

Navigating and Implementing the Title IX Regulations

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OVERVIEW

II. Title IX, 20 USC 1681(a)

- Title IX of the Education Amendments of 1972
 - *No person . . . shall, on the basis of sex, be excluded from participation in, be denied the benefit of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.*
20 USC § 1681(a).
- Applicable to all schools that receive federal financial assistance
- Title IX and NHD OE require that schools have a policy to address complaints.
- Policy ACAC

- Substantive and procedural protections and requirements – detailed grievance procedure to provide protections from discrimination
- “On the basis of sex” – definition of “sex”?
 - Implications for which investigative process to utilize – ACAC or general anti-discrimination grievance process
- NH State Law protects individuals from discrimination on the basis of sex, gender identity and sexual orientation. RSA 193:38
 - Athletics – RSA 193:41 and West Virginia v. B.P.J., ____ U.S. ____, No. 24-43 (June 30, 2026)

III. The Title IX Regulations



- January 2025 - Federal Court vacated 2024 regulations nation-wide; return to 2020 regulations

A. Definitions

- Policy ACAC and 34 CFR 106.30 - “Sexual harassment:”
 - Conduct on the basis of sex occurring in an educational program or activity, that satisfies **one or more** of the following:
 - (1) A district employee conditioning the provision of an aid, benefit, or service of the [district] on an individual’s participation in unwelcome sexual conduct;
 - (2) Unwelcome conduct determined by a reasonable person to be so severe, pervasive, AND objectively offensive that it effectively denies a person equal access to the [district]’s education program or activity;
 - [or]
 - (3) “Sexual assault” as defined in 20 U.S.C. 1092(f)(6)(A)(v), “dating violence” as defined in 34 U.S.C. 12291(a)(10), “domestic violence” as defined in 34 U.S.C. 12291(a)(8), or “stalking” as defined in 34 U.S.C. 12291(a)(30) or state law.

Policy includes examples of conduct that might constitute sexual harassment –
NOTE: must meet above definition

“Actual Knowledge”

- *Actual knowledge* means **notice** of sexual harassment or allegations of sexual harassment to a [district's] **Title IX Coordinator or any official of the [district]** who has authority to institute corrective measures on behalf of the [district], **or to any employee of an elementary and secondary school.**
- The implications of this standard.
- Actual Knowledge triggers our obligation to provide supportive measures!!

“Deliberate Indifference”

- Takes a back seat to process.
 - *“A [district] with actual knowledge of sexual harassment in an education program or activity of the [district] against a person in the United States, must respond promptly in a manner that is not deliberately indifferent.”*

“Deliberate Indifference”

- Legal Standard:

- Districts are liable for monetary damages under Title IX when they are “deliberately indifferent to known acts of harassment in [their] programs or activities, including severe and pervasive acts of harassment perpetrated by fellow students in circumstances under the [Districts’] substantial control.”

M.L. v. Concord Sch. Dist., 2022 DNH 122 (D.N.H. Sept. 30, 2022)

“Deliberate Indifference”

- M.L. v. Concord, continued:
 - “A school satisfies its obligation under Title IX if it makes reasonable efforts to investigate and address peer-on-peer harassment. The statute does not require schools ‘to take heroic measures, to perform flawless investigations, to craft perfect solutions, or to adopt strategies advocated by parents.’ . . . [A] court must inquire whether the school’s response was objectively ‘so unlawful, so misdirected, or so poorly executed as to be clearly unreasonable under the known circumstances.’”
- “*Deliberate indifference*” = a response that is “*clearly unreasonable in light of the known circumstances.*”
 - May be equated with a lack of “supportive measures.”

“Deliberate Indifference”

- More M.L. v. Concord:
 - District’s actions were not deliberately indifferent:
 - No-contact between students (direct and indirect)
 - Different travel paths
 - Responding when parents reported concerns about potential contact/interactions
 - Notice to Parents about status of investigations
 - Assigned seats on bus

“Supportive Measures”

- “Non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, and without fee or charge.”
- “. . . designed to *restore or preserve equal access* to the [district’s] education program or activity *without unreasonably burdening* the other party, including measures *designed to protect* the safety of all parties or the [district’s] educational environment, or *deter sexual harassment*.”
- Examples:
 - counseling,
 - Course modifications,
 - Schedule changes,
 - SEL Measures,
 - System of Care/learning supports,
 - extensions of deadlines or other course-related adjustments,
 - modifications of work or class schedules,
 - campus escort services,
 - mutual restrictions on contact between the parties,
 - leaves of absence,
 - increased security and monitoring of certain areas of the campus
- DUTY – To immediately implement – presumption of protection!
 - Confidential!
 - Overseen by the Title IX Coordinator.
 - Never punitive.

“Formal Complaint”

- Document
 - Filed by a Complainant; or
 - Signed by the Title IX Coordinator
- Requesting that the District investigate the allegation of sexual harassment.
- Precondition: Complainant must be a
 - Program participant; or
 - Attempting to participate in program or activity of the District.
- Method of Filing:
 - In person;
 - Mail;
 - Electronic mail; or
 - “Any additional method designated by” the District.
- NOTE: Complainant who declines to file a formal complaint is still entitled to “supportive measures.”
- “Mandatory” and “permissive” dismissal procedures

“Education Program or Activity”

- Scope: An Institution’s “education programs and activities”
 - “Locations, events, or circumstances over which the institution exercised substantial control.”
 - Sexual harassment – that occurs in “any education program or activity.”
- Example: No jurisdiction over ‘study abroad.’

“Complainant” and “Respondent”

- Complainant: *“An individual who is alleged to be the victim of conduct that could constitute sexual harassment.”*
- Respondent: *“An individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment.”*

Additional Definitions

- Days – Calendar days...with some exceptions
- Decision-maker – person making the initial decision and person making any appellate decisions
- Determination of Responsibility – formal finding by the decision-maker as to each allegation of sexual harassment

IV. Conducting an Effective Title IX Investigation

- The Grievance process commences upon the filing of a formal complaint of sexual harassment. 34 CFR 106.45(b).
- Investigator = fact finder
- Must be free from bias and conflicts of interest.
 - Presumption that the respondent is “not responsible” when gathering evidence/investigating
 - Watch for the appearance of a bias or conflict of interest

A. Minimum Requirements for Title IX Investigations

- Equal opportunity to present witnesses
 - No restriction on the parties' ability to present evidence
- Parties must be allowed to have an advisor present at any meeting or proceeding under the grievance procedure
 - Can place limitations on the advisors' participation – limitations apply to both parties!
- Written notice to parties prior to any meeting or interview
- Parties must be given an equal opportunity to inspect and review evidence that is directly related to the allegations in the formal complaint
 - Includes evidence that the investigator does not intend to rely on
 - Intent is to give each party the opportunity to respond to the evidence before the investigation concludes

B. Role of the Title IX Coordinator

- Described in Policy ACAC
- Prompt notification to the Title IX Coordinator is key to the successful implementation of timely supportive measures and to ensure compliance with policy ACAC!

C. Notice to the Complainant, Respondent and Other Parties

- Provided to:
 - Complainant and Complainant's parent(s)/guardian
 - Respondent and Respondent's parent(s)/guardian
 - "Any other known party"
- Content of the Notice:
 - Notice of the school's grievance process, including any informal resolution process, AND
 - Notice of the allegations of sexual harassment, "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, and
 - the date and location of the alleged incident, if known.
 - 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.
 - Notice to the parties that they may have an advisor of their choice and of any provision in the district's code of conduct that prohibits knowingly making false statements or knowingly submitting false information during the grievance process.

Presumption of Non-Responsibility

- Respondent may NOT be presumed responsible until the conclusion of the grievance process.
 - Driven by Due Process considerations; and
 - Is why the supportive measures cannot be punitive.
 - Is NOT a presumption of truthfulness or greater credibility.
 - Goal of presumption is impartiality in the process

D. Initial Considerations

Who will investigate?

- Investigator = fact finder
 - Free from conflict of interest/bias

1. Do the allegations trigger other reporting duties?

- Reporting to Law Enforcement
 - Allegations of criminal behavior
 - Safe School Zone Violations (RSA 193-D)
- Potential Abuse/Neglect
 - Mandatory reporting obligation
- Reporting to the Insurer
 - Such as - bodily injury
- State Department of Education
 - Code of conduct requirements
- Reporting to Third Parties
 - Duty to warn of foreseeable harm

E. Scope and Conduct of the Investigation

- Scope will depend on the nature of the case
- Minimum requirements:
 - Interview/obtain statements from complainant/respondent/witnesses
 - Review district policies
 - Review evidence in district's control
 - Review evidence obtained from complainant/respondent/witnesses
 - State law considerations – RSA 189:70 regarding information from social media accounts

1. Conducting Interviews

- Factors to consider:
 - Location of the interview?
 - Who conducts the interview?
 - How many individuals are present?
 - Where will people sit?
 - Manner in which questions are phrased
 - Garrity warnings for employees
 - State law/social media limitations

2. Pre-decision access to the evidence

- Before concluding the investigation: Must provide the parties and their advisors equal opportunity to inspect and review the evidence obtained during the investigation that is *“directly related to the allegations raised in a formal complaint.”*
 - Must include all inculpatory and exculpatory evidence.
 - Ten (10) day review.
 - Evidence that is directly related to the complaint –
 - Tends to prove or disprove an issue in the complaint
 - Pertains to the allegations but does not prove or disprove the allegations

2. Pre-decision access to the evidence, Continued

- At conclusion of the investigation – Investigator must create an investigative report that fairly summarizes the evidence.
 - Investigator must consider the written responses from the parties prior to finalizing the report
- Investigative Report: Must be provided to the parties and the decision-maker in an electronic format or a hard copy
 - Post-disclosure process begins – decision-maker is involved
- State Law Considerations – limitations on social media access

3. The Investigation Report

- Summarize relevant evidence
- Provided to the parties and decision-maker
 - Hard copy or secure electronic format
- Report will be used by the decision-maker to make his/her determination
- Parties have 10 days to review the final report and provide written feedback to the decision-maker

3. The Investigation Report - contents

- Introduction/Summary of the Allegations
- Procedural History
 - Description of the steps taken as part of the investigation process
- Scope of Investigation/Applicable Policies
- Information Considered
 - Interviews
 - Documents
 - Provided by District (policies)
 - Provided by Complainant
 - Provided by Respondent
 - Provided by Witnesses
- Credibility of parties/witnesses
- Summary of Facts
 - For each allegation

F. The Role of the Decision-Maker

- Free from bias and conflict of interest
- Must be someone other than the Title IX Coordinator and investigator
- Should be new to the investigation
- Tasked with reviewing the investigation report and making an objective determination as to whether the allegations are founded or unfounded

Post-disclosure Process

- Decision-maker gives each party 10 days to submit written, relevant questions to be asked of other parties/witnesses. The parties have 10 days to provide answers to those questions, and 5 days will be provided for limited follow-up questions.
- Decision-maker considers all evidence then issues a written determination.
- Contents of final decision are outlined in the regulations.
- Simultaneous disclosure of the written decision

1. Standard of Proof

- Preponderance of the evidence requires the factfinder to consider the greater weight of the evidence. This is the burden of proof in most civil trials, in which the jury is instructed to find for the party that, on the whole, has the stronger evidence, however slight the edge may be, commonly in the context of a finding of “more likely than not.”
- Policy ACAC

2. Written Determination

- Issued within 10 days after the conclusion of the Q and A period.
- Contents of the decision
 - The date of the determination;
 - Identification of the allegations potentially constituting sexual harassment;
 - A description of the procedural steps taken from the receipt of the formal complaint through the determination, including notification to the parties, interviews with parties and witnesses, site visits, and methods used to gather other evidence;
 - Findings of fact supporting the determination;
 - Conclusions regarding the application of the school's code of conduct to the facts;
 - A statement of the result as to each allegation, including a rationale for each result. This must also include:
 - A determination regarding responsibility;
 - Any disciplinary sanctions to be imposed on the respondent;
 - Whether remedies designed to restore or preserve equal access to the District's education program or activity will be provided by the District to the complainant; and
 - The District's procedures and permissible bases for either party to appeal.
- The written decision becomes final after the conclusion of any appeals process, or the expiration of the appeals period.

G. Right to Appeal

- Triggered by the issuance of the written determination
- 10 days to file an appeal
 - Once filed, both parties 10 days to submit a written statement in support of, or challenging, the outcome
- Bases for appeal:
 - Procedural irregularity that affected the outcome.
 - New evidence that was not reasonably available when the determination of responsibility or dismissal was made that could affect the outcome.
 - The Title IX Coordinator, investigator, or decision-maker had conflict of interest or bias that affected the outcome.

Remedial measures/discipline imposed after the completion of the appeals process (or the expiration of the timeframe to file an appeal).

G. Right to Appeal

- Appellate decision-maker reviews the investigative report, the decision-maker's final report, and any information provided during the appeals process, to determine whether the decision was clearly erroneous (either made on unreasonable grounds, or without any proper consideration of the circumstances). If the appeal is based on new evidence, then appellate decision-maker may either make a determination of responsibility regarding that evidence or may remand the matter back to the investigator.
- Written decision should include:
 - Basis for the appeal
 - Decision on the appeal
 - Findings to support the decision

H. Informal Resolution

- Schools may use an “informal resolution process” BUT
 - only after a formal complaint has been filed.
- Prohibited when the allegation is that an employee harassed a student.
- To engage in an informal resolution process – both parties must give:
 - Voluntary;
 - Informed; and
 - Written consent.
- Either party may withdraw from the process and resume the grievance process at any point.

I. Prohibition against Retaliation

- Prohibited to retaliate against any individual for exercising his/her right under Title IX, including the participating in or refusing to participate in:
 - the filing of a complaint,
 - the investigation, or
 - any proceeding or hearing.

V. Recordkeeping and Training Requirements

- 7 year retention period
- Specific training requirements with publication of materials required