations stipulate that a District’s/School’s investigation efforts must be “sufficient to reach a determination” as to the findings of fact.
 3. The proposed regulations clarify that evidence obtained by law enforcement agencies, if applicable, is “admissible” in the District’s/School’s investigation and findings processes.


11 –Provision of Access to “All Evidence” to Involved Parties

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1. At least 10 calendar days prior to the finalization of their investigation report, the District/School must make available all relevant evidence (i.e., inculpatory and exculpatory) to the reporting and responding parties.
 2. On the issue of “relevance”, some experts interpret this to mean evidence that is relevant to the specific allegation(s) in the case. However, other experts conclude that the District/School must provide equal opportunity to parties to review “all evidence” gathered.
 3. The evidence may be made available electronically, as long as there are restrictions on the parties’ capacity to download/copy the material. There are technologies that prevent the taking of screen shots, but those can be expensive and ultimately ineffectual.


12 – Guidelines on Development and Sharing of an “Investigation Report”

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1. The investigation report must “fairly summarize” all relevant evidence.
 2. The investigation report must be made available at least 10 calendar days prior to the findings of fact (i.e., the “outcomes report”).
 3. Parties can submit written responses to the investigation report which must be considered in the findings of fact/outcomes report.
 4. Note: The proposed regulations are not clear on the level of detail that is required in the report, opening the door to the possibility that a “detailed summary” may demonstrate sufficient compliance.
 5. Note: The proposed regulations are not clear whether information about parties’ credibility/reliability or findings of fact should be included in the investigation report.


13 – Provides Option to Conduct “Live Hearings”

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1. If a District/School does call for live hearings, there are stipulations in the proposed regulations around “providing an opportunity for questioning” (i.e. this could be called “cross-examination” in post-secondary or courtroom settings)
 - a) The hearing must allow parties to submit written questions to be asked of parties, including witnesses. There is language that suggests that the “decision-maker” could ask the questions.
 - b) The proposed regulations do not detail guidelines for the determination of “relevance” or “appropriateness” of submitted questions.
 2. If choosing to conduct live hearings at the K-12 level, please also note:
 - a) The “decision maker” cannot be the Title IX Coordinator or Investigator.
 - b) Parties must attend the hearing. If a party does not appear, their evidence must be excluded.


14 – Allows Changes to Standard of Evidence

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1. K-12 Districts/Schools may use “preponderance of the evidence” (i.e., the 51% standard – “more likely to have occurred than not”) only if the District/School uses that same standard in any other student conduct violation process (e.g., expulsion).
 2. If a “clear and convincing” evidence standard is used in any other student or employee conduct process, then the District/School must use the “clear and convincing” evidence standard for Title IX cases.

15 - Adds Requirements to the “Outcome Report” (i.e., Findings of Fact):

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1. The outcome report must include a statement of and rationale for each finding of fact for each allegation.
 2. The outcome report must detail any and all remedial actions to all parties.
 3. Any remedial actions (i.e., sanctions, discipline) for the responding party must be designed to ensure ongoing access to educational programs and activities.
 4. The outcomes report must be provided to the reporting and responding parties at the same time.

#16 – Provides Guidelines on Internal Appeals Process

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1. While internal appeals are not required by the proposed regulations, they do provide guidelines should a District/School choose to conduct internal appeals.
 - a) All involved parties must be notified of a request for an appeal.
 - b) The hearing must provide for parties to express their support or opposition to the outcome of the case.
 - c) The decision-maker may not have had any role in the investigation or resolution process.
 - d) There must be a “reasonably prompt” timeline for the issuance of the appeal decision.

thank you.

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