

NEW TITLE IX REGULATIONS: DEPT. OF EDUCATION'S FINAL RULE

ATTORNEYS AT LAW



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Topics Covered

- ▶ Title IX and Final Rule – Introduction
- ▶ Definitions under Final Rule
- ▶ Equal Access
- ▶ Responding to Sexual Harassment Complaints
- ▶ Title IX Team
- ▶ Grievance Process
- ▶ How to Serve Impartially
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Title IX & Final Rule – Introduction

- ▶ No person in the United States shall, on the basis of sex, be excluded from participation in, denied the benefits of, or subjected to, discrimination under any education program or activity receiving Federal financial assistance.

(Title IX of the Education Amendments of 1972 (20 U.S.C. Section 1681 et seq.) and related regulations (34 C.F.R. Part 106).)

- ▶ USDE's Title IX regulations (Final Rule) now recognize that sexual harassment—including sexual assault—constitutes unlawful sex discrimination.
- ▶ USDE's previous guidance documents re: sexual harassment was not legally binding and did not have the force and effect of law.

Title IX & Final Rule – Introduction

- ▶ The Final Rule reflects core values of equal treatment on the basis of sex, free speech and academic freedom, due process of law, and fundamental fairness.
- ▶ To these ends, districts must operate free from sex discrimination, including sexual harassment.
- ▶ Complainants and respondents must have strong, clear procedural rights in a predictable, transparent grievance process.

Definitions

- ▶ Complainant
 - ▶ Individual who is alleged to be the victim of conduct that could constitute sexual harassment.
 - ▶ Final Rule expressly recognizes the legal rights of parents and guardians to act on behalf of parties (including by filing formal complaints) in Title IX process.
- ▶ Respondent
 - ▶ Individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment.

Definitions

- ▶ Sexual Harassment: conduct on the basis of sex that satisfies one or more of the following types of misconduct:
 - ▶ Quid Pro Quo
 - ▶ Unwelcome Conduct – Severe, Pervasive, and Offensive
 - ▶ Clery Act/Violence Against Women Act (VAWA) Offenses – Assault/Violence/Stalking

Definitions

- ▶ Quid Pro Quo
 - ▶ Conditioning an educational benefit or service upon a person's participation in unwelcome sexual conduct;
- ▶ Unwelcome Conduct
 - ▶ 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
- ▶ Clery Act/VAWA Offenses – Assault/Violence/Stalking
 - ▶ Sexual assault, dating violence, domestic violence, or stalking (as defined in the Clery Act, 20 U.S.C. § 1092(f), and the Violence Against Women Act, 34 U.S.C. § 12291(a).)
- ▶ Quid pro quo harassment and Clery Act/VAWA offenses don't need to meet severe, pervasive, offensive standard – they are in themselves serious enough to deprive equal access.

Equal Access (to Education Program or Activity)

- ▶ Complainant isn't required to prove concrete injury; doesn't have to demonstrate that he/she dropped out of school, failed a class, had a panic attack, or other reached some kind of "breaking point."
- ▶ Evidence of unequal education access due to harassment may include, among other examples, skipping class to avoid harasser, decline in GPA, difficulty concentrating in class.

When Must School Respond?

School must respond when:

- ▶ (1) it 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.

When Must School Respond?

Actual Knowledge

- ▶ “Actual knowledge” expanded to include notice to any elementary or secondary school employee.
- ▶ Any person (i.e., the alleged victim or any third party) may report to a Title IX Coordinator in person, by e-mail, phone, or mail, or by any other means that results in the Title IX Coordinator receiving a verbal or written report.

When Must School Respond?

Education Program or Activity

- ▶ Includes locations, events, situations over which the school exercised substantial control.
- ▶ Also includes buildings owned or controlled by student organizations officially recognized by a postsecondary institution (i.e., fraternity and sorority houses).
- ▶ Interpreted broadly to include both on-campus or off-campus programs or activities.

How Must School Respond?

Title IX Team:

- ▶ Title IX Coordinator
- ▶ Investigator(s)
- ▶ Decision Maker(s)
- ▶ Appeal Officer(s)
- ▶ Informal Resolution Facilitator(s)/Mediator(s)

How Must School Respond?

Title IX Coordinator

- ▶ Facilitates Title IX compliance and training
- ▶ Intake interviews of Complainant
- ▶ Offers supportive measures to Complainant & Respondent
- ▶ Facilitates grievance: explain process, accept formal complaints, consider and determine dismissal
- ▶ Sends notices
- ▶ Assess option of informal resolution
- ▶ Assign investigators
- ▶ Reviews reports but does not make decision re: responsibility

How Must School Respond?

Investigator

- ▶ Reviews complaint
- ▶ Gathers, reviews, weighs, and synthesizes evidence
- ▶ Interviews parties and witnesses
- ▶ Assesses relevance of evidence and credibility of witnesses
- ▶ Prepares investigative report
- ▶ Does not make decision re: responsibility

How Must School Respond?

Decisionmaker

- ▶ Reviews investigative report
- ▶ May conduct hearing (optional in k-12)
- ▶ Facilitates written questions between parties
- ▶ Makes determination re: responsibility
- ▶ Prepares written determination
- ▶ If applicable, may recommend sanctions and/or remedies

How Must School Respond?

Appeal Officer

- ▶ Provides written notice of right to appeal to both parties based on grounds for appeal
- ▶ Determine whether appeal request is within the scope of appeal
- ▶ Provides Notice of Appeal to both parties
- ▶ Reviews written statements and arguments
- ▶ Issues written decision to both parties at same time

How Must School Respond?

Informal Resolution Facilitator

- ▶ Cannot require informal process; obtains voluntary, written consent
- ▶ Provide written notice to the parties disclosing the allegations, the requirements of the process, and notice that the parties can withdraw and resume the grievance process
- ▶ May delegate to a trained mediator, if requested and appropriate
- ▶ Cannot use informal resolution where an employee is alleged to have sexually harassed a student

How Must School Respond?

- ▶ School violates Title IX when its response to sexual harassment is clearly unreasonable in light of the known circumstances
- ▶ Mandatory response obligations:
 - ▶ Offer supportive measures to the complainant
 - ▶ Promptly contact complainant to discuss supportive measures and explain process for filing a formal complaint.
 - ▶ Follow grievance process before imposing any disciplinary sanctions or other actions that aren't supportive measures against a respondent.
 - ▶ Do not restrict rights protected under the U.S. Constitution, including the First Amendment, Fifth Amendment, and Fourteenth Amendment, as a way of responding in a non-deliberately indifferent manner.

How Must School Respond?

Supportive Measures

- ▶ Non-disciplinary, non-punitive individualized services offered as appropriate and reasonably available, without charge, to the complainant or respondent.
- ▶ Designed to restore or preserve access to education program or activity, without unreasonably burdening the other party; protect safety of all parties and educational environment.
- ▶ E.g., counseling, course-related adjustments, modifications of work or class schedules, campus escort services, increased security and monitoring of certain areas of campus, and mutual restrictions on contact between the parties.

GRIEVANCE PROCESS

Basic Requirements

- ▶ Treat complainants and respondents equitably (provide remedies to address meritorious complaints; follow grievance before imposing disciplinary sanctions).
- ▶ Objectively evaluate relevant evidence, not person's status as complainant/respondent/witness.
- ▶ Title IX coordinators are to receive training; no conflict of interest or bias.
- ▶ Presume respondent isn't responsible until determination is made otherwise, following conclusion of grievance.
- ▶ Reasonably prompt timeframes: for conclusion of grievance, filing/resolving appeals, informal resolution processes, and process allowing delay or extension upon written notice of good cause.
- ▶ State a standard of evidence (preponderance or clear and convincing).

Relevant Evidence

- ▶ "The final regulations do not define relevance, and the ordinary meaning of the word should be understood and applied."
(Preamble to the Title IX Rule, p. 811, fn. 1018.)
- ▶ Dictionary definition:
 - ▶ having significant and demonstrable bearing on the matter at hand;
 - ▶ affording evidence tending to prove or disprove the matter at issue or under discussion.
- ▶ Evidence Code definition: evidence, including evidence relevant to the credibility of a witness, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action. (Cal. Evid. Code §210)

Relevant Evidence

- ▶ Evidence of complainants' prior sexual behavior is generally not relevant, nor is privileged information (e.g., attorney-client privilege).
 - ▶ *More on this later
- ▶ District may not adopt a rule excluding relevant evidence because such relevant evidence may be unduly prejudicial, concern prior bad acts, or constitute character evidence.
- ▶ District otherwise retains the flexibility to adopt rules that govern how the investigator and decision-maker evaluate evidence and conduct the grievance process.
- ▶ Decision-maker must explain—to the party proposing the questions—if decision-maker excludes a question as not relevant.

Notice of Allegations

- ▶ Upon receipt of formal complaint, must provide the following written notice to the parties:
 - ▶ Notice of grievance process and any informal resolution process;
 - ▶ Notice of allegations, including sufficient details (identification of the parties; description of alleged conduct allegedly constituting sexual harassment; incident date and location);
 - ▶ Statement that respondent is presumed not responsible until determination is made at conclusion of grievance;
 - ▶ Statement that each party may have an advisor of choice, who may be an attorney;
 - ▶ Prohibition against parties knowingly making false statements or knowingly submitting false information;
- ▶ If additional allegations, provide written Notice of Additional Allegations.
- ▶ Provide written notice of any changes in the process.

Dismissing Complaints

- ▶ Mandatory dismissal: must dismiss formal complaint if alleged conduct:
 - ▶ Doesn't constitute sexual harassment as defined in §106.30;
 - ▶ Didn't occur in the District's education program or activity; or
 - ▶ Didn't occur against a person in the U.S.
- ▶ These dismissals do not preclude the filing of a claim under another provision of District's applicable Code of Conduct, BP/AR or state law

Dismissing Complaints

- ▶ Permissive Dismissal: may dismiss formal complaint or allegations any time during the investigation or hearing, if:
 - ▶ Complainant notifies Title IX Coordinator in writing to withdraw the complaint;
 - ▶ Respondent is no longer enrolled or employed; or
 - ▶ Special circumstances prevent the District from gathering evidence in order to reach a determination
- ▶ All dismissals require written notice & reasons delivered to parties simultaneously

Consolidation

- ▶ District may consolidate formal complaints as to allegations of sexual harassment arising out of the same facts or circumstances:
 - ▶ Against more than one Respondent;
 - ▶ By more than one complainant against one or more respondents; or
 - ▶ By one party against the other party (cross-claims)

Informal Resolution

- ▶ Designed to function as a mediation in lieu of full investigation and determination
- ▶ Available after formal complaint filed and before determination re: responsibility
- ▶ Not available for complaints/allegations of employee on student harassment
- ▶ Purely optional for the parties—mutual written consent
 - ▶ Cannot condition employment on employee's waiving his/her right to Title IX process (i.e., providing only informal resolution as exclusive avenue for redress)
- ▶ Either party may withdraw prior to conclusion and resume grievance

Investigation: Evidence Gathering

- ▶ Investigator—not complainant or respondent—has the burden to gather sufficient evidence
- ▶ Investigator cannot gather privileged information (e.g., medical or psych records, etc.) without voluntary, written consent
- ▶ Parties must have equal opportunity:
 - ▶ To present witnesses and evidence
 - ▶ To have an advisor (e.g., attorney) of their choice present for any meeting or grievance proceeding
 - ▶ District may reasonably restrict extent to which advisor participates, so long as restriction is equally applied

Investigation: Discussing Allegations

- ▶ Cannot restrict the ability of any party to discuss the allegations under investigation or gather/present relevant evidence
- ▶ Likely can instruct parties and witnesses not to tamper with evidence
- ▶ However, witness tampering would still be prohibited under the anti-retaliation provisions under the Final Rule
 - ▶ Cannot intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by Title IX

Investigation: Notice for Hearings

- ▶ Written Notice for Hearings/Interviews/Meetings
 - ▶ Written notice of date/time/location/participants/purpose
 - ▶ Allow sufficient time for the party to prepare to participate

Investigation: Equal Opportunity to Inspect and Review Evidence

- ▶ Parties may review evidence directly related to the allegations, even evidence upon which investigator does not intend to rely.
- ▶ Allow parties to meaningfully respond to the evidence before the conclusion of the investigation.
- ▶ Prior to end of investigation, must send each party/advisor the evidence subject to inspection and review (electronic or hard copy) & give 10 days to respond.

Investigation: Investigation Report

- ▶ Send to each party/advisor in electronic or hard copy at least 10 days before any hearing; allow review and response

Pre-Determination Proceedings

- ▶ Hearing
 - ▶ The grievance process for K-12 districts (and other recipients that are not postsecondary institutions) may, but need not, provide for a hearing.
- ▶ Written Questions
 - ▶ With or without a hearing, after investigative report sent to parties and before reaching a determination re: responsibility, decision-maker(s) must allow each party to:
 - ▶ (1) Submit written questions that a party wants asked of any party or witness,
 - ▶ (2) Provide each party with the answers, and
 - ▶ (3) Allow for additional, limited follow-up questions from each party.

Pre-Determination Proceedings

Rape Shield Protections for Complainant

- ▶ With or without hearing, questions/evidence about complainant's sexual predisposition or prior sexual behavior are not relevant, unless offered to
 - ▶ (i) prove someone other than the respondent committed the alleged conduct, or
 - ▶ (ii) if questions/evidence concern specific incidents of complainant's prior sexual behavior vis-à-vis the respondent and are offered to prove consent.
- ▶ Note: Final Rule doesn't define "consent," leaving it up to districts to define and apply equitably.
 - ▶ Consider specifying that consent cannot be given by: minors; mentally disabled persons, if their disability was reasonably knowable; or persons who are incapacitated.

Written Determination

- ▶ Written determination of responsibility, issued by decision-maker (not Title IX Coordinator or investigator)
- ▶ Content
 - ▶ Allegations of sexual harassment
 - ▶ Procedural steps taken from complaint through determination (i.e., notices to parties, interviews, site visits, methods of evidence gathering, hearings)
 - ▶ Findings of fact
 - ▶ Conclusions re: application of applicable rules (Code of Conduct, BP/AR, etc.)

Written Determination

- ▶ Content (cont'd)
 - ▶ Statement of result for each allegation:
 - ▶ determination of responsibility;
 - ▶ rationale;
 - ▶ disciplinary sanctions, if any;
 - ▶ other remedies to restore or preserve equal access provided by respondent to complainant
 - ▶ Appeal procedure

Appeals

- ▶ Both parties may appeal dismissal or determination re: responsibility
- ▶ Grounds for appeal:
 - ▶ Procedural irregularity affecting outcome of matter
 - ▶ New evidence which could have affected the outcome and was not reasonably available at time of dismissal or determination
 - ▶ Conflict of interest or bias (Title IX Coordinator, investigator, or decisionmaker) that affected outcome

Recordkeeping

- ▶ Must maintain records for seven (7) years
- ▶ Including, but not limited to: records from investigation; appeal; informal; resolution; Title IX training materials for Coordinators, investigators, decisionmakers



HOW TO SERVE IMPARTIALLY: Applicable Rules, Guidance & Tips

Prejudgment of Facts, Conflicts of Interest, and Bias

- ▶ Any individual designated as a Title IX Coordinator, investigator, decisionmaker, or informal resolution facilitator, **must not have a conflict of interest or bias for or against complainants or respondents**, generally or individually.
- ▶ Must be trained in how to serve impartially and avoid prejudgment of the facts at issue.
- ▶ Prejudgment of facts, conflicts of interest, and bias are not explicitly defined by the Final Rule; dictionary definitions are referenced here.

Prejudgment

- ▶ Definition: to judge before hearing or before full and sufficient examination
- ▶ Commonly refers to passing judgment prematurely or without sufficient reflection or investigation
- ▶ General Rules
 - ▶ **Do not** prejudge the credibility of any party or ultimate conclusions about responsibility for sexual harassment
 - ▶ Do not draw conclusions about credibility based on party's status
 - ▶ Based conclusions on objective evaluation of relevant evidence
 - ▶ Remember to afford respondent a presumption of non-responsibility

Prejudgment

- ▶ Examples of Prejudgment and Problems
 - ▶ Allegations involving sexual conduct, sexual history, drugs, and/or alcohol use:
 - ▶ E.g., Respondent and Complainant had been in a consensual relationship, so the Title IX coordinator may assume consent was obtained for alleged misconduct in question.
 - ▶ Sex stereotypes
 - ▶ E.g., women have regret about sexual experiences and are likely lying about sexual assault
 - ▶ E.g., men cannot be victims of sexual assault

Prejudgment

- ▶ How to Avoid Prejudgment
 - ▶ Don't jump to assumptions or conclusions
 - ▶ Stay objective throughout the investigation process—focus on fact-gathering
 - ▶ Interview all necessary witnesses & obtain all of the material facts; remember there are oftentimes 2 sides to a story
 - ▶ Do not prejudge situations, including those involving sexual assault, drugs, or alcohol use, or based on sex stereotypes

Conflicts of Interest

- ▶ Definition: a conflict between the private interests and the official or professional responsibilities of a person in a position of trust or a conflict between competing duties
- ▶ Conflict of interests may arise from external relationships (family, friendships, co-workers), financial investments, or other societal factors
- ▶ Conflicts of interest can be "actual," "perceived," or "potential"
 - ▶ Title IX team should first determine what type of conflict is present as they consider their ability to impartially serve.

Conflicts of Interest

- ▶ Actual, Perceived, Potential
 - ▶ Actual conflict: a **direct conflict** between one's official duties and responsibilities, and a competing personal interest or obligation
 - ▶ E.g., Title IX investigator's daughter is the Respondent.
 - ▶ Perceived conflict: reasonable perception that a competing interest could improperly influence the performance of one's official duties and responsibilities
 - ▶ E.g., the Title IX decision-maker had prior relationship with the family member of complainant.
 - ▶ Potential conflict: personal interest or obligation possibly conflicting with one's official duties and responsibilities in the future
 - ▶ E.g., Title IX Coordinator and Respondent interact on the same faculty committee.
 - ▶ E.g., Title IX Coordinator has friendly relationship with Complainant's parents.

Bias

- ▶ Definition: an inclination of temperament or outlook; especially, a personal and sometimes unreasoned judgment
- ▶ Often based on stereotypes, rather than actual knowledge of an individual or a particular circumstance.
- ▶ Oftentimes can be based on a person's gender, race, sexual orientation, disability, economic status, and/or academic standing
- ▶ Understanding bias is particularly important in Title IX context because:
 - ▶ Most evidence is circumstantial rather than direct
 - ▶ Improper biases are prevalent and can prevent reliable outcomes

Bias

▶ Examples

- ▶ Decision-maker commences the hearing by asking the male Respondent what “he” did to the female Complainant.
- ▶ Decisionmaker finds Respondent more credible because Complainant speaks broken English, with a heavy accent.
- ▶ Investigator is highly suspicious of the Respondent, because Respondent was convicted of a DUI, whereas Complainant has a spotless academic record.

Impartiality During Formal Grievance Process: Reminders

- ▶ Do not make assumptions about the allegations based on irrelevant characteristics of complainant or respondent
- ▶ Treat each person as individual, not as a member of a class.
- ▶ Treat all reports of sexual harassment equally, regardless of the form of the report or the demographics of the complainant or respondent
- ▶ Afford respondents presumption of non-responsibility until grievance process is concluded
- ▶ Offer supportive measures to complainants and respondents equally
- ▶ Give both parties equal opportunity to present witnesses and evidence
- ▶ Objectively examine relevant evidence before reaching determination
- ▶ Continue to evaluate issues of bias and conflicts of interest throughout the grievance process

Technology for Live Hearing (if any)

- ▶ Live hearing may be conducted with all parties physically present in the same geographic location or, at the District's discretion, any or all parties, witnesses, and other participants may appear at the live hearing virtually, with technology enabling participants simultaneously to see and hear each other.
- ▶ Districts must create an audio or audiovisual recording, or transcript, of any live hearing and make it available to the parties for inspection and review; remember to maintain for at least seven (7) years
- ▶ Tech Considerations
 - ▶ Ensure video conferencing software works properly for all parties/representatives/witnesses involved—consider doing a virtual dry run
 - ▶ Ensure internet and workspace is secure
 - ▶ Any special equipment are you using for video, audio, and lighting?
 - ▶ What is the environment you're showing your witness?

The End – Thank You!

- ▶ Comments?
- ▶ Concerns?
- ▶ Feedback?

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