

MASLA

NYS Management Advocates for School Labor Affairs

Title IX Training Discrimination & Investigations

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Agenda

Today's Training & Review

Part 1: 12:00 to 1:30

▶ Title IX Defined – Legal Rules and Requirements

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

Part 2: 1:45 – 3:00

▶ Title IX – Implementation and Practice Recommendations

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

Title IX Harassment Defined

What is Title IX Harassment¹

- ▶ On July 12, 2022, the Department of Education published a notice of proposed rule making to update the regulations under Title IX from the previous August, 2020 rules adopted by the prior administration.
- ▶ The proposed rules would reinstate many of the requirements under Title IX repealed and/or replaced by the August 2020 rules, while also adding new requirements
- ▶ On April 29, 2024, the Final Rules to update the Department of Education's Title IX Regulations under Part 106 were published to the Federal Register
- ▶ The new Title IX Regulations took effect on August 1, 2024

See Appendix for OCR/DOE Guidance Documents

1. <https://www2.ed.gov/about/offices/list/ocr/docs/202106-titleix-noi.pdf> (*Application of Bostock*)
<https://www.govinfo.gov/content/pkg/FR-2024-04-29/pdf/2024-07915.pdf> (*2024 Title IX Rule*)

What is Title IX Harassment¹

▶ Under Part 106, 34 CFR 106.2 Definitions – “Sex Based Harassment” is a form of sex discrimination and means ***sexual harassment or other harassment on the basis of sex***

▶ “Sex Based Harassment” includes the following:

1) Quid pro quo harassment.*

An employee, agent, or other person authorized by the recipient to provide an aid, benefit, or service under the recipient's education program or activity explicitly or impliedly conditioning the provision of such an aid, benefit, or service on a person's participation in unwelcome sexual conduct;

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

1. <https://www2.ed.gov/about/offices/list/ocr/docs/202106-titleix-noi.pdf> (*Application of Bostock*)
<https://www.govinfo.gov/content/pkg/FR-2024-04-29/pdf/2024-07915.pdf> (*2024 Title IX Rule*)

What is Title IX Harassment¹

▶ “Sex Based Harassment” includes the following:

(2) Hostile environment harassment.

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

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

- (i) The degree to which the conduct affected the complainant's ability to access the recipient's education program or activity;
- (ii) The type, frequency, and duration of the conduct;
- (iii) The parties' ages, roles within the recipient's education program or activity, previous interactions, and other factors about each party that may be relevant to evaluating the effects of the conduct;
- (iv) The location of the conduct and the context in which the conduct occurred; and
- (v) Other sex-based harassment in the recipient's education program or activity;

1. <https://www2.ed.gov/about/offices/list/ocr/docs/202106-titleix-noi.pdf> (*Application of Bostock*)
<https://www.govinfo.gov/content/pkg/FR-2024-04-29/pdf/2024-07915.pdf> (*2024 Title IX Rule*)

What is Title IX Harassment¹

▶ “Sex Based Harassment” includes the following:

(3) Specific offenses.*

- (i) Sexual assault meaning an offense classified as a forcible or nonforcible sex offense under the uniform crime reporting system of the Federal Bureau of Investigation;
- (ii) Dating violence meaning violence committed by a person:(A) Who is or has been in a social relationship of a romantic or intimate nature with the victim; and(B) Where the existence of such a relationship shall be determined based on a consideration of the following factors:(1) The length of the relationship;(2) The type of relationship; and(3) The frequency of interaction between the persons involved in the relationship;
- (iii) Domestic violence meaning felony or misdemeanor crimes committed by a person who:(A) Is a current or former spouse or intimate partner of the victim under the family or domestic violence laws of the jurisdiction of the recipient, or a person similarly situated to a spouse of the victim;(B) Is cohabitating, or has cohabitated, with the victim as a spouse or intimate partner;(C) Shares a child in common with the victim; or(D) Commits acts against a youth or adult victim who is protected from those acts under the family or domestic violence laws of the jurisdiction; or
- (iv) Stalking meaning engaging in a course of conduct directed at a specific person that would cause a reasonable person to:(A) Fear for the person's safety or the safety of others; or(B) Suffer substantial emotional distress.

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

1. <https://www2.ed.gov/about/offices/list/ocr/docs/202106-titleix-noi.pdf> (*Application of Bostock*)
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What is Title IX Harassment¹

- ▶ Title IX's prohibition on sex-based harassment also clarifies through the August 2024 updated rules that sex discrimination includes discrimination based on sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity. (§ 106.10).
- ▶ Title IX therefore prohibits policies and procedures that disproportionately affect students or employees on the basis of sex, even if those policies and procedures appear neutral
- ▶ Title IX requires schools to adopt policies and procedures that are important for the prevention and correction of sex-based discrimination.

1. <https://www2.ed.gov/about/offices/list/ocr/docs/202106-titleix-noi.pdf> (*Application of Bostock*)
<https://www.govinfo.gov/content/pkg/FR-2024-04-29/pdf/2024-07915.pdf> (*2024 Title IX Rule*)

What is Title IX Harassment¹

- ▶ Under Part 106, 34 CFR 106.11 Application - For any recipient institution or program, Title IX applies to prohibit all sex discrimination occurring under a recipient's education program or activity in the United States. For purposes of Title IX, conduct that occurs under a recipient's education program or activity includes, but is not limited to, conduct that occurs in a building owned or controlled by a student organization that is officially recognized by a postsecondary institution, and ***conduct that is subject to the recipient's disciplinary authority.***
- ▶ Under the 2024 regulations, a recipient has an obligation to address a sex-based hostile environment under its education program or activity, ***even when some conduct alleged to be contributing to the hostile environment occurred outside the recipient's education program or activity or outside the United States.***
- ▶ Additionally, the Definition of a School's "Program or Activity" under section 106.2 has been broadened to encompass any program or activity over which a recipient may exercise any control, including disciplinary control

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<https://www.govinfo.gov/content/pkg/FR-2024-04-29/pdf/2024-07915.pdf> (*2024 Title IX Rule*)

What is Title IX Harassment

- ▶ Title IX's regulations as amended on April 19, 2024, make clear that sex-based discrimination covered by Title IX includes expansive categories of discrimination on the basis of sex
- ▶ Regulations have significant overlap under federal law with the definitions of discrimination under New York State Law
- ▶ Sexual harassment was previously defined under **34 C.F.R. §106.30** as conduct that occurred on the basis of sex that prevents a complainant's right of equal access to the educational institution and fall under one or more of three categories – this section has been repealed and revised in the August 2024 Regulations

1. <https://www2.ed.gov/about/offices/list/ocr/docs/202106-titleix-noi.pdf> (*Application of Bostock*)
<https://www.govinfo.gov/content/pkg/FR-2024-04-29/pdf/2024-07915.pdf> (*2024 Title IX Rule*)

What is Title IX Harassment

▶ Notice of Interpretation – June 22, 2021

DOE provided notice that enforcement of Title IX with respect to discrimination based on sexual orientation and gender identity would rely on the Supreme Court’s decision in *Bostock v. Clayton County*, 140 S. Ct. 1731, 590 U.S. 644 (2020)

Almost immediately, a coalition of states brought suit to enjoin the enforcement of this notice of interpretation. On July 15, 2022, a federal court barred enforcement of this NOI in 20 states

On June 11, 2024, in a separate lawsuit, a Federal Court in Texas granted the State’s request to “vacate” and “enjoin” the enforcement of the NOI in the State

1. <https://www2.ed.gov/about/offices/list/ocr/docs/202106-titleix-noi.pdf> (*Application of Bostock*)
<https://www.govinfo.gov/content/pkg/FR-2024-04-29/pdf/2024-07915.pdf> (*2024 Title IX Rule*)

What is Title IX Harassment

▶ Litigation over New Title IX Rules

As of September, 2024, the following disclaimer appears on OCR's guidance documents regarding the new August 2024 Regulations

As of July 31, 2024, pursuant to Federal court orders, the Department is currently enjoined from enforcing the 2024 Final Rule in the states of Alabama, Alaska, Arkansas, Florida, Georgia, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, West Virginia, and Wyoming; the Department is also currently enjoined from enforcing the 2024 Final Rule at the schools on the list located at <https://www2.ed.gov/about/offices/list/ocr/docs/list-of-schools-enjoined-from-2024-t9-rule.pdf> Per Court order, this list of schools may be supplemented in the future. The Final Rule and this resource do not currently apply in those states and schools. Pending further court orders, the Department's Title IX Regulations, as amended in 2020 (2020 Title IX Final Rule) remain in effect in those states and schools.

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<https://www.govinfo.gov/content/pkg/FR-2024-04-29/pdf/2024-07915.pdf> (*2024 Title IX Rule*)

What is Title IX Harassment

▶ Related New Notice of Proposed Rule Making – April 13, 2023

DOE provided notice for new Rules to amend Title IX regarding eligibility for male and female athletic teams under Title IX.

The proposed regulation would permit a school to use criteria that would limit or deny a student's eligibility to participate on a male or female team consistent with their gender identity if those criteria are substantially related to the achievement of an important educational objective. The proposed regulation would require a school to take into account differences in grade and education level, level of competition, and sports. The proposed regulation would also require a school to minimize harms to students whose participation on teams consistent with their gender identity would be limited or denied.

1. <https://www2.ed.gov/about/offices/list/ocr/docs/202106-titleix-noi.pdf> (*Application of Bostock*)
<https://www.govinfo.gov/content/pkg/FR-2024-04-29/pdf/2024-07915.pdf> (*2024 Title IX Rule*)

What is Title IX Harassment

► COMPARE Updated Final Rules (eff August 1, 2024)

Under Section 106.31 Education Programs or Activities

(1) Except as provided elsewhere in this part, no person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any academic, extracurricular, research, occupational training, or other education program or activity operated by a recipient that receives Federal financial assistance.

(2) In the limited circumstances in which Title IX or this part permits different treatment or separation on the basis of sex, a recipient must not carry out such different treatment or separation in a manner that discriminates on the basis of sex by subjecting a person to more than de minimis harm, except as permitted by 20 U.S.C. 1681(a)(1) through (9) and the corresponding regulations §§ 106.12 through 106.15, 20 U.S.C. 1686 and its corresponding regulation § 106.32(b)(1), or § 106.41(b).

Adopting a policy or engaging in a practice that prevents a person from participating in an education program or activity consistent with the person's gender identity subjects a person to more than de minimis harm on the basis of sex.

1. <https://www2.ed.gov/about/offices/list/ocr/docs/202106-titleix-noi.pdf> (*Application of Bostock*)
<https://www.govinfo.gov/content/pkg/FR-2024-04-29/pdf/2024-07915.pdf> (*2024 Title IX Rule*)

Why is Title IX Harassment a Concern?

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

Rules and Obligations

Title IX Notice and Policy Requirements

Title IX – Notice and Policy Requirements

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

- ▶ Designate a **person to coordinate the school's compliance with Title IX** and notify all students and employees of the name or title and contact information for this person;
- ▶ Publish a **notice of nondiscrimination**; *See Appendix for OCR and NYS proposed Notices*
- ▶ Adopt and publish **grievance procedures** providing for the prompt and equitable resolution of sex discrimination complaints; *See Appendix*
- ▶ Provide support measures and remedies to persons alleged to be victimized by sexual harassment;
- ▶ Resolve allegations of sexual harassment promptly and accurately under a fair grievance process that provides due process protections to alleged victims and alleged perpetrators of sexual harassment;
- ▶ Prohibit retaliation; and
- ▶ Effectively implement remedies for victims

Title IX – Notice and Policy Requirements

Required Title IX Policy components:

- Designate and authorize a Title IX Coordinator
- Description of the role of the Title IX Coordinator.
- Definition of sexual harassment for purposes of Title IX and a description of when a Formal Complaint can be filed.
- Process for responding to a “Formal Complaint” (grievance process) that complies with Title IX regulations, including appeals for both the charging party and respondent.

Title IX – Notice and Policy Requirements

Required Title IX Components, Section 106.8 – Designation of Coordinator, Policy, Notice, Training, Record Keeping

(a) Title IX Coordinator

(1) Each recipient must designate and authorize at least one employee, referred to herein as a Title IX Coordinator, to coordinate its efforts to comply with its responsibilities under Title IX and this part. If a recipient has more than one Title IX Coordinator, it must designate one of its Title IX Coordinators to retain ultimate oversight over those responsibilities and ensure the recipient's consistent compliance with its responsibilities under Title IX and this part.

(2) Delegation to designees. As appropriate, a recipient may delegate, or permit a Title IX Coordinator to delegate, specific duties to one or more designees.

Title IX – Notice and Policy Requirements

Required Title IX Components, Section 106.8 – Designation of Coordinator, Policy, Notice, Training, Record Keeping

(b) Adoption, publication, and implementation of nondiscrimination policy and grievance procedures.

(1) Nondiscrimination policy. Each recipient must adopt, publish, and implement a policy stating that the recipient does not discriminate on the basis of sex and prohibits sex discrimination in any education program or activity that it operates, as required by Title IX including in admission and employment. (applies to applications as well)

(2) Grievance procedures. A recipient must adopt, publish, and implement grievance procedures consistent with the requirements of § 106.45, and if applicable § 106.46, that provide for the prompt and equitable resolution of complaints made by students, employees, or other individuals who are participating or attempting to participate in the recipient's education program or activity, or by the Title IX Coordinator, alleging any action that would be prohibited by Title IX or this part.

Title IX – Notice and Policy Requirements

Required Title IX Components, Section 106.8 – Designation of Coordinator, Policy, Notice, Training, Record Keeping

(c) Notice of nondiscrimination

A recipient must provide a notice of nondiscrimination to students; parents, guardians, or other authorized legal representatives of elementary school and secondary school students; employees; applicants for admission and employment; and all unions and professional organizations holding collective bargaining or professional agreements with the recipient.

See Appendix for Model Notice and Posting

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

Effective June, 2023, New York State's Department of Labor, in consultation with the Division of Human Rights, released model documents¹

A New York Employer's Policy, Policy Notice, and complaint forms must be at least equivalent with the Model Form examples published by New York State

The Policy must, among other things, including the following:

- include a complaint form
- include a procedure for the timely and confidential investigation of complaints that ensures due process for all parties
- inform employees of their rights of redress and all available forums for adjudicating sexual harassment complaints administratively and judicially
- clearly state that sexual harassment is considered a form of employee misconduct and that sanctions will be enforced against individuals engaging in sexual harassment and against supervisory and managerial personnel who knowingly allow such behavior to continue
- clearly state that retaliation against individuals who complain of sexual harassment or who testify or assist in any investigation or proceeding involving sexual harassment is unlawful

1. See <https://www.ny.gov/combating-sexual-harassment-workplace/sexual-harassment-prevention-model-policy-and-training>

2. See Also Appendix Reproduction of NYS Forms

Rules and Obligations Title IX Publications and Notices

And Required Notices and Publications Under
New York Labor Law 201-g and Executive Law 296 et seq

Title IX – Notice and Policy Requirements

Required Content of a Notice of nondiscrimination- Section 106.8(c)(1)

The notice of nondiscrimination must include the following elements:

- (A) A statement that the recipient does not discriminate on the basis of sex and prohibits sex discrimination in any education program or activity that it operates, as required by Title IX and this part, including in admission (unless subpart C of this part does not apply) and employment;
- (B) A statement that inquiries about the application of Title IX and this part to the recipient may be referred to the recipient's Title IX Coordinator, the Office for Civil Rights, or both;
- (C) The name or title, office address, email address, and telephone number of the recipient's Title IX Coordinator;
- (D) How to locate the recipient's nondiscrimination policy under paragraph (b)(1) of this section; and the recipient's grievance procedures under paragraph (b)(2) of this section; and
- (E) How to report information about conduct that may constitute sex discrimination under Title IX; and how to make a complaint of sex discrimination under this part.

Title IX – Notice of Nondiscrimination

- ▶ Schools are required to publish a notice of nondiscrimination in the following ways. (34 C.F.R. § 106.9);

- ▶ The notice must be widely distributed to students, employees, AND prospective students and employees, and other relevant individuals.
- ▶ The notice must state that inquiries concerning the application of Title IX may be referred to the school's Title IX coordinator or to the federal Office for Civil Rights with information on how to contact the Title IX coordinator.
- ▶ Notices must be in writing provided to all employees under NY LL 201-g

Title IX - Publication and Procedures

- ▶ Designate at least one Title IX Coordinator - 34 CFR 106.8(a)
 - ▶ **Coordinator MUST be an employee of recipient** – See DOE OCR Policy Guidance Portal, Office for Civil Rights Issues New Resource to Help Education Institutions Implement the Title IX Final Regulations - Part 2 (Jan. 15, 2021)¹
 - ▶ “Each recipient must designate and authorize at least one employee, referred to herein as a Title IX Coordinator, to coordinate its efforts to comply with its responsibilities under Title IX and this part. If a recipient has more than one Title IX Coordinator, it must designate one of its Title IX Coordinators to retain ultimate oversight over those responsibilities and ensure the recipient's consistent compliance with its responsibilities under Title IX and this part.”¹
- ▶ Provide that any person may report sex discrimination, including sexual harassment (whether or not the person reporting is the person alleged to be the victim of conduct that could constitute sex discrimination or sexual harassment), in person, by mail, by telephone, or by electronic mail, using the contact information listed for the Title IX Coordinator, or by any other means that results in the
- ▶ Such a report may be made at any time (including during non-business hours) by using the telephone number or electronic mail address, or by mail to the office address, listed for the Title IX Coordinator

Title IX – Procedures – Coordinator’s Duties

34 CFR 106.44 (b) and (c)

► Response to Sex Discrimination –

(b) Barriers to Reporting - The School District must require its Title IX Coordinator to:

(1) Monitor the recipient's education program or activity for barriers to reporting information about conduct that reasonably may constitute sex discrimination under Title IX or this part; and

(2) Take steps reasonably calculated to address such barriers.

(c) Notification requirements. ***(1) An elementary school or secondary school recipient must require all of its employees who are not confidential employees to notify the Title IX Coordinator when the employee has information about conduct that reasonably may constitute sex discrimination under Title IX or this part.***

Title IX – Procedures – Coordinator’s Duties

34 CFR 106.44 (f)

► Title IX Coordinator Requirements

The Title IX Coordinator is responsible for coordinating the school district’s compliance with its obligations under Title IX

- (1) When notified of conduct that reasonably may constitute sex discrimination, to take prompt action to end the discrimination and remedy the effects
- (2) Notify complainants of the complaint process and informal resolutions if available – Informal resolution is NOT an option for complaints from adults regarding children
- (3) If a complaint is made, initiate the complaint process procedures
- (4) In the absence of a complaint or withdrawal of allegations, and in the absence of the termination of an informal resolution process, determine whether to initiate a complainant on behalf of the school district for sex discrimination
- (5) To make fact specific determinations where appropriate

Title IX – Procedures – Training Requirements

34 CFR 106.08(d)

The school district must ensure that the persons described in paragraphs (d)(1) through (4) of this section receive training related to their duties under Title IX promptly upon hiring or change of position that alters their duties under Title IX or this part, ***and annually thereafter***. This training must not rely on sex stereotypes.

▶ (1) All employees. All employees must be trained on:

- (i) The recipient's obligation to address sex discrimination in its education program or activity;
- (ii) The scope of conduct that constitutes sex discrimination under Title IX and this part, including the definition of sex-based harassment; and
- (iii) All applicable notification and information requirements

1. <https://www2.ed.gov/about/offices/list/ocr/docs/qa-titleix-part2-20210115.pdf>

Title IX – Procedures – Training Requirements

34 CFR 106.08(d)

- ▶ (2) Investigators, decisionmakers, and other persons who are responsible for implementing the recipient's grievance procedures or have the authority to modify or terminate supportive measures.

In addition to the training requirements in paragraph (d)(1) of this section, all investigators, decisionmakers, and other persons who are responsible for implementing the recipient's grievance procedures or have the authority to modify or terminate supportive measures must be trained on the following topics to the extent related to their responsibilities:

- (i) The school district's Title IX obligations under § 106.44;
- (ii) The school district's grievance procedures;
- (iii) How to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias; and
- (iv) The meaning and application of the term "relevant" in relation to questions and evidence, and the types of evidence that are impermissible regardless of relevance under § 106.45.

1. <https://www2.ed.gov/about/offices/list/ocr/docs/qa-titleix-part2-20210115.pdf>

Title IX – Procedures – Training Requirements

34 CFR 106.08(d)

▶ (3) Facilitators of informal resolution process.

In addition to the training requirements in paragraph (d)(1) of this section, all facilitators of an informal resolution process under § 106.44(k) must be trained on the rules and practices associated with the recipient's informal resolution process and on how to serve impartially, including by avoiding conflicts of interest and bias.

▶ (4) Title IX Coordinator and designees.

In addition to the training requirements in paragraphs (d)(1) through (3) of this section, the ***Title IX Coordinator and any designees*** under paragraph (a) of this section must be trained on their specific responsibilities under paragraph (a) of this section, responsibilities for providing Title IX information as required (§106.40(b)(3)), responsibilities regarding administering the school district's Title IX compliance and supportive measures (§106.44(f) and (g)), the school district's recordkeeping system and the requirements of the school district's compliance with Title IX, and any other training necessary to coordinate the recipient's compliance with Title IX.

1. <https://www2.ed.gov/about/offices/list/ocr/docs/qa-titleix-part2-20210115.pdf>

Title IX - Publication and Procedures

34 CFR § 106.8(c) (1) and (2)

- ▶ Each recipient must prominently display the **contact information** required to be listed for the Title IX Coordinator as part of the required policy, with the published notice of non discrimination being required to be placed on the school district's website and in each handbook, catalog, announcement, bulletin, and application form that it makes available to persons entitled to notice, or which are otherwise used in connection with the recruitment of students or employees.
- ▶ If necessary, due to the format or size of any publication, the school district may instead include in those publications a statement that the recipient prohibits sex discrimination in any education program or activity that it operates and that individuals may report concerns or questions to the Title IX Coordinator, **and provide the location of the notice on the recipient's website.**
- ▶ **Persons entitled to notification** of identity of Title IX Coordinator, include applicants for admission and employment, students, parents or legal guardians of elementary and secondary school students, employees, and all unions or professional organizations holding collective bargaining or professional agreements with the recipient.
- ▶ The notice to persons entitled to notice must also include the following information about the Title IX Coordinator: name **or title**, office address, electronic mail address, and telephone number.
- ▶ School's policy is also required to address the process for handling Formal Complaints made under Title IX, referred to as a "grievance process." – Similar under New York Law. Must identify the filing, forms, persons to file complaints to, and the overall process. (34 CFR § 106.8, NY Labor Law 201-g)

Title IX - Publication and Procedures

Current District policies that could address sexual harassment now:

- ▶ Policy prohibiting harassment of students under the Dignity for All Students Act
- ▶ Code of Conduct
- ▶ Policies proclaiming nondiscrimination against students
- ▶ Policy prohibiting sexual harassment of employees, interns, applicants for employment, and independent contractors under the NY Law.
- ▶ New York Required Sexual Harassment required policy
- ▶ Coordinate existing policies – to make certain that if a Formal Complaint is filed under the Title IX policy, it must be handled in accordance with the process under a New Unified Title IX and not under any other policy.
- ▶ Consider how principals, Dignity Act Coordinators, Human Resources personnel, and the Title IX Coordinator need to communicate among themselves regarding reports of sexual harassment.

Rules and Obligations

Title IX Investigation Requirements

Title IX—Investigation Requirements

Title IX Regulations require the following:

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

Title IX—Investigation Requirements

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

Title IX—Investigation Requirements

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

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

1. <https://sites.ed.gov/titleix/policy/>

Title IX Specific Terms

Definition of Harassment

“Based on Sex”

Title IX—Scope

The Reach of Title IX – Bostock and New Regulations

Title IX in the context of Title VII case law – The Supreme Court’s Decision in *Bostock*

- ▶ Holding: an employer violates Title VII, which makes it unlawful to discriminate against an individual “because of” the individual's sex, by firing an individual for being homosexual or being a transgender person. So long as the plaintiff 's sex was one but-for cause of that decision, that is enough to trigger the law. *Citing Nassar*, 570 U.S. at 350, 133 S.Ct. 2517.
- ▶ Congress has moved in the opposite direction [of narrow liability], supplementing Title VII in 1991 to allow a plaintiff to prevail merely by showing that a protected trait like sex was a “motivating factor” in a defendant's challenged employment practice. Civil Rights Act of 1991, § 107, 105 Stat. 1075, codified at *1740 42 U.S.C. § 2000e–2(m).
- ▶ “[D]iscrimination based on homosexuality or transgender status necessarily entails discrimination based on sex; the first cannot happen without the second. Nor is there any such thing as a “canon of donut holes,” in which Congress's failure to speak directly to a specific case that falls within a more general statutory rule creates a tacit exception. Instead, when Congress chooses not to include any exceptions to a broad rule, courts apply the broad rule. And that is exactly how this Court has always approached Title VII.” *Id.*, 140 S.Ct. at 1747.
- ▶ “We do not hesitate to recognize today a necessary consequence of that legislative choice: An employer who fires an individual merely for being gay or transgender defies the law.” *Id.*

Title IX—Scope

The Reach of Title IX – Bostock and New Regulations

Title IX in the context of Title VII case law – the resistance to *Bostock*¹

- ▶ OCR Notice of Interpretation dated June 16, 2021 – Published to the Federal Register on June 22, 2021²
- ▶ “Department has determined that the interpretation of sex discrimination set out by the Supreme Court in *Bostock*—that discrimination “because of . . . sex” encompasses discrimination based on sexual orientation and gender identity—properly guides the Department’s interpretation of discrimination “on the basis of sex” under Title IX and leads to the conclusion that Title IX prohibits discrimination based on sexual orientation and gender identity.”

1. <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/01194025-a5.pdf>, and <https://www2.ed.gov/about/offices/list/ocr/frontpage/faq/rr/policyguidance/index.html>
2. Enforcement of Title IX of the Education Amendments of 1972 With Respect to Discrimination Based on Sexual Orientation and Gender Identity in Light of *Bostock v. Clayton County*, 86 Fed.Reg. 32367 (June 22, 2021)

Title IX—Scope

The Reach of Title IX – Bostock and New Regulations

Title IX in the context of Title VII case law – the resistance to *Bostock*¹

- ▶ OCR and DOJ release a joint notice flyer “Confronting Anti-LGBTQI+ Harassment in Schools” dated June 23, 2021¹
 - ▶ Reiterated OCR’s determination regarding the withdrawal of the revised enforcement letter in the CIAC case that the “Revised Letter’s statement of OCR’s interpretation of Title IX and its implementing regulations should not be relied upon in this or any other matter.”
- ▶ OCR Releases “Questions and Answers on the Title IX Regulations on Sexual Harassment” dated July 20, 2021²
 - ▶ Provides comprehensive Q&A regarding all the requirements under Title IX from new regulations, including most recent interpretation on applicability to gender status, gender identity, etc in light of *Bostock*

1. <https://www2.ed.gov/about/offices/list/ocr/docs/ocr-factsheet-tix-202106.pdf>

2. <https://www2.ed.gov/about/offices/list/ocr/docs/202107-qa-titleix.pdf>

Title IX—Scope of Title IX

The Reach of Title IX – Bostock and New Regulations

Title IX and Gender Identity – the resistance to *Bostock*

- ▶ Competing decisions out of 4th, 7th, and 9th Circuits that Title IX covers transgender students vs. 11th Circuit that it does not
- ▶ Executive Order No. 13988, January 25, 2021

Executive Order on Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation.

- ▶ Extended the holding of *Bostock v. Clayton County* to Title IX, reasoning that “laws that prohibit sex discrimination... prohibit discrimination on the basis of gender identity or sexual orientation,” the Executive Order directed federal agencies to implement anti-discrimination statutes consistent with the Biden Administration’s interpretation. The ED published a Notice of Interpretation and issued a Dear Educator Letter as a result
- ▶ The State of Tennessee v. United States Department of Education (July 2022) – 20 States brought suit and were granted a preliminary injunction barring enforcement of EO 13988 and application of Title IX to gender identity and sexual orientation

Title IX Revised Regulations Expansion of Coverage for Sex-based Discrimination

Title IX— New and Expansive Application

Section 106.57 – Parental, Family, or marital status, pregnancy or related conditions

(a) A recipient must not adopt or implement any policy, practice, or procedure, or take any employment action, on the basis of sex:

(1) Concerning the current, potential, or past parental, family, or marital status of an employee or applicant for employment, which treats persons differently; or

(2) That is based upon whether an employee or applicant for employment is the head of household or principal wage earner in such employee's or applicant's family unit.

1. <https://www2.ed.gov/about/offices/list/ocr/docs/ocr-factsheet-tix-202106.pdf>
2. <https://www2.ed.gov/about/offices/list/ocr/docs/202107-qa-titleix.pdf>

Title IX— New and Expansive Application

Section 106.57 – Parental, Family, or marital status, pregnancy or related conditions

(b) Pregnancy or related conditions.

A recipient must not discriminate against any employee or applicant for employment on the basis of current, potential, or past pregnancy or related conditions.

(c) Comparable treatment to other temporary medical conditions.

A recipient must treat pregnancy or related conditions as any other temporary medical conditions for all job-related purposes, including commencement, duration and extensions of leave; payment of disability income; accrual of seniority and any other benefit or service; and reinstatement; and under any fringe benefit offered to employees by virtue of employment.

1. <https://www2.ed.gov/about/offices/list/ocr/docs/ocr-factsheet-tix-202106.pdf>
2. <https://www2.ed.gov/about/offices/list/ocr/docs/202107-qa-titleix.pdf>

Title IX— New and Expansive Application

Section 106.57 – Parental, Family, or marital status, pregnancy or related conditions

(d) Voluntary leaves of absence.

In the case of a recipient that does not maintain a leave policy for its employees, or in the case of an employee with insufficient leave or accrued employment time to qualify for leave under such a policy, a recipient must treat pregnancy or related conditions as a justification for a voluntary leave of absence without pay for a reasonable period of time, at the conclusion of which the employee shall be reinstated to the status held when the leave began or to a comparable position, without decrease in rate of compensation or loss of promotional opportunities, or any other right or privilege of employment.

1. <https://www2.ed.gov/about/offices/list/ocr/docs/ocr-factsheet-tix-202106.pdf>
2. <https://www2.ed.gov/about/offices/list/ocr/docs/202107-qa-titleix.pdf>

Title IX— New and Expansive Application

Section 106.57 – Parental, Family, or marital status, pregnancy or related conditions

(e) Lactation time and space.

- (1) A recipient must provide reasonable break time for an employee to express breast milk or breastfeed as needed.
- (2) A recipient must ensure that an employee can access a lactation space, which must be a space other than a bathroom that is clean, shielded from view, free from intrusion from others, and may be used by an employee for expressing breast milk or breastfeeding as needed.

1. <https://www2.ed.gov/about/offices/list/ocr/docs/ocr-factsheet-tix-202106.pdf>
2. <https://www2.ed.gov/about/offices/list/ocr/docs/202107-qa-titleix.pdf>

Title IX Specific Terms Prohibited Retaliation

Title IX—Prohibited Retaliation

Title IX prohibits retaliation against any individual for:

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

1. <https://sites.ed.gov/titleix/policy/>

Title IX—Prohibited Retaliation

Title IX prohibitions on retaliation also include:

- ▶ A recipient must prohibit retaliation, including peer retaliation, in its education program or activity. When a recipient has information about conduct that reasonably may constitute retaliation under Title IX or this part, the recipient is obligated to comply with § 106.44.
- ▶ Upon receiving a complaint alleging retaliation, a recipient must initiate its grievance procedures under § 106.45, or, as appropriate, an informal resolution process under § 106.44(k). (34 CFR § 106.71)
- ▶ The recipient of a complaint must keep confidential the identity of any individual who has made a report or complaint of sex discrimination, including any individual who has made a report or filed a formal complaint of sexual harassment, any complainant, any individual who has been reported to be the perpetrator of sex discrimination, any respondent, and any witness, except as may be permitted by the FERPA statute, or as required by law, or to carry out the purposes of 34 CFR part 106, including the conduct of any investigation, hearing, or judicial proceeding arising thereunder.

Prior Language under 106.71(a) removed

Civil Rights Laws and Title IX Intersections

What is Title VII Harassment

General Anti-Discrimination Civil Rights Laws

- ▶ Title VII of the Civil Rights Act of 1964 (Title VII):
 - ▶ Is the major federal law prohibiting discrimination in employment.
 - ▶ Title VII prohibits discrimination based on race, sex, color, religion, national origin, and retaliation.
- ▶ The Equal Pay Act of 1963 (EPA):
 - ▶ Protects men and women who perform substantially equal work from sex-based wage discrimination.
- ▶ The Age Discrimination In Employment Act of 1967 (ADEA):
 - ▶ Protects employees and job applicants who are 40 years of age or older from employment discrimination based on age.

What is Title VII Harassment

SEX BASED HARASSMENT

- ▶ Title VII of the Civil Rights Act of 1964, as amended at 42 USC §2000e *et seq*
- ▶ New York Labor Law 201-g and New York State Executive Law §296 *et seq* (New York Human Rights Law)
- ▶ Prohibits unwelcome sexual advances, requests for sexual favors and other verbal or physical conduct of a sexual nature, all of which constitute “sexual harassment” when:
 1. Submission to such conduct is made explicitly or implicitly a condition of an individual’s employment (Quid Pro Quo)
 2. Submission to or rejection of such conduct is used as a basis for an employment decision affecting the employee (Quid Pro Quo plus); or
 3. The harassment has the purpose or effect of unreasonably interfering with the employee’s work performance or creating an environment which is intimidating, hostile or offensive to the employee (Hostile work environment)

What is Title VII Harassment

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

- ▶ Based on sex (including sexual orientation, pregnancy, and gender identity), race, color, national origin, religion, age, disability, and/or genetic information; AND
- ▶ Detrimental to an employee's work performance, professional advancement, and/or mental health, or conduct that denies or limits employment-based participation or benefits.

What is Title VII Harassment

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

▶ Unwelcomed Conduct:

- ▶ Acquiescence in sexual conduct may not mean that the conduct is welcome.
- ▶ The charging party need not have confronted her offending supervisor where she feared retaliation, so long as her actions and comments demonstrated that the conduct was unwelcome.
- ▶ Standard – Plaintiff can not prevail if s/he unreasonably refused to take advantage of corrective measures.

▶ Quid Pro Quo Conduct:

- ▶ Occurs when submission to unwelcome sexual conduct is made an explicit or implicit term or condition of an individual's employment.

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

What is Title VII Harassment

Remedial Corrective Actions - *Fuller v. Oakland* (1995)

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

BREAK

Investigations of Complaints

Legal Obligations and Requirements

Investigation of Complaints

Initial Referral and/or Complaint

Review of Policies & Procedures

Interview of Complainant

Requests for Documentary Evidence

Fact Witness Interviews

Interview of Accused

Final Evidentiary Follow-up

Preliminary Report, Party Reviews, and Questions

Final Decision & Outcome Letters

Title IX Specific Terms Grievance Process

Title IX— Basic Requirements of Grievance Process

34 CFR § 106.45 (b)

A recipient's grievance procedures must:

- (1) Treat complainants and respondents equitably;
- (2) Require that any person designated as a Title IX Coordinator, investigator, or decisionmaker not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent. The decisionmaker may be the same person as the Title IX Coordinator or investigator;
- (3) Include a presumption that the respondent is not responsible for the alleged sex discrimination until a determination is made at the conclusion of the recipient's grievance procedures for complaints of sex discrimination

Title IX— Basic Requirements of Grievance Process

34 CFR § 106.45 (b)

A recipient's grievance procedures must:

- 4) Establish reasonably prompt timeframes for the major stages of the grievance procedures, including a process that allows for the reasonable extension of timeframes on a case-by-case basis for good cause with notice to the parties that includes the reason for the delay. Major stages include, for example, evaluation (i.e., the recipient's decision whether to dismiss or investigate a complaint of sex discrimination); investigation; determination; and appeal, if any;
- (5) Require the recipient to take reasonable steps to protect the privacy of the parties and witnesses during the pendency of a recipient's grievance procedures, provided that the steps do not restrict the ability of the parties to: obtain and present evidence, including by speaking to witnesses, subject to § 106.71; consult with their family members, confidential resources, or advisors; or otherwise prepare for or participate in the grievance procedures;
- (6) Require an objective evaluation of all evidence that is relevant, as defined in § 106.2, and not otherwise impermissible under paragraph (b)(7) of this section—including both inculpatory and exculpatory evidence—and provide that credibility determinations must not be based on a person's status as a complainant, respondent, or witness;

Title IX— Basic Requirements of Grievance Process

34 CFR § 106.45 (b)

A recipient's grievance procedures must:

7) Exclude the following types of evidence, and questions seeking that evidence, as impermissible (i.e., must not be accessed or considered, except by the recipient to determine whether an exception in paragraphs (i) through (iii) applies; must not be disclosed; and must not otherwise be used), regardless of whether they are relevant:

(i) Evidence that is protected under a privilege as recognized by Federal or State law or evidence provided to a confidential employee, unless the person to whom the privilege or confidentiality is owed has voluntarily waived the privilege or confidentiality;

(ii) A party's or witness's records that are made or maintained by a physician, psychologist, or other recognized professional or paraprofessional in connection with the provision of treatment to the party or witness, unless the recipient obtains that party's or witness's voluntary, written consent for use in the recipient's grievance procedures; and

(iii) Evidence that relates to the complainant's sexual interests or prior sexual conduct, unless evidence about the complainant's prior sexual conduct is offered to prove that someone other than the respondent committed the alleged conduct or is evidence about specific incidents of the complainant's prior sexual conduct with the respondent that is offered to prove consent to the alleged sex-based harassment. The fact of prior consensual sexual conduct between the complainant and respondent does not by itself demonstrate or imply the complainant's consent to the alleged sex-based harassment or preclude determination that sex-based harassment occurred; and

(8) If a recipient adopts grievance procedures that apply to the resolution of some, but not all, complaints articulate consistent principles for how the recipient will determine which procedures apply.

Title IX– Notice of Allegations

34 CFR § 106.45 (c)

The Notice of Allegations

Recipients must Provide a Notice of Allegations to accused of potential charges of sexual harassment upon receipt of a formal complaint

- ▶ Notice must provide a copy of any grievance procedures with sufficient details and time for respondent to prepare for any interview.
- ▶ Sufficient information available at the time to allow the parties to respond to the allegations. Sufficient information includes the identities of the parties involved in the incident(s), the conduct alleged to constitute sex discrimination under Title IX or this part, and the date(s) and location(s) of the alleged incident(s), to the extent that information is available to the recipient.
- ▶ The written notice must include a statement that the respondent is presumed not responsible for the alleged conduct and that a determination regarding responsibility is made at the conclusion of the grievance process.
- ▶ A statement that retaliation is prohibited
- ▶ A statement that the parties are entitled to an equal opportunity to access the relevant and not otherwise impermissible evidence or an accurate description of this evidence as set out in paragraph (f)(4) of this section; and if the recipient provides a description of the evidence, the parties are entitled to an equal opportunity to access to the relevant and not otherwise impermissible evidence upon the request of any party.
- ▶ If NEW claims or allegations arise during course of the investigation, a NEW “Notice of Revised Allegations” must be issued to the accused for those allegations.

Title IX— Notice of Allegations

34 CFR Sections 106.45 (c) versus 106.44(f)

Prohibited disclosure of personally identifiable information.

A recipient must not disclose personally identifiable information obtained in the course of complying with this part, except in the following circumstances:

- (1) When the recipient has obtained prior written consent from a person with the legal right to consent to the disclosure;
- (2) When the information is disclosed to a parent, guardian, or other authorized legal representative with the legal right to receive disclosures on behalf of the person whose personally identifiable information is at issue;
- (3) To carry out the purposes of this part, including action taken to address conduct that reasonably may constitute sex discrimination under Title IX in the recipient's education program or activity;
- (4) As required by Federal law, Federal regulations, or the terms and conditions of a Federal award, including a grant award or other funding agreement; or
- (5) To the extent such disclosures are not otherwise in conflict with Title IX or this part, when required by State or local law or when permitted under FERPA, 20 U.S.C. 1232g, or its implementing regulations, 34 CFR part 99.

Title IX– “Grievance” Process

34 CFR § 106.45(d) – Grievance and Complaint Procedures:

▶ Dismissal of Complaints

If the district unable to identify a respondent;

Respondent is not participating in the educational program or is not employed;

The complainant voluntarily withdraws any or all of the allegations in the complaint, the Title IX Coordinator declines to initiate a complaint, and the school district determines that, without the complainant's withdrawn allegations, the conduct that remains alleged in the complaint, if any, would not constitute sex discrimination under Title IX or this part even if proven;

The school district determines the conduct alleged in the complaint, even if proven, would not constitute sex discrimination, provided, that prior to dismissing the complaint, the school must make reasonable efforts to clarify the allegations with the complainant

▶ Upon a dismissal, the recipient must promptly send written notice of the dismissal and reason(s) therefor simultaneously to the parties and that a dismissal may be appealed

▶ Offer supportive measures to a complainant where appropriate

Initial Referral and/or Complaint

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

Notice of Allegations – Pre-Investigation

Written Notice of Allegations – Receipt of *FORMAL WRITTEN COMPLAINT*

- ▶ Upon receipt of a formal complaint, a recipient must provide the following written notice to the parties, INCLUDING the accused and the complainant:
- ▶ Notice of the recipient's grievance process that complies with this section, including any informal resolution process.
- ▶ Notice of the allegations of sexual harassment potentially constituting sexual harassment as defined in § 106.30, including sufficient details known at the time and with sufficient time to prepare a response before any initial interview.
- ▶ Sufficient details regarding the incident, if known, the describes the conduct allegedly constituting sexual harassment under § 106.30, and the date and location of the alleged incident, if known. IDENTITIES MAY NOT BE SUBJECT TO DISCLOSURE
- ▶ The written notice must include a statement that the respondent is presumed not responsible for the alleged conduct and that a determination regarding responsibility is made at the conclusion of the grievance process.
- ▶ The written notice must inform the parties that they may have an advisor of their choice, who may be, but is not required to be, an attorney, and may inspect and review evidence that is not otherwise protected.
- ▶ The written notice must inform the parties of any provision in the recipient's code of conduct that prohibits knowingly making false statements or knowingly submitting false information during the grievance process.

Review of Policies & Procedures

KNOW YOUR DISTRICT'S SEXUAL HARASSMENT/TITLE IX POLICIES

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

Review of Policies & Procedures

Does the Policy provide guidelines for determining what constitutes Sexual Harassment?

Not all unacceptable conduct with sexual connotations may constitute sexual harassment.

In many cases (other than quid pro quo situations where the alleged harasser offers academic or employment rewards or threatens punishment as an inducement for sexual favors), unacceptable behavior must be sufficiently severe, pervasive and objectively offensive to be considered sexual harassment.

If the behavior doesn't rise to the level of sexual harassment, but is found to be objectionable behavior, it may not constitute "Harassment" but could still be a violation of District Policies and/or the Code of Conduct as "harassment", i.e., unprofessional or inappropriate conduct.

Review of Policies & Procedures

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

Review of Policies & Procedures

Policy Guidelines for Investigating Complaints?

- Generally, reviews should begin within 5 working days of the initial complaint with the review be completed within 30 days, absent extenuating circumstances
- Requirement to investigate verbal complaints as well as written complaints
- Informal vs. Formal investigation procedures
- Rules regarding parental involvement for student complaints
- Requirements regarding notifications or outcome letters for complainants and accused
- Range of proscribed penalties and/or approved remedial actions
- Maintenance of complaint records

Review the Code of Conduct

Review any other related “harassment” policies & applicable collective bargaining agreements for issues that may fall outside the scope of your Title IX Policy

Interview of Complainant

After review of the policy and complaint (memorialized verbal and written complaints), interview Complainant

Use an initial opening script, provide a copy of the written script to the interviewee (separate script for complainant, witness, accused)

Try to conduct the interview within 5 days of the initial complaint, the sooner the better

Recommendations

- Recording interviews – yes or no?
- Union representatives – yes or no?
- Attorney's or outside district personal participating in the interview process – yes or no?
- Interview scripts to each interviewee - have them sign and date at the bottom as acknowledgement, and provide a copy for their records

Interview of Complainant

Written Complaints

- ▶ Start the interview – ASK THESE TWO IMPORTANT QUESTIONS
 - Are you taking any medications today that would prevent you from understanding my questions and providing truthful and complete answers?
 - Are you suffering from any medical conditions
- ▶ With a WRITTEN complaint
 - Try to narrow down specific details of each and every allegation or incident – Who, What, Where, When, Why
 - Identify witnesses, date and time, location and circumstances, and the specific language used or conduct that occurred
- ▶ At the end, ask –
IS THERE ANYTHING ELSE YOU WOULD LIKE TO ADD THAT I HAVE NOT ASKED YOU ABOUT

Interview of Complainant

Verbal Complaints

- ▶ Start the interview – ASK THESE TWO IMPORTANT QUESTIONS
 - Are you taking any medications today that would prevent you from understanding my questions and providing truthful and complete answers?
 - Are you suffering from any medical conditions
- ▶ IF there was a VERBAL complaint
 - Detail the questions /responses by typing into a word document on laptop
 - Narrow the allegations – Who, What, Where, When, Why
 - Identify witnesses, date and time, location and circumstances, and the specific language used or conduct that occurred
- ▶ At the end, ask –
IS THERE ANYTHING ELSE YOU WOULD LIKE TO ADD THAT I HAVE NOT ASKED YOU ABOUT
- ▶ THEN
 - At a statement to the end of the notes:
“The above notes are an accurate statement as to the events described and the undersigned swears they are true to the best of their recollection”
 - Print out a copy of the notes from the interview, Ask the complainant to review the notes of the interview, sign and date the notes

Initiation of a “Formal” Complaint

Verbal Complaints

For Verbal Complaints, if the complainant does not want to submit a written complaint, the lack of a written complaint requires a decision

The Title IX Coordinator can sign the written complaint on behalf of the District as the “complainant” ***if and only if*** the alleged conduct presents an imminent and serious threat to someone’s health or safety or prevents the recipient from ensuring equal access based on sex to its education program or activity. (§ 106.44(f)(1)(v)–(vi))

Any complaint of an improper sexual relationship between an adult employee and a student must be investigated as a serious threat to health or safety

Formal Complaint moves forward with potential “victim” as a witness

Normal process followed from investigation through conclusion

Does not prohibit use of “informal” process for resolving potential Title IX claim

Requests for Documentary Evidence

Following interview of Complainant

Immediately request and secure any video evidence as soon as possible to ensure retention

Request and review a copy of the personnel file/student file of complainant

Request and review a copy of the personnel file/student file of accused

Request and review a copy of the personnel file/student file of an critical fact witness

Where necessary, interview any administrator/supervisor not involved with the substance of the complaint regarding general work history of the complainant and the accused

Use the complaint to drive the document/evidence requests

Fact Witness Interviews

- ▶ Follow the same process as used with interviewing the complainant
- ▶ At the end, ask –
IS THERE ANYTHING ELSE YOU WOULD LIKE TO ADD THAT
I HAVE NOT ASKED YOU ABOUT

Fact Witness Interviews

- If the witness is lying or less than truthful, attempt to redirect them to provide truthful answers
- If necessary, suspend the interview and reschedule with a union representative present, provide notices of Weingarten & Garrity rights where necessary
- Request updated evidence as necessary based on interviews
- Conduct re-interviews for any discrepancies or clarifications between competing witness statements
- Review interview notes to drive any new or updated document/evidence requests
- Update any evidence summaries and timelines as needed

Revised Notice of Allegations

Issue a New Written “Notice of Revised Allegations”

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

Interview of Accused

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

Interview of Accused

Ask specific questions about the facts and nature of the allegations, about who, what, where, when, why

If the accused denies any claims, ask them why someone would provide a different story from what the accused is stating

Press the accused on any inconsistencies

Present and review evidence with the Accused

Ask the accused about any evidence

- Review Video/Audio recordings
- Review documentary evidence
- Be specific in your factual questions

Interview of Accused

Regardless of Weingarten, Garrity, or CADET Rights, ASK EVERY QUESTION

Send a message to the accused about the nature of the allegations, strength of the District's facts and evidence

For the benefit of a union representative to advise the accused

End by EMPHASISING

- CONFIDENTIALITY
- NO RETALIATION
- NO COMMENTS/CONTACTS WITH THE COMPLAINANT ABOUT THE NATURE OF THE COMPLAINT OR ALLEGATIONS

Final Evidentiary Follow-up

Re-update any requests for evidence or records as necessary

Request updated evidence as necessary based on interviews

Conduct final round of re-interviews for any discrepancies or clarifications between competing witness statements and accused

Review interview notes to drive any new or updated document/evidence requests

Review final facts with Title IX Policy, other Board Policies, Code of Conduct, and Legal Standards

Final Evidentiary Follow-up

Create timeline of events and circumstances

Organize documents and evidence chronologically based on timeline

Notate timeline with supporting interview statements/evidence

Number and order any supporting documentation to be included in final report

Prepare draft Executive Summary (no more than 2 pages) of the what a preliminary review of the evidence shows relative to the claims

Preliminary Draft Report & Conclusions

- ▶ Should be marked CONFIDENTIAL and, where possible, ATTORNEY CLIENT PRIVILEGED
- ▶ Report Details and Specifics
 - ▶ Background – Initial referral and credentials
 - ▶ Executive Summary – Summary of Complaint & Findings
 - ▶ Investigation - Chronological Order of evidence
 - ▶ Initial Complaint
 - ▶ Statement of the Allegations
 - ▶ Applicable Board Policies
 - ▶ Interviews
 - ▶ Documentary Evidence and Records
 - ▶ Conclusions and Findings
 - ▶ Possible Recommendations for Outcomes

Preliminary Draft Report & Conclusions

Attach relevant and necessary documents, communications, as Appendices to the Final Report

Provide Draft Outcome letters for review by the District/Board of Education

Provide range of recommendations based on findings and conclusions

Superintendent and/or the Board of Education are the final decisions makers

Title IX Coordinator/Officer only makes recommendations, is NOT the decision maker in the process

Final Decisions and Conclusions – 106.45(f)

► Prior to completion of the investigative report, a school district **is not required** to provide either party the opportunity comment on the draft report. Rather, as part of the grievance process, the school district is required to:

- (1) Ensure that the burden is on the recipient—not on the parties—to conduct an investigation that gathers sufficient evidence to determine whether sex discrimination occurred;
- (2) Provide an equal opportunity for the parties to present fact witnesses and other inculpatory and exculpatory evidence that are relevant and not otherwise impermissible;
- (3) Review all evidence gathered through the investigation and determine what evidence is relevant and what evidence is impermissible regardless of relevance, consistent with § 106.2 and with paragraph (b)(7) of this section;

Final Decisions and Conclusions – 106.45(f)

(4) Provide each party with an equal opportunity to access the evidence that is relevant to the allegations of sex discrimination and not otherwise impermissible, consistent with § 106.2 and with paragraph (b)(7) of this section, in the following manner:

- (i) A school district must provide an equal opportunity to access either the relevant and not otherwise impermissible evidence, or an accurate description of this evidence. If the recipient provides a description of the evidence, it must further provide the parties with an equal opportunity to access the relevant and not otherwise impermissible evidence upon the request of any party;
- (ii) A school district must provide a reasonable opportunity to respond to the evidence or to the accurate description of the evidence described in paragraph (f)(4)(i) of this section; and
- (iii) A recipient must take reasonable steps to prevent and address the parties' unauthorized disclosure of information and evidence obtained solely through the grievance procedures. For purposes of this paragraph, disclosures of such information and evidence for purposes of administrative proceedings or litigation related to the complaint of sex discrimination are authorized

Final Decisions and Conclusions – 106.45(f)

Questioning parties and witnesses to aid in evaluating allegations and assessing credibility.

For Questioning of Witnesses, this is a matter handled by the school district through the Title IX coordinator and decision maker.

Parties ARE NOT afforded the right to question witnesses.

Rather:

A recipient must provide a process that enables the *decisionmaker* to question parties and witnesses to adequately assess a party's or witness's credibility to the extent credibility is both in dispute and relevant to evaluating one or more allegations of sex discrimination.

Final Decisions and Conclusions – 106.45(f)

- ▶ Title IX Coordinator prepares a Final investigative report and recommendation for Decision Maker
- ▶ Investigative report must
 - fairly summarizes relevant evidence, responses;
 - Summarize the relevant District's policy;
 - Explain the basis for finding of responsibility or no responsibility; and
 - Make a recommendation as to the final outcome
- ▶ In school districts, the Title IX Coordinator may also be the Decisionmaker in so long as there is not a conflict of interest

Final Decisions and Conclusions – 106.45(f)

Determination whether sex discrimination occurred

► Following an investigation and evaluation of all relevant and not otherwise impermissible evidence, the school district must

Use the **preponderance of the evidence standard** of proof to determine whether sex discrimination occurred, unless the recipient uses the clear and convincing evidence standard of proof in all other comparable proceedings, including proceedings relating to other discrimination complaints

Notify the parties in writing of the determination whether sex discrimination occurred under Title IX or this part including the rationale for such determination, and the procedures and permissible bases for the complainant and respondent to appeal

Require the Title IX Coordinator to coordinate the provision and implementation of remedies to a complainant and other persons identified as having had equal access to the recipient's education program or activity **limited or denied** by sex discrimination

Final Decisions and Conclusions – 106.45(f)

Determination whether sex discrimination occurred

► Following an investigation and evaluation of all relevant and not otherwise impermissible evidence, the school district must

Require the Title IX Coordinator to coordinate the imposition of any disciplinary sanctions on a respondent, including notification to the complainant of any such disciplinary sanctions, and

Require the Title IX Coordinator to take other appropriate prompt and effective steps to ensure that sex discrimination does not continue or recur within the recipient's education program or activity

Comply with any appeals procedures requirements prior to the imposition of any discipline

Decision Makers and Outcome Letters

- ▶ Issuance of Outcome Letters – No longer formally required under New Regulations
 - Districts must simply notify the parties in writing of the determination whether sex discrimination occurred under Title IX or this part including the rationale for such determination, and the procedures and permissible bases for the complainant and respondent to appeal
- ▶ Notifications are approved by the school district's Final Decision Maker and who may be the Title IX Coordinator
- ▶ Could also mean the Superintendent or Board, or their Designee where appropriate

Decision Makers and Appeals

Federal Code and Rules

34 CFR §106.45(i) - Appeals

Both Parties must have a right to appeal a determination regarding responsibility or dismissal of a formal complaint or any allegations. However, the standard for appeals that applies to secondary institutions no longer applies to school districts.

Rather, an appeal of a decision finding an accused respondent responsible for a violation of Title IX must be the same appeals process for a dismissal of a Title IX complaint, and a school district is only required to offer the Parties an appeal process that, at a minimum, ***is the same as it offers in all other comparable proceedings, if any, including proceedings relating to other discrimination complaints.***

Practical Considerations

Pitfalls and Obstacles

“No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.” 20 U.S.C. § 1681(a).

This provision, which is enforceable through an implied private right of action, was enacted to supplement the Civil Rights Act of 1964's bans on racial discrimination in the workplace and in universities. *Yusuf v. Vassar Coll.*, 35 F.3d 709, 714 (2d Cir. 1994).

As such, it is important to note that the relevant conclusions and findings here apply to this context as an employment matter, the analysis and evaluation under Title IV and Title IX would carry equal weight.

Pitfalls and Obstacles

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

Pitfalls and Obstacles

▶ Section 703(a) sets forth Title VII's core ***anti discrimination*** provision in the following terms:

“It shall be an unlawful employment practice for an employer—
(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin;
or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.”

Burlington Northern & Santa Fe Ry. Co. v. White, 548 U.S. 53, 62 (2006),
citing 42 USC § 2000e–2(a).

Pitfalls and Obstacles

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

...

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

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

Pitfalls and Obstacles

Stated differently, while sexual harassment is typically based on pervasive and repeated objectively sexual or gender related conduct creating a hostile work environment or results in an adverse employment action, an isolated incident of harassment may be so severe as to rise to the level of creating an objectively hostile work environment.

Though Title IX (and Title VII) applies to the workplace, and generally to employees and workspaces over which the employer exercises managerial control, it does not apply to “non-employees” over which management has no control and where management does not approve or allow access or harassing conduct to take place

Pitfalls and Obstacles

Liability for retaliation is MUCH BROADER than liability for Harassment or Hostile Work Environment

You can have a finding of no Harassment, but still be liable for retaliation

Retaliation can be any adverse workplace action

- Undeserved negative evaluation
- Change in work assignment
- Change in work location
- Increased counseling memorandums

Supervisors and managers should be very wary of any work place decisions in close temporal proximity to a complaint

Pitfalls and Obstacles

Harassment vs. harassment

Harassment - Constitutional or Statutory

harassment – Unprofessional conduct, Code of Conduct violations, workplace civility

Two very different standards, responsibilities, and outcomes

Handled as very different matters, different standards of proof, different outcomes and responsibilities

Best Practices

Regular Sexual Harassment & Hostile Work Environment Training for Supervisors and Staff – Legally required

Regular review of policies and procedures

KEEP SEPARATE “**H**arassment” and “**h**arassment”

Proper Training for Title IX Officers– Legally required

Standardized Reporting Forms – New York State Law

Clear procedures for investigating complaints– New York State Law

30 Day process from complaint to findings and outcome

Additional Resources - Appendices

SUMMARY OF MAJOR PROVISIONS OF THE DEPARTMENT OF EDUCATION'S TITLE IX FINAL RULE RELEASED AUGUST, 2024

<https://www.ed.gov/sites/ed/files/about/offices/list/ocr/docs/t9-final-rule-summary.pdf>

OCR FACT SHEET REGARDING DEPARTMENT OF EDUCATION'S 2024 TITLE IX FINAL RULE AUGUST 2024

<https://www.ed.gov/sites/ed/files/about/offices/list/ocr/docs/t9-final-rule-factsheet.pdf>

OCR RESOURCE RECOMMENDATIONS FOR DEPARTMENT OF EDUCATION'S 2024 TITLE IX POLICY, NOTICE, AND GRIEVANCE PROCEDURE REQUIREMENTS AUGUST 2024

<https://www.ed.gov/sites/ed/files/about/offices/list/ocr/docs/resource-nondiscrimination-policies.pdf>

LETTER TO EDUCATORS ON TITLE IX'S 49TH ANNIVERSARY NOTICE OF LANGUAGE ASSISTANCE JUNE 23, 2021

JOINT DEPARTMENT OF JUSTICE AND DEPARTMENT EDUCATION NOTICE: CONFRONTING ANTI-LGBTQ+ HARASSMENT IN SCHOOLS, A RESOURCE FOR STUDENTS AND FAMILIES DATED JUNE 23, 2021

NEW YORK LABOR LAW 201-g: NEW YORK STATE SEXUAL HARASSMENT PREVENTION¹ MINIMUM POLICY STANDARDS², MODEL POLICY³, MODEL PUBLIC NOTICE⁴, AND MODEL COMPLAINT FORM⁵ SEPTEMBER 2023

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

NEW YORK LABOR LAW 201-g: NEW YORK STATE SEXUAL HARASSMENT PREVENTION FOR NEW YORK'S MODEL TRAINING DECKS AND SCRIPTS THAT COMPLY WITH NYS LABOR LAW SEPTEMBER 2023

<https://www.ny.gov/combating-sexual-harassment-workplace/sexual-harassment-prevention-model-policy-and-training>

THANK YOU

Link to Complete Training Certification

<https://forms.gle/DHVt51PTk5XeBRx48>