

Haverhill Public Schools Title IX Training

Title IX of the Education Amendments of 1972

Title IX protects people from discrimination based on sex in education programs or activities that receive Federal financial assistance, also known as “Recipients” [of Federal funding].

“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.”

Applies to elementary & secondary schools, post-secondary schools, charter schools, for-profit schools, libraries and museums.

What sort of things does Title IX protect?

Anyone attempting to access or participate in the programming
(students, athletes, employees, etc.)

Sexual Harassment / Sexual Assault

Policy Enforcement

Bathrooms

Athletics / Student Programming

Title IX in the News

U.S. Department of Education Launches New Title IX Resources for Students, Institutions as Historic New Rule Takes Effect

AUGUST 14, 2020

Executive Order 14021 of March 8, 2021

Guaranteeing an Educational Environment Free From Discrimination on the Basis of Sex, Including Sexual Orientation or Gender Identity



Department of Education: Moving to Amend 2020 Title IX Regulations on Sexual Harassment

Wednesday, April 7, 2021

The U.S. Department of Education's Office for Civil Rights (OCR) has **announced** it will conduct a comprehensive review of its regulations: starting

SUBSCRIBER EXCLUSIVE

Extortion, cyberstalking and a Title IX investigation: Read the FBI indictment of ex-Northeastern University track coach accused of targeting female student-athletes

"TRANSGENDER ATHLETES"

Biden Administration Withdraws From Conn. Transgender Athlete Case

TIME

SUBSC

IDEAS

Trump's New Rule Governing College Sex Assault Is Nearly Impossible for Survivors to Use. That's the Point

#NBC NEWS

Biden admin announces next steps in overhauling Betsy DeVos' Title IX rules

Girls sue to block participation of transgender athletes

By PAT EATON-ROBB February 12, 2020

LOCAL

Gloucester school board asks Supreme Court to review transgender policy

The Gloucester County School Board argues that its bathroom policy poses a 'pressing federal question of national importance.'



Timeline of Recent Title IX Related Events

- February 2020: Group of female high school runners in Connecticut sue to block transgender athletes from participating in female sports
- March 2020: Trump Administration files statement of interest in lawsuit, effectively supporting the plaintiffs, stating Title IX only protects sex – not gender identity
- May 2020: New Title IX Sexual Harassment regulations are announced
- June 2020: 18 State Attorney's General sue the DOE over the regulations
- June 2020: Supreme Court rules in favor of plaintiffs in Bostock (employment discrimination case with Title IX Implications)
- August 12th, 2020: Court denies States' attempt to delay new Title IX regulations
- August 14th, 2020: Sexual Harassment regulations take affect. School districts everywhere scramble to update policies and train staff
- January 20, 2021: Joe Biden is sworn in as President
- January 20, 2021: Executive Order on Gender Identity – orders the application of Bostock to discrimination laws (including Title IX)
- February 24, 2021: Biden Administration withdraws from Connecticut lawsuit, effectively reversing the Department of Justice and Department of Education's position on the issue
- March 8, 2021: Executive Order to review Title IX Regulations
- April 6, 2021: DOE announces its review of Title IX – anticipate new guidance documents and a rule change.
- June 2021: Confronting LGBTQI+ Harassment in Schools
- July 2021: Q&A Title IX Regulations on Sexual Harassment

So...Where are we now?

- Remember, Massachusetts law has been and is still applicable.
- Connecticut Title IX Lawsuit is still pending
- Bostock is the law of the land
- Title IX Sexual Harassment regulations are still in effect (but potentially enforced differently).

Sexual Harassment Update – Key Points

- Defines Sexual Harassment
- Due Process & Written Procedures Required
- Emphasis on the role of Title IX Coordinator
- Relevant staff must be trained
- Actual notice standard

Sexual Harassment

According to Title IX, sexual harassment is conduct on the basis of sex that meets one or more of the following:

- An employee of the District 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 District's education programs or activities; or
- Sexual Assault, domestic violence, dating violence, stalking as defined by federal laws

Sexual Harassment

- A school will be liable if it acts in a way that is “deliberately indifferent” or in a manner that is “clearly unreasonable in light of the known circumstances.”
- Title IX applies to locations, events, and activities over which the school exercise substantial control.
- It does not apply to events that occurred outside of the United States.
- Complainant must be participating / attempting to participate in the school or activity at the time of filing.

Examples of Sexual Harassment

While it is not possible to list all circumstances that may constitute sexual harassment, the following are examples of prohibited conduct between students, employees, and obviously employees and students:

- Unwelcome sexual advances -- whether they involve physical touching or not;
- Sexual epithets, jokes, written or oral references to sexual conduct, gossip regarding one's sex life; comment on an individual's body, comment about an individual's sexual activity, deficiencies, or prowess;
- Displaying sexually suggestive objects, pictures, cartoons;
- Unwelcome leering, whistling, brushing against the body, sexual gestures, suggestive or insulting comments;
- Inquiries into one's sexual experiences, and
- Discussion of one's sexual activities
- Taking or posting of photographs, videos or images of a sexual nature without consent

Responding to Sexual Harassment

- Schools must respond to allegations of sexual harassment upon having “Actual Notice” of sexual harassment.
- A school has “Actual Notice” when *any* employee/agent learns of sexual harassment.
- The employee could witness the sexual harassment his/herself, learn of it from the victim, or learn of it through a third party.
- Any District employee with knowledge of an allegation of sexual harassment must report it to their supervisor or the Title IX Coordinator.

Title IX Coordinator

The Title IX coordinator is responsible for:

- Responding to allegations of sexual harassment
- Ensuring compliance with Title IX of the Education Amendments of 1972
- Publication of the policy
- Training of employees and the Title IX Team
- Ensuring compliance with the Grievance Process

The Title IX Coordinator's information must be published in your policy handbook and on your website.

Title IX Coordinator

The Title IX Coordinator must contact the alleged victim, or “the Complainant,” to gather preliminary information, offer “Supportive Measures,” and inform that person of the right to file a “Formal Complaint” against the alleged perpetrator, or “the Respondent.”

Formal Complaint

Document filed by the Complainant or signed by the Title IX Coordinator requesting that the district investigate the allegations

Initiates the Grievance Process

Can be filed in person, by mail, or electronic mail

Complainant may withdraw formal complaint any time.

The District may dismiss a Formal Complaint for not qualifying as Sexual Harassment under Title IX.

Supportive Measures

- Non-disciplinary, non-punitive individualized services offered as appropriate and reasonably available
- Without fee or charge to the complainant or respondent
- Available regardless of filing of a Formal Complaint
- Designed to restore / preserve equal access to education and activities
- Protect safety and deter sexual harassment
- Do not *unreasonably burden* any other person
- District must maintain confidentiality of supportive measures to the extent possible

Examples of Supportive Measures

- Counseling
- Deadline extensions
- Course adjustments
- Schedule modifications
- Increased security in areas
- Mutual restrictions on contact

Implementing Supportive Measures

- School must consider the alleged victims requests
- The school must keep the confidential to the greatest extent possible
- Equally available to complainant and respondent
- Title IX Coordinator must document

Informal Resolution

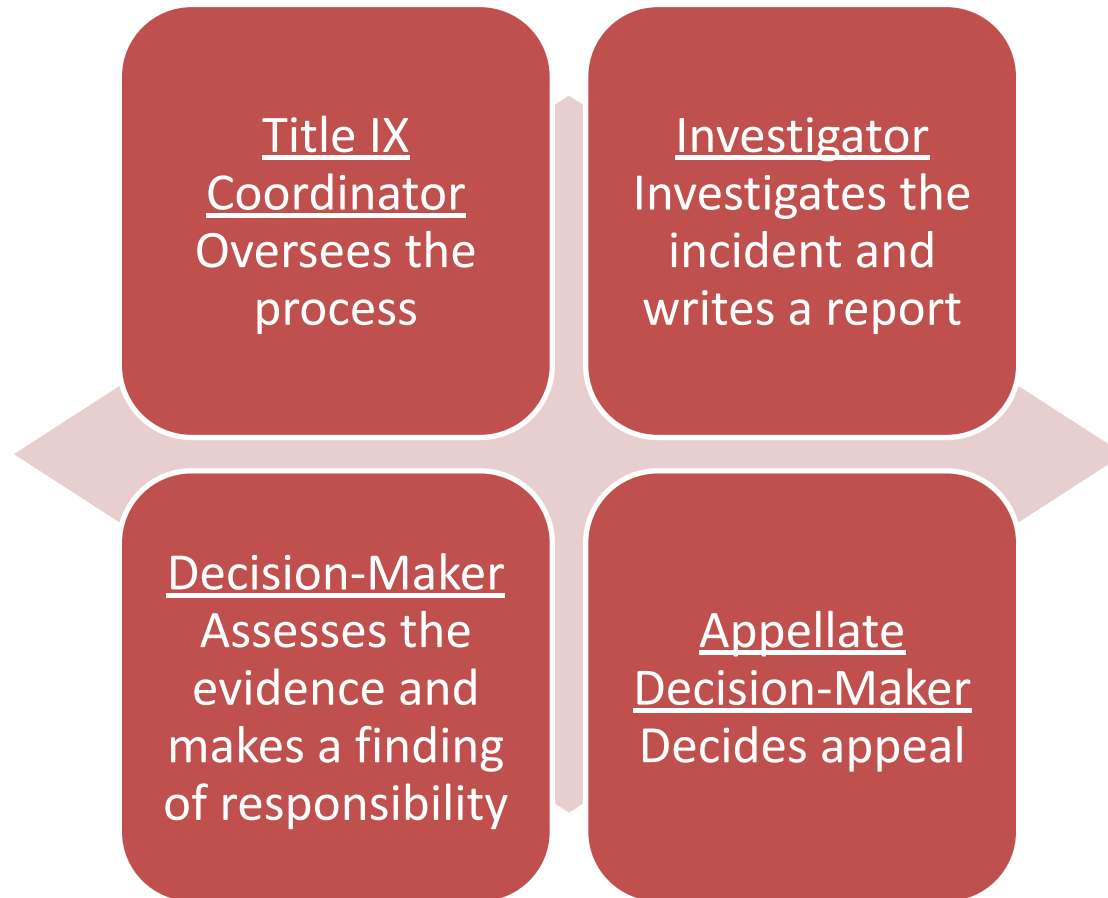
Informal resolutions, such as mediation, may be offered to the Complainant and Respondent, in the discretion of the Title IX Coordinator, but not until after a Formal Complaint is filed and notice has been provided.

- The District must obtain written consent from the Complainant and Respondent to begin informal resolution.
- Either party can withdraw from informal resolution and the Grievance Process will resume.

Grievance Process

- Written Notice is provided to the Complainant and Respondent.
- The Formal Complaint is assigned a Decision-Maker and Investigator
- Decision-Maker, Investigator, and Title IX Coordinator must be properly trained, and free of conflicts and biases

Roles in the Grievance Process



Written Notice

- Provided Simultaneously
- Detail the allegations of sexual harassment
- Describe the Grievance Process
- Detail each party's right to:
 - Be presumed not responsible
 - Supportive measures
 - Choose an advisor (who may be an attorney), or have an advisor provided to them, who will accompany them throughout the process
 - Inspect and examine evidence
- Remind them of the prohibition against false statements and retaliation
- You cannot order a party to not discuss the complaint.

Investigations

A properly trained investigator must complete the investigation and author an Investigative report.

- Prior to any interviews with witnesses, the investigator must provide sufficient notice and time to prepare for the interview.
- Both parties and their advisors must have an opportunity to examine and inspect evidence.
- The Investigative Report will summarize the investigation and the relevant evidence discovered.
- Both parties will have 10 days before any hearing or determination of responsibility to respond to the report.

Questions Related to Previous Sexual Behavior

- These are strictly prohibited.
- Questions about a person's previous sexual history are irrelevant unless offered to prove consent or someone other than the Respondent committed the act.

Privileges

- Information protected by a legal privilege or doctor patient privilege is not accessible
- Neither party is allowed to seek, permit about, or allow the introduction of evidence that is protected by a recognized privilege.
- Individuals may waive their privilege, but not doing so must not be held against them.

Conducting an Effective Investigation

- Keep the Formal Complaint as a handy reference
- Plan your interviews (and give proper notice)
 - Who needs to be interviewed?
 - What should the order be?
 - What questions are necessary?
 - Do we need assistive technology / translators?
- Leave time for follow up.
- Avoid promises of confidentiality – you may not be able to keep it.

Conducting an Effective Investigation (cont'd.)

Interviews

- Make the person feel comfortable.
- Ask open ended questions—what, when, who, and where.
- Avoid leading questions.
- Interview one witness at a time.
- Remain engaged and interested, but objective.
 - Be careful not to affirm or reject a statement with your words or body language.

Conducting an Effective Investigation (cont'd.)

- Avoid asking about the allegations right away
- Develop a relationship
- Ask if the witness knows why they are there
- Let the witness finish answering questions
 - Circle back for the necessary details
 - Identification
 - Dates / Times
- Be able to decipher what this persona actually witnessed and what they heard or are speculating about.
- Ask if there is anyone else that you should speak with.
- Give them an opportunity to close out the interview by asking “Is there anything else I need to know?”
- Transition out of interview mode.

Conducting an Effective Investigation (cont'd.)

- Ask for and review documents, electronic records, or other physical evidence.
- It is important to preserve all relevant **physical evidence** or at least take a **photograph** if maintaining it is not practical or appropriate.
- Maintain a “chain of custody.” Document who has handled an examined the evidence and on what date.

Adversarial Process

- Title IX mandates that the District conduct an “adversarial process” or an opportunity for the parties to confront each other and present evidence.
- This can be done by conducting a “Live Hearing” or allowing for the “Submission of Questions.”

Submission of Questions

- The Complainant and Respondent have the opportunity to submit written questions that they want asked of any participant in the investigation.
- The Decision-Maker reviews the question to ensure it is relevant, and then asks it of the participant.
- The Decision-Maker will provide written decision on why he excluded a question for not being relevant.
- Limited follow up questions are allowed.

Live Hearings

- Hearings are optional for K-12 Schools.
- Each party's advisor is allowed to ask witnesses relevant questions.
- Upon request, technology may be used to separate parties during the hearing process to avoid confrontation.
- If a person does not submit to cross-examination, their original statement cannot be considered.
- The decision to not participate shall not be used against that person.
- Schools also have to create an audio or audiovisual recording, or a transcript, of any live hearing, and make it available to the parties for inspection and review.

Assessing the Evidence

- Each party is afforded the same consideration without bias.
- Do not speculate or consider anything that was not presented.
- Consider the presentation of witnesses—candid, guarded, responsive, evasive.
- Were the statements reasonable or unreasonable in light of the other evidence
- Did the witness have a good opportunity to observe?
- Consider potential motives for testimony and statements.
- Excluded questions, statements, answers are not evidence.
- Do not make up your mind until all of the evidence is presented.

Finding of Responsibility

- Any respondent found by a *preponderance of the evidence* to have committed sexual harassment shall be subject to discipline, including:
 - Detention
 - Exclusion of extracurricular activities
 - Suspension
 - Expulsion
 - Termination of employment
- Decision will simultaneously issue a written decision to both parties.

Written Determination

- Describe the allegations
- Procedural steps taken
- Findings of fact
- Conclusion reached
- Statement of rationale on responsibility
- Discipline to be imposed
- Remedial measures designed to restore or preserve equal access to education and access

Appeal

- There are Limited Grounds for Appeal:
 - Procedural irregularity
 - New evidence was not reasonably available at the time of determination
 - Conflict of interest or bias affected outcome
- Both, the Complainant and Respondent, shall have the right to appeal the decision.
- They must notify the Title IX Coordinator in writing.
- Both parties shall have an opportunity to write a statement supporting their position.
- Appeal shall be reviewed by a person that was not the original decision-maker.
- Appellate Decisionmaker shall issue a written decision.

Emergency Removals

- A school can remove a respondent from the school's education programs or activities on an emergency basis if the respondent poses an immediate threat to anyone's physical health or safety. There are additional requirements for emergency removal proceedings that schools should consider if they institute this process.
- If the respondent is a school employee, the final regulations don't prevent a school from placing an employee on administrative leave during the investigation.

Free Speech

- New Title IX regulations explicitly prohibit any sort of suppressions of free speech is not appropriate response to sexual harassment.
- These are protected by the First Amendment.

Training

- Training materials must be preserved and posted on the school's website.
- All Title IX Coordinators, mediators, decision-makers, and investigators must be trained.

Questions?

FAQ

- **Question:** Is the school permitted to take steps to reports of sexual harassment that go beyond those set out in the 2020 Amendments?
- **Answer:** Yes – the amendments set out the minimum. Your additional steps must be consistent, and not conflict with the amendments.

FAQ

Question: How can a school determine whether sexual harassment “effectively denies a person’s right to equal access to its education program or activity” under the “unwelcome conduct” category in the definition of sexual harassment in the 2020 amendments?

Answer: “[W]hether a reasonable person in the complainant’s position would be effectively denied equal access to education compared to a similarly situated person who is not suffering the alleged sexual harassment.”

An effective denial of equal access to educational opportunities may include skipping class to avoid a harasser, a decline in a student’s grade point average, or having difficulty concentrating in class.

Examples of specific situations that likely constitute effective denial of equal access to educational opportunities also include “a third grader who starts bed-wetting or crying at night due to sexual harassment, or a high school wrestler who quits the team but carries on with other school activities following sexual harassment.”

A complainant does not need to have “already suffered loss of education before being able to report sexual harassment.”

While these examples help illustrate an effective denial of access, “[n]o concrete injury is required” to prove an effective denial of equal access. “School officials turning away a complainant by deciding the complainant was ‘not traumatized enough’ would be impermissible.”

FAQ

- **Question:** How do the 2020 amendments apply to alleged sexual harassment that takes place electronically or on an online platform used by the school?
- **Answer:** In discussing Title IX and online platforms used by a school, the preamble provides this guidance to schools:
- The operations of a school “may certainly include computer and internet networks, digital platforms, and computer hardware or software owned or operated by, or used in the operations of, the [school].”
- “[T]he factual circumstances of online harassment must be analyzed to determine if it occurred in an education program or activity.” The preamble adds that the definition of “education program or activity” in the 2020 amendments “does not create a distinction between sexual harassment occurring in person versus online.”

FAQ

- **Question:** How do the 2020 amendments apply to alleged sexual harassment that is perpetrated by a student using a personal electronic device during class?
- **Answer:** The preamble explains that “a student using a personal device to perpetrate online sexual harassment during class time may constitute a circumstance over which the [school] exercises substantial control.” As with in-person harassment, “the factual circumstances of online harassment must be analyzed to determine if it occurred” in circumstances “over which a school exercised substantial control over the respondent and the context.”

FAQ

- **Question:** Is a school required to respond if it has notice of alleged misconduct that could meet the definition of sexual harassment but it is not certain whether the harassment occurred?
- **Answer:** Yes – the school must respond so long as it could constitute sexual harassment.

FAQ

Question: Is a school required to accept a formal complaint of a sexual harassment from a complainant who is not currently enrolled in or attending the school?

Answer: Yes, but only if the complainant is attempting to participate in the school's education program or activity.