

Managing Title IX Sexual Harassment

EASTERN OKLAHOMA STATE COLLEGE

Title IX Fundamentals



Session Points

Title IX Fundamentals

The New Rule & Sexual Harassment

Key Definitions

Responding to Title IX Sexual Harassment

Elements of a Sufficient Response

Interim & Supportive Measures

Formal Complaints of Title IX Sexual Harassment

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Additional Considerations

The Title IX Statute

Title IX of the Education Amendments of 1972 prohibits discrimination **on the basis of sex** in education programs and activities and employment.

- Covers not only equity in athletic programming, but all forms of discrimination based on sex.
- Protects students **and** employees.
- Applies to all institutions that receive federal financial assistance, either directly or indirectly.
- Enforced by the Office of Civil Rights.

The Title IX Regulations

Amplify the statute considerably, requiring institutions to:

- Disseminate a policy which includes a **non-discrimination statement**.
- Designate a Title IX Coordinator.
- Adopt and publish **grievance procedures** that are prompt and equitable and allow for adequate, reliable, and impartial investigation of complaints.
- **Take action** to address and prevent sex-based discrimination.

The Title IX Regulations

With regard to **students**, specifically prohibit discrimination in:

Admission and recruitment	Education programs or activities	Housing
Facilities	Counseling	Financial and employment assistance
Health insurance and benefits	Marital or parental status	Athletics

The Title IX Regulations

With regard to **employment**, specifically prohibit discrimination in:

Employment	Recruitment	Compensation
Job classification	Fringe benefits	Marital or parental status
Advertising	Pre-employment inquiries	Employment criteria

The New Rule & Sexual Harassment



Title IX Timeline

DATE	EVENT
June 23, 1972	<u>Title IX of the Education Amendments of 1972</u>
July 21, 1975	ED publishes <u>34 CFR Part 106</u> , which implements Title IX.
March 13, 1997	ED publishes <u>Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties</u> .
June 22, 1998	<u>Gebser v. Lago Vista Ind. Sch. Dist.</u> , 524 U.S. 274 (1998) (holding that an individual may only recover monetary damages under Title IX when a school official with authority to institute corrective measures has actual notice of the harassment but is deliberately indifferent to it).
May 24, 1999	<u>Davis v. Monroe Cty. Bd. of Educ.</u> , 526 U.S. 629 (1999) (holding that a school can be liable under Title IX for student-on-student sexual harassment, but only if the school is deliberately indifferent to known sexual harassment, the respondent is under the school's disciplinary authority, and the behavior is so severe, pervasive, and objectively offensive that it denies access to the school's program and activities).

Title IX Timeline

DATE	EVENT
Jan. 2001	Following significant judicial activity, ED publishes <u>Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties</u> . ED draws distinction between standards for administrative enforcement and standards for private litigation.
Nov. 13, 2000	ED updates Title IX rules to incorporate the Civil Rights Restoration Act's broadened definitions of "program or activity" and "program."
Oct. 25, 2006	ED updates Title IX rules to clarify and modify requirements regarding single-sex schools, classes, and extracurricular activities in elementary and secondary schools.
April 2011	ED publishes <u>DCL</u> with extensive guidance concerning school responsibilities for preventing and addressing sexual harassment and sexual violence.
April 2014	ED publishes <u>Questions and Answers</u> on Title IX and Sexual Violence, further clarifying guidance articulated in 2001 Guidance and 2011 DCL.
May 2016	ED and DOJ issue joint <u>DCL</u> regarding treatment of transgender students, accompanied by Examples of Policies and Emerging Practices for Supporting Transgender Students.

Title IX Timeline

DATE	EVENT
Feb. 2017	ED publishes DCL rescinding May 2016 DCL regarding treatment of transgender students.
Sept. 2017	ED publishes DCL rescinding April 2011 DCL as well 2014 Q&A on Campus Sexual Misconduct.
Nov. 2018	On November 29, 2018, ED publishes the official version of its proposed Title IX rule in the Federal Register. The first significant rule concerning sexual misconduct since 1975.
May 2020	On May 19, 2020, ED publishes the official version of its final Title IX rule in the Federal Register.
August 14, 2020	Effective Date of new Title IX Rule.

The New Title IX Rule

Controversial, and already challenged, ED's new rule is its first regulation addressing **sexual harassment** since 1975.

The new rule articulates a complex framework for managing allegations of sexual harassment on campus.



The Big Picture

Discrimination Based on Sex: Institutions are obligated to adopt and publish grievance procedures that provide for the prompt and equitable resolution of student and employee complaints alleging any form of prohibited sex discrimination occurring against a person in the United States. 34 CFR 106.8(c)-(d).

Title IX Sexual Harassment: With or without a formal complaint, institutions with actual knowledge of Title IX sexual harassment occurring in an education program or activity of the school against a person in the United States must respond promptly in a manner that is not deliberately indifferent and complies with 34 CFR 106.44(a).

Formal Complaint of Title IX Sexual Harassment: In response to a formal complaint of sexual harassment, institutions must follow a Title IX formal complaint process that complies with the new standards set forth in 34 CFR 106.45.



Key Definitions

New Definitions of Key Terms

Sexual Harassment

Complainant

Respondent

Consent

Actual Knowledge

Supportive Measures

Formal Complaint

Sexual Harassment

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

- 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;
- an employee of the school conditioning the provision of an aid, benefit, or service of the school on an individual's participation in unwelcome sexual conduct; or
- sexual assault, as defined in the Clery Act, or dating violence, domestic violence, or stalking as defined in VAWA.

Sexual Harassment

What is the basis for the new definition of sexual harassment?

- From one administration to the next, the Department has consistently maintained that the standards the agency uses to determine Title IX compliance do not need to align with those established by the Supreme Court in *Gebser* and *Davis*.
- Without surrendering this discretion, this Department has chosen “to build these final regulations upon the foundation established by the Supreme Court...”
- This Department “believes it would be beneficial for recipients and students alike if the **administrative standards** governing recipients’ responses to sexual harassment were aligned with the **standards developed by the Supreme Court** in private actions...”

Sexual Harassment

Does this definition prohibit all harassing or offensive remarks?

- No. Unwelcome conduct must be severe, pervasive, and objectively offensive. But schools can still address such remarks in a variety of ways.

Does quid pro quo harassment need to be severe, pervasive, and objectively offensive? How about Clery/VAWA offenses?

- No. Only the “unwelcome conduct” prong of the sexual harassment definition must be severe, pervasive, and objectively offensive. A victim of quid pro quo sexual harassment or Clery/VAWA sex offenses, has been effectively denied equal access to education.

Complainant, Respondent, Consent

Complainant. An individual who is alleged to be the victim of conduct that could constitute sexual harassment.

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

Consent. The Assistant Secretary will not require schools to adopt a particular definition of consent with respect to sexual assault.

- Some schools are under state law requirements to apply a particular definition of consent for purposes of campus sexual misconduct policies.

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Responding to Title IX Sexual Harassment

Responding to Title IX Sexual Harassment

An institution **must** respond to sexual harassment, **with or without** a formal complaint, when:

- the school has **actual knowledge** of the alleged sexual harassment;
- the alleged sexual harassment occurred in an **education program or activity** of the school; **and**
- the alleged sexual harassment was against a person **physically located in the United States**.

Actual Knowledge

Actual knowledge means notice of sexual harassment or allegations of sexual harassment to a school's Title IX Coordinator or any official of the school who has **authority to institute corrective measures on behalf of the institution**.

- The mere ability or obligation to report sexual harassment or to inform a student about how to report sexual harassment, or having been trained to do so, does **not** qualify an individual as one who has authority to institute corrective measures on behalf of the institution.

Actual Knowledge

Who can make a report?

- Any person (including bystanders or anonymous reports).

Who is an official with authority to institute corrective measures on behalf of the institution?

- This is a fact-specific determination. Per the Preamble, possibly supervisors and deans. Schools can identify such individuals in a list.

Which employees must report sexual harassment to the Title IX Coordinator?

- As to employees who are not the Title IX Coordinator or Officials with Authority, schools have wide discretion to craft and implement their own employee reporting policy.

Program or Activity

An **education program or activity** of the school 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, and also includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution.”

Program or Activity

How does an institution determine what constitutes a program or activity?

- “It’s a fact specific inquiry. The key questions are whether the recipient exercised substantial control over the respondent and the context in which the incident occurred.”

What if a student is sexually assaulted outside of an education program or activity but later suffers Title IX sexual harassment in an education program or activity?

- Title IX would only cover the act of sexual harassment in an institution’s education program or activity, but the institution may still choose address the prior assault through its own process or code of conduct.

Physical Location

The complainant must be a person physically located in the United States.

- The Department acknowledges that individuals experiencing sexual harassment while outside of the country (*i.e.*, studying abroad) would not be covered.
- However, it would appear that sexual harassment perpetrated online against an individual physically located in the United States could be covered, even if the perpetrator were located outside of the country.



Elements of Sufficient Response

Elements of sufficient Response

Institutions must respond “promptly” and “in a manner that is not **deliberately indifferent**.”

A school is deliberately indifferent “only if its response to sexual harassment is clearly unreasonable in light of the known circumstances.”

In the proposed rule, the Department offered additional detail regarding conduct that would, or would not, constitute deliberate indifference. The final rule does **not** include this language.

Elements of sufficient Response

However, the final rule **does** specify that a 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; **and**
- explain to the complainant the process for filing a formal complaint.

A failure to satisfy these specific requirements could be characterized as deliberate indifference.

Elements of sufficient Response

Further, the final rule specifies that a school's response must treat complainants and respondents equitably by offering **supportive measures** to a complainant, and by following a **compliant grievance process** before the imposition of any disciplinary sanctions against a respondent.

Once again, a failure to satisfy these requirements could be deemed deliberate indifference.

Elements of sufficient Response

Does the deliberate indifference standard relieve recipients of their obligation to respond to every known allegation of sexual harassment?

- No.

In the absence of a formal complaint, are there circumstances where an institution would initiate a grievance process against the respondent to avoid being deliberately indifferent?

- Yes. The Title IX Coordinator may sign a formal complaint to initiate a grievance process. Examples noted in the Preamble are threat, serial predation, violence, or weapons.

Interim & Supportive Measures



Interim Measures: Removal/Leave

An institution would be permitted to remove a respondent from campus on an emergency basis, provided:

- that the school 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.

An institution also would be permitted to place a “non-student employee respondent” on administrative leave during the “pendency of [its] grievance process.”

Interim Measures: Removal/Leave

What does the “individualized safety or risk analysis” require?

- “...more than a generalized, hypothetical, or speculative belief that the respondent may pose a risk to someone’s physical health or safety.”

What does it mean that an individual can challenge their removal “immediately” after removal?

- This is fact-specific, but is generally understood as occurring without delay, as soon as possible, given the circumstances.

Interim Measures: Removal/Leave

Is self-harm grounds for emergency removal?

- Yes, when the threat arises from allegations of sexual harassment. But it is important for institution's to consider and comply with the ADA.

Do respondents who are employees receive the same due process protections with respect to emergency removals (i.e., post-removal notice and opportunity to challenge the removal)?

- Yes.

Supportive Measures

Supportive measures means 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 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.

Examples of Supportive Measures

Counseling

Extensions of deadlines or other course-related adjustments

Modifications of work or class schedules

Campus escort services

Mutual restrictions on contact between the parties

Changes in work locations

Changes in housing locations

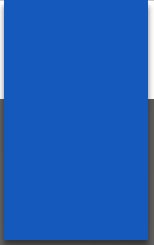
Leaves of absence

Increased security and monitoring of certain areas of the campus

Supportive Measures

The school must maintain as confidential any supportive measures provided to the complainant or respondent, to the extent that maintaining such confidentiality would not impair the ability of the school to provide the supportive measures.

The Title IX Coordinator is responsible for coordinating the effective implementation of supportive measures.



Formal Complaints
of Title IX
Sexual Harassment

Formal Complaint

- ❖ A **formal complaint** of Title IX sexual harassment means 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.
- ❖ The phrase “**document filed by a complainant**” means a document or electronic submission that contains the complainant’s physical or digital signature, or otherwise indicates that the complainant is the person filing the formal complaint.

Formal Complaint

- ❖ A formal complaint **may be filed** with the Title IX Coordinator in person, by mail, or by electronic mail... and by any additional method designated by the school.
- ❖ 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.

Formal Complaint Process

Core Requirements	• Details 10 core requirements of formal complaint process
Complaint Dismissal	• Grounds for dismissal and procedural requirements
Consolidation	• Complaint consolidation in specific circumstances
Notice of Allegations	• Requirements for initial and ongoing notice to parties
Investigations	• 7 required elements of formal investigation
Informal Resolutions	• Permits informal resolution where appropriate
Hearings	• Hearing requirements, including cross-x and advisors
Determinations	• Requirements for adjudicators and determinations
Appeals	• Grounds and procedures for appeals
Recordkeeping	• Record maintenance requirements for specified periods



Recordkeeping

Recordkeeping

For each formal complaint of Title IX sexual harassment, the institution must maintain records for **7 years** that include:

- records of any actions, including any supportive measures, taken in response to a report or formal complaint of sexual harassment;
- the basis for the school's conclusion that its response was not deliberately indifferent;
- documentation that the school took measures designed to restore or preserve equal access; **and**
- if the school did not provide supportive measures, the reasons why such a response was not clearly unreasonable in light of the known circumstances.

Recordkeeping

If there was an adjudication, the records also **must** contain:

- any determination regarding responsibility;
- any audio or audiovisual recording or transcript;
- any disciplinary sanctions imposed on the respondent;
- any remedies provided to the complainant;
- any appeal and the result; **and**
- any informal resolution and the result.

Recordkeeping

Apart from any specific proceeding, institutions also must keep for 7 years, all materials used to **train** Title IX Coordinators, investigators, adjudicators, and any person who facilitates an informal resolution process.

Further, schools must make these training materials **publicly available on their websites**.



Additional Considerations

Retaliation

The new rule specifically **prohibits retaliation**, providing that no school “or other person may intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by Title IX or this part, or because the individual has made a report or complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing under this part.”

Relationship to Title VII

Title VII of the Civil Rights Act of 1964 generally prohibits discrimination in the workplace, and has been interpreted by the Supreme Court to prohibit sexual harassment.

In the Preamble to the new rule, the Department observes that it “is aware that Title VII imposes different obligations with respect to sexual harassment, including a different definition, and recipients that are subject to both Title VII and Title IX will need to comply with both sets of obligations.”

Relationship to Title VII

This having been acknowledged, the Department concludes that “nothing in these final regulations precludes an employer from complying with Title VII. The Department recognizes that employers must fulfill both their obligations under Title VII and Title IX, and **there is no inherent conflict** between Title VII and Title IX.”

Office of Civil Rights

OCR Title IX Blog

- Will include new guidance on a rolling basis.

OCR Email Address

- OPEN@ed.gov
- May be used for submitting inquiries regarding the new Title IX rule.



Title IX Rule Comparison

Title IX Rule Comparison

- Shows the changes the new rule will make to 34 C.F.R. Part 106 as of August 14, 2020.

THOMPSON COBURN LLP

Comparison Showing Changes to USED Title IX Rule Effective August 14, 2020

Last Updated: May 20, 2020

On May 18, 2020, the U.S. Department of Education published the official version of [34 CFR 106.3 \(regulation\)](#) in the Federal Register. This new rule constitutes the final official version of the Department's Title IX regulations concerning sexual harassment in over 40 years. Among other things, this new rule updates the scope of a school's responsibility for addressing incidents of sex discrimination, defines procedural requirements for the resolution of Title IX complaints, and defines key concepts in the law. The effective date of the new rule is August 14, 2020. Below, we provide a comparison that shows the changes the new rule will make to 34 C.F.R. Part 106 as of August 14, 2020. We have created this document by comparing the existing rule to the changes set forth in the Federal Register, noted above.

For inquiries with questions regarding the new Title IX rule, we encourage you to contact Karen Laska at (204) 512-8800 or karen.laska@thompsoncoburn.com. Adam J. Gels is the leader of Thompson Coburn's Higher Education Practice, one of the firm's regional leaders, and editorial director of [Education Law](#), the firm's higher education law and policy blog.

Disclaimer

Please note that the purpose of this document is to provide information on a regulatory matter and all content provided is for informational purposes only and should not be considered legal advice. No representation or warranty from the document does not establish an attorney-client relationship with the reader. If you have legal advice for a particular situation, you should consult an attorney.

Section A – Introduction

106.1 Purpose and effective date.

The purpose of this part is to implement 106.19 of the Education Amendments of 1972, as amended by Pub. L. 96-58, 96 Stat. 483, except sections 101 and 102 of those Amendments which is assigned fundamental (with certain exceptions) institutional on the basis of and is any education program or activity receiving Federal financial assistance, whether or not such program or activity is offered or sponsored by an educational institution as defined in this part. This part is not intended to address section 106.19 of the Education Amendments of 1972, Pub. L. 92-318, 86 Stat. 484. The effective date of this part shall be July 21, 1979.

106.2 Definitions.

As used in this part, the term:

- (1) Title IX means 106.19 of the Education Amendments of 1972, Pub. L. 92-318, as amended by section 3 of Pub. L. 96-58, 96 Stat. 483, except sections 101 and 102 thereof, 92 U.S.C. 1811, 1812, 1813, 1814, 1815, 1816.
- (2) Department means the Department of Education.
- (3) Secretary means the Secretary of Education.
- (4) Assistant Secretary means the Assistant Secretary for Civil Rights of the Department.

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THANK YOU!