

# A New Era of Title IX

## (Module I: Title IX Primer)

**Wednesday, August 26, 2020**

9:00 AM - 12:30 PM | Zoom

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**Presented by**

Ann S. Chapman, Isabel B. Ekman & Allen L. Kropp

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### Join us for the next 3 modules:

- **Module 2 | September 9**  
In-Depth Training for Title IX Coordinators/AAO Officers
- **Module 3 | September 11**  
Investigator Training
- **Module 4 | September 15**  
Relevance Assessments required Under Title IX: Questions and Evidence

# The New Era of Title IX

## MODULE 1

TITLE IX PRIMER | AUGUST 26, 2020

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## INTRODUCTION

- Your presenters for today.
- This is the first in our series of four modules on Title IX. The upcoming modules are:
  - September 9 – In-Depth Training for Title IX Coordinators/AAO Officers
  - September 11 – Investigator Training
  - September 15 – Relevance Assessments Required Under Title IX: Questions and Evidence

## TODAY'S AGENDA

- What we are covering today:
  - Brief orientation to Title IX.
  - When do schools have to act under Title IX and who must report.
  - Who is protected by Title IX.
  - Where Title IX applies.
  - Conduct covered under Title IX.
  - Conduct covered under related laws and policies.
  - Overview of policies and procedures.
  - Basics of investigations.
  - Conflicts of interest and bias.

## LOGISTICS FOR TODAY

- We will take two short breaks (at approximately 10:15 and 11:30), and end at 12:30.
- Your microphone will be muted.
- Please include just your first name, district and title in your Zoom name.
- Please use the chat box to ask questions. We will get to as many questions as we can during the program.

# Part One

## ***Title IX Harassment – Where We Have Come From***

## A Brief History of Title IX

- Title IX became law in 1972.
- The law states in relevant part, *“No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance....”* 20 U.S.C. § 1681 *et seq.*
- Until 1998, if you asked someone about Title IX, the response would focus on athletics, and particularly on expanded opportunities for female athletes.

## Brief History: The Supreme Court Cases - *Gebser*

- In 1998, the Supreme Court decided *Gebser v. Lago Vista Independent School District*.
- Frank Waldrop, a teacher at Lago Vista, groomed Alida Gebser during her freshman year in high school, and the two began a sexual affair that spring. In January of her sophomore year, a police officer caught them engaging in sexual intercourse.
- Waldrop was arrested, and immediately fired.
- Gebser sued the school district under Title IX, seeking money damages.
- The Court held that where a school has **actual knowledge** of an employee sexually harassing a student but responds to such knowledge with **deliberate indifference**, the school itself has engaged in discrimination, subjecting the school to monetary damages in a private lawsuit under Title IX.
- The *Gebser* case was dismissed.

## Brief History: The Supreme Court Cases – *Davis*

- In 1999, in *Davis v. Monroe County Board of Education*, the Supreme Court held that where sexual harassment is committed by a peer rather than an employee (i.e., student-to-student sexual harassment), the same standards of **actual knowledge** and **deliberate indifference** apply.
- The *Davis* Court additionally crafted a definition of when sex-based conduct becomes actionable sexual harassment, defining the conduct as “so **severe, pervasive, and objectively offensive**” that it denies its victims equal access to education.
- The *Davis* case was allowed to proceed.

## Brief History: Prior OCR Guidance

During the Obama Administration, the 2011 Dear Colleague Letter and 2014 Q&As established new requirements for Title IX compliance, including:

- Schools must investigate any claim made by a student that they had been the victim of sex discrimination – *of any form and wherever it occurred* – including sexual misconduct.
- Sexual misconduct was defined to include sexual assault, sexual violence, sexual exploitation, or sexual harassment.
- Sexual harassment was defined broadly as “any unwelcome conduct of a sexual nature.”
- Equally important, whether sexual conduct was unwelcome was judged by a subjective, not an objective, standard. Whether a reasonable person would consider the conduct to be unwelcome was largely irrelevant. What mattered was that the student believed they had been the victim of unwelcome conduct of a sexual nature.
- OCR asserted that preponderance of the evidence (more likely than not) was the standard by which sexual misconduct cases must be judged.

## Part Two

### ***The New Title IX Regulations on Sexual Harassment***

## The New Title IX Regulations on Sexual Harassment

- In May 2020, the Department of Education published new regulations on sexual harassment. 34 C.F.R. Part 106.  
<https://www2.ed.gov/about/offices/list/ocr/newsroom.html>
- The actual regulations comprise a small portion of the publication (7 pages).
- The explanatory preamble is over 500 pages!
- The effective date of the regulations was August 14, 2020.

## The 2020 Title IX Regulations – General Principles *When Must Schools Act and Who Must Report?*

- The 2020 regulations return the focus of Title IX requirements for response by school units to **actual knowledge** and **deliberate indifference**.
- Only if the school unit has **actual knowledge** of **sexual harassment** (as sexual harassment is defined in the regulations) in its education programs and activities, against a person **in the United States**, does Title IX require a school unit to respond promptly in a manner that is not **deliberately indifferent** – meaning not clearly unreasonable in light of the known circumstances.
- **Actual knowledge** means notice of sexual harassment or allegations of sexual harassment to a **Title IX Coordinator** or any official who has the authority to institute corrective measures on behalf of the school unit (e.g., Superintendent, building administrator).
- **ALL** employees in a K-12 school unit are required to report suspected sexual harassment to the school unit's **Title IX Coordinator**.

## The 2020 Title IX Regulations – General Principles, *continued*

- There is now a difference between a **REPORT** of sexual harassment and a **FORMAL COMPLAINT**.
  - A “Report” triggers “*Supportive Measures*” to the alleged victim, but not an investigation.
  - Generally, only the victim (or parent/legal guardian for K-12 student) can file a formal complaint; this triggers an investigation.
  - The Title IX Coordinator can also trigger an investigation in certain circumstances (such as repeated accusations against the same student or employee).
  - If a Formal Complaint is filed, the decision-maker cannot be the same person as the investigator or Title IX Coordinator.
- Schools must treat complainants and respondents (those alleged to have committed sexual harassment) “equitably” in terms of the process.
- Schools must not presume responsibility on the part of a respondent until the process has run its course (and must state as much in the initial notice to parties of formal complaint).
- School units may now choose to use the “preponderance” standard or the “clear and convincing” standard.

## The 2020 Title IX Regulations – *The Title IX Coordinator*


- The 2020 regulations require that school units appoint a ***Title IX Coordinator***, who has broad responsibilities for implementing the regulations and related policies/procedures for a school unit.
- Deputy Title IX Coordinators are allowed (but one Coordinator should have overall responsibility).
- The Title IX Coordinator role may be combined with the Affirmative Action Officer role, but “Title IX Coordinator” must be part of the title.
- In-depth training for Title IX Coordinators and Affirmative Action Officers will be provided in Module 2 of this training on September 9, 2020.



## The 2020 Title IX Regulations – *Enforcement*

- Title IX enforcement remains with the U.S. Department of Education's Office for Civil Rights (OCR), and through private lawsuits.
- OCR also announced in May that they were launching a new initiative to increase scrutiny on how K-12 schools handle sexual assaults through compliance reviews and data collection.
- Other forms of sex/gender discrimination covered under Title IX are unaffected and the existing Title IX regulations pertaining to them remain in effect (e.g. athletics).

## The 2020 Regulations - *How Do School Units Avoid Being Deliberately Indifferent?*

- By appointing a Title IX Coordinator.
  - By adopting policies and procedures that comply with the Title IX regulations.
  - By following the adopted policies and procedures, and retaining required records to demonstrate compliance.
-  MSMA/DWM have provided legally-compliant sample policies/procedures to Maine school units.
- By retaining required records for seven years.

## The 2020 Regulations - *Who is Covered Now: A Broader Scope*

- All students enrolled in the school unit.
- All students seeking to enroll in the school unit.
- Any individual participating in school programs, activities, and events.
- Employees, applicants for employment, and volunteers of the school unit.

 The addition of employees is a significant change.

## The 2020 Regulations – *Where Does Title IX Apply: “Education Programs and Activities”*

- Under the new regulations, school units only have a duty to respond to sexual harassment which occurs:
  - In education programs, activities or other events sponsored by the school unit and taking place at school (e.g. classes, extra-curriculars, professional development activities).
  - Off school property, but only in the context of an education program or activity and when the school unit has **substantial control** over the person who allegedly engaged in sexual harassment (e.g. field trips, away athletic events).
  - In the United States.

## How is Title IX Sexual Harassment Defined

- The regulations prohibit **“sexual harassment.”**
- **Sexual harassment** means conduct on the basis of sex that falls into one of the following categories:
  1. **“Quid Pro Quo”** harassment by an **employee** (conditioning provision of a school unit’s aid, benefit or service on an individual’s participation in unwelcome sexual conduct) against another employee or a student (e.g. a good evaluation for an employee; a better grade for a student).
  2. **“Hostile Environment”**: Unwelcome conduct based on sex that is so **severe, pervasive AND objectively offensive** that it effectively denies a person’s access to the school unit’s education programs and activities.



The prior OCR Guidance definition was broader – Unwelcome conduct that was sufficiently severe, persistent, **OR** pervasive so as to limit a student’s ability to participate in or benefit from the school unit’s education programs/activities.

## How is Title IX Sexual Harassment Defined, continued

### 3. **Sexual Assault, Dating Violence, Domestic Violence, and Stalking:**

**Sexual Assault:** Defined as an offense classified as a Forcible or Non-Forcible Sex Offense under the uniform crime reporting system of the FBI. Those offenses are –

- **Non-Forcible Sex Offenses** – Include incest and statutory rape. In Maine, statutory rape is defined as a sexual act with another person who is not the perpetrator’s spouse and is under the age of 14, or who is 14 or 15 and the perpetrator is at least 5 years older.
- **Forcible Sex Offenses** – Any sexual act directed against another person, without the **consent** of the victim, including instances where the victim is in a state of incapacitation. This sounds like a broad definition, but a sexual act is further defined **only** to include:
  - Forcible rape – Sexual intercourse with a person, forcibly and/or without that person’s consent, or in instances where the victim is in a state of incapacitation.
  - Forcible oral or anal sexual intercourse – with another person, forcibly or without consent, or because of incapacitation.
  - Sexual assault with an object – Use of an object or instrument to unlawfully penetrate, however, slightly, the genital or anal opening of the body of another person, forcibly, or without consent or because of incapacitation.
  - Forcible fondling – The touching of the private body parts (genitals, buttocks or breasts) of another person for the purpose of sexual gratification, forcibly, or without consent, or because of incapacitation.

## How is Title IX Sexual Harassment Defined, continued

4. **Dating Violence:** The Title IX regulations define dating violence as physical or sexual abuse, or threats of physical or sexual abuse, or emotional abuse committed by a person:
  - Who is or has been in a social relationship of a romantic or intimate nature with the victim; and
  - Where the existence of such a relationship is determined based on a consideration of the following factors: (a) length of relationship; (b) type of relationship; (c) the frequency of interaction between persons in the relationship.
5. **Domestic Violence:** This is essentially the same thing as Dating Violence, except among current or former spouses or cohabitants or people who share a child in common (in the K-12 context, this will only apply to employees).

## How is Title IX Sexual Harassment Defined, continued

6. **Stalking:** The Title IX regulations define stalking as engaging in a course of conduct directed at a specific person that would cause a reasonable person to:
  - Fear for their safety or the safety of others; or
  - Suffer **severe** emotional distress.


Additionally, the Regulations prohibit:

7. **Retaliation:** Prohibited, but addressed only through other student and employee disciplinary processes.

## How is Title IX Sexual Harassment Defined, continued

- To summarize:
  - Quid Pro Quo harassment by an **employee**.
  - Unwelcome conduct based on sex that is severe, pervasive AND objectively offensive that it denies access to education programs/activities.
  - Sexual Assault
    - Situations where there is actual sexual contact involving penetration
    - Touching (fondling) of genitals, breasts, or buttocks.
  - Dating violence and domestic violence.
  - Stalking.
  - Retaliation.

## Sexual Harassment Under Other Laws

- School units need to comply with both Title IX and the other applicable nondiscrimination/harassment laws (e.g., State law & Title VII).
  -  The MSMA/DWM sample policies/procedures address both Title IX and non-Title IX harassment and discrimination.
- School units will need to carefully review all harassment-related reports/complaints to ensure the appropriate procedure is followed.
- Don't forget:
  - JICK – Bullying.
  - JICIA – Weapons, Violence and School Safety.
  - Other conduct policies that may apply.

## Sexual Harassment Under Title IX and Other Laws: Side-By-Side

	Title IX	Title VII/State Law
<b>Quid Pro Quo</b>	By an employee against employee or student – conditioning school aid, benefit or service on individual's participation in unwelcome sexual conduct.	By an employee or student – Submission to unwelcome sexual conduct is made explicitly or implicitly a term or condition of education/employment benefits or is used as a basis for decisions on education/employment benefits.
<b>Hostile Environment</b>	Unwelcome conduct based on sex that a reasonable person would find so severe, pervasive AND objectively offensive that it effectively denies equal access to education program/activities.	Conduct on the basis of sex that has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile OR offensive school/work environment.
<b>Other Conduct Covered</b>	Sexual assault, dating violence, domestic violence, stalking, retaliation.	Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature (can include conduct defined under Title IX), and retaliation.
<b>Scope</b>	Conduct that takes place within education programs and activities in the United States.	Impact on alleged victim at school/work.



**Title IX Complaint Procedure**



**Discrimination/Harassment Complaint Procedure**

## Part Three

### *Policies and Procedures*

## AC – Nondiscrimination/Equal Opportunity and Affirmative Action

The umbrella policy that addresses the school unit's compliance with all federal and state nondiscrimination laws/regulations, including Title IX.

 Refer to policy for discussion.

## ACAA – Unlawful Harassment and Sexual Harassment of Students

The policy that addresses harassment and sexual harassment towards students.

 Refer to policy for discussion.

## ACAA-R – Student Discrimination/ Harassment and Title IX Sexual Harassment Complaint Procedures

The procedure that addresses how the school unit will respond to reports of discrimination and harassment, including Title IX sexual harassment.

 Refer to procedure for discussion.

## ACAB – Harassment and Sexual Harassment of School Employees

The policy that addresses harassment and sexual harassment towards employees.

 Refer to policy for discussion.



## ACAB-R – Employee Discrimination/ Harassment and Title IX Sexual Harassment Complaint Procedures

The procedure that addresses how the school unit will respond to reports of discrimination and harassment, including Title IX sexual harassment, against employees.

 Refer to procedure for discussion.

## Part Four

### *Basics of Investigations*

## Basics of Investigations

- The Title IX regulations require that those involved in addressing Title IX reports/complaints receive training on conducting investigations.
- This includes Title IX Coordinators, investigators, decision-makers and individuals assisting in informal resolutions.
- This is a brief overview.
- Module 3 on September 11 will provide comprehensive training on investigation best practices, including the specific requirements for investigations in the Title IX regulations.

## Basics of Investigations, continued

- Assess the nature of the complaint and/or suspected misconduct:
  - What policy(ies) and/or law(s) may have been violated?
  - If it is a report of possible sexual misconduct – is it a potential Title IX sexual harassment violation or something else?
- Follow internal communication protocol (i.e., coordination with Superintendent's office).

## Basics of Investigations, continued

- Take any necessary steps to ensure safety and provide any necessary notices:
  - Address any physical or other safety issues.
  - Contact law enforcement/EMS if appropriate.
  - Safeguard property.
  - Notify parents/guardians if there is student involvement.
  - Does DHHS/DA need to be notified.
  - Ascertain any collective bargaining rights of employees involved.

## Basics of Investigations, continued

- Preserve evidence:
  - Take custody of computers/electronic devices if appropriate.
  - Take screenshots or photographs of texts, social media posts, etc.
  - Photograph/document damage, injuries, location where the violation occurred, if applicable.
  - Save or copy recordings of video surveillance footage, if applicable.

## Basics of Investigations, continued

Choose an investigator. Determine:

- The right person to investigate the particular issue.
- Whether the investigator should be internal or external.
- Be sure the investigator is:
  - Free of bias/conflicts, perceived or otherwise.
  - Trained.
  - Able to treat people with respect/sensitivity.
  - Able to ask hard questions and reach hard conclusions.
  - Able to write effective reports.
  - Able to act as an effective witness (if necessary).

## Basics of Investigations, continued

Plan the investigation:

- Scope.
- Witnesses.
- Evidence.
- Type of Report.
- Timeline.

## Basics of Investigations, continued

### Prepare for interviews:

- Who will be interviewed.
- Sequence of interviews.
- Who will be present.
- How will interviews be documented.
- Questions.

## Basics of Investigations, continued

### Conduct interviews:

- Be respectful and sensitive.
- Listen!
- Plan questions, but go where answers lead.
- Ask the hard questions.
- Follow up on inconsistencies and gaps.
- Observe tone and body language.

## Basics of Investigations, continued

- Finish investigation:
  - Know when it's time to stop.
  - Consider relevant evidence (Module 4 will cover this in the Title IX context).
  - Reach conclusions (in Title IX investigations, this must be done by a decision-maker, someone who is not the investigator).
  - Write a report.
- Determine appropriate sanctions (role of decision-maker in Title IX cases).
- Notify individuals of results:
  - Follow applicable laws, policies, and procedures.
  - Remember confidentiality requirements.

## Part Five

### *Conflicts of Interest and Bias*

## Conflicts of Interest and Bias

- The Title IX regulations require those involved in the Title IX process to be free of conflicts of interest and bias, and to receive training on these topics (Title IX Coordinators, investigators, decision-makers and those assisting in informal resolutions).
- Fairness and equity are an important part of any investigation and/or discipline process.

## What is a Conflict of Interest or Bias?

- The regulations require that those involved in Title IX processes must not pre-judge the facts and must not be biased against or in favor of a particular class of parties in the complaint process.
  - Believing that a complainant, as a victim or survivor, should be presumptively believed constitutes bias.
  - Believing that all women or all men behave in a certain way constitutes bias.
  - Believing that complaints generally arise from sex that someone regrets constitutes bias.
  - Believing that accused parties are usually guilty constitutes bias.



Remember – The regulations require a presumption of non-responsibility on the part of a respondent (until the point when the decision-maker makes a finding).

## What is a Conflict of Interest or Bias, continued

- A conflict of interest or bias can also occur in a particular case, depending upon knowledge about or a prior relationship with individuals involved in a particular case (positive or negative).
- Parties are provided opportunities (under the complaint procedures) to raise concerns about conflict or bias.
- School units should be alert to any real or perceived conflicts of interest or bias, and assign other individuals to particular roles if a conflict or bias exists.

## What is Not a Conflict of Interest or Bias

- There are some things which do not necessarily constitute a conflict of interest or actual bias:
  - Being an employee of the school unit does not mean an individual is automatically “biased” in favor of the school unit.
  - Having done advocacy in the field of sexual violence (OCR believes training can “cure” any issue of bias).
  - Title IX Coordinators can also serve as investigators in Title IX cases (but not decision-makers) – although we recommend caution.
- Conflicts of interest and bias are judged by an objective standard – whether a reasonable person would believe bias exists.



# Wrap Up

**Join us for the next 3 modules:**

- **September 9** – In-Depth Training for Title IX Coordinators/AAO Officers
- **September 11** – Investigator Training
- **September 15** – Relevance Assessments Required Under Title IX: Questions and Evidence

# Thank You

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**PART 106—NONDISCRIMINATION ON  
THE BASIS OF SEX IN EDUCATION  
PROGRAMS OR ACTIVITIES  
RECEIVING FEDERAL FINANCIAL  
ASSISTANCE**

- 1. The authority citation for part 106 continues to read as follows:

**Authority:** 20 U.S.C. 1681 *et seq.*, unless otherwise noted.

- 2. Section 106.3 is amended by revising paragraph (a) to read as follows:

**§ 106.3 Remedial and affirmative action and self-evaluation.**

(a) *Remedial action.* If the Assistant Secretary finds that a recipient has discriminated against persons on the basis of sex in an education program or activity under this part, or otherwise violated this part, such recipient must take such remedial action as the Assistant Secretary deems necessary to

(Continued on next page.)

remedy the violation, consistent with 20 U.S.C. 1682.

\* \* \* \* \*

■ 3. Section 106.6 is amended by revising the section heading and adding paragraphs (d), (e), (f), (g), and (h) to read as follows:

**§ 106.6 Effect of other requirements and preservation of rights.**

\* \* \* \* \*

(d) *Constitutional protections.*

Nothing in this part requires a recipient to:

(1) Restrict any rights that would otherwise be protected from government action by the First Amendment of the U.S. Constitution;

(2) Deprive a person of any rights that would otherwise be protected from government action under the Due Process Clauses of the Fifth and Fourteenth Amendments of the U.S. Constitution; or

(3) Restrict any other rights guaranteed against government action by the U.S. Constitution.

(e) *Effect of Section 444 of General Education Provisions Act (GEPA)/ Family Educational Rights and Privacy Act (FERPA).* The obligation to comply with this part is not obviated or alleviated by the FERPA statute, 20 U.S.C. 1232g, or FERPA regulations, 34 CFR part 99.

(f) *Title VII of the Civil Rights Act of 1964.* Nothing in this part may be read in derogation of any individual's rights under title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* or any regulations promulgated thereunder.

(g) *Exercise of rights by parents or guardians.* Nothing in this part may be read in derogation of any legal right of a parent or guardian to act on behalf of a "complainant," "respondent," "party," or other individual, subject to paragraph (e) of this section, including but not limited to filing a formal complaint.

(h) *Preemptive effect.* To the extent of a conflict between State or local law and title IX as implemented by §§ 106.30, 106.44, and 106.45, the obligation to comply with §§ 106.30, 106.44, and 106.45 is not obviated or alleviated by any State or local law.

\* \* \* \* \*

■ 4. Section 106.8 is revised to read as follows:

**§ 106.8 Designation of coordinator, dissemination of policy, and adoption of grievance procedures.**

(a) *Designation of coordinator.* Each recipient must designate and authorize at least one employee to coordinate its efforts to comply with its responsibilities under this part, which

employee must be referred to as the "Title IX Coordinator." The recipient must notify applicants for admission and employment, students, parents or legal guardians of elementary and secondary school students, employees, and all unions or professional organizations holding collective bargaining or professional agreements with the recipient, of the name or title, office address, electronic mail address, and telephone number of the employee or employees designated as the Title IX Coordinator pursuant to this paragraph. Any person may report sex discrimination, including sexual harassment (whether or not the person reporting is the person alleged to be the victim of conduct that could constitute sex discrimination or sexual harassment), in person, by mail, by telephone, or by electronic mail, using the contact information listed for the Title IX Coordinator, or by any other means that results in the Title IX Coordinator receiving the person's verbal or written report. Such a report may be made at any time (including during non-business hours) by using the telephone number or electronic mail address, or by mail to the office address, listed for the Title IX Coordinator.

(b) *Dissemination of policy—(1) Notification of policy.* Each recipient must notify persons entitled to a notification under paragraph (a) of this section that the recipient does not discriminate on the basis of sex in the education program or activity that it operates, and that it is required by title IX and this part not to discriminate in such a manner. Such notification must state that the requirement not to discriminate in the education program or activity extends to admission (unless subpart C of this part does not apply) and employment, and that inquiries about the application of title IX and this part to such recipient may be referred to the recipient's Title IX Coordinator, to the Assistant Secretary, or both.

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

(ii) A recipient must not use or distribute a publication stating that the recipient treats applicants, students, or employees differently on the basis of sex except as such treatment is permitted by title IX or this part.

(c) *Adoption of grievance procedures.* A recipient must adopt and publish

grievance procedures that provide for the prompt and equitable resolution of student and employee complaints alleging any action that would be prohibited by this part and a grievance process that complies with § 106.45 for formal complaints as defined in § 106.30. A recipient must provide to persons entitled to a notification under paragraph (a) of this section notice of the recipient's grievance procedures and grievance process, including how to report or file a complaint of sex discrimination, how to report or file a formal complaint of sexual harassment, and how the recipient will respond.

(d) *Application outside the United States.* The requirements of paragraph (c) of this section apply only to sex discrimination occurring against a person in the United States.

■ 5. Section 106.9 is revised to read as follows:

**§ 106.9 Severability.**

If any provision of this subpart or its application to any person, act, or practice is held invalid, the remainder of the subpart or the application of its provisions to any person, act, or practice shall not be affected thereby.

■ 6. Section 106.12 is amended by revising paragraph (b) to read as follows:

**§ 106.12 Educational institutions controlled by religious organizations.**

\* \* \* \* \*

(b) *Assurance of exemption.* An educational institution that seeks assurance of the exemption set forth in paragraph (a) of this section may do so by submitting in writing to the Assistant Secretary a statement by the highest ranking official of the institution, identifying the provisions of this part that conflict with a specific tenet of the religious organization. An institution is not required to seek assurance from the Assistant Secretary in order to assert such an exemption. In the event the Department notifies an institution that it is under investigation for noncompliance with this part and the institution wishes to assert an exemption set forth in paragraph (a) of this section, the institution may at that time raise its exemption by submitting in writing to the Assistant Secretary a statement by the highest ranking official of the institution, identifying the provisions of this part which conflict with a specific tenet of the religious organization, whether or not the institution had previously sought assurance of an exemption from the Assistant Secretary.

\* \* \* \* \*

■ 7. Add § 106.18 to subpart B to read as follows:

**§ 106.18 Severability.**

If any provision of this subpart or its application to any person, act, or practice is held invalid, the remainder of the subpart or the application of its provisions to any person, act, or practice shall not be affected thereby.

■ 8. Add § 106.24 to subpart C to read as follows:

**§ 106.24 Severability.**

If any provision of this subpart or its application to any person, act, or practice is held invalid, the remainder of the subpart or the application of its provisions to any person, act, or practice shall not be affected thereby.

■ 9. Add § 106.30 to subpart D to read as follows:

**§ 106.30 Definitions.**

(a) As used in this part:

*Actual knowledge* means notice of sexual harassment or allegations of sexual harassment to a recipient's Title IX Coordinator or any official of the recipient who has authority to institute corrective measures on behalf of the recipient, or to any employee of an elementary and secondary school. Imputation of knowledge based solely on vicarious liability or constructive notice is insufficient to constitute actual knowledge. This standard is not met when the only official of the recipient with actual knowledge is the respondent. The mere ability or obligation to report sexual harassment or to inform a student about how to report sexual harassment, or having been trained to do so, does not qualify an individual as one who has authority to institute corrective measures on behalf of the recipient. "Notice" as used in this paragraph includes, but is not limited to, a report of sexual harassment to the Title IX Coordinator as described in § 106.8(a).

*Complainant* means an individual who is alleged to be the victim of conduct that could constitute sexual harassment.

*Consent.* The Assistant Secretary will not require recipients to adopt a particular definition of consent with respect to sexual assault, as referenced in this section.

*Formal complaint* means a document filed by a complainant or signed by the Title IX Coordinator alleging sexual harassment against a respondent and requesting that the recipient investigate the allegation of sexual harassment. At the time of filing a formal complaint, a complainant must be participating in or attempting to participate in the education program or activity of the recipient with which the formal complaint is filed. A formal complaint

may be filed with the Title IX Coordinator in person, by mail, or by electronic mail, by using the contact information required to be listed for the Title IX Coordinator under § 106.8(a), and by any additional method designated by the recipient. As used in this paragraph, the phrase "document filed by a complainant" means a document or electronic submission (such as by electronic mail or through an online portal provided for this purpose by the recipient) that contains the complainant's physical or digital signature, or otherwise indicates that the complainant is the person filing the formal complaint. Where the Title IX Coordinator signs a formal complaint, the Title IX Coordinator is not a complainant or otherwise a party under this part or under § 106.45, and must comply with the requirements of this part, including § 106.45(b)(1)(iii).

*Respondent* means an individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment.

*Sexual harassment* means conduct on the basis of sex that satisfies one or more of the following:

(1) An employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct;

(2) Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity; or

(3) "Sexual assault" as defined in 20 U.S.C. 1092(f)(6)(A)(v), "dating violence" as defined in 34 U.S.C. 12291(a)(10), "domestic violence" as defined in 34 U.S.C. 12291(a)(8), or "stalking" as defined in 34 U.S.C. 12291(a)(30).

*Supportive measures* means non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, and without fee or charge to the complainant or the respondent before or after the filing of a formal complaint or where no formal complaint has been filed. Such measures are designed to restore or preserve equal access to the recipient'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. Supportive measures may include 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, and other similar measures. The recipient must maintain as confidential any supportive measures provided to the complainant or respondent, to the extent that maintaining such confidentiality would not impair the ability of the recipient to provide the supportive measures. The Title IX Coordinator is responsible for coordinating the effective implementation of supportive measures.

(b) As used in §§ 106.44 and 106.45:

*Elementary and secondary school* means a local educational agency (LEA), as defined in the Elementary and Secondary Education Act of 1965, as amended by the Every Student Succeeds Act, a preschool, or a private elementary or secondary school.

*Postsecondary institution* means an institution of graduate higher education as defined in § 106.2(l), an institution of undergraduate higher education as defined in § 106.2(m), an institution of professional education as defined in § 106.2(n), or an institution of vocational education as defined in § 106.2(o).

■ 10. Add § 106.44 to subpart D to read as follows:

**§ 106.44 Recipient's response to sexual harassment.**

(a) *General response to sexual harassment.* A recipient with actual knowledge of sexual harassment in an education program or activity of the recipient against a person in the United States, must respond promptly in a manner that is not deliberately indifferent. A recipient is deliberately indifferent only if its response to sexual harassment is clearly unreasonable in light of the known circumstances. For the purposes of this section, §§ 106.30, and 106.45, "education program or activity" includes locations, events, or circumstances over which the recipient exercised substantial control over both the respondent and the context in which the sexual harassment occurs, and also includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution. A recipient's response must treat complainants and respondents equitably by offering supportive measures as defined in § 106.30 to a complainant, and by following a grievance process that complies with § 106.45 before the imposition of any disciplinary sanctions or other actions that are not supportive measures as defined in § 106.30, against a respondent. The Title IX Coordinator

must promptly contact the complainant to discuss the availability of supportive measures as defined in § 106.30, consider the complainant's wishes with respect to supportive measures, inform the complainant of the availability of supportive measures with or without the filing of a formal complaint, and explain to the complainant the process for filing a formal complaint. The Department may not deem a recipient to have satisfied the recipient's duty to not be deliberately indifferent under this part based on the recipient's restriction of rights protected under the U.S. Constitution, including the First Amendment, Fifth Amendment, and Fourteenth Amendment.

(b) *Response to a formal complaint.*

(1) In response to a formal complaint, a recipient must follow a grievance process that complies with § 106.45. With or without a formal complaint, a recipient must comply with § 106.44(a).

(2) The Assistant Secretary will not deem a recipient's determination regarding responsibility to be evidence of deliberate indifference by the recipient, or otherwise evidence of discrimination under title IX by the recipient, solely because the Assistant Secretary would have reached a different determination based on an independent weighing of the evidence.

(c) *Emergency removal.* Nothing in this part precludes a recipient from removing a respondent from the recipient's education program or activity on an emergency basis, provided that the recipient undertakes an individualized safety and risk analysis, 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 provides the respondent with notice and an opportunity to challenge the decision immediately following the removal. This provision may not be construed to modify any rights under the Individuals with Disabilities Education Act, Section 504 of the Rehabilitation Act of 1973, or the Americans with Disabilities Act.

(d) *Administrative leave.* Nothing in this subpart precludes a recipient from placing a non-student employee respondent on administrative leave during the pendency of a grievance process that complies with § 106.45. This provision may not be construed to modify any rights under Section 504 of the Rehabilitation Act of 1973 or the Americans with Disabilities Act.

■ 11. Add § 106.45 to subpart D to read as follows:

**§ 106.45 Grievance process for formal complaints of sexual harassment.**

(a) *Discrimination on the basis of sex.* A recipient's treatment of a complainant or a respondent in response to a formal complaint of sexual harassment may constitute discrimination on the basis of sex under title IX.

(b) *Grievance process.* For the purpose of addressing formal complaints of sexual harassment, a recipient's grievance process must comply with the requirements of this section. Any provisions, rules, or practices other than those required by this section that a recipient adopts as part of its grievance process for handling formal complaints of sexual harassment as defined in § 106.30, must apply equally to both parties.

(1) *Basic requirements for grievance process.* A recipient's grievance process must—

(i) Treat complainants and respondents equitably by providing remedies to a complainant where a determination of responsibility for sexual harassment has been made against the respondent, and by following a grievance process that complies with this section before the imposition of any disciplinary sanctions or other actions that are not supportive measures as defined in § 106.30, against a respondent. Remedies must be designed to restore or preserve equal access to the recipient's education program or activity. Such remedies may include the same individualized services described in § 106.30 as "supportive measures"; however, remedies need not be non-disciplinary or non-punitive and need not avoid burdening the respondent;

(ii) Require an objective evaluation of all relevant evidence—including both inculpatory and exculpatory evidence—and provide that credibility determinations may not be based on a person's status as a complainant, respondent, or witness;

(iii) Require that any individual designated by a recipient as a Title IX Coordinator, investigator, decision-maker, or any person designated by a recipient to facilitate an informal resolution process, not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent. A recipient must ensure that Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process, receive training on the definition of sexual harassment in § 106.30, the scope of the recipient's education program or activity, how to conduct an investigation and grievance

process including hearings, appeals, and informal resolution processes, as applicable, and how to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias. A recipient must ensure that decision-makers receive training on any technology to be used at a live hearing and on issues of relevance of questions and evidence, including when questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant, as set forth in paragraph (b)(6) of this section. A recipient also must ensure that investigators receive training on issues of relevance to create an investigative report that fairly summarizes relevant evidence, as set forth in paragraph (b)(5)(vii) of this section. Any materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process, must not rely on sex stereotypes and must promote impartial investigations and adjudications of formal complaints of sexual harassment;

(iv) Include a presumption that the respondent is not responsible for the alleged conduct until a determination regarding responsibility is made at the conclusion of the grievance process;

(v) Include reasonably prompt time frames for conclusion of the grievance process, including reasonably prompt time frames for filing and resolving appeals and informal resolution processes if the recipient offers informal resolution processes, and a process that allows for the temporary delay of the grievance process or the limited extension of time frames for good cause with written notice to the complainant and the respondent of the delay or extension and the reasons for the action. Good cause may include considerations such as the absence of a party, a party's advisor, or a witness; concurrent law enforcement activity; or the need for language assistance or accommodation of disabilities;

(vi) Describe the range of possible disciplinary sanctions and remedies or list the possible disciplinary sanctions and remedies that the recipient may implement following any determination of responsibility;

(vii) State whether the standard of evidence to be used to determine responsibility is the preponderance of the evidence standard or the clear and convincing evidence standard, apply the same standard of evidence for formal complaints against students as for formal complaints against employees, including faculty, and apply the same standard of evidence to all formal complaints of sexual harassment;

(viii) Include the procedures and permissible bases for the complainant and respondent to appeal;

(ix) Describe the range of supportive measures available to complainants and respondents; and

(x) Not require, allow, rely upon, or otherwise use questions or evidence that constitute, or seek disclosure of, information protected under a legally recognized privilege, unless the person holding such privilege has waived the privilege.

(2) *Notice of allegations*—(i) Upon receipt of a formal complaint, a recipient must provide the following written notice to the parties who are known:

(A) Notice of the recipient's grievance process that complies with this section, including any informal resolution process.

(B) Notice of the allegations of sexual harassment potentially constituting sexual harassment as defined in § 106.30, including sufficient details known at the time and with sufficient time to prepare a response before any initial interview. Sufficient details include the identities of the parties involved in the incident, if known, the conduct allegedly constituting sexual harassment under § 106.30, and the date and location of the alleged incident, if known. The written notice must include a statement that the respondent is presumed not responsible for the alleged conduct and that a determination regarding responsibility is made at the conclusion of the grievance process. The written notice must inform the parties that they may have an advisor of their choice, who may be, but is not required to be, an attorney, under paragraph (b)(5)(iv) of this section, and may inspect and review evidence under paragraph (b)(5)(vi) of this section. The written notice must inform the parties of any provision in the recipient's code of conduct that prohibits knowingly making false statements or knowingly submitting false information during the grievance process.

(ii) If, in the course of an investigation, the recipient decides to investigate allegations about the complainant or respondent that are not included in the notice provided pursuant to paragraph (b)(2)(i)(B) of this section, the recipient must provide notice of the additional allegations to the parties whose identities are known.

(3) *Dismissal of a formal complaint*—(i) The recipient must investigate the allegations in a formal complaint. If the conduct alleged in the formal complaint would not constitute sexual harassment as defined in § 106.30 even if proved,

did not occur in the recipient's education program or activity, or did not occur against a person in the United States, then the recipient must dismiss the formal complaint with regard to that conduct for purposes of sexual harassment under title IX or this part; such a dismissal does not preclude action under another provision of the recipient's code of conduct.

(ii) The recipient may dismiss the formal complaint or any allegations therein, if at any time during the investigation or hearing: A complainant notifies the Title IX Coordinator in writing that the complainant would like to withdraw the formal complaint or any allegations therein; the respondent is no longer enrolled or employed by the recipient; or specific circumstances prevent the recipient from gathering evidence sufficient to reach a determination as to the formal complaint or allegations therein.

(iii) Upon a dismissal required or permitted pursuant to paragraph (b)(3)(i) or (b)(3)(ii) of this section, the recipient must promptly send written notice of the dismissal and reason(s) therefor simultaneously to the parties.

(4) *Consolidation of formal complaints*. A recipient may consolidate formal complaints as to allegations of sexual harassment against more than one respondent, or by more than one complainant against one or more respondents, or by one party against the other party, where the allegations of sexual harassment arise out of the same facts or circumstances. Where a grievance process involves more than one complainant or more than one respondent, references in this section to the singular "party," "complainant," or "respondent" include the plural, as applicable.

(5) *Investigation of a formal complaint*. When investigating a formal complaint and throughout the grievance process, a recipient must—

(i) Ensure that the burden of proof and the burden of gathering evidence sufficient to reach a determination regarding responsibility rest on the recipient and not on the parties provided that the recipient cannot access, consider, disclose, or otherwise use a party's records that are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in the professional's or paraprofessional's capacity, or assisting in that capacity, and which are made and maintained in connection with the provision of treatment to the party, unless the recipient obtains that party's voluntary, written consent to do so for a grievance process under this section

(if a party is not an "eligible student," as defined in 34 CFR 99.3, then the recipient must obtain the voluntary, written consent of a "parent," as defined in 34 CFR 99.3);

(ii) Provide an equal opportunity for the parties to present witnesses, including fact and expert witnesses, and other inculpatory and exculpatory evidence;

(iii) Not restrict the ability of either party to discuss the allegations under investigation or to gather and present relevant evidence;

(iv) Provide the parties with the same opportunities to have others present during any grievance proceeding, including the opportunity to be accompanied to any related meeting or proceeding by the advisor of their choice, who may be, but is not required to be, an attorney, and not limit the choice or presence of advisor for either the complainant or respondent in any meeting or grievance proceeding; however, the recipient may establish restrictions regarding the extent to which the advisor may participate in the proceedings, as long as the restrictions apply equally to both parties;

(v) Provide, to a party whose participation is invited or expected, written notice of the date, time, location, participants, and purpose of all hearings, investigative interviews, or other meetings, with sufficient time for the party to prepare to participate;

(vi) 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, including the evidence upon which the recipient does not intend to rely in reaching a determination regarding responsibility and inculpatory or exculpatory evidence whether obtained from a party or other source, so that each party can meaningfully respond to the evidence prior to conclusion of the investigation. Prior to completion of the investigative report, the recipient must send to each party and the party's advisor, if any, the evidence subject to inspection and review in an electronic format or a hard copy, and the parties must have at least 10 days to submit a written response, which the investigator will consider prior to completion of the investigative report. The recipient must make all such evidence subject to the parties' inspection and review available at any hearing to give each party equal opportunity to refer to such evidence during the hearing, including for purposes of cross-examination; and

(vii) Create an investigative report that fairly summarizes relevant evidence

and, at least 10 days prior to a hearing (if a hearing is required under this section or otherwise provided) or other time of determination regarding responsibility, send to each party and the party's advisor, if any, the investigative report in an electronic format or a hard copy, for their review and written response.

(6) *Hearings.* (i) For postsecondary institutions, the recipient's grievance process must provide for a live hearing. At the live hearing, the decision-maker(s) must permit each party's advisor to ask the other party and any witnesses all relevant questions and follow-up questions, including those challenging credibility. Such cross-examination at the live hearing must be conducted directly, orally, and in real time by the party's advisor of choice and never by a party personally, notwithstanding the discretion of the recipient under paragraph (b)(5)(iv) of this section to otherwise restrict the extent to which advisors may participate in the proceedings. At the request of either party, the recipient must provide for the live hearing to occur with the parties located in separate rooms with technology enabling the decision-maker(s) and parties to simultaneously see and hear the party or the witness answering questions. Only relevant cross-examination and other questions may be asked of a party or witness. Before a complainant, respondent, or witness answers a cross-examination or other question, the decision-maker(s) must first determine whether the question is relevant and explain any decision to exclude a question as not relevant. If a party does not have an advisor present at the live hearing, the recipient must provide without fee or charge to that party, an advisor of the recipient's choice, who may be, but is not required to be, an attorney, to conduct cross-examination on behalf of that party. Questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant, unless such questions and evidence about the complainant's prior sexual behavior are offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or if the questions and evidence concern specific incidents of the complainant's prior sexual behavior with respect to the respondent and are offered to prove consent. If a party or witness does not submit to cross-examination at the live hearing, the decision-maker(s) must not rely on any statement of that party or witness in reaching a determination regarding

responsibility; provided, however, that the decision-maker(s) cannot draw an inference about the determination regarding responsibility based solely on a party's or witness's absence from the live hearing or refusal to answer cross-examination or other questions. Live hearings pursuant to this paragraph may be conducted with all parties physically present in the same geographic location or, at the recipient's discretion, any or all parties, witnesses, and other participants may appear at the live hearing virtually, with technology enabling participants simultaneously to see and hear each other. Recipients must create an audio or audiovisual recording, or transcript, of any live hearing and make it available to the parties for inspection and review.

(ii) For recipients that are elementary and secondary schools, and other recipients that are not postsecondary institutions, the recipient's grievance process may, but need not, provide for a hearing. With or without a hearing, after the recipient has sent the investigative report to the parties pursuant to paragraph (b)(5)(vii) of this section and before reaching a determination regarding responsibility, the decision-maker(s) must afford each party the opportunity to submit written, relevant questions that a party wants asked of any party or witness, provide each party with the answers, and allow for additional, limited follow-up questions from each party. With or without a hearing, questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant, unless such questions and evidence about the complainant's prior sexual behavior are offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or if the questions and evidence concern specific incidents of the complainant's prior sexual behavior with respect to the respondent and are offered to prove consent. The decision-maker(s) must explain to the party proposing the questions any decision to exclude a question as not relevant.

(7) *Determination regarding responsibility.* (i) The decision-maker(s), who cannot be the same person(s) as the Title IX Coordinator or the investigator(s), must issue a written determination regarding responsibility. To reach this determination, the recipient must apply the standard of evidence described in paragraph (b)(1)(vii) of this section.

(ii) The written determination must include—

(A) Identification of the allegations potentially constituting sexual harassment as defined in § 106.30;

(B) A description of the procedural steps taken from the receipt of the formal complaint through the determination, including any notifications to the parties, interviews with parties and witnesses, site visits, methods used to gather other evidence, and hearings held;

(C) Findings of fact supporting the determination;

(D) Conclusions regarding the application of the recipient's code of conduct to the facts;

(E) A statement of, and rationale for, the result as to each allegation, including a determination regarding responsibility, any disciplinary sanctions the recipient imposes on the respondent, and whether remedies designed to restore or preserve equal access to the recipient's education program or activity will be provided by the recipient to the complainant; and

(F) The recipient's procedures and permissible bases for the complainant and respondent to appeal.

(iii) The recipient must provide the written determination to the parties simultaneously. The determination regarding responsibility becomes final either on the date that the recipient provides the parties with the written determination of the result of the appeal, if an appeal is filed, or if an appeal is not filed, the date on which an appeal would no longer be considered timely.

(iv) The Title IX Coordinator is responsible for effective implementation of any remedies.

(8) *Appeals.* (i) A recipient must offer both parties an appeal from a determination regarding responsibility, and from a recipient's dismissal of a formal complaint or any allegations therein, on the following bases:

(A) Procedural irregularity that affected the outcome of the matter;

(B) New evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter; and

(C) The Title IX Coordinator, investigator(s), or decision-maker(s) had a conflict of interest or bias for or against complainants or respondents generally or the individual complainant or respondent that affected the outcome of the matter.

(ii) A recipient may offer an appeal equally to both parties on additional bases.

(iii) As to all appeals, the recipient must:

(A) Notify the other party in writing when an appeal is filed and implement appeal procedures equally for both parties;

(B) Ensure that the decision-maker(s) for the appeal is not the same person as the decision-maker(s) that reached the determination regarding responsibility or dismissal, the investigator(s), or the Title IX Coordinator;

(C) Ensure that the decision-maker(s) for the appeal complies with the standards set forth in paragraph (b)(1)(iii) of this section;

(D) Give both parties a reasonable, equal opportunity to submit a written statement in support of, or challenging, the outcome;

(E) Issue a written decision describing the result of the appeal and the rationale for the result; and

(F) Provide the written decision simultaneously to both parties.

(9) *Informal resolution.* A recipient may not require as a condition of enrollment or continuing enrollment, or employment or continuing employment, or enjoyment of any other right, waiver of the right to an investigation and adjudication of formal complaints of sexual harassment consistent with this section. Similarly, a recipient may not require the parties to participate in an informal resolution process under this section and may not offer an informal resolution process unless a formal complaint is filed. However, at any time prior to reaching a determination regarding responsibility the recipient may facilitate an informal resolution process, such as mediation, that does not involve a full investigation and adjudication, provided that the recipient—

(i) Provides to the parties a written notice disclosing: The allegations, the requirements of the informal resolution process including the circumstances under which it precludes the parties from resuming a formal complaint arising from the same allegations, provided, however, that at any time prior to agreeing to a resolution, any party has the right to withdraw from the informal resolution process and resume the grievance process with respect to the formal complaint, and any consequences resulting from participating in the informal resolution process, including the records that will be maintained or could be shared;

(ii) Obtains the parties' voluntary, written consent to the informal resolution process; and

(iii) Does not offer or facilitate an informal resolution process to resolve allegations that an employee sexually harassed a student.

(10) *Recordkeeping.* (i) A recipient must maintain for a period of seven years records of—

(A) Each sexual harassment investigation including any determination regarding responsibility and any audio or audiovisual recording or transcript required under paragraph (b)(6)(i) of this section, any disciplinary sanctions imposed on the respondent, and any remedies provided to the complainant designed to restore or preserve equal access to the recipient's education program or activity;

(B) Any appeal and the result therefrom;

(C) Any informal resolution and the result therefrom; and

(D) All materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process. A recipient must make these training materials publicly available on its website, or if the recipient does not maintain a website the recipient must make these materials available upon request for inspection by members of the public.

(ii) For each response required under § 106.44, a recipient must create, and maintain for a period of seven years, records of any actions, including any supportive measures, taken in response to a report or formal complaint of sexual harassment. In each instance, the recipient must document the basis for its conclusion that its response was not deliberately indifferent, and document that it has taken measures designed to restore or preserve equal access to the recipient's education program or activity. If a recipient does not provide a complainant with supportive measures, then the recipient must document the reasons why such a response was not clearly unreasonable in light of the known circumstances. The documentation of certain bases or measures does not limit the recipient in the future from providing additional explanations or detailing additional measures taken.

■ 12. Add § 106.46 to subpart D to read as follows:

**§ 106.46 Severability.**

If any provision of this subpart or its application to any person, act, or practice is held invalid, the remainder of the subpart or the application of its provisions to any person, act, or practice shall not be affected thereby.

■ 13. Add § 106.62 to subpart E to read as follows:

**§ 106.62 Severability.**

If any provision of this subpart or its application to any person, act, or

practice is held invalid, the remainder of the subpart or the application of its provisions to any person, act, or practice shall not be affected thereby.

■ 14. Subpart F is revised to read as follows:

**Subpart F—Retaliation**

Sec.

106.71 Retaliation.

106.72 Severability.

**Subpart F—Retaliation**

**§ 106.71 Retaliation.**

(a) *Retaliation prohibited.* No recipient or other person may intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by title IX or this part, or because the individual has made a report or complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing under this part. Intimidation, threats, coercion, or discrimination, including charges against an individual for code of conduct violations that do not involve sex discrimination or sexual harassment, but arise out of the same facts or circumstances as a report or complaint of sex discrimination, or a report or formal complaint of sexual harassment, for the purpose of interfering with any right or privilege secured by title IX or this part, constitutes retaliation. The recipient must keep confidential the identity of any individual who has made a report or complaint of sex discrimination, including any individual who has made a report or filed a formal complaint of sexual harassment, any complainant, any individual who has been reported to be the perpetrator of sex discrimination, any respondent, and any witness, except as may be permitted by the FERPA statute, 20 U.S.C. 1232g, or FERPA regulations, 34 CFR part 99, or as required by law, or to carry out the purposes of 34 CFR part 106, including the conduct of any investigation, hearing, or judicial proceeding arising thereunder. Complaints alleging retaliation may be filed according to the grievance procedures for sex discrimination required to be adopted under § 106.8(c).

(b) *Specific circumstances.* (1) The exercise of rights protected under the First Amendment does not constitute retaliation prohibited under paragraph (a) of this section.

(2) Charging an individual with a code of conduct violation for making a materially false statement in bad faith in the course of a grievance proceeding



under this part does not constitute retaliation prohibited under paragraph (a) of this section, provided, however, that a determination regarding responsibility, alone, is not sufficient to conclude that any party made a materially false statement in bad faith.

**§ 106.72 Severability.**

If any provision of this subpart or its application to any person, act, or practice is held invalid, the remainder of the subpart or the application of its provisions to any person, act, or practice shall not be affected thereby.

- 15. Add subpart G to read as follows:

**Subpart G—Procedures**

Sec.

106.81 Procedures.

106.82 Severability.

**Subpart G—Procedures**

**§ 106.81 Procedures.**

The procedural provisions applicable to title VI of the Civil Rights Act of 1964 are hereby adopted and incorporated herein by reference. These procedures may be found at 34 CFR 100.6–100.11 and 34 CFR part 101. The definitions in § 106.30 do not apply to 34 CFR 100.6–100.11 and 34 CFR part 101.

**§ 106.82 Severability.**

If any provision of this subpart or its application to any person, act, or practice is held invalid, the remainder of the subpart or the application of its provisions to any person, act, or practice shall not be affected thereby.

**Subject Index to Title IX Preamble and Regulation [Removed]**

- 16. Remove the Subject Index to Title IX Preamble and Regulation.

- 17. In addition to the amendments set forth above, in 34 CFR part 106, remove the parenthetical authority citation at the ends of §§ 106.1, 106.2, 106.3, 106.4, 106.5, 106.6, 106.7, 106.11, 106.12, 106.13, 106.14, 106.15, 106.16, 106.17, 106.21, 106.22, 106.23, 106.31, 106.32, 106.33, 106.34, 106.35, 106.36, 106.37, 106.38, 106.39, 106.40, 106.41, 106.42, 106.43, 106.51, 106.52, 106.53, 106.54, 106.55, 106.56, 106.57, 106.58, 106.59, 106.60, and 106.61.

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# A New Era of Title IX

(Module 2: In-Depth Training for Title IX  
Coordinators/Affirmative Action Officers)

**Wednesday, September 9, 2020**

9:00 AM - 12:30 PM | Zoom

Meeting ID: 822 6156 2961

Passcode: 657606

**Presented by**

Ann S. Chapman, Isabel B. Ekman & Allen L. Kropp

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## Join us for the next 2 modules:

- **Module 3 | September 11**  
Investigator Training
  - **Module 4 | September 15**  
Relevance Assessments required Under Title IX: Questions and Evidence
-

## **A Guide for Affirmative Action Officers and Title IX Coordinators in Maine Schools**

*Ann S. Chapman, Isabel B. Ekman and Allen L. Kropp*

### **A. Introduction**

Maine school units and school officials pride themselves on complying with all nondiscrimination, harassment, and bullying laws, and ensuring that all students are able to access the full range of educational and extracurricular activities offered at school. Similarly, our schools work to ensure that all personnel are able to fulfill their responsibilities in a work environment that is free of discrimination and harassment.

The range of discrimination issues that arise in schools today are quite varied and are only becoming more and more complex. Critical to the school unit's efforts to address discrimination are the Affirmative Action Officer and the Title IX Coordinator, who must address and resolve discrimination and harassment issues that arise in school, during a school event or activity, or otherwise impact students or others while at school. Some school units choose to assign both of these roles to the same individual, while others may assign different individuals to each post. In either case, this guide describes the roles of these key officials, as well as the primary discrimination laws that they are charged with implementing.

Perhaps the most common form of prohibited discrimination at school is when an individual – student, employee, visitor, etc. – is harassed because of their race, national origin, religion, sex, sexual orientation, disability, or some other protected status. Affirmative Action Officers (and/or Title IX Coordinators) must be adept at promptly assessing, addressing and resolving instances of harassment and maintaining a safe and productive school environment.

Maine law requires that school units appoint an Affirmative Action Officer (AAO).<sup>1</sup> Similarly, Title IX of the Education Amendments of 1972 (Title IX), which is enforced by the United States Department of Education's Office for Civil Rights (OCR),<sup>2</sup> requires that all schools receiving federal funding designate a Title IX Coordinator. The title "Affirmative Action Officer" has been traditionally used to refer to the person responsible for addressing all discrimination issues in a school unit. As a matter of law, however, the position of AAO and Title IX Coordinator have specific responsibilities, regardless of whether a school unit assigns different individuals or a single person to fulfill those roles.

This guide outlines the major laws that impact the duties of both AAOs and Title IX Coordinators, as well as other student-focused laws that are often connected

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<sup>1</sup>5 M.R.S. § 783.

<sup>2</sup>34 C.F.R. Part 106. OCR is also responsible for enforcing Title VI of the Civil Rights Act of 1964, Section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, Title II of the Americans with Disabilities Act of 1990, and the Boy Scouts of America Equal Access Act.

with these positions. This guide also addresses the important responsibilities of each position.

## **B. Overview of State and Federal Laws**

### **1. Laws Addressed by the Affirmative Action Officer**

By far the most demanding responsibility of the AAO is to ensure compliance with the various state and federal laws that protect employees and applicants for employment from discrimination. A discussion of these laws follows. As is noted in Part 3, many of these laws also apply to students, and AAOs should be familiar with both applications of the law.

#### **a. Title VII of the Civil Rights Act of 1964**

Title VII is a federal law that prohibits discrimination on the basis of race, color, religion, sex, or national origin in employment, including hiring, retention, and promotion.<sup>3</sup> The various types of discrimination prohibited by this law include the following:

##### *Race/Color*

Title VII prohibits employers from making employment decisions that are based on the employee or applicant's race, or stereotypes about abilities or qualities associated with that race. This prohibition applies regardless of an individual's race and also protects against discrimination towards multi-racial individuals.

##### *Religion*

It is unlawful for an employer to treat employees or job applicants more or less favorably because of their religious beliefs or practices. This means that employees may not be forced to participate in religious activities and that employers must reasonably accommodate employees' sincerely-held religious practices unless doing so would be unduly burdensome on the employer.

##### *National Origin*

National origin discrimination means treating an individual less favorably because they come from a different place, speak a different language (unless there are legitimate reasons for requiring that an employee speak a particular language), have a particular accent, or have a particular ethnic background.

##### *Sex*

Sex based discrimination can take a variety of forms, including:

- *Pregnancy discrimination* - The Pregnancy Discrimination Act of 1978 amended Title VII to prohibit discrimination

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<sup>3</sup>42 U.S.C. § 2000e, *et seq.*

on the basis of pregnancy, childbirth, and related medical conditions. This federal law makes it unlawful for an employer to refuse to hire a pregnant woman, refuse to permit a woman to work while pregnant (assuming she is able to perform her job), or provide different health or other fringe benefits to pregnant women.

- *Sexual stereotyping* - This is a form of discrimination in which an employer acts on the belief that a man or woman should act in a particular way. For example, an employer firing a woman because she's not "feminine enough" because she refuses to wear makeup, jewelry, or have her color her hair.
- *Sexual harassment*<sup>4</sup> – This form of sex-based discrimination is a major focus for employers, and ranges from direct requests for sexual favors to any type of workplace condition (comments, gestures, messages, writings, etc.) that creates a hostile work environment.

#### *Retaliation*

Importantly, Title VII also prohibits an employer from taking adverse employment action against an employee for asserting their rights under that law.

#### b. Age Discrimination in Employment Act

The Age Discrimination in Employment Act (ADEA) is a federal law that protects individuals who are 40 years of age or older from employment discrimination based on age.<sup>5</sup> The ADEA's protections apply to both employees and job applicants. Under the ADEA, it is unlawful to discriminate against a person because of their age with respect to any term, condition, or privilege of employment including, but not limited to, hiring, firing, promotion, layoff, compensation, benefits, job assignments, and training.

#### c. Genetic Information Nondiscrimination Act

The Genetic Information Nondiscrimination Act (GINA) is a federal law which took effect in 2008 that prohibits employers from discriminating against employees or applicants based on their genetic information.<sup>6</sup>

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<sup>4</sup>See, generally, 29 C.F.R. § 1604.11. Keep in mind that sexual harassment against employees is now also addressed in the new Title IX regulations, 34 C.F.R. Part 106, discussed in Section 2.

<sup>5</sup>29 U.S.C. § 621 *et seq.*

<sup>6</sup>42 U.S.C. §2000ff *et seq.*

d. Americans with Disabilities Act

Under the Americans with Disabilities Act (the ADA), employers are prohibited from discriminating against qualified individuals with disabilities in job application procedures, hiring, firing, advancement, compensation, job training, and other terms, conditions and privileges of employment.<sup>7</sup>

An individual with a disability is a person who:

- Has a physical or mental impairment that substantially limits one or more major life activities;
- Has a record of such an impairment; or
- Is regarded as having such impairment.

A qualified employee or applicant with a disability is an individual who, with or without reasonable accommodations, can perform the essential functions of the job in question. Reasonable accommodations may include, but are not limited to:

- Making existing facilities used by employees readily accessible to and usable by persons with disabilities.
- Job restructuring, modifying work schedules, reassignment to a vacant position.
- Acquiring or modifying equipment or devices, modifying examinations, training materials or policies, and providing qualified readers or interpreters.

An employer is required to make a reasonable accommodation to the known disability of a qualified applicant or employee if it would not impose an “undue hardship” on the operation of the employer’s business. Undue hardship is defined as an action requiring significant difficulty or expense when considered in light of factors such as an employer’s size, financial resources, and the nature and structure of its operation.

Under the ADA, disability determinations must be made “without regard to the ameliorative effects of mitigating measures” such as medication, hearing aids, other technology, reasonable accommodations, “learned behavioral or adaptive neurological modifications,” or other such interventions – with the exception of ordinary eyeglasses or contact lenses. Additionally, an impairment “that is episodic or in remission” is considered a disability if it would “substantially limit a major life activity when active.”

e. Section 504 of the Rehabilitation Act of 1973

Section 504 of the Rehabilitation Act of 1973 (Section 504) prohibits discrimination against qualified individuals with disabilities

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<sup>7</sup>42 U.S.C. § 2000e *et seq.*

employed in programs that receive federal financial assistance.<sup>8</sup> It is generally interpreted to be consistent with the ADA in terms of scope and protections.

f. Equal Pay Act of 1963

The Equal Pay Act (EPA) protects men and women who perform substantially equal work in the same establishment from sex-based wage discrimination.<sup>9</sup>

g. Maine Human Rights Act

The Maine Human Rights Act (MHRA), a state law, is essentially a combination of the federal laws described above and prohibits discrimination in employment on the basis of race, color, sex, sexual orientation, gender identity, physical or mental disability, religion, age, ancestry or national origin.<sup>10</sup> As explained below, the MHRA overlaps a great deal with federal laws in terms of protections against discrimination and also extends beyond federal laws (including Title IX) in a number of important ways (*e.g.*, in prohibiting discrimination based on sexual orientation and gender identity).

h. Whistleblower's Protection Act (WPA)

This Maine statute<sup>11</sup> protects employees who (1) make good faith complaints about violations of law or safety; or (2) refuse to commit illegal acts or engage in unsafe activities. It is not necessary that the employee be correct in making a complaint to be entitled to protection under this law. Thus, an employee who complains that a certain action of the employer is illegal, even when it is not, is entitled to the same level of protection conferred on an employee who makes a valid claim. Except in exceptional circumstances, in order to be entitled to WPA protection, an employee must make the complaint to the employer and give the employer adequate time to make corrections before going further.

i. Hazing

Maine has an “anti-hazing” law which requires school boards to adopt and publicize policies prohibiting “injurious hazing” meaning any action or situation, including harassing behavior, that recklessly or intentionally endangers the mental or physical health of any school personnel or student enrolled in a public school.<sup>12</sup>

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<sup>8</sup>29 U.S.C. § 794.

<sup>9</sup>29 U.S.C. § 206.

<sup>10</sup>5 M.R.S. § 4571.

<sup>11</sup>26 M.R.S. § 831 *et seq.*

<sup>12</sup>20-A M.R.S. § 6553.

j. Other Laws Pertaining to Employees

In addition to the discrimination laws for which the AAO is responsible, there are other laws that AAOs should be familiar with because they provide rights to employees that may be impacted during or after an affirmative action investigation.

*Confidentiality of Personnel Files*

20-A M.R.S. § 6101 requires that information pertaining to an employee, an applicant for employment, or a member of an employee's immediate family be kept confidential if it relates to the following:

- All information, working papers and examinations used in the examination or evaluation of all applicants for employment;
- Medical information of any kind;
- Performance evaluations, personal references and other reports and evaluations reflecting on the quality or adequacy of the employee's work or general character compiled and maintained for employment purposes;
- Credit information;
- Personal history, general character or conduct of the employee or a member of the employee's immediate family (except information included under directory information);
- Complaints, charges of misconduct, replies to complaints and charges of misconduct and memoranda and other materials pertaining to disciplinary action;
- Social security number;
- Teacher action plan and support system documents and reports maintained for certification purposes;
- Criminal history record information.

There is an exception to these confidentiality requirements for any written record of a decision involving disciplinary action taken with respect to an employee by the school board.<sup>13</sup>

*Provision of Personnel Files*

26 M.R.S. § 63 requires that employers provide all employees with a complete copy of their personnel file once a year, if requested. A personnel file is defined more broadly than just an official file and includes virtually all information about the employee's "character, credit, work

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<sup>13</sup>1 M.R.S. § 497(2).



habits, compensation and benefits.” It must be made available within 10 days of a request.

## **2. Laws Addressed by the Title IX Coordinator**

### **a. Title IX of the Education Amendments of 1972**

Title IX is the federal law that protects students, employees, and others from discrimination on the basis of sex in school programs and activities. The law applies to all educational organizations that receive federal funds, including public elementary and secondary schools. It states:

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

Historically, Title IX was understood to focus on athletics, and many point to Title IX as the primary vehicle behind the significant gains in participation levels of female athletes in school sports, and in the quality of female athletic programs in high schools and colleges. However, sex-based discrimination under Title IX can take many forms including, for example, limitations based on pregnancy, sex-based restrictions for courses or extracurricular activities, or differences in employment opportunities or disciplinary practices due to sex. In general, Title IX mandates equity in the treatment of males and females across all aspects of school, unless the law provides a specific exception (for example, Title IX does allow for separate, single-sex classes that primarily deal with human sexuality).<sup>14</sup> More recently, the emphasis on Title IX has centered on the subject of sexual harassment, which is discussed in detail below. The Title IX Coordinator must be familiar with and prepared to address any form of sex-based discrimination that arises in school.

## **3. Other Discrimination Laws Protecting Students**

Aside from Title IX, there are other laws that protect students from discrimination and harassment. School units should carefully consider how compliance with these laws is handled. Ideally, the AAO and/or Title IX Coordinator would either be responsible for or involved in coordinating such compliance. In our experience, many problems that school units face in addressing these issues stem from a lack of communication and coordination among school administrators addressing these issues. It can be very useful to discuss these issues with legal counsel.

Below are the other laws relating to discrimination and harassment that Title IX coordinators and Affirmative Action Officer must understand, even if they are not directly responsible for compliance with these laws.

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<sup>14</sup>OCR’s Title IX Resource Guide addressing the full scope of Title IX requirements applicable to schools is located in the Appendix.

Some of these laws will look familiar from the earlier discussion on laws that protect employees and applicants for employment, but apply differently to students in a number of ways.

a. Maine Human Rights Act

The MHRA provides extensive protections to students in Maine. Protected categories for students include race, color, sex, sexual orientation, gender identity, physical or mental disability, religion, ancestry, and national origin, but not age. In our view, it makes sense for the Title IX Coordinator to at least be responsible for addressing complaints concerning sex, sexual orientation, and gender identity, in addition to Title IX complaints, to ensure all legal requirements are met.

b. Americans with Disabilities Act

As noted earlier, the ADA prohibits discrimination on the basis of disability in programs and services offered by public entities, including public schools.<sup>15</sup> Thus, schools may not exclude a qualified student with a disability from services, programs, and activities offered by the school, and may be required to make modifications in policies, practices and procedures to accommodate people with disabilities. This requirement includes providing access to athletic opportunities and other extracurricular opportunities. Additionally, schools must operate their programs so that they are “readily accessible and useable” by people with disabilities.

Interestingly, the ADA requires school units to assign an ADA Coordinator to ensure compliance with that law (much like Title IX requires a Coordinator to be responsible for Title IX compliance). Under the ADA, the school unit must also develop and publish a grievance procedure for the prompt and equitable resolution of complaints of disability discrimination.<sup>16</sup>

c. Section 504 of the Rehabilitation Act of 1973

Section 504 prohibits discrimination on the basis of disability in programs that receive federal financial assistance.<sup>17</sup> The law also requires schools to provide accommodations to “qualified” students with disabilities, to ensure that the student receives a “free and appropriate public education” (FAPE). A Section 504 plan, which documents these accommodations, is not the same as an Individualized Education Program (IEP) in that it focuses only on accommodations and does not provide specially designed instruction. Importantly, however, students with IEPs

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<sup>15</sup>42 U.S.C. § 12131 *et seq.*

<sup>16</sup>28 C.F.R. § 35.107. Typically, in Maine school units this procedure is consolidated with the complaint procedures for other protected categories, *see* DWM/MSMA Samples ACAA/ACAA-R and ACAB/ACAB-R.

<sup>17</sup>29 U.S.C. § 794.

are equally protected from disability discrimination (e.g., disability harassment, or different treatment in school programs), as are disabled students under Section 504.

Like the ADA, Section 504 requires schools to have a Section 504 Coordinator to ensure compliance with Section 504, and to establish grievance procedures for resolving disability discrimination complaints. Typically, a single person serves as the school unit's ADA/504 Coordinator since the requirements in both discrimination laws are so similar.

d. Title VI of the Civil Rights Act of 1964

This federal statute prohibits discrimination based on race, color, or national origin in programs or activities receiving federal financial assistance (e.g. from the U.S. Department of Education).<sup>18</sup> Examples of discrimination covered under this statute include racial harassment, school segregation, and the denial of language services to English Language Learners.

e. Hazing

Maine's anti-hazing law discussed earlier applies to students as well as employees. As noted, any action or situation, including harassing behavior, that recklessly or intentionally endangers the mental or physical health of any employee or student enrolled in a public school is prohibited.<sup>19</sup> This law was expanded in 2019 to include "any activity expected of a student as a condition of joining or maintaining membership in a group that humiliates, degrades, abuses or endangers the student, regardless of the student's willingness to participate in the activity."<sup>20</sup>

Affirmative Action Officers and Title IX Coordinators should be aware of this reference to "harassing behavior" as there may be occasions when such conduct constitutes a violation under other federal and/or state nondiscrimination laws.

f. The Maine Bullying Law

Maine has a detailed and robust state statute that prohibits bullying against any student that occurs at school or on school grounds, at school activities, or while students are being transported to school or school activities.<sup>21</sup> The law also prohibits bullying that occurs in locations other than school, including bullying through the use technology (or cyberbullying), if the bullying infringes on the rights of a student at school.

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<sup>18</sup>42 U.S.C. § 2000d et seq.

<sup>19</sup>See 20-A M.R.S. § 6553.

<sup>20</sup>*Id.*

<sup>21</sup>See 20-A M.R.S.A. § 6554.

Specifically, bullying is defined in the law as any written, oral or electronic expression or physical act that:

- causes a student physical harm or damage to property;
- places the student in reasonable fear of physical harm or damage to property;
- interferes with the student's educational experience; or
- is based on actual or perceived characteristics (related to the student's race, color, religion, sex, ancestry, national origin, physical or mental disability or sexual orientation).

In some respects, the bullying law may seem redundant given the other laws prohibiting discrimination described throughout this guide. Notably, the latter portion of the bullying law refers to bullying that is based on certain characteristics (race, color, religion, sex, disability, etc.). Thus, when a student is harassed based on such characteristics, the school's obligations under both the relevant discrimination law and Maine's bullying law are triggered. In such instances it is appropriate, and advisable, to perform a single, full investigation as a means of complying with both the discrimination laws detailed above, as well as with the bullying law.

On the other hand, Maine law is intended to protect all students – regardless of their personal characteristics – from conduct that physically harms a student (or her/his property), creates fear or a hostile educational environment, or interferes with the student's ability to participate in school. It is behavior of this sort that is the essence of bullying under Maine law, whether or not the behavior also constitutes harassment (or other forms of discrimination), so that all students can feel safe and have the opportunity to thrive in school.

School officials, including Affirmative Action Officers, Title IX Coordinators, principals, and other school-based administrators should all be familiar with the requirements of this important law, and be able to coordinate the school's response whenever the bullying law, or any of the Federal and State discrimination law as detailed in this guide, are implicated.

### **C. Appointment and Duties of the Affirmative Action Officer**

Maine statutory law provides that:

Officials and supervisory employees shall appoint, assign and promote personnel on the basis of merit and fitness, without regard to race, color, religious creed, national origin, sex, ancestry, age, physical [disability] or mental [disability], unless related to a bona fide occupational qualification. Each appointing authority shall designate an affirmative action officer. The officer must be so placed within the agency's organizational structure that he or she shall have direct access to the appointing authority. Each department or

agency shall prepare an affirmative action program for that department or agency in accordance with criteria set forth by the Bureau of Human Resources.

5 M.R.S. § 783. For school units, the “appointing authority” referred to in the statute is the school unit’s school board or school committee. Although the AAO must have direct access to the board, in most cases, they will work closely with the Superintendent to investigate and address complaints.

### **1. Addressing Employee Discrimination Complaints**

Broadly, an Affirmative Action Officer is charged with ensuring compliance with the laws addressed in Section B (1). This includes investigating and responding to complaints from employees of discrimination based on a protected characteristic. AAOs must have a solid understanding of these laws and what constitutes employee discrimination or harassment.

### **2. Affirmative Action Plan and Training**

School units in Maine are required to adopt an affirmative action plan that provides, among other things, a description of the school unit’s nondiscriminatory hiring practice and plans for in-service training programs on gender equity.<sup>22</sup> The Affirmative Action Plan must be reviewed on an annual basis and any updates must be provided to the Commissioner of Education.<sup>23</sup> The AAO is responsible for ensuring that such a plan is in place and that it is in compliance with the law.<sup>24</sup>

Maine law requires school units to train employees in a number of different areas. 26 M.R.S. § 807 requires that employers, including school units, provide training to new employees within one year of employment on a description of sexual harassment,<sup>25</sup> utilizing examples; the internal complaint process available to the employee; the legal recourse and complaint process available through the [Maine Human Rights Commission]; directions on how to contact the commission; and the protection against retaliation.

Additional training is required for supervisory employees, who are obligated to ensure “immediate and appropriate corrective action” in addressing sexual harassment complaints. School units are also required to provide periodic gender equity training to board members, administrators and employees.<sup>26</sup>

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<sup>22</sup>20-A M.R.S. § 4502(4-A).

<sup>23</sup>*Id.*

<sup>24</sup>Drummond Woodsum is in the process of updating its model Affirmative Action Plan and anticipates it will be available by October, 2020.

<sup>25</sup>Bear in mind that since the effective date of the new Title IX regulations on August 14, 2020, there are two distinct definitions of sexual harassment: one under Title IX and one under state law/Title IX. The Title IX Coordinator must understand both of these definitions.

<sup>26</sup>20-A M.R.S. § 4502(4-A).

Finally, both federal and state laws include requirements that employers post notices of employee rights pertaining to various laws at locations in the workplace where they can be seen. Ensuring that all required postings are so displayed is often the responsibility of the AAO.<sup>27</sup>

## **D. Appointment and Duties of the Title IX Coordinator**

Title IX prohibits discrimination on the basis of sex in all public school programs and activities. A chief requirement of the law is that school units designate at least one employee as the “Title IX Coordinator,” who is responsible for ensuring that the school unit fulfills all of its responsibilities under Title IX. The school unit must notify the school community (employees, students, parents, etc.) of the person(s) serving as the Title IX Coordinator, including their contact information.

Title IX also requires that each school unit adopt and publish grievance procedures for promptly and effectively resolving complaints of sex-based discrimination, including allegations of sexual harassment. The Title IX Coordinator must be fully knowledgeable about the school unit’s grievance procedures and must ensure that those procedures, as well as the school’s policies prohibiting sex-based discrimination, are followed in response to instances or allegations of such discriminatory conduct.

The Title IX Coordinator is expected not only to oversee compliance with Title IX and the school unit’s related policies and procedures, but also to:

- Educate school community members on how to file a complaint of sex discrimination;
- Coordinate complaint investigations;
- Ensure that any remedies resulting from an investigation are implemented; and
- Identify patterns or assess the effects on others that may warrant additional action.

In sum, the Title IX Coordinator is the school unit’s chief official for ensuring that the school environment for students, employees, and others participating in the school’s academic, extracurricular, athletic or other programs is free from unlawful sex discrimination, including sexual harassment (as discussed more fully below).<sup>28</sup>

### **1. Independence of Title IX Coordinator**

In guidance materials, OCR has stressed the importance of ensuring that the Title IX Coordinator is afforded sufficient independence to avoid any potential conflict of interest when addressing issues of sex-based discrimination. Accordingly, the Title IX Coordinator should report directly to senior administration and should not have other job responsibilities that could

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<sup>27</sup>A helpful list of required state and federal posters and links to the posters is available at: <http://www.maine.gov/labor/posters>.

<sup>28</sup>See <https://www2.ed.gov/about/offices/list/ocr/docs/dcl-title-ix-coordinators-guide-201504.pdf>

create a conflict of interest with the Coordinator's responsibility to ensure compliance with Title IX. Such conflicts may arise when the Title IX Coordinator role is assigned to the Superintendent, a school principal or the school unit athletic director. The Title IX Coordinator also must be free of conflict when responding to individual complaints of sex discrimination (e.g., due to a close friendship with a party to a complaint).

## **2. Responding to Complaints of Sexual Harassment under Title IX**

### **a. Sexual Harassment and OCR's May 2020 Title IX Regulations**

Sexual harassment claims are among the most sensitive, complex and challenging issues school units have to address. Colleges and universities in particular, have made significant strides in responding to, and proactively addressing, sexual harassment, and public K-12 schools have worked hard to catch up. Given the increasing frequency of sexual harassment complaints, particularly in this age of social media, Title IX Coordinators (and other school unit officials and administrators) must understand the breadth of Title IX implications whenever sexual harassment occurs.

Since the early 1990s, federal case law has made clear that sexual harassment in school is a form of sex-based discrimination prohibited under Title IX. As a result, public schools can be found in violation of Title IX – and subjected to potential liability via an OCR investigation or in a civil lawsuit – if the school unit has been informed of an incident of sexual harassment and fails to respond appropriately.

Between the late 1990s and 2014, OCR published a series of Title IX guidance documents advising schools on a broad range of responsibilities and steps they should take when notified of possible sexual harassment, regardless of the form of the sexual conduct or where it had taken place. In 2017, however, OCR withdrew those policies, and in May of 2020 OCR issued new Title IX regulations for addressing sexual harassment. The new regulations revised the scope of a school's responsibilities and provided a lengthy series of procedural steps the school unit must follow – and the Title IX Coordinator must oversee – when receiving, investigating, and resolving complaints of sexual harassment under Title IX.

The 2020 Title IX regulations make clear that a school unit's obligation to respond to instances of sexual harassment applies to sexual harassment involving students, employees, volunteers, and others participating in the school unit's programs and activities. According to the Title IX regulations, schools are now required to respond to sexual harassment that occurs in an educational program or activity conducted or sponsored by the school, if it takes one of the following forms:

- *"Quid Pro Quo" sexual harassment* by a school employee, which refers to the conditioning a school aid, benefit, or service

(such as a better grade or a college recommendation) on an individual's participation in unwelcome sexual conduct;

- *"Hostile Environment" sexual harassment* which refers to unwelcome conduct based on sex that is so severe, pervasive, and objectively offensive that it effectively denies a person's access to the school unit's education programs and activities; or

*Sexual Assault, Dating Violence, Domestic Violence, and Stalking*, as defined by Federal law.<sup>29</sup>

Under the new Title IX regulations, school units are responsible for responding to any incident of alleged sexual harassment that is brought to the attention of a school employee. In other words, the school unit is considered to have "actual knowledge" (as stated in the regulations) of the harassment if an employee is aware of the incident. As a result, all school employees must be trained to immediately report instances of sexual harassment to the Title IX Coordinator. The Title IX Coordinator is responsible for providing supports to the alleged victim and, if a formal complaint is filed, ensuring that an impartial and comprehensive investigation of the allegations is conducted.

The steps involved in a Title IX sexual harassment investigation under the new regulations – which include written notification to the parties, the parties' rights to representation and to review all investigation evidence, and many other steps – are extensive and intended to ensure that both the alleged victim and respondent (alleged perpetrator) are treated equitably during the investigation process. Each procedural step should be specified in the school unit's grievance procedure discussed previously. In addition, disciplinary measures can only be imposed against the respondent if the school's assigned decision-maker determines, based on the investigation, that the responding party is responsible for engaging in prohibited sexual harassment.

#### **b. Sexual Harassment under State Law**

It is important to note that sometimes an instance of alleged sexual harassment does not fall within the Title IX definitions. For example, sexual harassment that occurs off school property and not as part of a school program or activity, would not constitute sexual harassment under the Title IX regulations and, therefore, would not be investigated under Title IX. However, a school must still address the alleged harassment pursuant to the Maine Human Rights Act and, in some cases, other federal laws.<sup>30</sup> Those laws generally define *"hostile environment sexual harassment"* more broadly than Title IX to mean:

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<sup>29</sup>See 20 U.S.C. 1092(f)(6)(A)(v), and 34 U.S.C. 12291(a)(8), (10), & (30).

<sup>30</sup>Specifically, Title VII of the Civil Rights Act when the victim of the alleged harassment is an employee.



conduct of a sexual nature that is unwelcome and interferes with a student's academic performance, or an employee's work, performance, or creates an intimidating, hostile or offensive environment for the victim. Thus, even if an alleged instance of sexual harassment does not trigger the school unit's obligation to respond in accordance with Title IX (and the specific grievance procedure required for such complaints), the school unit must still respond under its complaint procedure for addressing harassment under other state and/or federal laws (e.g., Title VII which protects employees). It is critical, therefore, that Title IX Coordinators are fully trained in assessing allegations of sexual harassment, determining which complaint procedure applies, and most importantly, responding promptly and effectively to instances of alleged harassment.

### **3. Gender Identity**

The application of Title IX to transgender students has also received a great deal of attention in recent years. OCR's position on whether Title IX does, or does not, protect persons from discrimination based on their sexual orientation or gender identity continues to shift given the preferences of the governing administration at the time. What is clear, and was reinforced by OCR in its commentary to the May 2020 Title IX regulations, is that LGBTQ persons, or any other individual who does not conform to traditional or stereotypical notions of sex, sexuality, or gender, are protected from sexual harassment, including sexual harassment prohibited under the new Title IX regulations. Thus, anyone may experience sexual harassment, irrespective of their gender identity or sexual orientation, warranting a prompt and effective response on the part of the school.

Although Title IX may not prohibit discrimination based on gender identity or sexual orientation, Maine law clearly does. All school administrators must be aware that in 2014, the Maine Law Court affirmed the right of transgender students to use facilities consistent with their gender identity under the Maine Human Rights Act (MHRA). Accordingly, pursuant to the MHRA, schools must not treat a transgender student differently from the way they treat other students based on their gender identity. Once notified that a student is transgender, a school has the obligation to, among other things, use names and pronouns consistent with the student's gender identity, and permit access to restrooms and locker room facilities that are consistent with the person's gender identity. Overall, the school must afford such individuals a safe nondiscriminatory environment, meaning that the Title IX Coordinator should be familiar with and protect the rights of transgender individuals under the MHRA, even though the level of protection under Title IX is unclear.

## **E. Conclusion**

As is clear from the breadth of information above, the roles of the AAO and Title IX Coordinator are extensive, complex, and have become increasingly challenging. At the same time, those who fulfill either one or both of these positions are critical to ensuring that the school environment is free of discrimination and harassment, and maintaining a safe and healthy environment for students, employees and other school community members.

## Sexual Harassment Under Title IX and Other Laws: Side-By-Side

	Title IX	Title VII/State Law
<b>Quid Pro Quo</b>	By an employee against employee or student – conditioning school aid, benefit or service on individual’s participation in unwelcome sexual conduct.	By an employee or student – Submission to unwelcome sexual conduct is made explicitly or implicitly a term or condition of education/employment benefits or is used as a basis for decisions on education/employment benefits.
<b>Hostile Environment</b>	Unwelcome conduct based on sex that a reasonable person would find so severe, pervasive AND objectively offensive that it effectively denies equal access to education program/activities.	Conduct on the basis of sex that has the purpose or effect of unreasonably interfering with an individual’s work performance or creating an intimidating, hostile OR offensive school/work environment.
<b>Other Conduct Covered</b>	Sexual assault, dating violence, domestic violence, stalking, retaliation.	Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature [can include conduct defined under Title IX], and retaliation.
<b>Scope</b>	Conduct that takes place within education programs and activities in the United States.	



**Title IX Complaint Procedure**



**Discrimination/Harassment  
Complaint Procedure**

## Other State Laws Prohibiting “Harassment”

	Maine Bullying Law	Maine Hazing Law
<b>Scope of Conduct</b>	<p>Bullying; cyberbullying; harassment and sexual harassment covered under ACAA; retaliation; making knowingly false accusations of bullying behavior.</p> <p>A. “Bullying” includes, but is not limited to, a written, oral or electronic expression or a physical act or gesture or any combination thereof directed at a student or students that:</p> <p>(1) Has, or a reasonable person would expect it to have, the effect of:</p> <p>(a) Physically harming a student or damaging a student's property; or</p> <p>(b) Placing a student in reasonable fear of physical harm or damage to the student's property; <b>OR</b></p> <p>(2) Interferes with the rights of a student by:</p> <p>(a) Creating an intimidating or hostile educational environment for the student; or</p> <p>(b) Interfering with the student's academic performance or ability to participate in or benefit from the services, activities or privileges provided by a school; <b>OR</b></p> <p>(3) Is based on a student’s actual or perceived race, color, national origin, ancestry, religion, physical or mental disability, gender, sexual orientation, or any other distinguishing characteristic, or is based on a student’s association with a person with one or more of these actual or perceived characteristics, and that has the effect described in subparagraph (1) or (2) above. (These behaviors might also meet the criteria for harassment as defined in board policy ACAA: Harassment and Sexual Harassment of Students.)</p> <p>B. “Cyberbullying” means bullying through the use of technology or any electronic communication, including, but not limited to, a transfer of signs, signals, writing, images, sounds, data or intelligence of any nature transmitted by the use of any electronic device, including, but not limited to, a computer, telephone, cellular telephone, text messaging device and personal digital assistant.</p>	<p>Injurious hazing is “any action or situation, including harassing behavior, that recklessly or intentionally endangers the mental or physical health of any school personnel or a student enrolled in a school or any activity expected of a student as a condition of joining or maintaining membership in a group that humiliates, degrades, abuses or endangers the student regardless of the student’s willingness to participate in the activity.”</p>
<b>Policy Code/Legal Reference</b>	<p>JICK/JICK-R</p> <p>20-A M.R.S. § § 254 (11-A); Maine Public Law, Chapter 659</p>	<p>ACAD</p> <p>20-M.R.S. § 6553</p>



**Assess if conduct should be addressed under ACAA-R Complaint Procedure, otherwise, use Procedure JICK-R.**



**Also assess whether conduct might be covered by ACAA-R or ACAB-R Complaint Procedures.**

# A New Era of Title IX

## (Module 3: Investigator Training)

**Friday, September 11, 2020**

9:00 AM - 12:30 PM | Zoom

Meeting ID: 879 1755 4804

Passcode: 646701

**Presented by**

Ann S. Chapman, Isabel B. Ekman & Allen L. Kropp

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### Join us for the final module:

- **Module 4 | September 15**  
Relevance Assessments required Under Title IX: Questions and Evidence
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## **How to Conduct Effective Investigations in Schools**

*Ann S. Chapman, Isabel B. Ekman and Allen L. Kropp*

### **A. Introduction**

One of the primary duties of AAOs/Title IX Coordinators is to ensure that all complaints of discrimination and harassment are appropriately investigated. This does not mean that the AAO/Title IX Coordinator will personally conduct all investigations, but the AAO/Title IX Coordinator should be fully familiar with proper investigatory practices in order to ensure that effective investigations are done.

This guide provides a roadmap for planning and conducting effective investigations of both student and employee complaints regarding alleged discrimination and harassment, and can also be used to investigate other misconduct.

#### **Step 1: Assess the Nature of the Complaint/Suspected Misconduct**

As soon as a report/complaint is received, or there is reason to suspect that misconduct has occurred, the AAO/Title IX Coordinator must make an initial assessment of the seriousness of the complaint and what policy/legal violations may have occurred.

Virtually every incident of alleged misconduct warrants some level of investigation. However, complaints concerning discrimination and harassment (as well as complaints that may involve the safety of students, employees or the public; and complaints of potential criminal misconduct) need to be addressed right away and require a greater level of scrutiny than those relating to minor policy violations or workplace annoyances.

Cast a wide net and make sure you review all the possible relevant policies/procedures associated with the alleged misconduct so that you are sure you are applying the correct policy/procedure for the situation. For instance, if there is a complaint that a student or employee has been harassed, you may need review the following (depending on the information you have received):

- ACAA/ACAA-R – Harassment and Sexual Harassment of Students/Complaint Procedure;
- ACAB/ACAB-R – Harassment and Sexual Harassment of Employees/Complaint Procedure;
- JICK – Bullying and Cyberbullying of Students;
- ACAD – Hazing (applies to students and employees).

The Title IX sexual harassment regulations which became effective on August 14, 2020 include strict definitions and procedures that need to be followed, which makes it more important than ever to ensure that you use the correct

policy/procedure for each report/complaint you receive.<sup>1</sup>

## **Step 2: Take Any Necessary Steps to Ensure Safety and Provide Any Necessary Notices**

If there is any actual or potential injury to people or property, steps should be taken to address the threat, including calling law enforcement, crisis services, and/or removing the student or employee from the school.<sup>2</sup>

At a minimum, if there is an issue between particular employees and/or students, consider whether supportive measures are appropriate to ensure that the parties do not come into contact with each other.

- When students are involved, it is important to notify the parents/guardians, at least in general terms, about what is going on.
- In cases where there is reason to believe that a child has been abused or neglected, be sure to comply with DHHS/District Attorney reporting requirements (review your school board's child abuse policy/procedure for more detail).
- Keep in mind there is a Maine law that requires local school units to notify the Maine Department of Education if a credentialed employee leaves their employment for any reason during a covered investigation, or is disciplined, suspended, or terminated as a result of such an investigation.<sup>3</sup>
- It is important to comply with any collective bargaining requirements or policies that may apply.

## **Step 3: Preserve Evidence**

Preserving evidence of wrongdoing is an important step in an investigation. Sometimes this means taking photographs of the scene of an incident or of a physical injury, or it might mean taking custody of a computer or electronic device. Preservation of evidence can be particularly challenging in an investigation of misconduct that involves social media, texts, emails or access to inappropriate websites because information can so easily be deleted or altered. It is important to act quickly to take screen shots or make copies of information before someone has

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<sup>1</sup>See detailed materials from Modules 1 and 2 for further information. In cases of possible Title IX sexual harassment, some steps of the investigation process will need to be compressed. For instance, although you will not do a full investigative interview at the outset (because no formal complaint has been filed), you will need to meet with the alleged victim (if known), provide supportive measures as appropriate, and explain how to file a formal complaint.

<sup>2</sup> In addition, there are specific requirements concerning "emergency removal or administrative leave" under the Title IX regulations.

<sup>3</sup>A "covered investigation" means an investigation into the conduct of a credentialed employee when there is a reasonable expectation that the investigation will affect the employee's continued employment because the alleged conduct involves "alcohol, illegal drugs, physical abuse, emotional abuse, inappropriate contact between a credential holder and a student, stalking, or similar behavior that endangers the health, safety or welfare of a student." 20-A M.R.S. § 13025.

the chance to delete or alter it. Consider whether in some cases there may be video surveillance available of the incident.

#### **Step 4: Review Documents**

To the extent it has not been done already, it is important to review any relevant documents such as a collective bargaining agreement or contract, other school board policies/procedures, and the personnel records and/or education records of the parties involved. This will ensure that the investigation is conducted in accordance with any particular contract or policy requirements, and the parties' records may be helpful to the investigator in some cases when assessing statements for accuracy and/or assessing credibility.

#### **Step 5: Choose an Investigator**

It is important to choose the right person to conduct each investigation. Although the AAO/Title IX Coordinator is responsible for overseeing the investigation, they may not be the most appropriate person to conduct a particular investigation.<sup>4</sup>

The investigator should:

- Have no bias or conflict of interest;
- Be fair and impartial;
- Be well-trained;<sup>5</sup>
- Have a clear understanding of applicable laws, policies, and rules;
- Be a trusted and respected individual;
- Be able to treat people with respect and sensitivity;
- Be able to get to the truth;
- Be able to ask hard questions;
- Be thorough, but know when to stop;
- Be able to reach conclusions;
- Be a good note-taker and writer;
- Be an effective witness (if necessary).

#### **Step 6: Plan the Investigation**

It is important for the investigator to plan out the investigation. No two investigations are exactly alike and virtually every investigation will differ in some (often unexpected) ways from others. Planning the investigation will include at least

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<sup>4</sup>Under the new Title IX sexual harassment regulations, Title IX Coordinators may conduct investigations, but there may be good reasons to appoint someone else to conduct such investigations.

<sup>5</sup>There are specific training requirements for investigators dealing with Title IX sexual harassment matters.



the following general steps. However, it is important that investigators follow the requirements of the particular complaint procedure applicable to the matter.

- Determine the scope of the investigator's responsibility (and who will be responsible for what discipline and/or other actions may be taken as a result of the investigation).
- Determine what documents/evidence will need to be gathered (in addition to any preserved when the report or complaint was received).
- Determine who will be interviewed (the same person should do all interviews). Sometimes it is difficult to determine the proper scope, but in general it is best to keep the investigation as small as possible and still be thorough. Investigations almost always have an impact in the school, no matter how discreet an investigator is in conducting the investigation.
- Determine whether a site visit will be needed.
- Determine how the investigation will be documented, what kind of report will be written, and who will see it.
- Develop a tentative timeline for the investigation. Some policies/procedures or collective bargaining agreements have specific deadlines that need to be followed. In every case, an effort should be made to conduct and conclude the investigation within a reasonable time, based on the particular circumstances.

### **Step 7: Prepare for the Interviews**

Once the overall plan for the investigation is mapped out, it is important to take the time to prepare for the interviews.

- **Determine sequence of interviews:** Usually (but not always), the complainant should be interviewed first, any witnesses next, and the respondent should be interviewed last (but not always). Except in rare circumstances individuals should not be interviewed together.
- **Determine location of interviews:** Choose a private location. If possible, it is often a good idea to hold the interviews outside of the location where the incident/conduct occurred (for instance, at central office if the incident occurred in a particular school building). It is always a good idea to have water and tissues on hand during interviews, and if possible, there should also be a restroom nearby.
- **Determine how to document interviews:** Consider how interviews will be documented. In most cases, taking notes by hand or on a computer works well. Only the facts should be recorded, not the investigator's impressions of credibility or conclusions. In some cases, it may make sense to have someone present to take notes, but if so, it should be someone who can accurately document what was said and who can keep information strictly confidential. Generally, our recommendation is not

to audio or video record interviews. If you feel that a particular interview should be recorded, we recommend that you consult with legal counsel first. The people you interview should not be allowed to record their interview, as the investigator will have no control over what happens with that recording. You should politely confirm that no one present is recording the interview.

- **Determine whether anyone will or could accompany the persons to be interviewed:** Employees may have a right to have a representative with them in certain situations, parents/guardians may want to be present at interviews of their children, and employees and/or students may ask for a “support” person at an interview. Decisions about these issues should be made on a case-by-case basis depending on the particular circumstances.

In Title IX sexual harassment investigations, the parties have the right to an “advisor” throughout the complaint process, and this advisor may be an attorney.

- **Prepare interview questions:** Questions should be prepared ahead of time (more on questions in the next section). However, the cardinal rule of interviewing is to be flexible, so investigators must be prepared to go where the witness takes them during the interview. An effective investigator recognizes that questions should be tailored to the person being interviewed and the nature of the issue being investigated.

## **Step 8: Conduct Interviews**

The following are some basic tips for conducting effective interviews:

- Show respect for the individual by being on time and prepared for the interview.
- Explain the investigator’s role (“I’m here to find out what happened”); what the individual’s role is in the investigation; the importance of confidentiality<sup>6</sup> and the prohibition against retaliation for participating in the investigation. Ask the individual if they have any questions for you at the outset.
- Individuals are often nervous and not sure what to expect in the interview, even if they have not been accused of any wrongdoing. In such cases, you can ask them if they have any particular concerns about participating in the interview.
- Make sure the individual knows they can take a break to go to the restroom or get some fresh air if they need to (breaks can sometimes be a strategic tool for investigators to use as well).

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<sup>6</sup>Keep in mind that during a Title IX sexual harassment investigation, the parties cannot be prohibited from talking about the situation, but they (or those they speak with) still cannot engage in retaliatory conduct or other conduct that interferes with the investigation process.

- Do not promise that you can keep an individual's identity or statements confidential.
- If there is a union representative or support person/advisor with the individual being interviewed, they should not be answering questions or explaining things for the witness, or asking the investigator questions themselves. This should be explained at the outset of the interview.
- Build rapport with the individual before jumping into investigatory questions. Talking about the weather, what classes and activities a student likes, what their job entails, etc., can help put an individual at ease and shows an interest in them as a person.
- Get the basic information first (such as full name, grade or position, how long they have been employed, etc.).
- Let the individual tell their story first, without jumping in. Ask open-ended questions (e.g. "Tell me what happened," "Tell me about Mr. X's style in class," "Tell me about your relationship with Julie," etc.), rather than questions that suggest the answer (e.g. "Mr. X made suggestive comments to you, didn't he?" "I am here to talk to you about what Johnny did to Suzy," or "Did you look down Ms. Young's shirt?").
- Often there is important background information that provides context for the issue at hand, so make sure to ask questions about the history of the relationship between the parties, etc.
- The hard questions must be asked at some point during the interview (although usually not at the outset!). If someone is accused of a specific act, you will need to ask that person if they engaged in that act, no matter how hard or embarrassing it is to ask about it. You must have either an admission or denial, and obtain their version of what happened, in order to make an accurate assessment about what occurred.
- It is often useful to ask an individual to act out what happened. Have the individual show you exactly where and how they were touched, where people were in the room; or ask them to demonstrate a tone of voice. Ask for details, such as what time it was, what people were wearing, whether the door was open or shut, whether the lights on or off, etc.
- Follow-up on inconsistencies or gaps in a matter of fact manner to avoid defensiveness or the individual shutting down. If an individual has made inconsistent statements or you have reason to doubt their truthfulness, it can be helpful to have them repeat their story later in the interview to see if anything changes.
- For evasive individuals, it is often helpful to drop a line of questioning and come back to it later.

- For hostile individuals, remind them that this is their opportunity to share what they know, and if they refuse, assessments will be based on the totality of facts the investigator knows. Stay calm and try to elicit the reasons for the hostility. If an interview really is not going anywhere, you can end it and say that you may be in touch at a later time.
- Before the end of the interview, be sure to ask the individual if there is anything you did not ask that they think you should know, whether there is anyone else with direct information about the incident, and whether there are any documents, texts, etc. that the individual has or knows about.
- At the end of the interview, thank the individual for their time. Let them know that you may contact them again if there are further questions and invite them to contact you if they think of anything else. If it is one of the parties, let them know what the next steps will be. Remind the individual about confidentiality and that retaliation is prohibited.
- Be as thorough as you can in your first interview, but if there are inconsistencies or gaps based on the totality of the interviews you conduct and information received, do not hesitate to follow up to resolve lingering questions.

### **Step 9: Finish the Investigation**

Even the most seasoned investigator sometimes has difficulty determining when it is time to stop investigating and move on to the next stage. Once the evidence has been gathered and witnesses have been interviewed, the investigator should go over what they have and see if anything else is needed.

Keep in mind that in Title IX sexual harassment investigations, there are specific requirements for sharing evidence with the parties and obtaining their responses to the evidence.

It is important to try to meet any required or self-imposed deadlines, but it is also very important to do a thorough investigation. If necessary, it is better to get an extension for good cause than to rush through a flawed investigation that may be challenged and will reflect poorly on the school unit.

### **Step 10: Reach a Conclusion**

Now it is time to reach a conclusion about the case (other than in Title IX sexual harassment cases, where a separate decision maker determines whether there is a finding of responsibility on the part of the respondent).

Reaching a conclusion is often difficult to do for many reasons: the respondent denies engaging in the conduct and there is no “smoking gun,” there are inconsistencies or contradictions in people’s stories, etc. It is the investigator’s responsibility to weigh the evidence, assess the credibility of all the individuals involved, decide who to believe and who not to believe, and to reach a conclusion as to whether a

policy violation was committed.

Generally speaking, determinations that an individual is responsible for a violation are made based on the preponderance of the evidence standard (“more likely than not”).

### **Step 11: Write the Report**

Careful thought should be given to the issue of what to include in the investigation report. It is important to remember that if the case is litigated later, the report will almost always be admissible in court.

In most cases, a written report should be concise and include basic information about the investigation:

- A statement of what the complaint was about and the scope of the investigation.
- A summary of the respondent’s response to the allegations.
- A list of documents/evidence reviewed.
- A list of witnesses who were interviewed. Whether or not to include summaries of what witnesses said is something that should be discussed at the outset of the case.
- The investigator’s conclusion as to whether the complaint is valid or not (and what policies were violated, if applicable), and the reasons for that conclusion. (This is not applicable in Title IX sexual harassment cases.)

In Title IX sexual harassment cases, the investigator must provide the investigation report to the parties, provide them an opportunity to provide feedback on the report, and consider that feedback before finalizing the report.

Generally speaking, reports should not include recommendations as to what, if any, remedial action should be taken, unless the investigator was assigned that responsibility at the outset.

Investigation reports should not include information that is extraneous to the incident being investigated. For example, if the investigation revealed the existence of more widespread harassment in a school than just that between the complainant and the respondent, that issue should be addressed separately, not in the report on the specific complaint.

Similarly, if the investigator develops opinions as to what employees or others should have done or should not have done to avoid the incident, those opinions should be raised outside of the context of the investigation and should not be included in the report.

### **Step 12-A: Notify People of the Results and Take Appropriate Actions – Non-Title IX Sexual Harassment Matters**

Care should be taken in dealing with people in the aftermath of an investigation, because it is likely that one or even both parties will be unhappy with the results. In addition, in a high profile case, there may be a need to make public statements of some kind – any such statements should be carefully crafted in consultation with legal counsel.

Both the complainant and respondent should be notified that the investigation has been concluded and both should be told whether the allegations were determined to be founded or unfounded. It is worth planning in advance how to handle conversations with affected parties.

How much more each side should be told depends upon whether the investigation deals with employees or students, and what complaint procedure is being followed.

In general, because employment records of public school employees must be kept confidential by law, giving the complainant information as to any discipline imposed is prohibited.

By contrast, Maine’s bullying law requires that a student complainant be informed of: (a) individual remedies offered to the complainant; (b) sanctions imposed upon the respondent that directly relate to the complainant; and (c) other steps to be taken to eliminate the hostile environment and prevent recurrence.<sup>7</sup>

If a conclusion is made that unlawful discrimination or harassment did occur, the next step is to determine what should be done to ensure that such conduct ceases and does not recur.

### **Step 12-B: Title IX Sexual Harassment Matters – The Decision-Maker and Notification Process**

The new Title IX sexual harassment regulations prescribe a process whereby the investigator submits their final report to an assigned decision maker (who cannot be the same person as the investigator or the Title IX Coordinator). After the AAO or Title IX Coordinator has sent the investigation report to the decision maker (and to the parties), the decision maker must provide each party the opportunity to submit written, relevant questions that a party wants asked of any other party or witness. The answers must be provided to each party, who also must be given a chance pose additional, limited follow-up questions.<sup>8</sup>

Subsequently, the decision maker must issue a written determination as to whether the respondent is found “responsible” for sexually harassing conduct. The written determination must include:

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<sup>7</sup>20-A M.R.S § 6554.

<sup>8</sup>These step are intended to afford the parties a chance to question one another without the school having to conduct a “live hearing,” which is only required at the post-secondary level.

- Findings of fact;
- Conclusions as to whether the alleged conduct occurred;
- A rationale for the result as to each allegation in the complaint;
- Any disciplinary sanctions imposed on the respondent; and
- A statement as to whether remedies will be provided to the complainant.

The written determination must be sent simultaneously to the parties along with information about how to file an appeal.

# A New Era of Title IX

(Module 4: Relevance Assessments Required  
Under Title IX: Questions and Evidence)

**Tuesday, September 15, 2020**

10:00 - 11:30 AM | Zoom

Meeting ID: 889 5258 5706

Passcode: 179497

**Presented by**

Melissa A. Hewey & Allen L. Kropp



# The New Era of Title IX

## MODULE 4

RELEVANCE ASSESSMENTS REQUIRED UNDER TITLE IX:  
QUESTIONS AND EVIDENCE | SEPTEMBER 15, 2020

**Presented by:**

Melissa Hewey & Allen Kropp

## AGENDA

- (Very Brief!) Recap. of Modules 1, 2 & 3
- Title IX Regulations and Requirements on:
  - Relevant Evidence
  - Relevant Questions during decision-making
- Practical Approach to meeting requirements and reaching decisions
- Final Q & A (on all 4 Modules!)

## Basic Requirements for Grievance Process

- Treat complainants and respondents equitably . . .
- Require an objective evaluation of all **relevant evidence**—including both inculpatory and exculpatory evidence
- Investigators must receive training on, and create an investigative report that fairly summarizes, **relevant evidence**
- Decision-makers must receive training on issues of **relevance of questions and evidence**, including when questions and evidence about sexual predisposition/prior sexual behavior are not relevant

## Role of the Title IX Investigator

Among the Investigator's tasks:

- Allow Parties to identify witnesses and submit favorable and unfavorable evidence.
- Ascertain the facts: Interview witnesses, make site visits, review documents (including emails and texts).
- *Consider only evidence that is **relevant and directly related** to the allegations in the Formal Complaint.*
- Provide the Parties with an equal opportunity to inspect and review any evidence that is obtained in the investigation, whether the Investigator considers the evidence reliable or not, and including favorable and unfavorable evidence.
- Give the Parties the opportunity to respond to the evidence prior to the conclusion of the investigation.
- *Write an investigation report that fairly summarizes **relevant** evidence and submit it to the Title IX Coordinator.*

## Decision-making

- No live hearing requirement for K-12 (unlike postsecondary)
- After investigative report is issued to the parties:
  - The decision-maker(s) must afford each party the opportunity to submit written, **relevant questions** that a party wants asked of any party or witness, provide each party with the answers, and allow for additional, limited follow-up questions from each party.
  - The decision-maker must explain to the party proposing the questions any decision to exclude a question **as not relevant**.

## What is "Relevant" Evidence?

### Rule 401 of the Federal Rules of Evidence

Evidence is relevant if:

- (a) it has any 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

## "Relevant" Evidence That May Not Be Considered

- Evidence about a Complainant's sexual predisposition or prior sexual behavior is not relevant, unless it:
  - (1) is offered to prove that someone other than a Respondent committed the alleged conduct, or
  - (2) concerns specific incidents of a Complainant's prior sexual behavior with a Respondent and is offered as evidence of consent.
- Evidence that is privileged
  - Medical, psychological or similar records are not admissible unless the Party has consented in writing to the disclosure of those records.
  - Other legally recognized privilege or immunity in the State of Maine (communications with attorney, clergy, spouse)
- Evidence that is needlessly cumulative

## How does the Decision Maker make this work?

- Review investigator's report and provide it to both parties
- Review and categorize proposed questions
  1. Questions that are relevant and appropriate—ask them
  2. Questions that are not appropriate either because they are not relevant or are otherwise not to be considered – notify requesting party that they will not be asked and why
  3. Questions that are questionable – either because relevance is not apparent or question is objectionable as phrased but not in theory – clarify

## Katherine and Eric Hypothetical

Katherine (a sophomore) and Eric (a senior) hook up at a band trip after drinking in a hotel room.

Katherine claims Eric went too far; Eric claims the sexual activity was consensual.

## Questions Requested by Eric's Family

### To Katherine:

- How many boys had you hooked up with before the incident with Eric?
- Do you have a close relationship with your parents?
- Did you take antidepressant medication before drinking at the party?
- How far is "too far" in your opinion?
- Did you delete all of your texts or just those you received from Eric? What are you trying to hide?

## Questions Raised by Eric's Family - Continued

Questions to Sallie:

- Has Katherine told you about other boys she has hooked up with?
- Does Katherine party a lot?
- Do you know of any instances where Katherine has lied to her parents to keep out of trouble?

## Wrap Up

***WHAT'S STILL ON YOUR MIND???***

# Thank You

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