

The New Era of Title IX

Raymond School District

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Presented by:

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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.

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 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.
- 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.

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).
- 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.

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.

ACAC –Title IX Sexual Harassment and Grievance Process

The policy that addresses Title IX sexual harassment towards students, staff and others in the school community.

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.

Thank You

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