

# A New Era of Title IX

## (Module 2: In-Depth Training for Title IX Coordinators and Other Interested Personnel)

Presented on  
**Friday, October 2, 2020**  
9:00 AM - 12:00 PM | Zoom

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## How to Conduct Effective Investigations in Schools

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### A. Introduction

One of the primary duties of Human Rights Officers (HRO's) and/or Title IX Coordinators is to ensure that all complaints of discrimination and harassment are appropriately investigated. This does not mean that the HRO/Title IX Coordinator will personally conduct all investigations, but the HRO/Title IX Coordinator should be fully familiar with proper investigatory practices in order to ensure that effective investigations are done.

This guide provides a roadmap for planning and conducting effective investigations of both student and employee complaints regarding alleged discrimination and harassment, and can also be used to investigate other misconduct.

#### Step 1: Assess the Nature of the Complaint/Suspected Misconduct

As soon as a report/complaint is received, or there is reason to suspect that misconduct has occurred, the HRO/Title IX Coordinator must make an initial assessment of the seriousness of the complaint and what policy/legal violations may have occurred.

Virtually every incident of alleged misconduct warrants some level of investigation. However, complaints concerning discrimination and harassment (as well as complaints that may involve the safety of students, employees or the public; and complaints of potential criminal misconduct) need to be addressed right away and require a greater level of scrutiny than those relating to minor policy violations or workplace annoyances.

Cast a wide net and make sure you review all the possible relevant policies/procedures associated with the alleged misconduct so that you are sure you are applying the correct policy/procedure for the situation. For instance, if there is a complaint that a student or employee has been harassed, you may need review the following (depending on the information you have received):

- ACAA/ACAA-R – Harassment and Sexual Harassment of Students/Complaint Procedure;
- ACAB/ACAB-R – Harassment and Sexual Harassment of Employees/Complaint Procedure;
- JICK – Bullying and Cyberbullying of Students;
- JICFA – Hazing (applies to students and employees).

The Title IX sexual harassment regulations which became effective on August 14, 2020 include strict definitions and procedures that need to be followed, which makes it more important than ever to ensure that you use the correct policy/procedure for each report/complaint you receive.<sup>1</sup>

## **Step 2: Take Any Necessary Steps to Ensure Safety and Provide Any Necessary Notices**

If there is any actual or potential injury to people or property, steps should be taken to address the threat, including calling law enforcement, crisis services, and/or removing the student or employee from the school.<sup>2</sup>

At a minimum, if there is an issue between particular employees and/or students, consider whether supportive measures are appropriate to ensure that the parties do not come into contact with each other.

- When students are involved, it is important to notify the parents/guardians, at least in general terms, about what is going on.
- In cases where there is reason to believe that a child has been abused or neglected, be sure to comply with DCYF reporting requirements (review your school board's child abuse policy/procedure for more detail).
- Keep in mind that the New Hampshire Code of Conduct requires administrators to notify the Superintendent when a credential holder has violated the code of conduct. It is then incumbent on the Superintendent to report that violation to the Department of Education.<sup>3</sup>
- It is important to comply with any collective bargaining requirements or policies that may apply.

## **Step 3: Preserve Evidence**

Preserving evidence of wrongdoing is an important step in an investigation. Sometimes this means taking photographs of the scene of an incident or of a physical injury, or it might mean taking custody of a computer or electronic device. Preservation of evidence can be particularly challenging in an investigation of misconduct that involves social media, texts, emails or access to inappropriate websites because information can so easily be deleted or altered. It is important to act quickly to take screen shots or make copies of information before someone has the chance to delete or alter it. Consider whether in some cases there may be video

<sup>1</sup>See materials from Module 1 for further information. In cases of possible Title IX sexual harassment, some steps of the investigation process will need to be compressed. For instance, although you will not do a full investigative interview at the outset (because no formal complaint has been filed), you will need to meet with the alleged victim (if known), provide supportive measures as appropriate, and explain how to file a formal complaint.

<sup>2</sup> In addition, there are specific requirements concerning "emergency removal or administrative leave" under the Title IX regulations.

<sup>3</sup> See N.H. Admin. Code Ed. 510.05.

surveillance available of the incident.

#### Step 4: Review Documents

To the extent it has not been done already, it is important to review any relevant documents such as a collective bargaining agreement or contract, other school board policies/procedures, and the personnel records and/or education records of the parties involved. This will ensure that the investigation is conducted in accordance with any particular contract or policy requirements, and the parties' records may be helpful to the investigator in some cases when assessing statements for accuracy and/or assessing credibility.

#### Step 5: Choose an Investigator

It is important to choose the right person to conduct each investigation. Although the HRO/Title IX Coordinator is responsible for overseeing the investigation, they may not be the most appropriate person to conduct a particular investigation.<sup>4</sup>

The investigator should:

- Have no bias or conflict of interest;
- Be fair and impartial;
- Be well-trained;<sup>5</sup>
- Have a clear understanding of applicable laws, policies, and rules;
- Be a trusted and respected individual;
- Be able to treat people with respect and sensitivity;
- Be able to get to the truth;
- Be able to ask hard questions;
- Be thorough, but know when to stop;
- Be able to reach conclusions;
- Be a good note-taker and writer;
- Be an effective witness (if necessary).

#### Step 6: Plan the Investigation

It is important for the investigator to plan out the investigation. No two investigations are exactly alike and virtually every investigation will differ in some (often unexpected) ways from others. Planning the investigation will include at least the following general steps. However, it is important that investigators follow the

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<sup>4</sup>Under the new Title IX sexual harassment regulations, Title IX Coordinators may conduct investigations, but there may be good reasons to appoint someone else to conduct such investigations.

<sup>5</sup>There are specific training requirements for investigators dealing with Title IX sexual harassment matters.

requirements of the particular complaint procedure applicable to the matter.

- Determine the scope of the investigator's responsibility (and who will be responsible for what discipline and/or other actions may be taken as a result of the investigation).
- Determine what documents/evidence will need to be gathered (in addition to any preserved when the report or complaint was received).
- Determine who will be interviewed (the same person should do all interviews). Sometimes it is difficult to determine the proper scope, but in general it is best to keep the investigation as small as possible and still be thorough. Investigations almost always have an impact in the school, no matter how discreet an investigator is in conducting the investigation.
- Determine whether a site visit will be needed.
- Determine how the investigation will be documented, what kind of report will be written, and who will see it.
- Develop a tentative timeline for the investigation. Some policies/procedures or collective bargaining agreements have specific deadlines that need to be followed. In every case, an effort should be made to conduct and conclude the investigation within a reasonable time, based on the particular circumstances.

### Step 7: Prepare for the Interviews

Once the overall plan for the investigation is mapped out, it is important to take the time to prepare for the interviews.

- **Determine sequence of interviews:** Usually (but not always), the complainant should be interviewed first, any witnesses next, and the respondent should be interviewed last (but not always). Except in rare circumstances individuals should not be interviewed together.
- **Determine location of interviews:** Choose a private location. If possible, it is often a good idea to hold the interviews outside of the location where the incident/conduct occurred (for instance, at central office if the incident occurred in a particular school building). It is always a good idea to have water and tissues on hand during interviews, and if possible, there should also be a restroom nearby.
- **Determine how to document interviews:** Consider how interviews will be documented. In most cases, taking notes by hand or on a computer works well. Only the facts should be recorded, not the investigator's impressions of credibility or conclusions. In some cases, it may make sense to have someone present to take notes, but if so, it should be someone who can accurately document what was said and who can keep information strictly confidential. Generally, our recommendation is not to audio or video record interviews. If you feel that a particular

interview should be recorded, we recommend that you consult with legal counsel first. The people you interview should not be allowed to record their interview, as the investigator will have no control over what happens with that recording. You should politely confirm that no one present is recording the interview.

- **Determine whether anyone will or could accompany the persons to be interviewed:** Employees may have a right to have a representative with them in certain situations, parents/guardians may want to be present at interviews of their children, and employees and/or students may ask for a “support” person at an interview. Decisions about these issues should be made on a case-by-case basis depending on the particular circumstances.

In Title IX sexual harassment investigations, the parties have the right to an “advisor” throughout the complaint process, and this advisor may be an attorney.

- **Prepare interview questions:** Questions should be prepared ahead of time (more on questions in the next section). However, the cardinal rule of interviewing is to be flexible, so investigators must be prepared to go where the witness takes them during the interview. An effective investigator recognizes that questions should be tailored to the person being interviewed and the nature of the issue being investigated.

## Step 8: Conduct Interviews

The following are some basic tips for conducting effective interviews:

- Show respect for the individual by being on time and prepared for the interview.
- Explain the investigator’s role (“I’m here to find out what happened”); what the individual’s role is in the investigation; the importance of confidentiality<sup>6</sup> and the prohibition against retaliation for participating in the investigation. Ask the individual if they have any questions for you at the outset.
- Individuals are often nervous and not sure what to expect in the interview, even if they have not been accused of any wrongdoing. In such cases, you can ask them if they have any particular concerns about participating in the interview.
- Make sure the individual knows they can take a break to go to the restroom or get some fresh air if they need to (breaks can sometimes be a strategic tool for investigators to use as well).

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<sup>6</sup>Keep in mind that during a Title IX sexual harassment investigation, the parties cannot be prohibited from talking about the situation, but they (or those they speak with) still cannot engage in retaliatory conduct or other conduct that interferes with the investigation process.

## NOTES

- Do not promise that you can keep an individual's identity or statements confidential.
- If there is a union representative or support person/advisor with the individual being interviewed, they should not be answering questions or explaining things for the witness, or asking the investigator questions themselves. This should be explained at the outset of the interview.
- Build rapport with the individual before jumping into investigatory questions. Talking about the weather, what classes and activities a student likes, what their job entails, etc., can help put an individual at ease and shows an interest in them as a person.
- Get the basic information first (such as full name, grade or position, how long they have been employed, etc.).
- Let the individual tell their story first, without jumping in. Ask open-ended questions (e.g. "Tell me what happened," "Tell me about Mr. X's style in class," "Tell me about your relationship with Julie," etc.), rather than questions that suggest the answer (e.g. "Mr. X made suggestive comments to you, didn't he?" "I am here to talk to you about what Johnny did to Suzy," or "Did you look down Ms. Young's shirt?").
- Often there is important background information that provides context for the issue at hand, so make sure to ask questions about the history of the relationship between the parties, etc.
- The hard questions must be asked at some point during the interview (although usually not at the outset!). If someone is accused of a specific act, you will need to ask that person if they engaged in that act, no matter how hard or embarrassing it is to ask about it. You must have either an admission or denial, and obtain their version of what happened, in order to make an accurate assessment about what occurred.
- It is often useful to ask an individual to act out what happened. Have the individual show you exactly where and how they were touched, where people were in the room; or ask them to demonstrate a tone of voice. Ask for details, such as what time it was, what people were wearing, whether the door was open or shut, whether the lights on or off, etc.
- Follow-up on inconsistencies or gaps in a matter of fact manner to avoid defensiveness or the individual shutting down. If an individual has made inconsistent statements or you have reason to doubt their truthfulness, it can be helpful to have them repeat their story later in the interview to see if anything changes.
- For evasive individuals, it is often helpful to drop a line of questioning and come back to it later.

- For hostile individuals, remind them that this is their opportunity to share what they know, and if they refuse, assessments will be based on the totality of facts the investigator knows. Stay calm and try to elicit the reasons for the hostility. If an interview really is not going anywhere, you can end it and say that you may be in touch at a later time.
- Before the end of the interview, be sure to ask the individual if there is anything you did not ask that they think you should know, whether there is anyone else with direct information about the incident, and whether there are any documents, texts, etc. that the individual has or knows about.
- At the end of the interview, thank the individual for their time. Let them know that you may contact them again if there are further questions and invite them to contact you if they think of anything else. If it is one of the parties, let them know what the next steps will be. Remind the individual about confidentiality and that retaliation is prohibited.
- Be as thorough as you can in your first interview, but if there are inconsistencies or gaps based on the totality of the interviews you conduct and information received, do not hesitate to follow up to resolve lingering questions.

### Step 9: Finish the Investigation

Even the most seasoned investigator sometimes has difficulty determining when it is time to stop investigating and move on to the next stage. Once the evidence has been gathered and witnesses have been interviewed, the investigator should go over what they have and see if anything else is needed.

Keep in mind that in Title IX sexual harassment investigations, there are specific requirements for sharing evidence with the parties and obtaining their responses to the evidence.

It is important to try to meet any required or self-imposed deadlines, but it is also very important to do a thorough investigation. If necessary, it is better to get an extension for good cause than to rush through a flawed investigation that may be challenged and will reflect poorly on the school unit.

### Step 10: Reach a Conclusion

Now it is time to reach a conclusion about the case (other than in Title IX sexual harassment cases, where a separate decision maker determines whether there is a finding of responsibility on the part of the respondent).

Reaching a conclusion is often difficult to do for many reasons: the respondent denies engaging in the conduct and there is no “smoking gun,” there are inconsistencies or contradictions in people’s stories, etc. It is the investigator’s responsibility to weigh the evidence, assess the credibility of all the individuals involved, decide who to believe and who not to believe, and to reach a conclusion as to whether a



policy violation was committed.

Generally speaking, determinations that an individual is responsible for a violation are made based on the preponderance of the evidence standard (“more likely than not”).

### **Step 11: Write the Report**

Careful thought should be given to the issue of what to include in the investigation report. It is important to remember that if the case is litigated later, the report will almost always be admissible in court.

In most cases, a written report should be concise and include basic information about the investigation:

- A statement of what the complaint was about and the scope of the investigation.
- A summary of the respondent’s response to the allegations.
- A list of documents/evidence reviewed.
- A list of witnesses who were interviewed. Whether or not to include summaries of what witnesses said is something that should be discussed at the outset of the case.
- The investigator’s conclusion as to whether the complaint is valid or not (and what policies were violated, if applicable), and the reasons for that conclusion. (This is not applicable in Title IX sexual harassment cases.)

In Title IX sexual harassment cases, the investigator must provide the investigation report to the parties, provide them an opportunity to provide feedback on the report, and consider that feedback before finalizing the report.

Generally speaking, reports should not include recommendations as to what, if any, remedial action should be taken, unless the investigator was assigned that responsibility at the outset.

Investigation reports should not include information that is extraneous to the incident being investigated. For example, if the investigation revealed the existence of more widespread harassment in a school than just that between the complainant and the respondent, that issue should be addressed separately, not in the report on the specific complaint.

Similarly, if the investigator develops opinions as to what employees or others should have done or should not have done to avoid the incident, those opinions should be raised outside of the context of the investigation and should not be included in the report.

### **Step 12-A: Notify People of the Results and Take Appropriate Actions – Non-Title IX Sexual Harassment Matters**

Care should be taken in dealing with people in the aftermath of an investigation, because it is likely that one or even both parties will be unhappy with the results. In addition, in a high profile case, there may be a need to make public statements of some kind – any such statements should be carefully crafted in consultation with legal counsel.

Both the complainant and respondent should be notified that the investigation has been concluded and both should be told whether the allegations were determined to be founded or unfounded. It is worth planning in advance how to handle conversations with affected parties.

How much more each side should be told depends upon whether the investigation deals with employees or students, and what complaint procedure is being followed.

In general, because employment records of public school employees must be kept confidential by law, giving the complainant information as to any discipline imposed is prohibited.

Consistent with state and federal law regarding student and employee privacy, New Hampshire's bullying law requires that schools have a written procedure for communication with parents or guardians of victims and perpetrators regarding the school's remedies and assistance.<sup>7</sup>

If a conclusion is made that unlawful discrimination or harassment did occur, the next step is to determine what should be done to ensure that such conduct ceases and does not recur.

### **Step 12-B: Title IX Sexual Harassment Matters – The Decision-Maker and Notification Process**

The new Title IX sexual harassment regulations prescribe a process whereby the investigator submits their final report to an assigned decision maker (who cannot be the same person as the investigator or the Title IX Coordinator). After the HRO or Title IX Coordinator has sent the investigation report to the decision maker (and to the parties), the decision maker must provide each party the opportunity to submit written, relevant questions that a party wants asked of any other party or witness. The answers must be provided to each party, who also must be given a chance pose additional, limited follow-up questions.<sup>8</sup>

Subsequently, the decision maker must issue a written determination as to whether the respondent is found "responsible" for sexually harassing conduct. The written determination must include:

<sup>7</sup> RSA 193-F:4, II(m).

<sup>8</sup>These steps are intended to afford the parties a chance to question one another without the school having to conduct a "live hearing," which is only required at the post-secondary level.

# NOTES

- Findings of fact;
- Conclusions as to whether the alleged conduct occurred;
- A rationale for the result as to each allegation in the complaint;
- Any disciplinary sanctions imposed on the respondent; and
- A statement as to whether remedies will be provided to the complainant.

The written determination must be sent simultaneously to the parties along with information about how to file an appeal.