

Title IX Changes/Regulations

Effective August 14, 2020

Establish Title IX Team

- Title IX Coordinator
- Deputy Title IX Coordinator (optional)
- Investigator
- Decision Maker (must be well versed in legal terminology and legal relevance issues)
- Appeal members
- Informal Resolution Facilitator (optional)
 - Factors
 - All team members must work in “silos”
 - Cannot have same person in more than one role
 - May appoint outside investigators, decision makers and appeal members
 - All positions must have training for the role

How to Ensure Accessible Reporting to the Title IX Coordinator

- Items That Must Be Posted on Website:
 - Name, office address, telephone number, and email address of Title IX Coordinator
 - Title IX Policies and Procedures
 - Training materials
- Schools must also notify applicants for admission and employment, parents or legal guardians of elementary and secondary school students, and all unions of the name, office address, email address, and telephone number of the Title IX Coordinator.

Definition of Sexual Harassment for Title IX Purposes

- Regulations define sexual harassment broadly to include three types of misconduct on the “basis of sex,” all of which jeopardize the equal access to education. These include the following:
 - Any instance of *quid pro quo* harassment by a school employee;
 - Any unwelcome conduct that a reasonable person would find so severe, pervasive, AND objectively offensive that it denies a person equal educational access, OR
 - Any instance of sexual assault (as defined in the Clery Act), dating violence, domestic violence, or stalking as defined in the Violence Against Women Act.
- Title IX statute refers to persons in the United States and in the institution’s education program or activity (including on-campus or off-campus events and activities where the school district exercises substantial control over both the respondent and the context in which the harassment occurs).
- One of the main penalties for violating Title IX is potential loss of federal funding.

Definition of Actual Knowledge of Sexual Harassment

- A school district is not required to respond if it merely “should have known” about sexual harassment; rather, its obligation to respond is triggered only after the school districts has “actual knowledge” of the alleged conduct.
- “Actual Knowledge” means notice to the Title IX Coordinator, or to an official with authority to institute corrective measures on the recipient’s behalf, or to any school employee.

- Any person may report sexual discrimination, including sexual harassment, by any means necessary to get the information to the Title IX Coordinator. The person who reports does not need to be the complainant. Verbal or written reports can be made at any time, including non-business hours.
- A witness may make a report.

Definition of “Education Program or Activity in the United States”

- Regulations and statute contain broad definitions
- Locations, events or circumstances over which the school exercises “substantial control” over both the respondent and the context in which the sexual harassment occurred
- All school’s education programs and activities, whether such programs or activities occur on-campus or off-campus.

Other Definitions:

- **Complainant** is an individual who is alleged to be the victim of conduct that constitutes sexual harassment.
 - Any third party as well as the complainant may report sexual harassment
 - Parents/Guardians do not become complainants; guidelines recognize parents/guardians to act on behalf of the parties (including filing a formal complaint).
- **Respondent** is the individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment.
- **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 the school investigate the allegation of sexual harassment and states the following:
 - At the time of filing the formal complaint, the complainant must be participating in or attempting to participate in the education program or activity of the school
 - Complaint may be filed with the Title IX Coordinator in person, by mail, or electronic mail, and by any additional method designated by the school.
- **Supportive Measures** Supportive measures are individualized services reasonably available that are
 - Non-punitive,
 - Non-disciplinary, and
 - Not unreasonably burdensome to the other part
 - Designed to
 - Ensure equal educational access
 - Protect safety, or
 - Deter sexual harassment

Examples of supportive measures include, but are not limited to, the following:

- Counseling
- Extension of deadlines or other course related adjustments
- Modification of class schedules
- Mutual contact restrictions

Mandatory Responses

- Schools must respond promptly to Title IX sexual harassment in a manner that is not deliberately indifferent (not clearly unreasonable in light of the known circumstances).
- Schools must offer supportive measures.
- Title IX Coordinator must promptly contact the complainant (alleged victim) confidentially and discuss the following:

- Availability of supportive measures (with or without filing a formal complaint),
- Consider the complainant's wishes with respect to the supportive measures, and
- Explain the process for filing a formal complaint
- A complainant's wishes with respect to filing a formal complaint to initiate an investigation should be respected *unless* the Title IX Coordinator determines that signing the formal complaint to initiate an investigation over the wishes of the complainant is *not clearly unreasonable* in light of the known circumstances. If the Title IX Coordinator signs the complaint, the person is not a complainant or a party to the process.
- Grievance process must be followed before imposing any disciplinary measures.
- Requires schools to investigate sexual harassment allegations in any formal complaint, which can be filed by a complainant, or signed by Title IX Coordinator. A school may not continue with the grievance process in the absence of a formal complaint.

Grievance Process----General Requirements

- Consistent
- Transparent
- Provide for the prompt and equitable resolution of complaints
- Treat complainants equitably by providing remedies any time a respondent is found responsible
- Treat respondents equitably by not imposing disciplinary sanctions without following the grievance process (due process)
 - Due Process
 - Written notices of investigative interviews, meetings, or hearings
 - Meaningful opportunity to be heard
 - Impartial process
 - Objective evaluation
 - Fair, reliable, unbiased, accurate outcomes
- Training for all key players (Title IX Coordinator, Investigator, Decision-Maker)
- Presumption of innocence for the respondent
- Designate reasonable time frames for entire process including appeals and reasonable, good cause, short-term delays or extension of time frames
- Develop and communicate a range of remedies for the complainant and a range of disciplinary sanctions a school may impose on a respondent
- Use and consistently apply either a “preponderance of the evidence” or “clear and convincing” standard of evidence.
 - Preponderance of the evidence.....scales tilt ever so slightly to one side
 - Clear and convincing.....scales are tipped significantly
- Appeal procedures
- Cannot use, rely on, or seek disclosure of information protected under a legally recognized privilege, unless the person holding such privilege has waived it
- All provisions, rules, or practices must be applied equally to both parties.
- Burden of gathering information and burden of proof is on the school not the parties.
- No gag orders
- Parties must have the same opportunity to select an advisor of the part's choice who may be, but need not be, an attorney.
- Schools must provide complainant and respondent (and their parents/guardians) an equal opportunity to review any evidence obtained that is directly related to the allegations raised in a formal complaint. The information must be given in writing, either in an electronic format or hard copy, with at least 10 days for the parties inspect, review, and respond to the evidence.

- Schools must send the parties an investigative report that fairly summarized relevant evidence, in electronic format or hard copy, with at least 10 days for the parties to respond.
- Schools may consolidate formal complaints where the allegations arise out of the same facts.
- Regulations protect the privacy of the party's medical, psychological, and similar treatment records by stating that the school cannot access or use such records unless the school obtains the party's voluntary, written consent.
- Schools may, but need not, provide for a hearing. Hearings are option for K-12 schools. If a hearing is part of the process, there are a list of rules/regulations governing the hearing.
- Written questions are required.
 - After the school has sent the investigative report to the parties and before reaching a determination regarding responsibility, the decision-maker must afford each party the opportunity to submit written, relevant questions that a party wants asked of any party or witness,
 - Provide each party with the answers; and,
 - Allow for additional, limited follow-up questions from each party.
- Rape Shield Protection
 - Regulations provide rape shield protection for the complainant
 - Questions and evidence regarding complainant's prior sexual behavior is deemed irrelevant, unless
 - Offered to prove that someone else other than the respondent committed the alleged misconduct, or
 - Offered to prove consent.
- Written Determination by the Decision-Maker must include
 - Findings of Fact,
 - Conclusions about whether the alleged conduct occurred,
 - Rationale for the result as to each allegation,
 - Any disciplinary sanctions imposed on the respondent, and
 - Whether remedies will be provided to the complainant
 - ***The written determination must be sent simultaneously to the parties along with information about how to file an appeal.

Appeal

- School must offer both parties an appeal from a determination or dismissal based on the following:
 - Procedural irregularity that affected the outcome of the matter,
 - Newly discovered evidence that would affect the outcome of the matter, and/or
 - Title IX personnel had a conflict of interest or bias that affected the outcome of the matter.
 - As school may offer an appeal to both parties on additional bases.

Informal Resolutions

- Schools may, in its discretion, choose to offer and facilitate informal resolution options (mediation or restorative justice) so long as both parties give
 - Voluntary
 - Informed
 - Written consent
- Person who facilitates an informal resolution must be well trained.
- A school may not require waiver of the right to an informal investigation and adjudication of formal complaints.
- May not require parties to participate in informal resolutions.

- May not offer an informal resolution until a formal complaint filed.
- Any time prior to agreeing to a resolution, any party has the right to withdraw from informal resolution process and resume the grievance process.
- Schools must not offer or facilitate an informal resolution process to resolve allegations that an employee sexually harassed a student.

Dismissal of a Formal Complaint

- **Mandatory dismissal:**
 - Allegations of conduct do not meet the definition of sexual harassment, or
 - Conduct did not occur in a school's education program or activity against a person in the United States.
 - ***Dismissal is only for Title IX purposes and does not preclude the school from addressing the conduct in any manner the school deems appropriate
- **Discretionary dismissal:**
 - School may dismiss the allegation or formal complaint, if the complainant informs the Title IX Coordinator, in writing, that the complainant desires to withdraw the allegation or formal complaint, or
 - If the respondent is no longer enrolled or employed by the school, or
 - If specific circumstances prevent the school from gathering sufficient evidence to reach a determination.
- Schools must give the parties written notice of a dismissal (mandatory or discretionary) and the reasons for the dismissal.

Retaliation prohibited

Trainings

- Title IX personnel (Coordinator, investigator, decision-maker, any person who facilitates an informal resolution) must be unbiased and free from conflicts of interest
- Title IX personnel must receive training as follows:
 - Definition of sexual harassment
 - Scope of the school's education program or activity
 - How to conduct an investigation and grievance process
 - How to serve impartially, including avoiding any prejudgment of the facts at issue
 - How to avoid conflicts of interest and bias
 - Decision-makers must receive training on any technology to be used at a live hearing, and on issues of relevance of questions and evidence, including rape shield law
 - Investigators must receive training on issues of relevance to create an investigative report that fairly summarized relevant evidence

All materials used to train Title IX personnel

- Must not rely on sex stereotypes,
- Must promote impartial investigations and adjudications of formal complaints of sexual harassment,
- Must be maintained by the school for at least 7 years,
- Must be publicly available on the school's website; if the school does not maintain a website the school must make the training materials available upon request for inspection by members of the public.

- Under the Title IX Rule, students, employees, the Department, and the public will be able to examine a school’s training materials, providing a necessary safeguard to improve the impartiality, reliability, and legitimacy of Title IX proceedings. This requirement will improve the overall transparency and integrity of a school’s Title IX policies and procedures.
- Schools must publish training materials that are up to date and reflect the latest training provided to Title IX personnel.
- Section 106.45(b) (10) (i)(D) does not permit a school to *choose* whether to post the training materials or offer a public inspection option. Rather, if a school has a website, the school must post the training materials on its website.
 - A school must post on its website: “*All materials used to train* Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process.” Posting anything less than “all materials” on the website is insufficient. Accordingly, merely listing topics covered by the school’s training of Title IX personnel, or merely summarizing such training materials is not the same as posting “all materials.”
- If a school’s current training materials are copyrighted or otherwise protected as proprietary business information (for example, by an outside consultant), the school still must comply with the Title IX Rule. This may mean that the school has to secure permission from the copyright holder to publish the training materials on the school’s website.
 - Nothing in the Title IX Rule abrogates intellectual property rights. If a school is unable to secure permission from a third party to post copyrighted training materials, then the school must create or obtain training materials that can lawfully be posted on the school’s website.
- The Department does not certify, endorse, or otherwise approve or disapprove of particular organizations (whether for-profit or non-profit) or individuals that provide Title IX-related training and consulting services to schools.