

Updated Title IX Regulations: What to Expect

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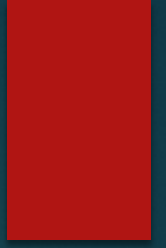
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OVERVIEW AND CAVEAT



The regulations discussed in this material are proposed and subject to change. The reader should continue to comply with the current regulations and policies regarding Title IX until the final regulations are released and policies are amended.

Basis in the Law

Title IX of the Education Amendments of 1972

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

The Title IX Regulations



- ▶ 2020: Current Title IX Regulations took effect
- ▶ 2022 Proposed Revisions: Comprehensive proposed revisions to the Title IX regulations
- ▶ 2023: Proposed revision regarding athletics
- ▶ 2024: Anticipating release of the 2022 Proposed Revisions

Scope of the Proposed Regulations

Discrimination on the basis of sex includes discrimination on the basis of sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity.

Scope of the Proposed Regulations, continued

Tile IX applies to “sex discrimination occurring under a recipient’s education program or activity in the United States,” which **“includes but is not limited to conduct . . . that is subject to the recipient’s disciplinary authority.** A recipient as an obligation to address a sex-based hostile environment under its education program or activity, **even if sex-based harassment contributing to the hostile environment occurred outside the recipient’s education program or activity or outside the United States.”**

2022 Proposed Regulations, § 106.11.

Proposed changes to definitions

- ▶ Number of proposed definitions
- ▶ Several new terms
- ▶ Several changed terms
- ▶ Significant proposed changes to definitions follow (not all definitions are in these materials)



Sex-based Harassment, defined

Sexual harassment, harassment on the basis of sex, and other conduct on the basis of sex that is –

- ▶ Quid pro quo harassment;
- ▶ Specific offenses:
 - ▶ Sexual assault
 - ▶ Dating violence
 - ▶ Domestic violence
 - ▶ Stalking; or,

Hostile environment harassment

- ▶ Unwelcome sex-based conduct that is sufficiently severe OR pervasive, that, based on the totality of the circumstances and evaluated subjectively AND objectively, denies or limits a person's ability to participate in or benefit from the recipient's education program or activity. Whether a hostile environment has been created is a fact-specific inquiry that includes consideration of the following:
 - ▶ The degree to which the conduct affected the complainant's ability to access the district's education program or activity;
 - ▶ The type, frequency and duration of the conduct;
 - ▶ The parties ages, roles within the district, previous interactions, and other factors about each party that may be relevant to evaluating the effects of the alleged unwelcome conduct
 - ▶ The location of the conduct, the context in which the conduct occurred, and the control the district has over the respondent; and
 - ▶ Other sex-based harassment in the district's education program or activity.

Additional Definitions

Remedies “Measures provided, as appropriate to a complainant or any other person the recipient identifies as having had equal access to the recipient’s education program or activity limited or denied by sex discrimination. These measures are provided to restore or preserve that person’s access to the recipient’s education program or activity after a recipient determines that sex discrimination occurred.”

Supportive Measures: “non-disciplinary, non-punitive individualized measures offered as appropriate, as reasonably available, without unreasonably burdening a party, and without fee or charge to the complainant or respondent to: (1) restore or preserve that party’s access to the recipient’s education program or activity, **including temporary measures that burden a respondent imposed for non-punitive and non-disciplinary reasons and that are designed to protect the safety of the complainant or the recipient’s educational environment, or deter the respondent from engaging in sex-based harassment;** or (2) provide support during the recipient’s grievance procedures under § 106.45, and if applicable § 106.46, or during the informal resolution process under § 106.44(k).”

Complaint: “an **oral or written** request to the recipient to initiate the recipient’s grievance procedures as described in § 106.45.”

Complainant:

- “(1) A student or employee who is alleged to have been subjected to conduct that could constitute sex discrimination under Title IX; or
- (2) A person other than a student or employee who is alleged to have been subjected to conduct that could constitute sex discrimination under Title IX and who was participating or attempting to participate in the recipient’s education program or activity when the alleged sex discrimination occurred.”

Respondent “*person who is alleged to have violated the recipient’s prohibition on sex discrimination.*”

Key Proposed Changes to the Grievance Process Requirements

- ▶ The decisionmaker may be the same person as the Title IX Coordinator or investigator;
- ▶ Establish reasonably prompt timeframes for the major stages of the grievance procedures – major stages include – “evaluation (i.e., the recipient’s determination of whether to dismiss or investigate a complaint of sex discrimination); investigation; determination; and appeal, if any;
- ▶ Take reasonable steps to protect the privacy of the parties and witnesses during the pendency of the grievance procedures, provided that the steps do not restrict the ability of the parties to obtain and present evidence, including by speaking to witnesses, consult with a family member, confidential resource or advisor, or otherwise defend their interest;
- ▶ Require an objective evaluation of all relevant evidence (inculpatory and exculpatory) and provide that credibility determinations must not be based on a person’s status of a complainant, respondent, or witness;

Investigating Complaints – proposed changes to the process

“Adequate, reliable, and impartial investigation of complaints,” which requires the following:

- ▶ Burden is on the district to conduct an investigation that gathers sufficient evidence to determine whether sex discrimination occurred;
- ▶ Provides an equal opportunity for the parties to present relevant fact witnesses and other inculpatory and exculpatory evidence
- ▶ Review all evidence gathered through the investigation and determine what evidence is relevant and what evidence is impermissible, regardless of relevance (e.g. privileged information)
- ▶ Provide each party with a description of the evidence that is relevant to the allegations and a reasonable opportunity to respond
- ▶ A process that enables the decisionmaker to adequately assess the credibility of the parties and witnesses to the extent credibility is in dispute and relevant to evaluating one or more allegations of sex discrimination

Post- investigation Process

Following an investigation consistent with the above, the district must:

- ▶ Use a preponderance of the evidence standard to determine whether sex discrimination occurred;
- ▶ Use the preponderance of the evidence standard, unless clear and convincing evidence is used for all other proceedings (then permissible to use either, but must select one);
- ▶ Provide notice of the outcome of the complaint and the appellate pathway;
- ▶ Implement remedies/take steps to ensure that sex discrimination does not occur or recur;
- ▶ If additional provisions are adopted, they must apply equally to all parties

Next steps...

- ▶ Ongoing implementation of existing Title IX regulations/Policy ACAC until the new regulations take effect
- ▶ Prompt updates to policy ACAC after release of the final regulations



Conducting an Effective Title IX Investigation

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





Minimum Requirements for Title IX Investigations

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

Initial Considerations

- ▶ Do you need an outside investigator?
- ▶ Factors to consider:
 - ▶ Conflict of interest/bias
 - ▶ Scope of the investigation
 - ▶ Potential for subsequent litigation



Do the allegations trigger other reporting duties?

Reporting to Law Enforcement

- Allegations of criminal behavior
- Safe School Zone Violations (RSA 193-D)

Potential Abuse/Neglect

- Mandatory reporting obligation

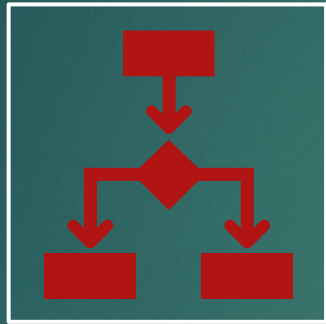
Reporting to the Insurer

- Bodily injury

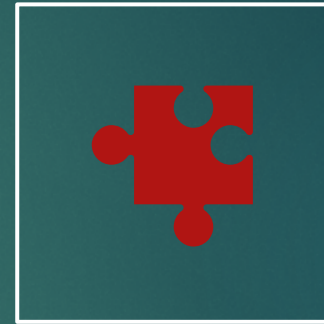
State Department of Education

- Code of conduct requirements

Scope and Conduct of the Investigation



Scope will depend on the nature of the case



Minimum requirements:

Interview/obtain statements from complainant/respondent/witnesses

Review district policies

Review evidence obtained from complainant/respondent/witnesses

Conducting Interviews

- ▶ Factors to consider:
 - ▶ Location of the interview?
 - ▶ Who conducts the interview?
 - ▶ How many individuals are present?
 - ▶ Where will people sit?
 - ▶ Manner in which questions are phrased
 - ▶ Potential Garrity warnings for employees
 - ▶ State law considerations – RSA 189:70 regarding information from social media accounts





Pre-decision access to the evidence

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

Pre-decision access to the evidence, Continued

At conclusion of the investigation –
Investigator must create an investigative
report that fairly summarizes the evidence.

- Investigator must consider the written responses from the parties prior to finalizing the report

Investigative Report: Must be provided to
the parties and the decision-maker in an
electronic format or a hard copy

- Once the report is complete, the post-investigation process begins – decision-maker is involved



The Investigation Report

- ▶ Identify parties and describe allegations
- ▶ Description of procedural steps taken by the Investigator – notice to parties/dates/times of interviews
- ▶ Summarize relevant evidence – for each allegation!
 - ▶ Interviews and other documentary evidence
 - ▶ Documents
 - ▶ Provided by District (policies)
 - ▶ Provided by Complainant
 - ▶ Provided by Respondent
 - ▶ Provided by Witnesses
- ▶ Credibility assessment of witnesses
- ▶ Information provided by the parties as part of their review of the evidence

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

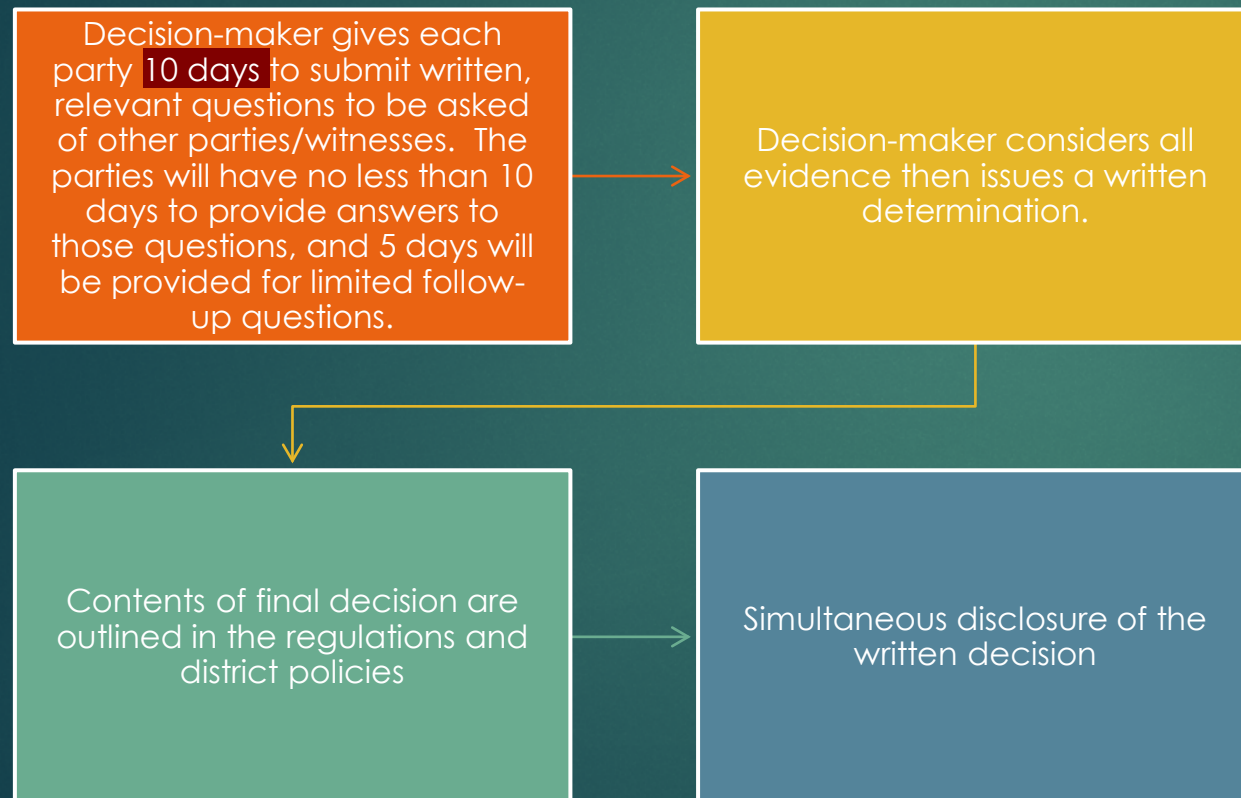




The Role of the Decision-Maker

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

Post-Investigation Process



Written Determination

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



Questions?