

Title IX Training

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Background: What is Title IX?

Title IX-No person in the US 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.

Evolution of Title IX:

- 1972-statute
- 1975-limited rulemaking
- 1980s-1990s- judicial decisions
- 1997-2017 policy guidance
- 2018 – 2020 extensive rulemaking aimed at sexual harassment

Policy Guidance vs. Rules

- Most recent federal guidance on Title IX—Dear Colleague Letters and Q&A Documents from 2011, 2014, and 2017—was policy guidance.
- New regulations (also known as rules) were promulgated through the Administrative Procedure Act’s rulemaking process and have the force and effect of law.
- New rules are 26 pages long.
- Preamble is more than 2,000 pages long.

Big picture shifts

- departure from broad obligation to change school culture
- more focus on schools’ responsibility to address serious cases of sexual misconduct through a technical grievance process
- emphasis on due process and impartiality

Overview of Changes and New Requirements

- Substantive
 - new terms and definitions
 - Impartiality, prohibition of bias, conflicts of interest, and prejudgment
 - changes to scope of conduct actionable under Title IX
 - school response and liability standards
 - confidentiality requirements
 - protection of constitutional rights
 - rape shield protections
 - no “gag orders”
- Procedural
 - reporting
 - notice requirements
 - supportive measures
 - informal resolution
 - prescriptive grievance process
 - no single-investigator model

- written questions for decision making process
- mandatory appeals
- training

Training Requirements

Who Must be Trained:

- Title IX Coordinator, any investigator, any decision-maker, and any person who facilitates informal resolution

Training Must Include:

- Title IX's 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 by avoiding 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 when questions and evidence about a complainant's sexual predisposition or prior sexual behavior are not relevant
- investigators must receive training on issues of relevance to create an investigative report that fairly summarizes relevant evidence

Potential consequences

- U.S. Department of Education's Office for Civil Rights (OCR) enforces Title IX.
- Individuals can also bring Title IX claims in court.
 - Monetary damages are available.
- Title IX protects against:
 - student on student harassment
 - employee on student harassment
 - employee on employee harassment

Overview of New Title IX Regulations

Table of Contents

- [Key Terms and Definitions](#)
- [Notifications](#)
- [Intake and School Response](#)
- [Supportive Measures](#)
- [Informal Resolution](#)
- [Relevance](#)
- [Investigation](#)
- [Hearings](#)
- [Appeals](#)
- [Sanctions/Remedies](#)
- [Bias, Impartiality, Conflicts of Interest](#)
- [Recordkeeping](#)
- [Rules of Procedure and Decorum](#)

Key Terms and Definitions

“Sexual Harassment” in the Past: In the past, no set definition. Previous widely-understood standard: Sexual harassment is unwelcome conduct of a sexual nature. It includes unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal, or physical conduct of a sexual nature.

New Definition of Sexual Harassment: Sexual harassment includes three categories of misconduct on the basis of sex:

- Quid pro quo harassment by an employee;
- Severe, pervasive, **and** objectively offensive unwelcome conduct; and
- Sexual assault, dating violence, domestic violence, or stalking as defined under the Clery Act and VAWA 106.30(a)

Definition of Actual Knowledge: Actual Knowledge: means notice of sexual harassment or allegations of sexual harassment to a recipient’s Title IX Coordinator or any official of the recipient who has the authority to institute corrective measures on behalf of the recipient, or to any employee or an elementary or secondary school. 106.30(a)

- departure from previous constructive notice-type standard for “responsible employees” who knew or reasonably should have known about harassment

Who counts as having actual knowledge?

- For K-12, any employee.
- No discretion for schools to designate “responsible employees” for notice and reporting purposes. Actual knowledge of any employee triggers Title IX duties.
- Training is key. Staff need to know their reporting duties. Similar to mandatory reporter laws.

Education program or activity

“Education Program or Activity” includes locations, events, or circumstances over which the recipient exercised substantial control over both the respondent and the context in which the sexual harassment occurs and also includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution. 106.44(a)

Examples include:

regular school hours, recruitment, admissions, hiring, counseling, athletics, extracurricular activities, outreach programs, employment.

Off-campus harassment

- no bright-line geographic test
- Preamble says Title IX obligations extend to off-campus harassment if any of three conditions are met:
- off-campus incident occurs as part of the school’s “operations” pursuant to 20 U.S.C. 1687 and 34 CFR 106.2(h);
- school exercised substantial control over the respondent and the context of alleged sexual harassment that occurred off campus; or
- incident of sexual harassment occurs at an off-campus building owned or controlled by a student organization official recognized by a postsecondary institution pursuant to § 106.44(a). Preamble 30196

What does substantial control mean?

- Preamble: Federal courts have examined factors such as whether the school funded, promoted, or sponsored the event or circumstance where the harassment occurred. 30197
- Preamble: “While it may be helpful or useful for [schools] to consider factors applied by Federal courts to determine the scope of a [school’s] program or activity, no single factor is determinative to conclude whether a [school] exercised substantial control over the respondent and the context in which the harassment occurred, or whether an incident occurred as part of ‘all of the operations of’ a school, college, or university.” 30197

Remote learning

- The statutory and regulatory definitions of ‘program or activity’ encompass all operations of recipients, and operations may certainly include computer and internet networks, digital platforms, and computer hardware or software owned or operated by, or used in the operations of, recipient. 30202
- Addressing whether a school can exercise substantial control over a student studying remotely, DOE said “a student using a personal device to perpetrate online sexual harassment during class time may constitute a circumstance over which the recipient exercises substantial control.” 30202

Conduct beyond Title IX’s Scope

- Schools may develop their own policies, codes of conduct, and processes for handling conduct that falls outside Title IX’s ambit.
- e.g., misconduct that doesn’t meet new definition of sexual harassment or misconduct that occurs outside the education program or activity
- But, must be handled through separate process—not treated as a Title IX complaint.
- miscategorizing complaints and using “wrong” grievance procedure may result in Title IX violation. Preamble 30221 & 30283

Notifications

Designation of Title IX Coordinator

- School must designate and authorize at least one employee to coordinate its efforts to comply with Title IX responsibilities, which employee must be referred to as the Title IX Coordinator. § 106.8(a)
- School must notify applicants for admission and employment, students and all unions or professional organizations holding collective bargaining professional agreements with the school, of the name or title, office address, electronic mail address, and telephone number of the employee or employees designated as the Title IX Coordinator. § 106.8(a)
- School must prominently display contact information for the Title IX Coordinator on its website, if any, and in each handbook or catalog that it makes available to persons entitled to notification per the regulations. § 106.8(b)(2)(i)

Policy Dissemination

- School must notify persons entitled to notification under these rules that it does not discriminate on the basis of sex in the education program or activity that it operates, and that it is required by Title IX not to discriminate in such a manner. § 106.8(b)(1)
- Such notification must state that the requirement not to discriminate in the education program or activity extends to admission and employment, and that inquiries about Title IX’s application may be referred to the school’s Title IX Coordinator, the Assistant Secretary of Education, or both. § 106.8(b)(1)

Grievance Procedure

- School must adopt and publish grievance procedures that provide for the prompt and equitable resolution of student and employee complaints alleging any action that would be prohibited by Title IX and a grievance process that complies with Title IX's requirements for formal complaints as defined in the regulations. § 106.8(c)
- School must provide notice of its grievance procedures and grievance process, including how to report or file a complaint of sex discrimination, how to report or file a formal complaint of sexual harassment, and how the school will respond. § 106.8(c)

Content of Grievance Procedure

- description of the range of possible disciplinary sanctions and remedies or a list of possible disciplinary sanctions and remedies that the school may impose;
- statement of whether the standard of evidence to be used to determine responsibility is the preponderance of the evidence standard or the clear and convincing evidence standard;
- procedures and permissible bases for the complainant and respondent to appeal; and
- description of the range of supportive measures available to complainants and respondents. § 106.45(b)(1)(vi) – (ix).

Training Materials

- School must make its Title IX training materials publicly available on its website, or if the school does not maintain a website, it must make the materials available upon request for inspection by members of the public. § 106.45(b)(10)

Publications Generally

- School must not use or distribute a publication stating that the school treats applicants, students, or employees differently on the basis of sex except as such treatment is permitted by Title IX. § 106.8(b)(2)(ii)

Intake and School Response

- reporting
- duty to act
- response obligations
- dismissals

Reporting

- anyone can report sexual harassment (including third parties)
- informal reports vs. formal complaints:
- different things but both trigger the school's duty to act

General Response Obligations

- Must treat complainants and respondents equitably. § 106.44(a)
- Burden of proof and burden of gathering evidence sufficient to reach a determination regarding responsibility rests on school, not the parties. § 106.45(b)(5)(i)
- Must follow Title IX grievance process before imposing discipline § 106.44(a)
- Regulations require "reasonably prompt time frames." § 106.45(b)(1)(v)
- School may need to undertake some degree of investigation or inquiry at outset to determine whether allegations fall under scope of Title IX.

Informal reports – school response

- Upon receipt of a sexual harassment report from anyone, Title IX Coordinator must:
- contact complainant to discuss availability of supportive measures, with or without formal complaint;
- consider complainant’s wishes with respect to supportive measures; and
- explain to complainant the process for filing a formal complaint.

§ 106.44(a)

Formal Complaints

- triggers obligation to initiate grievance process. § 106.44(b)(1). To be a formal complaint, a report must:
- allege sexual harassment;
- be made by a person (or the parent of a person) who: (1) allegedly experienced the conduct complained of, and (2) is participating or attempting to participate in a program or activity;
- be a document filed by a complainant or signed by a Title IX Coordinator;
- be made “against a respondent”; and
- request an investigation.

Reports Covered by Title IX **but without** a formal complaint

Title IX Coordinator must either:

- close the report (under certain circumstances); or
- sign a formal complaint and initiate the Title IX grievance process.
 - Some circumstances may require Title IX Coordinator to initiate an investigation and adjudication of allegations in order to protect the IHE’s educational community or otherwise avoid being deliberately indifferent to known sexual harassment. p. 30132
 - Contact legal counsel to evaluate which route is appropriate.

Notice after formal complaint

School must provide the parties with:

- notice of the school’s grievance process, plus availability of any informal resolution process
- detailed notice of the allegations, including:
 - identities of involved parties, if known
 - conduct allegedly constituting sexual harassment
 - date and location of alleged incident, if known

Additional requirements for written notice

- Statement that respondent is presumed not responsible for the alleged conduct and that a determination is made at the conclusion of the grievance process.
- Inform parties that they may have an advisor of their choice, who may be, but is not required to be, an attorney.
- If school decides to investigate additional allegations that are not in the original notice to the parties, must provide written notice to parties of the additional allegations.

Mandatory dismissals

Must dismiss a complaint from the Title IX process if the alleged conduct:

- would not constitute sexual harassment as defined by law;
- did not occur in the school’s education program or activity; OR
- did not occur against a person in the United States.

§ 106.45(b)(3)(i)

Discretionary dismissal

May dismiss a complaint from the Title IX process, at any time, if:

- complainant notifies the Title IX Coordinator in writing that they want to withdraw the complaint or any of its allegations;
- the respondent is no longer enrolled in or employed by the school; or
- specific circumstances prevent the school from gathering evidence sufficient to reach a determination.

§ 106.45(b)(3)(ii)

Dismissal requirements

Upon dismissal, the school must:

- promptly send written notice of dismissal and the reason to both parties, and
- provide opportunity for an appeal.

§ 106.45(b)(3)(iii)

May still address misconduct not covered by Title IX through separate process and procedure.

Emergency Removal

Rules allow emergency removal of student or employee, provided that school:

- (1) undertakes an individualized safety and risk analysis;
- (2) determines an immediate threat to the physical health or safety of any student or other individual arising from the allegations of sexual harassment justifies removal; and
- (3) provides respondent with notice and opportunity to challenge decision immediately following removal.

*Be sure to assess special education laws.

Different provision in Title IX for placing employees on administrative leave on **non-emergent basis.

Supportive measures

Supportive Measures

- Non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, and without fee or charge to the complainant or the respondent before or after the filing of a formal complaint or where no formal complaint has been filed.
- Purpose: designed to restore or preserve equal access to the school's education program or activity without unreasonably burdening the other party, including measures designed to protect the safety of all parties, or the school's educational environment, or deter sexual harassment.

CSDB's Supportive Measures

- Supportive measures may include, but are not limited to: counseling, extensions of deadlines or other course-related adjustments, modifications of work or class schedules, campus escort services, mutual restrictions on contact between the parties, changes in work or housing locations, leaves of absence, increased security and monitoring of certain areas of campus, or other similar measures.
- See policy AC-R-2

Supportive measures: more Considerations

- Consider the complainant's wishes
- Do not have to be "proportional to the harm alleged" or be the least burdensome measures available.
- But, cannot impose an unreasonable burden on the other party.
- Cannot be a sanction.
- Must be kept confidential.

- Must document, whether they are or aren't provided.

Informal resolution

Processes such as: mediation, arbitration, restorative justice, or other strategies.

School may allow informal resolution when:

- formal complaint has been filed;
- complaint does not allege an employee sexually harassed a student;
- both parties provide voluntary, written consent to informal resolution; and
- school gives the parties written notice disclosing the allegations and requirements of the informal process.
- Cannot condition enrollment, employment, or any other student/employee rights upon agreeing to informal process.
- At any time prior to agreeing to a resolution, either party may withdraw from the informal process and resume the formal grievance process with no consequences.

Relevance

- Investigators and decision-makers must objectively evaluate all relevant evidence.
- Title IX grievance process is designed to bring all relevant evidence to the decision-maker's attention to reach a fair and reliable result.
- Relevance Defined: Investigators and decision-makers must objectively evaluate all relevant evidence. -Title IX grievance process is designed to bring all relevant evidence to the decision-maker's attention to reach a fair and reliable result.

Exclusions

Title IX bars the following evidence as not relevant:

- information protected by rape shield provisions
- information protected by a legal recognized privilege (unless waived by party)
- any party's medical, psychological, and similar records, unless party gives voluntary written consent
- party or witness statements from person not subject to cross exam

Rape Shield Provisions

(1) All questions and evidence of a complainant's sexual predisposition are irrelevant, with no exceptions; and

(2) Questions and evidence about a complainant's prior sexual behavior are irrelevant, unless:

- offered to prove that someone other than the respondent committed the conduct alleged; or
- they concern specific incidents of the complainant's prior sexual behavior with respect to the respondent and are offered to prove consent

Prior Sexual behavior and sexual predisposition

- sexual behavior = activities involving actual physical contact or that imply sexual intercourse or sexual contact, including use of contraceptives, evidence of childbirth, sexually transmitted diseases, and dreams or fantasies.
- sexual predisposition = mode of dress, speech, or lifestyle

Areas involving relevance

- grievance process generally
- investigation
- decision-making phase
- appeal
- training
- effect of school making incorrect relevance determinations

[Relevance Hypotheticals](#)

Investigation

Investigator qualifications

- Trained and familiar with the Title IX regulations and CSDB school policies
- Objective, fair, and impartial
- Detailed and organized
- Able to maintain confidentiality

Main steps in investigation process

- Formal Complaint:
 - Sets forth allegations for investigation
 - May be expanded
- Collect Information:
 - Plan investigation
 - Gather available information, interview witnesses, etc.
- Prepare Report:
 - Review evidence
 - Provide parties opportunity to review evidence and submit response
 - Complete report
 - Provide report to parties. Give parties another opportunity to submit response.

Planning the investigation

- Equal opportunities to both parties.
- Stay within the scope of the original allegations or provide notice of an expanded scope.
- Gather background information and create a plan before interviewing witnesses.
- Obtain written consent when necessary, for waiver of any privilege, or medical records, etc.
- Decide who to interview. Parties may be accompanied by advisor.
- Give parties sufficient advance notice of when interviews will take place.

Conducting interviews

- Prepare in advance
- Avoid assumptions and bias
- Do not promise confidentiality or certain results
- Show your work. Document and keep good records.
- Be respectful of all interviewees.

Sharing evidence and creating report

- School must provide all **directly related** evidence to the parties before investigator completes the investigative report.
- The investigative report should only summarize the **relevant** evidence.
 - fair summary of relevant evidence

- include recommendations or conclusions in the report?
- Remember: two opportunities for party responses at this stage of the grievance process.

Why are investigations important?

- Title IX compliance – burden to investigate lies on school
- Fairness and due process to parties
- Investigations/Investigative Reports can have far reaching implications: part of the decision-making phase in the school Title IX grievance procedure, can appear as evidence in lawsuits, and may be relevant in personnel actions
- Moral of the Story: be diligent, fair, and objective.

Hearings

Hearings and cross exam optional

- Draft rules required hearings and cross for K-12
- DOE revised them to make hearings optional.
- Elementary and secondary schools, “may but need not,” provide for a hearing. §106.45(b)(6)(ii)
- Discretion:
 - School may adopt policy requiring live hearing all the time, never, on a case-by-case basis, or under circumstances defined by age or academic year of parties.

Decision-Making (in Lieu of Hearing)

School decision-maker must:

- afford parties “an opportunity to submit written, relevant questions that 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”
- explain to the party proposing the questions any decision to exclude a question as not relevant
 - must analyze relevance and apply rape shield provisions

Standard of evidence

- choice: preponderance of evidence OR clear and convincing standard
 - departure from past federal guidance which required preponderance of evidence
- grievance process must identify applicable standard
 - **CSDB policy designates preponderance of evidence standard.**
- must use same standard for formal complaints against students as for employees

Written determination must include:

- identification of allegations potentially constituting sexual harassment
- description of procedural steps taken throughout grievance process
- findings of fact supporting determination
- conclusion regarding application of school’s code of conduct to the facts
- statement of, and rationale for, the result as to each allegation, including a determination of responsibility, any disciplinary sanctions imposed, and whether remedies will be provided; and
- procedures and permissible bases for appeal

Appeals

- Must allow parties to appeal: (1) dismissal of a formal complaint, and (2) a determination regarding responsibility

- Three bases for appeal: (1) procedural irregularity that affected outcome; (2) new evidence not reasonably available before; and (3) Title IX Coordinator, investigator, or decision-maker had conflict of interest or bias that affected outcome
- Discretion: may offer additional bases for appeal equally to both parties. e.g., insufficiency of evidence

Sanctions and remedies

- Schools have discretion over available sanctions and remedies.
- When school determines respondent is responsible, must provide complainant with remedies.
- Remedies must be designed to restore or preserve equal access to education program or activities. Remedies may include actions that are the same or similar to the supportive measures.
- Cannot impose sanctions until after time for appeal.
- Remedies should be kept confidential, except in limited circumstances.

CSDB Policy

If a respondent is determined responsible for sexual harassment following the grievance process, sanctions may range from reprimand, behavioral/educational counseling and possible restitution, imposition of a restrictive order limiting contact with the complainant or certain areas of campus, detention, or suspension to expulsion. If a staff member is determined responsible for sexual harassment, remedies may include corrective and/or disciplinary action, including termination from employment.

Bias, Impartiality, Conflicts of Interest

- Title IX personnel must serve impartially.
- Any individual designated as a Title IX Coordinator, investigator, decisionmaker, or any person facilitating informal resolution cannot have a conflict of interest or bias for or against complainants or respondents generally, or any individual complainant or respondent.
- What do bias, impartiality, and conflict of interest mean

Examples of bias

- Decision-maker has personal or professional connections with one party's parents.
- Decision-maker influenced by other school officials.
- School failure to follow its own policy and procedures.
- Title IX personnel made statements demonstrating favor towards complainants or respondents.
- School failure to share certain evidence discovered with parties.
- School failure to conduct an adequate and objective investigation.
- School used one-sided training materials.

How to avoid bias and conflicts

- Train key staff on these topics.
- Treat complainants and respondents equitably.
- Treat each person as an individual, not as a member of a class.
- Avoid stereotypes – in speech, writing, and thought.
- Objectively evaluate and weigh evidence. Avoid prejudgment.
- Give parties the same opportunities throughout the grievance process.

Recordkeeping

- seven-year retention requirement
- must keep records of: district action taken, documentation of reasons why response was not deliberately indifferent, supportive measures provided (or reason they weren't provided), each investigation, any informal resolution process and result, any record of a live hearing, any appeal and result, disciplinary sanctions imposed, remedies issued, and training materials

Rules of Procedure and Decorum

- Section 106.45(b) allows schools to adopt "provisions, rules, and practices" as part of grievance process as long as any additional provisions, rules, and practices apply equally to both parties.
- Preamble affirms that schools may adopt "procedural rules" and/or "rules of decorum."

Procedural rule Ideas

- timeframes and deadlines for each phase of grievance process
- template forms for use by school and parties
- local definitions for undefined terms, such as "consent" and "good cause," etc.
- procedural requirements for investigations
- procedural requirements for hearing or other decision-making process
- additional grounds for appeal
- parameters on advisor role
- ***but can't further restrict admissible evidence**

Parameters on advisors' role: "The role of an advisor is to assist and advise the party."

30320

- Cannot limit choice of advisor or presence of advisor. 30297
- May restrict *participation of* advisors, as long as restrictions apply equally to parties. 30297
 - e.g., restrictions against: speaking or acting on party's behalf, standing in for party when attendance is expected, obstructing process, or representing multiple parties in same case
- May adopt rules of decorum to ensure participants, including advisors, participate respectfully and non-abusively.
 - no witness badgering
 - If advisor refuses to comply with rules of decorum, may require party to use a different advisor. 30297
 - e.g., two strikes then out after warnings

Intersection with other laws

Internal References to:

- Constitutional protections: First, Fifth, & Fourteenth Amendments
- FERPA
- Title VII
- Title VI (procedural provisions)
- parent/guardian legal rights

- Clery Act and VAWA
- IDEA, Section 504, & ADA

And more spaces for overlap

- Claire Davis School Safety Act
- compulsory attendance laws
- school disciplinary proceedings
 - student conduct and discipline codes
 - safe school plans
- parallel criminal proceedings
- employment law generally, employee handbooks, collective bargaining agreements, etc.
- other federal and state anti-discrimination laws
 - existing school nondiscrimination policy

A final note

- Title IX's new requirements are technical/prescriptive.
- Contact legal counsel upon receipt of a Title IX complaint or upon receipt of notice of allegations -potentially within the scope of Title IX.