

NEW TITLE IX REGULATIONS

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August 21, 2020



SCHOOLS LEGAL SERVICE

Schools Legal Service is a joint powers entity providing legal and collective bargaining services to public education agencies since 1976.

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CHANGES TO TITLE IX EMPHASIZE:

Due Process:
Was it a fair and just
process?

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WHAT TITLE IX DOES NOT DO:

- Interfere with any other constitutional right
- Allow FERPA to obviate obligation to comply with Title IX
- Derogate any rights under Title VII
- Derogate any rights a parent or guardian has to act on behalf of child
- Allow state law to alleviate obligation to comply with Title IX

EXCLUSIONS

- No longer covers sex discrimination occurring against a person outside of the United States (i.e., study abroad programs)
- Institutions whose primary purpose is the training of individuals for military or merchant marine services
- Groups (as to membership practices):
 - Fraternities and sororities that are tax exempt pursuant to Internal Revenue Code section 501(a)
 - YMCA, YWCA, Girl Scouts, Boy Scouts, and Camp Fire Girls
 - Volunteer youth service organizations that are tax exempt pursuant to Internal Revenue Code section 501(a)

RELIGIOUS SCHOOLS

- Exempt from Title IX if application would not be consistent with religious tenets of the organization
- The highest ranking official of the institution must submit request for waiver in writing to Assistant Secretary
- If notified of investigation, can then submit for waiver

DEFINITIONS

- *Recipient*: School/education agency
- *Complainant*: Alleged victim
- *Respondent*: Alleged perpetrator
- *Consent*: Not required to adopt definition in your grievance process (i.e., CALCRIM defines consent as a person must act freely and voluntarily and know the nature of the act)
- *Formal Complaint*: Document filed by complainant or signed by Title IX Coordinator
 - May be filed in person, by mail, or email
 - If Title IX Coordinator is person that actually signs, does not make him/her a party

DEFINITIONS

Actual Knowledge:

- Notice to Title IX Coordinator
- Notice to any official recipient who has authority to institute an investigation/corrective measure
- *As to Elementary and Secondary: Any employee with knowledge*

DEFINITIONS

What is not actual knowledge:

- Imputation of knowledge based solely on vicarious liability or constructive notice
 - *Vicarious Liability:* Legally liable for actions of another
 - *Constructive Notice:* A legal fiction that a person received notice even though they did not actually receive it (i.e., notice to a party for certain types of legal actions that left the state, can give notice in an approved newspaper)
 - *What this Means:* Even though you should have known, if you did not actually know, it is not “actual notice” if notice is solely based on one of these principals
- The only official of the recipient with actual knowledge is the respondent

DEFINITIONS

Sexual Harassment:

- An employee conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct;
- Unwelcome conduct that is "severe, pervasive, **and** objectively offensive" as determined by a reasonable person; or
- Sexual assault, dating violence, domestic violence, and stalking.
 - *Dating and Domestic Defined by VAWA*: Former spouse, spouse, former cohabitant, cohabitant, someone have a child with, and have or previously have had dating or engagement relationship
 - Includes same sex relationships
- Recipient's treatment of a complainant or respondent in regards to a complaint may constitute harassment

DEFINITIONS

- Education program or activity:
 - Includes locations, events, or circumstances over which the recipient exercised substantial control over both the respondent and the context in which the sexual harassment occurs
 - Any building owned or controlled by a student organization that is officially recognized by a post secondary institution

TITLE IX ROLES

- Title IX Coordinator
- Informal Resolution Facilitator
- Investigator
- Decision Maker
- Appeal Decision Maker

Each position requires specific training

REQUIRED TRAINING FOR TITLE IX ROLES

- Definition of sexual harassment in 34 C.F.R. section 160.30.
- Scope of recipient's education program or activity
- How to conduct an investigation and grievance process, including hearings, appeals, and informal resolution process
- How to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias
 - Required not to have a conflict of interest or bias against complainant or respondent, as a group or individuals
- Materials used for training must not rely on "sex stereotypes and must promote impartial investigations and adjudications of formal complaints of sexual harassment"

TITLE IX COORDINATOR

- Responsible for the independent implementation of Title IX grievance process
 - Receives complaints or may sign a complaint if receive report of sexual harassment
 - May sign for an anonymous report
- Cannot be the same person for this role and the role of Investigator, Decision Maker, or Appeal Decision Maker
- Responsible for effective implementation of any remedies

INVESTIGATOR

- Cannot be the same person as the Title IX Coordinator or either of the Decision Maker roles
- Cannot make a decision on your own work
- Additional required training:
 - Issues of relevance to create an investigative report that fairly summarizes relevant evidence

DECISION MAKER

- Cannot be the same person as the Title IX Coordinator or the Investigator
- Additional required training:
 - Any technology to be used at a live hearing
 - Issues of relevance of questions and evidence
 - Issues of relevance of complainant's sexual predisposition

APPEAL DECISION MAKER

Cannot be:

- Decision Maker that reached the determination regarding responsibility or dismissal
- Investigator
- Title IX Coordinator

RESOLUTION FACILITATOR

- Title IX does not prohibit the Resolution Facilitator to be or not be any particular person - this role can be filled by someone who has another Title IX role.
- When choosing the Resolution Facilitator, keep in mind that this is similar to mediation. A mediator is independent.

RESPONSE

- A recipient with actual knowledge of sexual harassment must respond promptly in a manner that is not deliberately indifferent.
 - This response is required regardless of whether or not a formal complaint was filed.
- Was response clearly unreasonable in light of the known circumstances?

TITLE IX COORDINATOR'S RESPONSE ONCE HAVE ACTUAL KNOWLEDGE OF HARASSMENT:

- Must treat complainants and respondents equally by offering:
 - Supportive measures
 - Following an appropriate grievance process before any disciplinary sanction or other adverse action that is not supportive
- Specifically as to complainant:
 - Must “promptly contact” to discuss available supportive measures
 - Inform him/her that supportive measures are available with or without the filing of a formal complaint
 - Consider complainant’s wishes in regards to those supportive measures
 - Explain the process for filing a formal complaint
 - Must be signed by complainant or Title IX Coordinator - cannot be made anonymously
 - Must comply regardless of whether the complainant files a formal complaint or not
 - Remember your mandated reporting obligations

RESPONSE TO FORMAL COMPLAINT

- Must respond in accordance with the district’s written grievance process that is in accordance with Title IX required grievance procedures
 - Must investigate a formal complaint
- Will not find that responded inappropriately if Assistant Secretary would have reached a different conclusion, as long as responded in a manner that was not deliberately indifferent

REMOVALS

- *Students*: Can do an emergency removal as long as they follow procedures outlined in the statute
 - This **DOES NOT** modify any rights under IDEA or 504
 - Must also consider suspension and expulsion rules in the California Education Code
 - See Education Code section 48900(n)(o)(r)(t)
 - Education Code section 48900.2 only allows suspension of students in grades 4-12 for sexual harassment
 - See Education Code section 212.5 for state definition of sexual harassment

REMOVALS

- *Students (cont.)*:
 - Education Code section 48915(c) requires the Superintendent or designee to recommend expulsion, regardless of grade, who commits sexual assault or battery
 - Education Code section 48900.4 allows for suspension of students for intentionally engaging in harassment, threats, or intimidation that is sufficiently severe or pervasive to have the actual and reasonably expected effect of materially disrupting education environment
 - *Education Code section 48900(w)(2)*: State legislature intends that the “Multi-Tiered System of Supports” be used
- *Employee*: Statute does not preclude administrative leave for a non-student employee, but follow labor laws/MOU/Title VII

EMERGENCY REMOVAL OF STUDENTS

- May remove a student respondent from the education program or activity if:
 - Recipient performs an individualized safety and risk analysis;
 - Determines that an immediate threat to the physical health or safety of any student or other individual justifies the removal;
 - Excludes threat to mental health; and
 - Recipient provides respondent with notice and an opportunity to challenge the decision immediately.
- This statute does not modify any rights under IDEA, 504 or ADA
 - Must follow process and timelines in those statutes
 - Cannot remove a special education child for more than 10 days

EMERGENCY REMOVAL OF EMPLOYEES

- May place a non-student employee respondent on administrative leave during pendency of the grievance process
 - The statute does not modify any rights under 504 or ADA
 - Follow labor laws and any provisions for administrative leave contained in your MOU or contract with the employee

GRIEVANCE PROCEDURE

Each district must adopt a grievance policy that includes the complete process to be followed and how recipient will respond to any complaint

PRINCIPLES OF GRIEVANCE PROCESS

- Treat complainants and respondents equitably
- An objective evaluation of all relevant evidence, including inculpatory and exculpatory evidence
 - *Inculpatory*: Tends to show a person is guilty
 - *Exculpatory*: Tends to show a person is not guilty
- Credibility determinations are not to be made based on status of complainant, respondent, or witness
- Those involved in the investigation cannot have a conflict of interest
- *Presumption that the Respondent is not Responsible*: Presumption of innocence

ASIDE FROM THE PROCESS ITSELF, WHAT MUST BE INCLUDED IN THE WRITTEN GRIEVANCE PROCESS

- Required training for each position
- Reasonably prompt time frames for conclusion of grievance process, including appeal process
 - Title IX does not have any set time frames, but may want to consider setting a time limit in order to be in line with time lines in other statutes such as UCP.

ASIDE FROM THE PROCESS ITSELF, WHAT MUST BE INCLUDED IN THE WRITTEN GRIEVANCE PROCESS (CON'T)

- Allow for a temporary delay of the grievance process or limited extension of time frames for good cause
 - Must provide written notice to the complainant and respondent of the delay and reasons for the action
 - Good cause may include:
 - Absence of a party, a party's advisor, or a witness
 - A concurrent law enforcement activity
 - Need for language assistance or accommodations of disabilities
- Must state in the procedures permissible bases for either party to appeal

WHAT MUST BE INCLUDED IN WRITTEN GRIEVANCE PROCESS

Supportive Measures:

- *Definition:* Services for complainant or respondent before or after the filing of formal complaint or where no formal complaint has been filed
- Must be made available to complainant and respondent
- These services are confidential
- *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 absences, increased security and monitoring of certain areas of the campus, and other similar measures
- Be aware of special education students and possible changes to their placement and/or services

WHAT MUST BE INCLUDED IN WRITTEN GRIEVANCE PROCESS (CON'T)

Remedy:

- List of range of possible disciplinary sanctions and remedies must be listed in grievance process
- Remedy shall be designed to “restore or preserve equal access to the recipient’s education program or activity”
- Provide the remedy to complainant when there is a finding against respondent

NOTICE REQUIREMENTS

Upon receipt of a formal complaint, must provide written notice to the known parties of the following:

- Recipient's grievance process
- Any informal resolution process that is available
 - Note that an informal resolution process is not available if an employee is the respondent and the complainant is a student.
- Sufficient details of the allegations that, as known at the time, allows a sufficient amount of time to prepare a response before initial interview.
 - *Sufficient Details*: Identities of the parties involved, the conduct, date of incident, and location of incident
- Inform respondent that he/she is presumed not responsible

NOTICE REQUIREMENTS (CON'T)

- Parties may have an advisor of their choice
 - May or may not be an attorney
 - District does not have to provide
- Right to inspect and review all evidence
- Must advise of any provision in the recipient's code of conduct that prohibits knowingly making a false statement or submitting false information

NOTICE REQUIREMENTS (CON'T)

- Once an investigation has been initiated, must provide written notice of the following to each party whose participation is invited or expected of the date, time, location, participants, and purpose of:
 - All hearings
 - Investigative interviews
 - Meetings
 - Written notice must be given with sufficient time for the party to prepare to participate
- If determine should investigate additional allegations, must provide additional written notice to the parties that are known.
- While not required by law, consider informing the parties of the name of each person in each role so that the party may raise concerns about any conflict of interest or bias.

WHEN A COMPLAINT MUST BE DISMISSED

- Conduct does not constitute sexual harassment even if proved
 - Conduct did not occur in the recipient's education program or activity
 - What about social media?
 - Considerations for now requiring students to be online?
 - Conduct did not occur against a person in the United States
- Note:* If dismissed for one of these reasons, may still proceed as a violation of district's code of conduct.

WHEN A COMPLAINT MAY BE DISMISSED

- Complainant notifies the Title IX Coordinator, in writing, that he/she would like to withdraw complaint.
- Respondent is no longer enrolled or employed by recipient
- A specific circumstance prevents the recipient from gathering sufficient evidence to reach a determination

DISMISSED CASE

- If dismissed, must promptly send written notice of dismissal and reasons for dismissal simultaneously to the parties
- Complainant may appeal a dismissal
- Comply with mandated reporting requirements

CONSOLIDATION OF COMPLAINTS

- May consolidate if same set of facts or circumstances
- Must provide written notice and supportive measures as previously outlined to all parties

REQUIREMENTS OF INVESTIGATION OF FORMAL COMPLAINT

- Burden of proof and gathering evidence rests on the recipient, not the parties
- Cannot access or consider a party's records maintained by any treating professional unless the party or parent, if minor, consents
- Cannot restrict the ability of either party to discuss the allegations or ability to gather and present relevant evidence; no "gag order" may be issued

STANDARD OF EVIDENCE

- *Preponderance of the Evidence*: It is more likely than not that the allegations are true
- *Clear and Convincing Evidence*: Evidence is of such a convincing force that it demonstrates a high probability that the allegations are true. A higher standard than preponderance of the evidence.
- Must use the same standard for both students and employees
 - Employees are entitled to preponderance of the evidence during discipline investigation

INVESTIGATION

- Must provide an equal opportunity for the parties to present:
 - Fact or expert witnesses
 - *Inculpatory Evidence*: Incriminating evidence, tends to prove guilt
 - *Exculpatory Evidence*: Exonerating evidence, tends to prove not guilty
- Must still comply with investigation and remainder of grievance process even if there is an investigation by law enforcement

EXCLUSION OF PRIOR SEXUAL HISTORY

- Evidence of a complainant's sexual history is generally not relevant and should be excluded
 - Examples:
 - She had sex with Sam, therefore, she had consensual sex with John.
 - Evidence regarding a reputation for being promiscuous.
- Evidence can be considered if it is directly relevant to an issue
 - Examples:
 - Complainant previously consented to an act with respondent, therefore, he/she consented during the current incident (state of mind).
 - The evidence will explain an injury the complainant has or other evidence.
- Title IX specifies the only two conditions that sexual history may be asked:
 - Someone other than respondent committed the act
 - Specific incidents between respondent and complainant to prove consent

SUPPORT PERSON/ADVISOR

- Must provide either party the same opportunity to have another person present during any grievance proceeding (interview, hearing, etc.)
 - Cannot place restrictions on who the support person/advisor is
- May include:
 - Advisor
 - Attorney
 - Support Person
 - If involves employee, will likely have union representative or attorney
- May establish restrictions regarding the extent to which a advisor may participate
 - These restrictions must apply equally to both parties
 - Recommend any restrictions to be written in policy to assure uniformity

TIMELINE OF INVESTIGATION REPORT

- Prior to completion of the investigation report, must send each party and their advisor, if any, the evidence in electronic format or hard copy.
 - Must include evidence that recipient does not intend to rely on
- Must provide at least 10 days from receipt of evidence for each party to submit a written response
- Investigator must consider each written response
- Investigator must write a report that “fairly summarizes” all relevant evidence
 - The investigator is not deciding responsibility
- If conducting a hearing, report must be provided 10 days prior to the hearing.
- If not conducting a hearing, report must be provided to each party and advisor in electronic or hard copy.
 - Each party is allowed to review and provide written response

HEARING

- A hearing is required in post-secondary settings, but is optional in K-12
- A K-12 district should determine in their guidelines whether to have a hearing
- If having a hearing, must make all evidence made available for inspection during investigation available at any hearing.

POST-SECONDARY HEARING

- There are specific requirements for a post-secondary hearing, but not for a K-12 hearing
- If a party does not have an advisor, the recipient must provide an advisor of the recipient's choice without fee or charge to the party
 - May or may not be an attorney
- Decision Maker must permit each party's advisor to ask questions of any witness
 - Parties are not allowed to ask questions of witnesses
 - Limitations as what advisor may ask does not apply to post-secondary hearings
- If either party requests, recipient must provide that the live hearing be located in separate rooms with technology enabling the parties and Decision Maker to simultaneously see and hear each party/witness
 - Allows for parties to also be at different geographic locations

POST-SECONDARY HEARING (CON'T)

- Only relevant cross-examination and other questions may be asked of a party or witness
 - Questions may also challenge credibility
 - Questions regarding sexual history are not relevant unless used as previously described
 - The Decision Maker must determine whether the question is relevant and explain any decision to exclude a question as not relevant
- If a party or witness refuses to submit to cross-examination at the hearing, the Decision Maker must not rely on that person's statements.
- Must create audio or audio-visual recording or transcript of any live hearing and make available to either party

NO HEARING PROCEDURE FOR K-12

- Allows for a live hearing or “written hearing”
- Once the report is written, but before a determination regarding responsibility, the Decision Maker must:
 - Afford each party the opportunity to submit written relevant questions the party wants asked of another party or witness
 - Provide each party with the answers
 - Allow for additional, limited follow-up questions from each party
- Must provide for “additional, limited follow-up questions”
- Exclusion of prior sexual history as previously described
- Decision Maker must explain to the party proposing the questions any decision to exclude a question

DETERMINATION OF RESPONSIBILITY

- Decision Maker must make a determination of responsibility based on the standard of proof selected by the district in their guidelines
- The determination must be in writing
- Written determination must be provided to parties simultaneously
- Determination is final on:
 - Date appeal is issued; or
 - Date on which appeal must be filed; appeal no longer timely

WRITTEN REPORT MUST INCLUDE:

- Identification of the allegations
- Detailed description of the procedural steps taken from the receipt of formal complaint through conclusion
 - *Includes:* Notifications to the parties, interviews with parties/witnesses, site visits, methods used to gather evidence and hearings held
- Findings of fact supporting the determination
- Any conclusions made in regards to code of conduct to the facts

WRITTEN REPORT (CON'T)

- Statement/rationale for the result of each allegation, including:
 - Determination regarding responsibility
 - Any disciplinary sanctions recipient imposes on respondent
 - Whether remedies designed to restore or preserve equal access to education/activities will be provided by recipient to complainant
- Procedures and bases for complainant and respondent to appeal

APPEAL PROCESS

- District must offer appeal for these three bases:
 - Procedural irregularity that affected the outcome of the matter
 - New evidence that was not reasonably available at the time of the determination of responsibility
 - The Title IX Coordinator, Investigator, or Decision Maker had a conflict of interest or bias
- Recipient may add additional basis for appeal, but must be made available equally to both parties

APPEAL PROCESS (CON'T)

- Must provide written notice to the other party when appeal is filed
- Implement appeal procedures equally for both parties
- Must give both parties opportunity to submit written statement in support of or challenging the outcome
- Must issue written decision containing the result of appeal and the rationale for the result
- Must provide written appeal decision simultaneously to both parties.

INFORMAL RESOLUTION

- Different than supportive measures
- Recipient may offer/suggest information resolution if:
 - A formal complaint has been filed; and
 - A determination of responsibility has not been made.
- Cannot require either party to participate
- Cannot require either party to participate in informal resolution or waive right to investigation or adjudication as a condition of enrollment, continued enrollment, employment, continued employment, or enjoyment of any other right

INFORMAL RESOLUTION PROCESS

May facilitate informal resolution process without a full investigation and adjudication if:

- Recipient provides written notice to parties disclosing:
 - Allegations in the complaint
 - Requirements of informal resolution process, including circumstances under which it precludes parties from resuming the formal complaint process
 - Policy must allow any party the right to withdraw and resume the formal complaint process prior to agreeing to a resolution
 - This policy must be written in grievance policy
 - Any consequences resulting from participating in informal resolution, including that the records will be maintained or could be shared

INFORMAL RESOLUTION PROCESS (CON'T)

May facilitate informal resolution process without a full investigation and adjudication if (con't):

- Obtain each party's voluntary, written consent to the informal resolution process
- Does not involve an employee sexually harassing student

RECORDKEEPING

Must maintain the following for seven years:

- *The Investigation - Keep Everything*: Investigation report, decision report, any determination of responsibility, any audio/audiovisual recording or transcript, disciplinary sanctions, and remedies
- Any appeal and result
- Any informal resolution and result
- All materials used to train each of the five roles
 - Must make these materials available on website or if don't have website, make them available
 - Be aware of copyright issues
 - Yearly student/parent notices are not sufficient, statute specifically states must be on website

RECORDKEEPING (CON'T)

If just received complaint or had notice, but did not go through full grievance process, a recipient must create and maintain for seven years:

- Records of any actions, including supportive measures, taken in response to the report or complaint
 - If don't provide supportive measures, must document the reasons it was not "clearly unreasonable in light of the known circumstances."
- Document basis for its conclusion that its response was not deliberately indifferent
- Document that it has taken measures designed to restore or preserve equal access to the recipient's education program or activity.

FERPA

- The records created in the Title IX grievance hearing are likely "student records" of the perpetrator and victim.
- Title IX specifies that a school cannot hide behind FERPA to avoid obligations.
- *Parent Inspection of Records*: Parent has right to inspect record when it is complete and an actual record.
- *Challenge Student Records*: Should only allow the parent, person responsible for creating the record and superintendent to be part of the meeting.
 - The Title IX process allows for a written response to be part of the record, but could allow them to file another written response.
 - Student has right to hearing pursuant to 34 CFR 99.21 & 99.22
- *Law Enforcement Records*: If law enforcement was involved in investigation, those reports are not "student records" pursuant to FERPA.

RETALIATION

- Statute now specifically states that retaliation for exercising one's rights pursuant to Title IX is prohibited
- Retaliation includes:
 - A recipient or other person intimidating, threatening, coercing, or discriminating against any individual:
 - For the purpose of interfering with any right or privilege pursuant to Title IX
 - Because the individual has made a report or complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing
 - Acts of the above-described retaliation that arise out of the same set of facts, but do not involve sex discrimination or harassment
 - Making a report or formal complaint of sexual harassment for the purpose of interfering with any right or privilege secured by Title IX

RETALIATION (CON'T)

Must keep identity of complainant, respondent, witnesses, and any person who has made a report or complaint confidential.

Exceptions:

- As permitted by FERPA statutes and regulations
- As permitted by Code of Federal Regulations regarding FERPA
- Carrying out the purpose of Title IX, including investigations, hearings, or judicial proceedings arising thereunder

Breaking confidentiality of the investigation can constitute retaliation

RETALIATION (CON'T)

What does not constitute retaliation:

- Exercise of rights protected under First Amendment
- Charging an individual with a code of conduct violation for making materially false statements in bad faith during the course of a grievance proceeding
 - The determination of responsibility cannot be, alone, sufficient to conclude that any party made a materially false statement in bad faith

Complaint of retaliation may be filed in accordance with the grievance procedure

NOTICE OF POLICY

- Must prominently display Title IX Coordinator contact information
- Must publish policy
- Who must receive written notice:
 - Students
 - Applicants for Admission
 - Parent/Legal Guardian of K-12
 - Employees
 - Applicants for Employment
 - Unions or Professional Organizations Holding Collective Bargaining or Agreements with Recipient
- *How:* Must prominently display contact information, training materials, and policy on website. If don't have website, may use other means such as handbook.
 - *Potential Copyright Issues:* Must either obtain permission to publish or write own training materials that can be posted on the website.

IMPLEMENTATION

- Title IX clearly states that it is not retroactive
 - OCR confirmed in statement 8/5/20
- Lawsuits were pending requesting injunction, have been denied

NOW WHAT?

1. Revise your sexual harassment policy/regulations to incorporate new requirements.
 - a) What standard of evidence will you choose?
 - b) Will you have a hearing? What will that hearing look like?
 - c) What supportive measures do you want to create?
 - d) How do you want to handle dismissal requests?
 - e) Create informal resolution process.
2. Appoint a person to each position
3. Training:
 - a) Specific training for those in each Title IX role.
 - b) In K-12, do you want to train all employees to recognize sexual harassment?
 - c) Assure staff understand what “actual knowledge” now means and that it triggers a duty to report to Title IX Coordinator.
4. Post your policy and training materials to your district website and include in student handbooks
5. Implement

Thank you for your participation

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