

# Title IX: New Regulations, Roles and Responsibilities

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# Presentation Objectives

1. Understand the current definition of sexual harassment contained in 34 CFR §106.30 (Title IX Regulations)
2. Consider and be cognizant of the scope of the BOCES programs and activities within which Title IX protection may extend to employees and students.
3. Understand the roles and responsibilities of each Title IX compliance position during the grievance process – including investigations, hearings (if applicable), appeals, and any informal resolution.
4. Understand how to conduct a consistent, thorough, and fair investigation that is free from bias, prejudice of facts and conflicts of interest.

# Title IX – Education Amendments of 1972



Title IX is a federal law prohibiting discrimination on the basis of sex in all education programs and activities operated by recipients of federal funds.

20 U.S.C.A §1681(a):

*“No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any educational program or activity receiving federal financial assistance...”*

# Title IX Protection

Title IX prohibits recipient institutions from discriminating on the basis of sex in:

- **Recruitment or admission** of students.
- **Access to all programs**, including counseling and guiding students or applicants for admission.
- Providing **equality with respect to student rules and policies**.
- **Financial Assistance** - may not provide different amounts or types of financial assistance, limit eligibility for such assistance, apply different criteria, or otherwise discriminate on the basis of sex in administering financial assistance.
- **Athletics** – may not discriminate in interscholastic, intercollegiate, clubs, or intramural athletics offered by recipient institutions including athletic benefits and opportunities, and athletic financial assistance.
- **Students must not be subjected to unlawful harassment, either in the classroom or while participating in other education programs or activities.**
- Title IX also prohibits recipients from discriminating on the basis of **pregnancy, childbirth, false pregnancy, termination of pregnancy, or recovery therefrom** or applying any rule concerning **parental, family or marital status** that treats persons differently on the basis of sex.

# Title IX Protection Extends To:



- **Elementary Schools, Secondary Schools, Colleges & Universities**– public or private, Certain other educational programs & activities.
- Title IX protection extends to all aspects of these institutions' educational programs and activities.
- Applies to any individual participating in or attempting to participate in education programs or activities **including students and employees.**

# Scope of the Educational Program

- Any activity, event, location, program or service over which the recipient exercises substantial control over both the respondent (the person against whom the complaint is made) and the context in which the sexual harassment occurs.
- May include field trips, “on-site” and “off-site” work and educational programming, etc.
- Title IX does not cover conduct/incidents occurring outside of the U.S.

# New Title IX Regulations

On May 6, 2020, the U.S. Department of Education issued the Final Rule implementing the new Title IX regulations, which were effective on **August 14, 2020**.

- The final regulations are premised on setting forth clear legal obligations that require recipients of federal funding to:
  - promptly respond to individuals who are alleged to be victims of sexual harassment by offering supportive measures;
  - follow a fair grievance process to resolve sexual harassment allegations when a complainant requests an investigation, or a Title IX Coordinator decides on the recipient's behalf that an investigation is necessary; and
  - provide remedies to victims of sexual harassment designed to restore or preserve equal access to the educational program or activity.

# Broader Definitions of Sexual Harassment



New Title IX Regulations (34 CFR 106.30) define sexual harassment more broadly to include any of three types of conduct on the basis of sex, all of which jeopardize the equal access to education:

(1) An employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct; [**\*Commonly referred to as “Quid pro quo”**]

(2) Unwelcome conduct 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; or

(3) **“Sexual assault”** as defined in 20 U.S.C. 1092(f)(6)(A)(v) [*Clery Act*], **“dating violence”** as defined in 34 U.S.C. 12291(a)(10), **“domestic violence”** as defined in 34 U.S.C. 12291(a)(8), or **“stalking”** as defined in 34 U.S.C. 12291(a)(30) [VAWA Act].

\* *Quid pro quo* and Clery Act/VAWA offenses are NOT evaluated for severity, pervasiveness, offensiveness, or denial of equal educational access, because such misconduct is sufficiently serious to deprive a person of equal access.



# Under the New Regulations



Local educational agencies are required to:

- Officially **designate and authorize at least one Title IX Coordinator**;
  - Notify applicants for admission and employment, students, parents or legal guardians of elementary and secondary school students, employees, and all unions or professional organizations holding collective bargaining or professional agreements with the EA of **name or title, office address, email address and telephone # of Title IX Coordinator(s)**;
- Establish **grievance procedures (complaint procedures) that provide for prompt and equitable resolution of student and employee** complaints of discrimination on the basis of sex (including sexual harassment) in educational programs and activities;
- Adopt and disseminate a non-discrimination **policy; and**
- **Train individuals designated as Title IX coordinators and those who may be involved in the Title IX grievance process as investigators, decision-makers, decision-makers for appeals and any other person who may help facilitate the informal resolution process.**

# The Grievance Process

- New Title IX regulations state that a school's grievance process must:
  - Treat complainants **equitably** by providing remedies any time a respondent is found responsible and by not imposing disciplinary sanctions without following the grievance process prescribed in the new Title IX regulations.
  - Remedies, which are required to be provided to a complainant when respondent is found responsible, must be designed to maintain the complainant's equal access to education, however, remedies need not be non-disciplinary or non-punitive and need not avoid burdening the respondent.
  - Require **objective evaluation of all relevant evidence, inculpatory and exculpatory**, and avoid credibility determination based on a person's status as a complainant, respondent, or witness. **MUST AVOID PREJUDGMENT OF THE FACTS.**

# The Grievance Process Cont



- Require Title IX personnel to be free from conflicts of interest or bias for or against complainants or respondents. *Consider prior interactions with those involved.*
- Include 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.** *“Innocent until proven guilty”*
- Include reasonably prompt time frames for conclusion of grievance process, including appeals and informal resolutions, with allowance for short-term, good cause delays or extensions of time frames.
- State which standard of evidence the school has chosen to use for all formal complaints of sexual harassment.
- Describe the school's appeal procedures and range of support measures available to complainants and respondents.
- Any additional provisions, rules or practices in the grievance process, other than those required by Title IX that a school adopts **must apply equally to both complainants and respondents.**

# Supportive Measures



34 CFR 106.30: “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.

# Title IX Team

- The amended Title IX Regulations state that a Title IX Coordinator shall be supported by their team including–
  - Investigators;
  - Decision makers;
  - Appeal officers;
  - Informal resolution process facilitators;

All must be impartial, unbiased, and free from conflicts.

# Title IX Coordinators Responsibilities – in general...

The Title IX Coordinator has wide ranging responsibilities that include:

- Provide district wide oversight and assurance of compliance;
- Prevent and remediate all sex/gender-based discrimination and harassment;
- May conduct school visits, review policies, publications, grievance procedure and hiring process for compliance with Title IX and the harassment and anti-bullying policy;
- Be accessible to students, educators, staff, and community members to answer questions about harassment and bullying and file a formal complaint;
- Coordinate to provide for Title IX and anti-harassment and bullying training for students, staff, educators and board members as appropriate;
- Coordinate training for investigators, decision-makers, appeals decision makers, and informal resolution facilitators;
- Be the primary contact for government inquiries;
- Stay current on the latest developments, laws, and regulation.
- Districts should designate at least two (2) Title IX Coordinators, as to prevent a potential appeal issue of bias or conflict of interest.

# Coordinator Responsibilities – when complaint filed..



- Conduct intake meeting with complainant;
- Explain process and provide guidance on filing formal complaint
- Offer supportive measures to complainant and respondent;
- Explain the grievance process, accept formal complaints, and determine mandatory dismissal;
- Evaluate for emergency removal (based on threat of physical health or safety concerns), provide notice, and opportunity for respondent to challenge decision;
- Assign unbiased investigator;
- Send notices of allegations and/or grievance process;
- Review investigative reports, written decision, and appeal decision (not determining guilt/innocence);
- Draft outcome letter after decision is issued;
- Ensure appropriate remedies, sanctions and overall corrective plan;
- Ensure proper record keeping (all records retained for at least 7 years)

# Title IX Coordinator Investigates

- Title IX Coordinator may investigate when needed or act as a facilitator of an informal resolution process but may NOT make decisions about responsibility, determine sanctions or rule on appeal.



# Investigator

- The role of an investigator is to conduct a fair and impartial investigation of alleged misconduct.
- The investigator may work with the Title IX Coordinator to develop a strategy for the investigation, but process is dictated by Board adopted Policy
- **The investigator does NOT decide the guilt or innocence of the respondent. He/she is a fact finder only.**

# Dismissal of Complaint

- Investigator/school must dismiss allegations of conduct that do not meet the Title IX definitions of sexual harassment, did not occur in a school's education program or activity, or did not occur against a person in the US.
  - Such dismissal is for Title IX purposes only and does not preclude a school from addressing the alleged misconduct in another manner.
- Investigator/school, in their discretion, may dismiss a formal complaint if the complainant wishes to withdraw the formal complaint, to which such notice is given in writing to the Title IX Coordinator, or the respondent is no longer enrolled or employed by the school, or the investigator finds that specific circumstances prevent the school from gathering sufficient evidence to reach a determination.
  - Schools must give parties written notice of dismissal and reasons for such.

# Investigator Responsibilities

- Meet with Title IX Coordinator regarding intake information of complaint;
- Gathers, reviews and weighs evidence;
- Meet and interview complainant, respondent and identify any witnesses;
- Assess relevant information and credibility of parties;
  - **Evidence is relevant if:** (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action.
  - Inculpatory evidence is evidence that shows, or tends to show, a person's involvement in an act, or evidence that can establish guilt.
  - Exculpatory evidence is evidence favorable to the respondent. (i.e., that exonerates or tends to exonerate the respondent of guilt)
- Maintain accurate and thorough investigation records and notes;
- Creates an investigative report summarizing evidence.

# Prior Sexual History of Complainant - generally off limits...

May not ask questions about complainant's prior sexual behavior

- Unless it is used to prove someone other than the respondent committed the offense
- Or offered to prove consent

Does not apply to respondents

- Evidence of a pattern of inappropriate behavior by respondent is relevant

# Investigator Responsibilities Continued

- School must send **written notice to both parties** that it is investigating a formal complaint of sexual harassment and **what specifically the allegations are**. Also must provide notice of grievance process.
- The burden of gathering evidence and proof must remain on the school/investigator, not on the parties.
- Investigator must provide equal opportunity for the parties to present fact and expert witnesses and other inculpatory/exculpatory evidence.
- Investigator cannot issue a “gag” order regarding allegations.
- Parties must have same opportunity to select an advisor or rep. of the party’s choice (may/may not be attorney).

# Investigator Responsibilities Continued



- Investigator must send written notice of any investigative interviews, meetings or hearings.
- Investigator must send the parties/advisors, evidence directly related to the allegations and the “draft report”, with at least 10 days for the parties to inspect, review and respond to the evidence.
- After finalization, investigator must send parties/advisors an investigative report that fairly summarizes relevant evidence, with at least 10 days for the parties to respond prior to the decision maker issuing his/her decision (whether or not hearing held).

# How to conduct an effective investigation

Upon receipt of complaint or notice of allegations, consider the...

- Who? What? Where? When? Why? How?
  - Personnel matter? Student matter? Criminal matter?
- Impact?
- Is this a formal complaint?
  - Important to take all suspicions, complaints, and allegations seriously.
  - Do not ignore knowledge or notice of offensive behavior due to the lack of a formal complaint.
- Next Steps – Supportive Measures?

# How to conduct an effective investigation

- Utilize one lead investigator who controls the process
  - Avoid “too many cooks in the kitchen”
  - Consider whether non-district investigator necessary
- Is the investigator impartial – i.e. no bias toward complainant or accused?
  - Can he/she review complaint free of any pre-judgments/conclusions?
- Review all relevant District policies, Collective Bargaining Agreements, and applicable laws that may dictate process and penalties.
- **Make proper notifications** – Respondent must be provided notice of sufficient details of the allegations against him/her in the case of sexual harassment. 106.45(b)(2). Union? Parents? Law Enforcement? Legal Counsel? Insurance Carrier? NYSED?



# How to conduct an effective investigation



“Sufficient details include the identities of the parties involved in the incident, if known, the conduct allegedly constituting sexual harassment under §106.30, and the date and location of the alleged incident, if known. The written notice must include 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 the grievance process. The written notice must inform the parties that they may have an advisor of their choice, who may be, but is not required to be, an attorney, under paragraph (b)(5)(iv) of this section, and may inspect and review evidence under paragraph (b)(5)(vi) of this section. The written notice must inform the parties of any provision in the recipient’s code of conduct that prohibits knowingly making false statements or knowingly submitting false information during the grievance process.” CFR 106.45(b)(2)

# How to conduct an effective investigation

- Identify witnesses – request each interviewee to provide names of additional persons that may have information **relevant** to your investigation.
- Preserve relevant evidence or evidence that has probative value.
  - Generally, evidence is relevant if it could be used to prove or disprove a fact and such fact is of consequence when determining the action.
- Obtain **written** statements wherever possible
  - Signed and dated
- Advise all parties of their right to have a representative present during interviews (students may wish to have a parent or other representative present)
- Equal opportunity must be given for all parties (including the accused) to present witnesses and other evidence throughout process, as well as to inspect and respond to evidence presented by the other party.

# How to conduct an effective investigation

- Interview complainant first and **as soon as possible** after the precipitating incident/submission of the complaint.
- Interview *known* witnesses next.
- In most cases, it is best to interview the accused last and after you have obtained all relevant information which will form the basis of your questions for him/her.
- May need to do follow-up interviews with the complainant and others after the interview with the accused, however. There is no “one size fits all” approach to investigations, but consider timelines, etc.

# Decision Maker

- Role is to determine whether district policy has been violated based on the **“preponderance of the evidence” standard**.
- Ask – does the evidence support the conclusion that it is **more likely than not** that the respondent engaged in the conduct alleged?
- Make determination based on the investigation report in most cases, but must hold hearing in the case of allegations arising from student or staff participation in/relation to adult workforce development/career training programs.
  - Hearing process dictated by Policy
  - Where hearing required, each party will have an equal opportunity through its advisor to ask the other party and any witnesses all relevant questions and follow-up questions, including those challenging credibility, before a determination regarding responsibility is issued.
- Create a written determination with findings of fact, conclusions and rationale for the results to each allegation in the complaint, and information on how to appeal.
- If appropriate, the decision maker will recommend disciplinary action and remedies if policy violation found.

# Decision Maker Typical Process

- Following the parties' receipt of the investigative report and following a 10-day review period, the decision maker must afford each party an opportunity to submit written, relevant questions that a party wants asked of any party or witness, provide each party with the answers, and allow for additional, limited follow-up questions from each party. No determination of responsibility may be made until an opportunity for cross-examination is given.
- Cross-examination questions must provide rape shield protections 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.
  - Remember the rule restricting access to confidential medical records without voluntary consent.
- Written determination sent simultaneously to complainant and respondent.

# Decision Maker for Appeal



Makes a determination on a party's request for an appeal of the initial determination of the decision maker.

Three grounds for appeal articulated in the regulations, which must be made available equally to both parties:

1. procedural irregularity that affected the outcome of the matter; and/or
2. newly discovered evidence that could affect the outcome of the matter; and/or
3. Title IX personnel had a conflict of interest or bias, that affected the outcome of the matter.

# Informal Resolution

- Under the new regulations, schools may offer and facilitate an informal resolution option (mediation or restorative justice) so long as both parties give voluntary, informed, written consent to attempt informal resolution.
  - Cannot conduct an informal resolution process unless a formal complaint is filed.
  - Any party may withdraw consent to an informal resolution process prior to agreeing to a resolution and resume the grievance process with respect to a formal complaint.
  - Schools must not offer or facilitate an informal resolution process to resolve allegations that an employee sexually harassed a student.

# Retaliation

- Amended Title IX expressly prohibits retaliation.
- Charging an individual with code of conduct violations that do not involve sexual harassment but arise out of the same facts or circumstances as a report or formal complaint of sexual harassment, for the purpose of interfering with any right or privilege secured by Title IX constitutes retaliation.
- The school must keep confidential the identity of complainants, respondents, and witnesses, except as may be permitted by FERPA, as required by law, or as necessary to carry out a Title IX proceeding.
- Complaints alleging retaliation may be filed according to a school's prompt and equitable grievance procedures.
- The exercise of rights protected under the First Amendment does not constitute retaliation.
- Charging an individual with a code of conduct violation for making a materially false statement in bad faith in the course of a Title IX grievance proceeding does not constitute retaliation; however, a determination regarding responsibility, alone, is not sufficient to conclude that any party made a bad faith materially false statement.



Questions?