

# *Sexual Misconduct Title IX / RSA 188-H & CCSNH Policies*

*Community College System of New Hampshire  
Administrator Training  
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## **Agenda For Today**

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- Brief orientation on the Title IX landscape
- The new Title IX regulations on sexual harassment
- Related aspects of the new State law on sexual misconduct (RSA 188-H)
- CCSNH Sexual Misconduct/Harassment Policies:
  - Title IX/RSA188H Policy - Students
  - Title IX/RSA188H Policy - Employees
- References & updates to CCSNH:
  - Student Code of Conduct
  - Workplace Conduct Policy
- Questions & Answers

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# Part One

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## *Title IX Harassment – Where We Have Come From*

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## A Brief History of Title IX

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- Title IX became law in 1972.
- It 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 . . . .”
- Until 1998, if you asked someone about Title IX, the response would focus on athletics, and particularly on expanded opportunities for female athletes.

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## Brief History: *GEBSER*

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- In 1998, the Supreme Court decided *Gebser v. Lago Vista Independent School District*.
- Frank Waldrop, a teacher at Lago Vista, groomed Alida Gebser during her freshman year in high school, and the two began a sexual affair that spring. In January of her sophomore year, a police officer caught them engaging in sexual intercourse.
- Waldrop was arrested and immediately fired.
- Gebser sued the school district under Title IX, seeking money damages.
- The Court held that where a school has **actual knowledge** of an employee sexually harassing a student but responds with **deliberate indifference** to such knowledge, the school itself has engaged in discrimination, subjecting the school to money damages in a private lawsuit under Title IX.
- The *Gebser* case was dismissed.

## Brief History: *DAVIS*

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- In 1999, in *Davis v. Monroe County Board of Education*, the Supreme Court held that where sexual harassment is committed by a peer rather than an employee (i.e., student to student sexual harassment), the same standards of **actual knowledge** and **deliberate indifference** apply.
- The *Davis* Court additionally crafted a definition of when sex-based conduct becomes actionable sexual harassment, defining the conduct as “**so severe, pervasive, and objectively offensive**” that it denies its victims equal access to education.
- The *Davis* case was allowed to proceed.

## Brief History: OCR Guidance

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During the Obama Administration, the 2011 Dear Colleague Letter and 2014 Q&As established new requirements for Title IX compliance, including:

- Institutions must investigate any claim made by a student that they had been the victim of sex discrimination **in any form**, including sexual misconduct.
- Sexual harassment was defined broadly as any “unwelcome conduct of a sexual nature.”
- Whether sexual conduct was unwelcome was judged by a subjective, as well as objective, standard.
- Except for a limited group of “confidential employees,” any faculty or staff member had to report any possible sexual misconduct against a student.
- OCR asserted that preponderance of the evidence (more likely than not) was the standard by which sexual misconduct cases must be judged.
- There was no right to a formal hearing.

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## Part Two

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*The New Title IX Regulations on  
Sexual Harassment & CCSNH's  
Revised Title IX/RSA 188-H Policy*

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## The New Title IX Regulations

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- In May, 2020, the Department of Education published new Title IX regulations on sexual harassment. 34 C.F.R. Part 106.  
<https://www2.ed.gov/about/offices/list/ocr/newsroom.html>
- The regulations themselves are 7 pages in length.
- The explanatory preamble is over 500 pages!
- The effective date of the regulations was August 14, 2020.

## The New Title IX Regulations Under the Biden Administration

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- In March 2021, the Biden Administration announced that it would be reviewing the Title IX Regulations over the following 100 days and provide its findings.
- On April 6, 2021, the Administration issued a letter to stakeholders detailing its plans regarding the Regulations, including holding hearings, issuing interim guidance and engaging in formal notice and comment rulemaking.
- In June of 2021, the Administration conducted public hearings to gather input on the current regulations.
- ***The regulations remain in effect now, but will (in all likelihood) change after the 2021-2022 academic year.***

## Title IX Coordinator

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- Each CCSNH institution is to finalize its local policy version to include certain college-specific information, including the college's Title IX Coordinator.
- Title IX Coordinator has broad responsibility for implementing and overseeing the Title IX/RSA 188-H Policy.
- Only the Title IX Coordinator can implement supportive measures.

## The Title IX Regulations – General Principles When Must the College Act and Who Must Report

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### Title IX Regulations:

- The 2020 regulations returned the focus of Title IX requirements for response by institutions to **actual knowledge** and **deliberate indifference**.
- Only if the institution has **actual knowledge** of **sexual harassment** (as defined in the regulations) in its **education programs and activities**, against a person **in the United States**, does Title IX require the institution 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 the **Title IX Coordinator** or any official who has the authority to institute corrective measures on behalf of the institution.

### CCSNH Policies:

- All persons are encouraged to report incidents of sexual misconduct/sexual harassment involving students or employees.
- All CCSNH/College employees with supervisory or management responsibilities, and individuals designated as Campus Security Authorities under the Clery Act, who receive information about possible sexual misconduct/harassment are required to make a report.

## How Might an Institution Be Deliberately Indifferent *(and Subject to Liability via OCR Investigation or Civil Lawsuit)?*

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- Failing to treat Complainants and Respondents equitably.
- Presuming a Respondent is responsible before a determination is made following a hearing.
- Failing to objectively evaluate all relevant evidence.
- Failing to ensure that any individuals involved in the grievance process (coordinators, investigators, adjudicator) have appropriate training, and do not have conflicts of interest or bias.
- Failing to conclude the grievance process promptly and explain reasons for delay.
- Failing to provide notices of meetings and hearings.
- Failing to provide opportunities for parties to review and respond to relevant evidence, both favorable and unfavorable.
- Failing to provide appropriate supportive measures.

## Deliberately Indifferent (continued)

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- Failing to provide opportunities for parties to review and respond to relevant evidence, both favorable and unfavorable.
- Failing to allow parties to be accompanied to any meetings or hearings by an advisor of their choice.
- Failing to give parties the opportunity to present witnesses, as well as other relevant evidence.
- Placing the burden of gathering evidence and of proof on the Complainant.
- Restricting the parties from speaking about the case for their own emotional support and to prepare their case.
- Failing to follow confidentiality and privacy laws.

## How Does the College Avoid Being Deliberately Indifferent?

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- By appointing a Title IX Coordinator (*done*).
- By adopting policies that complies with the 2020 Title IX regulations (*done*).
- By consistently following the regulations and CCSNH policies.
- By retaining required records to demonstrate compliance.

## Who Is Protected Under the Title IX Regulations Now?

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- All students enrolled at a CCSNH institution
- Employees of the College (and applicants for employment) (*depending on the circumstances, a student who is employed by one of the Colleges may be considered an employee under this policy*)
- Other individuals participating (or attempting to participate) in a College program or activity (e.g., volunteers, high school students touring campus or attending campus programs, applicants for employment, participants in alumni programs, etc.).
- Only individuals are covered, not organizations such as student clubs or teams (which may be covered under other policies).



## Where Does Title IX Apply: “Education Programs and Activities”

- Under the new regulations, institutions only have a duty to respond to sexual harassment which occurs within their “education programs and activities.”
- “Education program or activity” includes locations, events, or circumstances over which the College exercises substantial control over both the respondent and the context in which the sexual harassment occurs.
- The incident must have taken place in the United States.

## How Is Sexual Harassment Defined Under the Title IX Regulations: *Quid Pro Quo* and *Hostile Environment*

- The regulations prohibit **sexual harassment**. This term encompasses the following types of conduct on the basis of sex:
- **Quid Pro Quo** harassment by an **employee**: An employee conditioning the provision of an aid, benefit, or service of the College on an individual's participation in unwelcome sexual conduct. (e.g. a good evaluation for an employee; a better grade for a student).
- **Hostile Environment**: 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 College's education program or activity.



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 College's education programs and activities.

## How Is Title IX Sexual Harassment Defined: *Sexual Assault, Dating Violence, Domestic Violence, Stalking*

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**Sexual Assault** (an offense classified as a forcible or non-forcible sex offense under the FBI's Uniform Crime Reporting System).

- **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) such as:
  - 1) **Forcible rape (except statutory 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.
  - 2) **Forcible sodomy:** Oral or anal sexual intercourse with another person, forcibly and/or without that person's Consent or in instances where the victim is incapable of giving Consent because of their youth or because of Incapacitation.
  - 3) **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 and/or without that person's Consent or in instances where the person is incapable of giving Consent because of their youth or because of Incapacitation.
  - 4) **Forcible fondling:** The touching of the private body parts of another person for the purpose of sexual gratification, forcibly and/or without that person's Consent or in instances where the person is incapable of giving Consent because of their youth or because of Incapacitation.

## Definitions: Sexual Assault (continued)

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### 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.

## Definitions: Dating Violence

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**Dating Violence:** Crimes of violence 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 shall be 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.

Dating violence includes, but is not limited to:

- Sexual abuse
- Physical abuse
- Emotional violence
- The threat of such violence
- Does not include acts that meet the definition of Domestic Violence

## Definitions: Domestic Violence/ Stalking

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- **Domestic Violence:** Physical or sexual abuse, or threats of physical or sexual abuse, or emotional abuse among current or former spouses or cohabitants, or people who share a child in common.
- **Stalking:** 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.

Examples of stalking may include:

- Unwanted, intrusive, and frightening communications by phone, mail, and/or email
- Repeatedly leaving or sending unwanted items such as gifts
- Following or waiting for a person at places such as home, school, or work
- Making direct or indirect threats of harm to a person, or to the person's children, relatives, friends, or pets
- Damaging or threatening to damage property
- Harassment through the Internet or social media
- Posting information or spreading rumors about a person

## Other Important Definitions: Consent

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- The Title IX regulations do not define “consent.” The CCSNH Title IX/RSA 188-H Policy definition of Consent is as follows:

*An affirmative decision to engage in mutually acceptable sexual activity given by clear actions or words. It is an informed decision made freely, willingly, and actively by all parties. Consent is knowing and voluntary. Consent is active, not passive. Accordingly, silence or absence of resistance cannot be interpreted as consent. Consent can be given by words or actions so long as those words or actions may be reasonably understood to give permission regarding sexual activity. Individuals cannot give consent if they are incapacitated due to alcohol or legal or illegal drugs, or under the age of 16.*

## Definition: Retaliation

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CCSNH Title IX/RSA 188-H Policies:

- CCSNH also prohibits retaliation against anyone who is involved in the making or reporting of a complaint, or in the investigation or hearing of a formal complaint of sexual harassment.
- Incidents of retaliation will be addressed under the Student Code of Conduct (for alleged retaliation by students) and Workplace Conduct Policy (for alleged retaliation by employees).

## To Summarize: What Conduct Is Prohibited Under Title IX?

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- **Quid pro quo harassment** by an employee
- Unwelcome conduct based on sex that is so severe, pervasive and objectively offensive that it denies access to education programs and activities (referred to in the Title IX Regulations as **hostile environment harassment**).
- **Sexual assault:**
  - Situations where there is actual sexual contact involving penetration.
  - Touching (fondling) of genitals, breasts, or buttocks.
- **Dating violence**
- **Domestic violence**
- **Stalking**
- **Retaliation**

## How Does CCSNH Address Sexual Misconduct That Falls Outside the Scope of Title IX?

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Conduct that either does not meet Title IX definitions of sexual harassment, or occurred outside a College's education programs/activities, or occurs outside the U.S. will be addressed as possible violations of:

- Workplace Conduct – Policy 323.01 (Revised):
- Student Code of Conduct – Policy 730.06 (Revised)

## “Report” of Sexual Harassment

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- There is a difference between a **report** of sexual harassment and a **formal complaint** under the Title IX regulations.
- Upon receiving a **report**, which can come from anyone (and may be anonymous), the Title IX Coordinator must:
  - In consultation with the possible victim, offer **supportive measures**.
    - These are individualized services, previously referred to as “interim measures,” such as no contact orders, changes to class or work locations, changes in residence, etc.
    - Any such supportive measures cannot “unreasonably” interfere with a Respondent’s access to education programs and activities, and cannot be “disciplinary” before a determination of responsibility.
    - If supportive measures are not provided, the Title IX Coordinator must document why.
  - Explain the **Formal Complaint Resolution and Informal Resolution** processes to the possible victim. (The College **cannot** offer an Informal Resolution process without a formal complaint first being filed.)
- Generally, the College does not need to act beyond these steps unless it receives a **formal complaint**.

## Formal Complaint of Sexual Harassment

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A **formal complaint** of Title IX sexual harassment:

- Initiates the Grievance Procedure.
- Can only be filed and signed by the person who claims to be the victim (**Complainant**) and who is a student or employee. (But recall that prospective students, applicants for employment, and other third parties may also be able to file a formal complaint in certain circumstances.)
- A Title IX Coordinator can file a formal complaint in certain circumstances, but is not the Complainant.
- The formal complaint must be a document or electronic filing that includes a signature and provides:
  - Basic information regarding claimed sexual harassment (what lawyers call a short and plain statement of the claim), such as date, time, location, type of incident, name(s) of individuals involved; and
  - A request for an investigation of an allegation of sexual harassment.

## Formal Complaint (continued)

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- Formal complaints can be consolidated if they arise from the same incident/facts.
- Formal complaints may be amended (with notice to the parties).

## Mandatory Dismissal of Formal Complaints

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Under the Title IX regulations, the Title IX Coordinator **must** dismiss a formal complaint:

- If the conduct alleged in the formal complaint does not constitute sexual harassment under the Title IX regulations;  
or
  - If the conduct alleged did not occur within the scope of the College's education programs and activities, or did not occur in the United States.
- Importantly, CCSNH policies regarding dismissal provide: *“if the conduct alleged is otherwise covered by another CCSNH/College policy, the conduct may be addressed under the applicable policy, depending on the circumstances.”*

## Permissive Dismissal of Formal Complaints

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- The Title IX Coordinator **may** dismiss a formal complaint:
  - If a Complainant withdraws the formal complaint or withdraws particular allegations within the complaint;
  - The Respondent is no longer enrolled in or employed by the College; or
  - If there are specific circumstances that prevent the College from gathering evidence sufficient to reach a determination regarding the formal complaint.
- Parties have the right to appeal the decision to dismiss a formal complaint.

## Part Three

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### *The New State Law on Sexual Misconduct – NH RSA 188-H*



## NH RSA/CHAPTER 188-H

### SEXUAL MISCONDUCT AT INSTITUTIONS OF HIGHER EDUCATION (Jan. 2021)

- Relevant portions of State law incorporated into CCSNH Title IX/RSA 188-H Policy, which provides:

**Scope of Policy and Jurisdiction:** *CCSNH and its Colleges prohibit sexual misconduct/sexual harassment against any person participating in or attempting to participate in education programs and activities of CCSNH/Colleges (which includes employment). The scope and definitions of sexual misconduct and sexual harassment under federal and state laws differ . . .*

- Note that RSA 188-H includes several other requirements being addressed by CCSNH/Colleges through other initiatives – e.g., Task Force/Climate surveys/ Collaboration with law enforcement/ Prevention & awareness/Training for students and employees/ MOUs with crisis centers.

## NH RSA/CHAPTER 188-H (continued)

- The policy requirements under RSA 188-H reiterate many of the requirements in the Title IX rules – e.g., reporting sexual misconduct; supportive measures; investigation/ resolution procedures; review of evidence; right to advisor; discipline process/sanctions; appeals, etc.
- Additionally, each individual College policy must include information on emergency assistance:
  - > Medical facilities;
  - > Rape crisis/domestic violence center;
  - > National 24-hour crisis hotline;
  - > Programs that assist with costs of emergency medical assistance;
  - > Counseling and health, safety, academic, and other support services within the local community;
  - > Rights to contact law enforcement; receive assistance from campus authorities; seek protective orders.

**“Sexual Misconduct” under CCSNH Title IX/RSA 188-H Policy  
and Other CCSNH Policies**

Title IX Sexual Harassment	Sexual Harassment under Title VII and the NH Law Against Discrimination	Sexual Misconduct under NH RSA 188-H
Quid pro quo/Hostile environment/ Sexual assault, dating violence, domestic violence, stalking	Defines sexual harassment similarly to Title IX in some respects, but also includes conduct of a sexual nature that unreasonably interferes with an individual's academic/work performance (hostile environment)	A broadly defined term that includes Title IX, Title VII or State law sexual harassment and any other incident of sexual violence, gender-based violence, or violence based on sexual orientation or gender identity or expression
Follow Title IX Grievance Procedure	Follow Student Code of Conduct or Workplace Conduct Policy	Specific allegations will dictate whether to follow Title IX/RSA 188-H Policy, or Student Code of Conduct or Workplace Conduct Policy

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# Part Four

*The Formal Title IX Grievance Procedure Under CCSNH Policy – Informal Resolutions, Investigations, and Hearings*

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## Advisors

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- The Title IX regulations require that parties be allowed to have an advisor of their choice throughout the formal resolution process, who may be an attorney.
- An advisor is an individual, from within or outside of the College, chosen by a party, who may be present in any meeting or proceeding under the grievance procedure in order to advise the party and participate in the live hearing.
- The advisor plays an important role at a live hearing, in conducting cross examination and questioning of witnesses.
- Advisors cannot speak on behalf of the party (except for advisors conducting questioning/cross at hearing and as otherwise permitted by the rules of decorum at the live hearing).

## Notice of Formal Complaint

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**Parties must receive detailed** written notice of a formal complaint that includes, among other things:

- Notice of the grievance procedure and the availability of an informal resolution process;
- Sufficient details regarding the allegations known at the time (including identities of parties, if known; the conduct alleged; and the date and location of the alleged incident, if known), with sufficient time to prepare before any initial interview (no less than five days);
- A statement that the Respondent is presumed not responsible for the alleged conduct and that a determination as to whether the Respondent is responsible for prohibited conduct will be made at the conclusion of the grievance procedure;
- Notice that the parties may have an advisor of their choice, who may be an attorney; and that the parties may inspect and review evidence obtained during the investigation;
- Notice of provisions in an applicable code of conduct or policy that prohibits knowingly making false statements or submitting false information during the grievance procedure;
- Notice that the College, not either party, has the burden of proof; and
- Notice of the name of the investigator, with sufficient time (no less than five calendar days) to raise concerns of conflict of interest or bias.

## Informal Resolution

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- Title IX regulations permit an Informal Resolution only if:
  - A formal complaint has been filed; and it is
  - Agreed to in writing by both parties, and the Title IX Coordinator believes the circumstances are appropriate.
- Exception: Cases alleging sexual harassment by an employee against a student may not be resolved by Informal Resolution.

## Informal Resolution (continued)

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### CCSNH TIX/RSA 188-H POLICY:

- Informal resolutions can take many forms, depending on the particular case. Examples include, but are not limited to, facilitated discussions between the parties; restorative justice; acknowledgment of responsibility by a respondent; apologies; agreed upon sanctions against a respondent or requirements to engage in specific services; or supportive measures. Parties must voluntarily agree in writing to participate in an informal resolution process, and either party can withdraw from the process at any time.
- Any terms in an informal resolution that include involvement by CCSNH/College must be approved by the Title IX Coordinator. If an informal resolution agreement is reached, it must be signed by the parties and CCSNH/College. Once signed, the agreement is final and binding according to its terms.
- If an informal resolution process does not resolve the formal complaint, nothing from the informal resolution process may be considered as evidence in the procedure.

## In a Nutshell, What Does the CCSNH Formal Grievance Procedure Look Like?

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- The formal complaint is referred to a trained, independent investigator to conduct an investigation.
- When the investigation is completed, the case proceeds to a live hearing.
- The hearing is presided over by a “decision maker” which can be an individual and determines (based on a preponderance of the evidence standard) whether a Respondent is responsible or not responsible for a violation of the Policy, and any resulting sanctions or remedies.
- Any party has the right to appeal the decision.

## Can a Student Respondent Be Placed on Emergency Leave?

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- Yes, in unique circumstances.
  - Only after a determination, after individualized safety and risk analysis, that there is an immediate threat to the physical health or safety of a student or other individual arising from the allegations of sexual harassment.
  - The Respondent will be provided notice of the emergency leave and will be provided an opportunity to challenge the decision following the removal (in a meeting or other opportunity to be heard; not a hearing). The Respondent has the burden to demonstrate why the emergency leave was unreasonable.
  - Must consider ADA/504 protections.
- ***Note: Administrative leave for employees is permitted in accordance with CCSNH policy and contracts.***

## Investigation of Formal Complaints

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The Investigator will:

- Meet with the parties after they have received appropriate notice of any meeting and its purpose, with sufficient time to prepare.
- Allow the parties to have their advisor at all meetings or proceedings. The advisor may not make any statements or otherwise advocate on behalf of the party during any meeting or proceeding, except with regard to the live hearing, as described below.
- Allow the parties to identify fact and expert witnesses, and submit inculpatory and exculpatory evidence.
- Interview witnesses and conduct such other activities that will assist in ascertaining facts (site visits, review of documents, etc.).
- Consider evidence that is relevant and directly related to the allegations in the formal complaint.

## Investigation (continued)

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- The investigator will:
  - Provide both parties and their advisors with an equal opportunity to inspect and review any evidence that is obtained as part of the investigation that is directly related to the allegations in the formal Complaint, including evidence which the College does not intend to rely upon in reaching a determination of responsibility, and favorable and unfavorable evidence.
  - Provide the parties 10 calendar days to submit a written response prior to completion of the investigation report.
  - Draft an investigation report that fairly summarizes the relevant evidence and give the parties the opportunity to submit a written response to the report before it is finalized.
- The investigative report and the parties' responses shall be forwarded to the decision maker in advance of the hearing.
- The College will not restrict the ability of either party to discuss the allegations under investigation or to gather and present relevant evidence.
- Additional timelines are specified in the CCSNH Policies.

## Next – The Live Hearing

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- The Title IX regulations emphasize that the burden of proof rests with the College, not the Complainant or Respondent.
- The Title IX Coordinator will issue a notice of the hearing, identifying the decision maker.
- The decision maker will preside over the live hearing and will establish rules of decorum that parties and their advisors must follow.
- At the request of a Party (or at the College’s discretion), the hearing will be held virtually with Parties in separate rooms that allow the Parties and decision-maker to see and hear each other.
- The hearing is recorded and the recording is made available to parties for inspection and review.

## Live Hearing, *continued*

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- Parties must have an advisor at the live hearing; an Advisor may be an attorney. If a party does not have an Advisor for the live hearing, the Title IX Coordinator will appoint an advisor for the party (at no cost to the party).
- The Title IX regulations specify that a party’s advisor (and not the party) may cross-examine the other party and the witnesses.
- All evidence gathered in the investigation that is directly related to the allegations raised in the formal complaint, and which the investigator provided to the parties prior to the hearing, will be available at the hearing for purposes of reference and cross-examination.

## Cross-Examination

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- Under the current Title IX regulations, the cross-examination requirement is viewed as a critical factor in providing due process to parties.
- Cross-examination is often adversarial, particularly where the credibility of a Complainant or Respondent is a critical element of the case.
- The TIX regulations commentary provides that cross-examination may not be aggressive or abusive.
- Cross-examination includes permission to ask the opposing party and any other witnesses in the matter all **relevant** questions, including those challenging credibility.
- The decision maker will make determinations in real time regarding the relevance of questions posed by advisors and will explain any decisions to exclude any question/evidence. The formal rules of evidence do not apply.

## Rulings on Evidence (Relevance)

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- Relevant evidence is evidence that tends to make a fact of consequence more or less probable than it would be without the evidence
- Questions and evidence about a Complainant's sexual predisposition or prior sexual behavior is not relevant, unless it:
  - is offered to prove that someone other than a Respondent committed the alleged conduct, or
  - concerns specific incidents of the Complainant's prior sexual behavior with a Respondent and is to prove consent.
- Evidence relating to a party's medical, psychological or similar records is not admissible unless the party has consented in writing to the disclosure of those records.
- Evidence that is protected from disclosure by the attorney-client privilege or other legally-recognized privilege or immunity in the State of New Hampshire is not admissible unless the holder of the privilege has waived the privilege.



## Other Evidence That May Not Be Considered

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- If a party or witness does not submit to cross-examination at the live hearing, the decision maker must not rely on any statement of that party or witness in reaching a determination of responsibility.
- The decision maker may not draw an inference regarding responsibility based solely on a party's or witness's absence from the live hearing or refusal to answer questions.

## Part Five

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*Decision-Making, Sanctions, Appeals,  
and Conflicts of Interest/Bias*

## The Decision and Outcome Letter

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- Following objective consideration of all the relevant evidence (including cross-examinations), the decision maker will determine whether, based on a *preponderance of the evidence*, the Respondent is responsible for the alleged sexual harassment, and, if so, appropriate sanction(s) and remedies.
- The outcome letter issued by the decision maker includes:
  - Identification of all the allegations potentially constituting sexual harassment;
  - A description of the procedural steps taken from receipt of the formal complaint through the determination, including notifications to the parties, interviews with parties and witnesses, site visits, methods used to gather other evidence, and hearings held;
  - Findings of fact supporting the determination;
  - Conclusions regarding the application of the policy (prohibited conduct) to the facts;
  - A statement of, and rationale for, the result as to each allegation, including a determination regarding responsibility, any disciplinary sanctions the College imposes on the Respondent, and whether remedies designed to restore or preserve equal access to the College's education programs and activities will be provided to the Complainant; and
  - The College's procedure and permissible bases for the Complainant and Respondent to appeal

## Remedies & Sanctions

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### CCSNH Policies:

- **“Remedies”** are measures used to ensure that the complainant has equal access to the College's education programs and activities following a decision maker's determination. Such remedies may include supportive measures and depend upon the determination and the needs of the complainant. The Title IX Coordinator is responsible for implementing remedies and providing any needed assistance to the Complainant.
- **Student Sanctions:**
  - Warning; Probation; loss of privileges; no contact orders; fines; restitution; campus housing suspension/expulsion; class/College suspension/expulsion; educational/service sanctions.

## Sanctions (continued)

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- **Employee Sanctions:**

- Sanctions against employee Respondents who are found to have committed the alleged conduct and thereby violated this policy, will be based on the circumstances and seriousness of the offense. Sanctions against CCSNH faculty and staff will be handled in accordance with employment policies or collective bargaining agreements governing discipline and dismissal.
- Sanctions may include, but are not limited to: Mandated training, position reassignment, imposed workplace conditions, written warning, disciplinary suspension without pay, demotion, or dismissal.

## Appeals

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Parties may appeal:

- Title IX Coordinator's decision to dismiss a formal complaint; and
- The decision maker's decision.

Bases for appeal [CCSNH Policies]:

- Procedural irregularity that affected the outcome of the matter;
- New evidence that was not reasonably available at the time of the decision that could affect the outcome of the matter;
- The Title IX Coordinator wrongfully concluded that the formal complaint did not constitute sexual harassment under this procedure and dismissed the formal complaint;
- The Title IX Coordinator, investigator or a decision maker had a conflict of interest or bias for or against Complainants or Respondents generally, or the individually Complainant or Respondent that affected the outcome of the matter.
- A sanction imposed was improper in light of mitigating or extenuating circumstances not known at the time that a Party was provided an opportunity to comment on sanctions, if any, or was not properly considered by the decision maker.

An appeal must be submitted in writing within 10 calendar days of receiving the determination, stating the grounds for the appeal and including any relevant supporting documentation.

## Appeals (*continued*)

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Appeals will be reviewed and decided by the appeals officer.

- Copy of appeal is provided to other parties who may submit written responses (within seven days)
- Review on appeal will be impartial and will include consideration of the written record of the matter and, where appropriate, consultation with other College officials.
- The individual deciding the appeal shall issue a written decision describing the result of the appeal and rationale for the result, and will provide the written decision simultaneously to the parties.

## Conflict of Interest & Bias

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- The Title IX regulations mandate training on the topics of bias, conflict of interest, and impartiality of Title IX Coordinators, investigators, decision makers, or “...person designated by a recipient to facilitate an informal resolution process.”

## What Is a Conflict of Interest or Bias?

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- The Title IX regulations require that those involved in Title IX processes must not pre-judge the facts and must not be biased against or in favor of a particular class of parties in the grievance procedure.
  - Believing that a Complainant, as a victim or survivor, should be presumptively believed constitutes bias.
  - Believing that all women or all men behave in a certain way constitutes bias.
  - Believing that complaints generally arise from sex that someone regrets constitutes bias.
  - Believing that accused parties are usually guilty constitutes bias.



Remember – The regulations require a presumption of non-responsibility on the part of a Respondent (until the point when the Title IX decision maker makes a finding).

## Conflict of Interest/Bias (continued)

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- A conflict of interest or bias can also occur in a particular case, depending upon knowledge about or a prior relationship with individuals involved in a particular case (positive or negative).
- Conflict or bias on the part of Title IX Coordinator, investigator, or a decision maker is a basis for appeal.

## What Is Not Necessarily a Conflict of Interest or Bias

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- Being an employee.
- Past advocacy in the field of sexual violence.
- Conflict of interest and bias are judged by an objective standard -- whether a reasonable person would believe bias exists.

## Recordkeeping

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- The College must maintain records in connection with a report of sexual harassment, supportive measures, a formal complaint, and proceedings under the TIX/RSA 188-H Policies for a minimum of seven years from resolution of the matter.
- All materials used to train Title IX Coordinators, investigators, decision makers, individuals handling appeals, and any person who facilitates informal resolutions will be posted on the CCSNH/College website.

# THANK YOU!



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