New Title IX Regulations: Comprehensive Training for Title IX Coordinators, Administrators, and Relevant Personnel

August 5, 2020

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Title IX

No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance.

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Overview of Title IX

- The new Title IX regulations were finalized on May 6, 2020.
- The regulations go into effect on August 14, 2020.
- The regulations imposed an extremely prescriptive grievance process and have created a much more detailed and resource-intensive investigative process.
- The single-investigator model is now eliminated. Multiple personnel will need to be involved in the investigative process.
- Districts will need new Title IX Grievance Procedures to meet the requirements.

Retaliation Prohibited

"No [school district] or other person may intimidate, threaten, coerce or discriminate against any individual for the purpose of interfering with any right or privilege secure by Title IX…or because the individual has made a report or complaint, testified, assisted or participated or refused to participate in an manner in an investigation, proceeding or hearing under this part."

- Retaliation may include "charges against an individual for code of conduct violations that do not involve sex 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 harassment…. for the purpose of interfering with any right or privilege secured by Title IX or this part……"

District's Duty to Respond to Sexual Harassment under Title IX

- Now, when must a district respond under Title IX?
  - Whenever the ***district has actual knowledge,*** which means whenever any employee receives notice of sexual harassment or notice of allegations of sexual harassment occurring within an education program or activity of the district in the U.S.
  - (Prior standard - whenever the *district knew or should have known* of an allegation of sexual harassment under Title IX).
- The district's response must be prompt and not deliberately indifferent, which means not clearly unreasonable in light of the known circumstances.

Are Individuals Who Identify as LGBTQ Protected From Sexual Harassment Under Title IX?

- *Yes.*
- *The Department declines to take commenters' suggestions to include a definition of the word "sex" in these final regulations because defining sex is not necessary to effectuate these final regulations and has consequences that extend outside the scope of this rulemaking. These final regulations primarily address a form of sex discrimination – sexual harassment – that does not depend on whether the definition of "sex" involves solely the person's biological characteristics (as at least one commenter urged) or whether a person's "sex" is defined to include a person's gender identity (as other commenters urged).* ***Anyone may experience sexual harassment, irrespective of gender identity or sexual orientation.***

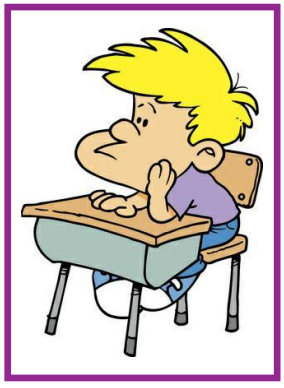
New Definition of Sexual Harassment

(1) Any instance of quid pro quo harassment by a employee; or

(2) Unwelcome conduct on the basis of sex, including unwelcome conduct based on sex stereotyping or on the basis of traditional notions of masculinity and femininity, that is sufficiently severe and pervasive and objectively offensive conduct, effectively denying a person equal educational access; or

(3) Any instance of sexual assault, dating violence, domestic violence, or stalking as defined by the Clery Act and the Violence Against Women Act.

TITLE IX



Students and Employees Protected

All three types of sexual harassment apply to both student victims and employee victims.

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Quid pro quo Sexual Harassment

An employee of a recipient conditioning the provision of an aid, benefit, or service … on an individual's participation in unwelcome sexual conduct.

Severe, pervasive, and objectively unreasonable

Unwelcome conduct, on the basis of sex, 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

This is a significant narrowing from prior definition of "sufficiently severe or persistent or pervasive…"

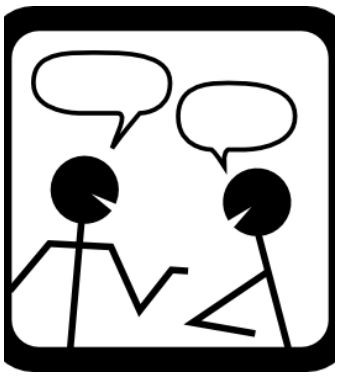
First Amendment Rights in the Educational Environment

A stated Department rationale for the narrowing of this part of the sexual harassment definition was to avoid infringement on First Amendment rights in the educational environment, where:

- Younger students are still learning appropriate social behavior; and
- Older students should be freely engaging in robust exchanges of ideas.

First Amendment Rights in the Educational Environment

Now, speech and expressive conduct must meet a higher threshold than under the prior regulations to qualify as "sexual harassment under Title IX."



The Department believes that the tension between student and faculty freedom of speech, and regulation of speech to prohibit sexual harassment, is best addressed through rules that prohibit harassing and assaultive physical conduct, while ensuring that harassment in the form of speech and expression is evaluated for severity, pervasiveness, objective offensiveness, and denial of equal access to education.

Clery Act
&
Violence Against Women Act (VAWA) Offenses

- Sexual Assault
- Dating Violence
- Domestic Violence
- Stalking

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Sexual Assault, Dating Violence, Domestic Violence, or Stalking

Sexual Assault:

- Rape: The penetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person, without the consent of the victim.
- Fondling: The touching of the private body parts of another person for the purpose of sexual gratification, without the consent of the victim, including instances where the victim is incapable of giving consent because of his/her age or because of his/her temporary or permanent mental incapacity. In Massachusetts, pursuant to M.G.L. c. 265, § 13B, a child under the age of 14 is incapable of giving consent to indecent touching.
- Incest: Sexual intercourse between persons who are related to each other within the degrees wherein marriage is prohibited by law.
- Statutory Rape: Sexual intercourse with a person who is under the statutory age of consent. In Massachusetts, pursuant to M.G.L. c. 265, § 23, the statutory age of consent is 16 years of age.

Sexual Assault, **Dating Violence**, Domestic Violence, or Stalking

Dating Violence:

Violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the victim. The existence of such a relationship shall be determined based on the reporting party's statement and with consideration of the length of the relationship, the type of relationship, and the frequency of interaction between the persons involved in the relationship. For the purposes of this definition, dating violence includes, but is not limited to, sexual or physical abuse or the threat of such abuse. Dating violence does not include acts covered under the definition of domestic violence.

Sexual Assault, Dating Violence, **Domestic Violence**, or Stalking

Domestic Violence:

A felony or misdemeanor crime of violence committed by a current or former spouse or intimate partner of the victim; by a person with whom the victim shares a child in common; by a person who is cohabitating with, or has cohabitated with, the victim as a spouse or intimate partner; by a person similarly situated to a spouse of the victim under the domestic or family violence laws of the jurisdiction in which the crime of violence occurred; by any other person against an adult or youth victim who is protected from that person's acts under the domestic or family violence laws of the jurisdiction in which the crime of violence occurred.

Sexual Assault, Dating Violence, Domestic Violence, or **Stalking**

Stalking:

Engaging in a *course of conduct* directed at a specific person that would cause a *reasonable person* to fear for the person's safety or the safety of others or suffer *substantial emotional distress*.

Course of conduct: two or more acts, including, but not limited to, acts in which the stalker directly, indirectly, or through third parties, by any action, method, device, or means, follows, monitors, observes, surveils, threatens, or communicates to or about a person, or interferes with a person's property.

Reasonable person: a reasonable person under similar circumstances and with similar identities to the victim.

Substantial emotional distress: significant mental suffering or anguish that may, but does not necessarily, require medical or other professional treatment or counseling.

Evaluating Sexual Harassment: Recap

Quid pro quo

Sexual assault, dating violence, domestic violence, or stalking

Are always *per se* sexual harassment

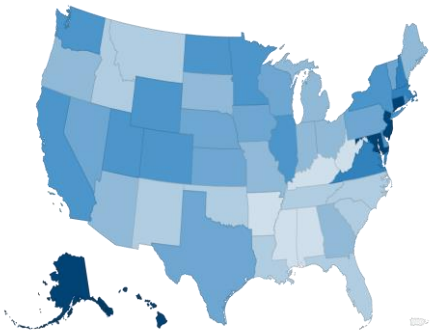
Evaluating Sexual Harassment: Recap

Always requires a determination of:
Severity;
Pervasiveness;
Objective offensiveness; and
Denial of alleged victim's equal access to education.

Jurisdiction of Title IX Sexual Harassment Regulations

- What locations are covered?
  - Any education program or activity of the district in the U.S.

Education program or activity: locations, events, or circumstances over which the district exercised substantial control over both the respondent and the context in which the sexual harassment occurred.



What does this mean for school trips abroad?

Title IX covers persons in the U.S. only: conduct that occurs in a school trip abroad does not fall within the jurisdiction of "any education program or activity of the District in the U.S." so it does not fall within Title IX.

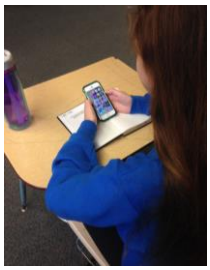
This conduct should instead be addressed by a school code of conduct, and any grievance process covering other definitions of sexual harassment.

(See upcoming slide on MA state law definition and Title VII definition)

What does this mean for other off-campus conduct (conduct within the U.S.)?

- Did the off-campus conduct take place at a location, event, or circumstance over which the district exercised substantial control over both the respondent and the context in which the sexual harassment occurred?

School Field Trip vs. Private Weekend House Party



What does this mean for electronic communications/social media?

Was this a location, event or circumstance over which the district exercised substantial control over both the respondent and the context in which the sexual harassment occurred?

School computer

vs.

Cell phone use at school

vs.

Cell phone use at home

What about sexual harassment that does not meet the Title IX definition?

The district continues to have an obligation to respond to sexual harassment of students and employees that does not meet the Title IX definition of sexual harassment but would meet the definition under Massachusetts state law and/or Title VII.

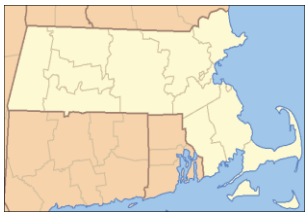
The specific due process provisions required for handling Title IX sexual harassment formal complaints are not required for handling sexual harassment complaints that fall outside the scope of Title IX. For these complaints, district should follow its civil rights grievance procedures providing for a prompt and equitable investigation to comply with state law and Title VII.

Sexual Harassment under State Law

Any sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when:

(1) Quid pro quo: submission to or rejection of such advances, requests or conduct is made either explicitly or implicitly a term or condition of the provision of the benefits, privileges or placement services or as a basis for the evaluation of academic achievement or employment; or

(2) Hostile Environment: such advances, requests or conduct have the purpose or effect of unreasonably interfering with an individual's education or employment by creating an intimidating, hostile, humiliating or sexually offensive educational environment.



See M.G.L. c. 151B (employment) and M.G.L. c. 151C (education)

Sexual Harassment under Title VII (employees)

Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when:

(1) Submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment;

(2) Submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual; or

(3) Such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, <u>or</u> offensive working environment.

The Title IX Team

- Title IX Coordinator
- Investigator(s)
- Decision-Maker
- Appeals Officer
- Informal Resolution Facilitator(s)

Training

To ensure a consistent, transparent and fair grievance process for both parties all Title IX Personnel must receive training on the following topics:

- How to conduct the Grievance Process
- Relevance as it pertains to evidence and questions
- Impartiality
- Technology to be used in cases of live hearings (K-12 not required)

All training material must not rely on sex stereotypes and must be posted on the district's website. Must maintain for 7 years.

The Role of the Title IX Team

- No more single-investigator model. Team-based approach.
- All members of the Title IX Team need training on the definition of sexual harassment, the scope of the education program or activity, how to conduct an investigation and the grievance procedure including hearings, appeals and informal resolution.
- Impartiality

Title IX Team has no side other than the integrity of the process!

Title IX Coordinator

- Must assign a district level Title IX Coordinator, can also have more than one Title IX Coordinator.

  District can assign Deputy Title IX Coordinators (i.e. Athletics, Human Resources)
- Leads and coordinates compliance efforts for Title IX of the entire district.
- **Must** know the district's Title IX policy and grievance procedure.
- Should report to the Superintendent.
- Must have autonomy and independence.
- **Cannot** be the Decision-Maker or Appeals Officer.
- **Can** serve as the Investigator.

Investigator(s)

- Can be the Title IX Coordinator; in practice could be an Assistant Principal or Principal.
- Must receive training on "issues of relevance to create an Investigative Report that fairly summarizes relevant evidence…"
- Must maintain a presumption that the respondent is not responsible.
- Any formal complaint about an employee who holds a supervisory position shall be investigated by a person who is not subject to that supervisor's authority.

Investigator(s)

Responsible for completing an impartial investigation by seeking and gathering evidence relative to the investigation.

- Interview parties and witnesses.
- Identify, organize and compile relevant information.
- Maintain investigation records and notes.
- Write an Investigative Report that fairly summarizes the relevant evidence.

Decision-Maker(s)

- **Cannot** be the Title IX Coordinator or Investigator; could be the building Principal.
- Reviews Investigative Report and evidence, reviews responses to questions by each party.
- Must make the determination of responsibility or non-responsibility.

Appeal Decision-Maker / Appeal Officer

- **Cannot** be the Title IX Coordinator, the Decision-Maker or Investigator, may be the Superintendent.
- Must determine if the appeal can move forward based on specific criteria.
- Reviews investigation report and other evidence that was gathered, along with statements by all parties.
- Completes a written determination describing the outcome of the appeal and the rationale.

Informal Resolution Facilitator

- Facilitates the **voluntary** process for informal resolution.
- **Cannot** be Investigator or Decision-Maker, could be Title IX Coordinator if not the Investigator.
- Must receive training on:
  - The definition of sexual harassment;
  - The scope of the recipient's education program or activity;
  - How to conduct informal resolution processes; and
  - How to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, or bias.

FERPA and Title IX

A district must provide both parties an equal opportunity to inspect and review any evidence obtained as part of the investigation that is directly related to the allegations raised in a formal complaint.

- FERPA and its implementing regulations define the term "education records" as meaning, with certain exceptions, records that are directly related to a student and maintained by an educational agency or institution, or by a party acting for the agency or institution.
- Parents/Student may "inspect and review" the educational records of their child.

FERPA and Title IX

- If educational record contains information about other students, parents should only view the information about their child, unless the information cannot be segregated or redacted.
  - District may seek consent of the parent/student to disclose the information, but it is not required.

- Evidence obtained through the investigation that is **directly related** to the allegation(s) in the complaint that cannot be redacted or segregated becomes a part of the student record for both the complainant and respondent.

FERPA cannot be construed to conflict with or prevent compliance with Title IX.

The Grievance Process

The Grievance Process: General Standards

Standard of Proof

Districts can choose between two standards of proof to use for their Title IX sexual harassment grievance procedures. The same standard of proof must be used for all formal sexual harassment complaints (i.e. whether respondent is an employee or student).

1) Clear and convincing evidence – highly and substantially more likely to be true than untrue. Decision-Maker must be convinced that the contention is highly probable; or

2) Preponderance of the evidence – "more probable than not"; also referred to as "50% plus a feather."

- ❑ Check your collective bargaining agreements for a specific standard of proof for complaints involving employees and whether that would conflict with your Title IX grievance procedure.
- ❑ The preponderance of the evidence standard has generally been used in prior practice in school-related determinations in Massachusetts.

The Grievance Process: General Standards

Burden of Proof

- ❑ The burden of proof is on the District, not the complainant or respondent.
- ❑ District has the burden to gather sufficient evidence to reach a determination regarding responsibility.
- ❑ District must provide both parties equal opportunity to gather and present witnesses or other evidence, but cannot place the burden or obligation on the parties to do so.

The Grievance Process: General Standards

Presumption that the Respondent is Not Responsible

All grievance procedures must include a statement that the respondent is deemed to be not responsible until the conclusion of the grievance process.

- ❑ Remember – innocent until proven guilty!

Timing

- ❑ Include "reasonably prompt" timeframes for: filing and resolving appeals, informal resolution processes, temporary delay or limited extension of time frames for good cause, and conclusion of the grievance process.
- ❑ "Good cause" for a temporary delay: e.g., absence of a party, party's advisor, or witness; concurrent law enforcement activity; need for language assistance or accommodation of disabilities, etc.

The Grievance Process: General Standards

Written Notice Required:

- ❑ Whenever a party is expected to participate in an interview, meeting or hearing.
- ❑ Include date, time, location, and the nature of the event (i.e. who is attending, what will be discussed, respondent's/complainant's rights at that event).
- ❑ If there is a temporary delay of the grievance process or limited extension of time frames for good cause.
- ❑ Explain the delay and the reasons for it in writing!

Report of Conduct: Methods of Reporting

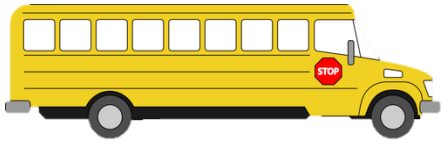
- Can be written or verbal, formal or informal. No specific forms are required for a District to be on notice of an allegation of sexual harassment.
  (Written formal complaint triggers mandatory grievance process)
- Can be made at any time, including non-business hours, to the contact information for the Title IX Coordinator posted on the District's website.
- Does not have to be from the alleged victim. Parents/guardians of elementary and secondary school students can file a complaint on their child's behalf. A friend/peer of the complainant could file a report.

Report of Conduct: Methods of Reporting

Any district employee who observes sexual harassment of a student or receives notice of an allegation of sexual harassment **must report** the incident to the Principal or Title IX Coordinator.

Includes: teachers, support staff, administrators, cafeteria workers, bus drivers, custodial staff, etc.

That employee should intervene to stop the conduct and report it to the Principal and Title IX Coordinator.



Report of Conduct: Actual Knowledge/Notice

A district with actual knowledge of sexual harassment in an education program or activity of the district in the United States must respond promptly in a manner that is not deliberately indifferent.

- District is deemed to have actual knowledge of sexual harassment when ANY district employee:
  - witnesses sexual harassment; OR
  - hears about sexual harassment from a complainant or third party; OR
  - receives a written or verbal complaint about sexual harassment allegations by any means (email, mail, phone call, etc.).
- Deliberate indifference: If a district's response to a report of sexual harassment is clearly unreasonable in light of the known circumstances.

Anonymous Reports

- An anonymous report can suffice to put the district on notice of an allegation of sexual harassment.
- The district's obligation is to respond to an anonymous report in a manner that is not clearly unreasonable in light of the known circumstances.
- A Formal Complaint may not be filed anonymously.

Anonymous Reports and Confidentiality

- If the anonymous reporter is the complainant and they request confidentiality, the district can and should offer supportive measures to the extent consistent with maintaining the request for confidentiality.
- If an anonymous report is received without a disclosure of the complainant's identity, the district will be unable to provide the complainant supportive measures in response to that report.
- The district may, under state law, be required to report sexual harassment identified in an anonymous report to state and/or local authorities such as the Massachusetts Department of Children and Families and/or take actions to protect the safety of the school community (contacting the police, for example) that may result in the identity of the reporting person being disclosed.

Report of Conduct: Next Steps

Once a district has actual knowledge of an allegation of sexual harassment, the Title IX Coordinator **MUST**:

Promptly and confidentially contact the complainant (or alleged victim of sexual harassment).

- Discuss the availability of supportive measures;
- Consider the complainant's wishes in respect to supportive measures;
- Inform the complainant of the availability of supportive measures with or without filing a formal complaint;
- Explain to the complainant the process for filing a formal complaint; and
- If the district does not provide the complainant with supportive measures, the Title IX Coordinator or their designee must document the reasons why such a response was reasonable.

Supportive Measures

- Must be discussed and considered for all complaints, whether formal or informal. May be provided whether the complaint is formal or informal.
- Title IX Coordinator is responsible for coordinating the effective implementation of supportive measures.
- Districts may continue supportive measures after a determination of non-responsibility.
- Non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, and without fee or charge to the complainant or respondent before or after the filing of a formal complaint or where no formal complaint has been filed.
  - If an action is listed as a disciplinary procedure which may be applied if a respondent is deemed responsible, it cannot be employed as a supportive measure.
  - Does not preclude District from implementing emergency removal under Title IX.

Supportive Measures

- Designed to restore or preserve equal access to the District's education program or activity without unreasonably burdening the other party, including measures designed to protect the safety of all parties or the recipient's educational environment, or deter sexual harassment.
  - "Unreasonable burden" on a complainant or respondent is fact-specific.
  - In commentary to regulations, U.S. D.O.E. notes that schedule changes are often reasonable, but whether limiting participation in sports or extra-curriculars is unreasonable could be more fact-specific.
- District must maintain confidentiality of any supportive measures provided to the complainant or respondent, to the extent that the confidentiality would not impair the ability of the District to provide supportive measures.

Supportive Measures: Examples

- ❑ Counseling
- ❑ Extensions of deadlines or other course-related adjustments
- ❑ Modifications of work or class schedules
- ❑ Campus escort services
- ❑ Mutual restrictions on contact between the parties
- ❑ Changes in work or housing locations
- ❑ Leaves of absence
- ❑ Increased security and monitoring of certain areas of the campus
- ❑ Other similar measures

This is a non-exhaustive list and does not preclude Districts from implementing other measures that do not place unreasonable burdens on either party and are not disciplinary or punitive in nature. Carefully crafted supportive measures must be created after a fact-specific inquiry.

Formal Complaint Process

Formal Complaint Process: Step 1 Filing the Formal Complaint

What is a Formal Complaint?

- A document (paper or electronic) filed by a complainant or signed by the Title IX Coordinator alleging sexual harassment by a respondent and requesting that the district investigate the allegation of sexual harassment.
- Must state (if known to the reporter or alleged victim) the name(s) of the persons involved, witnesses to the conduct, if any, a description of the conduct, and to the extent possible, the dates and locations of the conduct. A formal complaint may not be dismissed solely because it was not completely filled out or it was filled out incorrectly.

Formal Complaint Process: Step 1 Filing the Formal Complaint

- A formal complaint may be filed at any time, including during non-business hours. Complaints submitted outside of normal business hours should be deemed received on the following school working day.
- A formal complaint may be filed with the Title IX Coordinator in person, by mail, or by electronic mail, by using the contact information for the Title IX Coordinator provided by the district, and by any additional method designated by the district.
- At the time of the filing of the formal complaint, the alleged victim must be participating in or attempting to participate in the education program or activity of the district with which the formal complaint is filed.

Formal Complaint Process: Step 1 Filing the Formal Complaint

Districts may consolidate formal complaints where the allegations arise out of the same facts or circumstances.

- ❑ Title IX Coordinator receives two complaints from students/parents about respondents Student A and Student B regarding allegations of sexual harassment by both Student A and Student B that occurred at the same time in the bathroom during Senior Prom. → Consolidate!
- ❑ Student C makes a complaint of allegations of sexual harassment by respondent Student D. Student D also files a complaint of sexual harassment, by respondent Student C. → Consolidate!

Formal Complaint Process: Step 1 Filing the Formal Complaint

Parental Authority – A parent/legal guardian who retains legal rights over a student may file a formal complaint on their child's behalf.

Reports filed by a Third Party – not formal complaint

While reports filed by a third party trigger the district's obligation to respond, a formal complaint may only be signed by the complainant (or his/her parent/guardian) or the Title IX Coordinator.

Anonymous Reports – not formal complaint

Example: Sexualized comments or graffiti on bathroom stalls.

District cannot be deliberately indifferent. If district employee sees it and it fits the definition of sexual harassment, district is on notice. District should remove the graffiti, communicate to students that the graffiti is unacceptable.

Formal Complaint Process: Step 1 Filing the Formal Complaint

- Title IX Coordinator may sign a complaint to initiate an investigation.
- The complainant's wishes with respect to whether the district investigates will generally be respected unless the Title IX Coordinator determines that signing a formal complaint to initiate an investigation over the wishes of the complainant is not clearly unreasonable in light of the known circumstances.

Consider:

- Concerns articulated by the parties, the best interests of the community, fairness to all concerned, and the district's legal obligations under applicable state and federal laws.

- Remember – the Title IX Coordinator is not a complainant or a party during the grievance process and must be free from conflicts or bias.

Formal Complaint Process: Step 2 Initial Assessment

- Does the formal complaint allege sexual harassment by a respondent and request that the District investigate the allegation of sexual harassment?
- Filed by the correct party? (Complainant or their parent/legal guardian?)
- Supportive Measures – discuss with complainant, determine what measures are necessary. Implement supportive measures prior to beginning investigation process, or state in writing why supportive measures are not being implemented.
- Is the complainant currently participating in, or attempting to participate in the District's education program or activity?
- Consider mandatory/discretionary dismissal of the complaint.

Formal Complaint Process: Step 3 Consideration of Dismissal

Mandatory dismissal – Title IX Coordinator MUST dismiss the formal complaint if:

- ❑ Even if true, the alleged conduct would not constitute sexual harassment as defined by Title IX; or
- ❑ The alleged conduct did not occur in the district's education program or activity; or
- ❑ The alleged conduct did not occur within the United States.

Even if a complaint is dismissed under this section, a district may still take action under its code of conduct or applicable statutes (i.e. bullying law, M.G.L. c. 151B and 151C, Title VII).

Formal Complaint Process: Step 3 Consideration of Dismissal

Discretionary dismissal – Title IX Coordinator MAY dismiss the formal complaint if at any time during the investigation or hearing:

- ❑ Complainant notifies the Title IX Coordinator in writing that he/she would like to withdraw the formal complaint or any allegations in it;
- ❑ Respondent is no longer enrolled or employed by the district;
- ❑ Specific circumstances prevent the district from gathering evidence sufficient to reach a determination as to the formal complaint or the allegations.

Upon any dismissal (mandatory or discretionary), district must send written notice of the dismissal and the reasons for it to both parties simultaneously.

Formal Complaint Process: Step 4 Written Notice of Allegations

Upon receipt of a formal signed complaint, District must send written notice of the allegations, to both the complainant and respondent that includes:

1) A statement prohibiting knowingly submitting false information;

2) Sufficient details known at the time to allow the respondent the opportunity to respond, which includes the identities of the parties, the conduct allegedly constituting sexual harassment, and the date and location of the alleged incident, if known;

3) A statement that the respondent is presumed not responsible;

4) A statement that a determination regarding responsibility is made at the conclusion of the grievance process;

5) A statement that the parties may have an advisor of their choice who may be, but is not required to be, an attorney; and

6) A statement that the parties/advisors may inspect and review the evidence.

Formal Complaint Process: Step 5 Initial Investigation

Formal complaint to be investigated by Title IX Coordinator or other individual designed to serve as Investigator by the Title IX Coordinator (e.g., Assistant Principal).

Responsibilities of Investigator:

- To gather evidence;
- To provide an equal opportunity for the parties to present fact and expert witnesses and other inculpatory and exculpatory evidence, and to inspect and review any evidence obtained that is directly related to the allegations;
- To ensure the ability of the parties to discuss the allegations or gather and present relevant evidence (i.e., no “gag” orders);
- To send prior written notice to the parties of <u>any</u> investigative interviews, meetings, or hearings in which their participation is invited or expected.

Formal Complaint Process: Step 5 Initial Investigation

Throughout the formal complaint investigation process:

- Each party may have one (1) advisor of their own selection and *at their own expense* participate in the grievance process (districts do not need to provide).
- In the case of a minor child, the advisor may be in addition to the parents.

Formal Complaint Process: Step 5 Initial Investigation

Question: During the formal complaint investigation process, what constitutes consent?

- Definition of Consent to be Applied: "The Department believes the definition of what constitutes consent ... within a recipient's education community is a matter best left to the discretion of recipients, many of whom are under State law requirements to apply particular definitions of consent."
- Massachusetts definition of lack of consent: compelling a person to do an act by force or by threat of bodily injury and against the complainant's will.
- Note: In Massachusetts, a child under the age of 14 is incapable of giving consent to "indecent touching" and a child under the age of 16 is incapable of giving consent to sexual intercourse. M.G.L. c. 265, §13B and §23.

Formal Complaint Process: Step 6 Opportunity to Respond to Evidence

Districts must send the parties (and advisors) evidence "directly related" to the allegation, in electronic format or hard copy.

- "Directly related" is broader than "relevant": Department believes that it is most beneficial for the parties to have access to all "directly related" evidence.
- After parties have reviewed the evidence, the Investigator will then determine what evidence is "relevant."

The Parties then shall be afforded at least ten (10) calendar days to inspect, review, and respond to the evidence.

Formal Complaint Process: Step 6 Opportunity to Respond to Evidence

Further Privacy Concerns:

- The district shall not require, allow, rely upon, or otherwise use evidence that is protected by a legally recognized privilege, unless waived by the holder of the privilege.
- Prior to providing evidence to the parties, the Investigator may redact confidential information that is not directly related to the allegations or that is otherwise barred from use under Title IX or by privilege (e.g., treatment records), FERPA, and/or Massachusetts regulations regarding privacy of student records.
- The parties and their advisors shall be prohibited from dissemination of any of the evidence for any purpose not directly related to the grievance procedure.

Legally Recognized Privilege

- A District cannot access, consider, disclose, or use a party's medical or counseling records that are maintained in connection with provision of treatment to the party, unless the District obtains voluntary, written consent to do so for the grievance process.

- District cannot access information that would be considered attorney-client privilege without consent.

Legally Recognized Privilege

- If the complainant or respondent is under 18, then the District would need to obtain consent from the parent/guardian to waive any of the privileges.

- If consent is received, the District is only obligated to share that information contained in these records that is **directly related to the allegations** raised in the formal complaint.

- District will need to review the evidence provided and ensure that it is directly related to the allegation in the complaint, before sharing with the other party.

Confidentiality

Important Practice Tips:

- The Investigator will need to review **ALL** the evidence provided and ensure that it is "**directly related**" to the allegation in the complaint, before sharing with the other party.
- District may require both parties to sign non-disclosure agreements.
- District may not allow parties to copy sensitive information (i.e. nude picture).
- The district may redact parts of evidence that are not "**directly related**" to the allegation in the formal complaint.
- If the district decides not to share evidence, then they need to be able to justify why they did not.

Confidentiality: "Rape Shield" Protections

Mirrors the spirit, if not the actual language, of state laws that are designed to protect alleged victims of sexual assault in criminal trials from being exposed at trial to harassing or irrelevant questions concerning their past sexual behavior.

In Massachusetts, M.G.L. c. 233, § 21B:

- "Evidence of the reputation of a victim's sexual conduct shall not be admissible in an investigation or proceeding before a grand jury or a court of the Commonwealth."
- "Evidence of specific instances of a victim's sexual conduct … shall not be admissible except evidence of the victim's sexual conduct with the defendant, or evidence of recent conduct of the victim alleged to be the cause of any physical feature, characteristic, or condition of the victim."

Rape Shield Protections In Practice During Title IX Grievance Procedures

Questions and evidence offered by the respondent regarding the complainant's general sexual predisposition are not relevant and should not be considered.

A complainant's prior sexual behavior is also not relevant and should not be considered except for the two limited exceptions that are specific to the actual offensive conduct alleged:

- If it is offered to prove someone else committed the conduct;
- If it is offered to prove the complainant consented to the conduct under investigation.

Note: questions and evidence about a *respondent's* sexual predisposition or prior sexual behavior are not subject to any special consideration but rather must be judged like any other question or evidence as relevant or irrelevant to the allegations at issue.

Rape Shield Protections In Practice During Title IX Grievance Procedures

Relevance is the key: "the Department believes that well-trained Decision-Makers are fully capable of determining relevance of questions and evidence, including the special consideration given to a complainant's sexual history."

Test for Relevance, Massachusetts Guide to Evidence Section 401:

a) It has a tendency to make a fact more or less probable than it would be without the evidence; and
b) The fact is of consequence in determining the action.

The Department expects Decision-Makers to apply a relevance rule and consider prior sexual behavior irrelevant other than the two "concrete" exceptions.

Note: While something may be relevant (and thus admissible to be considered), the Decision-Maker still possesses discretion to assign whatever weight and credibility he or she chooses to the evidence.

Formal Complaint Process: Step 7 Completion of Investigative Report

- The district must send the parties and their advisors in electronic or hard copy an Investigative Report in which the Investigator fairly summarizes relevant evidence but does not reach any conclusions regarding responsibility.

- A copy of the Investigative Report shall also be sent to the Decision-Maker.

- While there is no specific timeline mandated by the regulations, it is recommended that the Investigative Report be completed and sent within twenty-five (25) school days of receipt of the formal complaint.

Note: After completion of Investigative Report, there is a personnel shift – the Decision-Maker takes over.

Formal Complaint Process: Step 8 Parties' Opportunity to Respond to Investigative Report

- District shall provide each party an opportunity to respond to the Investigative Report.
- The Investigative Report will notify the parties of the opportunity to submit to the Decision-Maker directed questions of the other party and/or any witness.
- The Decision-Maker cannot be the Investigator or the Title IX Coordinator (Recommended: Principal or Principal's designee).

Formal Complaint Process: Step 9 Directed Questions From Parties

After Investigative Report has been sent to the parties the Decision-Maker shall:

- ❑ Afford both complainant and respondent the opportunity to submit to the Decision-Maker written, relevant questions of the other party or any witness;
- ❑ Provide the party with the other party's and/or witness's written responses to the questions; and
- ❑ Allow for additional, limited follow-up questions from each party in writing.

Formal Complaint Process: Step 9 Directed Questions From Parties

Restrictions on Directed Questions:

- ❑ All questions must be posed in a respectful manner.
- ❑ Only relevant questions will be permitted (Decision-Maker must provide reason(s) for excluding any questions as not relevant).
- ❑ Questions regarding the complainant's sexual predisposition are not relevant.
- ❑ Questions about the complainant's prior sexual behavior are also not relevant unless such questions are offered to prove someone other than the respondent committed the conduct alleged, or if the questions concern specific incidents of the complainant's prior sexual behavior with respect to the respondent and are offered to prove consent.

After receipt of answers by the parties, the Decision-Maker must allow additional, but limited, follow-up questions from each party.

Formal Complaint Process: Step 9 Live Hearing Option

- Elementary and secondary schools' grievance processes may, but need not, provide for a live hearing option.
- If a district chooses to hold a live hearing, unlike the prescriptive live-hearing requirement for colleges and universities, the Department has left significant discretion as to how to conduct such a live hearing and "desires to leave elementary and secondary schools as much flexibility as possible to apply procedures that fit the needs of the recipient's educational environment."
- The only requirement by the Department regarding live hearings conducted at the elementary and secondary school level is that any rules adopted by a district for use in a Title IX live hearing must apply equally to both parties.
- Generally, we do not recommend a live hearing process for the K-12 setting.

Formal Complaint Process: Step 9 Directed Questions From Parties

Question: What if a party does not answer directed questions from the other party?

- Regulations are silent on this possibility.
- Regarding Title IX live hearings at the college and university level, the Decision-Maker "cannot draw any inference about the determination regarding responsibility based solely on a party's or witness's absence from the hearing or refusal to answer cross-examination questions."
- The Department's comments to the regulations state the grievance process should not infringe upon a party's Fifth Amendment right to remain silent and provide that everyone has a right to participate or not participate in the grievance process, and the regulations themselves prohibit retaliation against any person exercising rights under Title IX, which includes the refusal to participate in the grievance process.

It would follow that an inference regarding responsibility should not be made by the Decision-Maker if a party does not respond to directed questions from the other party.

Determination of Responsibility

Determination of Responsibility

- Based on the objective evaluation of all relevant evidence the Decision-Maker must determine whether the respondent is responsible or not responsible for the sexual harassment alleged in the formal complaint.
- Apply the standard in the Title IX Grievance Procedure (i.e., preponderance of the evidence or clear and convincing evidence).
- Decision-Maker **must** be free from bias and prejudgment of the facts.
- The determination of responsibility has to be **factually reliable**.
- Not all evidence may be directly relevant to the determination of responsibility.

Objective Evaluation of the Evidence

- The Decision-Maker must maintain a presumption of non-responsibility until the conclusion of the grievance process.
- The Decision-Maker cannot make credibility determinations based on the status of the individual as either the complainant or the respondent - invites bias and partiality.
- The Decision-Maker must evaluate both inculpatory and exculpatory evidence.
- Any rules or process of evaluating evidence by the Decision-Maker must apply equally to both parties.
  - Example: the district may adopt a rule or standard for evaluating the weight or credibility of prior bad acts, but this standard needs to be applied to both the complainant and respondent.

Relevance/Materiality

- The standard of relevance needs to be applied in the same manner for complainants and respondents.
- Decision-Maker determines whether questions submitted by the parties are considered relevant, must be able to provide rationale if not allowed.
- Specifically, when questions are about a Complainant's prior sexual history they are deemed "not relevant." (see exceptions in Rape Shield).
- Decision-Makers may determine that certain questions are irrelevant if they are considered "badgering" or asking the same question over and over. The same standard needs to be applied to complainant and respondent.

Impartiality

- A conflict of interest can create a bias for or against a party.
- Types of conflict and impartiality to consider:
  - Playing too many roles in the process.
  - Decision-Makers who are not impartial.
  - Training materials are biased.
- All Title IX Team members must avoid prejudgment of the facts at issue.
- Consider having objective criteria to make the determination whether a Title IX Team Member is biased.

Title IX Team has no side other than the integrity of the process!

Written Determination Regarding Responsibility

Written Determination must be sent to both parties simultaneously.

Written Determination may not be completed by Title IX Coordinator or Investigator.

Written Determination Regarding Responsibility

Mandatory Components of Written Determination:

- ❑ Procedural steps taken;
- ❑ Findings of fact, which must be based on an objective review of all relevant evidence, inculpatory and exculpatory, and avoid credibility determinations based on a person's status as a complainant, respondent, or witness;
- ❑ Conclusions about whether the alleged conduct occurred, and rationale for the result as to each allegation;
- ❑ Disciplinary sanctions to which the respondent may be subject;
- ❑ Whether remedies will be provided to the complainant;
- ❑ Procedures and bases for appeal.

Remedies

If the Decision-Maker determines that sexual harassment has occurred, the district administration shall take steps to eliminate the harassing environment, which may include, but not be limited to, providing **remedies** to a complainant that are designed to restore or preserve the complainant's equal access to the district's education programs and/or activities.

Remedies may be the same individualized services as "supportive measures" and/or may include alternative interventions and/or punitive or disciplinary sanctions that burden the respondent.

Whether remedies will be provided must be included in the Written Determination, but the details of what those remedies are should not be included and should remain confidential (except as needed for implementation).

Examples of Remedies

- Discipline;
- Counseling;
- Extensions of deadlines or other course-related adjustments;
- Modifications of work or class schedules;
- Campus escort services;
- Mutual restrictions on contact between the parties;
- Changes in work locations;
- Leaves of absence; and
- Increased security and monitoring of certain areas of the building and/or campus.

Appeals

Either the complainant or respondent may appeal from a determination regarding responsibility and/or from the district's dismissal of a Formal Complaint or any allegations therein, only on the following bases:

- Procedural irregularity that affected the outcome of the matter;
- Newly discovered evidence that could affect the outcome of the matter; and/or
- Title IX personnel had a conflict of interest or bias that affected the outcome of the matter.

Appeals

- Appeal process and bases for appeal must be included in Title IX Grievance Procedure and in all written determinations.
- Appeal Officer must be an individual not previously involved (someone other than the Title IX Coordinator, Investigator, and Decision-Maker).
- Recommend establishing a brief timeframe for an appeal, such as five (5) calendar days from the decision being appealed.
- The Title IX Formal Complaint grievance process is deemed complete when either the time period for appeal has lapsed or upon the issuance of the Appeal Officer's decision on a timely filed appeal.

OCR Complaints

- In addition to internal appeal rights, either party may file a complaint with OCR alleging a violation of Title IX.
- OCR's oversight includes identifying and correcting any violations the district may have committed during the Title IX grievance process, but:
  - *The Department will not overturn the outcome of a Title IX grievance process solely based on whether the Department might have weighed the evidence in the case differently from how the recipient's decision-maker weighed the evidence.*

Discipline

Persons who engage in sexual harassment or retaliation may be subject to disciplinary action including:

- ❑ Reprimand
- ❑ Termination
- ❑ Suspension
- ❑ Expulsion
- ❑ Other sanctions as determined by the district administration

Discipline

Students may be subject to discipline for sexual harassment or retaliation under Massachusetts student discipline laws, M.G.L. c. 71, §§ 37H, 37H ½, and 37H ¾.

To be clear, however: under the new Title IX regulations a respondent may not be subject to disciplinary sanctions for the misconduct being investigated under the Title IX grievance procedure until after the process has been completed.

Options for Districts to Consider:

- ❑ Use of Supportive Measures upon a report of sexual harassment.
- ❑ Emergency Removal under the Title IX regulations.

Title IX Emergency Removal
(*Do **not** confuse this with emergency removal under M.G.L. c. 71, § 37H ¾)*

Districts may remove a respondent on an emergency basis at any time provided the school district:

1) Undertakes an "individualized safety and risk analysis";

2) Determines that "an immediate threat to the physical health or safety of any student or other individual arising from the allegations of sexual harassment justifies removal" and that there is no alternative to the respondent's emergency removal to mitigate the threat presented; and

3) Provides the respondent with notice (oral or written) and the opportunity to challenge the decision immediately following the removal.

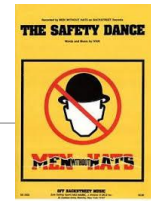
Title IX Emergency Removal

Districts may need to undertake an emergency removal:

- ❑ Where a respondent poses an immediate threat to the physical health or safety of an individual before an investigation into sexual harassment allegations concludes.
- ❑ In order to fulfill the district's Title IX duty not to be "deliberately indifferent" and protect the safety of the district's community.

The emergency removal may be undertaken <u>in addition to</u> implementing supportive measures designed to restore or preserve a complainant's equal access to education.

Title IX Emergency Removal



Question: What is an "Individualized Safety or Risk Analysis?"

Answer: Department declined to articulate specific factors or provide a checklist.

Commentary to the regulations states that the analysis:

- ❑ Does not require a formal evaluation.
- ❑ Must be fact-based.
- ❑ Must be individualized to the particular respondent.
- ❑ Must show immediate threat to physical health or safety of complainant.
- ❑ May consider actions "arising from the allegations of sexual harassment" that may be actions other than the sexual harassment allegations themselves (e.g., threats to the complainant by the respondent made after the respondent was notified of the allegations).

Emergency Removal Don'ts

Districts may not impose an emergency removal:

- ❑ Based upon the likelihood the complainant will prevail on the allegations (i.e., the "strength" of the case).
- ❑ Based upon a generalized, hypothetical, or speculative belief.
- ❑ Based upon general assumptions about sex, or research that purports to profile characteristics of sex offense perpetrators, or statistical data about the frequency or infrequency of false or unfounded sexual misconduct allegations.

Title IX Emergency Removal v. M.G.L. c. 71, §37H ¾ Emergency Removal

37H¾: Principal may unilaterally remove student charged with a school rules disciplinary offense for up to two (2) days when continued presence poses a danger to persons or property, or would substantially and materially disrupt order of school, and there is no alternative available to alleviate the danger/disruption.

37H¾: Written notice and scheduling of disciplinary hearing within 2 school days.

Title IX Emergency Removal:

- "Individual safety and risk analysis" that an immediate threat to the physical health or safety of any student or other individual arising from the allegations of sexual harassment justifies removal.
- No limit to amount of days.
- Respondent has an opportunity to challenge the decision immediately following removal.

Administrative Leave for Employees

The Title IX Emergency Removal regulations do not preclude a district from placing an employee on administrative leave for the duration of the investigation – specifically, the emergency removal standard does not need to be satisfied to implement an administrative leave.

Informal Resolution Process

Regulations contain an "Informal Resolution" alternative process with the following conditions:

- Only available after a formal written complaint has been filed;
- Both parties must be provided written notice of the allegations;
- Both parties must give voluntary, informed, and written consent to attempt an informal resolution;
- Both parties may withdraw from the informal process at any time prior to agreeing to a resolution.

Note: Informal Resolution Process may not be used to resolve allegations that an employee sexually harassed a student.

Mandatory Trainings under Revised Title IX Regulations

Individuals serving in the following roles MUST be trained by August 14, 2020:

- Title IX Coordinators
- Investigators
- Decision-Makers
- Appeal Officers
- Informal Resolution Facilitators

Mandatory Training Topics

- Definition of sexual harassment.
- Scope of the district's education program or activity.
- How to conduct an investigation and implement grievance process.
- How to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias.
- How to determine relevance, in regard to questions, evidence, and information to be included in Investigative Report.
- How to write a written determination, including rationales for determinations.

Mandatory Training: Additional Details

- Training materials must not rely on sex stereotypes.
- Training materials must promote impartial investigations and adjudications.
- Training materials must be posted on district's website.

Record Keeping

District must maintain the following records for **7 years**:

- ❑ Records of each sexual harassment investigation, including disciplinary sanctions and remedies;
- ❑ Any appeal and the result therefrom;
- ❑ Any informal resolution and the result therefrom;
- ❑ All materials used to train Title IX Coordinators, investigators, decision-makers, and informal resolution facilitators;
  - ❑ Training materials must also be publicly available on the district's website;
- ❑ Record of any actions, including any supportive measures, taken in response to a report or formal complaint of sexual harassment.
- ❑ In each instance, the district must document that its response was not deliberately indifferent and that it has taken measures to ensure equal access to the district's educational program or activity.

Questions?

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