

# **Title IX Regulations Sexual Harassment**

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2020 Revisions  
As Applicable to Elementary & Secondary Schools



# What is Title IX?

- Title IX is the federal law that prohibits educational institutions who receive federal funds from discriminating against any person, excluding any person from participation in, or denying any benefits to a person, on the basis of sex.
- Includes elementary and secondary schools, vocational/technical schools, and institutions of higher education.
- Applies to educational programs and activities.
- Codified at 20 U.S.C. § 1681 *et seq.* and 34 C.F.R. part 106.

# Background of Title IX

- “Title IX” refers to Title IX of the Education Amendments Act of 1972, signed into law by President Nixon.
- It is an application of the 14<sup>th</sup> Amendment’s guarantee of equal protection under the law.
- The purpose of Title IX is to eliminate discrimination on the basis of sex in educational programs or activities receiving federal funds.
- In 1975, the U.S. Department of Health, Education and Welfare (now known as the Department of Education) issued implementing regulations, including a requirement for educational institutions to file “assurance of compliance” documents.

# Background of Title IX

- In 1984, the U.S. Supreme Court, in *Grove City College v. Bell*, held that Title IX requirements were only applicable to the specific program or activity which benefited from federal grant funds, as opposed to the entire institution.
- In 1988, Congress passed the Civil Rights Restoration Act of 1987 in response to the Supreme Court's holding in *Grove City*. It interpreted Title IX's "program or activity" language to mean all the operations of an (educational) institution when any part of that institution receives federal funds.
- President Reagan vetoed the legislation (citing unjustifiable expansion of the federal government over private institutions), then Congress overrode his veto.

# Evolution of Title IX

- Admissions
- Athletics
- Sexual harassment
- Gender identity/sexual orientation

# How is Title IX Enforced?

- The U.S. Department of Education's Office for Civil Rights (OCR) is the regulatory arm. The OCR:
  - Proposes and establishes official regulations.
  - Issues, in lieu of formal rules, "Dear Colleague" letters and various interpretations and clarifications to which courts tend to defer and which therefore are somewhat binding.
  - Has the power to terminate federal funding for non-compliance.
- Private individuals may sue educational institutions for Title IX violations and receive monetary and/or injunctive relief.

# The 2020 Revisions – Sexual Harassment

- Instituted by Education Secretary Betsy DeVos under the Trump administration.
- Changes were proposed to some of the Obama administration’s previous regulatory guidance on sexual harassment. A formal grievance procedure was proposed.
- It was politically divisive, triggering over 124,000 public comments during the 60-day comment period.
- On August 14, 2020, the new final regulations were made effective.
- As of mid-2022, under the Biden administration, there are additional revisions being proposed which include changes to the 2020 sexual harassment revisions.

# 2022 Title IX NPRM Announcement

- On June 23, 2022, the 50<sup>th</sup> anniversary of Title IX being signed into law, the Biden administration announce a Notice of Proposed Rulemaking (NPRM).
- The Department of Education, pursuant to an executive order by President Biden, has been reviewing the 2020 amendments since March of 2021.
- Proposed changes would address the major objections to the 2020 revisions. Would expand the definition of sex discrimination to include but not be limited to sexual harassment. Also includes clarification on sexual orientation/gender identity protections.
- After the 60-day public comment period, responses to comments and finalization of the regulations will be made before the regulations can become effective.
- Until that time, the 2020 regulations will continue to be in effect.



# Definitions and Applicability

# Defining Sexual Harassment

For Title IX purposes

- Conduct on the basis of sex that meets one or more of the following descriptions:
    - Quid pro quo – an educational benefit is conditioned upon unwelcome sexual conduct.
    - Unwelcome sexual conduct (reasonable person standard) so severe, pervasive and objectively offensive that it denies a person reasonable access to the school’s educational program/activities.
    - Sexual assault, dating violence, sexual violence or stalking as defined in other federal laws such as the Violence Against Women Act or the Clery Act.
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# Defining Sexual Harassment

For Title IX purposes.

- Only a school employee can commit quid pro quo sexual harassment, but any person may commit the other two types.
- Misconduct not based on sex isn't considered sexual harassment under Title IX but may be addressed under other laws or by school policy.

# Applicability of Title IX

Title IX covers sexual harassment that occurs in a school's education program or activity.

- Can occur on or off campus.
- Can occur at locations, events and circumstances where a school exercises substantial control over the context of the alleged harassment and the person accused of committing the harassment.

# The School's Response

# Responding to an Allegation of Sexual Harassment

Schools must respond when they have actual knowledge of an allegation.

- For elementary and secondary schools, ALL teachers and staff members are considered mandatory reporters.
- ANY employee who is told of an allegation of sexual harassment, or who witnesses or hears about it, must report it .

# Responding to an Allegation of Sexual Harassment

When is a school on notice?

- If a report is made to the school's Title IX coordinator, the school is considered to be on notice.
- If any employee within the school system has been given notice, then the school has actual knowledge.
- Reports may be verbal or written to trigger notice requirements.

# Retaliation Expressly Prohibited

No school or person may retaliate against someone for exercising rights under Title IX.

- In the event someone believes they have been retaliated against, a complaint may be filed with the school, and the school must have procedures in place for prompt and equitable resolution.
- To make retaliation less likely and to protect parties' privacy, the school must keep confidential the identities of parties and witnesses to Title IX matters unless disclosure is required under other laws or is necessary to conduct the grievance process.



# Retaliation Expressly Prohibited

What is NOT considered retaliation?

- If a school punishes someone for making a bad faith, materially false, statement during a Title IX grievance process.
- However, school can't determine bad faith based solely on the outcome of the case.

# Supporting Alleged Victims

What are a school's obligations once they have actual knowledge?

- School must respond promptly.
- School can't be "deliberately indifferent" meaning clearly unreasonable under the known circumstances.

# Supporting Alleged Victims

What—at a minimum—must a school provide to a person alleging sexual harassment?

- Availability of supportive measures from the school (whether or not a formal complaint is filed).
- Information on the person's right to file a complaint.
- Instructions on how to file a complaint.

# Supporting Alleged Victims

What are supportive measures?

- Free, individualized services designed to restore or preserve equal access to the educational program or activity, to protect safety, or to deter sexual harassment.
- Measures which provide support to a student without being punitive or disciplinary to another student.
- Measures which don't unreasonably burden another person.
- Measures which may be provided to the alleged perpetrator as well as the alleged victim.

# Supporting Alleged Victims

Examples of supportive measures:

- Counseling
  - Deadline extensions
  - Leaves of absence
  - Modification of class schedules
  - Campus escort services
  - Mutual restrictions on contact between individuals
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# Supporting Alleged Victims

Implementing supportive measures.

- The Title IX coordinator is responsible for implementation.
- The alleged victim's wishes must always be considered.
- Any supportive measures must be kept confidential.

# Required Personnel and Policies

# Title IX Coordinator

School must provide coordinator's  
information to the public.

- The Title IX coordinator's name and contact information must be provided to every student, parent/guardian, employee, and/or applicant.
- The Title IX coordinator's name and contact information must be posted on the school's website.



# Non-Discrimination Policy

OCR sample language:

- The (Name of School) does not discriminate on the basis of race, color, national origin, sex, disability, or age in its programs and activities and provides equal access to the Boy Scouts and other designated youth groups. The following person has been designated to handle inquiries regarding the non-discrimination policies:

Name and/or Title

Address

Telephone No.

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# Grievance Procedures Policy

Basic contents:

- Must be written.
- Gives information about filing a formal complaint.
- Can't treat people differently on the basis of sex.
- Rules comply with final regs and apply equally to complainants and respondents.
  - "Complainant" = alleged victim.
  - "Respondent" = alleged perpetrator.

# Grievance Procedures Policy

## Specific Requirements:

- Equitable treatment of both complainant and respondent.
- Objective evaluation of the evidence, consideration of all relevant evidence, and no credibility determination made based on status as complainant or respondent.
- Mandated training requirements, and allow no conflict of interest on the part of the Title IX coordinator, facilitator, investigator, decision maker or appeals decision maker.
- Presumption of innocence of the respondent until conclusion of the grievance process.
- Reasonably prompt timeframes for resolution of formal complaints, with delays only for good cause.

# Grievance Procedures Policy

Specific Requirements:

- Description of range of possible outcomes such as remedies and disciplinary sanctions that could occur following end of grievance process.
- Specification of standard of evidence as either preponderance or clear and convincing (must be same for all proceedings).
- Right to appeal and how to invoke an appeal.
- Range of supportive measures available to both parties.
- Explanation that anything protected by privilege (attorney/client, doctor/patient, etc.) will not be disclosed unless waived and may not be sought out.

# The Formal Grievance Process

# Emergency Removals

When are they allowed?

- School can remove the respondent on an emergency basis if respondent poses an immediate threat to anyone's physical health or safety.
- If the respondent is a school employee, the school may put respondent on administrative leave during the investigation.

# Overarching Principles

Ensuring equity.

- The grievance process itself can't discriminate against a complainant or respondent on the basis of sex.
- Practices must apply equally to complainants and respondents and can't discriminate between men and women, especially with respect to credibility determinations.

# Written Notice

Requirements:

- Must be sent as soon as the school receives a formal complaint.
- Must be given to both parties.
- Grievance process/policy must be included.
- Must let parties know whether informal resolution is an option.



# Written Notice

Requirements:

- Must contain:
    - Actual allegations and facts that would constitute sexual harassment.
    - Presumption of innocence until after grievance process concludes.
    - Statement that parties may have an advisor of their choice.
    - Statement that parties may request to inspect and review certain evidence.
    - Information about school's code of conduct and prohibition on making false statements.
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# Dismissal of a Complaint

Mandatory dismissal is required, but schools may address under their codes of conduct if they so choose, when:

- Complainant describes conduct that doesn't meet the definition of sexual harassment under Title IX.
- Complainant alleges sexual harassment that didn't occur in the school's educational program or activity.
- Complainant alleges sexual harassment that did not occur in the United States.

# Dismissal of a Complaint

Dismissal is discretionary under some circumstances:

- Complainant notifies Title IX coordinator that he/she wishes to withdraw the formal complaint or some of its allegations.
- Respondent is no longer enrolled or employed by the school.
- If specific circumstances would prevent the school from gathering evidence that would allow it to reach a determination about the allegations.
- In the event of a discretionary dismissal, the school must provide prompt notice to both parties about the dismissal, the reasons for it, and of the right to appeal \_\_\_\_\_ the dismissal.

# Gathering Evidence

Equal rights and protections which must be afforded to both parties:

- Burden is on the school to collect evidence needed for the investigation that is sufficient to reach a determination regarding responsibility.
- Equal opportunity for witnesses and evidence.
- School can't restrict the ability of either party to discuss allegations or gather and present evidence.
- Both parties have the same opportunity to have others present during proceedings, including access to an advisor of their choice.
- School must provide written notice of the date/time/place of all proceedings and give sufficient time to prepare.

# Gathering Evidence

Equal rights and protections which must be afforded to both parties:

- Equal opportunity for parties and advisors to review evidence the school has collected.
- Meaningful opportunity to respond to evidence after the school has produced it.
- School has to prepare an investigative report on the allegations of the formal complaint which fairly summarizes the school's evidence:
  - Parties must be given at least ten days to respond, and school must consider a written response before releasing a final investigative report.
  - Parties must be given at least ten days to review the final investigative report before any determination of responsibility or a hearing is held.

# Conducting Hearings

Not mandatory at the elementary/secondary level.

- If a district chooses to have a hearing, both parties still have the right to submit written, relevant, questions to one another before a determination is made.
- Parties have the right to participate, or not to participate, in any part of the grievance process, including a hearing.
- No one can be threatened, coerced or discriminated against for choosing not to participate in a hearing.

# Decision-Making

Relevant evidence is evaluated by the decision maker to determine whether the respondent is responsible for the alleged sexual harassment.

- The decision maker has to use independent judgment, so cannot be the person who conducted the investigation and cannot be the Title IX coordinator.
- The decision maker cannot have any conflict of interest or bias for or against the complainant or respondent.
- The decision maker must undergo special training on impartiality and relevance of evidence.

# Decision-Making

The decision maker will weigh relevant evidence to determine if it meets the school's evidentiary standard for sexual harassment allegations.

- After the evidence has been weighed, a written determination must be made, and is required to contain the following:
  - Procedural steps taken by the school (notices, interviews, hearings, etc.).
  - Findings of fact and conclusions.
  - Statement and rationale for ultimate determination of responsibility.
  - Any disciplinary sanctions imposed on respondent/remedies provided to complainant.
  - Statement and rationale for remedies and how they will restore educational access.
  - Statement of school's procedures, the parties' right to appeal and permissible bases for appeal.



# Appeals

## Requirements:

- Both parties must be given the same appeal opportunity.
- Can be done after a dismissal (voluntary or mandatory) before the grievance process, or at the end of the grievance process.
- Grounds:
  - Procedural irregularity affecting outcome.
  - New evidence that wasn't previously available.
  - Conflict or bias of coordinator, investigator or decision maker which affected outcome.
  - Additional grounds school may determine, so long as they are applied equally.

# Appeals

Procedural steps:

- Written notification and equal implementation to both parties.
- Both parties have equal opportunity to submit written statements supporting or challenging the outcome.
- Appeals decision maker cannot be the original decision maker, the investigator, or the Title IX coordinator.
- Appeals decision maker considers the written statements, then makes a written decision which must be sent simultaneously to both parties.
- The school's decision as to whether the respondent was responsible for the sexual harassment allegation is final after appeal.

# Informal Grievance Resolution

# Schools May Offer Informal Resolution

This is not mandatory.

- Exception to informal resolution is in cases where the respondent is a school employee and complainant is a student. In those cases no informal resolution is allowed.
- Both parties must be willing to enter into the informal resolution process completely voluntarily.
- The school can't force, coerce, threaten, or require, any party to enter into the informal resolution process.

# Schools May Offer Informal Resolution

If the parties wish to enter into informal resolution, a facilitator must be provided.

- The facilitator has to be free of conflicts of interest and bias.
- The facilitator has to undergo special training on impartiality and relevance of evidence.

# Schools May Offer Informal Resolution

Written notice requirements the school must give both parties:

- The allegations.
- The parties' rights.
- Information about confidentiality of the process.
- Information about withdrawal from the process, including assurances that either party may terminate the informal process at any time before an agreement has been reached.

# Record-Keeping Requirements

# Records Must be Kept for Seven Years

What must be kept?

- Records of the school's investigation, including:
    - Determination of responsibility.
    - Any transcripts.
    - Disciplinary measures taken.
    - Remedies provided.
  - Records of any appeal and materials.
  - Records of any informal resolution process.
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# Records Must be Kept for Seven Years

What must be kept?

- Records of all training materials used for Title IX coordinators, investigators, decision makers, appeals decision makers, and any information resolution decision maker.
  - These must be posted on the school's website.
  - If school doesn't have a website they must be publicly available.
- Records of supportive measures taken in response to a report or complaint of sexual harassment.

## Resources:

- “The 14<sup>th</sup> Amendment and the Evolution of Title IX.” *United States Courts*, <https://www.uscourts.gov/educational-resources/educational-activities/14th-amendment-and-evolution-title-ix>.
- 20 U.S.C. 1681, <https://www.govinfo.gov/content/pkg/USCODE-2020-title20/pdf/USCODE-2020-title20.pdf>.
- 34 C.F.R. part 106 (2020), <https://www.ecfr.gov/current/title-34/subtitle-B/chapter-I/part-106>.
- OCR Webinar: Title IX Regulations Addressing Sexual Harassment (2020), <https://www.youtube.com/watch?v=TdfT5R8ibm4&t=20s>

## Resources:

- Questions and Answers on the Title IX Regulations on Sexual Harassment (July 2021) (Updated June 28, 2022),  
<https://www2.ed.gov/about/offices/list/ocr/docs/202107-qa-titleix.pdf>
- Federal Register Notice of Proposed Rulemaking (2022),  
<https://www2.ed.gov/about/offices/list/ocr/docs/t9nprm.pdf>
- Fact Sheet: U.S. Department of Education's 2022 Proposed Amendments to its Title IX Regulations,  
<https://www2.ed.gov/about/offices/list/ocr/docs/t9nprm-factsheet.pdf>
- Summary of Major Provisions of the Department of Education's Title IX Final Rule, <https://www2.ed.gov/about/offices/list/ocr/docs/titleix-summary.pdf>