

TITLE IX

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What is Title IX?

- Federal Civil Rights Law
- Passed in 1972
- Protects people from discrimination based on sex in education programs or activities that receive federal dollars.
 - “No person in the United States shall, on the basis of sex, be excluded from participation in, be denied benefits of, or be subjected to discrimination under any education program of activity receiving Federal financial assistance.”

Major Areas of Change

- Narrows definition of sexual assault under Title IX and provides formal definition of sexual harassment for coverage under the Rule.
- Limits the obligation to investigate complaints only to conduct that occurred in the school's program or activity (not unrelated off campus conduct)
- Mandatory responses/obligations for schools
- Change to standard for school liability
- More detailed grievance procedure which impacts on processing and responding to complaints
- Hearing optional/ written questions required (k-12)
- Choice of standard of evidence to use
- Must offer both parties an appeal from a determination

Title IX- Sexual Harassment

- Prior to Rule change sexual harassment was addressed in non-binding guidance. With Rule change- formal coverage under Title IX
 - Definition of sexual harassment:
 - Three types of misconduct on the basis of sex which jeopardize equal access to education:
 - 1) Any *quid pro quo* harassment by a school employee
 - 2) Any unwelcome conduct that a reasonable person would find so severe, pervasive, and objectively offensive that it denies a person equal education access; and
 - 3) Any instance of sexual assault (defined in the Clery Act), dating

Sexual Harassment Misconduct

1) Any *quid pro quo* harassment by a school employee

And

3) Any instance of sexual assault (defined in the Cleary Act), dating violence, or stalking as defined in the Violence Against Women Act (VAWA)

These are not evaluated for severity, pervasiveness, offensiveness, or denial of equal educational access as the misconduct is “sufficiently severe” enough to deprive a person of equal access.

Sexual Harassment- Definitions

2) Any unwelcome conduct that a reasonable person would find so severe, pervasive, and objectively offensive that it denies a person equal education access

~ severe **and** pervasive **and** objectively offensive conduct which **effectively denies a person equal education access**.

~ different definition than under Title VII workplace standard which requires severe **or** pervasive conduct **creating a hostile work environment**. (Still have this as part of an investigation as an employer)

Distinction is to balance Title IX enforcement with respect for free speech and academic freedom. (Free speech or expression which may be offensive issues)

Other Statutory Responsibilities

- District still has an obligation to review alleged conduct under Board policies (unlawful harassment of Employees, HHB etc.) and employer/school responsibilities under Federal and Vermont law.
 - Section I.C of Policy:
 - “While all forms of sex-based discrimination are prohibited in the District, the purpose of this policy is to address, and only address, *sexual harassment as defined in Title IX and Section II.M. below*. For conduct which satisfies that definition, a school's response is governed by this policy, and in those cases for which they have received a filing of a formal complaint of same, as set forth under the Title IX Grievance Process set forth in Section IV below. For other forms of inappropriate conduct, or conduct which may satisfy the definition of harassment on the basis of sex under Vermont law, including student misconduct and employment based statutes prohibiting unlawful harassment and other forms of misconduct, the District may have the separate obligation to address those behaviors as required by other school policies and applicable laws.”

Occurring in a School's Education Program or Activity

- The Title IX statute and existing regulations contain broad definitions of a school's "program or activity"
- Definition is continually being assessed about the scope of a school's education program or activity.
- Education program or activity **includes locations, events, or circumstances over which the school exercised substantial control over both the respondent and the context in which the sexual harassment occurred,**
- Title IX applies to all of a school's education programs or activities, whether such programs or activities occur on-campus or off-campus. (Field trips, athletic competitions, participation in parade etc.)

- Must have a Title IX Coordinator

Notice of How to Report

- This designated employee must be referred to as the Title IX Coordinator
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- **BIG CHANGE:** previously notified students, parents, employees through handbooks and (hopefully) **school website**.

- **NOW** in addition must also notify applicants for employment, unions in addition to prominently displaying on website the following:

- Name or title,
- Office address (if at Central Office or out in buildings);
- Email address, and

Who may report? And how?

- **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 e-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 e-mail address, or by mail to the office address, listed for the Title IX Coordinator

What is required for a formal complaint?

- Title IX regulations defines “formal complaint” as a document filed by a complainant or signed by the Title IX Coordinator alleging sexual harassment against a respondent and requesting that the school investigate the allegation of sexual harassment and states:
 - 1) 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 school with which the formal complaint is filed.
 - 2) 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 the Final Rule, and by any additional method designated by the school.

REMEMBER

- The Complainant does not have to file a Report of Sexual Harassment. It can be any person.
- But for the grievance procedure under the Policy and Rule to be invoked: either the complainant (or their parent/guardian) or the Title IX Coordinator files a **Formal Complaint** alleging sexual harassment against a respondent AND requesting an investigation of the allegation.
- Before an investigation is conducted against the Respondent, a Formal Complaint (allegations and a request to investigate) must be received

Actual Knowledge

- Actual knowledge: means notice of sexual harassment or allegations of sexual harassment to
 - the Title IX Coordinator,
 - any official of the school who has the authority to institute corrective measures on behalf of the school;
 - or to **any employee of an elementary and/or secondary school.**

Actual Knowledge and Notice Sufficient

- II. A. (d). Notice sufficient to trigger an obligation under this policy only shall exist where any employee has sufficient personal knowledge of alleged facts to be aware that if such facts were found to be true it would constitute a violation of this policy.

When does Actual Knowledge Not Exist?

- Actual Knowledge shall not be deemed to exist when the only official of the school with actual knowledge is the respondent (alleged “perpetrator”) See Policy: II.A(b)
- II. A(e). Imputation of knowledge based solely on vicarious liability OR constructive notice shall be insufficient to establish or constitute actual knowledge

Reporting

- Section III, A.1(a) of School Policy:
 - **ANY STAFF MEMBER MAY RECEIVE REPORTS.**
 - (b) In case where the Title IX Coordinator is the alleged respondent, the report or formal complaint may be made to the Superintendent who will then fulfill role of Title IX Coordinator for that Report/Complaint or may delegate to another person.

REPORTING

- School must respond promptly to a Title IX sexual harassment in a manner which is not deliberately indifferent. Which means a response that is clearly not unreasonable in light of the known circumstances.

Mandatory Response Obligations

- Supportive measures (next slide)
- The Title IX Coordinator must promptly contact the complainant to discuss the availability of supportive measures, consider the complainant's wishes with respect to supportive measures, inform the complainant that supportive measures can be put in place with or without a Formal Complaint, and Title IX Coordinator **must explain the process for filing a formal complaint with the complainant.**

Obligation to provide supportive measures

- Examples:
 - Counseling
 - Extensions of deadlines or other course related adjustments
 - Modifications of work or class schedules
 - Mutual restrictions on contact between the parties
 - Change in work locations
 - Leave of absence
 - Increased monitoring of certain areas of school
 - Check in
 - And similar measures.

When to put into place supportive measures

- Before or after filing of a formal complaint
- Or even if a formal complaint is not received (report was received)
- Reasons for putting such measures in place:
 - To restore or preserve equal access but not unreasonably burdening other party, to deter sexual harassment, protect safety of all parties etc.

Complaint

- The Final Rule affirms that a complainant's wishes with respect to whether the school investigates should be respected unless the Title IX Coordinator determines that signing a formal complaint to initiate an investigation over the wishes of the complainant is not clearly unreasonable in light of the known circumstances

Complaint does not support Title IX sexual harassment definition

- If the allegations in a formal complaint do not meet the definition of sexual harassment under the Final Rule or the Policy, or did not occur in the school's educational program or activity against a person in the United States:
 - School must dismiss such allegation/complaint for PURPOSES OF TITLE IX ONLY but may still be required to (or chose to) address the allegations in any manner the school deems appropriate under the school's own code of conduct, policies, state law or employment agreements.

Formal Complaint Received- Grievance Process

- Give both parties written notice of the allegations,
- Give both parties an equal opportunity to select an advisor of the party's choice (who may be, but does not need to be, an attorney),
- and an equal opportunity to submit and review evidence throughout the investigation;
- Use trained Title IX personnel to objectively evaluate all relevant evidence without prejudgment of the facts at issue and free from conflicts of interest or bias for or against either party;

Grievance Process

- Protect parties' privacy by requiring a party's written consent before using the party's medical, psychological, or similar treatment records during a grievance process;
- Obtain the parties' voluntary, written consent before using any kind of "informal resolution" process, such as mediation or restorative justice, and not use an informal process where an employee allegedly sexually harassed a student;
- Apply a presumption that the respondent is not responsible during the grievance process (often called a "presumption of innocence"), so that the school bears the burden of proof and the standard of evidence is applied correctly;
- Protect parties' privacy by requiring a party's written consent before using the party's medical, psychological, or similar treatment records during a grievance process;

Grievance Process

- Ensure that the decision-maker is not the same person as the investigator or Title IX Coordinator (Superintendents- DELEGATE if the respondent is the Title IX Coordinator)
- Protect all complainants from inappropriately being asked about prior sexual history (“rape shield” protections);
- Send both parties a written determination regarding responsibility explaining how and why the decision-maker reached conclusions;
- Effectively implement remedies for a complainant if a respondent is found responsible for sexual harassment;

Grievance Procedures

- Offer both parties an equal opportunity to appeal;
- Protect any individual, including complainant, respondent, and witnesses from retaliation for reporting sexual harassment or participating in (or refusing to participate) in any Title IX grievance process;
- Make all materials used to train Title IX personnel publicly available on the school's website, make the materials available upon request for inspection by a member of the public; and
- Document and keep records of all sexual harassment reports and investigations.

Grievance Procedure and Investigation

- Must require objective evaluation of all relevant evidence, inculpatory and exculpatory, and avoid credibility determinations based upon a person's status as a complainant, respondent or witness.
- Require Title IX personnel to be free from conflicts of interest or bias for or against complainants or respondents
- Include a presumption that the respondent is not responsible for alleged conduct until a determination regarding responsibility is made at the conclusion of the grievance process

Grievance Procedure and Investigation

- Describe the school's appeal procedures, and the range of supportive measures available to complainants and respondents.
- A school's grievance process must not use, rely on, or seek disclosure of information protected under a legally recognized privilege, unless the person holding such privilege has waived the privilege.
- Any provisions, rules, or practices other than those required by the Final Rule that a school adopts as part of its grievance process for handling formal complaints of sexual harassment, must apply equally to both parties.

Grievance Procedure Must Contain

- For recipients that are K-12 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 school has sent the investigative report to the parties 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.**

Model Policy from VSBA
