

NYSED Title IX Grievance Procedure

The New York State Education Department (“NYSED” or the “Department”) is committed to maintaining a workplace free from sexual harassment and from unlawful discrimination. NYSED has adopted a complaint procedure for the prompt and equitable investigation and resolution of allegations of unlawful discrimination. NYSED will take steps to prevent discrimination and harassment, to prevent the recurrence of discrimination and harassment, and to remedy its discriminatory effects on the victim(s) and others, if appropriate. Conduct that may constitute harassment is described in the Definitions section. Sex discrimination includes sexual harassment and sexual violence. Retaliation against a person who files a complaint, serves as a witness, or assists or participates in any manner in this procedure is prohibited and may result in disciplinary action.

Definitions

Harassment on the Basis of Protected Characteristic(s) other than Sex/Gender – harassment based on race, color, age, religion, national origin, disability, sexual orientation or other protected characteristics is oral, written, graphic or physical conduct relating to an individual's protected characteristics that is sufficiently severe and/or serious, pervasive, or persistent so as to interfere with or limit the ability of an individual to participate in or benefit from the educational institution's programs or activities.

Sex Discrimination – behaviors and actions that deny or limit a person's ability to benefit from, and/or fully participate in the educational programs or activities or employment opportunities because of a person's sex. This includes but is not limited to sexual harassment, sexual assault, sexual violence by employees, students, or third parties. Employees should report sex discrimination, including but not limited to, sexual harassment and assault that they observe or become aware of, to the Title IX coordinator.

Sexual Assault – physical sexual act or acts committed against a person's will and consent or when a person is incapable of giving active consent, incapable of appraising the nature of the conduct, or incapable of declining participation in, or communicating unwillingness to engage in, a sexual act or acts. Sexual assault is an extreme form of sexual harassment. Sexual assault includes what is commonly known as “rape,” whether forcible or non-forcible, “date rape” and “acquaintance rape.” Nothing contained in this definition shall be construed to limit or, conflict with the sex offenses enumerated in Article 130 of the New York State Penal Law, which shall be the guiding reference in determining if alleged conduct is consistent with the definition of sexual assault.

Sexual Harassment – a form of sex discrimination that includes harassment on the basis of sex, sexual orientation, self-identified or perceived sex, gender expression, gender identity, and/or the status of being transgender.

Sexual Harassment consists of words, signs, jokes, pranks, intimidation, or physical violence of a sexual nature, or that are directed at an individual because of that individual's sex. Sexual

harassment also includes any unwanted verbal or physical advances, sexually explicit derogatory statements, or sexually discriminatory remarks made by someone in the workplace that are offensive or objectionable to the recipient, and cause the recipient discomfort or humiliation, or interfere with the recipient's job performance.

Sexual harassment is also known as "quid pro quo" harassment when a person in authority tries to trade job benefits for sexual favors.

Sexual harassment includes but is not limited to:

- Inappropriate physical actions of a sexual nature such as touching, cornering, leering, whistling, grabbing, brushing against the body, or other suggestive contact;
- Unwelcome sexual advances, requests for dates or propositions, or displays including sexually oriented gestures, noises, remarks, jokes, magazines, and calendars;
- Comments about a person's physical appearance, sexuality or sexual experience;
- Preferential treatment, or promises of preferential treatment, to an employee for submitting to sexual conduct, including soliciting or attempting to solicit any employee to engage in sexual activity for compensation or reward;
- Subjecting, or threats of subjecting, an employee to unwelcome sexual attention.
- Inappropriate comments or behavior of a sexual nature toward pregnant or breast-feeding mothers in the workplace;
- Intentionally making performance of the employee's job more difficult because of that employee's sex, gender identity, or sexual orientation; and
- Retaliation for opposing or reporting sexual harassment in the workplace.

Sexual harassment is unwelcomed when it subjects an individual to inferior terms, conditions, or privileges of employment. Sexual harassment need not be severe or pervasive to be unlawful and can be any sexually harassing conduct that consists of more than petty slights or trivial inconveniences.

Sexual Violence - physical sexual acts perpetrated against a person's will or where a person is incapable of giving consent.

Preponderance of the Evidence – the standard of proof in sexual harassment and sexual assault cases, which asks whether it is "more likely than not" that the sexual harassment or sexual violence occurred. If the evidence presented meets this standard, then the accused should be found responsible.

Applicability

This procedure may be used by any NYSED-administered program participant or NYSED employee, applicants for employment, interns, whether paid or unpaid, contractors and persons conducting business with NYSED. Employee grievance procedures established through negotiated contracts will supersede this procedure. This procedure does not deprive a Complainant of the right to file with outside enforcement agencies, such as the New York State Division of Human Rights, the Equal Employment Opportunity Commission, and the Office for Civil Rights

of the United States Department of Education. However, after filing with one of these outside enforcement agencies, or upon the initiation of litigation, the complaint will be referred to NYSED's Title IX Coordinator for investigation in conjunction with the Office of Counsel.

The Department's Title IX Coordinator is Jeffrey Matteson, Senior Deputy Commissioner for P-20 Policy. Mr. Matteson may be reached via email at LEGAL@nysed.gov or by telephone at (518) 474-3852.

Upon receipt of a sex discrimination complaint or report, the Title IX Coordinator will promptly contact the Complainant with a written notice describing the available options, including pursuing a criminal complaint with a law enforcement agency, pursuing NYSED's investigative process (or both simultaneously) and the potential consequences of pursuing both options (*i.e.*, possible temporary delay of the fact-finding aspect of NYSED's investigation while the law enforcement agency is in the process of gathering evidence). Additionally, the Title IX Coordinator will ensure that Complainants in sex discrimination cases are made aware of their Title IX rights, remedies and resources (such as counseling, local rape crisis center), and interim measures of protection. The Title IX Coordinator will also discuss with the Complainant the availability of potential supportive measures (*i.e.*, counseling, modifications of work schedules, mutual restrictions on contact between the parties, changes in work locations, leaves of absence, increased security and monitoring of certain areas of the campus, etc.).

Procedure

The following Discrimination Complaint Procedure applies to both the informal and formal processes. This procedure provides a mechanism through which NYSED may identify, respond to, and prevent incidents of sex-based discrimination.

NYSED reserves the right to promptly investigate all incidents of sex discrimination of which it has notice. Based on information received, the Title IX Coordinator will make reasonable efforts to investigate and address instances of sex discrimination when it knows or should have known about such instances, regardless of Complainant cooperation and involvement, consistent with NYSED's Anti-Discrimination and Equal Employment Opportunity Policy.

NYSED will comply with law enforcement requests for cooperation, which may constitute a good cause basis for NYSED to temporarily delay the fact-finding aspect of an investigation while the law enforcement agency gathers evidence. In the event of such delay, NYSED will provide written notice to the parties and will resume its investigation as soon as it learns that the law enforcement agency that it has completed the evidence gathering process. NYSED will implement appropriate interim steps during the law enforcement agency's investigation period to provide for the safety of the victim(s), as described below.

The Complainant is not required to pursue NYSED's internal procedures before filing a complaint with a state or federal agency. In addition, if the Complainant chooses to pursue NYSED's internal procedure, the Complainant is free to file a complaint with a state or federal agency at any point during the process. The Title IX Coordinator shall make known to Complainant all available supportive measures.

No one may make an audio or video recording of any portion of the procedures detailed below. NYSED keeps complaints and investigations confidential.

Retaliation against a person who files a complaint, serves as a witness, or assists or participates in any manner in this procedure is unlawful and may result in disciplinary action. Retaliation is an adverse action taken against an individual because she or he complained about, or provided information regarding, unlawful discrimination or harassment, exercising a legal right, and/or participating in a complaint investigation as a third-party witness. Adverse action includes discharge, discipline, or discrimination because the employee reports, provides information, or otherwise assists in any investigation of a sexual harassment complaint. Participants who experience retaliation should contact the Title IX Coordinator and may file a complaint pursuant to the below procedures.

Complaint Consultation and Review

Any program participant or employee may consult with the Title IX Coordinator regarding potential discrimination or harassment. This may occur by telephone, email, or in person.

The Title IX Coordinator will promptly respond to all inquiries. This response may include interim measures to protect the parties during the investigation process. If an interim measure affects the terms or conditions of an employee is in a collective bargaining unit, the bargaining unit will be notified.

All complaints or concerns that are reported to an administrator, manager or supervisor must be immediately referred to the Title IX Coordinator. Employees who observe or become aware of sex discrimination, including sexual harassment and sexual violence, should report this information to the Title IX Coordinator.

Filing Complaints and Time Limits

Complaints must generally be in writing. Federal law requires that all complaints be made within 180 days of the alleged harassment, discrimination, or retaliation. For complaints involving conduct that occurred outside this time period, the Complainant must demonstrate good cause for why he or she is entitled to a waiver.

If NYSED is unable to review the complaint due to this time limitation, NYSED may refer the complaint to the Office of Human Resources Management and inform the Complainant of other places where a complaint could be made. Complaints of sex discrimination beyond the 180-day period will be tracked and investigated to the extent possible, consistent with the Title IX obligations, including the Title IX Coordinator's duties to spot patterns and address systemic issues.

All complaints must be submitted on the forms provided by NYSED (see Forms below). As soon as reasonably possible, the Title IX Coordinator will confirm to Complainant that the complaint has been received and provide a copy of the complaint to any Respondent(s).

Employees: Employees must file a written complaint with the Title IX Coordinator within 180 calendar days following the alleged discriminatory act, or the date on which the Complainant first knew or reasonably should have known of such act.

Program Participants: Program Participants must file a complaint within 180 calendar days following the alleged discriminatory act.

Contents of Complaint

The complaint must include:

1. The name, local and permanent address(es), telephone number(s), and status (employee, Program Participant, third party) of the Complainant.
2. A statement of facts explaining what happened and what the Complainant believes constituted the unlawful discriminatory acts in sufficient detail to give each Respondent reasonable notice of what is claimed against him/her. The statement should include the date and approximate time/place where the alleged acts of unlawful discrimination or harassment occurred. If the acts occurred on more than one date, the statement should also include the last date on which the acts occurred as well as detailed information about the prior acts. The names of any potential witnesses should be provided.
3. The name(s), address(es) and telephone number(s) of the Respondent(s), i.e., the person(s) claimed to have committed the act(s) of unlawful discrimination, if known.
4. Identification of the status of the persons charged whether employee, Program Participant, or third party, if known.
5. A statement indicating whether or not the Complainant has filed or reported information concerning the incidents referred to in the complaint to law enforcement or any other federal or state agency. If an external complaint has been filed, the statement should indicate the name of the department or agency with which the information was filed and its address.
6. A description of any corrective or remedial action that the Complainant would like to see taken.
7. Signature of Complainant and the date complaint signed.

Informal Resolution

If a Complainant elects to have the matter dealt with in an informal manner, the Title IX Coordinator will attempt to resolve the problem to the mutual satisfaction of the parties.

In seeking an informal resolution, the Title IX Coordinator shall review all relevant information, interview pertinent witnesses, and bring the Complainant and the Respondent together, if desired and appropriate. Complaints of sexual violence will not be resolved by mediation and must be referred immediately to the Title IX Coordinator. The Complainant will not be required to resolve the problem directly with the Respondent in cases of alleged sex discrimination.

If both Complainant and Respondent agree to a satisfactory resolution within 24 calendar days from the filing of the complaint, the Title IX officer shall close the case, sending a written notice

to that effect to the Complainant and Respondent. This written notice, a copy of which shall be attached to the original complaint form in the officer's file, shall contain the terms of any agreement reached by Complainant and Respondent, and shall be signed and dated by the Complainant, the Respondent and the Title IX Coordinator.

If the Title IX Coordinator is unable to resolve the complaint within the 24-day time period, the Title IX Coordinator shall so notify the Complainant. The Title IX Coordinator shall advise the Complainant how he or she may proceed internally, and/or his or her right to separately file with appropriate external enforcement agencies.

The 24-day time period may be extended by mutual, written agreement of the Complainant and Respondent with the approval of the Title IX Coordinator.

The Complainant may elect to forego the informal resolution process and proceed to the formal resolution procedure at any time after the Charge of Discrimination form is filed.

Formal Resolution

The formal complaint proceeding is commenced by the filing of a complaint form as described above. The 180-day time limit applies to the filing of a formal complaint. If the Complainant initially pursued the informal process but subsequently decides to pursue a formal complaint, he/she may so indicate on the complaint form, together with a date and signature.

Notice to Parties: Upon receipt of a complaint, the Title IX Coordinator will provide the following written notice to parties who are known: (A) Notice of the recipient's grievance process that complies with this section, including any informal resolution process; (B) Notice of the allegations of sexual harassment potentially constituting sexual harassment as defined above, including sufficient details known at the time and with sufficient time to prepare a response before any initial interview.

Appointment of an Investigator: Within 7 calendar days of receipt of the complaint, the Title IX Coordinator shall send notification to the Complainant and the Respondent that a review of the matter shall take place by an investigator to be selected by the Title IX Coordinator.

Review: The investigator shall review all relevant information, interview pertinent witnesses, and, at his or her discretion, solicit testimony from the Complainant and/or the Respondent, if desirable. There will be no live hearing. Both the Complainant and the Respondent(s) shall be entitled to submit written statements and/or other relevant material evidence and witnesses, and to provide rebuttal to the written record compiled by the investigator. The Complainant and Respondent have the right to request alternative arrangements if the Complainant does not want to be in the same room as a Respondent. These alternative arrangements must be consistent with the rights of the accused and must enable both parties and the investigator to hear each other during any potential hearing.

Findings and Recommendations: Within 30 calendar days from the completion of selection of the investigator, the investigator shall submit a summary of his or her findings and recommendation(s)

to the Decision Maker. The burden of proof in cases of discrimination is a preponderance of the evidence. If the Decision Maker is a Respondent, the findings and recommendation shall be submitted to the Commissioner of Education or his or her designee. When the investigator transmits the summary of its findings and recommendation(s) to the Decision Maker, the investigator will also transmit, concurrently, copies of both the summary of its findings and recommendation(s) to the Complainant, Respondent, and the Title IX Coordinator.

Within 10 calendar days of receipt of the written summary, the Decision Maker shall issue a written statement to the Complainant and Respondent, indicating what action the Decision Maker proposes to take. The Decision Maker will use the preponderance of the evidence standard. The action proposed by the Decision Maker, may consist of:

- a. A determination that the complaint was not substantiated; or
- b. A determination that the complaint was substantiated.

The Decision Maker may recommend that the Office of Human Resources take such action as he/she deems appropriate, including termination, demotion, reassignment, suspension, reprimand, or training. For employees in a bargaining unit, NYSED shall follow the disciplinary process described in the applicable collective bargaining agreements.

The action of the Decision Maker—or Commissioner of Education, in limited circumstances—shall be final for purposes of this discrimination procedure.

Notice of outcome: No later than 7 calendar days following issuance of the statement by the Decision Maker or Commissioner, as the case may be, the Title IX Coordinator shall issue a letter to the Complainant and to the Respondent(s) advising them that the matter, for purposes of this discrimination procedure, is closed.

Appeal: The Complainant or the Respondent may appeal from a determination regarding responsibility, and from a recipient's dismissal of a formal complaint. Such an appeal must be made in writing to the Title IX Coordinator no later than 7 calendar days following issuance of the letter by the Title IX Coordinator to the Complainant and to the Respondent(s) advising them that the matter has been closed. Appeals may be based upon the following:

- (i) procedural irregularity that, in fact, affected the outcome of the matter;
- (ii) the availability of new evidence that was not reasonably available at the time of the determination that could affect the outcome of the matter; and
- (iii) the Title IX Coordinator, investigator(s), or Decision Maker (s) had a conflict of interest or bias for or against Complainants or Respondents generally or the individual Complainant or Respondent that affected the outcome of the matter.

Upon receipt of an appeal, the Title IX Coordinator will appoint a new Decision Maker within 14 days to review the appeal. Within 7 days following the appointment of a new Decision Maker, both parties will be permitted to submit a written statement in support of, or challenging, the outcome. The Decision Maker will issue a written decision limited to the three grounds for appeal

identified above. The Decision Maker will provide the written decision simultaneously to both parties within 21 days following his or her appointment.

Time limitations: The time limitations set forth above may be extended by mutual agreement of the Complainant and Respondent with the approval of the Title IX Coordinator, investigator, and Decision Maker. The Title IX Coordinator will also have the discretion to reasonably extend the deadlines if an investigation is deemed complex. Such extension shall be confirmed in writing.

External Agencies: If the Complainant is dissatisfied with the Decision Maker decision, the Complainant may elect to file a complaint with one or more state and federal agencies. The Title IX Coordinator can provide general information on state and federal guidelines and laws, as well as names and addresses of various enforcement agencies. A Complainant may however be precluded from challenging certain arguments if he or she had a full and fair opportunity to present his or her case in the NYSED Title IX proceeding.

Recordkeeping: For all incidents involving sexual harassment as defined herein, the Department will retain for seven years records of any action including any supportive measures, taken in response to a report or formal complaint of sexual harassment.

Training Materials: The Department will make publicly available all materials used to train the Title IX Coordinator, Investigator(s), Decision Maker(s) and any person who facilitates an informal resolution process.

Legal Protections and External Remedies

In addition to NYSED's policy, sexual harassment is prohibited by state and federal law.

Aside from the internal process at NYSED, employees may also choose to pursue legal remedies with the following governmental entities at any time.

New York State Division of Human Rights (DHR): The Human Rights Law (HRL), codified as N.Y. Executive Law, art. 15, §§ 290 *et seq.*, applies to employers in New York State and protects employees, paid or unpaid interns and non-employees regardless of immigration status, from sexual harassment. A complaint alleging a violation of the HRL may be filed either with DHR or in New York State Supreme Court.

Complaints with DHR may be filed any time within one year of the harassment. If an individual did not file at DHR, they can sue directly in state court under the HRL within three years of the alleged discrimination or sexual harassment. An individual may not file with DHR if they have already filed a HRL complaint in state court.

Complaining internally to NYSED does not extend your time to file with DHR or in court.

The one year or three years is counted from date of the most recent incident of harassment.

You do not need an attorney to file a complaint with DHR, and there is no cost to file with DHR.

DHR will investigate your complaint and determine whether there is probable cause to believe that discrimination or sexual harassment has occurred. Probable cause cases are forwarded to a public hearing before an administrative law judge. If discrimination or sexual harassment is found after a hearing, DHR has the power to award relief, which varies but may include requiring your employer to take action to stop the harassment, or redress the damage caused, including paying monetary damages, attorneys' fees and civil fines.

DHR's main office contact information is: NYS Division of Human Rights, One Fordham Plaza, Fourth Floor, Bronx, New York 10458, (718) 741-8400, www.dhr.ny.gov

Contact DHR at (888) 392-3644 or visit dhr.ny.gov/complaint for more information about filing a complaint. The website has a complaint form that can be downloaded, filled out, notarized and mailed to DHR. The website also contains contact information for DHR's regional offices across New York State.

United States Equal Employment Opportunity Commission (EEOC): The EEOC enforces federal anti-discrimination laws, including Title VII of the 1964 federal Civil Rights

Act (codified as 42 USC § 2000e *et seq.*). An individual can file a complaint with the EEOC anytime within 300 days from the harassment. There is no cost to file a complaint with the EEOC. The EEOC will investigate the complaint and determine whether there is reasonable cause to believe that discrimination has occurred, at which point the EEOC will issue a Right to Sue letter permitting the individual to file a complaint in federal court.

The EEOC does not hold hearings or award relief but may take other action including pursuing cases in federal court on behalf of complaining parties. Federal courts may award remedies if discrimination is found to have occurred.

An employee alleging discrimination against at work can file a "Charge of Discrimination." The EEOC has district, area, and field offices where complaints can be filed. Contact the EEOC by calling 1-800-669-4000 (1-800-669-6820 (TTY)), visiting their website at www.eeoc.gov or via email at info@eeoc.gov

If an individual filed an administrative complaint with DHR, DHR will file the complaint with the EEOC to preserve the right to proceed in federal court.

Local Law Enforcement: If the harassment involves unwanted physical touching, coerced physical confinement or coerced sex acts, the conduct may constitute a crime. Contact the local police department.