



Oneida-Herkimer-Madison BOCES

Title IX – Training

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Title IX

- Title IX is a Federal law that protects people from discrimination on the basis of sex in educational programs/providers that receive federal funds.
- Law states: “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 education program or activity receiving Federal financial assistance”.

Title IX

- In May of 2020 the federal regulations governing Title IX were amended.
 - New regulations contain a new narrow definition of sexual harassment
 - New regulations modify the due process afforded to students
 - New regulations modify protections for accused and alleged victims
 - New regulations contain specific training requirements

Title IX

- Training provided must promote **impartial** investigations and **impartial** adjudication of formal complaints
- Respondent is presumed not responsible throughout process until final determination of responsibility is made, or if appealed, until appeal is final.

Training

- Title IX Coordinators, investigators, decision makers and any person who facilitates an informal resolution process must receive training on:
 - Definition of sexual harassment
 - Scope of the district's education program or activity

Training

- How to conduct an investigation and grievance process including:
 - Hearings
 - Appeals
 - Informal resolution processes
- How to serve impartially including
 - Avoiding prejudgment of facts/issues
 - Conflicts of interest
 - Bias

Training

- How to use technology in a live hearing and how to record a live hearing
- How to determine issues of relevance, including when questions and/or evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant
 - Relevant ONLY when evidence/questions are offered to prove that someone other than respondent committed the offense alleged; or
 - Are offered to prove complainant's consent

Title IX - definitions

- Definition of sexual harassment is conduct on the basis of sex that satisfies one or more of the following:
 - 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;

Title IX - definitions

- Unwelcome conduct determined by a reasonable person to be so severe, pervasive **and** objectively offensive that it effectively denies a person's equal access to the recipient's education program or activity; or
- “sexual assault”, “dating violence”, “domestic violence” or “stalking

Title IX – definitions

- Narrow definition of “actual knowledge”
 - Notice of sexual harassment or allegations of sexual harassment to your Title IX coordinator or any official who has the authority to institute corrective measures
 - Imputation of knowledge based solely on vicarious liability or constructive notice is insufficient to constitute actual knowledge

Actual Knowledge

- If a school has actual knowledge of sexual harassment against a person in a program or activity it must respond promptly and in a manner that is not deliberately indifferent

Deliberate indifference

- Deliberate indifference in the regulations means:
 - A failure to respond reasonably in light of known circumstances
 - Remedial action only follows after lengthy and unjustified delay

Supportive Measures

- Supportive measures means non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, and without fee or charge to complainant or respondent before or after filing a formal complaint or where no formal complaint is filed

Supportive Measures

- Supportive measures are designed to restore or preserve equal access to the education program or activity without unreasonably burdening the other party, including measures designed to protect the safety of all parties or the educational environment, or deter sexual harassment

Supportive Measures

- Supportive measures may include, but are not limited to:
 - Counseling
 - Course-related adjustments to deadlines
 - Modification of work or class schedules
 - Mutual restrictions on contact between the parties
 - Leaves of absence

Supportive Measures

- Any supportive measures provided to the complainant or respondent must be kept confidential to the extent that maintaining confidentiality would not impair the ability to provide the supportive measures
- Title IX Coordinator is responsible for coordinating the effective implementation of supportive measures

Response to Sexual Harassment

- Even if no formal complaint filed, District with actual knowledge of sexual harassment must respond promptly and in a manner that is NOT deliberately indifferent
- Deliberate indifference:
 - If response to sexual harassment is clearly unreasonable in light of the known circumstances

Response

- Title IX coordinator must (with or without complaint):
 - Promptly contact complainant and offer supportive measures
 - Consider complainant's wishes regarding supportive measures
 - Inform complainant of availability of supportive measures with or without formal complaint
 - Explain to complainant process to file formal complaint

Response

- Must treat complainants and respondents equitably:
 - Offer supportive measures to complainant
 - Follow grievance procedure before imposing any disciplinary sanctions or other actions that are not supportive measures against respondent

Response

- Emergency removal
 - Student/employee may be removed from education program or activity on an emergency basis only after:
 - Individualized safety and risk analysis
 - Determination that an immediate threat to physical health/safety of student or other arising from allegations of sexual harassment justifies removal
 - Provides respondent with notice and opportunity to challenge decision immediately following removal

Response

- Administrative leave
 - May place non-student employee respondent on administrative leave during pendency of a grievance process

Grievance Process

- Must treat complainant and respondents equitably
- Must follow the grievance procedure before the imposition of **any** disciplinary sanctions or other actions that are not supportive measures
- Must require objective evaluation of all relevant evidence
 - Inculpatory and exculpatory

Grievance Process

- Must make credibility determinations – not based on person's status as complainant, respondent or witness
- Must facilitate an informal resolution process and must not have a conflict of interest
- Must include a presumption that respondent is not responsible for the alleged conduct until a determination is made at conclusion of grievance process

Grievance Process

- Must include reasonably prompt time frames for conclusion, including times for:
 - Filing appeals
 - Resolving appeals
 - Resolving information resolution process
 - Temporary delay of time frames for good cause, with written notice to other party

Grievance Process

- Must describe range of possible disciplinary sanctions and remedies
- State the standard of evidence to be used to determine responsibility:
 - Preponderance of the evidence; or
 - Clear and convincing evidence
- Same standard must be applied to formal complaint filed against a student or employee

Grievance Process

- Must include basis for appeal and procedures for appeal
- Must describe range of supportive measures
- Must not rely on privileged information unless privilege is waived
- Must keep and maintain a record (recording or video) of the hearing

Formal Complaint

- A formal complaint is a document filed by a complainant OR signed by the Title IX Coordinator alleging sexual harassment against a respondent and requesting that the District investigate the allegation of sexual harassment
 - May be filed in person, by mail, e-mail, form on website, etc.

Process Overview

- Formal Complaint – Initial Assessment
 - Notice to parties
 - Dismissal?
- Formal Investigation and Report
 - Identification of witnesses; interview scheduling; evidence collection; investigation report drafted; evidence & draft investigation report shared; investigation report finalized
- Determination/ Hearing
 - Exchange of written questions and responses; determination; remedies
- Appeals

Written Notice

- Upon receipt of a formal complaint, parties must be provided:
 - Notice of the grievance process, including information on resolution options
 - Notice of the allegations of sexual harassment with sufficient detail including identity of parties, conduct alleged, date and location of alleged conduct

Written Notice

- Respondent must receive statement that respondent is presumed innocent until determination made at end of grievance process
- Parties may have an advisor of their choice and may inspect and review evidence
- Inform parties of any provision in the Code of Conduct that prohibits knowingly making false statements or knowingly submitting false information during the grievance process

Written Notice

- If, during the course of investigation, investigator decides to investigate allegations about complainant or respondent not in formal complaint, must provide notice of additional allegations

Dismissal

- Initial Assessment
- If the allegations in the formal complaint do not constitute sexual harassment, or did not occur in the school or at a school related activity or event, the formal complaint must be dismissed
 - However, such dismissal does NOT preclude action under another provision of the Code of Conduct

Dismissal

- If at any time during the investigation or hearing a complainant notifies the Title IX Coordinator in writing that s/he would like to withdraw the formal complaint or any of the allegations therein
- If respondent is no longer enrolled or employed by District
- If cannot gather sufficient evidence to make a determination

Dismissal

- If a matter is dismissed for any of the reasons discussed, must send written notice of the dismissal and reason(s) simultaneously to the parties

Consolidation

- Formal complaints may be consolidated where the allegations of sexual harassment arise out of the same facts and circumstances
 - Formal complaints against more than one respondent
 - More than one formal complaint against one or more respondents

Impartiality

- Title IX coordinator, investigators, decision makers or anyone designated by District to facilitate an informal resolution process must:
 - Be free from conflict of interest
 - Be free from bias
 - Avoid prejudgment of facts/issues
 - Determine credibility of witnesses (including the parties)

Investigation

- The burden of proof and the burden of gathering evidence sufficient to make a determination regarding responsibility is on the District NOT the parties
- Remember, there is a presumption that respondent is NOT responsible until a determination regarding responsibility is made at conclusion of grievance process

Investigation

- Investigator must provide an EQUAL opportunity for the parties to present witnesses, including fact and expert witnesses, and other inculpatory and exculpatory evidence

Investigation

- Investigator will not restrict the ability of either party to discuss the allegations or to gather and present relevant evidence

Investigation

- Investigator will give the parties equal opportunities to have others present during any grievance proceeding
 - This includes the opportunity to be accompanied to any meeting or proceeding by the advisor of their choice
 - This may be an attorney, but does not have to be an attorney
 - District may put limits on extent advisor may participate but limits must apply equally to all parties

Investigation

- Investigator must provide written notice to all parties of hearings, investigative interviews or other meetings
 - Notice must include date, time, location, participants and purpose
 - Notice must be sufficient to allow parties time to prepare

Investigation

- All interviews as part of an investigation should take place promptly while the incident is still fresh in the witnesses' memories and evidence is still available
- The investigator should plan the interviews carefully.
- Prepare a detailed list of questions designed to learn facts about the alleged sexual harassment.

Investigation

- Take time to plan your interview questions
- Interview the complainant first
- Interview corroborating witnesses
- Interview the respondent
- Be sure to interview witnesses with possible exculpatory information
- Interview all witness suggested by the parties equally

Investigation

- Start the investigation by interviewing the complaining witness
 - In cases where the complainant prefers to speak to someone of the same sex about the alleged harassment, an attempt should be made to find a suitable person to conduct this interview.
 - Ask him/her for the names of witnesses and all corroborating details.

Investigation

- Where do I conduct the interviews as part of my investigation?
 - What am I investigating?
 - Sexual harassment claims include questions about private, intimate issues
 - Who am I interviewing?
 - A third-party witness?
 - An alleged victim?
 - An alleged perpetrator?

Investigation

- Who else may be present for the interview of a student?
 - Other staff members:
 - Administrator
 - Teacher
 - SRO
 - Counselor
 - Others:
 - Parent (grandparent, aunt, uncle, boy/girl friend of parent, family minister)
 - Attorney(s)
 - No one else

Investigation

- Keep a timeline of the events that took place during the incident.
 - Better analyze the testimony
 - Further refine your questions
 - The timeline also enables you, as the investigator, to reconstruct what happened with a greater level of detail and assess credibility

Investigation

- Identify and gather any documents or other physical evidence promptly before either can be destroyed – including videos.
- Visit the site where the incident took place.
 - Helps refine questioning
 - Helps the investigator determine which witnesses are reliable
 - Like the timeline, it also helps to reconstruct the incident with a greater level of detail

Investigation

- Separately interview eyewitnesses, if any, and corroborating witnesses, if any.
- Investigate any corroborating details specified by the complainant or respondent equally and obtain any additional, available documentary and other evidence relevant to the complaint.

Investigation

- Interview each person accused of engaging in the misconduct
- Keep written notes of interviews
- Tape record these interviews?
 - If recorded, may have to produce to parties if asked

Investigation

- Determine credibility
- Ask questions that have verifiable answers
- Determine whether the witness has any biases or improper motives in favor of or against the respondent or complainant
- Take note of body language and other clues that the individual may be truthful or lying
- Use timeline to help assess credibility

Investigation

- Investigator must provide all parties an equal opportunity to inspect and review evidence obtained during the investigation
 - Including evidence the investigator does not intend to use in reaching a determination
 - Including inculpatory/exculpatory evidence
 - Parties will have an opportunity to respond to the evidence prior to the conclusion of the investigation

Investigation

- Prior to completion – investigator must send electronic or hard copies of all evidence to each party
- Parties have 10 days to submit a written response
- Investigator must consider submitted responses before completing investigative report

Investigation

- All evidence subject to the parties' inspection and review must be available at hearing for each party's use equally

Investigation

- Investigator must prepare an investigative report that fairly summarizes the evidence
- At least 10 days before hearing or other time of determination of responsibility, provide each party and their advisors the investigative report in hard copy or electronic form for review and written response

Hearings

- Hearings are not mandatory – NOT required at the elementary/secondary school level

Hearings

- With or without a hearing, after sending investigative report and before reaching a determination regarding responsibility, decision maker must give each party the opportunity to do the following:
 - Submit written questions for any party or witness to answer
 - Provide each party with answers
 - Allow for additional, limited follow-up questions from each party

Hearings

- Decision maker must apply same rules for questions regarding complainant's sexual history
 - Relevant ONLY when evidence/questions are offered to prove that someone other than respondent committed the offense alleged; or
 - Are offered to prove complainant's consent

Determination of Responsibility

- Decision maker must issue a written determination regarding responsibility
- Must reach this decision using the standard of proof chosen by the District
 - Clear and convincing (beyond a reasonable doubt)
 - Preponderance of the evidence (more likely than not)

Determination of Responsibility

- Relevance is ultimately up to the decision-maker, who is not bound by the investigator's judgment
- All relevant evidence must be objectively evaluated and considered – both inculpatory and exculpatory

Written Decision

- The written decision must include:
 - The allegations
 - Description of procedural steps taken including:
 - All notifications to parties
 - Interviews with parties and witnesses
 - Site visits
 - Methods used to gather evidence
 - Hearing (if hearing is held)

Written Decision

- Written decision must include (con't)
 - Findings of fact supporting determination
 - Conclusions regarding Code of Conduct to the facts
 - Statement of and rationale for results on each allegation, including:
 - Determination of responsibility
 - Disciplinary sanctions to be imposed
 - If remedies designed to restore or preserve equal access to education will be provided to complainant

Written Decision

- Analyze the notes and/or tape recordings of the witness interviews as well as any documentary or other evidence obtained
- Determine which witnesses are credible in light of all the information obtained
- Make a new time line of all uncontradicted facts

Written Decision

- Written decision must include (con't)
 - District's procedures and bases for an appeal
- Written decision must be provided to parties simultaneously
- Determination is final when:
 - Written determination of appeal is provided to parties, or
 - Time to appeal has expired

Appeals

- All parties must be provided with an equal opportunity to appeal from:
 - Written determination of responsibility
 - Written decision to dismiss formal complaint, or any allegations contained in formal complaint
- District must set time frames for bringing an appeal and decision on appeal

Appeals

- An appeal may be brought on the following grounds:
 - Procedural irregularity that affected the outcome
 - New evidence that was not reasonably available at the time determination was made AND that could affect the outcome
 - Conflict of interest or bias for or against a party that affected the outcome
 - Grounds determined by the District - equally

Appeals

- District must notify the other party in writing when an appeal is filed
- Implement the appeals process equally
- Decision maker for appeal may not be decision maker in underlying determination, Title IX coordinator or anyone who conducted the investigation

Appeals

- Both parties must be afforded a reasonable, equal opportunity to submit written statement in support of or against the appeal
- Decision maker for appeal must issue a written decision describing result and rationale
- Written decision must be provided to parties simultaneously

Informal Resolution

- District cannot require parties to participate in informal resolution process
- District may not offer informal resolution process unless a formal complaint is filed
- Parties may participate in informal resolution process at any time prior to a determination of responsibility

Informal Resolution

- May be undertaken when the District provides the parties written notice of:
 - The allegations
 - The requirements of informal resolution process
 - Statement of when informal resolution process precludes parties from resuming formal complaint arising from the same allegations if all parties agree to a resolution

Informal Resolution

- District written notice (con't)
 - That any party has right to withdraw from informal resolution process prior to agreeing to a resolution and may resume grievance process regarding formal complaint
 - Inform parties of any consequences resulting from participating in informal resolution process including records that will be maintained or could be shared

Informal Resolution

- District must obtain voluntary, written consent of each party to participate in informal resolution process
- District may NOT offer or facilitate informal resolution process to resolve allegations that an employee sexually harassed a student

Record Keeping Required

- District must maintain records related to complaints of sexual harassment for seven years, including
 - Complaint
 - Decision
 - Audio or visual recording or transcripts
 - Disciplinary sanctions imposed on respondent
 - Remedies provided to complainant to restore or preserve equal access to education or activity

Record Keeping Required

- District must keep for 7 years (con't)
 - Any appeal and result of appeal
 - Informal resolution and result thereof
 - All materials used to train Title IX coordinator, investigators, decision makers, and any person who facilitates an informal resolution
 - Training materials must be on website or if no website available upon request

Record Keeping Required

- Must keep records for 7 years of each response to sexual harassment including:
 - Any supportive measures taken
 - Basis for conclusion that response was not deliberately indifferent
 - Documents re: measures taken designed to restore or preserve equal access to education or activity
 - Reasons why supportive measures not provided



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