



An Overview of the New Title IX Regulations

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Purpose and Overview

Title IX of the Education Amendments of 1972. Title IX is a comprehensive federal law that prohibits discrimination on the basis of sex in any federally funded education program or activity. Prior to new regulations, “sexual harassment” as a form of sex discrimination was never addressed. The new.

Title IX regulations released in May 2020 were intended to:

- Clarify sexual harassment as a form of sex discrimination.
- Tighten up policies and investigation procedures and hold schools accountable for ensuring a more consistent and equitable response to sexual misconduct allegations.
- Ensure fairness in due process proceedings between both parties.
- Require the school to offer survivors supportive measures, to ensure educational access for both parties.

Definitions

Sexual harassment means conduct on the basis of sex that satisfies one or more of the following:

(i) A school employee conditioning education benefits on participation in unwelcome sexual conduct (i.e., quid pro quo); or

(ii) Unwelcome conduct that a *reasonable person* would determine is so **severe, pervasive, and objectively offensive** that it effectively denies a person equal access to the school's education program or activity; or

(iii) Sexual assault (as defined in the Clery Act), dating violence, domestic violence, or stalking as defined in the Violence Against Women Act (VA WA).

Grievance Process

Overarching Principles

Written grievance procedures for dealing with sexual harassment must abide by the new regulations.

These **must be in place by August 14, 2020.**

The grievance process cannot itself discriminate against a **complainant** or a **respondent** on the basis of sex or status. Practices must apply equally to both parties.

The remedies for a complainant must be designed to restore or preserve equal access to the school's education program or activity.

Ten Requirements of Written Grievance Procedures

Treat parties equitably

Objective evaluation of evidence

Training of staff; no conflict of interest

Presumption of innocence

Reasonably prompt timeframes

Description of range of outcomes

Standard of evidence

Right to appeal

Description of range of supportive measures

Privileges

On notice: What activates an investigation?

- Once a school has “actual knowledge” of sexual harassment, or allegations of sexual harassment, that activates the recipient’s **legal obligation** to respond promptly.
- “Actual knowledge” means notice or allegations received by Title IX coordinator, school official with authority to institute corrective measures on behalf of the school, or any school employee.
- A school must treat a person as a complainant any time the school has notice that the person is alleged to be the victim of conduct that could constitute sexual harassment (regardless of whether the person themselves reported, or a third party reported the sexual harassment), and irrespective of whether the complainant ever chooses to file a formal complaint.
- There is no time limit or statute of limitations on a complainant’s decision to file a formal complaint.

What does reasonably prompt mean?

The Department believes that recipients (LEAs) are in the best position to designate “reasonably prompt time frames” that balance the need to conclude Title IX grievance processes promptly with providing the fairness and accuracy that these final regulations require.

This provision does not permit a recipient to conduct a grievance process without a “set” time frame; to the contrary, this provision requires a recipient to designate and include in its grievance process what its set time frame will be for each phase of the grievance process (including appeals and any informal resolution process.)

Parties must be notified whenever the recipient applies a short-term delay or extension. Any delay or extension must be for good cause and must be temporary and limited in duration.

What if law enforcement is involved?

Reasonably prompt time-frame recommendations

- Evidence provided to the accused 10 days before response
- Party access to evidence/report (the 25-day requirement)
 - Investigation report created when required and fairly summarizes all relevant evidence
 - Prior to completion of report, all evidence directly related to allegations must be provided to parties and advisors (in electronic or hard copy)
 - Clear protocol and workflow for these steps is developed
 - Sufficient time to prepare a response
 - Party receive finalized report to review and submit written responses 10 days prior to time of the determination of responsibility

Appropriate Delays

- USDOE determined categorically prohibiting delays based on concurrent law enforcement investigations would deprive recipients of flexibility to work effectively and appropriately with law enforcement
- Delay or extension (even for good cause) needs to be “temporary” or “limited.”
- USDOE declined to specify a number of days that constitute “temporary” delays or “limited” extensions of time frames.
- Regulations allow but do not require a recipient to implement short-term delays even for good cause.
- Regulations obligate a recipient to offer supportive measures to complainants, with or without a grievance process pending.
- Work with your local law enforcement and district administration to determine appropriate delays.

Obligations for School's Response

- Response must be reasonably prompt and equitable and executed in a manner that is not deliberately indifferent, which means in a way that is not clearly unreasonable in light of the known circumstances.
- The Title IX Coordinator must promptly contact the complainant to discuss the availability of supportive measures, consider the complainant's wishes with respect to supportive measures, inform the complainant of the availability of supportive measures with or without the filing of a formal complaint.
- Must explain to the complainant the process for filing a formal complaint.
- Emergency removals are allowed if the respondent poses an immediate threat to anyone's physical health or safety.

Examples of supportive measures

Range

- Non-disciplinary, non-punitive, individualized
- Not unreasonably burdensome
- Protect safety of parties and educational environment
- Deter harassment

Examples

- No contact orders
- Academic accommodations
- Counseling
- Health and mental health services
- Disability services

Emergency removals

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.

- Risk analysis
- Provide responding party with notice and opportunity to challenge the decision immediately **following removal**
- Comply with IDEA/504/ADA – manifestation determination
- Refer to district policy and consult administration to determine what qualifies as an immediate threat

Receiving a Formal Complaint

The Final Rule defines “formal complaint” as 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.

At the time of filing a formal complaint, a complainant must be participating in or attempting to participate in the education program or activity of the school with which the formal complaint is filed.

A complaint may be filed by any person or group, including the Title IX Coordinator.

Details of Written Notice

The actual allegations and facts that would constitute sexual harassment.

The presumption of innocence, both parties have equal rights and protections.

A statement that the parties are entitled to advisor of their choice.

A statement that the parties can request to inspect and review certain evidence.

Information regarding the code of conduct and false statements.

Inform parties if there is an opportunity to engage in **informal resolution**.

Determination of dismissal – both parties have the right to appeal.

Range of possible remedies and disciplinary sanctions following determination of responsibility.

Which standard of evidence will be used to reach a determination.

Grounds for Mandatory Dismissal

Must dismiss a complaint that does not describe conduct that meets the definition of sexual harassment.

Complaint alleges sexual harassment that did not occur in the school's education program or activity.

Complaint alleges sexual harassment did not occur in the United States.

Complaints can still be addressed under the school's code of conduct.

Grounds for Discretionary Dismissal

- 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 in the school - **no statute of limitations.**
- If specific circumstances prevent the school from gathering evidence sufficient to reach a determination about the allegations.

Rights of the Parties

- Equal opportunity for the parties to have witnesses and evidence, including expert witnesses and well as **inculpatory or exculpatory** evidence.
- School can't restrict the ability of either party to discuss the allegations under investigation or to gather and present relevant evidence. Discussions are not in-person between complainant and respondent.
- Provide the same opportunities to have others present during the grievance proceedings, including access to an advisor of choice for any meetings or hearings (can be an attorney).
- Access for both parties and advisors to inspect and review evidence obtained as part of the investigation if it is directly related to the allegations raised by the formal complaint.
- School is required to provide parties sufficient written notice of scheduled meetings and hearings.

Conducting an Investigation

- Provide written notice to the parties.
- Assemble investigation team.
- Evaluate all relevant evidence including inculpatory and exculpatory evidence. Hearings are not required for K-12.
- After evaluating evidence prepare an investigative report.
- After the school has sent the investigative report to the parties and before reaching a determination regarding responsibility, the decision-maker(s) 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.
- Make a determination and provide written determination of responsibility to both parties simultaneously.

Who's on the team?

- Title IX coordinator, investigator, decision-maker
- Title IX coordinator can be an investigator but **NOT** the decision-maker. Every LEA **must** have a designated Title IX coordinator. **Contact information must be prominently posted** on websites and student/parent handbooks, employment applications, which includes the coordinator's name, e-mail, phone, and office location.
- A decision-maker **MUST** be a separate individual or group of individuals
- Members of the team must not have any bias or conflict of interest
- All **must be trained** in their duties as assigned
- Training materials
 - need to be posted online (be aware of copyright issues)
 - cannot rely on sex stereotypes
 - must promote impartial investigations and adjudications
 - if school does not have a website, make resources available for public inspection upon request

Standards of Evidence

Schools must select a “standard of evidence” in making their determination of responsibility. Schools may choose which one, but they need to be consistent across all formal complaints. The following two options are available:

Preponderance of evidence - a majority of the evidence proves a fact. Mathematically, it would be more than 50% of the evidence.

Clear and convincing evidence - a heightened standard which requires more than a *preponderance of evidence* to prove a fact. One definition of *clear and convincing* evidence is something that is highly and substantially more probable than not.

FERPA Concerns

Parties must be provided with access to all evidence directly related to the allegations. The investigator is required to share all evidence gathered during the investigation that is directly related to the allegations. This could include information about other students and would require disclosing the identities of student witnesses to the parties.

The school cannot access, consider, disclose, or otherwise use a party's records that are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in the professional's or paraprofessional's capacity, or assisting in that capacity, and which are made and maintained in connection with the provision of treatment to the party, **unless the school obtains that party's voluntary, written consent to do so.**

FERPA Concerns Continued

The parties have the right to have an advisor of their choice present with them during all meetings, interviews, hearings, etc. that take place as part of the resolution process. This advisor will be privy to information shared during the meetings, interviews, hearings. Also, the advisor must be provided with copies of the evidence and investigation report that will be provided to the parties.

A written determination regarding responsibility must be provided to the parties. Among the items required to be included, the determination must include the rationale for the determination of responsibility, any disciplinary sanctions imposed on the respondent and any remedies provided to the complainant.

Grounds for Appeal

When a complainant disagrees with a decision of responsibility, they have the right to appeal on the basis of the following conditions:

- A procedural irregularity which affected the outcome of the matter
- New evidence that has been discovered that was not reasonably available at the time of the determination of responsibility or dismissal
- Conflict of interest
- Other additional grounds as long as they apply on an equal basis to the parties

Appeals Process

Recipient is required **to notify the parties in writing** and implement appeal procedures equally.

Both parties have equal opportunity to submit **a written statement** of support or disagreement.

The person who decides the appeal cannot be the person who reached the original determination, or the same person as the investigator or Title IX coordinator.

After reviewing written statements the new decision-maker is required to issue a decision to the parties simultaneously.

Determination regarding responsibility is final after appeal is processed.

Informal Resolution

- Offering informal resolution is not a requirement under the new regulations
- May only be attempted if each party enters the process voluntarily
- A school can never force, threaten, or require any party into going formal resolution
- Must provide a facilitator who is free from conflicts of interest or bias and who has received special training
- School needs to provide both parties notice of allegations, notice of rights, information about whether the informal process is confidential, and about withdrawing from the process

Record Keeping

Records must be kept for seven years and includes:

- Records of a school's investigation
- Records of any appeals and materials associated with an appeal
- Records of any informal resolution process
- All materials used to train Title IX coordinators, investigators, decision-makers, and any person who facilitates an informal resolution
- Records of the supportive measures that were taken

Stop Gap Measures

- Proceed using your current policies and procedures (risky, but you may have no other choice due to political variables, COVID-19 impacts, or the tight timeframe for updates);
- Pause findings, recommended findings, and/or adjudications (not investigations) until new policies and procedures are put in place, but ensure that recipients implement the full measure of supportive actions and remedies in the meantime (a potentially workable compromise, but one with a few-month shelf life at most);
- Implement a set of procedures that moves toward compliance with the regulations but does not fully embrace them until you've had the chance to fully build new procedures, assign staff to required roles, and train everyone.

- These recommendations provided by the atIXa organization May 2020

Disclaimer

Information provided is an overview of the changes to the Title IX Regulations released May 19, 2020 in the Federal Register that K-12 educators need to know concerning sexual harassment, sexual assault, sexual violence and dating violence.

This is not legal advice as the presenters are not attorneys and you should consult with your LEA's legal counsel as to how they plan to implement the regulations.

Resources

- atIXa
 - Free resources <https://atixa.org/r3/>
 - Training (cost involved)
- Western Educational Equity Assistance Center (WEEAC) <https://www.msudenver.edu/weeac/>
- John Golom jgolom@utah.gov and Sol Garcia sgarcia@utah.gov - Utah Division of Risk Management
- Office for Civil Rights (OCR)
 - Documents <https://www2.ed.gov/about/offices/list/ocr/newsroom.html>
 - Webinar <https://youtu.be/TdfT5R8ibm4>

Contact information

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