

# The Role of the Investigator and Decision-Maker in the Title IX Complaint Process

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# OVERVIEW

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## II. Title IX, 20 USC 1681(a)

- Title IX of the Education Amendments of 1972
  - *No person . . . shall, on the basis of sex, be excluded from participation in, be denied the benefit of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.*  
20 USC § 1681(a).
  - Applicable to all schools that receive federal financial assistance
  - Title IX and NHDOE require that schools have a policy to address complaints.

# III. The New Regulations

- Effective: August 14, 2020
- Impact: Policies and practices will have to be revised. Conduct expectations will change.
- Available online: <https://www.govinfo.gov/content/pkg/FR-2020-05-19/pdf/2020-10512.pdf>

# A. Definitions

- Policy ACAC - "Sexual harassment:"

- Conduct on the basis of sex (including, without limitation, gender, sexual orientation, and/or gender identity) occurring in an educational program or activity, that satisfies **one or more** of the following:

- (1) A district employee 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) or state law.

"On the basis of sex" includes gender, sexual orientation and gender identity.

# “Actual Knowledge”

- *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.**
- The implications of this standard.
- Actual Knowledge triggers our obligation to provide supportive measures!!

# “Deliberate Indifference”

- Takes a back seat to process.
  - *“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.”*
- *“Deliberate indifference”* = a response that is *“clearly unreasonable in light of the known circumstances.”*
  - May be equated with a lack of “supportive measures.”

# “Supportive Measures”

- “Non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, and without fee or charge.”
- “. . . 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*.”
- Examples:
  - 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
- DUTY – To immediately implement – presumption of protection!
  - Confidential!
  - Overseen by the Title IX Coordinator.
  - Never punitive.



# “Formal Complaint”

- Document
  - Filed by a Complainant; or
  - Signed by the Title IX Coordinator
- Requesting that the District investigate the allegation of sexual harassment.
- Precondition: Complainant must be a
  - Program participant; or
  - Attempting to participate in program or activity of the District.
- Method of Filing:
  - In person;
  - Mail;
  - Electronic mail; or
  - “Any additional method designated by” the District.
- NOTE: Complainant who declines to file a formal complaint is still entitled to “supportive measures.”
- “Mandatory” and “permissive” dismissal procedures

# “Educational Program or Activity”

- Scope: An Institution’s “education programs and activities”
  - “Locations, events, or circumstances over which the institution exercised substantial control.”
  - Sexual harassment – that occurs in “any education program or activity.”
- Example: No jurisdiction over ‘study abroad.’

# “Complainant” and “Respondent”

- Complainant: *“An individual who is alleged to be the victim of conduct that could constitute sexual harassment.”*
- Respondent: *“An individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment.”*

# Additional Definitions

- Days – Calendar days...with some exceptions
- Decision-maker – person making the initial decision and person making any appellate decisions
- Determination of Responsibility – formal finding by the decision-maker as to each allegation of sexual harassment

# IV. Conducting an Effective Title IX Investigation

- The Grievance process commences upon the filing of a formal complaint of sexual harassment. 34 CFR 106.45(b).
- Investigator = fact finder
- Must be free from bias and conflicts of interest.
  - Presumption that the respondent is “not responsible” when gathering evidence/investigating
  - Watch for the appearance of a bias or conflict of interest

# A. Minimum Requirements for Title IX Investigations

- Equal opportunity to present witnesses
  - No restriction on the parties' ability to present evidence
- Parties must be allowed to have an advisor present at any meeting or proceeding under the grievance procedure
  - Can place limitations on the advisors' participation – limitations apply to both parties!
- Written notice to parties prior to any meeting or interview
- Parties must be given an equal opportunity to inspect and review evidence that is directly related to the allegations in the formal complaint
  - Includes evidence that the investigator does not intend to rely on
  - Intent is to give each party the opportunity to respond to the evidence before the investigation concludes

# 1. Role of the Title IX Coordinator

- Described in Policy ACAC
- Prompt notification to the Title IX Coordinator is key to the successful implementation of timely supportive measures and to ensure compliance with policy ACAC!

# B. Initial Considerations

## 1. Do you need an outside investigator?

- Factors to consider:
  - Conflict of interest/bias
  - Scope of the investigation
  - Potential for subsequent litigation



## 2. Do the allegations trigger other reporting duties?

- Reporting to Law Enforcement
  - Allegations of criminal behavior
  - Safe School Zone Violations (RSA 193-D)
- Potential Abuse/Neglect
  - Mandatory reporting obligation
- Reporting to the Insurer
  - Bodily injury
- State Department of Education
  - Code of conduct requirements
- Reporting to Third Parties
  - Duty to warn of foreseeable harm

# C. Notice to the Complainant, Respondent and Other Parties

- Provided to:
  - Complainant and Complainant's parent(s)/guardian
  - Respondent and Respondent's parent(s)/guardian
  - "Any other known party"
- Content of the Notice:
  - Notice of the school's grievance process, including any informal resolution process, AND
  - Notice of the allegations of sexual harassment, "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, and
    - the date and location of the alleged incident, if known.
  - 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.
  - Notice to the parties that they may have an advisor of their choice and 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.

# Presumption of Non-Responsibility

- Respondent may NOT be presumed responsible until the conclusion of the grievance process.
  - Driven by Due Process considerations; and
  - Is why the supportive measures cannot be punitive.
  - Is NOT a presumption of truthfulness or greater credibility.
  - Goal of presumption is impartiality in the process

# Collateral Issues

- The allegation(s) that are presented may trigger other district policies/requirements
  - Bullying
  - RSA 193:38-39 Anti-discrimination policy

# D. Scope and Conduct of the Investigation

- Scope will depend on the nature of the case
- Minimum requirements:
  - Interview/obtain statements from complainant/respondent/witnesses
  - Review district policies
  - Review evidence in district's control
  - Review evidence obtained from complainant/respondent/witnesses
  - State law considerations – RSA 189:70 regarding information from social media accounts

# 1. Conducting Interviews

- Factors to consider:
  - Location of the interview?
  - Who conducts the interview?
  - How many individuals are present?
  - Where will people sit?
  - Manner in which questions are phrased
  - Garrity warnings for employees

## 2. Pre-decision access to the evidence

- Before concluding the investigation: Must provide the parties and their advisors equal opportunity to inspect and review the evidence obtained during the investigation that is “*directly related to the allegations raised in a formal complaint.*”
  - Must include all inculpatory and exculpatory evidence.
  - Ten (10) day review.
  - Evidence that is directly related to the complaint –
    - Tends to prove or disprove an issue in the complaint
    - Pertains to the allegations but does not prove or disprove the allegations

## 2. Pre-decision access to the evidence, Continued

- At conclusion of the investigation – Investigator must create an investigative report that fairly summarizes the evidence.
  - Investigator must consider the written responses from the parties prior to finalizing the report
- Investigative Report: Must be provided to the parties and the decision-maker in an electronic format or a hard copy
  - Post-disclosure process begins – decision-maker is involved
- State Law Considerations – limitations on social media access



# 3. The Investigation Report

- Summarize relevant evidence
- Provided to the parties and decision-maker
  - Hard copy or secure electronic format
- Report will be used by the decision-maker to make his/her determination
- Parties have 10 days to review the final report and provide written feedback to the decision-maker

# 3. The Investigation Report

- Introduction/Summary of the Allegations
- Procedural History
  - Description of the steps taken as part of the investigation process
- Scope of Investigation/Applicable Policies
- Information Considered
  - Interviews
  - Documents
    - Provided by District (policies)
    - Provided by Complainant
    - Provided by Respondent
    - Provided by Witnesses
- Credibility
- Summary of Facts
  - For each allegation

# V. The Role of the Decision-Maker

- Free from bias and conflict of interest
- Must be someone other than the Title IX Coordinator and investigator
- Should be new to the investigation
- Tasked with reviewing the investigation report and making an objective determination as to whether the allegations are founded or unfounded

# Post-disclosure Process

- Decision-maker gives each party 10 days to submit written, relevant questions to be asked of other parties/witnesses. The parties will have no less than 10 days to provide answers to those questions, and 5 days will be provided for limited follow-up questions.
- Decision-maker considers all evidence then issues a written determination.
- Contents of final decision are outlined in the regulations.
- Simultaneous disclosure of the written decision

# A. Standard of Proof

- Preponderance of the evidence requires the factfinder to consider the greater weight of the evidence. This is the burden of proof in most civil trials, in which the jury is instructed to find for the party that, on the whole, has the stronger evidence, however slight the edge may be, commonly in the context of a finding of “more likely than not.”

# B. Written Determination

- Issued within 10 days after the conclusion of the Q and A period.
- Contents of the decision
  - The date of the determination;
  - Identification of the allegations potentially constituting sexual harassment;
  - A description of the procedural steps taken from the receipt of the formal complaint through the determination, including notification to the parties, interviews with parties and witnesses, site visits, and methods used to gather other evidence;
  - Findings of fact supporting the determination;
  - Conclusions regarding the application of the school's code of conduct to the facts;
  - A statement of the result as to each allegation, including a rationale for each result. This must also include:
    - A determination regarding responsibility;
    - Any disciplinary sanctions to be imposed on the respondent;
    - Whether remedies designed to restore or preserve equal access to the District's education program or activity will be provided by the District to the complainant; and
    - The District's procedures and permissible bases for either party to appeal.
- The written decision becomes final after the conclusion of any appeals process, or the expiration of the appeals period.

# VI. Right to Appeal

- Triggered by the issuance of the written determination
- 10 days to file an appeal
  - Once filed, both parties 10 days to submit a written statement in support of, or challenging, the outcome
- Bases for appeal:
  - Procedural irregularity that affected the outcome.
  - New evidence that was not reasonably available when the determination of responsibility or dismissal was made that could affect the outcome.
  - The Title IX Coordinator, investigator, or decision-maker had conflict of interest or bias that affected the outcome.

Remedial measures/discipline imposed after the completion of the appeals process (or the expiration of the timeframe to file an appeal).

# VI. Right to Appeal

- Appellate decision-maker reviews the investigative report, the decision-maker's final report, and any information provided during the appeals process, to determine whether the decision was clearly erroneous (either made on unreasonable grounds, or without any proper consideration of the circumstances). If the appeal is based on new evidence, then appellate decision-maker may either make a determination of responsibility regarding that evidence or may remand the matter back to the investigator.
- Written decision should include:
  - Basis for the appeal
  - Decision on the appeal
  - Findings to support the decision



# VII. Additional Considerations

## ● A. Informal Resolution

- Schools may use an “informal resolution process” BUT – only after a formal complaint has been filed.
- Prohibited when the allegation is that an employee harassed a student.
- To engage in an informal resolution process – both parties must give:
  - Voluntary;
  - Informed; and
  - Written consent.
- Either party may withdraw from the process and resume the grievance process at any point.

## B. Prohibition against Retaliation

- Prohibited to retaliate against any individual for exercising his/her right under Title IX, including the participating in or refusing to participate in:
  - the filing of a complaint,
  - the investigation, or
  - any proceeding or hearing.

## Case study #1:

Justin is a 14 year old cis male, Krista is a 13 year old cis female at the middle school. They have been “dating” for 6 months. Both Justin and Krista are known to the teachers as good students. Neither has a disciplinary history.

On a Monday morning Justin arrives for school and attends first period. Between first and second period he goes to guidance and discloses to a counselor that over the weekend he received several nasty messages on SnapChat from female friends of Krista’s. These messages accuse him of raping Krista. Justin is distraught, crying, very upset. The guidance counselor contacts Justin’s next period teacher to excuse Justin from class. She asks Justin if she can call his parent, which he allows. Justin goes home for the day. Justin is absent from class the next day.

On Wednesday, the day Justin returns to school, the guidance counselor sees Krista in the hall, looking very upset. She asks Krista if everything is OK. Krista starts crying. The Counselor brings Krista into her office to talk. Krista tells guidance that she and Justin broke up and that things were “very bad” before they broke up. The Counselor asks Krista what she means by “very bad” and Krista says Justin “touched her.” The Counselor asks Krista where Justin touched her and Krista says, “my boob.” The Counselor asked if she can call a parent, which Krista allows. Krista goes home for the day.

The Counselor immediately calls the Title IX Coordinator to say what she’s learned.

Questions for discussion:

*Should the counselor have done anything else? What? When?*

*After contacting the Title IX Coordinator, what are the “next steps”?*

## Case Study #2

David has taught math at the high school for over 15 years – he has been there longer than any other teacher in the department. He is active in the community as a scout leader, regularly volunteers to chaperone school events and field trips, tutors students and is involved with student counsel. He is universally liked by parents, teachers and students.

You arrive at work Monday and find the office staff looking at photos of the past Friday's soccer game on Facebook. The photos are of the game but also of the kids hanging around the field sidelines generally goofing and hanging out. A secretary comments: "David is always in the middle of it. Those kids love him." You look at the pictures and notice that David is the only adult in these pictures. He is goofing along with the kids, arms around them, heads in close to theirs. You don't think much of it and go about your day.

Shortly before lunch a teacher, Lisa, comes into your office. She shows you her phone, on which she shows you a number of other photos posted on David's account on Facebook (Lisa and David are Facebook friends). The pictures show David at the game, but also at a party that appears to be at a house. There are no other adults in the pictures at the house – just David, with all the students. In one photo, a beer can is plainly visible. David is seen sitting on a couch with a female student, Jessica, known to you and Lisa as a junior. His hand is on Jessica's knee and his arm is around her shoulder. Jessica is leaning into David resting her head on his shoulder David appears to be kissing the top of her head. Lisa is concerned about the photo. The two of you look back through the other pictures and see that in nearly all of them David is with Jessica.

### Case Study #3

Jack and Diane are both teachers at the middle school. They have worked closely for the past 5 years and have always appeared to get along well. They regularly eat lunch together in Jack's classroom with Lisa, another teacher at the school. All three are well liked and well respected by their co-workers and parents. The students seem to enjoy their classes.

Diane is married with one child. She is pregnant with her second. Jack is also married.

Late Sunday afternoon you receive an email from Diane that reads as follows:

“Hi,  
I'm really sorry to other you on a Sunday. I cannot come in tomorrow. Can we have a phone call in the morning?”

Knowing that Diane rarely calls in sick or misses a class you are concerned that there may be issues with her pregnancy. You email back and ask if you can have a conversation that afternoon.

Continued...

A few hours later you are on the phone with Diane. She tells you that on Friday she was in her classroom finishing a few things before heading home for the weekend. Jack came in and sat on her desk while she was working. He asked her why she had not been to lunch that day. When Diane told him that he had made her uncomfortable with some of his comments at lunch the day prior, Jack laughed like he thought she was joking. Diane stood up to move from her desk because she felt uncomfortable with how close Jack was to her. Jack walked to Diane and put his arm around her, giving her a side hug in which his hand rested on her pregnant belly, kissed her on the cheek and said, “those hormones are going to be my death.” Diane said she did not know what to say so she packed her things and left.

You asked Diane what comments had been made the day before that made her uncomfortable. She told you that it was more than just that one day, that he had been making comments to her and about her for a while and she just couldn't take it anymore. In general, Jack had made comments that she looked beautiful and sexy while pregnant, commented on her legs, commented about sex during pregnancy, and that her husband must be “enjoying himself immensely.” Diane said that Jack had made these comments in front of Lisa. During one lunch time when Jack made some of these comments a student was in the room doing make up work. She was not sure if the student overheard these comments or not. Diane also said that during a conference with one of her IEP students who had had an especially difficult week, Jack had interrupted her, telling the parents that the problem was likely not the student but her because she was a bit emotional “for obvious reason” (while gesturing at her belly). The parents did not respond but looked very uncomfortable.

Diane said she had spent the weekend dreading going back to school. She did not want to see Jack.

## Case Study #4

Amanda and Katherine are both 17 year old female students at the high school. They have been dating for about a year.

On a Friday after class is dismissed Amanda finds her English teacher in the classroom and asks to talk to the teacher. She says that she needs help and doesn't know who else to talk too. The teacher sits down and asks Amanda what's going on. Amanda discloses that she and Katherine had been having sex, often times at school, for several months. They broke up about a month ago but tried to still be friends. The week before Katherine had asked Amanda to meet her at their "usual place" to talk. Their "usual place" is a back stairwell. The conversation turns to an argument. Katherine wants them to get back together and says she misses Amanda. Amanda says she does not want to get back together. While they are arguing Katherine forcibly kisses Amanda and puts her hand down Amanda's pants, touching her vagina. Amanda tells the teacher that she pulled away, pushed Katherine away and left school early that day. She has not seen Katherine since.

The teacher tells Amanda that she thinks Amanda should talk to Guidance. Amanda agrees to talk to a guidance counselor and the teacher walks her to the guidance office.