NYS Management Advocates for School Labor Affairs

Title IX Training
Discrimination & Investigations

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Agenda
Today's Training & Review

Part 1: 8:30 to 10:00

- **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: 10:15 – 11:30

- **Title IX – Implementation and Practice Recommendations**
  I. **Investigation of Complaints-Legal Obligations and Requirements**
  II. **Practical Considerations**
  III. **Best Practices**
  IV. **Conclusions and Discussions**

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Title IX Harassment Defined

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What is Title IX Harassment[1]

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

1. https://www2.ed.gov/about/offices/list/ocr/docs/titleix-summary.pdf

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What is Title IX Harassment

- Title IX regulations as amended on August 14, 2020, make clear that Sexual harassment is a form of sex discrimination covered by Title IX (and Title VII - more later).
- Regulations include expansive definitions under federal law with overlap under New York State Law, which is in some areas more expansive
- Sexual harassment is now defined under 34 C.F.R. §106.30 as conduct that occurs on the basis of sex that prevents a complainant's right of equal access to the educational institution and falls under one or more of the following three categories:
- The Final Rule defines sexual harassment broadly to include any of three types of misconduct on the basis of sex, all of which jeopardize and "effectively deny" a complainant's equal access to the educational institution that Title IX is designed to protect:.
  - Any instance of "Quid Pro Quo" harassment - an employee of the recipient institution conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct;
  - Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity; or
  - Any instance of conduct that qualifies as "Sexual assault" as defined under the Clery Act, "dating violence", "domestic

1. https://www2.ed.gov/about/offices/list/ocr/docs/titleix-summary.pdf

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What is Title IX Harassment

- The Final Rule utilizes the "effectively denies" standard from the Supreme Court's decision in *Davis v. Monroe*, 526 U.S. 629 (1999)
  - Case involving peer sexual harassment between students
  - Intent of offender is irrelevant
  - so severe, pervasive, and objectively offensive, and that so undermines and detracts from the … educational experience, that the victim … are effectively denied equal access to an institution's resources and opportunities.
- The Final Rule removes language and standard for harassment where conduct only "limits" equal access to the institution's resources and opportunities
- The Final Rule as originally crafted in 2020 attempts to rely more directly on Supreme Court precedents in in Title IX cases like *Davis*, while also distinguishing any reliance on Title VII cases in the employment context

1. https://www2.ed.gov/about/offices/list/ocr/docs/titleix-summary.pdf

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Where does Title IX apply

- Sexual Harassment is defined as occurring in a School's "Education Program or Activity" and "in the United States"
- The Title IX statute applies to persons in the United States with respect to education programs or activities that receive Federal financial assistance. Under the Final Rule, schools must respond when sexual harassment **occurs in the school's education program or activity, against a person in the United States.**
  - The Title IX statute and existing regulations contain broad definitions of a school's "program or activity" and the Department will continue to look to these definitions for the scope of a school's education program or activity.
  - Education program or activity includes locations, events, or circumstances over which the school exercised substantial control over both the respondent and the context in which the sexual harassment occurred, and also includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution (such as a fraternity or sorority house).
- A school may address sexual harassment affecting its students or employees that falls outside Title IX's jurisdiction in any manner the school chooses, including providing supportive measures or pursuing discipline

1. https://www2.ed.gov/about/offices/list/ocr/docs/titleix-summary.pdf

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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.
- Under new and recently released guidance, Title IX also gender-based harassment as a form of discrimination as prohibited under New York State Law.
- Harassing conduct based on sex or sex stereotypes may or may not still be barred, even if the harassment is not sexual in nature, but it is still prohibited under New York State Law.
- Examples include:
  - A student harassing a fellow student by altering his/her lab results because of his/her sex.
  - A student harassing another student and refusing to be his/her lab partner in a physics class or CTE class because s/he thinks s/he will not be able to handle the work seriously because of his/her sex.
  - A teacher refusing to assign a partner to work with a female students because the teacher thinks the female student cannot/will not be able to handle the work seriously because of her sex

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Rules and Obligations
Title IX Policy Requirements

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Title IX - 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.

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Title IX - Policy Requirements

- Required Title IX Policy components:
  - Requirement that the Title IX Coordinator, investigators, initial and appeal decision makers receive training as required by Title IX.
  - Description of the potential sanctions to be imposed upon a harasser where there is a determination that a complainant has been sexually harassed.
  - **State the evidentiary standard to be used in all cases: "clear and convincing" or "preponderance of evidence."**
- Under New York Human Rights law, contractors can also be accused of Sexual Harrassment

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Title IX - 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.

- Publish a **notice of nondiscrimination**;
- 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;
- Adopt and publish **grievance procedures** providing for the prompt and equitable resolution of sex discrimination complaints;
- 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

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Minimum Standards for Sexual Harassment Prevention Policies

Every employer in the State of New York is required to adopt a sexual harassment prevention policy pursuant to Section 201-g of the Labor Law. An employer that does not adopt the model policy must ensure that the policy that they adopt meets or exceeds the following minimum standards. The policy must:

i) prohibit sexual harassment consistent with guidance issued by the Department of Labor in consultation with the Division of Human Rights;

ii) provide examples of prohibited conduct that would constitute unlawful sexual harassment;

iii) include information concerning the federal and state statutory provisions concerning sexual harassment, remedies available to victims of sexual harassment, and a statement that there may be applicable local laws;

iv) include a complaint form;

v) include a procedure for the timely and confidential investigation of complaints that ensures due process for all parties;

vi) inform employees of their rights of redress and all available forums for adjudicating sexual harassment complaints administratively and judicially;

vii) 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; and

viii) 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.

Employers must provide each employee with a copy of its policy in writing. Employers should provide employees with the policy in the language spoken by their employees.

* * *

The adoption of a policy does not constitute a conclusive defense to charges of unlawful sexual harassment. Each claim of sexual harassment will be determined in accordance with existing legal standards, with due consideration of the particular facts and circumstances of the claim, including but not limited to the existence of an effective anti-harassment policy and procedure.

https://www.ny.gov/sites/default/files/atoms/files/MinimumStandardsforSexualHarassmentPreventionTraining.pdf

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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

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Title IX – Notice of Nondiscrimination

- **Publish a notice of nondiscrimination** – "that the recipient does not discriminate on the basis of sex in the education program or activity that it operates, and that it is required by title IX and this part not to discriminate in such a manner. Such notification must state that the requirement not to discriminate in the education program or activity extends to admission (unless subpart C of this part does not apply) and employment, and that inquiries about the application of title IX and this part to such recipient may be referred to the recipient's Title IX Coordinator, to the Assistant Secretary, or both" (34 CFR § 106.8)
- 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

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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 to coordinate its efforts to comply with its responsibilities under this part, which employee must be referred to as the 'Title IX Coordinator.' Thus, the restriction placed on a recipient's choice of a Title IX Coordinator is that the person must be the recipient's 'employee'."[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 Title IX Coordinator receiving the person's verbal or written report.
- Such a report may be made at any time (including during non-business hours) by using the telephone number or electronic mail address, or by mail to the office address, listed for the Title IX Coordinator

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

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Title IX - Publication and Procedures

- Each recipient must prominently display the **contact information** required to be listed for the Title IX Coordinator under paragraph (a) of this section and as part of the required policy described in paragraph (b)(1) of this section on its website, if any, and in each handbook or catalog that it makes available to persons entitled to a notification under paragraph (a) of this section. (34 CFR § 106.8)
- **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)

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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 Policy.
- 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.

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Title IX–Investigation Requirements

Title IX Final 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 ***or not***, file a formal complaint ***or not***, participate in a grievance process ***or not***.
- Survivors are protected against bullying or harassment throughout the grievance (complaint and investigation) process

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Rules and Obligations
Title IX Investigation Requirements

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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.

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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/

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Title IX Specific Terms

Definition of Harassment "Based on Sex"

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Title IX–Scope of Title IX *Redux and Reversed*

Title IX in the context of Title VII case law - The Supreme Court's Decision in *Bostock*[1]

- 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.*

1. *Bostock v. Clayton County*, 140 S.Ct. 1731 (June 15, 2020)

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Title IX–Scope of Title IX *Redux and Reversed*

Title IX in the context of Title VII case law - the resistance to *Bostock*[1]

- OCR's Letter of Impending Enforcement Action dated May 15, 2020[2]
  - Connecticut Interscholastic Athletic Conference (CIAC) promulged rules allowing transgender athletes to compete based on gender identity rather than biological sex
  - Female Student Athletes filed OCR complaints under Title IX claiming they were deprived of competitive opportunities based on sex for being forced to compete against transgendered athletes who were biologically male
  - OCR referred to DOJ for civil enforcement and pursuit of claims against the CIAC and the Glastonbury Board of Education[3]
- OCR's Letter of Impending Enforcement Action dated August 31, 2020[2]
  - OCR specifically disavowed the application of the Supreme Court's decision in *Bostock* asserting it "does not alter the relevant legal standards" under Title IX's regulations and that on its face, *Bostock* only applies in the context of Title VII given the differing statutory authorities and case law

1. *Bostock v. Clayton County*, 140 S.Ct. 1731 (June 15, 2020)
2. https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/01194025-a2.pdf
3. https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/01194025-a3.pdf

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Title IX–Scope of Title IX *Redux and Reversed*

Title IX in the context of Title VII case law - the resistance to *Bostock*[1]

- OCR's Withdrawal Letter of Impending Enforcement Action dated February 23, 2021[1]
  - OCR determined "the Revised Letter was issued without the review required for agency guidance documents that set out policy on a regulatory issue" and "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 Notice of Interpretation dated June 16, 2021 – Published to the Federal Register on June 22, 2021[2]
  - "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)

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Title IX–Scope of Title IX *Redux and Reversed*

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, 2021[1]
  - 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, 2021[2]
  - 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

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Title IX Specific Terms
Prohibited Retaliation

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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/

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Title IX–Prohibited Retaliation

Title IX prohibitions on retaliation also include:

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

Specific Circumstances under § 106.71

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

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Title IX Specific Terms
Grievance Process

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Title IX– "Grievance" Process

34 CFR § 106.45 - Title IX Grievance (complaint) procedures – Similar to the older requirements and would encompass requirements consistent with NYS law

- Provide Notice of Allegations to accused of potential charges of sexual harassment upon receipt of a formal complaint
  - Notice must provide sufficient details with sufficient time for respondent to prepare for any interview.
  - Sufficient details include the identities of the parties involved in the incident, if known, the conduct allegedly constituting sexual harassment under § 106.30, and the date and location of the alleged incident, if known.
  - The written notice must include a statement that the respondent is presumed not responsible for the alleged conduct and that a determination regarding responsibility is made at the conclusion of the grievance process.
  - The written notice must inform the parties that they may have an advisor of their choice, who may be, but is not required to be, an attorney, and may inspect and review evidence.
  - The written notice must inform the parties of any provision in the recipient's code of conduct that prohibits knowingly making false statements or knowingly submitting false information during the grievance process
- If NEW claims or allegations arise during course of the investigation, a NEW "Notice of Revised Allegations" must be issued to the accused for those allegations.

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Title IX– "Grievance" Process

34 CFR § 106.45 – Grievance and Complaint Procedures:

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

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Title VII and Title IX Intersections

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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.

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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 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)

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What is Title VII Harassment

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

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

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What is Title VII Harassment

Unwelcome or offensive conduct in the workplace:

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

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What is Title VII Harassment

For Prohibited Sexual Harassment Under Title VII (and Title IX)

- IS IT SEXUAL HARASSMENT?
  - Unwanted and unwelcome.
  - Interferes with your performance at work or school; creates intimidating or hostile environment.
  - Could be dangerous.
  - Causes uncomfortable feelings.
  - Designed or does make victim feel powerless.
  - Negatively influences work performance.
  - Sexual in nature.

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What is Title VII Harassment

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

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

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

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What is Title VII Harassment

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

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What is Title VII Harassment

Employer Requirements regarding Title VII Claims and Investigations

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

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What is Title VII Harassment

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

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What is Title VII Harassment

RETALIATION

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

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What is Title VII Harassment

RETALIATION

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

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BREAK

Code:

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Investigations of Complaints

Legal Obligations and Requirements

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Investigation of Complaints

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

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Initial Referral and/or Complaint

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

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Notice of Allegations – Pre-Investigation

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

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

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Review of Policies & Procedures

- KNOW YOUR DISTRICT'S SEXUAL HARASSMENT AND TITLE IX POLICIES
- Who is the appointed Title IX 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

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Review of Policies & Procedures

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

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Review of Policies & Procedures

- Does the Policy provide guidelines for determining what constitutes Sexual Harassment?
- In evaluating the totality of the circumstances and making a determination of whether conduct 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.

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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

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Interview of Complainant

- After review of the policy and complaint (memorialized verbal and written complaints), interview Complainant
- Use an initial opening script, provide a copy of the written script to the interviewee (separate script for complainant, witness, accused)
- Try to conduct the interview within 5 days of the initial complaint, the sooner the better
- Recommendations
  - 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

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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

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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

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Initiation of a "Formal" Complaint
Verbal Complaints

- For Verbal Complaints, if the complainant does not want to submit a written complaint, the Title IX Coordinator can sign the written complaint on behalf of the District as the "complainant" if the Title IX coordinator believes there is sufficient evidence of a potential claim of violation of Title IX
- 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

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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

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Fact Witness Interviews

- 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 interviewee
- Try to conduct fact interviews within 2 weeks of the complainant's interview, the sooner the better
  - Emphasis CONFIDENTIALITY and NO RETAILIATION
  - Who, What, Where, When, Why - Challenge with evidence, records, video, etc.
  - Inform the witness that dishonesty can be grounds for discipline if the witness is evasive, try cooperation
  - Contemporaneously memorialize the witnesses testimony
- At the end, ask –

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

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Fact Witness Interviews

- If the witness is lying or less than truthful, attempt to redirect them to provide truthful answers
- If necessary, suspend the interview and reschedule with a union representative present, provide notices of Weingarten & Garrity rights where necessary
- Recommendations
  - 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

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Update Request for Documentary Evidence – Re-interviews as needed

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

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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

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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

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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

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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

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Final Evidentiary Follow-up

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

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Final Evidentiary Follow-up

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

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Preliminary Draft Report & 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

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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

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Preliminary Draft Report & Conclusions to Final Report and Conclusions

- Prior to completion of the investigative report, the recipient must send to each party and the party's advisor, if any, the evidence subject to inspection and review in an electronic format or a hard copy - 34 CFR 106.45(b)(5)(vi)
- Parties (complainant/victim & accused) must have at least 10 days to submit a written response, as well as pose any written questions either Party would like the other Party/witnesses to respond - 34 CFR 106.45(b)(5)(vii), (b)(6)(ii)
- The recipient must make all such evidence subject to the parties' inspection and review available for inspection as part of draft report;
- Title IX Coordinator may pass on written questions from the Parties and solicit responses from opposing Parties, or explain to the proposing party any decision to exclude a question as not relevant- 34 CFR 106.45(b)(6)(ii)

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Preliminary Draft Report & Conclusions to Final Report and Conclusions

- Parties can refuse to response to written questions, and may be construed as a refusal to submit to "cross-examination"
  - Under Regulations, refusal to submit to cross examination in a live hearing required exclusion of refusing Parties' statements and testimony – 34 CFR 106.45(b)(6)(i)
  - Regulation invalidated and vacated in *Victim Rights Law Center et al. v. Cardona*, No. 1:20-cv-11104, 2021 WL 3185743 (D. Mass. July 28, 2021), appeals pending (1st Cir.)
  - Not applicable to elementary/secondary schools
- Title IX Coordinator must consider all Parties feedback, questions, and responses prior to completion of the investigative report

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Preliminary Draft Report & Conclusions to Final Report and Conclusions

- 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
- Decision Maker must review Investigative report and Recommendations
- Final Decision based on Decision Maker's independent review of the totality of report, evidence, and conclusions
- Final Report and Recommendations MUST include all elements of any final conclusions and recommendations – CANNOT BIFURCATE LIABILITY AND PENALTY

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Decision Makers and Outcome Letters

- Issuance of Outcome Letters – Required as part of the process for Complainant and Accused – Comes from Final Decision Maker - 34 CFR 106.45(b)(7)(ii)
- Complainant Outcome Letters – One to each complainant and determinations must be provided simultaneously
- Purpose of the final outcome letter – Once Approved
  - Notify the conclusion of the investigation
  - Summarize the nature of the complaint
  - Provide a statement of findings and outcomes
- Outcome letters are approved by the Recipient's (school district's) Final Decision Maker and must be issued by someone other than Title IX Coordinator
- Potentially means the Superintendent or Board, or their Designee where appropriate

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Decision Makers and Outcome Letters

Federal Code and Rules

34 CFR §106.45(b)(7) – Formal Grievance (Complaint/Investigation) Process

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

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Decision Makers and Appeals

Federal Code and Rules

34 CFR §106.45(b)(8) – Formal Grievance (Complaint/Investigation) Process & Appeals

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

- (A) Procedural irregularity that affected the outcome of the matter;
- (B) New evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter; and
- (C) The Title IX Coordinator, investigator(s), or decision-maker(s) had a conflict of interest or bias for or against complainants or respondents generally or the individual complainant or respondent that affected the outcome of the matter.
- (D) Or on any other basis the District deems appropriate.

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Decision Makers and Appeals

Federal Code and Rules

34 CFR §106.45(b)(8) – Formal Grievance (Complaint/Investigation) Process & Appeals

As to all appeals, the District must

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

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Practical Considerations

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Pitfalls and Obstacles

- "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a).
- This provision, which is enforceable through an implied private right of action, was enacted to supplement the Civil Rights Act of 1964's bans on racial discrimination in the workplace and in universities. *Yusuf v. Vassar Coll.*, 35 F.3d 709, 714 (2d Cir. 1994).
- As such, it is important to note that the relevant conclusions and findings here apply to this context as an employment matter, the analysis and evaluation under Title IV and Title IX would carry equal weight.

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Pitfalls and Obstacles

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

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Pitfalls and Obstacles

- Section 703(a) sets forth Title VII's core ***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).

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Pitfalls and Obstacles

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

…

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

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

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Pitfalls and Obstacles

- Stated differently, while sexual harassment is typically based on pervasive and repeated objectively sexual or gender related conduct creating a hostile work environment or results in an adverse employment action, an isolated incident of harassment may be so severe as to rise to the level of creating an objectively hostile work environment.
- Though Title IX (and Title VII) applies to the workplace, and generally to employees and workspaces over which the employer exercises managerial control, it does not apply to "non-employees" over which management has no control and where management does not approve or allow access or harassing conduct to take place

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Pitfalls and Obstacles

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

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Pitfalls and Obstacles

- **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

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Best Practices

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

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Additional Resources

- Summary of Major Provisions of the Department of Education's Title IX Final Rule Released August 2020
- OCR FAQ - Part 1: Questions and Answers Regarding the Department's Title IX Regulations dated January 15, 2021
- OCR FAQ - Part 2: Questions and Answers Regarding the Department's Title IX Regulations dated January 15, 2021
- Letter to Educators on Title IX's 49th Anniversary Notice of Language Assistance dated June 23, 2021
- Joint Department of Justice and Department Education Notice: Confronting Anti-LGBTQI+ Harassment in Schools, a Resource for Students and Families dated June 23, 2021
- OCR Question and Answers on the Title IX Regulations on Sexual Harassment dated July 20, 2021

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THANK YOU

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