

Department of Education Office for Civil Rights



Title IX: An Introduction to the New Regulations

Overview

- The Office for Civil Rights
- Title IX of the Education Amendments Act of 1972
- Sexual harassment and sex discrimination
- New Departmental regulations became effective on August 14, 2020.

Seven Main Questions

1. What is sexual harassment?
2. When is a school on notice of sexual harassment?
3. What must a school do to support alleged victims?
4. What personnel and policies do schools need?
5. What grievance process must a school generally follow before making findings and disciplining?
6. What are other features of the new regulations?
7. How do the new regulations protect free speech?

1. The definition of sexual harassment

- “Quid Pro Quo” 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 school’s education program or activity.
- “Sexual assault,” “dating violence,” “domestic violence,” or “stalking” as those terms are defined under other Federal laws called the Clery Act and the Violence Against Women Act.

Education Programs and Activities

- Title IX covers sexual harassment that happens in a school's "education program or activity."
- Not just "on campus" situations.
- That includes locations, events, and circumstances where a school exercises substantial control over the context of the alleged harassment and the person accused of committing sexual harassment.
- Includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution.

2. When does a school have notice?

- Once a school has actual knowledge of sexual harassment or allegations of sexual harassment, the school has to respond and take action.
- A school has actual knowledge when the school has notice that a person may have been victimized by sexual harassment.
- Any person, whether the alleged victim or a parent, friend, or bystander, has the right to report sexual harassment to put the school on notice.
- And sometimes school personnel will personally witness sexual harassment.

Actual Knowledge and School Personnel

- The Title IX Coordinator for the school district or school.
- Schools have to provide the contact information for the Title IX Coordinator.
- Other people within the school who have authority to institute corrective measures. This could vary from school to school, but always includes the Title IX Coordinator.
- In elementary and secondary schools, telling any school employee always puts the school on notice.

3. What kind of response must the school provide?

- The school can't be "deliberately indifferent." That also means that it can't be "clearly unreasonable" in light of the known circumstances.
- The Title IX Coordinator must provide information to the individual:
 - the availability of supportive measures;
 - the right to file a complaint; and
 - how to file a complaint.

What are supportive measures?

- Supportive measures are free, individualized services designed to restore or preserve equal access to education, protect safety, or deter sexual harassment.
- There doesn't need to be a formal complaint for a an alleged victim to receive supportive measures.
- Supportive measures support a student, and they aren't punitive or disciplinary with respect to another student.
- Supportive measures don't unreasonably burden any other person.

Examples of supportive measures

Examples of supportive measures could include:

- Counseling;
- Extensions of deadlines;
- Modifications of work or class schedules;
- Campus escort services;
- Changes in housing location;
- Increased security or monitoring of parts of campus;
- Mutual restrictions on contact between individuals.

Implementing Supportive Measures

- The school always has to consider the alleged victim's wishes when it comes to requests for supportive measures.
- The school generally has to keep supportive measures confidential.
- The Title IX Coordinator is responsible to implementing supportive measures.

Formal Complaints

- A formal complaint is an official document alleging sexual harassment.
- It's filed by the student (or their parent or legal guardian in some cases), or in some cases the Title IX Coordinator.
- In cases where an alleged victim doesn't file a formal complaint, a Title IX Coordinator might initiate grievance procedures where discipline is appropriate.

4. Personnel and Policies

4. What personnel and policies do schools need to have?
- Title IX Coordinator;
 - Specific information about how to contact the Title IX Coordinator must be provided by the school.
 - Non-Discrimination policy;
 - Written grievance procedures;
 - Information about how to file a formal complaint regarding sexual harassment.

Written Grievance Procedures

- Schools' written grievance procedures for dealing with sexual harassment must abide by the new regulations.
- The grievance procedures themselves can't discriminate on the basis of sex, and any additional provisions that a school adds must apply equally to complainants and respondents.
- Note: The final regulations refer to alleged victims as complainants and alleged perpetrators as respondents, whether or not the grievance process has begun.
- Written grievance procedures need to include 10 other specific items.

Requirement 1: Treat Parties Equitably

- The school's grievance process must treat complainants and respondents equitably by providing remedies to a complainant if a respondent is found responsible, and by following the prescribed grievance process imposing discipline on a respondent.
- The remedies for a complainant have to be designed to restore or preserve equal access to the school's education program or activity.
- Unlike supportive measures in place with or without a grievance process pending, a complainant's remedies CAN be punitive or disciplinary against the respondent.

Requirement 2: Objective Evaluation of Evidence

- The school's grievance process must ensure an objective evaluation of all relevant evidence—including inculpatory and exculpatory evidence.
- Credibility determinations can't be made on the basis of a person's status as a complainant, respondent, or witness.

Requirement 3: Training; No Conflicts of Interest

- The individuals involved in the process—like the Title IX Coordinator, investigators, decision-makers, or facilitators of informal, voluntary resolution efforts—must not have any bias or conflict of interest.
- These individuals must also be trained. The materials used to train Title IX personnel can't rely on sex stereotypes, must promote impartial investigations and adjudications, and must be posted on each school's website (and if a school does not maintain a website, make them available for public inspection upon request).

Requirement 4: Presumption of Innocence

- Under the school's grievance procedures, the respondent must be presumed not responsible, so that any finding of responsibility only comes at the conclusion of a grievance process.

Requirement 5: Reasonably Prompt Time Frames

- The grievance process must include reasonably prompt time frames for resolving formal complaints of sexual harassment.
- Temporary delays are permitted only for good cause. Good cause can include law enforcement activities, the absence of a party or witness, the absence of a party's advisor of choice, or the need to provide language assistance or accommodation of disabilities.

Requirement 6: Description of Range of Outcomes

- The grievance process must describe or list the range of possible remedies and disciplinary sanctions that could occur following a determination of responsibility.

Requirement 7: Standard of Evidence

- The grievance process must state which standard of evidence the school will use to reach a determination regarding responsibility, to be used for all sexual harassment proceedings.
- Schools can choose between the preponderance of the evidence standard and the clear and convincing evidence standard.
- Whichever standard the school chooses, it has to use that standard for all formal complaints of sexual harassment, whether the respondent is a student, or employee, including a faculty member.
- All sexual harassment proceedings must have the same standard of evidence.

Requirement 8: Right to Appeal

- The grievance procedures they have to contain the right to appeal the result of a grievance process, and information about how to invoke the right to appeal.
- Schools must offer an appeal to every party on certain bases, and schools also have the option to expand the bases on which an appeal may be taken, as long as they apply those bases equally to both parties.

Requirement 9: Description of Range of Supportive Measures

- The school's grievance process must describe the range of supportive measures available to complainants and respondents.

Requirement 10: Privileges

- The school's grievance process must explain that no information protected by a legal privilege, such as the attorney-client privilege or the doctor-patient privilege, can be used during an investigation unless the person holding that privilege has waived it.
- Neither a party nor the school is allowed to seek, permit questions about, or allow the introduction of evidence that is protected by a recognized privilege.
- Individuals can always opt to waive their own privileges, if they want, but they don't have to.

5. Walking Through the Grievance Process

This is the process initiated by a formal complaint, either by an individual or the Title IX Coordinator.

Emergency Removals

Two quick notes:

- A school can remove a respondent from the school's education programs or activities on an emergency basis if the respondent poses an immediate threat to anyone's physical health or safety. There are additional requirements for emergency removal proceedings that schools should consider if they institute this process.
- If the respondent is a school employee, the final regulations don't prevent a school from placing that employee on administrative leave during the investigation.

Overarching Principles

- The grievance process cannot itself discriminate against a complainant or a respondent on the basis of sex.
- Practices must apply equally to both complainants and respondents—either of which can be male or female—and can't discriminate as between men and women, notably with respect to credibility determinations.

Written Notice to the Parties

- When the school begins an investigation, it has to provide the parties with written notice of certain information.
- It has to give notice to the parties of the school's grievance process, which must comply with the 10 items we listed before.
- It also has to include whether there is an opportunity to engage in informal resolution. Schools don't have to offer informal resolution processes, but if they choose to, it's important that they are mentioned in this initial notice.

Details of Written Notice

- 1. The actual allegations and facts that would constitute sexual harassment.
- 2. The presumption of innocence.
- 3. A statement that the parties are entitled to adviser of their choice.
- 4. A statement that the parties can request to inspect and review certain evidence.
- 5. Information regarding the code of conduct and false statements.

Mandatory Dismissals

- A school must dismiss a complaint:
- that does not describe conduct that meets the definition of sexual harassment;
- that alleges sexual harassment that did not occur in the school's education program or activity;
- that alleges sexual harassment that did not occur in the United States at all.
- Schools can still address these complaints under their code of conduct, even if the misconduct is not sexual harassment under Title IX.

Discretionary Dismissals

- A school may dismiss a complaint:
- if the complainant notifies the Title IX Coordinator in writing that the complainant wishes to withdraw the formal complaint or some of its allegations;
- if the respondent is no longer enrolled or employed by the school; or
- if specific circumstances prevent the school from gathering evidence sufficient to reach a determination about the allegations.

Dismissal Procedures

- Whenever a school dismisses a formal complaint, or any allegations in it, the school has to promptly send written notice of the dismissal and the reasons to the parties.
- As we will mention later, both parties have the right to appeal a school's dismissal decisions.

Gathering Evidence: Schools and Parties

- The school must give both parties specific, equal rights and protections. These rights and protections apply whether the complainant filed the formal complaint, or whether the Title IX Coordinator began the investigation by signing the formal complaint.
- The school is not allowed to access a party's personal records if they are maintained by a physician, psychiatrist, psychologist, or other professional for the purpose of treatment to the party, without consent.

Gathering Evidence: Schools and Parties

- The school must provide an equal opportunity for the parties to have witnesses and evidence, including expert witnesses, as well as inculpatory or exculpatory evidence.
- The school can't restrict the ability of either party to discuss the allegations under investigation, or to gather and present relevant evidence.
- The school has to provide the same opportunities to the parties to have others present during the grievance proceedings, including access to an adviser of choice for any meetings or hearings.

Gathering Evidence: Schools and Parties

- The school has to provide written notice of the date, time, location, participants, and purpose of all hearings, interviews, or other meetings, with sufficient time for the party to prepare.
- The school must also provide equal opportunities for the parties and their advisors to inspect and review the evidence obtained by the school as part of its investigation, if the information is directly related to the allegations raised the formal complaint.
- The school also has to give the parties a meaningful opportunity to respond to the evidence after the school has provided it.



Investigative Reports

- After gathering evidence, the school needs to prepare an investigative report on the allegations of the formal complaint.
- A school has to give the parties at least ten days to respond to the evidence in writing. If a response is submitted, the school must consider that response before finalizing the investigative report.
- The investigative report can then be finalized and provided to the parties.
- That report must be circulated to the parties at least another 10 days before any determination of responsibility, or 10 days before a hearing, if a hearing happens.



Hearings (ESE)

- For elementary and secondary schools, the school has the option, but never the obligation, to hold a hearing.
- Even without a hearing, the elementary or secondary school must give still the parties equal opportunity to submit relevant, written questions to each other, before the decision-maker reaches a determination.
- Questions and evidence about a complainant's prior sexual history are not relevant, with two limited exceptions.



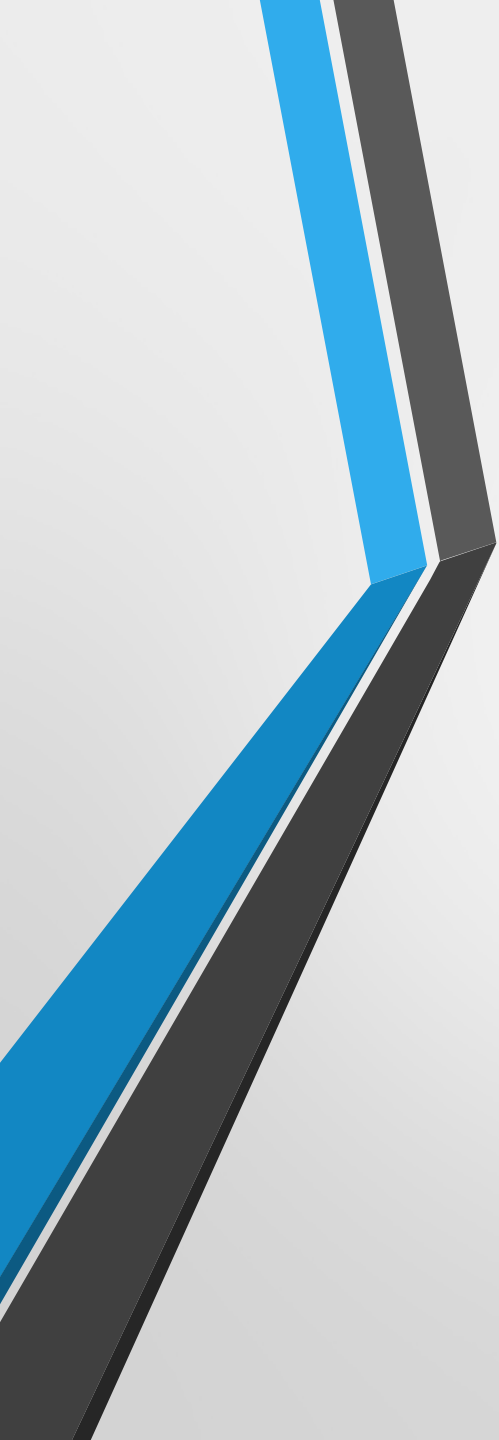
Hearings (PSE)

- At the postsecondary level, the school must hold a live hearing.
- The parties' advisors must be allowed to cross-examine other parties and witnesses.
- No party can ever be allowed to personally question or cross-examine anyone.
- If any party requests it, the entire hearing must be held with the parties located in separate rooms, with technology enabling everyone to see and hear each other.
- Cross-examination simply means that a party's advisor asks questions that might challenge the other party's denials, or allegations.
- Cross-examination questions must be relevant, and decision-makers must decide if a question is relevant BEFORE the party or witness has to answer it.
- A complainant's privacy must be protected by only allowing questions or evidence about prior sexual history in two narrow circumstances.



Cross-Examination

- No party is EVER allowed to personally cross-examine anyone.
- The school must provide a party with an advisor, of the school's own choosing, free of charge, solely for the purpose of conducting cross-examination on that party's behalf.
- An advisor chosen by the school does NOT need to be a lawyer.
- By hearing each party's version of events, and hearing each party answer questions about their version of events, the neutral, unbiased decision-maker is more likely to reach an accurate determination regarding responsibility.



Participation and Cross-Examination

- The final regulations protect every person's right to choose to participate, or not participate, in any part of a grievance process.
- No one should be forced, threatened, coerced, or discriminated against for choosing not to be part of the school's grievance process.
- If a party or witness chooses not to appear at the live hearing, or not to answer cross-examination questions, the decision-maker excludes that party's or witness's statements and evaluates any evidence that doesn't involve those statements.
- The decision-maker must never make inferences about the determination regarding responsibility based on the fact that a party or witness didn't come to the hearing or submit to cross-examination.
- A school may hold the entire live hearing virtually, or a school may allow some participants to appear virtually, with technology that allows everyone to see and hear each other.



Recordings

- Schools also have to create an audio or audiovisual recording, or a transcript, of any live hearing, and make it available to the parties for inspection and review.
- It's important to remember that a school must **ALWAYS** comply with disability laws, so that individuals with disabilities who participate in a school's grievance process are appropriately accommodated, including with respect to the use of technology and the reliance on visual, auditory, or written modes of communication.

Decision- making: Objective and Unbiased

- The school's decision-maker needs to objectively evaluate the relevant evidence and reach conclusions about whether the respondent is responsible for the alleged sexual harassment.
- A school's decision-maker needs to use independent judgment, so the decision-maker cannot be the same person who conducted the investigation, and cannot be the school's Title IX Coordinator.
- Who are the decision-makers?
- Decision-makers must be free from conflicts of interest or bias for or against complainants or respondents, and must receive special training about how to be impartial and how to decide what evidence is relevant.
- The decision-maker will weigh the relevant evidence and decide whether it meets the school's standard of evidence for sexual harassment allegations.

Decision- making: Written Decisions

After the evidence has been weighed, the determination has to be written. It must include:

- 1. the portion of the school's policies that was violated.
- 2. a description of the procedural steps that were taken by the school on the way to getting to that point.
- 3. a findings of fact section.
- 4. a section that draws conclusions after applying the facts to the portion of the school's policy that applies.
- 5. a statement and rationale for the ultimate determination of responsibility.
- 6. any disciplinary sanctions that the school will impose on the respondent, and state whether the school will provide remedies to the complainant.
- 7. a statement and rationale for any remedies for the complainant, addressing how those remedies will restore or preserve equal access.
- 8. a statement of the recipient's procedures, a statement that the parties have a right to appeal the initial determination regarding responsibility, and the permissible bases for appeal.

Decision- making: After the Decision

- The school must send the written determination to the parties simultaneously, along with information about how to appeal the determination.
- A school has discretion to set deadlines for when an appeal must be filed, bearing in mind the obligation to conclude the entire grievance process and bring resolution to the situation for both parties, within a reasonably prompt time frame.
- The Title IX coordinator is responsible for carrying out the remedies contained in the written decision.



Appeals

- A school has to offer both parties an opportunity to appeal.
- Appeals can be taken from two different steps in the process.
 - After a dismissal before the grievance process, whether mandatory or discretionary.
 - At the end of the grievance process.



Grounds for Appeal

- 1. A procedural irregularity affected the outcome of the matter.
- 2. New evidence has been discovered that was not reasonably available at the time of the determination on responsibility or dismissal.
- 3. A conflict of interest on the part of a Title IX Coordinator, an investigator who compiled evidence, or a decision-maker, and the conflict of interest affected the outcome.
- 4. Schools can offer additional grounds for appeals, if they want to, so long as the grounds apply on an equal basis to the parties.



Appellate Processes

- The recipient has to notify the parties in writing and implement appeal procedures equally.
- Both parties must have equal opportunity to submit a written statement supporting or challenging the outcome.
- The person who decides the appeal cannot be the same person who reached the determination regarding responsibility, or the same person as the investigator or Title IX Coordinator.
- After considering the parties' written statements, the decision-maker on appeal has to issue a written decision and send it to the parties simultaneously.
- The school's determination about whether the respondent is responsible for the sexual harassment allegations becomes final after appeal.

Informal Resolution

- Schools can offer informal resolution in appropriate cases.
 - **Exception:** Where the respondent is an employee of the school.
- Informal resolution may only be attempted if each party enters the process completely voluntarily.
- A school can never force, threaten, or require any party, complainant or respondent, into going into informal resolution.
- If informal resolution proceeds, the school must provide a facilitator who is free from conflicts of interest or bias, and who has received special training.
- The school still needs to provide complainants and respondents with notice of the allegations, notice of their rights, information about whether an informal process is confidential, and about withdrawing from the process.

6. Other issues: Record-Keeping

- This duty extends for 7 years, and includes several categories of documents:
- 1. records of a school's investigation.
- 2. records of any appeal and the materials associated with an appeal .
- 3. records of any informal resolution process.
- 4. all materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution. These materials also have to be posted on a recipient's website, or made available for public inspection if the recipient doesn't have a website.
- 5. records of the supportive measures that they took in response to a report or complaint of sexual harassment.

Other issues: Retaliation

- No school or person is allowed to retaliate against anyone for exercising rights under Title IX.
- Any person retaliated against can file a complaint with the school and the school must have procedures in place for the prompt and equitable resolution of such complaints.
- The school should keep the identities of parties and witnesses confidential, unless disclosure of someone's identity is required under other laws or is necessary in order to conduct the grievance process.

Retaliation: Code of Conduct Issues

- If a school charges a person with a code of conduct violation for the purpose of discouraging the person from pursuing a sexual harassment report or formal complaint, or exercising any other Title IX rights, that's retaliation.
- If a code of conduct charge is for a violation unrelated to sexual harassment yet arises from the same facts as a sexual harassment allegation, that may be prohibited retaliation.

Non-retaliatory conduct

- It is NOT retaliation for a school to punish someone for making a bad-faith, materially false statement during a Title IX grievance process.
 - Note: The school cannot draw a conclusion of bad faith based on the outcome of the case.
- The anti-retaliation provision in the final regulations also expressly states that engaging in protected speech under the First Amendment never constitutes retaliation.

7. Free Speech

- OCR can never require a school to violate the First Amendment.
- When OCR investigates a school for possible Title IX violations, OCR will never view a school's attempt to suppress free speech as an appropriate response to sexual harassment.



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