

A vertical strip on the left side of the slide shows a nighttime cityscape of Washington, D.C., featuring several illuminated skyscrapers and a highway with light trails at the bottom.

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What is Title IX? An Overview of New Title IX Regulations

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Monica Skanes & Susan DiDonato
Questar III Professional Development

AGENDA

1. Title IX and role of school district policies
2. Basic requirements for school districts to be prepared to address complaints under Title IX
3. Sexual harassment under Title IX, and how it differs from DASA and NY law
4. Reports, complaints and Formal Complaints under Title IX – and responses to each
5. Interplay of Title IX and other board policies

AGENDA

6. Other requirements
7. Overview of what anyone in the process needs to know
8. Overview of what decisionmakers need to know
9. Overview of what investigators need to know
10. Pending litigation

TITLE IX AND ROLE OF SCHOOL DISTRICT POLICIES

What is Title IX?

- Title IX of the federal Education Amendments of 1972 (“Title IX”) states that:
 - “No person in the United States on the basis of sex shall be excluded from participation in, be denied benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.” 20 U.S. Code §1681
- Title IX protects students, employees, applicants for admission and employment, and other persons from all forms of sex discrimination, including discrimination based on gender identity or failure to conform to stereotypical notions of masculinity or femininity.
- Title IX is enforced jointly by the Office for Civil Rights in the US Department of Education and the US Department of Justice.

New Regulations

- May 2020: Title IX regulations are amended to specify that sexual harassment is a form of discrimination based upon sex under Title IX.
 - Regulations include more limited definition of sexual harassment.
 - Regulations specify how elementary and secondary schools, among other institutions, must respond to allegations of sexual harassment in educational programs or activities.
- Effective: August 14, 2020.

Overview of Obligations under Title IX Regulations

- School District must:
 - Not act in a manner that is deliberately indifferent to sexual harassment of which the District has actual knowledge;
 - Designate at least one Title IX Coordinator to address sex discrimination including sexual harassment;
 - Disseminate the District's non-discrimination policy and contact information for the Title IX Coordinator;
 - Respond promptly and supportively to persons alleged to be victimized by sexual harassment;
 - Resolve allegations of sexual harassment promptly and accurately under a fair grievance process that provides due process protections to alleged victims and alleged perpetrators of sexual harassment;
 - Prohibit retaliation; and
 - Effectively implement remedies for victims.

Role of Board Policies

- Nondiscrimination policy.
- Policy prohibiting sexual harassment of students, employees, and others as required by the New York Human Rights Law and DASA – and process for reports and complaints.
- What's New: Policy to address the process for handling Formal Complaints made under Title IX – under Title IX this is called a “grievance process.”

Review of Board Policies

- District policies that could address sexual harassment now:
 - Policy prohibiting harassment of students under the Dignity for All Students Act.
 - Code of Conduct Policy.
 - Policies proclaiming nondiscrimination against students and/or employees and applicants for employment.
 - Policy prohibiting sexual harassment of employees, interns, and independent contractors under the NY Human Rights Law.
- Coordinate existing policies – to make certain that if a Formal Complaint is filed under the Title IX policy, it must be handled in accordance with the process under that policy and not under any other policy.
- Consider how principals, Dignity Act Coordinators, Human Resources personnel, and the Title IX Coordinator need to communicate among themselves regarding reports of sexual harassment.

What Must a Title IX Policy Include?

A Title IX policy must include the following:

- Description of the role of the Title IX Coordinator.
- Definition of sexual harassment for purposes of Title IX and a description of when a Formal Complaint can be filed.
- Process for responding to a “Formal Complaint” (grievance process) that complies with Title IX regulations, including appeals.
- Requirement that the Title IX Coordinator, investigators, decision-makers receive training as required by Title IX.
- Description of the potential sanctions to be imposed upon a harasser where there is a determination that a complainant has been sexually harassed.
- State the evidentiary standard to be used in all cases: “clear and convincing” or “preponderance of evidence.”

**BASIC REQUIREMENTS FOR SCHOOL
DISTRICTS TO BE PREPARED TO
ADDRESS COMPLAINTS UNDER
TITLE IX**

What terms are used in the Title IX regulations that we should know?

- 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.
- District – Any educational institution receiving federal funding. This includes public school districts.
- Title IX Coordinator – An employee designated by the district to coordinate the district's efforts to comply with Title IX responsibilities.
- Grievance Process – Procedures that provide for the prompt and equitable resolution of student and employee complaints alleging any action prohibited by Title IX. It must comply with the new regulations for formal complaints.

Obligation to “not acting deliberately indifferent” to sexual harassment of which it has “actual knowledge”

- “Not acting deliberately indifferent” =
 - A district would be acting indifferently if its response to sexual harassment is clearly unreasonable in light of the known circumstances. Examples include:
 - it failed to have a process for responding to a formal complaint or it failed to comply with its process.
 - If it failed to offer supportive measures to the complainant whether or not a Formal Complaint is filed (or to the respondent when a Formal Complaint is filed).
- “Actual knowledge” =
 - Notice of sexual harassment or allegations of sexual harassment to a district’s Title IX Coordinator or to any employee of the elementary or secondary school.
 - Coordination among compliance officers is key.

Obligation to Designate a Title IX Coordinator

- The Board of Education may designate any employee to serve as the Title IX Coordinator, provided that the individual:
 - Understands (or is trained to understand) the responsibilities of the position;
 - Can have the time to undertake those responsibilities – consider what other responsibilities individual already has;
 - Has the support of the highest level of the organization to fulfill the responsibilities; and
 - Understands what supportive measures are and could be made available in the event a report or complaint is filed.
- There may be other things to consider – for example, does the individual have the skills to effectively communicate with students, parents, and staff members?

What training must the Title IX Coordinator and others have?

- The Title IX regulations require the Title IX Coordinator, investigators, decision-makers, and any person who facilitates an informal resolution process receive training on:
 - The definition of sexual harassment under Title IX regulations.
 - The scope of the District's education program or activity.
 - How to conduct an investigation.
 - How to conduct the grievance process, including hearings, appeals, informal resolution process, as applicable.
 - How to maintain impartiality.
 - How to avoid pre-judgement of facts at issue, conflicts of interest, and bias.

What other training requirements apply?

- Decision makers must also receive training on:
 - How to use any technology that is employed during the process.
 - What evidence and questions are relevant during the investigation (including when questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant).
- Investigators must also receive training on:
 - What evidence is relevant for purposes of making an investigation report that fairly summarizes the evidence.
- Training materials must not rely on sex stereotypes and must promote impartial investigations and adjudications of formal complaints of sexual harassment.
- The District must maintain documentation of the training, including training materials, for at least seven years.
- Additionally, the District is required to post on its website training materials used in the training. The materials provided to you today can be posted on the District's website.

Disseminate the District's non-discrimination policy and contact information for the Title IX Coordinator

- Must provide notice to students, parents/guardians, employees and applicants for employment, and union representatives, including on the district's website, student handbooks, and employee handbooks:
 - the name, physical address, email address, phone number of Title IX Coordinator;
 - notice of the District's policy implementing Title IX;
 - that the district does not discriminate on the basis of sex in the education program or activities as required by Title IX;
 - that reports of sexual harassment or suspected sexual harassment can be made by anyone in person, by mail, by email, or by any other means that results in the Title IX Coordinator receiving the person's verbal or written report; and
 - that reports can be made at any time – not just during business hours and that inquiries about the application of Title IX may be referred to the District's Title IX Coordinator and/or to the USDOE Assistant Secretary.

**SEXUAL HARASSMENT UNDER TITLE IX,
AND HOW IT DIFFERS FROM DASA AND
THE NEW YORK HUMAN RIGHTS LAW**

Definition of Sexual Harassment under Title IX

For Title IX purposes, the definition of Sexual Harassment is conduct on the basis of sex that satisfies one or more of the following:

- (1) An employee of the district conditioning the provision of an aid, benefit, or service of the district on an individual's participation in unwelcome sexual conduct;
- (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 district's education program or activity; or
- (3) "Sexual assault" as defined in 20 U.S.C. 1092(f)(6)(A)(v), "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).

What does “conduct on the basis of sex” mean?

- Conduct of a sexual nature.
- Conduct that is undertaken due to the sex of the person who is the subject of the conduct.
- Can be verbal, nonverbal, physical conduct.

“Quid Pro Quo”

Examples of a District employee conditioning the provision of an aid, benefit, or service of the District on an individual’s participation in unwelcome sexual conduct (“Quid Pro Quo”):

- Example 1: Teacher or administrator promises student a better grade or access to an extracurricular activity in return for sexual favors.
- Example 2: Supervisor threatens to render an unfavorable performance evaluation for an employee unless the employee enters a sexual relationship with the supervisor.

Severe, Pervasive, Objectively Offensive Unwelcome Conduct

What does “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 district’s education program or activity” mean?

- Unwelcome conduct – of a sexual nature or other unwelcome conduct on the basis of sex. May be verbal; nonverbal; physical
- Reasonable person standard – Not overly sensitive person
- Severe, pervasive and objectively offensive
 - Severity – serious versus trivial, annoying, offensive
 - Pervasive – when, where, how often; more severe the behavior less often it needs to occur
 - Objectively offensive- distinguished from mere opinion
- That it effectively denies a person equal access to the district’s education program or activity – For students, would effectively deny equal access to an education program or activity. For employees, would effectively make employee unable to perform job duties.

How did the New Regulations Change the Definition of Sexual Harassment for Title IX Purposes?

Previous Definition from Court Decisions and Dear Colleague Letters	New Definition in Title IX Regulations
Unwelcome conduct	Unwelcome conduct
Determined by the reasonable person standard	Determined by the reasonable person standard
To be severe, pervasive, or persistent and to interfere with or limit a student's ability to participate in or benefit from school services, activities, or opportunities.	To be so severe, pervasive, and objectively offensive that it effectively denies a person's equal access to the district's education program or activity.

Sexual Assault, Dating Violence, Domestic Violence and Stalking

- The Title IX regulations draw upon definitions of these terms found in federal law applicable to institutions of higher education.
- For purposes of Title IX, the regulations deemed these behaviors or actions to be so severe that they are deemed sexual harassment, without analysis as to whether they are severe, pervasive and objectively offensive.

Sexual Assault

- The term “sexual assault” means an offense classified as a forcible or nonforcible sex offense under the FBI’s uniform crime reporting system:
- Forcible Sexual Offenses:
 - Forcible Rape (Except Statutory Rape) – The carnal knowledge of a person, forcibly and/or against that person’s will or not forcibly or against the person’s will in instances where the victim is incapable of giving consent because of his/her temporary or permanent mental or physical incapacity.
 - Forcible Sodomy – Oral or anal sexual intercourse with another person, forcibly and/or against that person’s will or not forcibly or against the person’s will in instances where the victim is incapable of giving consent because of his/her youth or because of his/her temporary or permanent mental or physical incapacity.
 - Sexual Assault With An Object – To use an object or instrument to unlawfully penetrate, however slightly, the genital or anal opening of the body of another person, forcibly and/or against that person’s will or not forcibly or against the person’s will in instances where the victim is incapable of giving consent because of his/her youth or because of his/her temporary or permanent mental or physical incapacity.
 - Forcible Fondling – The touching of the private body parts of another person for the purpose of sexual gratification, forcibly and/or against that person’s will or not forcibly or against the person’s will in instances where the victim is incapable of giving consent because of his/her youth or because of his/her temporary or permanent mental or physical incapacity.
- Nonforcible Sexual Offenses:
 - Incest: Nonforcible sexual intercourse between persons who are related to each other within the degrees wherein marriage is prohibited by law.
 - Statutory Rape: Nonforcible sexual intercourse with a person who is under the statutory age of consent.

Dating Violence

- The term “dating violence” means violence committed by a person:
 - who is or has been in a social relationship of a romantic or intimate nature with the victim; and
 - where the existence of such a relationship shall be determined based on a consideration of the following factors:
 - the length of the relationship
 - the type of relationship, and
 - the frequency of interaction between the persons involved in the relationship.

Domestic Violence

- The term “domestic violence” includes felony or misdemeanor crimes of violence committed by:
 - a current or former spouse or intimate partner of the victim,
 - a person with whom the victim shares a child in common,
 - a person who is cohabitating with or has cohabitated with the victim as a spouse or intimate partner,
 - a person similarly situated to a spouse of the victim under the domestic or family violence laws of the jurisdiction receiving grant monies, or
 - by any other person against an adult or youth victim who is protected from that person’s acts under the domestic or family violence laws of the jurisdiction.

Stalking

- The term “stalking” means engaging in a course of conduct directed at a specific person that would cause a reasonable person to:
 - fear for his or her safety or the safety of others; or
 - suffer substantial emotional distress

Sexual Harassment

Title IX vs. DASA / NYS HRL

- How does the definition of sexual harassment under Title IX differ from the definitions under DASA and New York Human Rights Law?
 - Title IX definition is more limited.
- However, conduct that does not meet the Title IX definition may be violative of DASA, the NY Human Rights Law, and/or a district's Code of Conduct.
- Not all complaints of sexual harassment will become Formal Title IX Complaints.
- Consult definitions in district policies.

Sexual Harassment – Title IX vs. DASA / NYS HRL

Dignity for All Students Act ¹	NY Human Rights Law ²	Title IX ³
<p>Prohibits harassment, bullying and/or discrimination against a student by another student or employee on the basis of actual or perceived sexual orientation; gender; or sex. That creates a hostile school environment by conduct or by threats, intimidation or abuse that</p> <p>Would reasonably cause emotional harm <u>or</u> reasonably causes or would reasonably be expected to cause physical injury to a student or to cause a student to fear for his or her physical safety.</p>	<p>Unlawful discrimination practices:</p> <p>For an educational institution (including public school districts) to permit harassment of any student by reason of the student’s sexual orientation, gender identity or expression, or sex.</p> <p>For an employer to discriminate against applicants or employees because of an individual’s sexual orientation, gender identity or expression, or sex.</p> <p>For an employer to harass individual based on sexual orientation, gender identity or expression, sex (provided that the harassing conduct does not rise above level of what a reasonable victim of discrimination with the same protected characteristic would consider petty slights or trivial inconveniences.</p>	<p>Conduct on the basis of sex:</p> <p>An employee conditioning the provision of an aid, benefit, or service of the institution on an individual’s participation in unwelcome sexual conduct (quid pro quo); or</p> <p>Unwelcome conduct (unwelcome conduct of a sexual nature or other unwelcome conduct on the basis of sex)that is so severe, pervasive, and objectively offensive that it effectively denies a person equal access to education program or activity; or</p> <p>Sexual Assault, dating violence, domestic violence, stalking.</p>
<p>On school property; at school function; or off school property where acts create or would reasonably create substantial disruption to the school environment</p>		<p>In an educational program or activity of the institution (includes locations, events, or circumstances over which the institution exercised substantial control over both the alleged harasser and the context in which the sexual harassment occurs; any building owner or controlled by a student organization officially recognized by the of</p>

¹ Education Law, § 11(8); 8 NYCRR § 100.2(l)(2)(ii)(b)

² Executive Law, Article 15

³ 34 CFR Part 106.30

**REPORTS, COMPLAINTS AND FORMAL
COMPLAINTS UNDER TITLE IX – AND
RESPONSES TO EACH**

Sexual Harassment

Report vs. Complaint vs. Formal Complaint

What is the difference between a report of sexual harassment, a complaint of sexual harassment, and a Formal Complaint of sexual harassment under Title IX?

- Sexual Harassment: Anyone – not just the victim – can make a report of sexual harassment.
- Formal Complaint: The complaint must be made by the victim (or victim's parent) under the Title IX policy, after consultation with the Title IX Coordinator.
- Both: Reports of sexual harassment can be made in person, by mail, by telephone, or by email to the Title IX Coordinator.

What are the district's responsibilities to respond to reports of sexual harassment under Title IX?

- Respond promptly if it has:
 - actual knowledge
 - of sexual harassment
 - in an education program or activity of the district
 - against a person in the United States.
- Not be deliberately indifferent, or “clearly unreasonable in light of the known circumstances.”
- Contact the complainant and offer Supportive Measures
 - considering the complainants wishes.
- Inform the complainant of the availability of Supportive Measures whether or not a Formal Complaint is filed.
- Explain the process for filing a Formal Complaint.

Obligation to not act “deliberately indifferent”

“Deliberately indifferent”

- response to sexual harassment is clearly unreasonable in light of the known circumstances.
- Examples include:
 - Failing to comply with the Title IX Grievance Policy.
 - Ignoring a complaint.
 - Failing to offer supportive measures to the complainant whether or not a Formal Complaint is filed (or to the respondent when a Formal Complaint is filed).

Obligation to act when the District has “actual knowledge”

- What is “actual knowledge”?
 - Notice of sexual harassment or allegations of sexual harassment to the Title IX Coordinator or to ANY District employee.
 - Under the new rules, all students can report sexual harassment to ANY school employee to trigger the District’s obligation to respond.
 - NOTE: This includes counselors, and other employees who might not typically be expected to have an obligation to report, such as bus drivers, cafeteria workers, maintenance staff workers, etc.
 - This expanded definition of actual knowledge in elementary and secondary schools gives all students, including those with disabilities who may face challenges communicating, a wide pool of trusted employees of elementary and secondary schools (i.e., any employee) to whom the student can report.

What are the district's responsibilities to respond to reports of sexual harassment under Title IX?

- If a Formal Title IX Complaint is filed, the district must respond by following its Title IX policy.
- If no Formal Title IX Complaint is filed, the district can still conduct an investigation and impose discipline other district policies, including:
 - Code of Conduct
 - Sexual Harassment policy
 - DASA policy
- Some level of investigation or inquiry will be required if the allegations would constitute sexual harassment if true.

What are Supportive Measures?

- Non-disciplinary, non-punitive individualized services offered as appropriate and reasonably available without charge or fee.
- Supportive measures must be offered to a complainant even if a Formal Complaint is not filed. Supportive measures must be offered to the complainant and respondent if a Formal Complaint is filed.
- Supportive measures are designed to restore or preserve equal access to the district's education program or activity without burdening the other party.
- These include measures designed to protect the safety of all parties or the district's educational environment.
- The Title IX Coordinator is responsible for coordinating the effective implementation of supportive measures.

What are Supportive Measures?

- Examples:
 - referrals to counseling
 - modification of work or class schedules
 - modification of transportation
 - increased monitoring of students by school staff
 - extensions of deadlines or other course-related adjustments
 - campus escort services
 - mutual restrictions on contact between the parties (no contact orders)
 - increased security and monitoring of certain areas of the campus

What is a district’s “education program or activities”?

- These would include locations, events, or circumstances over which the District exercised substantial control over both the respondent and the context in which the sexual harassment occurred.
- Note that the conduct must have taken place in the United States. Conduct that took place solely on an international school trip, for instance, would not qualify under Title IX (but could violate other District policies, however).
- For school Districts, educational programs or activities would include:
 - School classrooms
 - School buses
 - School sponsored events such as athletic or other competitions, field trips, clubs sponsored by the school, musical performances
 - Employment, including off-site work-related activities
- Online harassment- will be fact specific, as to whether District exercised substantial control over respondent and context in which sexual harassment occurred.

When is a complaint a Formal Title IX Complaint?

- A complaint should only be considered a Formal Title IX Complaint when:
 - a complainant files and signs a written document alleging sexual harassment against an alleged harasser and requesting that the district investigate the allegation of sexual harassment;
 - the complainant (or the complainant's child) is participating in or attempting to participate in the district's "education programs or activities";
 - the alleged sexual harassment occurred in the district's "education program or activity," within the United States; and
 - the alleged sexual harassment constitutes sexual harassment under the Title IX definition we just discussed.

What if the conduct occurred BEFORE August 14, 2020?

- The preamble to the regulations and Q&A both state that the Title IX regulations are NOT retroactive.
- Accordingly, schools drafted policies that only apply to complaints involving alleged misconduct that occurred after August 14, 2020.
- However, a recent decision by the United States District Court for the Northern District of New York, Doe v. RPI, has called into question whether the Title IX regulations apply to conduct that occurred prior to August 14, 2020 as well.
- As a result, respondents may argue that the new Title IX regulations apply, even if the conduct occurred before the effective date.
- Problem: This may disadvantage the victim.

PROCESS FOR SEXUAL HARASSMENT COMPLAINTS

Verbal
Complaint by
target or third
party

Written complaint by
target or parent
under DASA or other
policy



To DASA Coordinator or Title IX
Coordinator
NEXT STEPS:
Contact target
Document
Supportive Measures if
appropriate
Continue Investigation
Coordinate with Title IX
Coordinator (if report is to DASA
Coordinator or other compliance
officer)



No Title IX Formal Complaint is
Filed
Continue process under district's
applicable policies, including
DASA, Sexual Harassment, Code
of Conduct policies as appropriate

Complainant wants to file a Formal
Title IX Complaint
Title IX Coordinator reviews Title IX
policy and grievance process with
complainant
Complainant signs and files a Formal
Complaint with Title IX Coordinator
STOP process under district's other
policies, including Code of Conduct
and any disciplinary action.
MOVE to district's Title IX policy and
grievance process

Once a Formal Complaint is Filed

- Title IX Coordinator must follow the district's grievance process.
- The Title IX Coordinator must provide notice to the parties.
- The grievance process must comply with the Title IX regulations (106.45).
- No disciplinary action can be taken against the respondent until the grievance process is concluded. (Exception: immediate risk to health and safety.)

Notice of Formal Complaint

- Upon receipt of a Formal Complaint, the district must provide written notice to known parties, that includes:
 - Notice of the grievance process (including informal resolution process).
 - Notice of the allegations – in sufficient details known at the time (identity of the parties, conduct allegedly constituting sexual harassment, dates/times of incident).
 - Include a statement that respondent is presumed not responsible and that a determination of responsibility is made at the conclusion of the grievance process.
 - Notice that parties may have an advisor of their choice (doesn't have to be an attorney).
 - Notice that the parties may inspect and review evidence presented.
 - Notice of any provision in the Code of Conduct that prohibits knowingly making false statements or knowingly submitting false information during the grievance process.

May a district remove a respondent during the investigation?

- For student respondents: If the presence of the respondent at the district poses an immediate risk, the district may remove the respondent provided:
 - (1) the district conducts an individualized safety and risk analysis and determines that removal is necessary to protect the respondent or another individual from an immediate threat to physical health and safety; and
 - (2) the respondent is provided with notice and an opportunity to challenge the decision immediately after removal.
- For employee respondents: The district may place an accused employee on paid administrative leave during the pendency of the investigation and decision-making process.

Mandatory Dismissal of Formal Complaint

- A Formal Complaint **MUST** be dismissed if the conduct alleged in the Formal Complaint
 - would not constitute sexual harassment as defined by Title IX, even if proved;
 - did not occur in the district's education program or activity; or
 - did not occur against a person in the United States.
- **NOTE:** the District can still take action under another board policy if the Formal Complaint is dismissed.

Permissive Dismissal of Formal Complaint

- A district MAY dismiss a Formal Complaint:
 - At any time during investigation where complainant notifies Title IX Coordinator in writing that complainant wants to withdraw the Formal Complaint or any allegations in it;
 - The respondent is no longer enrolled or employed by the district; or
 - Specific circumstances prevent the district from gathering evidence sufficient to reach a determination as to the Formal Complaint or allegations therein.

Notice of Dismissal of Formal Complaint

- Title IX Coordinator must promptly send written notice of dismissal and reason(s) for it to all parties simultaneously.
- This dismissal can be appealed by either party.

The Grievance Process

- Investigations must be conducted by a trained investigator who does not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent.
- The investigator:
 - must make an objective evaluation of relevant evidence, including both inculpatory and exculpatory evidence,
 - may not base credibility determinations on a person's status as a complainant, respondent, or witness, and
 - must not require, allow, rely upon, or otherwise use questions or evidence that constitute, or seek disclosure of, information protected under a legally recognized privilege, unless the person holding such privilege has waived the privilege.

The Grievance Process

- Protections for the respondent:
 - The burden of proof and the burden of gathering evidence sufficient to reach a determination regarding responsibility rests on the district.
 - Investigators must presume that the respondent is not responsible for the alleged conduct until a determination regarding responsibility is made at the end of the grievance process.

The Grievance Process

Protections for both parties:

- The parties must have an equal opportunity to present witnesses, including fact and expert witnesses, and other inculpatory and exculpatory evidence.
- The district cannot restrict the ability of either party to discuss the allegations under investigation or to gather and present relevant evidence.
- The parties have the same opportunities to have others present, including the opportunity to be accompanied to any related meeting or proceeding by the advisor of their choice, who may be, but is not required to be, an attorney.
- The district cannot access, consider, disclose, or otherwise use a party's records that:
 - are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in the professional's or paraprofessional's capacity, or assisting in that capacity, and
 - which are made and maintained in connection with the provision of treatment to the party,
 - unless the district obtains that party's voluntary, written consent to do so.

Confidentiality

- The district must keep confidential the identity of any individual who has made a report, complaint, or Formal Complaint – except as may be required to carry out its responsibilities under Title IX regulations or other law.
- If a Formal Complaint is filed, the respondent will be told who filed the complaint.

Avoiding Pre-Judgement of Facts

- No determination of responsibility until grievance process is complete.
- No presumption that complaint must be true.
- No presumption that respondent is responsible.
- It is the district's responsibility to
 - Treat complainants and respondents equitably.
 - Objectively evaluate all relevant evidence, both inculpatory and exculpatory.
 - Apply any rules adopted equally to the parties.

HOW TO CONDUCT AN INVESTIGATION

General Tips for Conducting an Investigation

- Determine who should be interviewed.
- The complainant/alleged victim, if any, usually should be interviewed first.
- Then interview other witnesses; may include students and/or staff.
- Ask the complainant/alleged victim and each witness, “is there anyone else you think I should speak to?”
- Usually, the alleged perpetrator should be interviewed last.

Notice of Interviews

- Complainants and respondents in a Title IX investigation must be provided prior written notice of any meeting or interview, and provided the opportunity to present evidence.
- Written notice must include the date, time, location, participants, and the purpose of the investigative interviews or other meetings. Parties must be given sufficient time to prepare.

General Tips for Conducting an Investigation

- Don't ask witnesses to prepare written statements, instead of conducting interviews.
 - Not admissible in a student disciplinary proceeding, unless the witness testifies.
 - It's up to you, not the witnesses, to know what information is relevant and needs to be captured.

General Tips for Conducting an Investigation

- Don't ask leading questions.
 - Example:
 - Leading: Did Mark Jones put his hands on your breasts when you were alone with him after class on Tuesday?
 - Non-leading: When you stayed after school on Tuesday, did anyone do or say anything to you which made you feel uncomfortable?

General Tips for Conducting an Investigation

- Distinguish between personal knowledge and hearsay.
- Focus on what each witness heard and/or saw, and what each witness said or did.
- Gather the facts, not opinions or conclusions, from each witness.
- Get answers to the “wh” questions – who, what, where, when, why?
- Hearsay reports may be appropriate for follow-up with other witnesses.

General Tips for Conducting an Investigation

- Consider what, if any, paper or electronic documents you might need to review as part of the investigation.
 - Ex: Prior student disciplinary history; email trails or other correspondence; social media.
- Consider what, if any, physical evidence you might need to collect and preserve.
- In some cases, you may need to coordinate the collection and preservation of evidence with law enforcement.

Electronic Evidence

- Is it on the school's computer system?
- Is it on someone's personal electronic device?
- Or both?

Electronic Evidence

- Do: Happily accept electronic evidence supplied to you by a third party, such as a parent, or a student.
- Do: Consult with IT staff as to how to best preserve the electronic evidence.
- Don't: Simply take a screenshot or print a photocopy of the electronic evidence, and then assume you are done. This approach may create evidentiary problems in a case when the student and parent have “lawyered up” and will aggressively challenge the evidence.
- Don't: Circumvent password protections or privacy settings on personal sites/devices.

Searches of the District's Electronic Network

- Anything on the District's computer network is fair game and may be searched for any reason.
 - Random
 - Spot-check
 - Other
- Students and parents are, or should be, on notice of the District's right to search electronic communications and internet use on the District's network.
 - E.g. Policy No. 4526-R & 4526.1-R

Searches of a Student's Personal Electronic Devices

- Standard is the same as for any other search of student belongings in school.
- The search must be:
 - justified at the inception;
and
 - reasonable in scope.

What is Relevant Evidence?

- “Relevant” evidence is evidence that tends to make an allegation of sexual harassment more or less likely to be true.
- “Relevant” questions are questions that solicit information that tends to make an allegation of sexual harassment more or less likely to be true.
 - For example, an email from respondent asking complainant to meet on the date the alleged sexual harassment occurred could be relevant evidence. An email from a student to the respondent inquiring about a class assignment may not be relevant.

What is NOT Relevant Evidence?

- Evidence and questions about the complainant's sexual predisposition or prior sexual behavior unless:
 - They are offered to provide that someone other than the respondent committed the conduct alleged; or
 - They concern specific incidents of the complainant's prior sexual behavior with respect to the respondent and are offered to prove consent.
- Evidence that is privileged material cannot be obtained or used unless the individual holding the privilege provides written consent. For example, medical records; records subject to attorney/client privilege.

Standards of Evidence

- What is the difference between “clear and convincing” and “preponderance of the evidence?”
- The Title IX regulations require districts to use one of two standards when making determinations regarding Formal Complaints. The choice of standard should be stated in the District’s policy. The choice of standard must be used consistently (that is, can’t choose one standard for one complaint and other standard for another complaint).
- The standards are:
 - Clear and convincing evidence – evidence shows that particular fact is substantially more likely than not to be true. The fact finder must be convinced that it’s highly probable that the events alleged occurred.
 - Preponderance of the evidence – evidence shows that a particular fact or event was more likely than not to have occurred. Some scholars define the preponderance of the evidence standard as requiring a finding that at least 51 percent of the evidence favors the plaintiff’s outcome. This is a lesser standard of evidence than “clear and convincing” evidence.

Investigative Report

- Once the investigation is complete, the investigator must create an investigative report that fairly summarizes relevant evidence.
- Must be given to parties no less than 10 days before a determination is made.
- Must fairly summarize relevant evidence.
- Identify the standard of evidence and how it was applied to relevant evidence.

Steps Before the Investigative Report is Finalized

Prior to the completion of the report:

- Both parties must be provided with an equal opportunity to inspect and review any evidence obtained as part of the investigation that is directly related to the allegations raised in a Formal Title IX Complaint, including:
 - the evidence that the investigator does not intend to rely upon in reaching a determination regarding responsibility;
 - inculpatory or exculpatory evidence whether obtained from a party or other source, so that each party can meaningfully respond to the evidence prior to the conclusion of the investigation; and
 - the district must send the evidence for inspection and review to each party and the party's advisor, if any, in an electronic format or a hard copy.
- The parties must have at least 10 days to submit a written response to the evidence, which the investigator will consider prior to completion of the investigative report.

Steps Before the Responsibility Determination is Made

- At least 10 days prior to the time of determination regarding responsibility, the district must send the investigative report to each party and the party's advisor, if any, in an electronic format or a hard copy, for their review and written response.
- Once the investigative report is sent to the parties, and before reaching a determination regarding responsibility, the decision-maker must afford each party the 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.

Evidence Excluded from Investigation and Written Questions

- Questions and evidence about the complainant's sexual predisposition or prior sexual behavior cannot be considered as relevant, unless such questions and evidence:
 - are offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or
 - concern complainant's prior sexual behavior with respect to the respondent and are offered to prove consent.
- The decision-maker(s) must explain to the party proposing the questions any decision to exclude a question as not relevant.

Determination of Responsibility

- Once the investigation report is sent to the parties, the investigator must refer the report to a designated decision maker who:
 - is not same person as the investigator, Title IX Coordinator, or the decision-maker for an appeal; and
 - has received the appropriate Title IX Training.
- The decision maker must issue a written determination regarding responsibility.
- Must apply the standard of evidence adopted by the district
- K-12 districts: no hearing required under Title IX, however Education Law 3214 would require a hearing to impose more than 5 day suspension.

Written Determination

- Written determination must include:
 - Identification of allegations potentially constituting sexual harassment;
 - Description of the procedural steps taken from the receipt of the Formal Complaint through the determination (including notifications to the parties, interviews with parties and witnesses, site visits, and methods used to gather other evidence);
 - Findings of fact supporting the determination;
 - Conclusions regarding the application of the Code of Conduct to the facts;
 - The result, and rationale for the result, as to each allegation; including:
 - a determination regarding responsibility,
 - any disciplinary sanctions the district imposes on the respondent, and
 - whether remedies designed to restore or preserve equal access to the district's education program or activity will be provided by the district to the complainant; and
 - District's procedures and permissible bases for the complainant and respondent to appeal.

Notice of the Determination of Responsibility

- The district must provide the written determination to the parties simultaneously
- The determination becomes final:
 - If no appeal is filed, after the period for filing an appeal expires; or
 - If an appeal is filed, on the date the district provides the parties with the written determination of the appeal.

Disciplining Student Respondents

- Disciplinary sanctions can be imposed once the determination of responsibility is made.
- Must be consistent with the Code of Conduct, and comply with Education Law.
- In New York, disciplinary sanctions of greater than 5 days suspension from school cannot be imposed unless there is a disciplinary hearing under Education Law section 3214.
- If the decision maker believes a long-term suspension may be warranted, the decision maker should refer the matter for a Superintendent's hearing to determine whether a harsher penalty may be warranted.
- During the hearing, remember relevance rules.

Disciplining Employee Respondents

- Disciplinary sanctions can be imposed once a determination of responsibility is made.
- However, must comply with collective bargaining agreements, the Education Law, and the Civil Service Law.
- For example, for teachers, cannot impose discipline until Education Law 3020-a hearing is completed.

Appeals

- District must offer both parties an appeal from:
 - a determination regarding responsibility; or
 - from a district’s dismissal of a Formal Complaint or any allegations in the Formal Complaint.
- Required bases for appeal :
 - A procedural irregularity affected the outcome of the matter;
 - New evidence is presented that was not reasonably available at the time the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter; or
 - The Title IX Coordinator, investigator(s), or decision-maker(s) had a conflict of interest or bias for or against complainants or respondents generally or the individual complainant or respondent that affected the outcome of the matter.

Appeals

- Decision-maker of the appeal:
 - must have received the appropriate Title IX training, and
 - cannot be the same person who made the determination of responsibility or dismissal, the investigator(s), or the Title IX Coordinator.
- The decision-maker must:
 - notify the other party in writing when an appeal is filed and implement appeal procedures equally for both parties;
 - give both parties a reasonable, equal opportunity to submit a written statement in support of, or challenging, the outcome;
 - issue a written decision describing the result of the appeal and the rationale for the result; and
 - provide the written decision simultaneously to both parties within 30 days of receiving the appeal.

Informal Resolution of Formal Complaint

- District may facilitate an informal resolution process at any time before a determination of responsibility is made.
- Provided that the district:
 - provides written notice disclosing various information (the allegations, the informal process, any consequences resulting from participating in the informal process including records to be maintained or share);
 - obtains the parties' voluntary, written consent to participate; and
 - cannot offer or facilitate informal resolution to resolve allegations that an employee sexually harassed a student.
- District cannot require as a condition of enrollment, continuing enrollment, employment, continuing employment, or enjoyment of any other right, waiver of the right to an investigation and determination of Formal Complaint under the grievance process.
- District cannot require that parties participate in informal resolution process.

INTERPLAY OF TITLE IX AND OTHER BOARD POLICIES

Other Board Policies that Could Address Sexual Harassment

- Bullying and harassment policy (Dignity for All Students Act)
- Sexual harassment of employees, students, and certain non-employees (NYS Human Rights Law)
- Anti discrimination policy (Title IX; Title VII)
- Code of Conduct (NY Education Law § 2801)

What do These Policies Have in Common? Or Not?

In Common:

- Address reports and complaints promptly and thoroughly
- Investigations
- Reports
- May allow for informal resolutions
- Potential Disciplinary Actions

Differ:

- No disciplinary process under Title IX until grievance process is complete
- Heightened need for written notices, documentation and training
- Supportive Measures are not “interim”
- Limitations emergency removal of respondent

OTHER REQUIREMENTS

Maintaining Records – Keep Everything!

- Records relating to each sexual harassment investigation must be maintained for 7 years in a secure location. These include:
 - The report, complaint and/or Formal Complaint.
 - Copies of all notices and correspondence to/from parties.
 - Actions taken by the Title IX Coordinator regarding the report – contact with the alleged victim (complainant); supportive measures offered (or explanation why none offered or provided).
 - Record of conversation with the complainant about the grievance process.
 - Record of emergency removal, where applicable, including individualized safety and risk analysis.
 - Summaries of all interviews of complainant, respondent, and witnesses.
 - All documents and other records submitted during the investigation including:
 - Investigation report and findings;
 - Determination of responsibility;
 - Appeals; and
 - Informal resolution.
- Also keep:
 - Copies of all training materials, policies, designations of Title IX Coordinator(s).

Avoiding Conflicts of Interest and Bias

- Title IX Coordinators, investigators, decisionmakers, and persons who facilitate informal resolutions must be free from conflicts of interest and bias, and must be trained to serve impartially without prejudging the facts at issue.
- Forms of bias on the part of individuals in charge of investigating and adjudicating allegations lessen the likelihood that outcomes are reliable and viewed as legitimate.
- Must be free from bias against complainants or respondents generally, or against an individual complainant or respondent.
- No presumption of responsibility until the conclusion of the grievance process.
- Although the decision-maker must be different from any individual serving as a Title IX Coordinator or investigator, pursuant to § 106.45(b)(7)(i), the final regulations do not preclude a Title IX Coordinator from also serving as the investigator, and the final regulations do not prescribe any particular administrative “chain of reporting” restrictions or declare any such administrative arrangements to be per se conflicts of interest prohibited under § 106.45(b)(1)(iii).
- Training materials must not rely on sex stereotypes.
- Potential conflicts of interest of bias?
 - Statements indicating bias or stereotypes.
 - Advocacy that could be seen as predisposing individual to prejudging facts at issue or favoring position of particular party.

Avoiding Conflicts of Interest and Bias

- Treat parties equally
- Do not rely on stereotypes as to how males, females should act based upon sex
- Avoid making decisions based upon characteristics of the parties – stick to the facts

No Retaliation!

- Retaliation is itself a violation of Title IX.
- Title IX regulations:
 - Prohibit intimidation, threats, discrimination against individual exercising rights under Title IX, making report or complaint, participating in the grievance process.
 - Prohibit charges against an individual for code of conduct violations not involving harassment or discrimination on basis of sex, but arise out of the same circumstances as report of complaint of sexual harassment “for the purpose of interfering” with rights under Title IX.
- To avoid retaliation claims, include in policy and in written notice(s) of allegations that even if respondent is not found guilty of the allegations for Title IX purposes, conduct could violate other district policies such as the Code of Conduct, DASA policies, sexual harassment policy.

Review: What Anyone in the Process Needs to Know

- Understanding of Title IX responsibilities.
- Understanding the grievance process.
- How to serve impartially, avoiding prejudgment of facts.
- Avoiding conflicts of interest and bias.
- How to conduct an investigation.
- Documentation requirements and records retention.

Review: What Decisionmakers Need to Know

- Understanding of Title IX definition of sexual harassment.
- Understanding relevance of questions and evidence.
- Technology to be used during investigation, hearing.

Review: What Investigators Need to Know

- Understanding of Title IX definition of sexual harassment.
- Understanding relevance of questions and evidence.
- Technology to be used during investigation, hearing.
- How to create an investigative report that fairly summarizes relevant evidence.

Questions?



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