MASLA

NYS Management Advocates for School Labor Affairs

Title IX Training
Sexual Harassment, Discrimination and Investigations

OCM BOCES and FEH BOCES

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Agenda

Today's Training & Review

Part 1: 12:00 to 1:30

▶Title IX Defined – Legal Rules and Requirements

I. **Title IX Harassment Defined**
II. **Rules and Obligations**
III. **Title IX Specific Terms**
IV. **Title VII and Title IX Intersections**

Part 2: 1:45 – 3:00

▶Title IX – Implementation and Practice Recommendations

I. **Investigation of Complaints-Legal Obligations and Requirements**
II. **Practical Considerations**
III. **Best Practices**
IV. **Conclusions and Discussions**

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Current Status of Title IX

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Title IX Litigation

- As of July 31, 2024, pursuant to Federal court orders, the Department of Education was enjoined from enforcing the 2024 Final Rule revising the 2020 Title IX Rules of the previous administration. The enjoinment applied to 26 states.
- Additionally, in July, a federal court in Kansas issued a partial nationwide injunction that barred the application of the 2024 Final Rules from being applied to schools where students attended whose parents were members of chapters for Mom's For Liberty, the plaintiff in the Kansas case.
- Then, on January 9, 2025, the U.S. District Court for the Eastern District of Kentucky ruled that the 2024 Title IX regulations were unconstitutional and vacated them by issuing a nationwide injunction, effectively reinstating the 2020 rules and repealing the 2024 rules. Upon the change in adminstration, the district court's order was not appealed and the case was settled.
- As of approximately January 25, 2025, the Department of Education's website page for Title IX has been restored with references and "webinars" related to the 2020 Title IX Rules.[1]
- On February 4, 2025, U.S. Department of Education released a dear colleague letter the Education Department will return to enforcing Title IX protections on the basis of biological sex in schools and on campuses through enforcement of the 2020 Title IX Rule (85 Fed. Reg. 30026)
- Sex based discrimination under Title IX under the current rules is based on biological sex and do not expressly cover claims based on sexual orientation or gender identity

1. https://www.ed.gov/laws-and-policy/civil-rights-laws/title-ix-and-sex-discrimination/sex-discrimination-overview-of-law
2. https://www.ed.gov/media/document/title-ix-enforcement-directive-dcl-109477.pdf

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Title IX Harassment Defined

What is Title IX Harassment[1]

- Title IX prohibits sex discrimination in the programs and activities of all educational institutions, including school-sponsored activities or travel that occur away from school, so long as the institution receives federal financial assistance.
- Title IX prohibits different treatment on the basis of sex in all aspects of a school's education programs or activities with respect to both students and staff
- Title IX prohibits retaliation against an individual for opposing or reporting discrimination, complaining about discrimination, or participating in a discrimination investigation.
- Title IX requires schools to have policies and procedures that are important for the prevention and correction of sex discrimination.
- Title IX also can prohibit policies and procedures that disproportionately affect women or girls in an adverse way, even if those policies and procedures appear neutral.
- Title IX requires schools to adopt policies and procedures that are important for the prevention and correction of sex discrimination.
- Title IX also expressly covers dating violence, domestic violence, stalking, and unwanted/non-consensual sexual conduct as a form of Sexual Harassment

1. https://www.ed.gov/laws-and-policy/civil-rights-laws/title-ix-and-sex-discrimination

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WHAT IS TITLE IX HARASSMENT

UNDER 34 C.F.R. §106.30 (PREVIOUS 2024 REG §106.2)

- As of May, 2020, Title IX regulations were amended, which were finalized on August 14, 2020, to make clear that Sexual harassment is a form of sex discrimination covered by Title IX (and Title VII – more later).
- Regulations include expansive definitions under federal law with Some overlap under New York State Law, while New York Law is more expansive
- Under Part 106, 34 CFR 106.2 Definitions – "Sex Based Harassment" is a form of sex discrimination and means ***sexual harassment or other harassment on the basis of sex*** that also satisfies one of three criteria

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WHAT IS TITLE IX HARASSMENT

UNDER 34 C.F.R. §106.30 (PREVIOUS 2024 REG §106.2)

- The Three criteria "Sex Based Harassment" include the following:

  1) Quid pro quo harassment.*

     USED TO BE (2024 Regulations) - An employee, agent, or other person authorized by the recipient to provide an aid, benefit, or service under the recipient's education program or activity explicitly or impliedly conditioning the provision of such an aid, benefit, or service on a person's participation in unwelcome sexual conduct.

     NOW (2020 Regulations) - 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

**NOTICE - There is NO threshold requirement that Quid Pro Quo harassment limit or prevent a complainant's ability to access the educational institution, only that it occurred*

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WHAT IS TITLE IX HARASSMENT

UNDER 34 C.F.R. §106.30 (PREVIOUS 2024 REG §106.2)

- The Three criteria "Sex Based Harassment" include the following:

(2) Hostile environment harassment.

USED TO BE (2024 Regulations)

Unwelcome sex-based conduct that, based on the totality of the circumstances, is subjectively and objectively offensive and is so severe or pervasive that ***it limits or denies a person's ability to participate in or benefit from the recipient's education program or activity*** (i.e.,creates a hostile environment).

Whether a hostile environment has been created is a fact-specific inquiry that includes consideration of the following:

(i) The degree to which the conduct affected the complainant's ability to access the recipient's education program or activity;

(ii) The type, frequency, and duration of the conduct;

(iii) The parties' ages, roles within the recipient's education program or activity, previous interactions, and other factors about each party that may be relevant to evaluating the effects of the conduct;

(iv) The location of the conduct and the context in which the conduct occurred; and

(v) Other sex-based harassment in the recipient's education program or activity;

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WHAT IS TITLE IX HARASSMENT

UNDER 34 C.F.R. §106.30 (PREVIOUS 2024 REG §106.2)

- The Three criteria "Sex Based Harassment" include the following:

(2) Hostile environment harassment.

NOW (2020 Regulations)

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;

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WHAT IS TITLE IX HARASSMENT

UNDER 34 C.F.R. §106.30 (PREVIOUS 2024 REG §106.2)

- The Three criteria "Sex Based Harassment" include the following:

(3) Specific offenses.* (Violence Against Women's Act Offenses)

USED TO BE (2024 Regulations)

(i) Sexual assault meaning an offense classified as a forcible or nonforcible sex offense under the uniform crime reporting system of the Federal Bureau of Investigation;

(ii) Dating violence meaning violence committed by a person:(A) Who is or has been in a social relationship of a romantic or intimate nature with the victim; and (B) Where the existence of such a relationship shall be determined based on a consideration of the following factors:(1) The length of the relationship; (2) The type of relationship; and (3) The frequency of interaction between the persons involved in the relationship;

(iii) Domestic violence meaning felony or misdemeanor crimes committed by a person who: (A) Is a current or former spouse or intimate partner of the victim under the family or domestic violence laws of the jurisdiction of the recipient, or a person similarly situated to a spouse of the victim; (B) Is cohabitating, or has cohabitated, with the victim as a spouse or intimate partner; (C) Shares a child in common with the victim; or (D) Commits acts against a youth or adult victim who is protected from those acts under the family or domestic violence laws of the jurisdiction; or

(iv) Stalking meaning engaging in a course of conduct directed at a specific person that would cause a reasonable person to: (A) Fear for the person's safety or the safety of others; or (B) Suffer substantial emotional distress.

***NOTICE - There is NO threshold requirement that Specific Offenses covered as harassment limit or prevent a complainant's ability to access the educational institution, only that they occurred*

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WHAT IS TITLE IX HARASSMENT

UNDER 34 C.F.R. §106.30 (PREVIOUS 2024 REG §106.2)

- The Three criteria "Sex Based Harassment" include the following:

(3) Specific offenses.* (Violence Against Women's Act Offenses)

NOW (2020 Regulations)

- "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)

These are specific statutory definitions based on criminal law, which includes a required "mens rea" element of intent.

***NOTICE - There is NO threshold requirement that Specific Offenses covered as harassment limit or prevent a complainant's ability to access the educational institution, only that they occurred*

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What is Title IX Harassment

under 34 C.F.R. §106.30

- Sexual harassment as conduct that occurs on the basis of sex can be assessed as presuming a complainant is effectively denied access when the accused/Respondent's conduct falls under No. 1 or 3 of the categories of prohibited conduct, while under no 2 it is an element to be evaluated by the fact-finder
- All forms of unwanted sexual contact or conduct are considered prohibited sex based harassment
- The allegations and complainant's claims and assertions must be judged through the reasonable person standard of someone standing in the complainant's place

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What is Title IX Harassment
Generally

- While sexual harassment is a concern for schools generally, it could be of particular concern in STEM areas or other programs where there are historically and/or frequently small numbers of female students in such courses or programs of study. Small numbers increase the potential that female students may become targets of harassment.
- gender-based harassment Is prohibited under New York State Law
- Given the return to the enforcement of the 2020 Title Ix Rules, it may (or likely) not be a basis for a claim under Title IX
- Harassing conduct based on sex or sex stereotypes may or may not still be barred, even if the harassment is not sexual in nature, but it is still prohibited under New York State Law.
- Examples include:
  - A student harassing a fellow student by altering his/her lab results because of his/her sex.
  - A student harassing another student and refusing to be his/her lab partner in a physics class or CTE class because s/he thinks s/he will not be able to handle the work seriously because of his/her sex.
  - A teacher refusing to assign a partner to work with a female students because the teacher thinks the female student cannot/will not be able to handle the work seriously because of her sex

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Rules and Obligations
Title IX Notice and Policy Requirements

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What is Title IX Harassment

Policy Requirements

A District's **Title IX Policy** Must Include:

- Designate and authorize a Title IX Coordinator, with description of the role of the Title IX Coordinator as coordinating the district's compliance with title ix.
- 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 for both the charging party and respondent.
- 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."**
- Under New York Human Rights law, contractors can also be accused of Title IX violations

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What is Title IX Harassment

Policy Requirements and Procedurals Obligations

Schools are required to comply with and make available the following procedural requirements, which are important for the prevention and correction of sex discrimination, re complaint procedures required to be adopted under 34 CFR §106.8 and 106.45.

- Designate a **person to coordinate the school's compliance with Title IX** and notify all students and employees of the name or title and contact information for this person; **(**§ 106.8(a)-(b)**)**
- Publish a **notice of nondiscrimination (**§ 106.8(b)**)**; *See Appendix for OCR and NYS proposed Notices*
- Adopt and publish **grievance procedures** providing for the prompt and equitable resolution of sex discrimination complaints; **(**§106.8(c)**)**

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What is Title IX Harassment

Publication and Procedures

34 CFR §106.8(a) - Designation of Coordinator

- Designate at least one Title IX coordinator who must be an employee of the district, with notice persons entitled to notification: 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 agreements with the recipient.
- The notice to the above individuals must also include the following information about the Title IX Coordinator: name or title, office address, electronic mail address, and telephone number.
- Each school must prominently display the contact information required to be listed for the Title IX Coordinator and the required on its website, if any, and in each handbook or catalog that it makes available to persons entitled to a notification
- Any person may report sex discrimination, including sexual harassment (whether or not the person reporting is the person alleged to be the victim of conduct that could constitute sex discrimination or sexual harassment), in person, by mail, by telephone, or by electronic mail, using the contact information listed for the Title IX Coordinator, or by any other means that results in the Title IX Coordinator receiving the person's verbal or written report. Such a report may be made at any time (including during non-business hours) by using the telephone number or electronic mail address, or by mail to the office address, listed for the Title IX Coordinator

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What is Title IX Harassment

Publication and Procedures

Schools are required to comply with the following procedural requirements, which are important for the prevention and correction of sex discrimination:

34 C.F.R. §106.8(b)(1) - Publish a **notice of nondiscrimination –**

- That the recipient does not discriminate on the basis of sex in the education program or activity that it operates, and that it is required by title IX and this part not to discriminate in such a manner;
- Such notification must state that the requirement not to discriminate in the education program or activity extends to admission and employment; and
- Inquiries about the application of title IX and this part to such recipient may be referred to the recipient's Title IX Coordinator, to the Assistant Secretary, or both"
- The notice must be widely distributed to students, employees, AND prospective students and employees, parents, guardians, and all unions holding collective bargaining agreements with the recipient.

- Notices must be in writing provided to all employees under NY LL 201-g

  See Appendix for Model Notice and Posting

- Schools required to have a Policy that also addresses the process for handling Formal Complaints made under Title IX, referred to as a "grievance process." *See* §106.45 – Similar under New York Law

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What is Title IX Harassment

Publication and Procedures

Current 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 a New Unified Title IX 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.

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What is Title IX Harassment

Policy Requirements and Procedurals Obligations

Schools are required to comply with and make available the following procedural requirements, which are important for the prevention and correction of sex discrimination, re complaint procedures required to be adopted under 34 CFR §106.8 and 106.45.

- §106.44-Recipient's response to sexual harassment, requires:
  - A school with actual knowledge of sexual harassment in an education program or activity of the recipient against a person in the United States, must respond promptly in a manner that is not deliberately indifferent.
  - A school is deliberately indifferent only if its response to sexual harassment is clearly unreasonable in light of the known circumstances.
  - For the purposes of this section, §§ 106.30, and 106.45, "education program or activity" includes locations, events, or circumstances over which the recipient exercised substantial control over both the respondent and the context in which the sexual harassment occurs, and also includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution.
  - A school response must treat complainants and respondents equitably by offering supportive measures to a complainant, and by following a grievance process that complies with § 106.45 before the imposition of any disciplinary sanctions or other actions that are not supportive measures as defined in § 106.30, against a respondent.

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What is Title IX Harassment

Policy Requirements and Procedurals Obligations

Schools are required to comply with and make available the following procedural requirements, which are important for the prevention and correction of sex discrimination, re complaint procedures required to be adopted under 34 CFR §106.8 and 106.45.

- §106.44-Recipient's response to sexual harassment, requires:
  - The Title IX Coordinator must
    - promptly contact the complainant to discuss the availability of supportive measures as defined in § 106.30,
    - consider the complainant's wishes with respect to supportive measures,
    - inform the complainant of the availability of supportive measures with or without the filing of a formal complaint, and
    - explain to the complainant the process for filing a formal complaint.
  - Schools Prohibit retaliation; and
  - Effectively implement remedies for victims

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What is Title IX Harassment

Investigation Requirements by Policy

Investigation requirements codified in your policies require the following:

- Respond promptly when *any* school employee has notice of sexual harassment, including sexual assault
- Title IX extends to all aspects of a school's education program or activity and applies to any activity controlled or operated by the school, or any building owned or controlled by school ***within the united states***
- If a survivor (accuser/complainant) ***chooses*** to participate in a grievance process, accusers cannot be inappropriately being asked about prior sexual history (also known as "rape shield" protections), and a survivor ***is not*** be required to divulge any medical, psychological, or similarly privileged records.
- A survivor never has to come face-to-face with the accused during a hearing, and an accused is never allowed to personally ask questions of a survivor.
- Survivors are protected against retaliation when they choose to report sexual misconduct ***or not***, file a formal complaint ***or not***, participate in a grievance process ***or not***.
- Survivors are protected against bullying or harassment throughout the grievance (complaint and investigation) process

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What is Title IX Harassment

Investigation Requirements by Policy

- Procedures must provide equal opportunity for both Parties to appeal a determination and decision
- If harassment occurs, schools must take prompt and effective steps reasonably calculated to end the harassment, eliminate any hostile environment, and prevent it from happening again to the victim or to others.
- For Example:
  - If a student files a sexual harassment complaint with the school against her teacher and the school determines that a hostile environment has been created, it must take steps to end the harassment, eliminate the hostile environment, and prevent its recurrence. Potential remedies should include allowing the student to have a new class or teacher.
  - If a school is made aware that a particular teacher denigrates the answers that are provided by female students but not similar answers by male students and this causes a hostile environment, it must take steps to end the conduct, eliminate the hostile environment, and prevent its recurrence. This may include speaking with that teacher and providing appropriate training.

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What is Title IX Harassment

Application to Employment

Title IX can also apply in the context of Employment IN THE SAME MANNER AS TITLE VII

- Schools may not discriminate on the basis of sex in employment or recruitment, including but not limited to hiring, promotion, consideration of and award of tenure, grants of leave, benefits, and selection and financial support for training. (34 C.F.R. § 106.51(b))
- Schools are prohibited from applying policies or employment actions concerning the marital, parental, or family status of employees or applicants that treat persons differently based on sex, or that are based on whether the employee or applicant is the head of household or principal wage earner. (34 C.F.R. § 106.57)
- A school cannot base a hiring or promotion decision for a teacher on stereotypes about a woman's ability to perform her job because she has/will have/may have children. (34 C.F.R. § 106.57)

1. https://www.ed.gov/laws-and-policy/civil-rights-laws/title-ix-and-sex-discrimination/sex-discrimination-overview-of-law

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What is Title IX Harassment

Prohibited Retaliation

Title IX prohibits retaliation against any individual for:

- Opposing or reporting discrimination, complaining about discrimination, or participating in a discrimination investigation.
- Schools are prohibited from retaliating against an individual because the individual has asserted a right protected by Title IX; made a Title IX complaint or participated in a Title IX investigation, hearing, or proceeding; or protested sex discrimination. (34 C.F.R. §106.71; 34 C.F.R. §100.7(e))
- If a student files a complaint alleging that a school discriminated against her on the basis of sex concerning course work, grades, access to extra-curricular activities, etc, the school must ensure that the student is not subjected to retaliation.
- If an employee alleges that the school discriminates against women in its decisions concerning employment, including but limited to tenure decisions; classroom or course assignments; approval of time off additional pay opportunities (advisors/coaches/professional development time) the school must ensure that the employee is not subjected to retaliation.

1. https://www.ed.gov/laws-and-policy/civil-rights-laws/title-ix-and-sex-discrimination/sex-discrimination-overview-of-law

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What is Title IX Harassment

Prohibited Retaliation

Additionally, as of 08/14/20 rules, Title IX prohibitions on retaliation also include:

- Intimidation, threats, coercion, or discrimination, including charges against an individual for code of conduct violations that do not involve sex discrimination or sexual harassment, but arise out of the same facts or circumstances as a report or complaint of sex discrimination, or a report or formal complaint of sexual harassment, for the purpose of interfering with any right or privilege secured by title IX or this part, constitutes retaliation. (34 CFR § 106.71 (a))
- The recipient of a complaint must keep confidential the identity of any individual who has made a report or complaint of sex discrimination, including any individual who has made a report or filed a formal complaint of sexual harassment, any complainant, any individual who has been reported to be the perpetrator of sex discrimination, any respondent, and any witness, except as may be permitted by the FERPA statute, or as required by law, or to carry out the purposes of 34 CFR part 106, including the conduct of any investigation, hearing, or judicial proceeding arising thereunder. (34 CFR § 106.71 (a))

Specific Circumstances under § 106.71

- **(1) The exercise of rights protected under the First Amendment does not constitute retaliation prohibited under this section.**
- (2) Charging an individual with a code of conduct violation for making a materially false statement in bad faith in the course of a grievance proceeding under this part does not constitute retaliation prohibited under paragraph (a) of this section, provided, however, that a determination regarding responsibility, alone, is not sufficient to conclude that any party made a materially false statement in bad faith.

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What is Title IX Harassment

Grievance (Complaint) Procedures Required in Policy

34 CFR § 106.45 (2020 rules) Similarity with NYS Requirements:

- Provide Notice of Allegations to accused of potential charges of sexual harassment upon receipt of a formal complaint
  - Notice must provide sufficient details with sufficient time for respondent to prepare for any interview.
  - 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, and may inspect and review evidence.
  - **When is evidence to be made available for inspection?**
  - 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
- If NEW claims or allegations arise during course of the investigation, a NEW notice of Allegations must be issued to the accused for those allegations.

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What is Title IX Harassment

Grievance (Complaint) Procedures Required in Policy

34 CFR § 106.45 – Grievance and Complaint Procedures:

- Dismissal of Complaints
  - If the conduct alleged in the formal complaint would not constitute sexual harassment as defined in § 106.30 even if proved, did not occur in the recipient's education program or activity, or did not occur against a person in the United States, then the recipient must dismiss the formal complaint with regard to Title IX
  - The recipient may dismiss the formal complaint or any allegations therein, if at any time during the investigation or hearing: A complainant notifies the Title IX Coordinator in writing that the complainant would like to withdraw the formal complaint or any allegations therein; the respondent is no longer enrolled or employed by the recipient; or specific circumstances prevent the recipient from gathering evidence sufficient to reach a determination as to the formal complaint or allegations therein.
  - Upon a dismissal, the recipient must promptly send written notice of the dismissal and reason(s) therefor simultaneously to the parties

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New York's Sexual Harassment Prevention Law -- Recent Updates

- Effective June, 2023, New York State's Department of Labor, in consultation with the Division of Human Rights, released model documents[1]
- A New York Employer's Policy, Policy Notice, and complaint forms must be at least equivalent with the Model Form examples published by New York State
- The Policy must, among other things, including the following:
  - include a complaint form
  - include a procedure for the timely and confidential investigation of complaints that ensures due process for all parties
  - inform employees of their rights of redress and all available forums for adjudicating sexual harassment complaints administratively and judicially
  - clearly state that sexual harassment is considered a form of employee misconduct and that sanctions will be enforced against individuals engaging in sexual harassment and against supervisory and managerial personnel who knowingly allow such behavior to continue
  - clearly state that retaliation against individuals who complain of sexual harassment or who testify or assist in any investigation or proceeding involving sexual harassment is unlawful

1. See https://www.ny.gov/combating-sexual-harassment-workplace/sexual-harassment-prevention-model-policy-and-training
2. See Also Appendix Reproduction of NYS Forms

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What is Title IX Harassment

Employment Situations and Title VII

Title IX can also apply in the context of Employment in the same manner as Title VII

- Schools may not discriminate on the basis of sex in employment or recruitment, including but not limited to hiring, promotion, consideration of and award of tenure, grants of leave, benefits, and selection and financial support for training. (34 C.F.R. § 106.51)
- Schools are prohibited from applying policies or employment actions concerning the marital, parental, or family status of employees or applicants that treat persons differently based on sex, or that are based on whether the employee or applicant is the head of household or principal wage earner. (34 C.F.R. § 106.57)
- A school cannot base a hiring or promotion decision for a teacher on stereotypes about a woman's ability to perform her job because she has/will have/may have children. (34 C.F.R. § 106.57)

1. https://www.ed.gov/laws-and-policy/civil-rights-laws/title-ix-and-sex-discrimination/sex-discrimination-overview-of-law

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Title VII Harassment Defined

What is Title VII Harassment

WHAT IS SEX BASED HARASSMENT UNDER TITLE VII?

- Title VII of the Civil Rights Act of 1964, as amended at 42 USC §2000e *et seq*
- New York State Executive Law §296 *et seq* (New York Human Rights Law)
- Prohibits unwelcome sexual advances, requests for sexual favors and other verbal or physical conduct of a sexual nature, all of which constitute "sexual harassment" when:
    1. Submission to such conduct is made explicitly or implicitly a condition of an individual's employment:
    2. Submission to or rejection of such conduct is used as a basis for an employment decision affecting the employee; or
    3. The harassment has the purpose or effect of unreasonably interfering with the employee's work performance or creating an environment which is intimidating, hostile or offensive to the employee.

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What is Title VII Harassment

Unwelcome or offensive conduct in the workplace that constitutes Harassment under Title VII is a form of discrimination that is:

- Based on sex (including sexual orientation, pregnancy, and gender identity), race, color, national origin, religion, age, disability, and/or genetic information; AND
- Sexual Orientation and/or Gender Identity and Bostock
- Detrimental to an employee's work performance, professional advancement, and/or mental health, or conduct that denies or limits employment based participation or benefits.
- Sexual Harassment is conduct that is
  - Unwanted and unwelcome.
  - creates intimidating or hostile environment.
  - Could be dangerous.
  - Causes uncomfortable feelings.
  - Designed or does make victim feel powerless.
  - Negatively influences work performance.
  - Sexual in nature.

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What is Title VII Harassment

Unwelcome or offensive conduct in the workplace that constitutes Harassment under Title VII is a form of discrimination that is:

- Ranges of Possible Harassment includes:
  - Offensive jokes, slurs, epithets or name calling
  - Offensive objects or pictures
  - Unwelcome touching or contact
  - Physical threats or assaults
  - Ridicule, mockery, or put-downs
  - Constant or unwelcome questions about an individual's identity to personal information
  - Undue and unwanted attention
- For Harassment in general, and particularly sexual harassment, it is **IRRELEVANT** whether or not conduct is motivated by sexual desire.
- The ONLY issue: Are members of different sexes/races/ethnicities treated differently on account of their sex/race/ethnicity?

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What is Title VII Harassment

TITLE VII does not prohibit all conduct of a sexual nature…it only forbids conduct which becomes a term or condition of employment.

- Unwelcomed Conduct:
  - Acquiescence in sexual conduct may not mean that the conduct is welcome.
  - The charging party need not have confronted her offending supervisor where she feared retaliation, so long as her actions and comments demonstrated that the conduct was unwelcome.
  - Standard – Plaintiff can not prevail if s/he unreasonably refused to take advantage of corrective measures.
- Quid Pro Quo Conduct:
  - Occurs when submission to unwelcome sexual conduct is made an explicit or implicit term or condition of an individual's employment.

https://www.diversity.va.gov/training/files/eeo-employees.ppt

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What is Title VII Harassment

TITLE VII does not prohibit all conduct of a sexual nature…it only forbids conduct which becomes a term or condition of employment.

- The day-to-day working environment is polluted with verbal or physical abuses.
- Unwelcome sexual conduct unreasonably interferes with job performance or creates an intimidating, hostile or offensive work environment.
- Factors Considered:
  - Frequency of the conduct.
  - Offensive utterances.
  - The more severe the conduct, the less pervasive it must be.
  - Environment
  - Did the conduct occur in view of others?
  - Consequences of conduct upon plaintiff
  - Plaintiff's unreasonable delay in reporting harassment

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What is Title VII Harassment

Employer Requirements regarding Title VII Claims and Investigations

- Employers must take timely and effective action to prevent sexual harassment.
- Employers and managers may be held personally liable for damages due to harassment.
- A “reasonable woman” standard MAY be used by the court to identify sexual harassment.
- Ellison v Brady (1991): Unless the conduct is quite severe, isolated incidents of sexual conduct or statements do not create a hostile environment. BUT, they do create an obligation on the part of a concerned employer to prevent a recurrent of the offensive act or statement

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What is Title VII Harassment

Employer Liability for Claims of Title VII Sexual Harassment

- Employers must take timely and effective action to prevent sexual harassment.
- Fuller v. Oakland (1995)
  - Once the employer knows or reasonably should know of sexually harassing conduct, the employer has an affirmative duty to take steps to prevent a recurrence of that conduct.
  - If the steps fail and the conduct reoccurs, the employer may be held liable.
  - You must investigate even if complainant asks you not to

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What is Title VII Harassment

Remedial Corrective Actions

- Must be reasonably calibrated to stop the conduct, to correct the impact of the conduct, and to prevent the conduct from reoccurring
- Remedial and/or Corrective Action will be evaluated in the context of:
  - Severity of conduct
  - Pervasiveness of conduct
  - Likelihood for conduct to be repeated
  - Courts will 2nd guess you … especially if the conduct did continue
- Poor or Failed corrective actions include
  - Ignore a complaint or problem
  - Deviate from or ignore your policy
  - Discuss with the violator over coffee
  - Put the victim and accused in a room to "sort it out"
  - **Punish/Retaliate** against the victim
  - Accept recantations blindly or half hearted investigations - "Oh, that's just Joe"
  - Pass investigation "up the chain" without legal or follow-up

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What is Title VII Harassment

RETALIATION

- Elements of a Charge for Retaliation under Title VII
  - Plaintiff filed a charge of harassment, or engaged in protected activity in connection to a complaint
  - Plaintiff's employer subsequently took adverse employment action against the plaintiff – much broader than what is required to sustain a complaint for hostile environment or discrimination, can be ***any*** employment related action
  - The adverse action was causally linked (in time, scope, or proximity) to the plaintiff's protected activity
- Once this prima facie showing of retaliation is made by the plaintiff, the burden shifts to the employer to articulate a legitimate, nondiscriminatory reason for its actions
- If the employer meets that burden of a legitimate, nondiscriminatory reason for its actions, the presumption of retaliation disappears UNLESS the employee can show that the employer's reason was simply pretext and the Employer's decisions were motivated by discriminatory/retaliatory animus

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What is Title VII Harassment

RETALIATION

- Retaliation Examples Include:
  - Unwanted/undeserved lower performance reviews
  - Transfers, duty changes, taking away or denying privileges
  - Discipline/discharge
  - Ridicule/blaming for work problems
  - Increased counseling, criticisms, or oversight without a change in work performance
  - Continuing/escalating the prohibited conduct
  - Threats
  - Ostracism/exclusion in a way that creates an intimidating, stressful environment
- Title VII (like Title IX) prohibits retaliation against an individual for opposing or reporting discrimination, complaining about discrimination, or participating in a discrimination investigation.

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BREAK

CLE CODE

DON’T FORGET YOUR CODE

Investigations of Complaints

Legal Obligations and Requirements

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Investigation of Complaints

- Initial Referral and/or Complaint
- Review of Policies & Procedures
- Interview of Complainant
- Requests for Documentary Evidence
- Fact Witness Interviews
- Interview of Accused
- Final Evidentiary Follow-up
- Draft or Preliminary Report, Party Reviews, and Questions
- Final decision & Outcome Letters

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Initial Referral and/or Complaint

- Immediately upon receipt of Complaint, do the following:
  - Written Complaints-
    - Is it signed and/or dated?
    - Is it on District provided complaint form?
    - Outline the details, facts, allegations
    - Is there an alleged violation on the face of the complaint?
    - Conduct alleged – duration, severity, scope, relative employment positions of the accused vs the complainant?
  - Verbal Complaints-
    - Still have an obligation to investigate
    - Who received the complaint, when, how?
    - Have the recipient memorialize the nature of the complaint as completely and thoroughly as possible
    - See above regarding written complaints
- Outline any clearly identified issues, concerns, topics
- Create a potential witness list
- Create a list of documents to request
- IMMEDIATELY request to secure any potential video evidence before it is lost

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Notice of Allegations – Pre Investigation

Written Notice of Allegations Upon Receipt of *WRITTEN COMPLAINT* - Upon receipt of a formal complaint, a recipient must provide the following written notice to the parties, INLCUDING the accused and the complainant:

- Notice of the recipient's grievance process that complies with this section, including any informal resolution process.
- Notice of the allegations of sexual harassment potentially constituting sexual harassment as defined in § 106.30, including sufficient details known at the time and with sufficient time to prepare a response before any initial interview.
- 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, and may inspect and review evidence that is not otherwise protected.
- 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.

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Review of Policies & Procedures

KNOW YOUR DISTRICT'S SEXUAL HARASSMENT AND TITLE IX POLICIES

- Who is the appointed Title IX Officer?
- Interview and/or confirm District's standard procedures
- Confirm District's standard forms in use and reporting process
- Policy Definitions vs. Legal Definitions
  - Is the District's Policy broader than legal requirements
  - Sexual Harassment
  - Gender-based harassment
  - Hostile Work Environment
- Does the Policy define unacceptable conduct?
  - Conduct that applies to students and employees alike
  - Sexual and/or gender based harassment are likely treated the same

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Review of Policies & Procedures

- Does the Policy provide guidelines for determining what constitutes Sexual Harassment?
- Not all unacceptable conduct with sexual connotations may constitute sexual harassment.
- In many cases (other than quid pro quo situations where the alleged harasser offers academic or employment rewards or threatens punishment as an inducement for sexual favors), unacceptable behavior must be sufficiently severe, pervasive and objectively offensive to be considered sexual harassment.
- If the behavior doesn't rise to the level of sexual harassment, but is found to be objectionable behavior, it may not constitute **"H**arassment" but could still be a violation of District Policies and/or the Code of Conduct as **"h**arassment", i.e., unprofessional or inappropriate conduct**.**

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Review of Policies & Procedures

- Does the Policy provide guidelines for determining what constitutes Sexual Harassment?
- In evaluating the totality of the circumstances and making a determination of whether conduct constitutes sexual harassment, the individual investigating the complaint should consider:
    - 1. the degree to which the conduct affected the ability of the student/employee to participate in or benefit from his or her education or altered the conditions of the student's learning environment or altered the conditions of the employee's working environment;
    - 2. the type, frequency and duration of the conduct;
    - 3. the identity of and relationship between the alleged harasser and the subject of the harassment (e.g., sexually based conduct by an authority figure is more likely to create a hostile environment than similar conduct by another student or a co-worker);
    - 4. the number of individuals involved;
    - 5. the age and sex of the alleged harasser and the subject of the harassment;
    - 6. the location of the incidents and context in which they occurred;
    - 7. other incidents at the school; and
    - 8. incidents of gender-based, but non-sexual harassment.

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Review of Policies & Procedures

- Does the Policy provide guidelines for Investigating Complaints?
  - General requirements that all reviews begin within 5 working days of the initial complaint and that the review be completed within 30 days, absent extenuating circumstances
  - Requirement to investigate verbal complaints as well as written complaints
  - Informal vs. Formal investigation procedures
  - Rules regarding parental involvement for student complaints
  - Requirements regarding notifications or outcome letters for complainants and accused
  - Range of proscribed penalties and/or approved remedial actions
  - Maintenance of complaint records
- Review the Code of Conduct
- Review any other related "harassment" policies & applicable collective bargaining agreements for issues that may fall outside the scope of your Title IX Policy

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Interview of Complainant

- After review of the policy and complaint (memorialized verbal and written complaints), interview Complainant
- Use an initial opening script, provide a copy of the written script to the interviewee (separate script for complainant, witness, accused)
- Try to conduct the interview within 5 days of the initial complaint, the sooner the better
- Recommendations
  - Do not tape or allow any interview to be tape recorded
  - Do not permit union representatives (accept for the accused)
  - Do not permit an attorney or outside district personal to participate in the interview process at all
  - Provide a copy of your interview script to each interviewee, have them sign and date at the bottom as acknowledgement, and provide a copy for their records

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Interview of Complainant

- Start the interview – ASK THESE TWO IMPORTANT QUESTIONS
  - Are you taking any medications today that would prevent you from understanding my questions and providing truthful and complete answers?
  - Are you suffering from any medical conditions
- IF there was a WRITTEN complaint
  - Try to narrow down specific details of each and every allegation or incident – Who, What, Where, When, Why
  - Identify witnesses, date and time, location and circumstances, and the specific language used or conduct that occurred
  - At the end, ask –

    IS THERE ANYTHING ELSE YOU WOULD LIKE TO ADD THAT I HAVE NOT ASKED YOU ABOUT

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Interview of Complainant

- IF there was a VERBAL complaint
  - Detail the questions /responses by typing into a word document on laptop
  - Narrow the allegations – Who, What, Where, When, Why
  - Identify witnesses, date and time, location and circumstances, and the specific language used or conduct that occurred
  - At the end, ask –

    IS THERE ANYTHING ELSE YOU WOULD LIKE TO ADD THAT I HAVE NOT ASKED YOU ABOUT
  - THEN
    - At a statement to the end of the notes:

      "**The above notes are an accurate statement as to the events described and the undersigned swears they are true to the best of their recollection**"
    - Print out a copy of the notes from the interview, Ask the complainant to review the notes of the interview, sign and date the notes

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REQUESTS FOR DOCUMENTARY EVIDENCE

- Immediately request and secure any video evidence as soon as possible to ensure retention
- Request and review a copy of the personnel file/student file of complainant
- Request and review a copy of the personnel file/student file of accused
- Request and review a copy of the personnel file/student file of an critical fact witness
- Where necessary, interview any administrator/supervisor not involved with the substance of the complaint regarding general work history of the complainant and the accused
- Use the complaint to drive the document/evidence requests

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FACT WITNESS INTERVIEWS

Follow the same process as used with interviewing the complainant

- Start the interview – ASK same two questions
  - Are you taking any medications today that would prevent you from understanding my questions and providing truthful and complete answers?
  - Are you suffering from any medical conditions Use an initial opening script, provide a copy of the written script to the interviewee
- Try to conduct fact interviews within 2 weeks of the complainant's interview, the sooner the better
- Emphasis CONFIDENTIALITY and NO RETAILIATION
- Who, What, Where, When, Why – Challenge with evidence, records, video, etc.
- Inform the witness that dishonesty can be grounds for discipline if the witness is evasive, try cooperation
- Contemporaneously memorialize the witnesses testimony

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FACT WITNESS INTERVIEWS

- If the witness is lying or less than truthful, attempt to redirect them to provide truthful answers
- If necessary, suspend the interview and reschedule with a union representative present, provide notices of Weingarten Garrity rights where necessary
- Recommendations
  - Do not tape or allow any interview to be tape recorded
  - Do not permit union representatives (accept for the accused)
  - Do not permit an attorney or outside district personal to participate in the interview process at all
  - Provide a copy of your interview script to each interviewee, have them sign and date at the bottom as acknowledgement, and provide a copy for their records

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UPDATE REQUEST FOR DOCUMENTARY EVIDENCE – RE-INTERVIEWS AS NEEDED

- Request updated evidence as necessary based on interviews
- Conduct re-interviews for any discrepancies or clarifications between competing witness statements
- Review interview notes to drive any new or updated document/evidence requests

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REVISED NOTICE OF ALLEGATIONS

Issue a Revised Written Notice of Allegations

- Upon review of evidence, prior to interview of Respondent, review Notice of Allegations
- Updated facts from records, witness interviews
- Preserve records, videos, evidence for Respondent accused
- Provide new notice to both complainant and accused
- Should occur PRIOR to interview of accused
- Provide with sufficient time for accused to have a representative present as required under Title IX

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INTERVIEW OF RESPONDENT

- Should be the LAST interview conducted
- Consider using a companion to take notes so that you can concentrate on the interviewing and questioning
- Start the interview – ASK THESE TWO IMPORTANT QUESTIONS
  - Are you taking any medications today that would prevent you from understanding my questions and providing truthful and complete answers?
  - Are you suffering from any medical conditions
- Use an initial opening script, provide a copy of the written script to the accused
  - Weingarten Rights explicitly stated
  - Garrity Rights where necessary explicitly stated
  - CADET Rights where available explicitly stated
  - Any waiver of union representation should be in writing signed by the employee –

    Employee knowing and freely waives their right to union representation for an interview with the employer, and recognizes that anything the employee says during such interview can be use by the employer for disciplinary purposes

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INTERVIEW OF RESPONDENT

- Ask specific questions about the facts and nature of the allegations, about who, what, where, when, why
- If the accused denies any claims, ask them why someone would provide a different story from what the accused is stating
- Press the accused on any inconsistencies
- Present and review evidence with the Accused
- Ask the accused about any evidence
  - Review Video/Audio recordings
  - Review documentary evidence
  - Be specific in your factual questions

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INTERVIEW OF RESPONDENT

- Regardless of Weingarten, Garrity, or CADET Rights, ASK EVERY QUESTION
- Send a message to the accused about the nature of the allegations, strength of the District's facts and evidence
- For the benefit of a union representative to advise the accused
- End by EMPHASISING
  - CONFIDENTIALITY
  - NO RETALIATION
  - NO COMMENTS/CONTACTS WITH THE COMPLAINANT ABOUT THE NATURE OF THE COMPLAINT OR ALLEGATIONS

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FINAL EVIDENTIARY FOLLOW-UP

- Re-update any requests for evidence or records as necessary
- Request updated evidence as necessary based on interviews
- Conduct final round of re-interviews for any discrepancies or clarifications between competing witness statements and accused
- Review interview notes to drive any new or updated document/evidence requests
- Review final facts with Title IX Policy, other Board Policies, Code of Conduct, and Legal Standards

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FINAL EVIDENTIARY FOLLOW-UP

- Create timeline of events and circumstances
- Organize documents and evidence chronologically based on timeline
- Notate timeline with supporting interview statements/evidence
- Number and order any supporting documentation to be included in final report
- Prepare draft Executive Summary (no more than 2 pages) of the what a preliminary review of the evidence shows relative to the claims

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PRELIMINARY DRAFT REPORT AND CONCLUSIONS

- Draft report Should be marked CONFIDENTIAL and privileged
- Report Details and Specifics
  - Background – Initial referral and credentials
  - Executive Summary – Summary of Complaint & Findings
  - Investigation - Chronological Order of evidence
    - Initial Complaint
    - Statement of the Allegations
    - Applicable Board Policies
    - Interviews
    - Documentary Evidence and Records
    - Conclusions and Findings
    - Possible Recommendations for Outcomes

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PRELIMINARY DRAFT REPORT AND CONCLUSIONS

- Attach relevant and necessary documents, communications, as Appendices to the Final Report
- Provide Draft Outcome letters for review by the District/Board of Education
- Provide range of recommendations based on findings and conclusions
- Superintendent and/or the Board of Education are the final decisions makers
- Title IX Coordinator/Officer or investigator only makes recommendations, is NOT the decision maker in the process

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PRELIMINARY DRAFT REPORT AND CONCLUSIONS – NOTIFICATIONS

- Prior to completion of the investigative report, the recipient must send to each party and the party's advisor, if any, notice of relevant evidence subject to inspection for review in an electronic format or a hard copy, and the parties must have at least 10 days to submit a written response to any draft report, which the investigator will consider prior to completion of the investigative report.
- The recipient must make all such evidence subject to the parties' inspection and review available at any hearing (hearings are required in higher education, not in K-12 schools) to give each party equal opportunity to refer to such evidence during the hearing, including for purposes of cross-examination.

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PRELIMINARY DRAFT REPORT AND CONCLUSIONS – NOTIFICATIONS

- Complainant and respondent are allowed to pose questions that they would like responses to from the opposing party
- Investigator and/or title ix coordinator is required to facility questions and responses from the parties to provide to the investigator to include as part of preliminary draft report.
- Parties are also permitted to provide narrative and comment on the evidence as part of response to preliminary draft report; and
- Investigator is required to Create an investigative report that fairly summarizes relevant evidence and, at least 10 days prior to determination regarding responsibility, and send to each party and the party's advisor, if any, the investigative report in an electronic format or a hard copy, for their review and written response.

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DECISION MAKERS AND OUTCOME LETTERS

- Outcome Letters – Required as part of the process for Complainant and Accused
- Complainant Outcome Letters – One to each complainant
- Purpose of the final outcome letter – Once Approved
  - Notify the conclusion of the investigation
  - Summarize the nature of the complaint
  - Provide a statement of findings and outcomes
- Outcome letters are approved by the Employer and must be issued by a decision maker other than Title IX Coordinator
- Means the Superintendent or Board where appropriate

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DECISION MAKERS AND OUTCOME LETTERS

34 CFR §106.45 – Formal Grievance (Complaint/Investigation) Process

- The decision-maker(s), who cannot be the same person(s) as the Title IX Coordinator or the investigator(s), must issue a written determination regarding responsibility. To reach this determination, the recipient must apply the standard of evidence described in paragraph (b)(1)(vii) of this section.
- The written determination must include -
  - **(A)** Identification of the allegations potentially constituting sexual harassment as defined in § 106.30;
  - **(B)** A description of the procedural steps taken from the receipt of the formal complaint through the determination, including any notifications to the parties, interviews with parties and witnesses, site visits, methods used to gather other evidence, and hearings held;
  - **(C)** Findings of fact supporting the determination;
  - **(D)** Conclusions regarding the application of the recipient's code of conduct to the facts;
  - **(E)** A statement of, and rationale for, the result as to each allegation, including a determination regarding responsibility, any disciplinary sanctions the recipient imposes on the respondent, and whether remedies designed to restore or preserve equal access to the recipient's education program or activity will be provided by the recipient to the complainant; and
  - **(F)** The recipient's procedures and permissible bases for the complainant and respondent to appeal.
- The recipient must provide the written determination to the parties simultaneously. The determination regarding responsibility becomes final either on the date that the recipient provides the parties with the written determination of the result of the appeal, if an appeal is filed, or if an appeal is not filed, the date on which an appeal would no longer be considered timely.

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DECISION MAKERS AND APPEALS

34 CFR §106.45 – Formal Grievance (Complaint/Investigation) Process

Both Parties must have a right to appeal a determination regarding responsibility or dismissal of a formal complaint or any allegations therein, on the following bases:

- (A) Procedural irregularity that affected the outcome of the matter;
- (B) New evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter; and
- (C) 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.
- (D) Or on any other basis the District deems appropriate.

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DECISION MAKERS AND APPEALS

34 CFR §106.45 – Formal Grievance (Complaint/Investigation) Process

As to all appeals, the District must

- (A) Notify the other party in writing when an appeal is filed and implement appeal procedures equally for both parties;
- (B) Ensure that the decision-maker(s) for the appeal is not the same person as the decision-maker(s) that reached the determination regarding responsibility or dismissal, the investigator(s), or the Title IX Coordinator;
- (C) Ensure that the decision-maker(s) for the appeal complies with the standards set forth in paragraph (b)(1)(iii) of this section;
- (D) Give both parties a reasonable, equal opportunity to submit a written statement in support of, or challenging, the outcome;
- (E) Issue a written decision describing the result of the appeal and the rationale for the result; and
- (F) Provide the written decision simultaneously to both parties.

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Practical Considerations

Pitfalls and Obstacles

- “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.” 20 U.S.C. § 1681(a).
- This provision, which is enforceable through an implied private right of action, was enacted to supplement the Civil Rights Act of 1964's bans on racial discrimination in the workplace and in universities. *Yusuf v. Vassar Coll.*, 35 F.3d 709, 714 (2d Cir. 1994).
- As such, it is important to note that the relevant conclusions and findings here apply to this context as an employment matter, the analysis and evaluation under Title IV and Title IX would carry equal weight.

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Pitfalls and Obstacles

- “The law doesn’t prohibit simple teasing, offhand comments, or isolated incidents that are not very serious. Harassment is illegal when it is so frequent or severe that it creates a hostile or offensive work environment or when it results in an adverse employment decision (such as the victim being fired or demoted). A hostile work environment exists ‘[w]hen the workplace is permeated with discriminatory intimidation, ridicule, and insult, that is sufficiently severe or pervasive to alter the conditions of the victim's employment’.” *Harris v. Forklift Systems, Inc*, 510 U.S. 17, 21 (1993).
- Conduct that is “merely offensive” and “not severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive—is beyond Title VII's purview.” *Id*.

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Pitfalls and Obstacles

- Section 703(a) sets forth Title VII's core ***antidiscrimination*** provision in the following terms:

  "It shall be an unlawful employment practice for an employer—
  (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
  (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin."
  Burlington Northern & Santa Fe Ry. Co. v. White, 548 U.S. 53, 62 (2006), *citing* 42 USC § 2000e–2(a).

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Pitfalls and Obstacles

"The anti-retaliation provision protects an individual not from all retaliation, but from retaliation that produces an injury or harm. … Courts … have used differing language to describe the level of seriousness to which this harm must rise before it becomes actionable retaliation. … a plaintiff must show that a reasonable employee would have found the challenged action materially adverse, 'which in this context means it well might have 'dissuaded a reasonable worker from making or supporting a charge of discrimination.'

…

The anti-retaliation provision seeks to prevent employer interference with "unfettered access" to Title VII's remedial mechanisms. It does so by ***prohibiting employer actions*** that are likely 'to deter victims of discrimination from complaining to the EEOC,' the courts, and their employers."

Burlington Northern, 548 U.S. at 62-63, *citing Robinson v Shell Oil Co.,* 519 U.S. 337, 346 (1997).

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Pitfalls and Obstacles

- Stated differently, while sexual harassment is typically based on pervasive and repeated objectively sexual or gender related conduct creating a hostile work environment or results in an adverse employment action, an isolated incident of harassment may be so severe as to rise to the level of creating an objectively hostile work environment.
- Though Title IX (and Title VII) applies to the workplace, and generally to employees and workspaces over which the employer exercises managerial control, it does not apply to "non-employees" over which management has no control and where management does not approve or allow access or harassing conduct to take place
- "… it is ***not reasonable*** for an employee to attribute the actions of a visiting individual to the employment actions of the employer." *See Dempsey v. Harrison*, 387 F.Supp.2d 558 (E.D.N.C. Sept. 5, 2005).

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Pitfalls and Obstacles

- Liability for retaliation is MUCH BROADER than liability for Harassment or Hostile Work Environment
- You can have a finding of no Harassment, but still be liable for retaliation
- Retaliation can be any adverse workplace action
  - Undeserved negative evaluation
  - Change in work assignment
  - Change in work location
  - Increased counseling memorandums
- Supervisors and managers should be very wary of any work place decisions in close temporal proximity to a complaint

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Pitfalls and Obstacles

- **H**arassment vs. **h**arassment
- Harassment - Constitutional or Statutory
- harassment – Unprofessional conduct, Code of Conduct violations, workplace civility
- Two very different standards, responsibilities, and outcomes
- Handled as very different matters, different standards of proof, different outcomes and responsibilities

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Best Practices

- Regular Sexual Harassment & Hostile Work Environment Training for Supervisors and Staff – Legally required
- Regular review of policies and procedures
- KEEP SEPARATE "**H**arassment" and "**h**arassement"
- Proper Training for Title IX Officers – Legally required
- Standardized Reporting Forms – New York State Law
- Clear procedures for investigating complaints – New York State Law
- 30 Day process from complaint to findings and outcome

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Additional Resources - Appendices

DEAR COLLEAGUE LETTER REGARDING TITLE IX ENFORCEMENT GUIDANCE DATED FEBRUARY 4, 2025
https://www.ed.gov/media/document/title-ix-enforcement-directive-dcl-109477.pdf

Department Of Education website resource page for title ix
https://www.ed.gov/laws-and-policy/civil-rights-laws/title-ix-and-sex-discrimination/sex-discrimination-overview-of-law

Summary of Major Provisions of Department of Educations Title IX Final Rule released August, 2020

OCR FAQ - PART 1: QUESTIONS AND ANSWERS REGARDING THE DEPARTMENT'S TITLE IX REGULATIONS DATED JANUARY 15, 2021

OCR FAQ - PART 2: QUESTIONS AND ANSWERS REGARDING THE DEPARTMENT'S TITLE IX REGULATIONS DATED JANUARY 15, 2021

NEW YORK LABOR LAW 201-g: NEW YORK STATE SEXUAL HARASSMENT PREVENTION[1] MINIMUM POLICY STANDARDS[2], MODEL POLICY[3], MODEL PUBLIC NOTICE[4], AND MODEL COMPLAINT FORM[5] SEPTEMBER 2023

1. https://www.ny.gov/combating-sexual-harassment-workplace/sexual-harassment-prevention-model-policy-and-training
2. https://www.ny.gov/sites/default/files/atoms/files/MinimumStandardsforSexualHarassmentPreventionPolicies.pdf
3. https://www.ny.gov/sites/default/files/2024-08/SexualHarassmentModelPolicyUpdated.pdf
4. Https://www.ny.gov/sites/default/files/atoms/files/sexualharassmentpreventionposter_English_handfill.pdf
5. https://www.ny.gov/sites/default/files/2023-04/CombatHarassmentComplaintForm.docx

NEW YORK LABOR LAW 201-g: NEW YORK STATE SEXUAL HARASSMENT PREVENTION FOR NEW YORK'S MODEL TRAINING DECKS AND SCRIPTS THAT COMPLY WITH NYS LABOR LAW SEPTEMBER 2023
https://www.ny.gov/combating-sexual-harassment-workplace/sexual-harassment-prevention-model-policy-and-training

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