

JacksonLewis

College of Westchester

Title IX Training

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- Title IX of the Education Amendments Act of 1972
- Title VII of the Civil Rights Act of 1964
- Campus SaVE Act
- New York State Human Rights Law
- New York Education Law Section 129-b
- Westchester County Human Rights Law

Laws Governing Sexual Misconduct

Title IX Explained

Title IX

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

Title IX of the Education Amendments of 1972
20 U.S.C. § 1681(a)

2020 Title IX Regulations

- May 6, 2020 Final Rule pertains principally to sexual harassment.
- Effective August 14, 2020
- NOT retroactive
- Ongoing federal litigation

2020 Final Rule Regulating Title IX

Liability Standard: Deliberate Indifference

A school with **actual knowledge** of **sexual harassment** in an **education program or activity of the school** against a **person in the United States**, must **respond promptly** in a manner that is **not deliberately indifferent**. A school is **deliberately indifferent only if its response** to sexual harassment is **clearly unreasonable** in light of the **known circumstances**

Notice & Obligation to Respond

Notice of Alleged Misconduct

- Under Title IX the obligation to respond to allegations of sexual misconduct is triggered if there is “Actual Notice.”
 - Actual Notice (knowledge) – allegation made to Title IX Coordinator or “official with authority” to take corrective measures.
 - This standard is not met when the only official of the school with actual knowledge is the respondent.
 - 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 school.

Notice of Alleged Misconduct



Under Title VII and other state and local laws, obligation is triggered if institution knew or reasonably should have known.

Jurisdiction

Does Title IX Grievance Process Apply?

Where did the alleged conduct occur?

- In the U.S.
- In the context of a CW “education program or activity.”
 - Locations, events, or circumstances in which the school exercised substantial control over both the respondent and the context in which the sexual harassment occurs.
 - On CW Campus.
 - At CW sponsored events or activities.
 - On CW technology platforms.
 - Any building owned or controlled by a student organization that is officially recognized by the institution.

Does Title IX Grievance Process Apply?

When did the alleged conduct occur?

- If after August 14, 2020, new grievance process applies.
- If prior to August 14, 2020, complaint should be addressed through Policy against Sexual Harassment and Sexual Misconduct

Does Title IX Grievance Process Apply?

Who are the Parties?

Complainant (alleged victim of conduct that could constitute sexual harassment)

- The school **must** dismiss the complaint if, at the time of filing a formal complaint, the complainant was not participating in or attempting to participate in the education program or activity of the school.
 - Fact specific inquiry.
 - Includes but is not limited to: current students, students on leave, alumni seeking to be involved, employees, other third parties attempting to participate in school programs.

Respondent (alleged perpetrator of conduct that could constitute sexual harassment)

- The school **may** dismiss a formal complaint if the respondent is no longer enrolled or employed by the school.

Does Title IX Grievance Process Apply?

If the alleged conduct were proven, would it constitute covered sexual harassment under Title IX as set forth in the Final Rule?

- If YES, Title IX Grievance Process applies.
- If NO, Title IX Grievance Process does not apply.

Title IX Sexual Harassment Defined

Title IX Sexual Harassment Defined

Conduct on the basis of sex that satisfies one or more of the following:

- An employee of the school conditioning the provision of an aid, benefit, or service of the school on an individual's participation in unwelcome sexual conduct, or
- 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 school's education program or activity, or
- "Sexual assault", "dating violence", "domestic violence", or "stalking."

*****Note: Conduct that does not meet one or more of these criteria may still be prohibited under the Code of Conduct or Policy Against Sexual Harassment and Sexual Misconduct.**

Sexual Assault

Any sexual act directed against another person, without the consent of the victim including instances where the victim is incapable of giving consent.

Sexual Assault is divided into two categories:

1. **Sexual Assault–Non-consensual Sexual Contact:** Includes any intentional touching of a sexual nature, however slight, whether clothed or unclothed, with any object or body part by a person against another person that is without Affirmative Consent and/or by force.
2. **Sexual Assault–Non-consensual Sexual Intercourse:** Includes any sexual intercourse, however slight, with any object or body part by a person against another person that is without Affirmative Consent and/or by force.

Domestic Violence

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

Dating Violence

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

Stalking

- A course of conduct directed at a specific person that would cause a reasonable person to feel fear for her, his, or others' safety, or to suffer substantial emotional distress.
- Examples of stalking include but are not limited to:
 - constantly appearing at places the victim is known to frequent;
 - persistent unwanted communication or contact whether in person, by telephone, text, or email; persistent unwanted gifts;
 - following or surveillance;
 - spreading harmful gossip about victims;
 - breaking-and-entering that can include vandalism, theft, or even simply rearranging objects so that victims know the stalker was there.

Title IX Grievance Process

Grievance Process Steps

1. Intake and Evaluation
2. Investigation
3. Hearing
4. Written Determination of Responsibility & Sanctions
5. Appeals

Intake and Evaluation

IS ALLEGED MISCONDUCT COVERED UNDER TITLE IX?

YES

- Must offer supportive measures.
- Was a Formal Complaint filed?
 - If yes, provide prompt notice to respondent.
 - If yes, consider whether informal resolution is appropriate and discuss with parties.

NO

- If formal complaint filed, dismiss complaint from Title IX process and provide notice to parties.
- Where appropriate, refer allegations to be addressed under the Policy against Sexual Harassment and Sexual Misconduct or other applicable policy (e.g., Student Conduct Policy).

Notice of Dismissal

Upon dismissal, school must promptly and simultaneously send written notice of the dismissal and reason(s) for the dismissal to the parties.

Parties have a right to appeal dismissal from Title IX process.

Supportive Measures



Non-disciplinary, non-punitive individualized services



Designed to restore or preserve equal access without unreasonably burdening the other party



To be provided to **both** parties



Use interactive process to determine supportive measures – consider “wishes” of the complainant and any corresponding burdens on respondent, where implicated



Document decisions relating to supportive measures

Emergency Measures

- Timely Warning
- Emergency Removal of Student Respondent
 - undertake an individualized safety and risk analysis
 - determine that an immediate threat to the physical health or safety of any student or other individual justifies a removal
 - If the College determines such removal is necessary, the respondent will be provided notice and an opportunity to request review and modification of the decision immediately following the removal.
- Administrative Leave for Employees

Informal Resolution

Informal Resolution

- Not available for allegations that an employee sexually harassed a student.
- School cannot require the parties to participate in informal resolution process.
- School must not offer informal resolution process unless formal complaint is filed.
- Process permitted any time prior to reaching a determination.
- Both parties must consent in writing.
- Both parties have right to withdraw and resume formal grievance process.
- Title IX Coordinator reserves the right to determine whether informal resolution is appropriate.

Overarching Principles

Overarching Principles


- Treat complainants and respondents equitably.
- Objective evaluation of all relevant evidence.
- No bias or conflict of interest.
- Presumption that the respondent is not responsible.
- Reasonably prompt timeframes, extensions for good cause.
- Standard of evidence: Preponderance (more likely than not).
- Document everything, including your rationale.
- Burden is on the institution.


Investigation


Investigation

- Ensure parties have notice of all meetings or interviews with adequate time to prepare.
- Parties are permitted to have their advisors present.
- Review definitions of prohibited conduct prior to interviews.
- Prepare questions for interviews in advance.
 - Open ended questions
 - More specific questions to get details
 - Be comfortable asking difficult questions
 - Ask about sensory memories
 - Ask if there is anything else you should know
- Gather documentary evidence from parties, witnesses and the institution and review in advance when possible.
- Give parties opportunity to identify witnesses and relevant evidence.


Investigation


 Make eye contact.


 Ask basic questions at the outset to put witnesses at ease and develop rapport.


 Give witnesses opportunity to take breaks if needed.

 Target questions at obtaining relevant information.

 Ask parties to identify other witnesses.

 Take copious notes.

 Document all present at interview, time, length, and location.

 Document efforts to reach out to witnesses and schedule appointments.

Investigation

- Gather all evidence directly related to allegations.
- Evidence that was obtained but is not directly related to the allegations can be redacted or excluded but must be logged.
 - Bear in mind FERPA obligations.
- Parties and advisors must be given an opportunity to review all evidence directly related to the allegations and log.

Prepare Investigation Report



- Investigative report summarizes:
 - Applicable policy provision(s)
 - Prohibited conduct alleged
 - Basis for Title IX Jurisdiction
 - Procedures followed throughout investigation
 - Witnesses interviewed
 - Documents reviewed
 - Relevant evidence obtained
 - Both inculpatory and exculpatory
 - Set forth undisputed facts

Exclude from consideration:

- information about the romantic or sexual history of either the Complainant or the Respondent, except:
 - to prove that someone other than the respondent committed the conduct alleged by the complainant or
 - with respect to the parties' shared sexual history when offered to prove consent.
- medical records and information, including mental health history or treatment, absent a waiver from the individual who is the subject of the medical record.
- information protected under a legally recognized privilege, such as the attorney-client privilege, spousal privilege, doctor-patient privilege, unless the person holding such privilege has waived the privilege.

Prepare Investigation Report



Prepare Investigation Report

Parties and advisors are given at least ten days to review preliminary investigative report and provide written comments to Title IX Coordinator.

Finalize investigation report.

Conducting the Live Hearing

Hearing Requirements

Live hearing with opportunity for cross-examination required

To be conducted by the Hearing Officer, who cannot be the same as the Title IX Coordinator(s) or Investigator(s)

Must provide access to all “directly related” evidence during hearing

May be held in the same geographic location or virtually

Specific location to be determined by school

Technology must allow the parties (and their advisors) to see and hear one another and any witnesses.

- Hearing officer must be trained on technology.

Recording or transcript of hearing required

Preparing for a Hearing



- Identify areas of factual dispute and of agreement.
- Identify witnesses
- Prepare questions for witnesses
- Prepare a script
- Practice asking sensitive questions
- Prepare for logistical issues

Conducting a Hearing

Hearing Officer Opening Statement

Hearing Officer is neutral

Purpose is to find facts.

Identify undisputed facts.

Explain presumption of innocence.

Explain preponderance of the evidence standard.

Explain how questioning will be handled.

Explain role of advisors.

Explain how logistical issues will be handled.

Go over the rules of decorum.

Conducting a Hearing

Cross Examination

- If party does not have an advisor, one must be provided for purposes of cross examination.
- Cross-examination must be conducted directly, orally, and in real time by the advisor.
- If a party or witness does not submit to cross examination at the live hearing, the hearing officer must not rely upon any statement by that party/witness in reaching a determination regarding responsibility.
- Party/advisor can elect not to cross-examine a particular witness, but their decision not to cross examine does not preclude use of the witness's statements.
- No negative inferences from a party's failure to submit to cross examination.

Conducting a Hearing

Relevance Determinations

- Only relevant cross-examination and other questions may be asked of a party or witness.
- The Hearing Officer must decide if question is relevant before it is answered at the hearing and explain any decision to exclude a question.
- Will the information help you determine whether a violation occurred?
- Has the question already been answered?
- Per Se Irrelevant:
 - information about the romantic or sexual history of the Complainant or the Respondent, except:
 - to prove that someone other than the respondent committed the conduct alleged by the complainant or
 - with respect to the parties' shared sexual history when offered to prove consent.
 - medical records and information, absent a waiver from the individual who is the subject of the medical record.
 - information protected under a legally recognized privilege, unless privileged is waived.
- Prior determinations of responsibility for violations may be considered for purposes of determining sanctions.

Analyzing Evidence

Evaluating Consent

- ***Affirmative consent***

- knowing, voluntary, and mutual decision among all participants to engage in sexual activity.
- by words or actions, as long as those words or actions create clear permission regarding willingness to engage in the sexual activity.
- Silence or lack of resistance, in and of itself, does not demonstrate consent.
- The definition of consent does not vary based upon a participant's sex, sexual orientation, gender identity, or gender expression.

- **Consent**

- must be freely and actively given
- cannot be obtained by coercive use of force, threats or intimidation.

Evaluating Consent

- Consent to one form of sexual activity does not imply consent to other forms of sexual activity, nor does past consent to intimacy imply consent to future intimacy.
- Consent to engage in sexual activity with one person does not imply consent to engage in sexual activity with another.
- Legal age of consent is 17 in New York.
- A person who is incapacitated for any reason cannot give consent.
- Consent can be withdrawn at any time.
- Consent is required regardless of whether the person initiating the sexual contact is under the influence of drugs and/or alcohol.

- What was it that the complainant said or did to communicate consent?

Evaluating Incapacitation

- **Incapacitation** is a state where an individual lacks the ability to knowingly choose to engage in sexual activity.
- A person may be incapacitated due to:
 - mental disability,
 - sleep,
 - unconsciousness,
 - physical restraint, or
 - from the consumption (voluntary or otherwise) of incapacitating drugs or quantities of alcohol
 - Facts to consider:
 - quantity consumed,
 - other substances,
 - slurred speech,
 - bloodshot eyes,
 - inability to maintain balance,
 - vomiting,
 - unusual or irrational behavior;
 - consciousness;
 - coherence.

Making Credibility Determinations

- Consistency
- Attempt to corroborate key information
 - Is there witness testimony:
 - Eyewitness.
 - Witness who saw either the alleged victim or accused shortly before or after the incident(s).
 - Corroborating witness
 - Is there physical evidence to confirm testimony:
 - Written documentation.
 - Texts, emails, etc.

Analyzing the Evidence

- Analyze the documentary and testimonial evidence and draw reasoned and logical conclusions.
 - Inherent plausibility.
 - Is the testimony believable on its face?
 - Does it make sense?
 - Note conflicting information.
- Determine whether preponderance of evidence suggests a violation occurred.

Determining Responsibility

- Focus on definitions of prohibited conduct.
- Evaluate each element and relevant evidence.
- Set personal feelings aside.
- Avoid “if I were him / her...”.
- Don’t infer facts that are not in evidence.
- Don’t get distracted by red herrings.
- Accept evidence unless contradicted by other evidence.
- Where evidence is conflicting, evaluate credibility.

Written Determination

Written Determinations – Requirements

- Allegations potentially constituting sexual harassment
- 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
- Findings of fact supporting the determination
- Conclusions regarding the application of the policy to the facts
- A statement of, and rationale for, the result as to each allegation
 - including a determination regarding responsibility, any disciplinary sanctions the school imposes on the respondent, and whether remedies designed to restore or preserve equal access to the school's education program or activity will be provided by the school to the complainant
- Appeal procedures and permissible bases for the complainant and respondent to appeal
- Must provide the written determination to the parties simultaneously

Appeals

Appeals

Grounds for Appeal:

Procedural irregularity that affected the outcome of the matter.

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.

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.

Appeals – Requirements

- Notify the other party in writing when an appeal is filed.
- Give both parties a reasonable, equal opportunity to submit a written statement in support of, or challenging, the outcome.
- Appeal Decision-maker(s) may not be the same person as the Hearing Officer that reached the determination regarding responsibility or dismissal, the Investigator(s), or the Title IX Coordinator.
- Appeal Panel of Three under 129-b.
- Issue a written decision describing the result of the appeal and the rationale for the result.
- Provide the written decision simultaneously to both parties.

Appeals – Requirements

- The determination regarding responsibility becomes final:
 - if an appeal is filed, on the date that the school provides the parties with the written determination of the result of the appeal or,
 - if an appeal is not filed, the date on which an appeal would no longer be considered timely.
- Notify when time for appeal has expired and decision is final.

Impartiality

How to Serve Impartially

- Avoid prejudgment of the facts at issue
- No bias for/against any party
- Avoid conflicts of interest
- Apply the relevant facts to the appropriate policy
- Avoid stereotypes
- Keep an open mind

Technology

Technology

- No specific technology required but must enable the Hearing Officer, the parties and the advisor to see and hear one another, and the witnesses, in real time.
- Must provide accommodations for those with disabilities.
- Ensure IT security and confidentiality.
- Train decision-makers on the use of the technology that will be employed.

Record-keeping

Record-keeping

- A school must maintain for a period of seven years records of each sexual harassment investigation including
 - any determination regarding responsibility
 - any audio or audiovisual recording or transcript required
 - any disciplinary sanctions imposed on the respondent, and
 - any remedies provided to the complainant designed to restore or preserve equal access to the school's education program or activity;
- Any appeal and the result therefrom
- Any informal resolution and the result therefrom

Additional Resources

Additional Resources from OCR

- Title IX: U.S. Department of Education Title IX Final Rule Overview [PDF](#) (553K)
- Summary of Major Provisions of the Title IX Final Rule [PDF](#)
- [Fact Sheet: Final Title IX Regulation](#)
- [Questions and Answers Regarding the Department's Final Title IX Rule](#)
- [OCR Webinar: Title IX Regulations Addressing Sexual Harassment](#) (Length: 01:11:29)
- [Conducting and Adjudicating Title IX Hearings: An OCR Training Webinar](#)
- [OCR Webinar on Due Process Protections under the New Title IX Regulations](#)
- [OCR Webinar on New Title IX Protections Against Sexual Assault](#)

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Thank **you.**