

New Title IX Regulations: Comprehensive Training for Title IX Coordinators, Administrators, and Relevant Personnel

July 29, 2020

NUTTALL, MACAVOY & JOYCE, P.C.
1020 PLAIN STREET, SUITE 270
MARSHFIELD, MA 02050
WWW.NMJEDLAW.COM

1

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 program or activity receiving federal financial assistance.

2

Overview of Title IX

- ❑ The new Title IX regulations were finalized on May 6, 2020.
- ❑ The regulations go into effect on August 14, 2020.
- ❑ The regulations imposed an extremely prescriptive grievance process and have created a much more detailed and resource-intensive investigative process.
- ❑ The single-investigator model is now eliminated. Multiple personnel will need to be involved in the investigative process.
- ❑ Districts will need new Title IX Grievance Procedures to meet the requirements.

NUTTALL, MACAVOY & JOYCE, P.C.

3

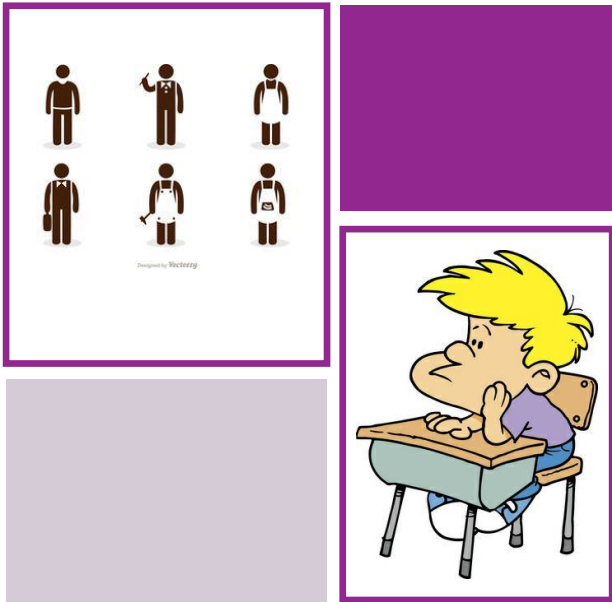
District's Duty to Respond to Sexual Harassment under Title IX

- ❑ Now, when must a district respond under Title IX?
 - ❑ Whenever the *district has actual knowledge*, which means whenever any employee receives notice of sexual harassment or notice of allegations of sexual harassment occurring within an education program or activity of the district in the U.S.
 - ❑ (Prior standard - whenever the *district knew or should have known* of an allegation of sexual harassment under Title IX).
- ❑ The district's response must be prompt and not deliberately indifferent, which means not clearly unreasonable in light of the known circumstances.



NUTTALL, MACAVOY & JOYCE, P.C.

4



Students and Employees Protected

All three types of sexual harassment apply to both student victims and employee victims.

NUTTALL, MACAVOY & JOYCE, P.C.

This Photo by Unknown Author is licensed under CC BY-NC-ND

5

1

Quid pro quo Sexual Harassment

An employee of a recipient conditioning the provision of an aid, benefit, or service ... on an individual's participation in unwelcome sexual conduct.

NUTTALL, MACAVOY & JOYCE, P.C.

6

2

Severe, pervasive, and objectively unreasonable

Unwelcome conduct, on the basis of sex, determined by a reasonable person to be so severe, pervasive, and objectively unreasonable that it effectively denies a person equal access to the recipient's education program or activity

This is a significant narrowing from prior definition of "sufficiently severe or persistent or pervasive..."

NUTTALL, MACAVOY & JOYCE, P.C.

7

Clery Act
&
Violence Against
Women Act (VAWA)
Offenses

3

- . Sexual Assault
- . Dating Violence
- . Domestic Violence
- . Stalking

8

Sexual Assault, Dating Violence, Domestic Violence, or Stalking

Sexual Assault:

- ❑ **Rape:** The penetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person, without the consent of the victim.
- ❑ **Fondling:** The touching of the private body parts of another person for the purpose of sexual gratification, without the consent of the victim, including instances where the victim is incapable of giving consent because of his/her age or because of his/her temporary or permanent mental incapacity. In Massachusetts, pursuant to M.G.L. c. 265, § 13B, a child under the age of 14 is incapable of giving consent to indecent touching.
- ❑ **Incest:** Sexual intercourse between persons who are related to each other within the degrees wherein marriage is prohibited by law.
- ❑ **Statutory Rape:** Sexual intercourse with a person who is under the statutory age of consent. In Massachusetts, pursuant to M.G.L. c. 265, § 23, the statutory age of consent is 16 years of age.

NUTTALL, MACAVOY & JOYCE, P.C.

9

Sexual Assault, Dating Violence, Domestic Violence, or Stalking

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 shall be determined based on the reporting party'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 includes, but is not limited to, sexual or physical abuse or the threat of such abuse. Dating violence does not include acts covered under the definition of domestic violence.

NUTTALL, MACAVOY & JOYCE, P.C.

10

Sexual Assault, Dating Violence, Domestic Violence, or Stalking

Domestic Violence:

A felony or misdemeanor crime of violence committed by a current or former spouse or intimate partner of the victim; by a person with whom the victim shares a child in common; by a person who is cohabitating with, or has cohabitated with, the victim as a spouse or intimate partner; by a person similarly situated to a spouse of the victim under the domestic or family violence laws of the jurisdiction in which the crime of violence occurred; by 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 the jurisdiction in which the crime of violence occurred.

NUTTALL, MACAVOY & JOYCE, P.C.

11

Sexual Assault, Dating Violence, Domestic Violence, or Stalking

Stalking:

Engaging in a *course of conduct* directed at a specific person that would cause a *reasonable person* to fear for the person's safety or the safety of others or suffer *substantial emotional distress*.

Course of conduct: two or more acts, including, but not limited to, acts in which the stalker directly, indirectly, or through third parties, by any action, method, device, or means, follows, monitors, observes, surveils, threatens, or communicates to or about a person, or interferes with a person's property.

Reasonable person: a reasonable person under similar circumstances and with similar identities to the victim.

Substantial emotional distress: significant mental suffering or anguish that may, but does not necessarily, require medical or other professional treatment or counseling.

NUTTALL, MACAVOY & JOYCE, P.C.

12

Evaluating Sexual Harassment: Recap



Quid pro quo




Sexual assault, dating violence, domestic violence, or stalking

Are always *per se* sexual harassment

NUTTALL, MACAVOY & JOYCE, P.C.

13

Evaluating Sexual Harassment: Recap



Always requires a determination of:
 Severity;
 Pervasiveness;
 Objective offensiveness; and
 Denial of alleged victim's equal access to education.

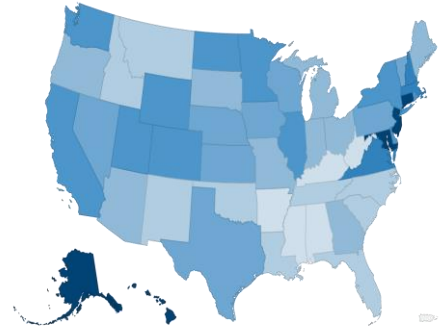
NUTTALL, MACAVOY & JOYCE, P.C.

14

Jurisdiction of Title IX Sexual Harassment Regulations

- What locations are covered?
 - Any education program or activity of the district in the U.S.

Education program or activity: locations, events, or circumstances over which the district exercised substantial control over both the respondent and the context in which the sexual harassment occurred.



NUTTALL, MACAVOY & JOYCE, P.C.

15

Sexual Harassment under State Law

Any sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when:

- (1) Quid pro quo: submission to or rejection of such advances, requests or conduct is made either explicitly or implicitly a term or condition of the provision of the benefits, privileges or placement services or as a basis for the evaluation of academic achievement or employment; or
- (2) Hostile Environment: such advances, requests or conduct have the purpose or effect of unreasonably interfering with an individual's education or employment by creating an intimidating, hostile, humiliating or sexually offensive educational environment.



See M.G.L. c. 151B (employment) and M.G.L. c. 151C (education)

NUTTALL, MACAVOY & JOYCE, P.C.

16

The Title IX Team



- Title IX Coordinator
- Investigator(s)
- Decision-Maker
- Appeals Officer
- Informal Resolution Facilitator(s)

NUTTALL, MACAVOY & JOYCE, P.C.

17



Training

To ensure a consistent, transparent and fair grievance process for both parties all Title IX Personnel must receive training on the following topics:

- How to conduct the Grievance Process
- Relevance as it pertains to evidence and questions
- Impartiality
- Technology to be used in cases of live hearings (K-12 not required)

All training material must not rely on sex stereotypes and must be posted on the district's website. Must maintain for 7 years.

NUTTALL, MACAVOY & JOYCE, P.C.

18



The Role of the Title IX Team

- No more single-investigator model. Team-based approach.
- All members of the Title IX Team need training on the definition of sexual harassment, the scope of the education program or activity, how to conduct an investigation and the grievance procedure including hearings, appeals and informal resolution.
- Impartiality

Title IX Team has no side other than the integrity of the process!

NUTTALL, MACAVOY & JOYCE, P.C.

19



Title IX Coordinator

- Must assign a district level Title IX Coordinator, can also have more than one Title IX Coordinator.
 - District can assign Deputy Title IX Coordinators (i.e. Athletics, Human Resources)
- Leads and coordinates compliance efforts for Title IX of the entire district.
- Must** know the district's Title IX policy and grievance procedure.
- Should report to the Superintendent.
- Must have autonomy and independence.
- Cannot** be the Decision-Maker or Appeals Officer.
- Can** serve as the Investigator.

NUTTALL, MACAVOY & JOYCE, P.C.

20

Investigator(s)



- Can be the Title IX Coordinator; in practice could be an Assistant Principal or Principal.
- Must receive training on “issues of relevance to create an Investigative Report that fairly summarizes relevant evidence...”
- Must maintain a presumption that the respondent is not responsible.
- Any formal complaint about an employee who holds a supervisory position shall be investigated by a person who is not subject to that supervisor’s authority.

NUTTALL, MACAVOY & JOYCE, P.C.

21

Investigator(s)



Responsible for completing an impartial investigation by seeking and gathering evidence relative to the investigation.

- Interview parties and witnesses.
- Identify, organize and compile relevant information.
- Maintain investigation records and notes.
- Write an Investigative Report that fairly summarizes the relevant evidence.

NUTTALL, MACAVOY & JOYCE, P.C.

22

Decision-Maker(s)

- Cannot** be the Title IX Coordinator or Investigator; could be the building Principal.
- Reviews Investigative Report and evidence, reviews responses to questions by each party.
- Must make the determination of responsibility or non-responsibility.



NUTTALL, MACAVOY & JOYCE, P.C.

23

Appeal Decision-Maker / Appeal Officer

- Cannot** be the Title IX Coordinator, the Decision-Maker or Investigator, may be the Superintendent.
- Must determine if the appeal can move forward based on specific criteria.
- Reviews investigation report and other evidence that was gathered, along with statements by all parties.
- Completes a written determination describing the outcome of the appeal and the rationale.

NUTTALL, MACAVOY & JOYCE, P.C.

24



Informal Resolution Facilitator

- Facilitates the **voluntary** process for informal resolution.
- Cannot** be Investigator or Decision-Maker, could be Title IX Coordinator if not the Investigator.
- Only can be used if a formal complaint is filed.
- Must receive training on:
 - The definition of sexual harassment;
 - The scope of the recipient's education program or activity;
 - How to conduct informal resolution processes; and
 - How to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, or bias.

NUTTALL, MACAVOY & JOYCE, P.C.

25

The Grievance Process

NUTTALL, MACAVOY & JOYCE, P.C.

26

The Grievance Process: General Standards



Standard of Proof

Districts can choose between two standards of proof to use for their Title IX sexual harassment grievance procedures. The same standard of proof must be used for all formal sexual harassment complaints (i.e. whether respondent is an employee or student).

1) **Clear and convincing evidence** – highly and substantially more likely to be true than untrue. Decision-Maker must be convinced that the contention is highly probable; or

2) **Preponderance of the evidence** – “more probable than not”; also referred to as “50% plus a feather.”

- Check your collective bargaining agreements for a specific standard of proof for complaints involving employees and whether that would conflict with your Title IX grievance procedure.
- The preponderance of the evidence standard has generally been used in prior practice in school-related determinations in Massachusetts.

NUTTALL, MACAVOY & JOYCE, P.C.

27



Report of Conduct: Actual Knowledge/Notice

A district with actual knowledge of sexual harassment in an education program or activity of the district in the United States must respond promptly in a manner that is not deliberately indifferent.

- District is deemed to have actual knowledge of sexual harassment when ANY district employee:
 - witnesses sexual harassment; OR
 - hears about sexual harassment from a complainant or third party; OR
 - receives a written or verbal complaint about sexual harassment allegations by any means (email, mail, phone call, etc.).
- Deliberate indifference: If a district’s response to a report of sexual harassment is clearly unreasonable in light of the known circumstances.

NUTTALL, MACAVOY & JOYCE, P.C.

28



Supportive Measures

- Must be discussed and considered for all complaints, whether formal or informal. May be provided whether the complaint is formal or informal.
- Title IX Coordinator is responsible for coordinating the effective implementation of supportive measures.
- Districts may continue supportive measures after a determination of non-responsibility.
- Non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, and without fee or charge to the complainant or respondent before or after the filing of a formal complaint or where no formal complaint has been filed.
 - If an action is listed as a disciplinary procedure which may be applied if a respondent is deemed responsible, it cannot be employed as a supportive measure.
 - Does not preclude District from implementing emergency removal under Title IX.

NUTTALL, MACAVOY & JOYCE, P.C.

29

Supportive Measures



- Designed to restore or preserve equal access to the District'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.
 - "Unreasonable burden" on a complainant or respondent is fact-specific.
 - In commentary to regulations, U.S. D.O.E. notes that schedule changes are often reasonable, but whether limiting participation in sports or extra-curriculars is unreasonable could be more fact-specific.
- District must maintain confidentiality of any supportive measures provided to the complainant or respondent, to the extent that the confidentiality would not impair the ability of the District to provide supportive measures.

NUTTALL, MACAVOY & JOYCE, P.C.

30

Supportive Measures: 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
- Other similar measures

This is a non-exhaustive list and does not preclude Districts from implementing other measures that do not place unreasonable burdens on either party and are not disciplinary or punitive in nature. Carefully crafted supportive measures must be created after a fact-specific inquiry.

NUTTALL, MACAVOY & JOYCE, P.C.

31

Formal Complaint Process: Step 1 Filing the Formal Complaint

What is a Formal Complaint?

- A document (paper or electronic) filed by a complainant or signed by the Title IX Coordinator alleging sexual harassment by a respondent and requesting that the district investigate the allegation of sexual harassment.
- Must state (if known to the reporter or alleged victim) the name(s) of the persons involved, witnesses to the conduct, if any, a description of the conduct, and to the extent possible, the dates and locations of the conduct. A formal complaint may not be dismissed solely because it was not completely filled out or it was filled out incorrectly.



NUTTALL, MACAVOY & JOYCE, P.C.

32

Formal Complaint Process: Step 1 Filing the Formal Complaint

- ❑ A formal complaint may be filed at any time, including during non-business hours. Complaints submitted outside of normal business hours should be deemed received on the following school working day.
- ❑ A formal complaint may be filed with the Title IX Coordinator in person, by mail, or by electronic mail, by using the contact information for the Title IX Coordinator provided by the district, and by any additional method designated by the district.
- ❑ At the time of the filing of the formal complaint, the alleged victim must be participating in or attempting to participate in the education program or activity of the district with which the formal complaint is filed.

NUTTALL, MACAVOY & JOYCE, P.C.

33

Formal Complaint Process: Step 1 Filing the Formal Complaint



Districts may consolidate formal complaints where the allegations arise out of the same facts or circumstances.

- ❑ Title IX Coordinator receives two complaints from students/parents about respondents Student A and Student B regarding allegations of sexual harassment by both Student A and Student B that occurred at the same time in the bathroom during Senior Prom. → Consolidate!
- ❑ Student C makes a complaint of allegations of sexual harassment by respondent Student D. Student D also files a complaint of sexual harassment, by respondent Student C. → Consolidate!

NUTTALL, MACAVOY & JOYCE, P.C.

34

Formal Complaint Process: Step 1

Filing the Formal Complaint

Parental Authority – A parent/legal guardian who retains legal rights over a student may file a formal complaint on their child’s behalf.

Reports filed by a Third Party – not formal complaint

While reports filed by a third party trigger the district’s obligation to respond, a formal complaint may only be signed by the complainant (or his/her parent/guardian) or the Title IX Coordinator.

Anonymous Reports – not formal complaint

Example: Sexualized comments or graffiti on bathroom stalls.

District cannot be deliberately indifferent. If district employee sees it and it fits the definition of sexual harassment, district is on notice. District should remove the graffiti, communicate to students that the graffiti is unacceptable.

NUTTALL, MACAVOY & JOYCE, P.C.

35

Formal Complaint Process: Step 1

Filing the Formal Complaint



- Title IX Coordinator may sign a complaint to initiate an investigation.
- The complainant’s wishes with respect to whether the district investigates will generally 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.

Consider:

- Concerns articulated by the parties, the best interests of the community, fairness to all concerned, and the district’s legal obligations under applicable state and federal laws.
- Remember – the Title IX Coordinator is not a complainant or a party during the grievance process and must be free from conflicts or bias.

NUTTALL, MACAVOY & JOYCE, P.C.

36

Formal Complaint Process: Step 2 Initial Assessment

- Does the formal complaint allege sexual harassment by a respondent and request that the District investigate the allegation of sexual harassment?
- Filed by the correct party? (Complainant or their parent/legal guardian?)
- Supportive Measures – discuss with complainant, determine what measures are necessary. Implement supportive measures prior to beginning investigation process, or state in writing why supportive measures are not being implemented.
- Is the complainant currently participating in, or attempting to participate in the District’s education program or activity?
- Consider mandatory/discretionary dismissal of the complaint.

NUTTALL, MACAVOY & JOYCE, P.C.

37

Formal Complaint Process: Step 3 Consideration of Dismissal

Mandatory dismissal – Title IX Coordinator **MUST** dismiss the formal complaint if:

- Even if true, the alleged conduct would not constitute sexual harassment as defined by Title IX; or
- The alleged conduct did not occur in the district’s education program or activity; or
- The alleged conduct did not occur within the United States.



Even if a complaint is dismissed under this section, a district may still take action under its code of conduct or applicable statutes (i.e. bullying law, M.G.L. c. 151B and 151C, Title VII).

NUTTALL, MACAVOY & JOYCE, P.C.

38



Formal Complaint Process: Step 3 Consideration of Dismissal

Discretionary dismissal – Title IX Coordinator MAY dismiss the formal complaint if at any time during the investigation or hearing:

- Complainant notifies the Title IX Coordinator in writing that he/she would like to withdraw the formal complaint or any allegations in it;
- Respondent is no longer enrolled or employed by the district;
- Specific circumstances prevent the district from gathering evidence sufficient to reach a determination as to the formal complaint or the allegations.

Upon any dismissal (mandatory or discretionary), district must send written notice of the dismissal and the reasons for it to both parties simultaneously.

NUTTALL, MACAVOY & JOYCE, P.C.

39

Formal Complaint Process: Step 4 Written Notice of Allegations



Upon receipt of a formal signed complaint, District must send written notice of the allegations, to both the complainant and respondent that includes:

- 1) A statement prohibiting knowingly submitting false information;
- 2) Sufficient details known at the time to allow the respondent the opportunity to respond, which includes the identities of the parties, the conduct allegedly constituting sexual harassment, and the date and location of the alleged incident, if known;
- 3) A statement that the respondent is presumed not responsible;
- 4) A statement that a determination regarding responsibility is made at the conclusion of the grievance process;
- 5) A statement that the parties may have an advisor of their choice who may be, but is not required to be, an attorney; and
- 6) A statement that the parties/advisors may inspect and review the evidence.

NUTTALL, MACAVOY & JOYCE, P.C.

40



Formal Complaint Process: Step 5 Initial Investigation

Formal complaint to be investigated by Title IX Coordinator or other individual designed to serve as Investigator by the Title IX Coordinator (e.g., Assistant Principal).

Responsibilities of Investigator:

- To gather evidence;
- To provide an equal opportunity for the parties to present fact and expert witnesses and other inculpatory and exculpatory evidence, and to inspect and review any evidence obtained that is directly related to the allegations;
- To ensure the ability of the parties to discuss the allegations or gather and present relevant evidence (i.e., no “gag” orders);
- To send prior written notice to the parties of any investigative interviews, meetings, or hearings in which their participation is invited or expected.

NUTTALL, MACAVOY & JOYCE, P.C.

41

Formal Complaint Process: Step 5 Initial Investigation

Throughout the formal complaint investigation process:

- Each party may have one (1) advisor of their own selection and *at their own expense* participate in the grievance process (districts do not need to provide).
- In the case of a minor child, the advisor may be in addition to the parents.



NUTTALL, MACAVOY & JOYCE, P.C.

42

Formal Complaint Process: Step 5 Initial Investigation

Question: During the formal complaint investigation process, what constitutes consent?

- ❑ Definition of Consent to be Applied: “The Department believes the definition of what constitutes consent ... within a recipient’s education community is a matter best left to the discretion of recipients, many of whom are under State law requirements to apply particular definitions of consent.”
- ❑ Massachusetts definition of lack of consent: compelling a person to do an act by force or by threat of bodily injury and against the complainant’s will.
- ❑ Note: In Massachusetts, a child under the age of 14 is incapable of giving consent to “indecent touching” and a child under the age of 16 is incapable of giving consent to sexual intercourse. M.G.L. c. 265, §13B and §23.

NUTTALL, MACAVOY & JOYCE, P.C.

43

Formal Complaint Process: Step 6 Opportunity to Respond to Evidence

Districts must send the parties (and advisors) evidence “directly related” to the allegation, in electronic format or hard copy.

- ❑ “Directly related” is broader than “relevant”: Department believes that it is most beneficial for the parties to have access to all “directly related” evidence.
- ❑ After parties have reviewed the evidence, the Investigator will then determine what evidence is “relevant.”

The Parties then shall be afforded at least ten (10) calendar days to inspect, review, and respond to the evidence.



NUTTALL, MACAVOY & JOYCE, P.C.

44

Formal Complaint Process: Step 6 Opportunity to Respond to Evidence

Further Privacy Concerns:

- The district shall not require, allow, rely upon, or otherwise use evidence that is protected by a legally recognized privilege, unless waived by the holder of the privilege.
- Prior to providing evidence to the parties, the Investigator may redact confidential information that is not directly related to the allegations or that is otherwise barred from use under Title IX or by privilege (e.g., treatment records), FERPA, and/or Massachusetts regulations regarding privacy of student records.
- The parties and their advisors shall be prohibited from dissemination of any of the evidence for any purpose not directly related to the grievance procedure.

NUTTALL, MACAVOY & JOYCE, P.C.

45

Legally Recognized Privilege

- A District cannot access, consider, disclose, or use a party's medical or counseling records that are maintained in connection with provision of treatment to the party, unless the District obtains voluntary, written consent to do so for the grievance process.
- District cannot access information that would be considered attorney-client privilege without consent.



NUTTALL, MACAVOY & JOYCE, P.C.

46

Formal Complaint Process: Step 7 Completion of Investigative Report

- ❑ The district must send the parties and their advisors in electronic or hard copy an Investigative Report in which the Investigator fairly summarizes relevant evidence but does not reach any conclusions regarding responsibility.
- ❑ A copy of the Investigative Report shall also be sent to the Decision-Maker.
- ❑ While there is no specific timeline mandated by the regulations, it is recommended that the Investigative Report be completed and sent within twenty-five (25) school days of receipt of the formal complaint.

Note: After completion of Investigative Report, there is a personnel shift – the Decision-Maker takes over.



NUTTALL, MACAVOY & JOYCE, P.C.

47

Formal Complaint Process: Step 8 Parties' Opportunity to Respond to Investigative Report

- ❑ District shall provide each party an opportunity to respond to the Investigative Report.
- ❑ The Investigative Report will notify the parties of the opportunity to submit to the Decision-Maker directed questions of the other party and/or any witness.
- ❑ The Decision-Maker cannot be the Investigator or the Title IX Coordinator (Recommended: Principal or Principal's designee).



NUTTALL, MACAVOY & JOYCE, P.C.

48

Formal Complaint Process: Step 9 Directed Questions From Parties

After Investigative Report has been sent to the parties the Decision-Maker shall:

- Afford both complainant and respondent the opportunity to submit to the Decision-Maker written, relevant questions of the other party or any witness;
- Provide the party with the other party's and/or witness's written responses to the questions; and
- Allow for additional, limited follow-up questions from each party in writing.

NUTTALL, MACAVOY & JOYCE, P.C.

49



Formal Complaint Process: Step 9 Directed Questions From Parties

Restrictions on Directed Questions:

- All questions must be posed in a respectful manner.
- Only relevant questions will be permitted (Decision-Maker must provide reason(s) for excluding any questions as not relevant).
- Questions regarding the complainant's sexual predisposition are not relevant.
- Questions about the complainant's prior sexual behavior are also not relevant unless such questions are offered to prove someone other than the respondent committed the conduct alleged, or if the questions concern specific incidents of the complainant's prior sexual behavior with respect to the respondent and are offered to prove consent.

After receipt of answers by the parties, the Decision-Maker must allow additional, but limited, follow-up questions from each party.

NUTTALL, MACAVOY & JOYCE, P.C.

50

Formal Complaint Process: Step 9 Live Hearing Option

- ❑ Elementary and secondary schools’ grievance processes may, but need not, provide for a live hearing option.
- ❑ If a district chooses to hold a live hearing, unlike the prescriptive live-hearing requirement for colleges and universities, the Department has left significant discretion as to how to conduct such a live hearing and “desires to leave elementary and secondary schools as much flexibility as possible to apply procedures that fit the needs of the recipient’s educational environment.”
- ❑ The only requirement by the Department regarding live hearings conducted at the elementary and secondary school level is that any rules adopted by a district for use in a Title IX live hearing must apply equally to both parties.
- ❑ Generally, we do not recommend a live hearing process for the K-12 setting.

NUTTALL, MACAVOY & JOYCE, P.C.

51

Formal Complaint Process: Step 9 Directed Questions From Parties

Question: What if a party does not answer directed questions from the other party?

- ❑ Regulations are silent on this possibility.
- ❑ Regarding Title IX live hearings at the college and university level, the Decision-Maker “cannot draw any inference about the determination regarding responsibility based solely on a party’s or witness’s absence from the hearing or refusal to answer cross-examination questions.”
- ❑ The Department’s comments to the regulations state the grievance process should not infringe upon a party’s Fifth Amendment right to remain silent and provide that everyone has a right to participate or not participate in the grievance process, and the regulations themselves prohibit retaliation against any person exercising rights under Title IX, which includes the refusal to participate in the grievance process.

It would follow that an inference regarding responsibility should not be made by the Decision-Maker if a party does not respond to directed questions from the other party.

NUTTALL, MACAVOY & JOYCE, P.C.

52

Written Determination Regarding Responsibility

Written Determination must be sent to both parties simultaneously.

Written Determination may not be completed by Title IX Coordinator or Investigator.



NUTTALL, MACAVOY & JOYCE, P.C.

53

Written Determination Regarding Responsibility



Mandatory Components of Written Determination:

- Procedural steps taken;
- Findings of fact, which must be based on an objective review of all relevant evidence, inculpatory and exculpatory, and avoid credibility determinations based on a person's status as a complainant, respondent, or witness;
- Conclusions about whether the alleged conduct occurred, and rationale for the result as to each allegation;
- Disciplinary sanctions to which the respondent may be subject;
- Whether remedies will be provided to the complainant;
- Procedures and bases for appeal.

NUTTALL, MACAVOY & JOYCE, P.C.

54

Remedies

If the Decision-Maker determines that sexual harassment has occurred, the district administration shall take steps to eliminate the harassing environment, which may include, but not be limited to, providing **remedies** to a complainant that are designed to restore or preserve the complainant's equal access to the district's education programs and/or activities.

Remedies may be the same individualized services as "supportive measures" and/or may include alternative interventions and/or punitive or disciplinary sanctions that burden the respondent.

Whether remedies will be provided must be included in the Written Determination, but the details of what those remedies are should not be included and should remain confidential (except as needed for implementation).

NUTTALL, MACAVOY & JOYCE, P.C.

55

Appeals

Either the complainant or respondent may appeal from a determination regarding responsibility and/or from the district's dismissal of a Formal Complaint or any allegations therein, only on the following bases:

- Procedural irregularity that affected the outcome of the matter;
- Newly discovered evidence that could affect the outcome of the matter; and/or
- Title IX personnel had a conflict of interest or bias that affected the outcome of the matter.



NUTTALL, MACAVOY & JOYCE, P.C.

56

Appeals

- Appeal process and bases for appeal must be included in Title IX Grievance Procedure and in all written determinations.
- Appeal Officer must be an individual not previously involved (someone other than the Title IX Coordinator, Investigator, and Decision-Maker).
- Recommend establishing a brief timeframe for an appeal, such as five (5) calendar days from the decision being appealed.
- The Title IX Formal Complaint grievance process is deemed complete when either the time period for appeal has lapsed or upon the issuance of the Appeal Officer's decision on a timely filed appeal.

NUTTALL, MACAVOY & JOYCE, P.C.

57

Discipline

Students may be subject to discipline for sexual harassment or retaliation under Massachusetts student discipline laws, M.G.L. c. 71, §§ 37H, 37H ½, and 37H ¾.

To be clear, however: under the new Title IX regulations a respondent may not be subject to disciplinary sanctions for the misconduct being investigated under the Title IX grievance procedure until after the process has been completed.

Options for Districts to Consider:

- Use of Supportive Measures upon a report of sexual harassment.
- Emergency Removal under the Title IX regulations.

NUTTALL, MACAVOY & JOYCE, P.C.

58



Title IX Emergency Removal (Do not confuse this with emergency removal under M.G.L. c. 71, § 37H ¾)

Districts may remove a respondent on an emergency basis at any time provided the school district:

- 1) Undertakes an “individualized safety and risk analysis”;
- 2) Determines that “an immediate threat to the physical health or safety of any student or other individual arising from the allegations of sexual harassment justifies removal” and that there is no alternative to the respondent’s emergency removal to mitigate the threat presented; and
- 3) Provides the respondent with notice (oral or written) and the opportunity to challenge the decision immediately following the removal.

NUTTALL, MACAVOY & JOYCE, P.C.

59

Record Keeping

District must maintain the following records for 7 years:

- Records of each sexual harassment investigation, including disciplinary sanctions and remedies;
- Any appeal and the result therefrom;
- Any informal resolution and the result therefrom;
- All materials used to train Title IX Coordinators, investigators, decision-makers, and informal resolution facilitators;
 - Training materials must also be publicly available on the district’s website;
- Record of any actions, including any supportive measures, taken in response to a report or formal complaint of sexual harassment.
- In each instance, the district must document that its response was not deliberately indifferent and that it has taken measures to ensure equal access to the district’s educational program or activity.



NUTTALL, MACAVOY & JOYCE, P.C.

60



Questions?

NUTTALL, MACAVOY & JOYCE, P.C.

61

Nuttall, MacAvoy & Joyce, P.C.

1020 Plain Street, Suite 270
 Marshfield, Massachusetts 02050
 Telephone: (781) 837-7428
 Facsimile: (781) 837-7498
www.nmjedlaw.com

Thomas J. Nuttall
 Matthew W. MacAvoy
 Michael J. Joyce

Leigh W. Mello
 Kelsey M. Porcello
 Craig F. Kowalski
 Carolyn J. Wilson

NUTTALL, MACAVOY & JOYCE, P.C.

62