

TITLE IX UPDATE:

Final Rule and Amended Regulations K-12 Implications

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Final Rule Relative to Title IX

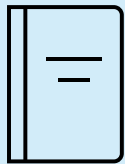
Issued by U.S. Dept. of Ed.'s Office for Civil Rights



Effective August 14, 2020; OCR will not apply retroactively
(date of alleged conduct controls)



Amends existing Title IX regs., 34 C.F.R. Part 106



Primarily focused on sexual harassment, which constitutes sex discrimination under Title IX; a school's treatment of a complainant or respondent may also constitute sex discrimination under Title IX



Review existing Title IX policies / procedures, revising as needed

Title IX: Background

▶ What is Title IX?

- ▶ Title IX prohibits discrimination on the basis of sex in education programs or activities receiving financial assistance from the government, inclusive of K-12 schools
- ▶ Districts are required to have a Title IX Coordinator and respond to allegations of Title IX violations, investigating allegations as required by / in accordance with Title IX regulations
- ▶ The U.S. Dept. of Ed.'s Office for Civil Rights enforces Title IX

Significance of Final Rule in K-12

- ▶ Codifies definition of “sexual harassment” in context of Title IX for the first time
 - ▶ Definition is inclusive of sexual assault, dating violence, domestic violence and stalking
- ▶ Modifies standards and schools’ Title IX obligations in several areas - as discussed herein
- ▶ Final Rule criticized by many as strengthening protections for alleged perpetrators and weakening protections for sexual harassment and sexual assault survivors, with an unrealistic/burdensome effective date given COVID-19

Key Changes for K-12 Schools

Discussed in Detail herein . . .

- ▶ When and how schools must respond to and investigate allegations of misconduct under Title IX
- ▶ Due Process / Procedural Requirements
- ▶ Evidentiary Standards
- ▶ Notice / Dissemination Requirements

Title IX Definition of Sexual Harassment

- ▶ 34 C.F.R. § 106.30(a) defines “sexual harassment” as “conduct on the basis of sex that satisfies one or more of the following:”
 - ▶ (1) A school employee conditioning a school aid, benefit or service on participation in unwelcome sexual conduct [*quid pro quo* harassment];
 - ▶ (2) Unwelcome conduct reasonably determined to be so “severe, pervasive, and objectively offensive” that it “effectively denies” a person equal access to a school education program or activity;
 - ▶ (3) “Sexual assault,” as defined in 20 U.S.C. 1092(f)(6)(A)(v), “dating violence” as defined in 34 U.S.C. 12291(a)(10), “domestic violence” as defined in 34 U.S.C. 12291(a)(8), or “stalking,” as defined in 34 U.S.C. 12991(a)(30)

Obligation to Respond - Location/Authority

- ▶ Response obligation as of August 14, 2020 under amended regulations:
 - ▶ Schools are not required to respond to alleged conduct occurring off school grounds and outside of a school program or activity if the conduct is not otherwise under the school's "substantial authority"
 - ▶ Schools are not required to respond to alleged conduct occurring outside of the U.S. (e.g., a trip abroad)
- ▶ OCR's prior position regarding response obligation:
 - ▶ Sexual misconduct "so severe, persistent, or pervasive" as to "deny or limit a student's ability to participate in or benefit from the school's programs or activities" creates a "hostile environment" and the school must respond, regardless of where the conduct occurred

Obligation to Respond - Knowledge

- ▶ Schools must “respond promptly” in a meaningful way, and may not be “deliberately indifferent,” offering “supportive measures,” upon “actual knowledge” of an allegation of sexual harassment / sexual assault occurring under a school’s “substantial authority”
- ▶ “Actual Knowledge” standard: newly defined as notice to any employee of a K-12 school, regardless of the employee’s position or whether a formal complaint is made - *(other than when the only employee with knowledge is the respondent)*
 - ▶ Anyone may report sex discrimination, inclusive of sexual harassment / sexual assault, to a school in any manner
 - ▶ Train all staff to inform the Title IX Coordinator immediately of any alleged misconduct, even if uncertain whether the conduct occurred or requires a response

Key Definitions Informing Response

- ▶ **“Consent” relative to sexual assault**: schools should consider how consent will be defined in this context; Final Rule does not require adoption of specific consent definition
- ▶ **“Prompt”/“Promptly”**: Final Rule does not define, nor does it set forth specific response deadlines or timeframes; schools should respond and provide appropriate supports as soon as possible
- ▶ **“Substantial Control”**: reference to substantial school authority over the alleged perpetrator and over the context in which the alleged conduct occurred
- ▶ **“Supportive Measures”**: 34 C.F.R. § 106.44(a) defines as “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”
 - ▶ Supportive measures should be “designed to restore or preserve equal access to the [school’s] education program or activity without unreasonably burdening the other party, including measures designed to protect the safety of all parties or the [school’s] educational environment, or deter sexual harassment”
 - ▶ A school’s Title IX Coordinator is responsible for coordinating and implementing supportive measures, which should be confidential to the extent possible; see 34 C.F.R. § 106.30(a)

When is the Obligation to Investigate Triggered?

- ▶ Investigation is required when a “formal complaint” is made; *see* 34 CFR § 106.30(a)
 - ▶ “Formal complaint” is defined as “a document or electronic submission” signed (physically or electronically) by a complainant (a parent/guardian may sign/file on a student’s behalf), or by the Title IX Coordinator, alleging sexual harassment against a respondent and requesting a school investigation, filed in person, by mail, by electronic mail, or by online portal provided for this purpose, using Title IX Coordinator contact information
 - ▶ A complainant must be participating in or attempting to participate in an education program or activity of the school at the time that the formal complaint is filed

Response vs. Investigation

- ▶ A school is required to conduct an investigation and follow a fair grievance process in compliance with 34 C.F.R. § 106.45 only when a formal complaint is filed (by student, parent/guardian, or Title IX Coordinator) when the complainant is participating in or attempting to participate in the school's education program or activity
- ▶ Regardless of whether a formal complaint is filed, or whether a duty to conduct an investigation exists, a school is required to respond promptly in a meaningful way, offering supportive measures to both the complainant and the respondent

Emergency Removal / Administrative Leave

- ▶ Title IX does not prohibit immediate emergency removal of a student from a program or activity if the school has conducted an individualized safety/risk analysis and determines that emergency removal is necessary due to “an immediate threat to physical health or safety”
- ▶ A respondent must be provided with notice and an opportunity to challenge immediately following an emergency removal decision
- ▶ An emergency removal could constitute a change in placement for a special education student; consult with special education staff and counsel as needed
- ▶ Title IX does not preclude placing an accused employee on administrative leave during a pending fair grievance process

Fair Grievance Process

- ▶ Upon receipt of a formal complaint, a school is required to provide opportunity for a fair, impartial and equitable grievance process in compliance with 34 C.F.R. § 106.45(b)
 - ▶ Offering to facilitate an informal resolution process is prohibited unless a formal complaint has been filed, is only permissible with both parties' written, informed, voluntary consent, and is not permissible relative to alleged employee to student conduct; a school's default procedure must include an investigation
- ▶ A complainant must not be coerced into a particular course of action or participation in the grievance process
- ▶ A respondent must be presumed innocent unless and until a decision-maker finds otherwise; a transparent grievance process must be followed prior to school imposition of any discipline
- ▶ The burdens of proof and sufficient investigation lie on the school, not on the parties
- ▶ Retaliation for reporting sexual harassment, participating in a grievance process or refusing to participate in a grievance process is prohibited

Process / Procedures

K-12 schools must:

- ▶ Give complainants and respondents written notice of allegations and grievance process, stating that respondent is presumed innocent, and informing parties of an equal opportunity to choose an advisor (advisor may be, but is not required to be, an attorney);
- ▶ Describe available supportive measures (available to respondents as well as to complainants);
- ▶ Describe possible disciplinary sanctions and remedies;
- ▶ State the standard of evidence to be used; either the “preponderance of the evidence” standard or the “clear and convincing evidence” standard may be used (discussed further in slide 17); the same standard of evidence must be used relative to formal complaints against students and formal complaints against employees;
- ▶ Provide equal opportunities for parties to present witnesses and to gather, inspect and present evidence, and to file written responses;

Process / Procedures, Continued

K-12 schools must:

- ▶ Not require, allow or rely upon privileged information, unless privilege is waived in writing by the holder;
- ▶ Provide an investigative report summarizing relevant evidence to each party, at least ten (10) days prior to a hearing (if a hearing will be held) or determination of responsibility, for the parties' review and written response;
- ▶ Objectively evaluate all relevant evidence, without basing creditability determinations on status as complainant, respondent or witness;
- ▶ Require that that a Title IX Coordinator, investigator, decision-maker, or facilitator of informal resolution: does not have a conflict of interest or bias, receives proper trainings, and does not rely on stereotypes; protect complainants from inappropriately being asked about prior sexual history;
- ▶ Include “reasonably prompt” time frames for conclusion of the grievance process or informal resolution process, and for filing and resolving appeals; provide notice of and reason for any good cause delays

Live Hearings / Cross Examination

- ▶ K-12 schools are NOT required to hold live hearings
- ▶ OCR discussion regarding live hearings states:
 - ▶ “local school officials . . . could determine that their educational community is best served by holding live hearings for high school students, for students above a certain age, or not at all,” provided that the decision whether to hold a hearing is equitably made
- ▶ Forgoing live hearings may be advisable, particularly so with young students, to avoid discomfort, which can rise to level of victim trauma, associated with live cross-examination
- ▶ Regardless of whether a live hearing is held, schools must allow parties to submit written questions for other parties and witnesses to answer, and allow limited follow up questions

Evidentiary Standards

- ▶ Schools may elect either one of two permissible evidentiary standards to apply relative to Title IX determinations; whichever standard selected must be uniformly and consistently used:
 - ▶ *Option 1: “preponderance of the evidence” (less stringent)
 - ▶ Meaning “more likely than not” that alleged conduct occurred
 - ▶ Option 2: “clear and convincing evidence” (heightened)
 - ▶ Meaning “high probability” or “reasonable certainty” that alleged conduct occurred
- ▶ *It continues to be our general recommendation that districts employ Option 1, the preponderance of the evidence standard typically used in sexual harassment and other civil cases

Decision-Maker / Determination

- ▶ A decision-maker cannot be the same person as the Investigator or the Title IX Coordinator; a single investigator process is not permitted
- ▶ A decision-maker must issue a written determination to the parties simultaneously, explaining procedures, conclusions, rationale and bases
- ▶ A school, through its Title IX Coordinator, must effectively implement remedies “designed to restore or preserve equal access” to the education program or activity for a complainant if a respondent is ultimately found to be responsible

Appeal

- ▶ Schools must offer each party equitable appeal opportunities and inform all parties of bases for appeal and appeal procedures, in accordance with 34 C.F.R. § 106.45(b)(8)
- ▶ Schools are required to offer both parties opportunity to appeal on certain bases (under subsection (i), procedural flaw, new evidence, conflict/bias)
- ▶ Schools are permitted but not required to offer both parties the opportunity to appeal on unspecified “additional bases” (under subsection (ii))
- ▶ Consistency is required with all opportunities for appeal and appeal procedures
- ▶ When an appeal is filed, the other party must be notified in writing; a written appeal decision must be provided simultaneously to both parties, describing the result and rationale
- ▶ The appeal decision-maker may not be the determination decision-maker, the investigator(s) or the Title IX Coordinator

Documentation / Recordkeeping

- ▶ Districts must document and keep records of all sexual harassment reports and investigations, for a minimum of seven (7) years, and in accordance with 34 C.F.R. § 106.45(b)(10)
- ▶ Districts must keep records of all Title IX training materials for a minimum of seven (7) years

Notice / Dissemination Requirements

- ▶ K-12 districts are required to provide notice of nondiscrimination policy and grievance procedures, how to report sexual harassment, and how the district will respond, as well as of the Title IX coordinator's name, title and contact information, to students, parents/guardians, unions, and applicants for admission or employment; *see* 34 C.F.R. § 106.8
- ▶ Nondiscrimination policy and Title IX Coordinator information must also be published on a district's website and in appropriate handbooks
- ▶ The amended regulations remove some additional policy dissemination obligations set forth in the version of 34 C.F.R. § 106.9 in effect prior to August 14, 2020
- ▶ Title IX Coordinators are required to include the title "Title IX Coordinator," with their job title(s) as of August 14, 2020

Website Posting Requirements

The following must be posted and readily visible on the District's website:

- ▶ The Title IX Coordinator's name, title and contact info., "prominently displayed"
- ▶ The District's Non-Discrimination Policy, "prominently displayed"
- ▶ All training materials used to train Title IX personnel
 - ▶ Training materials requiring posting to the District's website include *all* materials used to train Title IX "personnel," which includes the Title IX Coordinator, any investigators, any decision-makers, and any person facilitating an informal resolution (such as mediators)

Helpful OCR blog link detailing the posting requirement:

<https://www2.ed.gov/about/offices/list/ocr/blog/20200518.html>

Initial Action Items - Recap

- ▶ Confirm the district has a designated “Title IX Coordinator,” in function and in title
- ▶ Review/update policies, procedures, notices and handbooks for compliance
- ▶ “Prominently display” the Title IX Coordinator’s name, title, and contact information, along with nondiscrimination policy, on the district’s website; Post Title IX training materials on the district’s website
- ▶ Select a standard of evidence for consistent application
- ▶ Decide whether and under what circumstances (ages) to hold live hearings; Be consistent
- ▶ Update appeal information/procedures as needed (no single decision-maker model); Be consistent
- ▶ Train Title IX personnel (Title IX Coordinator, investigators, decision-makers, facilitators)
- ▶ Ensure all staff is aware that any knowledge of alleged misconduct violating Title IX requires a prompt, meaningful response, directing staff to consult with the Title IX Coordinator
- ▶ Moving forward, consult with local counsel regarding specific circumstances; analyses are fact-dependent