

Title IX – Education Amendments of 1972

**Last updated August 14, 2020*
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Title IX - Education Amendments of 1972



Title IX is a federal law that prohibits **discrimination on the basis of sex** in all education programs and activities operated by recipients of federal funds.

20 U.S.C. §1681(a):

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

Title IX Protection Extends to:



- Elementary Schools
- Secondary Schools
- Colleges & Universities— public or private
- Certain other educational programs & activities
 - Charter schools, For-profit schools, Libraries and museums and other rehabilitative agencies receiving federal funding

The protection extends to all aspects of these institutions' educational programs and activities.

Title IX prohibits all forms of sex discrimination, including but not limited to gender-based harassment, sexual harassment and sexual violence.

Title IX Protection

Title IX prohibits recipient institutions from discriminating on the basis of sex in:

- **Recruitment or admission** of students.
- **Access to all programs**, including counseling and guiding students or applicants for admission.
- Providing **equality with respect to student rules and policies**.
- **Financial Assistance** - may not provide different amounts or types of financial assistance, limit eligibility for such assistance, apply different criteria, or otherwise discriminate on the basis of sex in administering financial assistance.
- **Athletics** – may not discriminate in interscholastic, intercollegiate, clubs, or intramural athletics offered by recipient institutions including athletic benefits and opportunities, and athletic financial assistance.
- **Students must not be subjected to unlawful harassment, either in the classroom or while participating in other education programs or activities.**
- Title IX also prohibits recipients from discriminating on the basis of **pregnancy, childbirth, false pregnancy, termination of pregnancy, or recovery therefrom** or applying any rule concerning **parental, family or marital status** that treats persons differently on the basis of sex.

Sexual Harassment

On May 6, 2020, the U.S. Department of Education issued the Final Rule implementing the new Title IX regulations, which are effective on **August 14, 2020**.

- The final regulations are premised on setting forth clear legal obligations that require recipients of federal funding to:
 - promptly respond to individuals who are alleged to be victims of sexual harassment by offering supportive measures;
 - follow a fair grievance process to resolve sexual harassment allegations when a complainant requests an investigation or a Title IX Coordinator decides on the recipient's behalf that an investigation is necessary; and
 - provide remedies to victims of sexual harassment.

Sexual Harassment

34 CFR 106.30: 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; [*** (Commonly referred to as "Quid pro quo")**]
- (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).

Title IX Requirements

Local educational agencies are required to:

- officially **designate and authorize at least one Title IX Coordinator**;
 - 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 EA of **name or title, office address, email address and telephone # of Title IX Coordinator(s)**;
- establish **grievance procedures (complaint procedures) that provide for prompt and equitable resolution of student and employee** complaints of discrimination on the basis of sex (including sexual harassment) in educational programs and activities; and
- adopt and disseminate a non-discrimination **policy**.

Title IX Coordinator

- Must ALWAYS be someone designated and serving in role
 - He/she must be **free of conflict or bias**, and it is recommended that he/she report directly to senior leadership.
- Responsible for coordinating all efforts to comply with Title IX, including publication of the District's policy of non-discrimination, statement of non-discrimination and Grievance Procedure
 - Includes the Title IX Coordinator's contact information.
- Continuous Monitoring of overall agency activities for compliance with Title IX requirements.
- Investigating Complaints

Statement of Non-Discrimination

- “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.”

34 C.F.R. § 106.8



Grievance Procedure

Official adoption and publication of procedures **providing prompt and equitable resolution of student and employee complaints** related to Title IX is required.

The Grievance Procedure must promote impartial investigations which include a presumption of innocence of the accused until proven guilty.

The Grievance Procedure should be published in the same locations as the Statement of Non-discrimination.

See, 34 C.F.R. § 106.45(b)(1)

Standard of Proof

- Educational agencies may decide between “preponderance of evidence” (less strict) and “clear and convincing evidence” (more strict) standard to apply in cases of alleged Title IX violations. See, 34 C.F.R. § 106.45(b)(1)(vii)
- Whichever standard is chosen must be clearly stated (in policy) and applied consistently and uniformly in all cases, regardless of the status of the respondent (i.e. employee vs. student). See, 34 C.F.R. § 106.45(b)(7)(i)

Supportive Measures

During the pendency of a Title IX investigation, the educational agency 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.” *34 CFR 106.44*

Supportive Measures



34 CFR 106.30: “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.”

Changes at the Federal Level

- February 22, 2017 Joint (DOE OCR & DOJ) Dear Colleague Letter
 - Rescinds OCR’s May 13, 2016 Dear Colleague Letter regarding Transgender Rights
- “These guidance documents take the position that the prohibitions on discrimination “on the basis of sex” in Title IX of the Education Amendments of 1972 (Title IX), 20 U.S.C. § 1681 et seq., and its implementing regulations, see, e.g., 34 C.F.R. § 106.33, require access to sex-segregated facilities based on gender identity. These guidance documents do not, however, contain extensive legal analysis or explain how the position is consistent with the express language of Title IX, nor did they undergo any formal public process.”
- “In addition, the Departments believe that, in this context, there must be due regard for the primary role of the States and local school districts in establishing educational policy.”

- Governor Cuomo's February 23, 2017 Response Letter to then Commissioner Elia
 - Reaffirming New York State Protections for Transgender Students
- Discrimination on the Basis of Gender Identity still prohibited by NYS Human Rights Law and DASA



How to conduct an effective investigation

- Identify the core issue of the complaint or observance
 - Personnel matter?
 - Student matter?
 - Criminal matter?
- Is this a formal complaint? It is important to take all suspicions, complaints, and allegations seriously. Do not ignore knowledge or notice of offensive behavior due to the lack of a formal complaint.
- Consider potential **liability** and the **scope of investigation needed**
- Review all relevant District policies, Collective Bargaining Agreements, and applicable laws that may dictate process and penalties

How to conduct an effective investigation



Make proper notifications

- **Respondent** – must be provided notice of sufficient details of the allegations against him/her in the case of sexual harassment.
 - “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.” CFR 106.45(b)(2)
- Union? Parents? Law Enforcement? Legal Counsel? Insurance Carrier? NYSED?

How to conduct an effective investigation

- Preserve relevant evidence or evidence that has probative value.
 - Generally, evidence is relevant if it could be used to prove or disprove a fact and such fact is of consequence when determining the action.
- Utilize one lead investigator who controls the process
 - Avoid “too many cooks in the kitchen”
 - Consider whether non-district investigator necessary
- Is the investigator impartial – i.e. no bias toward complainant or accused?
 - Can he/she review complaint free of any pre-judgments/conclusions?

How to conduct an effective investigation

- Identify witnesses – request each interviewee to provide names of additional persons that may have information relevant to your investigation.
- Obtain written statements wherever possible
 - Signed and dated
- Advise all parties of their right to have a representative present during interviews (students may wish to have a parent or other representative present)
- Equal opportunity must be given for all parties (including the accused) to present witnesses and other evidence throughout process, as well as to inspect and respond to evidence presented by the other party.

How to conduct an effective investigation

- Interview complainant first and **as soon as possible** after the precipitating incident/submission of the complaint.
- Interview *known* witnesses next.
- In most cases, it is best to interview the accused last and after you have obtained all relevant information which will form the basis of your questions for him/her.
- May need to do follow-up interviews with the complainant and others after the interview with the accused, however. There is no “one size fits all” approach to investigations.

Representation

An employee has the right to be accompanied by a **union or other representative** at an employer-conducted interview that the **employee** reasonably believes may result in disciplinary action against him or her.

- Often referred to as “*Weingarten* rights” after the 1975 U.S. Supreme Court Decision - *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975).
- **Civil Service Law Section 75(2)** – “*An employee who at the time of questioning appears to be a potential subject of disciplinary action shall have a right to representation...*”
- **Civil Service Law Section 209-a(1)(g)** – Extends rights to unionized employees who do not have section 75 protections.
- In addition, PERB has extended *Weingarten* rights to probationary employees (NYS Correctional Officers & PBA, Inc, 43 PERB ¶ 3031 (2010)).

How to conduct an effective investigation



- Take detailed notes and keep an organized file with all documents/evidence gathered.
 - Understand that investigation may become part of litigation or employment action/proceeding
- Evaluate prior similar complaints and outcomes.
- Once investigation completed, prepare a **detailed written report** including:
 - Identification of allegations
 - Description of steps taken from receipt of complaint through determination
 - Findings of fact
 - Conclusions and application of Code of Conduct
 - Statement and rationale of responsibility assigned and any disciplinary actions/whether or not remedies needed to preserve equal access to educational program or activity needed.
 - Information on the procedures and permissible bases for appeal.
- Respondent and complainant must be provided the written determination simultaneously.

How to conduct an effective investigation



- 34 CFR 106.45: "...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."

Appeal

- Both parties must have an equal ability to appeal the determination on the following bases:
 - Procedural irregularity
 - New evidence
 - Conflict of interest or bias
 - Additional bases, as provided by District policy.

See, CFR 106.45(b)(8)

- Decision-maker for the appeal must be different than the decision-maker that reached the determination regarding responsibility for the allegations or dismissal.

See, CFR 106.45(b)(7)

Informal Resolution

- 34 CFR 106.45 "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."

Recordkeeping


- All records relative to an investigation of sexual harassment must be maintained for at least seven (7) years.
- This includes all written communications, records of determinations, appeals, informal resolutions, records of discipline or other remedies taken, recording or transcripts of interviews or hearings, etc.
- Training materials used to train the Title IX Coordinator, investigators, decision-makers, and any person who facilitates an informal resolution process must also be maintained for at least seven (7) years.

See, CFR 106.45 (b)(10)

Do's and Don'ts

- Do encourage employees to provide written accounts and/or complaints whenever possible
- Don't tell an employee that they MUST put their complaint in writing in order for it to be investigated
- Do inform employees that the contents of their complaint will be kept confidential to the extent practicable, but
- Don't promise employees that you will keep everything that they say between you and him/her

Do's and Don'ts

- Do begin with open ended questions during interviews
 - Don't avoid asking direct questions to be sure that Individuals respond to relevant information/allegations
 - Do allow Union representatives or Legal Counsel to be present during interviews, where necessary/requested
 - Don't allow Union representatives or Legal Counsel to interfere with process
- 
- A decorative graphic in the bottom right corner consisting of several overlapping, curved, light blue lines that resemble a stylized arrow or a swoosh.

Do's and Don'ts

- Do prepare questions ahead of time, where possible
- Don't hesitate to deviate from your prepared questions as the interview progresses
- Do explore the use of technology
- Don't neglect social media and other off-campus conduct where relevant



Policy Considerations

- INVESTIGATION will be conducted and determination made; appropriate action taken
- CONFIDENTIAL to the extent allowed by law and in order to conduct a full and fair investigation



Policy Considerations

- CORRECTIVE ACTION will be taken
- RETALIATION against complainants and witnesses prohibited
- MAKING FALSE ACCUSATIONS prohibited



QUESTIONS?

Thank you!

