

# The Fundamentals of Title IX

*Cheektowaga-Maryvale Union Free School District  
September 22, 2022*

Presented by:

Lindsay A. Menasco, Esq.

Albany | Buffalo | Greensboro | Hackensack | New York City | Palm Beach | Rochester | Saratoga Springs | Toronto

[www.hodgsonruss.com](http://www.hodgsonruss.com)



# Agenda

- Overview
- Duty to Investigate
- General Process of Investigations
- Special Considerations
- Resolutions
- Interaction with other laws and policies

# Overview

Title IX's protections apply to students, parents, staff members, and applicants for employment.

# What Is Title IX?

*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).*

## Title IX of the Education Amendments of 1972

Protection against discrimination and harassment on the basis of sex includes protection against sexual harassment, sexual assault, and discrimination based on sexual orientation and gender identity.

\*\* U.S. Dep't of Education issued new regulations August 14, 2020; proposed amendments 2022 to Title IX regulations (still in public comment period).

# Title IX Prohibited Discrimination

- **Disparate Treatment:** treating someone differently based on their sex.
  - Decision maker was aware of the complainant's sex and took action at least in part based on sex.
  - Does not require bad motives on the part of the decision maker.
- **Disparate Impact:** applying a facially-neutral policy that has a different impact on one sex over the other.
  - Facially-neutral policy had a disproportionate adverse impact based on sex.
  - There was no substantial legitimate justification for the policy.
- **Retaliation:** taking an action against someone because they made a complaint or participated in a Title IX investigation.
  - Complainant engaged in protected activity and the actor knew about it.
  - The actor subjected the complainant to adverse action because of the protected activity.

# Who Is Covered?

- The complainant must be a current student or employee, or a third party attempting to participate in school programs or activities.
- Title IX Coordinator may file a formal complaint even if the complainant is not associated with the school in any way.
- If the respondent is no longer enrolled, the school may dismiss a formal complaint.
  - BUT it must still promptly respond to the complaint's report of sexual harassment and offer supportive measures.

# Where Can It Occur?

- Any building or other location that is part of the school's operations, including remote learning platforms.
- This includes off-campus settings if the school exercises substantial control over the respondent and the context in which the alleged conduct occurred (e.g., a school field trip).
- Examples:
  - Extracurricular activities
  - Athletics, performances
  - Community engagement and outreach programs
  - School bus or other school-related vehicle

# Definition Of Sexual Harassment

- Sexual harassment means conduct on the basis of sex that satisfies one or more of the following:
  - An employee of the school conditioning the provision of aid, benefit, or service of the school on an individual's participating in unwelcome sexual conduct (i.e. *quid pro quo*);
  - Unwelcome conduct that a **reasonable** person would determine is so **severe, pervasive, and objectively offensive** that it effectively denies a person equal access to the school's education program or activity; or
  - Sexual assault, dating violence, domestic violence, or stalking.



# Definition Of Sexual Harassment – cont'd

- Whether a **reasonable person** in the complainant's position would be effectively denied *equal* access to education compared to a similarly situated person who is not suffering the alleged sexual harassment.
- Examples of an effective denial:
  - Skipping class to avoid a harasser,
  - A decline in the student's GPA, and
  - Difficulty concentrating in class.

# Duty to Investigate



# Title IX School Obligation

- Every school must:
  - Have and distribute a policy against sex discrimination.
    - The policy must be widely distributed & available.
      - Put on district website and in each student handbook or catalog.
    - Include statement that inquiries regarding Title IX may be directed to Title IX Coordinator or to OCR.
      - Title IX Coordinator's name and contact information must be prominently displayed on school's website.
  - Have a Title IX Coordinator.
    - Schools must notify all students and employees of name and title of Title IX Coordinator.
    - The Title IX Coordinator is responsible for:
      - Overseeing all complaints of sex discrimination, and
      - Addressing patterns or systemic problems that arise in review of such complaints.
    - The Title IX Coordinator must be properly trained.

# Title IX School Obligation, Con't

- Respond **promptly** and effectively to complaints in a manner that is not “deliberately indifferent” (reasonable and commonsense)
  - Offer and provide interim, supportive measures (“equal access”).
  - Make known where parents, students, and victims can find confidential support services.
  - Conduct adequate, reliable, and impartial investigations.
  - Impose disciplinary sanctions or other actions that are not supportive measures, as necessary.

# Mandatory Reporting

- **All employees and staff members** have an obligation to report instances of conduct that *could* constitute sexual harassment.
- A school has “actual knowledge” (i.e. notice) of a Title IX allegation if notice is given to **any** employee or staff member.
  - May receive notice through an oral report of sexual harassment by a complainant or anyone else, a written report, through personal observation, anonymous report or through various other means.
- ***Note:*** *A school may receive actual knowledge of sexual harassment from any person; there is no requirement that the person be participating in or attempting to participate in a school program or activity to report sexual harassment.*

# Initial Response

- Legal obligation to respond promptly and in a manner that is not deliberately indifferent.
- The Title IX Coordinator must promptly contact the complainant to discuss (1) available supportive measures, regardless of whether a formal complaint is filed, and to (2) explain the process for filing a formal complaint.
  - The school must offer and implement appropriate supportive measures to restore or preserve equal access to the educational program or activity.

# Supportive Measures

- Reasonably available individualized services.
- Non-punitive, non-disciplinary prior to determination.
- Not unreasonably burdensome to the other party.
- Designed to:
  - Ensure equal educational access,
  - Protect safety, and
  - Deter sexual harassment.

# Examples Of Supportive Measures

- Move student(s) from classes
- Mental health support
- Altered schedules
- Extended deadlines
- Course-related adjustments
- Student conference(s) with administrators
- Counseling/therapeutic interventions
- Classroom reassignment
- Teacher notification plan
- Parent meeting(s)
- Safety plans
- Increased monitoring/supervision
- Mutual restrictions on contact between parties
- Check in – check out
- Leaves of absences
- Increased security



# Supportive Measures

- The school must keep any supportive measures provided to the complainant or respondent confidential to the extent that maintaining such confidentiality would not impair the ability of the school to provide the supportive measures.
- The Title IX Coordinator is responsible for *coordinating* the effective implementation of supportive measures.
- If a formal complaint is filed, the school must:
  - Offer supportive measures to the respondent, and
  - Follow the Title IX grievance process.

# General Process of Investigations

PROCESS



# Complaint Procedure

- Who can report sexual harassment?
  - Anyone. Does not need to be the victim.
- Who can file a formal complaint?
  - The complainant (“an individual who is alleged to be the victim of conduct that could constitute sexual harassment.”)
    - Or a parent or guardian who has a legal right to act on behalf of the complainant.
    - “Respondent” = alleged perpetrator
  - Title IX Coordinator
    - Must respond promptly and appropriately.

# No Formal Complaint

- A “formal complaint” is a document filed by a complainant alleging sexual harassment against a respondent and requesting that the school investigate the allegation of sexual harassment
  - e.g. hard copy or electronic copy – must contain physical or digital signature or otherwise documenting that the complainant is the person filing the complaint, such as an email to Title IX Coordinator with student’s signature.
- If a complainant or parent decides not to file formal complaint: document ALL communications.
  - Formal complaint can also be made by a Title IX Coordinator if the school has knowledge of sexual harassment...
- Retain notes for SEVEN years.
- Determine if report is necessary to state welfare agency (i.e. Child Services) – generally triggered by mandatory reporting requirements.

# Investigation

- A formal complaint triggers an investigation.
  - A formal complaint can be filed in person, by mail, by telephone, or by email to the Title IX Coordinator.
  - A complaint may be dismissed if:
    - does not meet the definition of sexual harassment (but the complaint can be pursued under other provisions of the school's code of conduct);
    - the complainant requests to withdraw the complaint;
    - the accused's enrollment or employment ends; or
    - the school is prevented from gathering sufficient evidence to reach a determination (i.e. several years have passed).

# Investigation Of Sexual Harassment – School Obligations

- Provide written notice to the alleged victim and accused in sufficient time to allow the accused to prepare a response before an initial interview.
- Conduct interviews.
- Burden of gathering evidence is on the school, not the parties.
- Prepare a written investigation report summarizing evidence and send the report to both parties before making a determination as to responsibility.
  - Parties must be allowed an opportunity to submit written questions to be asked of the other party or any witnesses.
- Issue a determination.
  - The decision maker cannot be the Title IX Coordinator OR the investigator and should issue a written determination.

# Appeal Process

- Provide written notice of the appeal process.
- An appeal can be based on:
  - Procedural irregularity that affected the outcome of the matter;
  - 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/or
  - The Title IX Coordinator, investigator, or decision-maker had a conflict of interest or bias that affected the outcome of the matter.
- Provide notice to both parties if/when an appeal is filed.
  - Decision-maker cannot be same person as initial decision-maker on formal complaint.
- Provide both parties a chance to submit a written statement; and
- Issue a written decision and provide it to both parties.

# Equitable Treatment

- Both parties must be permitted to present evidence and witnesses.
- Both parties must be permitted to have a supporter or advisor present throughout all stages of the process.
- Both parties must have the opportunity to review **all** evidence (even that which the District will not rely upon to determine responsibility).
- Neither party may be required to bear the burden of proof.
- Neither party may be restricted in their ability to discuss the allegations.
- Neither party may be restricted in their ability to gather evidence.



# Complaints Of Sex Discrimination

- The grievance process required for formal sexual harassment complaints does not apply to complaints alleging discrimination based on pregnancy, different treatment based on sex, or other forms of sex discrimination.
- Schools must respond to those complaints using prompt and equitable grievance procedures.
  - Provide for adequate, reliable, and impartial investigation of complaints; be designated and reasonably prompt time frames for the complaint and resolution process; and provide notice to the parties of the outcome of a complaint.

# Special Considerations



# Confidentiality

- All parties involved (complainant, accused, and witnesses) should be:
  - Asked to keep the information confidential (though not formally required to).
  - Told the school will keep their information as confidential as possible.
- No guarantee of confidentiality in the process for the complainant or the respondent.
- A school must inform the complainant as to:
  - Whether it found the alleged conduct occurred,
  - Any individual remedies offered or provided to the complainant,
  - Any sanctions imposed on the respondent that directly relate to the complainant, and
  - Other steps the school has taken to eliminate the hostile environment, if the school finds one to exist, and prevent recurrence.

# Family Educational Rights and Privacy Act (FERPA)

- Schools must keep confidential, to the extent practicable, the identity of any person who has reported sexual harassment, or who has been reported to be a perpetrator of sexual harassment.
  - Purpose = prevent retaliation.
- Duty of confidentiality has three exceptions:
  - If disclosure is permitted under FERPA;
  - If disclosure is required by law; or
  - If disclosure is necessary to carry out the purposes of Title IX and its regulations, including to conduct a grievance process.

# Police Involvement

- Title IX proceedings and criminal investigations may coincide. However, they are independent and findings may differ.
- Therefore, a school district must conduct its **own** investigation of complaints of sexual harassment or discrimination and cannot rely solely on the report of law enforcement.
- Defer to law enforcement (in the event their investigation must be prioritized) but be mindful of the time constraints imposed by Title IX.
  - Title IX permits temporary delays of the grievance process or the limited extension of time frames, with good cause.
    - Examples of good cause:
      - The absence of a party, a party's advisor, or a witness;
      - Concurrent law enforcement activity; or
      - The need for language assistance or accommodation of disabilities.

# Resolutions



# Determination

- Title IX does not dictate any particular remedies for the complainant or disciplinary sanctions for the respondent after a finding of responsibility.
- A school is free to make disciplinary and remedial decision that it believes are in the best interests of its educational environment.
- The remedy must be designed to restore or preserve equal access to the school's education program or activity.
  - May include the same supportive services previously offered, additional services, and/or different services.
  - These remedies can be disciplinary or punitive and can burden the respondent.

# Disciplinary Charges

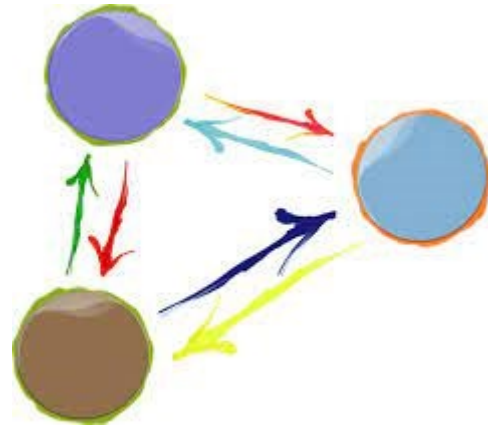
- Students: Education Law § 3214
- Teachers: Education Law § 3020-a
- Staff: Civil Service Law § 75



# Informal Resolution Process

- Schools may offer informal resolutions options under Title IX.
- Schools may only offer the informal process after a formal written complaint has been filed.
- Both parties must give voluntary, informed, written consent to using the informal process and any party may revoke their consent at any time, triggering the formal investigatory process.
- The informal resolution process may not be used where the allegations are that an employee sexually harassed a student.

# Interaction with Other Laws and Policies



# Code Of Conduct Violations

- Title IX is not the exclusive remedy for sexual misconduct or traumatic events that affect students.
- Schools have discretion to respond appropriately to behavior that does not meet the Title IX requirements.
  - It is not so severe, pervasive, and objectively offensive that it effectively denies a person equal access to an education;  
or
  - Occurs outside of the school's education program or activity;  
or
  - Occurs outside of the United States.

# Dignity For All Students Act (DASA)

- No student shall be subjected to harassment or bullying by employees or students on school property or at a school function; nor shall any student be subjected to discrimination based on a person's actual or perceived race, color, weight, national origin, ethnic group, religion, religious practice, disability, sexual orientation, gender, or sex by school employees or students on school property or at a school function.

# Key Takeaways

- ALL MEMBERS OF THE SCHOOL COMMUNITY must promptly report sexual harassment to the Title IX Coordinator(s);
- Title IX Coordinator may sign a formal complaint over a complainant's objections (to avoid deliberate indifference);
- Consider and immediately implement supportive measures, as necessary;
- Identify potential witnesses, conduct prompt/thorough investigation and take prompt corrective action;
- If the alleged conduct involves suspected child abuse or neglect or a potential crime, must notify appropriate social service and law enforcement agencies, as applicable;
- Equitable treatment of the parties;
- Avoid conflicts of interest;
- Follow the grievance procedure;
- Keep information confidential to the greatest extent practicable;
- Even if conduct does not rise to sexual harassment under Title IX, may still warrant discipline under Code of Conduct or other policy/procedure;
- All forms of retaliation are prohibited (retaliation complaints can and should be filed!).

?

?

?

QUESTIONS?

?

?

?