

# A New Era of Title IX

(Module 1: In-Depth Training for Title IX Coordinators  
and Other Interested Personnel)

Presented on  
**Wednesday, September 23, 2020**  
9:00 AM - 1:00 PM | Zoom

Presented by  
Ann S. Chapman, Meghan S. Glynn & Allen L. Kropp

# The New Era of Title IX

## MODULE 1

TITLE IX PRIMER | September 23, 2020

**Presented by:**

Ann Chapman, Meghan Glynn & Allen Kropp

## INTRODUCTION

- Your presenters for today.
- This is the first in our series of three modules on Title IX. The upcoming modules are:
  - October 2 – Investigator Training
  - October 9 – Relevance Assessments Required Under Title IX: Questions and Evidence

## TODAY'S AGENDA

- What we are covering today:
  - Brief orientation to Title IX.
  - When do schools have to act under Title IX and who must report.
  - Who is protected by Title IX.
  - Where Title IX applies.
  - Conduct covered under Title IX.
  - Conduct covered under related laws and policies.
  - Overview of policies and procedures.
  - Basics of investigations.
  - Conflicts of interest and bias.

## LOGISTICS FOR TODAY

- We will take two short breaks (at approximately 10:15 and 11:30), and end at 1:00.
- Your microphone will be muted.
- Please use the chat box to ask questions. We will get to as many questions as we can during the program.

# Part One

## ***Title IX Harassment – Where We Have Come From***

## A Brief History of Title IX

- Title IX became law in 1972.
- The law states in relevant part, *“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 *et seq.*
- Until 1998, if you asked someone about Title IX, the response would focus on athletics, and particularly on expanded opportunities for female athletes.

## Brief History: The Supreme Court Cases - *Gebser*

- In 1998, the Supreme Court decided *Gebser v. Lago Vista Independent School district*.
- Frank Waldrop, a teacher at Lago Vista, groomed Alida Gebser during her freshman year in high school, and the two began a sexual affair that spring. In January of her sophomore year, a police officer caught them engaging in sexual intercourse.
- Waldrop was arrested, and immediately fired.
- Gebser sued the school district under Title IX, seeking money damages.
- The Court held that where a school has **actual knowledge** of an employee sexually harassing a student but responds to such knowledge with **deliberate indifference**, the school itself has engaged in discrimination, subjecting the school to monetary damages in a private lawsuit under Title IX.
- The *Gebser* case was dismissed.

## Brief History: The Supreme Court Cases – *Davis*

- In 1999, in *Davis v. Monroe County Board of Education*, the Supreme Court held that where sexual harassment is committed by a peer rather than an employee (i.e., student-to-student sexual harassment), the same standards of **actual knowledge** and **deliberate indifference** apply.
- The *Davis* Court additionally crafted a definition of when sex-based conduct becomes actionable sexual harassment, defining the conduct as “so **severe, pervasive, and objectively offensive**” that it denies its victims equal access to education.
- The *Davis* case was allowed to proceed.

## Brief History: Prior OCR Guidance

During the Obama Administration, the 2011 Dear Colleague Letter and 2014 Q&As established new requirements for Title IX compliance, including:

- Schools must investigate any claim made by a student that they had been the victim of sex discrimination – *of any form and wherever it occurred* – including sexual misconduct.
- Sexual misconduct was defined to include sexual assault, sexual violence, sexual exploitation, or sexual harassment.
- Sexual harassment was defined broadly as “any unwelcome conduct of a sexual nature.”
- Equally important, whether sexual conduct was unwelcome was judged by a subjective, not an objective, standard. Whether a reasonable person would consider the conduct to be unwelcome was largely irrelevant. What mattered was that the student believed they had been the victim of unwelcome conduct of a sexual nature.
- OCR asserted that preponderance of the evidence (more likely than not) was the standard by which sexual misconduct cases must be judged.

## Part Two

### ***The New Title IX Regulations on Sexual Harassment***

## The New Title IX Regulations on Sexual Harassment

- In May 2020, the Department of Education published new regulations on sexual harassment. 34 C.F.R. Part 106. <https://www2.ed.gov/about/offices/list/ocr/newsroom.html>
- The actual regulations comprise a small portion of the publication (7 pages).
- The explanatory preamble is over 500 pages!
- The effective date of the regulations was August 14, 2020.

## The 2020 Title IX Regulations – General Principles *When Must Schools Act and Who Must Report?*

- The 2020 regulations return the focus of Title IX requirements for response by school districts to **actual knowledge** and **deliberate indifference**.
- Only if the school district has **actual knowledge** of **sexual harassment** (as sexual harassment is defined in the regulations) in its education programs and activities, against a person **in the United States**, does Title IX require a school district to respond promptly in a manner that is not **deliberately indifferent** – meaning not clearly unreasonable in light of the known circumstances.
- **Actual knowledge** means notice of sexual harassment or allegations of sexual harassment to a **Title IX Coordinator** or any official who has the authority to institute corrective measures on behalf of the school district (e.g., Superintendent, building administrator).
- **ALL** employees in a K-12 school district are required to report suspected sexual harassment to the school district's **Title IX Coordinator**.

## The 2020 Title IX Regulations – General Principles, *continued*

- There is now a difference between a **REPORT** of sexual harassment and a **FORMAL COMPLAINT**.
  - A “Report” triggers “*Supportive Measures*” to the alleged victim, but not an investigation.
  - Generally, only the victim (or parent/legal guardian for K-12 student) can file a formal complaint; this triggers an investigation.
  - The Title IX Coordinator can also trigger an investigation in certain circumstances (such as repeated accusations against the same student or employee).
  - If a Formal Complaint is filed, the decision-maker cannot be the same person as the investigator or Title IX Coordinator.
- Schools must treat complainants and respondents (those alleged to have committed sexual harassment) “equitably” in terms of the process.
- Schools must not presume responsibility on the part of a respondent until the process has run its course (and must state as much in the initial notice to parties of formal complaint).
- School districts may now choose to use the “preponderance” standard or the “clear and convincing” standard.

## The 2020 Title IX Regulations – *The Title IX Coordinator*


- The 2020 regulations require that school districts appoint a ***Title IX Coordinator***, who has broad responsibilities for implementing the regulations and related policies/procedures for a school district.
- Deputy Title IX Coordinators are allowed (but one Coordinator should have overall responsibility).
- The Title IX Coordinator role may be combined with the Affirmative Action Officer role, but “Title IX Coordinator” must be part of the title.



## The 2020 Title IX Regulations – *Enforcement*

- Title IX enforcement remains with the U.S. Department of Education's Office for Civil Rights (OCR), and through private lawsuits.
- OCR also announced in May that they were launching a new initiative to increase scrutiny on how K-12 schools handle sexual assaults through compliance reviews and data collection.
- Other forms of sex/gender discrimination covered under Title IX are unaffected and the existing Title IX regulations pertaining to them remain in effect (e.g. athletics).

## The 2020 Regulations - *How Do School Districts Avoid Being Deliberately Indifferent?*

- By appointing a Title IX Coordinator.
  - By adopting policies and procedures that comply with the Title IX regulations.
  - By following the adopted policies and procedures, and retaining required records to demonstrate compliance.
-  DWM has legally-compliant sample policies/procedures for New Hampshire school districts.
- By retaining required records for seven years.

## The 2020 Regulations - *Who is Covered Now: A Broader Scope*

- All students enrolled in the school district.
- All students seeking to enroll in the school district.
- Any individual participating in school programs, activities, and events.
- Employees, applicants for employment, and volunteers of the school district.



The addition of employees is a significant change.

## The 2020 Regulations – *Where Does Title IX Apply: “Education Programs and Activities”*

- Under the new regulations, school districts only have a duty to respond to sexual harassment which occurs:
  - In education programs, activities or other events sponsored by the school district and taking place at school (e.g. classes, extra-curriculars, professional development activities).
  - Off school property, but only in the context of an education program or activity and when the school district has **substantial control** over the person who allegedly engaged in sexual harassment (e.g. field trips, away athletic events).
  - In the United States.

## How is Title IX Sexual Harassment Defined

- The regulations prohibit **“sexual harassment.”**
- **Sexual harassment** means conduct on the basis of sex that falls into one of the following categories:
  1. **“Quid Pro Quo”** harassment by an **employee** (conditioning provision of a school district’s aid, benefit or service on an individual’s participation in unwelcome sexual conduct) against another employee or a student (e.g. a good evaluation for an employee; a better grade for a student).
  2. **“Hostile Environment”**: Unwelcome conduct based on sex that is so **severe, pervasive AND objectively offensive** that it effectively denies a person’s access to the school district’s education programs and activities.



The prior OCR Guidance definition was broader – Unwelcome conduct that was sufficiently severe, persistent, **OR** pervasive so as to limit a student’s ability to participate in or benefit from the school district’s education programs/activities.

## How is Title IX Sexual Harassment Defined, continued

### 3. **Sexual Assault, Dating Violence, Domestic Violence, and Stalking:**

**Sexual Assault:** Defined as an offense classified as a Forcible or Non-Forcible Sex Offense under the uniform crime reporting system of the FBI. Those offenses are –

- **Non-Forcible Sex Offenses** – Include incest and statutory rape. In New Hampshire, only children aged 16 and older can give consent to sexual contact with adults unless the two parties are legally married. A teenager under 13 cannot consent to any sexual contact. Children who are between 13 and 16 may consent to a sexual act when their partner is less than four years older than they are.
- **Forcible Sex Offenses** – Any sexual act directed against another person, without the **consent** of the victim, including instances where the victim is in a state of incapacitation. This sounds like a broad definition, but a sexual act is further defined **only** to include:
  - Forcible rape – Sexual intercourse with a person, forcibly and/or without that person’s consent, or in instances where the victim is in a state of incapacitation.
  - Forcible oral or anal sexual intercourse – with another person, forcibly or without consent, or because of incapacitation.
  - Sexual assault with an object – Use of an object or instrument to unlawfully penetrate, however, slightly, the genital or anal opening of the body of another person, forcibly, or without consent or because of incapacitation.
  - Forcible fondling – The touching of the private body parts (genitals, buttocks or breasts) of another person for the purpose of sexual gratification, forcibly, or without consent, or because of incapacitation.

## How is Title IX Sexual Harassment Defined, continued

4. **Dating Violence:** The Title IX regulations define dating violence as physical or sexual abuse, or threats of physical or sexual abuse, or emotional abuse committed by a person:
  - Who is or has been in a social relationship of a romantic or intimate nature with the victim; and
  - Where the existence of such a relationship is determined based on a consideration of the following factors: (a) length of relationship; (b) type of relationship; (c) the frequency of interaction between persons in the relationship.
5. **Domestic Violence:** This is essentially the same thing as Dating Violence, except among current or former spouses or cohabitants or people who share a child in common (in the K-12 context, this will only apply to employees).

## How is Title IX Sexual Harassment Defined, continued

6. **Stalking:** The Title IX regulations define stalking as engaging in a course of conduct directed at a specific person that would cause a reasonable person to:
  - Fear for their safety or the safety of others; or
  - Suffer **severe** emotional distress.


Additionally, the Regulations prohibit:

7. **Retaliation:** Prohibited, but addressed only through other student and employee disciplinary processes.

## How is Title IX Sexual Harassment Defined, continued

- To summarize:
  - Quid Pro Quo harassment by an **employee**.
  - Unwelcome conduct based on sex that is severe, pervasive AND objectively offensive that it denies access to education programs/activities.
  - Sexual Assault
    - Situations where there is actual sexual contact involving penetration.
    - Touching (fondling) of genitals, breasts, or buttocks.
  - Dating violence and domestic violence.
  - Stalking.
  - Retaliation.

## Sexual Harassment Under Other Laws

- School districts need to comply with both Title IX and the other applicable nondiscrimination/harassment laws (e.g., State law & Title VII).
  -  The DWM sample policies/procedures address both Title IX and non-Title IX harassment and discrimination.
- School districts will need to carefully review all harassment-related reports/complaints to ensure the appropriate procedure is followed.
- Don't forget:
  - JICK – Bullying.
  - Other conduct policies that may apply.

# Part Three

## *Policies and Procedures*


## AC – Nondiscrimination/Equal Opportunity and Affirmative Action

The umbrella policy that addresses the school district's compliance with all federal and state nondiscrimination laws/regulations, including Title IX.

 Refer to policy for discussion.


## ACAA – Unlawful Harassment and Sexual Harassment of Students

The policy that addresses harassment and sexual harassment towards students.

 Refer to policy for discussion.

## ACAA-R – Student Discrimination/ Harassment and Title IX Sexual Harassment Complaint Procedures

The procedure that addresses how the school district will respond to reports of discrimination and harassment, including Title IX sexual harassment.

 Refer to procedure for discussion.

## ACAB – Harassment and Sexual Harassment of School Employees

The policy that addresses harassment and sexual harassment towards employees.

 Refer to policy for discussion.

## ACAB-R – Employee Discrimination/ Harassment and Title IX Sexual Harassment Complaint Procedures

The procedure that addresses how the school district will respond to reports of discrimination and harassment, including Title IX sexual harassment, against employees.

 Refer to procedure for discussion.



# Part Four

## *Overview of Laws & Assessment of Complaints*

## Sexual Harassment Under Title IX and Other Laws: Side-By-Side

	Title IX	Title VII/State Law
<b>Quid Pro Quo</b>	By an employee against employee or student – conditioning school aid, benefit or service on individual's participation in unwelcome sexual conduct.	By an employee or student – Submission to unwelcome sexual conduct is made explicitly or implicitly a term or condition of education/employment benefits or is used as a basis for decisions on education/employment benefits.
<b>Hostile Environment</b>	Unwelcome conduct based on sex that a reasonable person would find so severe, pervasive AND objectively offensive that it effectively denies equal access to education program/activities.	Conduct on the basis of sex that has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile OR offensive school/work environment.
<b>Other Conduct Covered</b>	Sexual assault, dating violence, domestic violence, stalking, retaliation.	Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature [can include conduct defined under Title IX], and retaliation.
<b>Scope</b>	Conduct that takes place within education programs and activities in the United States.	Impact on alleged victim at school/work.



**Title IX Complaint Procedure**



**Discrimination/Harassment Complaint Procedure**

## Bullying

- RSA 193-F: NH Bullying Law
- Scope of Conduct: Bullying; cyberbullying; harassment and sexual harassment covered under ACAA; retaliation; making knowingly false accusations of bullying behavior.
- "Bullying" means a single significant incident or a pattern of incidents involving a written, verbal, or electronic communication, or a physical act or gesture, or any combination thereof, directed at another pupil which:
  - (1) Physically harms a pupil or damages the pupil's property;
  - (2) Causes emotional distress to a pupil;
  - (3) Interferes with a pupil's educational opportunities;
  - (4) Creates a hostile educational environment; or
  - (5) Substantially disrupts the orderly operation of the school.
- "Bullying" shall include actions motivated by an imbalance of power based on a pupil's actual or perceived personal characteristics, behaviors, or beliefs, or motivated by the pupil's association with another person and based on the other person's characteristics, behaviors, or beliefs.
- "Cyberbullying" means conduct defined in paragraph I of this section undertaken through the use of electronic devices. "Electronic devices" include, but are not limited to, telephones, cellular phones, computers, pagers, electronic mail, instant messaging, text messaging, and websites.

## Hazing

- RSA 631:7
- "Student hazing" means any act directed toward a student, or any coercion or intimidation of a student to act or to participate in or submit to any act, when:
  - (1) Such act is likely or would be perceived by a reasonable person as likely to cause physical or psychological injury to any person; and
  - (2) Such act is a condition of initiation into, admission into, continued membership in or association with any organization.

## Other Relevant Laws

- Americans with Disabilities Act
  - Protects qualified individuals with disabilities in their places of work/education
- NH Human Rights Act, RSA 354-A
  - Prohibits discrimination against employees and students based on age, sex, sexual orientation, gender identity, race, color, marital status, familial status (students only), physical or mental disability, religious creed, or national origin.
- Section 504 of the Rehabilitation Act of 1973
  - Prohibits discrimination against employees and students with disabilities
- Title VI of the Civil Rights Act of 1964
  - Prohibits discrimination based on race, color or national origin.

## HYPOTHETICALS

**Please review the following scenarios, assess the allegations, and identify:**

- 1) The type(s) of prohibited conduct described in each situation if any – e.g., bullying; race, color or other form of discrimination/harassment; sexual harassment, etc.
- 2) Which procedure (ACAA-R, ACAB-R, or other procedure) would you follow to address the alleged conduct?

### Scenario 1:

On a Friday afternoon, Audrey's mom Amy files a complaint in your office claiming that Audrey has been subject to discrimination because of the way she looks. Amy states that over the last several weeks, Audrey has been picked on, online, by a group of female classmates. Amy explains that the classmates have told Audrey her hair is "disgusting," encourage her to shave her head, and tell her that if they had frizzy hair like hers, they would never come to school. The classmates also make fun of Audrey's weight. According to Amy, Audrey is incredibly shaken by this, and is now stating she will only access remote learning. Prior to this incident Audrey had been very excited to return to in-person learning.

### Scenario 2:

After a particularly contentious IEP meeting, you receive a complaint from a parent that their child, Matthew, is being bullied by the high-school principal. Matthew, who has Autism, is about to start 9<sup>th</sup> grade and the meeting was intended to be a transition meeting between middle school and high school. Matthew's dad explains that Matt attended the recent IEP meeting, at the encouragement of the IEP team, but that during the meeting his new principal refused to answer any of Matt's questions, speak to him directly, or even make eye contact with him. The high school principal also refused to grant the family's request that Matt be placed in an out-of-district program. At the end of the meeting, Matt's dad thought he heard the principal use the "r-word" during a conversation with the case manager, and distinctly heard him say "I can't stand to sit in any more meetings with stupid people."

**Scenario 3:**

Joan is a high school teacher who comes to you in tears because another teacher in her department, Margaret, has been bullying her. She says that Margaret is really mean. She says Margaret always avoids sitting next to her at department meetings, and makes a point to roll her eyes at anything she says, like she thinks Joan is stupid. Joan says when she came down the hall to the break room the other day, she could hear Margaret talking about how much weight Joan has gained during the pandemic and that she looks like a cow. She also said that Margaret makes a point of posting pictures on her Instagram account showing her having fun with other teachers in their department at social events, but she never invites Joan. Joan wants you to do something about this bullying because the department head is afraid of Margaret and won't make her stop being mean to Joan. Joan says she dreads coming to work and is reluctant to participate in meetings anymore because of Margaret's bullying.

What if these facts are added:

All of these behaviors happened, but Joan is gay and married to another woman. Joan is the only gay person in the department.

What if Margaret has frequently expressed her strong views that marriage should only be between a man and a woman?

#### Scenario 4:

Katherine is beginning her sophomore year at the high school and plays in the school band. Early in the school year, her best friend Sallie meets with the school social worker and relays the following: Eric, a popular student in the high school's senior class and also a member of the school band, has been interested in dating Katherine. He asked Katherine out back in June and told her she was "really hot" (or something similar) a few times. Katherine didn't think much about the attention at the time and told Eric that her parents do not let her date. Then, after a pre-season band practice in mid-August, Sallie and Katherine went to a beach party and Eric was there. At some point, Katherine took a walk along the beach with Eric. The next day, Katherine called Sallie crying and explained that she and Eric began kissing while on their walk, but that Eric "took it way too far" by forcing his hands under her shirt and attempting to unbutton her pants. Katherine ran back to the party and got a ride home from another student since Sallie had already left. Sallie added that Katherine is "really upset and embarrassed" by the whole thing.

## NOTES:

Suppose Eric had been pursuing Katherine throughout her freshman year by regularly texting her about her attractiveness and stating, on multiple occasions, that he will not stop asking her out until she goes on at least one date with him?

What if the sexual encounter took place at the hotel where the band was staying during a regional high school band competition?

# Part Five

## *Basics of Investigations*

## Basics of Investigations

- The Title IX regulations require that those involved in addressing Title IX reports/complaints receive training on conducting investigations.
- This includes Title IX Coordinators, investigators, decision-makers and individuals assisting in informal resolutions.
- This is a brief overview.
- Module 2 on October 2nd will provide comprehensive training on investigation best practices, including the specific requirements for investigations in the Title IX regulations.



## Basics of Investigations, continued

- Assess the nature of the complaint and/or suspected misconduct:
  - What policy(ies) and/or law(s) may have been violated?
  - If it is a report of possible sexual misconduct – is it a potential Title IX sexual harassment violation or something else?
- Follow internal communication protocol (i.e., coordination with Superintendent's office).

## Basics of Investigations, continued

- Take any necessary steps to ensure safety and provide any necessary notices:
  - Address any physical or other safety issues.
  - Contact law enforcement if appropriate.
  - Safeguard property.
  - Notify parents/guardians if there is student involvement.
  - Does DCYF need to be notified.
  - Ascertain any collective bargaining rights of employees involved.

## Basics of Investigations, continued

- Preserve evidence:
  - Take custody of computers/electronic devices if appropriate.
  - Take screenshots or photographs of texts, social media posts, etc.
  - Photograph/document damage, injuries, location where the violation occurred, if applicable.
  - Save or copy recordings of video surveillance footage, if applicable.

## Basics of Investigations, continued

Choose an investigator. Determine:

- The right person to investigate the particular issue.
- Whether the investigator should be internal or external.
- Be sure the investigator is:
  - Free of bias/conflicts, perceived or otherwise.
  - Trained.
  - Able to treat people with respect/sensitivity.
  - Able to ask hard questions and reach hard conclusions.
  - Able to write effective reports.
  - Able to act as an effective witness (if necessary).

## Basics of Investigations, continued

### Plan the investigation:

- Scope.
- Witnesses.
- Evidence.
- Type of Report.
- Timeline.

## Basics of Investigations, continued

### Prepare for interviews:

- Who will be interviewed.
- Sequence of interviews.
- Who will be present.
- How will interviews be documented.
- Questions.

## Basics of Investigations, continued

### Conduct interviews:

- Be respectful and sensitive.
- Listen!
- Plan questions, but go where answers lead.
- Ask the hard questions.
- Follow up on inconsistencies and gaps.
- Observe tone and body language.

## Basics of Investigations, continued

- Finish investigation:
  - Know when it's time to stop.
  - Consider relevant evidence (Module 3 will cover this in the Title IX context).
  - Reach conclusions (in Title IX investigations, this must be done by a decision-maker, someone who is not the investigator).
  - Write a report.
- Determine appropriate sanctions (role of decision-maker in Title IX cases).
- Notify individuals of results:
  - Follow applicable laws, policies, and procedures.
  - Remember confidentiality requirements.

# Part Six

## *Conflicts of Interest and Bias*

## Conflicts of Interest and Bias

- The Title IX regulations require those involved in the Title IX process to be free of conflicts of interest and bias, and to receive training on these topics (Title IX Coordinators, investigators, decision-makers and those assisting in informal resolutions).
- Fairness and equity are an important part of any investigation and/or discipline process.

## What is a Conflict of Interest or Bias?

- The regulations require that those involved in Title IX processes must not pre-judge the facts and must not be biased against or in favor of a particular class of parties in the complaint process.
  - Believing that a complainant, as a victim or survivor, should be presumptively believed constitutes bias.
  - Believing that all women or all men behave in a certain way constitutes bias.
  - Believing that complaints generally arise from sex that someone regrets constitutes bias.
  - Believing that accused parties are usually guilty constitutes bias.



Remember – The regulations require a presumption of non-responsibility on the part of a respondent (until the point when the decision-maker makes a finding).

## What is a Conflict of Interest or Bias, continued

- A conflict of interest or bias can also occur in a particular case, depending upon knowledge about or a prior relationship with individuals involved in a particular case (positive or negative).
- Parties are provided opportunities (under the complaint procedures) to raise concerns about conflict or bias.
- School districts should be alert to any real or perceived conflicts of interest or bias, and assign other individuals to particular roles if a conflict or bias exists.

## What is Not a Conflict of Interest or Bias

- There are some things which do not necessarily constitute a conflict of interest or actual bias:
  - Being an employee of the school district does not mean an individual is automatically “biased” in favor of the school district.
  - Having done advocacy in the field of sexual violence (OCR believes training can “cure” any issue of bias).
  - Title IX Coordinators can also serve as investigators in Title IX cases (but not decision-makers) – although we recommend caution.
- Conflicts of interest and bias are judged by an objective standard – whether a reasonable person would believe bias exists.

## Thank You

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# A New Era of Title IX

## (Module 2: In-Depth Training for Title IX Coordinators and Other Interested Personnel)

Presented on  
**Friday, October 2, 2020**  
9:00 AM - 12:00 PM | Zoom

Presented by  
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## How to Conduct Effective Investigations in Schools

*Ann S. Chapman, Meghan S. Glynn and Allen L. Kropp*

### A. Introduction

One of the primary duties of Human Rights Officers (HRO's) and/or Title IX Coordinators is to ensure that all complaints of discrimination and harassment are appropriately investigated. This does not mean that the HRO/Title IX Coordinator will personally conduct all investigations, but the HRO/Title IX Coordinator should be fully familiar with proper investigatory practices in order to ensure that effective investigations are done.

This guide provides a roadmap for planning and conducting effective investigations of both student and employee complaints regarding alleged discrimination and harassment, and can also be used to investigate other misconduct.

#### Step 1: Assess the Nature of the Complaint/Suspected Misconduct

As soon as a report/complaint is received, or there is reason to suspect that misconduct has occurred, the HRO/Title IX Coordinator must make an initial assessment of the seriousness of the complaint and what policy/legal violations may have occurred.

Virtually every incident of alleged misconduct warrants some level of investigation. However, complaints concerning discrimination and harassment (as well as complaints that may involve the safety of students, employees or the public; and complaints of potential criminal misconduct) need to be addressed right away and require a greater level of scrutiny than those relating to minor policy violations or workplace annoyances.

Cast a wide net and make sure you review all the possible relevant policies/procedures associated with the alleged misconduct so that you are sure you are applying the correct policy/procedure for the situation. For instance, if there is a complaint that a student or employee has been harassed, you may need review the following (depending on the information you have received):

- ACAA/ACAA-R – Harassment and Sexual Harassment of Students/Complaint Procedure;
- ACAB/ACAB-R – Harassment and Sexual Harassment of Employees/Complaint Procedure;
- JICK – Bullying and Cyberbullying of Students;
- JICFA – Hazing (applies to students and employees).

The Title IX sexual harassment regulations which became effective on August 14, 2020 include strict definitions and procedures that need to be followed, which makes it more important than ever to ensure that you use the correct policy/procedure for each report/complaint you receive.<sup>1</sup>

## **Step 2: Take Any Necessary Steps to Ensure Safety and Provide Any Necessary Notices**

If there is any actual or potential injury to people or property, steps should be taken to address the threat, including calling law enforcement, crisis services, and/or removing the student or employee from the school.<sup>2</sup>

At a minimum, if there is an issue between particular employees and/or students, consider whether supportive measures are appropriate to ensure that the parties do not come into contact with each other.

- When students are involved, it is important to notify the parents/guardians, at least in general terms, about what is going on.
- In cases where there is reason to believe that a child has been abused or neglected, be sure to comply with DCYF reporting requirements (review your school board's child abuse policy/procedure for more detail).
- Keep in mind that the New Hampshire Code of Conduct requires administrators to notify the Superintendent when a credential holder has violated the code of conduct. It is then incumbent on the Superintendent to report that violation to the Department of Education.<sup>3</sup>
- It is important to comply with any collective bargaining requirements or policies that may apply.

## **Step 3: Preserve Evidence**

Preserving evidence of wrongdoing is an important step in an investigation. Sometimes this means taking photographs of the scene of an incident or of a physical injury, or it might mean taking custody of a computer or electronic device. Preservation of evidence can be particularly challenging in an investigation of misconduct that involves social media, texts, emails or access to inappropriate websites because information can so easily be deleted or altered. It is important to act quickly to take screen shots or make copies of information before someone has the chance to delete or alter it. Consider whether in some cases there may be video

<sup>1</sup>See materials from Module 1 for further information. In cases of possible Title IX sexual harassment, some steps of the investigation process will need to be compressed. For instance, although you will not do a full investigative interview at the outset (because no formal complaint has been filed), you will need to meet with the alleged victim (if known), provide supportive measures as appropriate, and explain how to file a formal complaint.

<sup>2</sup> In addition, there are specific requirements concerning "emergency removal or administrative leave" under the Title IX regulations.

<sup>3</sup> See N.H. Admin. Code Ed. 510.05.

surveillance available of the incident.

#### Step 4: Review Documents

To the extent it has not been done already, it is important to review any relevant documents such as a collective bargaining agreement or contract, other school board policies/procedures, and the personnel records and/or education records of the parties involved. This will ensure that the investigation is conducted in accordance with any particular contract or policy requirements, and the parties' records may be helpful to the investigator in some cases when assessing statements for accuracy and/or assessing credibility.

#### Step 5: Choose an Investigator

It is important to choose the right person to conduct each investigation. Although the HRO/Title IX Coordinator is responsible for overseeing the investigation, they may not be the most appropriate person to conduct a particular investigation.<sup>4</sup>

The investigator should:

- Have no bias or conflict of interest;
- Be fair and impartial;
- Be well-trained;<sup>5</sup>
- Have a clear understanding of applicable laws, policies, and rules;
- Be a trusted and respected individual;
- Be able to treat people with respect and sensitivity;
- Be able to get to the truth;
- Be able to ask hard questions;
- Be thorough, but know when to stop;
- Be able to reach conclusions;
- Be a good note-taker and writer;
- Be an effective witness (if necessary).

#### Step 6: Plan the Investigation

It is important for the investigator to plan out the investigation. No two investigations are exactly alike and virtually every investigation will differ in some (often unexpected) ways from others. Planning the investigation will include at least the following general steps. However, it is important that investigators follow the

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<sup>4</sup>Under the new Title IX sexual harassment regulations, Title IX Coordinators may conduct investigations, but there may be good reasons to appoint someone else to conduct such investigations.

<sup>5</sup>There are specific training requirements for investigators dealing with Title IX sexual harassment matters.

requirements of the particular complaint procedure applicable to the matter.

- Determine the scope of the investigator's responsibility (and who will be responsible for what discipline and/or other actions may be taken as a result of the investigation).
- Determine what documents/evidence will need to be gathered (in addition to any preserved when the report or complaint was received).
- Determine who will be interviewed (the same person should do all interviews). Sometimes it is difficult to determine the proper scope, but in general it is best to keep the investigation as small as possible and still be thorough. Investigations almost always have an impact in the school, no matter how discreet an investigator is in conducting the investigation.
- Determine whether a site visit will be needed.
- Determine how the investigation will be documented, what kind of report will be written, and who will see it.
- Develop a tentative timeline for the investigation. Some policies/procedures or collective bargaining agreements have specific deadlines that need to be followed. In every case, an effort should be made to conduct and conclude the investigation within a reasonable time, based on the particular circumstances.

### Step 7: Prepare for the Interviews

Once the overall plan for the investigation is mapped out, it is important to take the time to prepare for the interviews.

- **Determine sequence of interviews:** Usually (but not always), the complainant should be interviewed first, any witnesses next, and the respondent should be interviewed last (but not always). Except in rare circumstances individuals should not be interviewed together.
- **Determine location of interviews:** Choose a private location. If possible, it is often a good idea to hold the interviews outside of the location where the incident/conduct occurred (for instance, at central office if the incident occurred in a particular school building). It is always a good idea to have water and tissues on hand during interviews, and if possible, there should also be a restroom nearby.
- **Determine how to document interviews:** Consider how interviews will be documented. In most cases, taking notes by hand or on a computer works well. Only the facts should be recorded, not the investigator's impressions of credibility or conclusions. In some cases, it may make sense to have someone present to take notes, but if so, it should be someone who can accurately document what was said and who can keep information strictly confidential. Generally, our recommendation is not to audio or video record interviews. If you feel that a particular

interview should be recorded, we recommend that you consult with legal counsel first. The people you interview should not be allowed to record their interview, as the investigator will have no control over what happens with that recording. You should politely confirm that no one present is recording the interview.

- **Determine whether anyone will or could accompany the persons to be interviewed:** Employees may have a right to have a representative with them in certain situations, parents/guardians may want to be present at interviews of their children, and employees and/or students may ask for a “support” person at an interview. Decisions about these issues should be made on a case-by-case basis depending on the particular circumstances.

In Title IX sexual harassment investigations, the parties have the right to an “advisor” throughout the complaint process, and this advisor may be an attorney.

- **Prepare interview questions:** Questions should be prepared ahead of time (more on questions in the next section). However, the cardinal rule of interviewing is to be flexible, so investigators must be prepared to go where the witness takes them during the interview. An effective investigator recognizes that questions should be tailored to the person being interviewed and the nature of the issue being investigated.

## Step 8: Conduct Interviews

The following are some basic tips for conducting effective interviews:

- Show respect for the individual by being on time and prepared for the interview.
- Explain the investigator’s role (“I’m here to find out what happened”); what the individual’s role is in the investigation; the importance of confidentiality<sup>6</sup> and the prohibition against retaliation for participating in the investigation. Ask the individual if they have any questions for you at the outset.
- Individuals are often nervous and not sure what to expect in the interview, even if they have not been accused of any wrongdoing. In such cases, you can ask them if they have any particular concerns about participating in the interview.
- Make sure the individual knows they can take a break to go to the restroom or get some fresh air if they need to (breaks can sometimes be a strategic tool for investigators to use as well).

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<sup>6</sup>Keep in mind that during a Title IX sexual harassment investigation, the parties cannot be prohibited from talking about the situation, but they (or those they speak with) still cannot engage in retaliatory conduct or other conduct that interferes with the investigation process.

## NOTES

- Do not promise that you can keep an individual's identity or statements confidential.
- If there is a union representative or support person/advisor with the individual being interviewed, they should not be answering questions or explaining things for the witness, or asking the investigator questions themselves. This should be explained at the outset of the interview.
- Build rapport with the individual before jumping into investigatory questions. Talking about the weather, what classes and activities a student likes, what their job entails, etc., can help put an individual at ease and shows an interest in them as a person.
- Get the basic information first (such as full name, grade or position, how long they have been employed, etc.).
- Let the individual tell their story first, without jumping in. Ask open-ended questions (e.g. "Tell me what happened," "Tell me about Mr. X's style in class," "Tell me about your relationship with Julie," etc.), rather than questions that suggest the answer (e.g. "Mr. X made suggestive comments to you, didn't he?" "I am here to talk to you about what Johnny did to Suzy," or "Did you look down Ms. Young's shirt?").
- Often there is important background information that provides context for the issue at hand, so make sure to ask questions about the history of the relationship between the parties, etc.
- The hard questions must be asked at some point during the interview (although usually not at the outset!). If someone is accused of a specific act, you will need to ask that person if they engaged in that act, no matter how hard or embarrassing it is to ask about it. You must have either an admission or denial, and obtain their version of what happened, in order to make an accurate assessment about what occurred.
- It is often useful to ask an individual to act out what happened. Have the individual show you exactly where and how they were touched, where people were in the room; or ask them to demonstrate a tone of voice. Ask for details, such as what time it was, what people were wearing, whether the door was open or shut, whether the lights on or off, etc.
- Follow-up on inconsistencies or gaps in a matter of fact manner to avoid defensiveness or the individual shutting down. If an individual has made inconsistent statements or you have reason to doubt their truthfulness, it can be helpful to have them repeat their story later in the interview to see if anything changes.
- For evasive individuals, it is often helpful to drop a line of questioning and come back to it later.

- For hostile individuals, remind them that this is their opportunity to share what they know, and if they refuse, assessments will be based on the totality of facts the investigator knows. Stay calm and try to elicit the reasons for the hostility. If an interview really is not going anywhere, you can end it and say that you may be in touch at a later time.
- Before the end of the interview, be sure to ask the individual if there is anything you did not ask that they think you should know, whether there is anyone else with direct information about the incident, and whether there are any documents, texts, etc. that the individual has or knows about.
- At the end of the interview, thank the individual for their time. Let them know that you may contact them again if there are further questions and invite them to contact you if they think of anything else. If it is one of the parties, let them know what the next steps will be. Remind the individual about confidentiality and that retaliation is prohibited.
- Be as thorough as you can in your first interview, but if there are inconsistencies or gaps based on the totality of the interviews you conduct and information received, do not hesitate to follow up to resolve lingering questions.

### Step 9: Finish the Investigation

Even the most seasoned investigator sometimes has difficulty determining when it is time to stop investigating and move on to the next stage. Once the evidence has been gathered and witnesses have been interviewed, the investigator should go over what they have and see if anything else is needed.

Keep in mind that in Title IX sexual harassment investigations, there are specific requirements for sharing evidence with the parties and obtaining their responses to the evidence.

It is important to try to meet any required or self-imposed deadlines, but it is also very important to do a thorough investigation. If necessary, it is better to get an extension for good cause than to rush through a flawed investigation that may be challenged and will reflect poorly on the school unit.

### Step 10: Reach a Conclusion

Now it is time to reach a conclusion about the case (other than in Title IX sexual harassment cases, where a separate decision maker determines whether there is a finding of responsibility on the part of the respondent).

Reaching a conclusion is often difficult to do for many reasons: the respondent denies engaging in the conduct and there is no “smoking gun,” there are inconsistencies or contradictions in people’s stories, etc. It is the investigator’s responsibility to weigh the evidence, assess the credibility of all the individuals involved, decide who to believe and who not to believe, and to reach a conclusion as to whether a

policy violation was committed.

Generally speaking, determinations that an individual is responsible for a violation are made based on the preponderance of the evidence standard (“more likely than not”).

### **Step 11: Write the Report**

Careful thought should be given to the issue of what to include in the investigation report. It is important to remember that if the case is litigated later, the report will almost always be admissible in court.

In most cases, a written report should be concise and include basic information about the investigation:

- A statement of what the complaint was about and the scope of the investigation.
- A summary of the respondent’s response to the allegations.
- A list of documents/evidence reviewed.
- A list of witnesses who were interviewed. Whether or not to include summaries of what witnesses said is something that should be discussed at the outset of the case.
- The investigator’s conclusion as to whether the complaint is valid or not (and what policies were violated, if applicable), and the reasons for that conclusion. (This is not applicable in Title IX sexual harassment cases.)

In Title IX sexual harassment cases, the investigator must provide the investigation report to the parties, provide them an opportunity to provide feedback on the report, and consider that feedback before finalizing the report.

Generally speaking, reports should not include recommendations as to what, if any, remedial action should be taken, unless the investigator was assigned that responsibility at the outset.

Investigation reports should not include information that is extraneous to the incident being investigated. For example, if the investigation revealed the existence of more widespread harassment in a school than just that between the complainant and the respondent, that issue should be addressed separately, not in the report on the specific complaint.

Similarly, if the investigator develops opinions as to what employees or others should have done or should not have done to avoid the incident, those opinions should be raised outside of the context of the investigation and should not be included in the report.



### **Step 12-A: Notify People of the Results and Take Appropriate Actions – Non-Title IX Sexual Harassment Matters**

Care should be taken in dealing with people in the aftermath of an investigation, because it is likely that one or even both parties will be unhappy with the results. In addition, in a high profile case, there may be a need to make public statements of some kind – any such statements should be carefully crafted in consultation with legal counsel.

Both the complainant and respondent should be notified that the investigation has been concluded and both should be told whether the allegations were determined to be founded or unfounded. It is worth planning in advance how to handle conversations with affected parties.

How much more each side should be told depends upon whether the investigation deals with employees or students, and what complaint procedure is being followed.

In general, because employment records of public school employees must be kept confidential by law, giving the complainant information as to any discipline imposed is prohibited.

Consistent with state and federal law regarding student and employee privacy, New Hampshire's bullying law requires that schools have a written procedure for communication with parents or guardians of victims and perpetrators regarding the school's remedies and assistance.<sup>7</sup>

If a conclusion is made that unlawful discrimination or harassment did occur, the next step is to determine what should be done to ensure that such conduct ceases and does not recur.

### **Step 12-B: Title IX Sexual Harassment Matters – The Decision-Maker and Notification Process**

The new Title IX sexual harassment regulations prescribe a process whereby the investigator submits their final report to an assigned decision maker (who cannot be the same person as the investigator or the Title IX Coordinator). After the HRO or Title IX Coordinator has sent the investigation report to the decision maker (and to the parties), the decision maker must provide each party the opportunity to submit written, relevant questions that a party wants asked of any other party or witness. The answers must be provided to each party, who also must be given a chance pose additional, limited follow-up questions.<sup>8</sup>

Subsequently, the decision maker must issue a written determination as to whether the respondent is found "responsible" for sexually harassing conduct. The written determination must include:

<sup>7</sup> RSA 193-F:4, II(m).

<sup>8</sup>These steps are intended to afford the parties a chance to question one another without the school having to conduct a "live hearing," which is only required at the post-secondary level.

# NOTES

- Findings of fact;
- Conclusions as to whether the alleged conduct occurred;
- A rationale for the result as to each allegation in the complaint;
- Any disciplinary sanctions imposed on the respondent; and
- A statement as to whether remedies will be provided to the complainant.

The written determination must be sent simultaneously to the parties along with information about how to file an appeal.

# A New Era of Title IX

(Module 3: Relevance Assessments Required  
Under Title IX: Questions and Evidence)

Presented on  
Friday, October 9, 2020  
10:00 - 11:30 AM | Zoom

Presented by  
Meghan S. Glynn & Melissa A. Hewey

Notes:

**DrummondWoodsum**  
ATTORNEYS AT LAW

# The New Era of Title IX

## MODULE 3

### RELEVANCE ASSESSMENTS REQUIRED UNDER TITLE IX: QUESTIONS AND EVIDENCE

October 9, 2020

**Presented by:**  
Melissa Hewey & Meghan Glynn

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## AGENDA

- (Very Brief!) Recap. of Modules 1& 2
- Title IX Regulations and Requirements on:
  - Relevant Evidence
  - Relevant Questions during decision-making
- Practical Approach to meeting requirements and reaching decisions
- Final Q & A (on all 3 Modules!)

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## Basic Requirements for Grievance Process

- Treat complainants and respondents equitably . . .
- Require an objective evaluation of all **relevant evidence**—including both inculpatory and exculpatory evidence
- Investigators must receive training on, and create an investigative report that fairly summarizes, **relevant evidence**
- Decision-makers must receive training on issues of **relevance of questions and evidence**, including when questions and evidence about sexual predisposition/prior sexual behavior are not relevant

## Role of the Title IX Investigator

Among the Investigator's tasks:

- Allow Parties to identify witnesses and submit favorable and unfavorable evidence.
- Ascertain the facts: Interview witnesses, make site visits, review documents (including emails and texts).
- *Consider only evidence that is **relevant and directly related** to the allegations in the Formal Complaint.*
- Provide the Parties with an equal opportunity to inspect and review any evidence that is obtained in the investigation, whether the Investigator considers the evidence reliable or not, and including favorable and unfavorable evidence.
- Give the Parties the opportunity to respond to the evidence prior to the conclusion of the investigation.
- *Write an investigation report that fairly summarizes **relevant** evidence and submit it to the Title IX Coordinator.*

## Decision-making

- No live hearing requirement for K-12 (unlike postsecondary)
- After investigative report is issued to the parties:
  - The decision-maker(s) must afford each party the opportunity to submit written, **relevant questions** that a party wants asked of any party or witness, provide each party with the answers, and allow for additional, limited follow-up questions from each party.
  - The decision-maker must explain to the party proposing the questions any decision to exclude a question **as not relevant**.

## What is "Relevant" Evidence?

### Rule 401 of the Federal Rules of Evidence

Evidence is relevant if:

- (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and
- (b) the fact is of consequence in determining the action

## “Relevant” Evidence That May Not Be Considered

- Evidence about a Complainant’s sexual predisposition or prior sexual behavior is not relevant, unless it:
  - (1) is offered to prove that someone other than a Respondent committed the alleged conduct, or
  - (2) concerns specific incidents of a Complainant’s prior sexual behavior with a Respondent and is offered as evidence of consent.
- Evidence that is privileged
  - Medical, psychological or similar records are not admissible unless the Party has consented in writing to the disclosure of those records.
  - Other legally recognized privilege or immunity in the State of New Hampshire (communications with attorney, clergy, spouse)
- Evidence that is needlessly cumulative

## How does the Decision Maker make this work?

- Review investigator’s report and provide it to both parties
- Review and categorize proposed questions
  1. Questions that are relevant and appropriate—ask them
  2. Questions that are not appropriate either because they are not relevant or are otherwise not to be considered – notify requesting party that they will not be asked and why
  3. Questions that are questionable – either because relevance is not apparent or question is objectionable as phrased but not in theory – clarify

## Katherine and Eric Hypothetical

Katherine (a sophomore) and Eric (a senior) hook up at a band trip after drinking in a hotel room.

Katherine claims Eric went too far; Eric claims the sexual activity was consensual.

## Questions Requested by Eric's Family

### To Katherine:

- How many boys had you hooked up with before the incident with Eric?
- Do you have a close relationship with your parents?
- Did you take antidepressant medication before drinking at the party?
- How far is "too far" in your opinion?
- Did you delete all of your texts or just those you received from Eric? What are you trying to hide?



Notes:

## Questions Raised by Eric's Family - Continued

Questions to Sallie:

- Has Katherine told you about other boys she has hooked up with?
- Does Katherine party a lot?
- Do you know of any instances where Katherine has lied to her parents to keep out of trouble?

## Wrap Up

***WHAT'S STILL ON YOUR MIND???***

Notes:

# Thank You

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