



MarymountManhattan

TITLE IX TRAINING

SEPTEMBER 2022

BIEDERMANN·HOENIG·SEMPREVIVO
A PROFESSIONAL CORPORATION



TOPICS COVERED

- New York State Law: NYS Education Law 129-B
- Federal Laws: VAWA, Campus SaVe Act, Title IX
- 2020 Title IX Regulations
- When a Complaint is Received
- Title IX investigations
- Investigation Reports
- Conflicts of Interest/Impartiality/Bias
- Decision Makers
- Hearings
- Reaching a Determination
- Written Determination
- Appeals
- Informal Resolution
- Case Study



STATE LAWS: NYS EDUCATION LAW ARTICLE 129-B

NYS EDUCATION LAW 129-B



- Some requirements under "Enough is Enough"
 - Uniform Statement of Rights
 - Student's Bill of Rights
 - Uniform Definition of "Consent"
 - Alcohol and/or Drug Use Amnesty Policy

NYS EDUCATION LAW 129-B



- **Students' Bill of Rights as it relates to investigations:**
 - The process is fair, impartial, and provides adequate notice and a meaningful opportunity to be heard;
 - Be treated with dignity;
 - Be free from any suggestion that the reporting individual is at fault or should have acted in a different manner to avoid the crimes or violations; and
 - Describe the incident to as few institutional representatives as practicable and not be required to unnecessarily repeat a description of the incident.

NYS EDUCATION LAW 129-B



- **Required Definition of Consent:**

- Consent can be given by words or actions, as long as those words or actions create clear permission regarding willingness to engage in the sexual activity.
- Silence or lack of resistance, in and of itself, does not demonstrate consent.
- Consent may be initially given but withdrawn at any time.
- Consent cannot be given when a person is incapacitated.

FEDERAL LAWS: TITLE IX, VAWA, & CAMPUS SaVE ACT



VIOLENCE AGAINST WOMEN ACT (“VAWA”)



- Under the Campus Sexual Violence Act of VAWA, MMC must, among other things:
 - Conduct internal sexual misconduct proceedings that are prompt, fair, and impartial
 - Annually train college administration officials and employees responsible for investigating complaints of sexual misconduct

The background of the slide is a close-up, slightly blurred image of an American flag. The red and white stripes are prominent, and a portion of the blue field with white stars is visible at the top. The lighting is warm, suggesting a sunset or sunrise, with a golden glow filtering through the background.

TITLE IX OF THE EDUCATION AMENDMENT ACT OF 1972

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

TITLE IX REGULATIONS

- On May 6, 2020, the U.S. Department of Education released the Final Title IX Regulations. Unlike prior guidance, the regulations are considered binding law after undergoing a formal notice and comment period.
- The regulations went into effect on August 14, 2020.



TITLE IX – PROPOSED REGULATIONS (2022)

- ❑ However, in June of 2022, the Department of Education released a Notice of Proposed Rule Making (NPRM) to rewrite the regulations under President Biden's direction.
- ❑ If adopted, the scope of Title IX will expand coverage to all forms of sex discrimination, including sexual orientation and gender identity discrimination, as well as protect against a broader range of conduct.
- ❑ Procedurally, the NPRM would provide some additional flexibility for institutions, eliminate barriers that may prevent victims of sex discrimination from filing complaints, and maintain most protections for accused students.
- ❑ The NPRM is currently undergoing a public comment process. Regulations are expected to become final within the coming year. Until then, the 2020 regulations will remain in place.

WHAT DOES TITLE IX PROHIBIT?

The recent Title IX Regulations forbid sex-based discrimination, sexual harassment, sexual assault, and sexual violence in the College's Education and Program Activities in the United States.

Title IX also forbids discrimination because of sex in employment and recruitment consideration or selection, whether full-time or part-time, under any education program or activity operated by an institution receiving or benefiting from federal financial assistance.

KEY POINTS

01

Either “Preponderance of the Evidence” or “Clear and Convincing” standards can be applied

02

Only applies to off-campus conduct that is part of an “Education Program or Activity”

03

An equal right of appeal for all parties is required

04

Informal Resolution permitted if certain conditions are met

REQUIREMENTS

- Live Hearings
- Investigative Model that separates investigating from decision-making
- Clear Reporting Options, including electronic reporting methods
- First Response Protocol
- Training Requirements including publication on website



OCR 2021 GUIDANCE

OCR issued a Q&A Guidance Document on July 20, 2021

1. Determining whether sexual harassment “effectively denies a person’s right to equal access to an education program or activity” – reasonable person standard
2. A School must follow the requirements of Title IX and regulations or guidance in effect *at the time of the alleged conduct*.
3. A School may receive actual knowledge of sexual harassment from any person.
4. A School may remove a respondent from campus while a Title IX grievance process is pending if the school determines that the respondent is a threat to others.



TITLE IX – FACT OR FICTION

POLLS



TITLE IX DEFINITIONS

SEXUAL HARASSMENT

- ❑ Conduct on the basis of sex that satisfies one or more of the following:
 - (1) *Quid Pro Quo* – A College employee conditioning the provision of an aid, benefit, or service of the College on an individual's participation in unwelcome sexual conduct;
 - (2) *Sexual Harassment* – 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 recipient's education program or activity; or
 - (3) "Sexual assault" as defined in 20 U.S.C. 1092(f)(6)(A)(v), "dating violence" as defined in 34 U.S.C. 12291(a)(10), "domestic violence" as defined in 34 U.S.C. 12291(a)(8), or "stalking" as defined in 34 U.S.C. 12291(a)(30).



TITLE IX DEFINITIONS

- **SEXUAL ASSAULT**: Includes the following conduct:
 - Forcible sexual acts, forcible rape, forcible sodomy, sexual assault with an object, and forcible fondling
 - Non-Forcible Sexual Intercourse, including incest and statutory rape
- **DATING VIOLENCE**: Violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the Complainant. The existence of such a relationship shall be determined based on the Complainant'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,

TITLE IX DEFINITIONS

- ❑ **DOMESTIC VIOLENCE:** a felony or misdemeanor crime of violence committed
 - ❑ By a current or former spouse or intimate partner of the Complainant;
 - ❑ By a person with whom the Complainant shares a child in common;
 - ❑ By a person who is or has cohabitated with the Complainant as a spouse or intimate partner;
 - ❑ By a person similarly situated to a spouse of the Complainant under the domestic or family violence laws of New York State; or
 - ❑ By any other person against an adult or youth Complainant who is protected from that person's acts under the domestic or family violence laws of New York State
- ❑ **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.



TITLE IX DEFINITIONS

EDUCATION PROGRAM OR ACTIVITY:

- ❑ *“location, event or circumstance over which the Institution exercises substantial control over both the Respondent and the context in which the sexual harassment occurs.”*
- ❑ The regulations extend the scope of “education program or activity” to any building owned or controlled by a student organization that is officially recognized by a postsecondary institution, which includes school sanctioned sororities and fraternities.
- ❑ Title IX protections do NOT extend to students studying abroad, unlike under prior guidance.

TITLE IX DEFINITIONS



- **FORMAL COMPLAINT:**
 - A Formal Complaint is a document filed by a complainant or signed by the Title IX Coordinator alleging sexual harassment against a respondent and requesting that MMC investigate the allegation of sexual harassment.
 - The filing of a Formal Complaint will trigger the Title IX grievance process.
 - MMC Policy [Section VI, c]

TITLE IX DEFINITIONS



FACT PATTERN

- You have been assigned to investigate a formal complaint alleging that a student was being harassed by her ex-boyfriend, another student.
- What types of evidence/information would be relevant to determining whether the alleged harassment was **severe, pervasive** and **objectively offensive**?

TITLE IX DEFINITIONS

- **POLLS: Does
Title IX
Apply?**



TITLE IX - RETALIATION

- Title IX prohibits retaliation against an individual who makes a complaint of a Title IX violation or otherwise participates in the Title IX investigation process.



RETALIATION



■ Elements of retaliation:

- (1) The individual was engaged in a protected activity;
- (2) The retaliating party was aware of the individual's participation in the protected activity;
- (3) There was an adverse action taken against the individual; and,
- (4) There was a causal connection between the protected activity and the adverse action taken against the individual.

RETALIATION – CHANGE TO NY LAW



- ❑ On March 16, 2022, New York Governor Kathy Hochul, signed a series of bills into law designed at combatting harassment and discrimination in the workplace.
- ❑ Of note, she amended New York State Human Rights Law's definition of retaliation. Specifically, retaliation now includes revealing or releasing an employee's personnel file, or any information contained therein, in response to an employee opposing an unlawful discriminatory practice.
- ❑ However, an employer may disclose an employee's personnel file when necessary to respond to a complaint from the New York State Division of Human Rights or any other administrative or judicial proceeding.
- ❑ The law also provides that individuals may bring private rights of action in court and the attorney general may commence an action in state court in New York for a violation of the retaliation provisions of the law.

TITLE IX – HOSTILE ENVIRONMENT

- The College's action or inaction in response to a Title IX Complaint may support a finding that the College maintains a **hostile environment** that permits ongoing Title IX violations.



HOSTILE ENVIRONMENT

■ Elements of hostile environment:

- (1) The individual suffered intentional, unwanted treatment *because of* his or her sex;
- (2) The harassment was severe or pervasive;
- (3) The harassment affected the terms, conditions, or privileges of the education or work environment;
- (4) The harassment would detrimentally affect a reasonable person; and,
- (5) The College knew or should have known about the harassment and did nothing to stop the behavior.

HARASSMENT - HOSTILE ENVIRONMENT

■ *New York State Law*

- On August 12, 2019, Governor Cuomo signed legislation enacting sweeping new workplace harassment protections.
- Eliminates restriction that harassment be "Severe or Pervasive" in order for it to be legally actionable.
- Mandates that all employment contract NDAs include language allowing employees to file a complaint of harassment or discrimination.
- Extends the statute of limitations for employment sexual harassment claims filed from one year to three years.

INTERSECTION OF TITLE IX AND NYS 129-B

- Sexual misconduct that does not fall under Title IX may still be covered under NYS 129-B and require a response from the College
- ***“A reporting individual is encouraged to report sexual misconduct, domestic violence, dating violence and stalking regardless of where the incident occurred, or who committed it. Even if the College does not have jurisdiction over the responding individual, the College will still take prompt action to provide for the safety and well-being of the reporting individual and the broader campus community.” (MMC Policy Section V)***

WHAT ARE MMC'S OBLIGATIONS UNDER TITLE IX?

Marymount Manhattan College is responsible for properly investigating all allegations of Title IX violations.

The College's Title IX investigation must be adequate, reliable, impartial, and prompt and must include the opportunity for both parties to present witnesses and other evidence.

MMC'S SEXUAL MISCONDUCT POLICY

Consistent with its obligations under all federal and state laws, MMC has enacted its own Policy on Sexual Misconduct, Sexual Assault, Stalking, and Relationship Violence.

A copy of the College's policy can be found at www.mmm.edu/offices/human-resources/policy-sexual-misconduct-sexual-assault-stalking-relationship-violence.php

MMC'S SEXUAL MISCONDUCT POLICY

■ SCOPE

- This policy prohibits a broad range of behaviors that can create a hostile working, living or learning environment, including sexual assault and sexual harassment, collectively referred to as “sexual misconduct.”
- This policy applies to sexual misconduct whenever that sexual misconduct occurs:
 - On campus; or
 - At an off-campus Education Program or Activity as defined in the Policy.
- Sexual Misconduct that occurs off campus and is not part of an Education Program or Activity shall be subject to review and/or investigation under other applicable Codes of Conduct of the College.



TITLE IX COORDINATOR

- MMC's Title IX Coordinator – Desiree Sholes
 - Telephone: 212.517.0560
 - Email: dsholes@mmm.edu
- The Title IX Coordinator ensures that the College is complying with Title IX regulations, including coordinating any investigations of complaints received pursuant to Title IX and implementing Title IX regulations.



WHEN A
COMPLAINT
IS RECEIVED

WHEN A COMPLAINT IS RECEIVED

All employees are strongly encouraged to report incidents of sexual misconduct to MMC's Title IX Coordinator, Desiree Sholes.

Increased reporting helps the College to properly investigate and respond to instances of discrimination and harassment so that a hostile environment is not created.

WHEN A COMPLAINT IS RECEIVED



- **Immediately inform the Title IX Coordinator if possible.**
- When speaking to a Complainant, do the following:
 - First, advise the Complainant that his/her identity must be disclosed.
 - Listen to the Complainant.
 - Be supportive. Advise the Complainant that the College will review and respond to the allegations.
 - Document the allegations, including all facts as relayed.
 - Keep notes free from bias or any conclusions.
 - Request that the Complainant maintain any relevant evidence.
 - Inform the Complainant that the Title IX Coordinator will provide information on various resources.

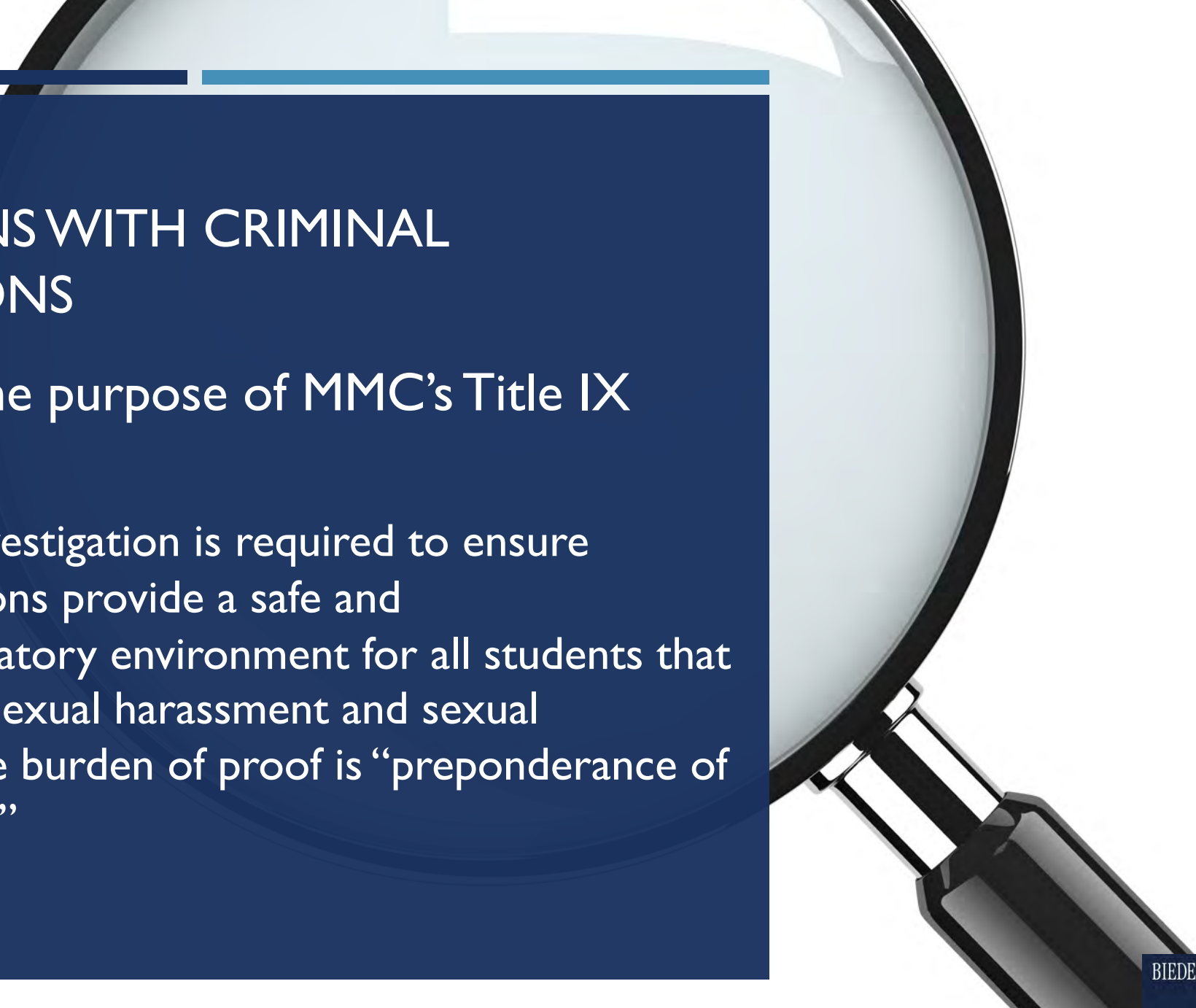
WHEN A COMPLAINT IS RECEIVED



- Steps the College must take after being made aware of a potential Title IX Violation:
 - The College must contact the Complainant and explain the reporting options, grievance process and supportive measures
 - Although the College shall seek consent from the Complainant before beginning an investigation, the College may be required to go forward with an investigation absent consent from the Complainant if the report presents a threat to the College community.
 - NOTE: If a Formal Complaint is filed for conduct that falls under Title IX, the grievance process is triggered.
 - The College must inform the Complainant that it cannot ensure confidentiality and will take all reasonable steps to investigate and respond to the complaint consistent with the request for confidentiality.
 - Title IX Team members privy to information of a private nature should only discuss the evidence with individuals who are tasked with similar roles.

INTERACTIONS WITH CRIMINAL INVESTIGATIONS

- Complainants also have the right to bring a criminal complaint against the Respondent.
- The timing of a College's Title IX investigation will typically coincide with the timing of the criminal investigation. The College's investigation should continue unless it would interfere with the police's investigation.
- Efforts should be made to cooperate and coordinate with local law enforcement as much as possible during a concurrent criminal investigation.



INTERACTIONS WITH CRIMINAL INVESTIGATIONS

Keep in mind the purpose of MMC's Title IX investigations:

- A Title IX investigation is required to ensure that institutions provide a safe and nondiscriminatory environment for all students that is free from sexual harassment and sexual violence. The burden of proof is “preponderance of the evidence.”

TITLE IX GRIEVANCE PROCESS

When a Formal Complaint is received that alleges conduct that falls under Title IX, the following grievance process is triggered:

- ❑ Investigation
 - ❑ Interviews of Complainant, Respondent and other witnesses
 - ❑ Review of documents and other evidence
- ❑ Live Hearing
 - ❑ Can be conducted remotely via video conferencing
- ❑ Summary of relevant evidence and Investigative Report, Written Decision
- ❑ Appeal Process



TITLE IX INVESTIGATIONS

TITLE IX INVESTIGATION

The Title IX Coordinator has asked you to be the lead investigator of a Title IX complaint. Now what?

- ☐ Timing
- ☐ What information do you already have?
- ☐ Identify the key players
- ☐ Develop a plan



TITLE IX INVESTIGATION

What should an investigation consist of?

- ❑ A review of the policy alleged to be violated
- ❑ Separate interviews of the Complainant, the Respondent, and other witnesses (if applicable).
- ❑ A review of any relevant documents, photographs, or other materials.



TITLE IX INVESTIGATION



Rights of Complainants and Respondents:

- ❑ Both parties have the right to participate in the investigative process or elect not to participate.
- ❑ Both parties may present evidence.
- ❑ Both parties are entitled to have an advisor of their choice present for all investigative and disciplinary proceedings. The advisor may be an attorney.

TITLE IX INVESTIGATION

General Tips for Investigators:

- Maintain an appropriate relationship with the Complainant and Respondent throughout the investigation process.
- Remember that your job is to fact-find in an impartial manner.
- Investigators should conduct themselves in a professional manner during the investigation.
- Avoid making any assumptions or conclusions during the interview process.



TITLE IX INVESTIGATION INTERVIEWS

- Investigators should conduct thorough interviews so as to limit, as much as possible, the amount of times that a Complainant is questioned about the incident.



TITLE IX INVESTIGATION INTERVIEWS



Before the interview:

- The key to conducting a meaningful interview is to prepare.
- Review all documents/materials received prior to the interview.
- Review the definitions contained within the College's Sexual Misconduct Policy and other potentially relevant policies to determine what information you need to obtain.
- Prepare an outline.

TITLE IX INVESTIGATION INTERVIEWS

At the beginning of the interview:

- Make it known that the College takes allegations of sexual misconduct very seriously.
- Acknowledge that you will be asking some difficult questions and explain your intent.
- Stress the importance of honesty during the interview.



TITLE IX INVESTIGATION INTERVIEWS

During the interview:

- Have the interviewee tell their story first.
- When you start questioning, begin with general questions, but get more specific as the interview progresses.
- Get the details – the “who, what, where, when, why.”
- Identify all potential witnesses and relevant records.