

Title IX: Addressing Sexual Harassment

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To Begin ...

When you think about problem-solving around student discipline in your school(s), what comes up for you?

- Please jot down 2-3 issues/scenarios.
- Be as specific as possible.
- Shorthand is fine – these examples are for you. Hopefully, they will help you think about what you would like to most get out of this session.

Federal Law

Title IX of the Education Amendments of 1972 - prohibits discrimination on the basis of sex in any federally funded education program or activity...

Federal Law

US Department of Education updated regulations that went into effect on August 14, 2020.

- Codifies that sexual harassment, including sexual assault, dating violence, domestic violence, and stalking, are prohibited under Title IX.
- Requires schools to respond promptly and supportively to persons alleged to be victimized by sexual harassment; resolve allegations of sexual harassment promptly and accurately under a predictable, fair grievance process that provides due process protections to alleged victims and alleged perpetrators of sexual harassment; and effectively implement remedies for victims.
- Added specific, legally binding steps that schools must take in response to notice of alleged sexual harassment.

Federal Law

March 2021

Biden administration issues Executive Order committing to a comprehensive review of the Title IX regulations put in place by the Trump administration

July 2021

OCR (Biden administration) issues Q&A on Title IX Regulations - Reiterates that current regulations adopted by Trump administration remain in effect pending review and adoption of new regulations

February 2022

Department of Education sent a draft of proposed Title IX Regulations to Office of Information and Regulatory Affairs (division of the Office of Management and Budget that coordinates the review of all executive branch regulations)

April/May 2022

Notice of proposed rulemaking and period for public comment expected in

In June 2021, Notice of Interpretation - *Bostock v. Clayton County*:

- Department of Education will enforce Title IX to include protections against discrimination on the basis of sexual orientation and gender identity

Office of Civil Rights will investigate complaints alleging the following:

- Harassment on the basis of sexual orientation and/or gender identity;
- Failure to promptly address bullying on the basis of sexual orientation and/or gender identity;
- Discriminatory discipline based on sexual orientation and/or gender identity;
- Exclusion from or denial of access to the school's programs or activities on the basis of sexual orientation and/or gender identity;
- Subjecting a student to sex stereotyping on the basis of sexual orientation and/or gender identity;
- Treating students differently on the basis of sexual orientation and/or gender identity.

Sexual Orientation and Gender Identity

Enforcement

U.S. Department of
Education, Office of Civil
Rights (OCR)

- Complaints
- Compliance Reviews
- Civil Rights Data Collection Project

U.S. Department of Justice,
Civil Rights Division

Individual Lawsuits

Authorizer

Public perception

Title IX Coordinator

Notice of Nondiscrimination

Grievance Procedure for Complaints of Sex
Discrimination (and other forms of discrimination)

Grievance Process for Formal Complaints of Sexual
Harassment

Title IX Must
Have

Addressing Sexual Harassment

- Obama administration sparked heightened focus on sexual harassment in schools
- Guidance issued by Obama administration governing school response to sexual harassment has been replaced by new Title IX regulations
- Title IX requires schools to have specific procedures in place to address sexual harassment

Definitions

Allegation

Assertion that someone has engaged in sexual harassment.

Complainant

Person who is alleged to be the victim of conduct that could constitute sexual harassment.

- Considered a “complainant” even if they don’t file a formal complaint

Reporter

Person who reports an allegation of sexual harassment to the school.

- This may be the complainant or may be someone else (“third party reporter”).

Definitions

Report

Allegation of sexual harassment shared with the school but not yet submitted as a formal Complaint.

Formal Complaint

Document filed by a complainant, complainant's parent/guardian or by the Title IX coordinator alleging sexual harassment against a respondent and requesting that the recipient investigate the allegation of sexual harassment.

Respondent

Person who has been reported to be the perpetrator of conduct that could constitute sexual harassment.

Definitions

Retaliation

Intimidation, threats, coercion, or discrimination, including charges against an individual for code of conduct violations that do not involve sex discrimination or sexual harassment, but arise out of the same facts or circumstances as a report or complaint of sex discrimination, or a report or formal complaint of sexual harassment, for the purpose of interfering with any right or privilege secured by Title IX.

Title IX Grievance Process

The school's process for addressing formal complaints of sexual harassment under Title IX.

- Schools are not required to title their policies in this way but should understand the differences between the general grievance process required for responding to complaints of sex discrimination and the specific grievance process required for responding to formal complaints of sexual harassment.

Definitions

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. Such measures are designed to restore or preserve equal access to the recipient's education program or activity without Unreasonably burdening the other party, including measures designed to protect the safety of all parties or the recipient's educational environment or deter sexual harassment.

Common Supportive Measures

Goal is to protect complainant and others during investigation

Must respect Complainant's wishes to the extent possible but cannot unreasonably burden Respondent

Mutual restrictions on contact between complainant and respondent

Provide counseling to complainant and/or respondent

Referral for victim support organizations

Academic supports/accommodations (such as extensions of deadlines, tutoring, etc.)

Schedule modifications

Campus escort; increased supervision/security on certain parts of campus

School-wide interventions, training, education

Revision of policies and procedures or dissemination of existing policies and procedures

Cannot unreasonably burden complainant or respondent (prior to formal investigation)

Sexual Harassment Definition

Three categories:

1. A school employee conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct
 - Quid pro quo sexual harassment – school employee offers something in exchange for sexual conduct
2. **Unwelcome conduct on the basis of sex determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity**
3. "Sexual assault," "dating violence," "domestic violence," or "stalking"
 - Definitions from Clery Act and Violence Against Women Act

Was the conduct severe, pervasive, and objectively offensive?

- The more severe, the less repetition needed; physical/accompanied by threats or violence = severe
- Pervasive – look for frequency, intensity, duration
- Objectively offensive – would a reasonable person consider the conduct offensive?

Sexual Harassment

Was complainant effectively denied equal access to school's education program or activity as a result of unwelcome conduct?

- Must evaluate “whether a reasonable person in the complainant’s position would be effectively denied equal access to education compared to a similarly situated person who is not suffering the alleged sexual harassment.
- Complainant does not need to have already suffered loss of education before being able to report sexual harassment
- Complainant does not need to have dropped out of school, failed a class, had a panic attack, or otherwise reached a breaking point or exhibited specific trauma symptoms
- Does not require that a complainant’s total or entire educational access has been denied
- No concrete injury is required

Sexual Harassment

Examples of situations that constitute denial of equal access

- Complainant is skipping class to avoid respondent
- Decline in complainant's grades
- Complainant is having difficulty concentrating in class
- Complainant stops participating in particular school activities
- Complainant is bed-wetting or crying at night due to sexual harassment

Sexual Harassment

Sexual Orientation and Gender Identity

Sexual harassment/discrimination can occur between members of the same sex

Schools should address discrimination/harassment based on gender identity or failure to conform to stereotypical notions of masculinity or femininity

Schools should investigate and resolve allegations of sexual or gender-based harassment of LGBTQ students using the same procedures and standards that it uses in all complaints involving sex-based harassment.

Sexual Assault Definition

Title IX defines sexual assault as an offense classified as a forcible or nonforcible sex offense under the uniform crime reporting system of the Federal Bureau of Investigation.

Dating Violence Definition

Title IX defines dating violence as violence committed by a person—

- who is or has been in a social relationship of a romantic or intimate nature with the victim; and
- where the existence of such a relationship shall be determined based on a consideration of the following factors:
 - The length of the relationship.
 - The type of relationship.
 - The frequency of interaction between the persons involved in the relationship.

What triggers school's duty to respond?

School must respond when:

- (1) the school has actual knowledge of sexual harassment;
- (2) that occurred within the school's education program or activity;
- (3) against a person in the United States.

Duty to Respond

- Actual knowledge = notice to any school employee that sexual harassment might have occurred
- Education program or activity includes locations, events, or circumstances over which the school exercised substantial control over both the respondent and the context in which the sexual harassment occurs
 - Buildings or other locations that are part of the school's operations, including remote learning platforms;
 - Off-campus settings if the school exercised substantial control over the respondent and the context in which the alleged sexual harassment occurred (e.g., a school field trip to a museum).
 - Sexual harassment that takes place in settings outside of the United States is not covered under Title IX.
- Title IX's requirements do not apply to alleged sexual harassment that occurs outside of the school's education program or activity BUT there is nothing stopping schools from adopting policies that address such allegations or offering supportive measures to the victim

Title IX - What response is required?

Title IX distinguishes between reports and formal complaints, with different responses required for each

Report:

Anyone can make a report

- School must “respond promptly in a manner that is not deliberately indifferent”
- School is deliberately indifferent if its response is clearly unreasonable in light of the circumstances
- Title IX Coordinator contacts complainant to discuss supportive measures and explain process for filing formal complaint

Formal Complaint:

Only Complainant, Complainant’s Parent or Title IX Coordinator can make a formal complaint

- School must offer supportive measures to complainant
- School must follow the Title IX grievance process to investigate allegation of sexual harassment
- If sexual harassment is found to have occurred, school must provide remedies to the complainant that are designed to restore and preserve equal access to the school’s education program and activities

Responding to Reports

All reports go immediately to Title IX Coordinator

Upon receipt of report, Title IX Coordinator must promptly contact complainant:

Explain the process for filing a formal complaint to complainant

- Complainant's wishes should be respected unless the Title IX Coordinator determines that initiating an investigation over the wishes of the complainant is not clearly unreasonable in light of the known circumstances.

Promptly discuss supportive measures with complainant

- Inform complainant of availability of supportive measures with or without filing of a formal complaint
- Consider complainant's wishes with respect to supportive measures
- Coordinate effective implementation of supportive measures accordingly
- Maintain confidentiality of supportive measures to the maximum extent possible

Responding to Reports

Title IX Coordinator determines whether to proceed with formal complaint if complainant doesn't initiate process

Mandatory reporting when required

Must treat complainants and respondents equitably

Cannot discipline respondent without formal investigation following specific procedures required by Title IX regulations except on an emergency basis (see next slide)

Emergency Removal of Respondent

School may remove a respondent on an emergency basis if:

- It undertakes an individualized safety and risk analysis;
- Determines that 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
- Provides the respondent with notice and an opportunity to challenge the decision immediately following the removal.

Emergency removal should be followed by formal complaint and resulting investigation

Who Can Make a Formal Complaint

Formal complaints can only be made by complainant, complainant's parent and Title IX Coordinator

Formal complaint can only be made if complainant is participating in or attempting to participate in the school's education program or activity at the time of the formal complaint

- If complainant has withdrawn but expresses desire to re-enroll then they are attempting to participate
- If complaint has graduated but intends to participate in alumni programs/activities then they are attempting to participate

Title IX Coordinator may decide to make a formal complaint even if the complainant is no longer associated with the school

- If complainant is no longer associated with the school, Title IX would not apply, and school would not be required to follow Title IX grievance process before disciplining respondent (would need to afford discipline due process)

Schools must at least provide supportive measures to complainant if respondent is no longer enrolled at the school; may dismiss a formal complaint but not required to

Responding to Formal Complaints

Title IX Coordinator must provide written notice to complainants and respondents upon receipt of formal complaint

Formal investigation begins

- Investigator and impartial decision maker assigned

Supportive measures made available during investigation

Title IX Coordinator may offer and facilitate informal resolution options if both parties give voluntary, informed, written consent

Informal Resolution

Informal Resolution may be used, but is not required, in response to formal complaints of student-on-student harassment

- mediation, restorative justice, etc.
 - only available when formal complaint is filed
 - may be offered so long as both parties give voluntary, informed, written consent
 - cannot be required as a condition of enrollment
 - cannot be conditioned on the waiver of right to an investigation
 - goal of informal resolution (and investigation process) is to protect the safety of complainants and promote accountability
- 

Investigator and Impartial Decision Maker

Title IX Coordinator

Investigator

2 Decision Makers

Can be school officials

Cannot have conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent

Must avoid prejudgment of the facts at issue

- Presumption that respondent is not responsible for alleged harassment – but can't assume complainant is lying or that harassment did not occur

Investigator and Impartial Decision Maker

All Title IX personnel involved in the informal resolution process and/or reporting and investigation processes must have adequate training and expertise

Title IX requires training on the following:

- The definition of sexual harassment;
- The scope of the school's education program or activity;
- How to conduct an investigation and grievance process including hearings, appeals, and informal resolution processes that protects the safety of complainants and promotes accountability;
- How to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias; and
- Issues of relevance, including when questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant.

Notice to Complainants and Respondents

Must include

- Explanation of investigation and informal resolution process including a statement that the respondent is presumed not responsible for the alleged conduct and that a determination regarding responsibility is made at the conclusion of investigation process;
- Description of allegations including sufficient details known at the time such as
 - the identities of the parties involved in the incident,
 - the conduct allegedly constituting sexual harassment, sexual assault and/or dating violence, and
 - the date and location of the alleged incident, if known
- Each party's right to have an advisor of their choice who may be, but is not required to be, an attorney;
- The right to inspect and review evidence;
- The prohibition against knowingly making false statements or knowingly submitting false information during the investigation process.



Provide periodic updates to parties as investigation proceeds



Extensions permitted for good cause and providing notice to parties when timelines are extended



Investigation period (suggested timeline – 30 days)

Day 1-15 - Evidence gathered

Day 15 - Evidence provided to each party (at least 10 days prior to investigative report)

Day 15-25 Parties have opportunity to respond in writing to evidence

Day 30 - Investigative Report issued

Investigation Period Timeline



Investigative Report shared with both parties and decision maker at conclusion of investigation

Suggested Decision-Making Timeline – 30 Days



Both parties have at least 10 days to respond to investigative report and submit written questions to other party and witnesses (Days 1-10)

- Decision maker must gather responses to those questions and provide responses in writing to each party (Days 10-15)

- Additional time permitted to submit additional, limited follow up questions (Days 15-20)



Days 20-30 - Decision maker reviews all evidence gathered through investigative report and responses from each party; makes a determination as to responsibility for the alleged conduct

Written decision issued to both parties

Decision Making Timeline

Appeal Timeline

Designation of independent decision maker

Both parties given time to make an appeal

Both parties given notice of appeal and opportunity to respond

Establish timeline for secondary investigation (as necessary) and decision

Written decision to both parties



Evidence

School bears burden of gathering evidence

Must consider all relevant evidence, including inculpatory (tends to show a person's involvement in an act) and exculpatory evidence (tends to show a person's innocence)

Investigation must include as necessary:

- Interviewing witnesses (coordinate with law enforcement if they are involved)
- Obtaining documents
- Allowing both parties to present any evidence, including witnesses

Keep detailed notes of all interviews

Respondent and complainant must be provided written notice if they are invited to participate in investigative process

- Written notice when scheduling their interviews - Must include date, time, location, participants and purpose

Interviewing Witnesses



Cross Examination

Live hearing/cross examination not required –
can be accomplished through exchange of
written, relevant questions

Written Decision

1. Summary of the allegations;
2. Summary of the course and outcome of the investigation including any notifications to the parties, interviews with parties and witnesses, and other methods used to gather evidence;
3. Findings of fact supporting the determination;
4. Conclusions regarding the application of the policy and code of conduct to the facts;
5. A statement of, and rationale for, the result as to each allegation, including a determination regarding responsibility, any disciplinary sanctions to be imposed on the respondent, and what other supportive measures will be made available to the complainant;
 - Cite concrete reasons for conclusions
6. Information about the procedures for appeal.

Appeal

Either party may appeal the dismissal of a formal complaint and/or the determination regarding responsibility

Grounds for appeal may include:

- Procedural irregularity that affected the outcome of the matter (i.e., a failure to follow the institution's own procedures);
- New evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter;
- The Title IX Coordinator, investigator(s), or decision-maker(s) had a conflict of interest or bias for or against an individual party, or for or against complainants or respondents in general, that affected the outcome of the matter.

Written Decision must include:

- Outcome of the appeal
- Rationale for the result
- Any change to the result of the initial investigation
- When results become final

Record Keeping

Title IX now explicitly requires schools to maintain the following documents for a period of at least 7 years:

- Records of each sexual harassment investigation, including any determination of responsibility; any audio or audiovisual recording or transcript; any disciplinary sanctions imposed on the respondent; and any remedies provided to the complainant;
- Records of any appeal and the result of that appeal;
- Records of any informal resolution and the results of that informal resolution;
- All materials used to train Title IX coordinators, investigators, decision-makers and any person who facilitates an informal resolution process (Title IX also requires schools to make these training materials publicly available on its website or, if it does not have a website, make them available for inspection by the general public upon request);
- Records of any actions, including any supportive measures taken in response to a report or formal complaint of sexual harassment.

To Close ...

Going back to the 2-3 issues/scenarios you jotted down at the beginning of the session, did we address them?

- If not, please keep them close at hand. At the end of the day, we would like to hear what issues we have not addressed and what concerns remain for you.



As you reflect on this session, what 2 follow-up actions will you take back to your schools?