

A New Era of Title IX

(Module 1: In-Depth Training for Title IX Coordinators
and Other Interested Personnel)

Presented on
Wednesday, September 23, 2020
9:00 AM - 1:00 PM | Zoom

Presented by
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The New Era of Title IX

MODULE 1

TITLE IX PRIMER | September 23, 2020

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INTRODUCTION

- Your presenters for today.
- This is the first in our series of three modules on Title IX. The upcoming modules are:
 - October 2 – Investigator Training
 - October 9 – 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 1:00.
- Your microphone will be muted.
- 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 districts to **actual knowledge** and **deliberate indifference**.
- Only if the school district 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 district 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 district (e.g., Superintendent, building administrator).
- **ALL** employees in a K-12 school district are required to report suspected sexual harassment to the school district'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 districts 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 districts appoint a ***Title IX Coordinator***, who has broad responsibilities for implementing the regulations and related policies/procedures for a school district.
- 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.

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 Districts 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.
-  DWM has legally-compliant sample policies/procedures for New Hampshire school districts.
- By retaining required records for seven years.

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

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



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 districts only have a duty to respond to sexual harassment which occurs:
 - In education programs, activities or other events sponsored by the school district 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 district 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 district’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 district’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 district’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 New Hampshire, only children aged 16 and older can give consent to sexual contact with adults unless the two parties are legally married. A teenager under 13 cannot consent to any sexual contact. Children who are between 13 and 16 may consent to a sexual act when their partner is less than four years older than they are.
- **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 districts need to comply with both Title IX and the other applicable nondiscrimination/harassment laws (e.g., State law & Title VII).
 -  The DWM sample policies/procedures address both Title IX and non-Title IX harassment and discrimination.
- School districts will need to carefully review all harassment-related reports/complaints to ensure the appropriate procedure is followed.
- Don't forget:
 - JICK – Bullying.
 - Other conduct policies that may apply.

Part Three

Policies and Procedures

AC – Nondiscrimination/Equal Opportunity and Affirmative Action

The umbrella policy that addresses the school district'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 district 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 district will respond to reports of discrimination and harassment, including Title IX sexual harassment, against employees.

 Refer to procedure for discussion.

Part Four

Overview of Laws & Assessment of Complaints

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

	Title IX	Title VII/State Law
Quid Pro Quo	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.
Hostile Environment	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.
Other Conduct Covered	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.
Scope	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

Bullying

- RSA 193-F: NH Bullying Law
- Scope of Conduct: Bullying; cyberbullying; harassment and sexual harassment covered under ACAA; retaliation; making knowingly false accusations of bullying behavior.
- "Bullying" means a single significant incident or a pattern of incidents involving a written, verbal, or electronic communication, or a physical act or gesture, or any combination thereof, directed at another pupil which:
 - (1) Physically harms a pupil or damages the pupil's property;
 - (2) Causes emotional distress to a pupil;
 - (3) Interferes with a pupil's educational opportunities;
 - (4) Creates a hostile educational environment; or
 - (5) Substantially disrupts the orderly operation of the school.
- "Bullying" shall include actions motivated by an imbalance of power based on a pupil's actual or perceived personal characteristics, behaviors, or beliefs, or motivated by the pupil's association with another person and based on the other person's characteristics, behaviors, or beliefs.
- "Cyberbullying" means conduct defined in paragraph I of this section undertaken through the use of electronic devices. "Electronic devices" include, but are not limited to, telephones, cellular phones, computers, pagers, electronic mail, instant messaging, text messaging, and websites.

Hazing

- RSA 631:7
- "Student hazing" means any act directed toward a student, or any coercion or intimidation of a student to act or to participate in or submit to any act, when:
 - (1) Such act is likely or would be perceived by a reasonable person as likely to cause physical or psychological injury to any person; and
 - (2) Such act is a condition of initiation into, admission into, continued membership in or association with any organization.

Other Relevant Laws

- Americans with Disabilities Act
 - Protects qualified individuals with disabilities in their places of work/education
- NH Human Rights Act, RSA 354-A
 - Prohibits discrimination against employees and students based on age, sex, sexual orientation, gender identity, race, color, marital status, familial status (students only), physical or mental disability, religious creed, or national origin.
- Section 504 of the Rehabilitation Act of 1973
 - Prohibits discrimination against employees and students with disabilities
- Title VI of the Civil Rights Act of 1964
 - Prohibits discrimination based on race, color or national origin.

HYPOTHETICALS

Please review the following scenarios, assess the allegations, and identify:

- 1) The type(s) of prohibited conduct described in each situation if any – e.g., bullying; race, color or other form of discrimination/harassment; sexual harassment, etc.
- 2) Which procedure (ACAA-R, ACAB-R, or other procedure) would you follow to address the alleged conduct?

Scenario 1:

On a Friday afternoon, Audrey's mom Amy files a complaint in your office claiming that Audrey has been subject to discrimination because of the way she looks. Amy states that over the last several weeks, Audrey has been picked on, online, by a group of female classmates. Amy explains that the classmates have told Audrey her hair is "disgusting," encourage her to shave her head, and tell her that if they had frizzy hair like hers, they would never come to school. The classmates also make fun of Audrey's weight. According to Amy, Audrey is incredibly shaken by this, and is now stating she will only access remote learning. Prior to this incident Audrey had been very excited to return to in-person learning.

Scenario 2:

After a particularly contentious IEP meeting, you receive a complaint from a parent that their child, Matthew, is being bullied by the high-school principal. Matthew, who has Autism, is about to start 9th grade and the meeting was intended to be a transition meeting between middle school and high school. Matthew's dad explains that Matt attended the recent IEP meeting, at the encouragement of the IEP team, but that during the meeting his new principal refused to answer any of Matt's questions, speak to him directly, or even make eye contact with him. The high school principal also refused to grant the family's request that Matt be placed in an out-of-district program. At the end of the meeting, Matt's dad thought he heard the principal use the "r-word" during a conversation with the case manager, and distinctly heard him say "I can't stand to sit in any more meetings with stupid people."

Scenario 3:

Joan is a high school teacher who comes to you in tears because another teacher in her department, Margaret, has been bullying her. She says that Margaret is really mean. She says Margaret always avoids sitting next to her at department meetings, and makes a point to roll her eyes at anything she says, like she thinks Joan is stupid. Joan says when she came down the hall to the break room the other day, she could hear Margaret talking about how much weight Joan has gained during the pandemic and that she looks like a cow. She also said that Margaret makes a point of posting pictures on her Instagram account showing her having fun with other teachers in their department at social events, but she never invites Joan. Joan wants you to do something about this bullying because the department head is afraid of Margaret and won't make her stop being mean to Joan. Joan says she dreads coming to work and is reluctant to participate in meetings anymore because of Margaret's bullying.

What if these facts are added:

All of these behaviors happened, but Joan is gay and married to another woman. Joan is the only gay person in the department.

What if Margaret has frequently expressed her strong views that marriage should only be between a man and a woman?

Scenario 4:

Katherine is beginning her sophomore year at the high school and plays in the school band. Early in the school year, her best friend Sallie meets with the school social worker and relays the following: Eric, a popular student in the high school's senior class and also a member of the school band, has been interested in dating Katherine. He asked Katherine out back in June and told her she was "really hot" (or something similar) a few times. Katherine didn't think much about the attention at the time and told Eric that her parents do not let her date. Then, after a pre-season band practice in mid-August, Sallie and Katherine went to a beach party and Eric was there. At some point, Katherine took a walk along the beach with Eric. The next day, Katherine called Sallie crying and explained that she and Eric began kissing while on their walk, but that Eric "took it way too far" by forcing his hands under her shirt and attempting to unbutton her pants. Katherine ran back to the party and got a ride home from another student since Sallie had already left. Sallie added that Katherine is "really upset and embarrassed" by the whole thing.

NOTES:

Suppose Eric had been pursuing Katherine throughout her freshman year by regularly texting her about her attractiveness and stating, on multiple occasions, that he will not stop asking her out until she goes on at least one date with him?

What if the sexual encounter took place at the hotel where the band was staying during a regional high school band competition?

Part Five

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 2 on October 2nd 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 if appropriate.
 - Safeguard property.
 - Notify parents/guardians if there is student involvement.
 - Does DCYF 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 3 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 Six

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 districts 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 district does not mean an individual is automatically “biased” in favor of the school district.
 - 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.

Thank You

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