



Title IX It's all about respect!

Agenda – June 2021 update

- I. Current Title IX Regulations - 34 CFR Part 106
- II. Investigations & Live Hearings
 - I. Justice Bridge
- III. What does the future hold for Title IX
 - I. Biden Administration
 - II. Mass Campus Safety Act – Ch. 337 of the Acts of 2020
 - III. N.H. Revised Statutes Annotated – RSA 188-H

“No person...on the basis of sex...”

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

-Title IX of the Educational Amendments of 1972 to the 1964 Civil Rights Act

Sexual Harassment

- 34 CFR Part 106 – effective August 14, 2020
- Incidents of Sexual Harassment are defined as prohibited conduct “on the basis of sex” that satisfies one of the following:
 - Quid pro quo – conditioning aid, benefit, or service on an individual’s participation in unwelcome sexual conduct.
 - Hostile Environment – unwelcome conduct determined by a reasonable person to be so severe, pervasive and objectionably offensive that it effectively denies a person equal access to an educational program or activity; or
 - Sexual Assault (Clery), Domestic Violence (VAWA), Dating Violence (VAWA), or Stalking (VAWA).

How does MCPHS University define - Consent

- The difference between sexual activity and sexual assault – IT ALL HINGES ON CONSENT.
- Consent is an agreement given freely without any undue influence of pressure.
- Consent is a clear YES. Not the absence of NO.
 - The lack of a struggle does not mean sexual advances were welcomed.
- Consent can only be given by someone of sound mind.
- Consent cannot be given by someone with intellectual disabilities.
- Consent will not be recognized if:
 - The person is asleep or unconscious;

- Frightened, Coerced or Intimidated; or
- Intoxicated or under the influence of drugs or alcohol.
- Consent can be withdrawn by either party at any time.
- Prior consent does not imply current or future consent; even in the context of an ongoing relationship.

MCPHS University is obligated to respond

- Once the school has actual knowledge of potential sexual harassment.
- That occurred within the school's "education program or activity".
- Against a "person in the United States."

Actual Knowledge

MCPHS University has actual knowledge of potential sexual harassment when - the Title IX Coordinator, the Chief Human Resources Officer, or the Senior Student Affairs Officer (Dean of Students) is notified.

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Who should report incidents of potential Title IX violations ?

- University Administration
- Staff in the Dean of Students Office
- Staff in Human Resources
- Public Safety personnel
- All other Faculty and Staff
 - Deans – Department Chairs – Program Directors - Faculty Advisors – Preceptors – Clinical Instructors - Adjuncts

Confidentiality

- MCPHS University Office of Counseling is the only confidential source at the University.
- A Counselor working within the scope of their professional license is the only Confidential Resource Advisor.
- A report of sexual misconduct to anyone else – they have a duty to report it to the Title IX Coordinator.

Title IX Coordinator notified of a potential Title IX violation

What is the analysis ?

- Did the conduct occur within the school's "education program or activity";
 - Includes locations, events, or circumstances over which the school exercises substantial control over the Respondent and the context in which the sexual harassment occurred.
- Against a "person in the United States";
 - The 2020 regulations limit Title IX to discrimination occurring "against a person in the United States." By its plain text, the statute does not have extraterritorial application.

The Parties

- Complainant – The person who claims to be the victim of the prohibited conduct.
- Respondent – The person alleged to have committed the prohibited conduct.
- The parties can be students, employees, or third parties.
- The parties must be participating or attempting to participate in the schools education program or activities.

The University has actual knowledge of a potential Title IX violation

- The Title IX Coordinator must promptly contact the Complainant to:
 - Discuss supportive measures;
 - To consider the complainant's wishes with respect to supportive measures;
 - To inform the Complainant of the availability of supportive measures with or without the filing of a formal complaint;
 - To explain the grievance process and the filing of a formal complaint.

Supportive Measures

- Designed to restore or preserve access to the school's education program or activity without unreasonably burdening the other party.
- Designed to protect the safety of all parties and the school's educational environment and deter sexual harassment.
- Emergency removal may still be appropriate, provided the school undertakes "individualized safety and risk analysis, determines that an immediate threat to the health or safety of students or employees justifies, removal, and provides the

Respondent with notice an opportunity to challenge the decision immediately following removal. Administrative leave of non-students during investigations also permitted.

- Supportive measures should be non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, and without fee or charge to the Complainant or the Respondent. Such as:
 - Counseling, modifications to work or class schedules, escort services, mutual no contact orders, leave of absences, changes in work or housing locations, extensions of deadlines or other course-related adjustments.

Formal Complaints

- Written notice signed by the Complainant, provide details of the incident (time, place, parties, behavior alleged to be prohibited conduct);
- Formal Resolution Process or Informal Resolution Process (one exception);
 - Sexual harassment by an employee against a student.
- Written notice to the parties – including section of the code alleged to be violated and potential sanctions;
- Thorough and fair investigation – Report to the parties with all evidence and ten (10) days to review and comment upon;
- Live Hearing presided over by Three (3) Decision Makers (DM); and
 - Evidentiary decisions made by hearing officer, advisors must be provided for the parties if they don't have one, cross examination allowed by advisors, if a party or witness will not participate in the live hearing, their testimony and evidence will not be considered in determining responsibility, preponderance of evidence standard – more likely than not, DM notifies parties as to determination of responsibility
- Appeal – only 3 grounds – available to both parties – except for this would have affected outcome..
 - Procedural irregularity
 - New evidence
 - Bias

Incident – Threshold Questions Whos is the Complainant? Who is the Respondent?

- Conduct on the “basis of sex” that satisfies the definition pursuant to 34 CFR Part 106 – YES
- Conduct occurred after August 14, 2021 – YES
- Occurs in the school’s education program or activity – YES
- Occurs in the United States – YES
- Complainant and Respondent are participating in or attempting to participate in an education program or activity at the school at the time the complaint is filed – YES
 - Complainant does not wish to file a formal complaint – supportive measures ongoing
 - Complainant does wish to file a formal complaint – written complaint signed by the Complainant and both parties receive written notice of the complaint with

sufficient time to prepare before the first meeting – supportive measures offered to both parties.

- Threat Assessment

Process

Informal Resolution Process*

- Both parties give voluntary, informed, written consent – Respondent does not dispute material facts, admits responsibility, and agree to resolve outside formal process
- Any time prior to agreeing to a resolution, any party has the right to withdraw and choose the formal grievance process

**Informal Resolution process not allowed to resolve complaints of sexual harassment by an employee against a student*

Formal Grievance Process

- Investigation
 - Reliable, adequate, thorough, prompt, impartial
- 10-day review of evidence and report
- Live Hearing w/ cross examination of parties
- Written determination as to responsibility issued by the Decision Makers
- Appeal on 3 bases – that could have affected the outcome; procedural irregularity, newly discovered evidence, Title IX personnel had a conflict of interest or bias.

2020 Regulations additional requirements

- Title IX information on the University website www.mcphs.edu/TitleIX
 - Title IX Policy and other related policies
 - Title IX Coordinator and Team contact information
 - Process and Procedures
 - Training Materials
- Specific Training Requirements and posting of training materials to web
- Reporting obligations and postings on web

Justice Bridge MOU and Agreement

- Justice Bridge Legal Center, a law incubator associated with the University of Massachusetts School of Law at the University of Massachusetts Dartmouth.
- Justice Bridge will develop and provide a pool of Mediators, Advisors, Appeals Officers, Appellate Administrators, Investigators, and Decision Makers within the Justice Bridge incubator community in support of Title IX processes at MCPHS University. Justice Bridge to provide services in conjunction with the MCPHS University Title IX processes in place.

Advisors – Decision Makers - Investigators

- Advisor – An Advisor asks cross-examination questions at the live hearing. Advisors may also be called upon to provide consultation and advice to a party and assist individuals

with navigating and understanding the investigation process, including providing support and asking questions during cross-examinations at a live hearing.

- Decision Maker – A Decision Maker (DM) presides in an impartial and unbiased manner over the live hearing and makes an impartial and unbiased determination regarding responsibility with respect to Title IX allegations and other allegations, as applicable. The DM determines the relevancy of proposed questions during the hearing, and issues written determinations of responsibility that include all findings, sanctions, and remedies in an impartial and unbiased manner.
- Investigator – An investigator acts as an impartial and unbiased fact finder who investigates the alleged violations of an institution's policies by: interviewing parties and witnesses; collecting, reviewing and organizing statements and evidence; providing a detailed, unbiased report regarding the findings of the investigation; assisting the institution in making the report and evidence accessible to the parties; and collecting and organizing responses submitted by the parties.
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What does the future hold for Title IX ?

- The Biden Administration promises to roll back some of the existing regulations in 34 CFR Part 106 – still awaiting the specifics and the timeframe for the changes.
- Mass Campus Safety Act (Ch. 337 of the Acts of 2020) goes into effect on August 1, 2021
 - Specifically includes language addressing gender-based violence; violence based on sexual orientation or gender identity or expression;
 - Additional policy & training requirements;
 - Addresses the need for an anonymous reporting vehicle;
 - Confidential Resource Provider;
 - MOU's;
 - Climate Surveys;
 - Additional reporting requirements.

What does the future hold for Title IX ?

- New Hampshire Revised Statutes Annotated - RSA 188-H
 - Additional Policy & Reporting Obligations;
 - Climate Survey & Task Force;
 - MOU's;
 - Confidential Resource Advisors;
 - Awareness Programming Requirements; and
 - Additional Training Requirements – including trauma informed.