



K-12 Title IX Training

Are You Ready? New Title IX Regulations
Go Into Effect on August 14, 2020

Agenda

1. Brief overview of Title IX;
2. The scope of a K-12 education program or activity;
3. The definition of sexual harassment provided within the regulations;
4. Grievance process including hearings, appeals, and informal resolution processes, as applicable;
5. How to conduct an investigation;
6. How to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias;
7. Investigator training on issues of relevance to create an investigative report that fairly summarizes relevant evidence; and
8. Decision-maker training on issues of relevance of questions and evidence, including when questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant.



**POST THESE (and all) TRAINING MATERIALS ON
YOUR WEBSITE**

Posting is **REQUIRED**



Title IX

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



Scope of “Educational Program or Activity”

- “No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”
- Jurisdictional trigger
- “locations, events, or circumstances over which the recipient [the school/district] exercised substantial control over both the respondent and the context in which the sexual harassment occurs . . .”

- *Respondent* means an individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment.
- *Complainant* means an individual who is alleged to be the victim of conduct that could constitute sexual harassment.
- Whether misconduct occurs on campus or off campus is not dispositive
- Title IX obligations for sexual harassment in K-12 institutions include incidents that occur off campus if:
 - if the off-campus incident occurs as part of the school’s “operations” or
 - if the school exercised substantial control over the respondent and the context of alleged sexual harassment that occurred off campus.



Definition of “Sexual Harassment”

- Conduct **on the basis of sex** that satisfies one or more of the following:
 - (1) 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 (quid pro quo sexual harassment);
 - (2) 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; or
 - (3) “Sexual assault”, “dating violence”, “domestic violence”, or “stalking” (as defined under Clery Act)



- Sexual assault” means an offense classified as a forcible or nonforcible sex offense under the uniform crime reporting system of the Federal Bureau of Investigation.
- “Dating violence” means violence committed by a person—
 - (A) who is or has been in a social relationship of a romantic or intimate nature with the victim; and
 - (B) where the existence of such a relationship shall be determined based on a consideration of the following factors:
 - (i) The length of the relationship.
 - (ii) The type of relationship.
 - (iii) The frequency of interaction between the persons involved in the relationship.

- “Domestic violence” includes felony or misdemeanor crimes of violence committed by a current or former spouse or intimate partner of the victim, by a person with whom the victim shares a child in common, by a person who is cohabitating with or has cohabitated with the victim as a spouse or intimate partner, by a person similarly situated to a spouse of the victim under the domestic or family violence laws of the jurisdiction receiving grant monies, or by any other person against an adult or youth victim who is protected from that person’s acts under the domestic or family violence laws of the jurisdiction.
- “Stalking” means engaging in a course of conduct directed at a specific person that would cause a reasonable person to—
 - (A) fear for his or her safety or the safety of others; or
 - (B) suffer substantial emotional distress.

- Definition under Title IX is different than interpretation under Title VII—must comply with both.
- Schools may continue to address harassing conduct that does not meet the new definition of sexual harassment under other provisions of the school's own code of conduct.

Definition of “Sexual Harassment”

- Conduct **on the basis of sex** that satisfies one or more of the following:
 - (1) 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 (quid pro quo sexual harassment);
 - (2) 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; or
 - (3) “Sexual assault”, “dating violence”, “domestic violence”, or “stalking” (as defined under Clery Act)



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 (quid pro quo sexual harassment)

- **Quid pro quo-#1**

- Encompasses situations where the quid pro quo nature of the incident is implied from the circumstances.
- Ex: if you do or don't do x, I will or won't do x
- Applies to all of a school's employees
- "unwelcome" as used in the first and second prongs of the definition of sexual harassment is a subjective element



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

- “Catch-all”-#2

- Focus factually on the nature of the misconduct itself – not on the victim's response to the misconduct.
- Determinations of severity, pervasiveness, and objective offensiveness depends on a constellation of factors including the ages and numbers of parties involved, disability status, positions of authority of involved parties etc.
- Whether harassing conduct is “objectively offensive” must be evaluated under a reasonable person standard, as a reasonable person in the complainant's position.
- No intent aspect.
- Does not require that a complainant has already suffered loss of education before being able to report sexual harassment



- Where conduct is sexual in nature, or where conduct references one sex or another, that suffices to constitute conduct “on the basis of sex.”
- Any individual – irrespective of sexual orientation or gender identity – may be victimized by the type of conduct defined as sexual harassment to which a school must respond under these final regulations.

- “If the conduct alleged in the formal complaint would not constitute sexual harassment as defined . . . then the recipient must dismiss the formal complaint with regard to that conduct for purposes of sexual harassment under title IX”
- BUT such a dismissal does not preclude action under another provision of the recipient’s code of conduct.

Reports of Sexual Harassment

- **The school is deemed to have actual knowledge of sexual harassment allegations if ANY staff member has knowledge.**
- The School is REQUIRED to respond promptly when it has actual knowledge in a way that is not deliberately indifferent.
- Any person may report sex discrimination, including sexual harassment (whether or not the person reporting is the person alleged to be the victim of conduct that could constitute sex discrimination or sexual harassment), in person, by mail, by telephone, or by electronic mail, using the contact information listed for the Title IX Coordinator, or by any other means that results in the Title IX Coordinator receiving the person's verbal or written report.
- Such a report may be made at any time (including during non-business hours) by using the telephone number or electronic mail address, or by mail to the office address, listed for the Title IX Coordinator.



Grievance Procedure for Sexual Harassment

Formal Complaints

1. Report
2. Supportive measures and information on formal complaint
3. Formal complaint
4. Written notice to parties
5. Investigation
6. Inspection and review of evidence
7. Investigative report with review and written response
8. Question and Answer period (and hearing if applicable)
9. Written determination
10. Appeal on certain bases
11. Notice of appeal and opportunity to respond
12. Final written decision on appeal

Report Received

Title IX Coordinator must promptly reach out to the individual who is alleged to be the victim of conduct that could constitute sexual harassment (aka the complainant) to:

1. discuss the availability of supportive measures,
2. consider the complainant's wishes with respect to supportive measures,
3. inform the complainant of the availability of supportive measures with or without the filing of a formal complaint, and
4. explain to the complainant the process for filing a formal complaint.



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.
- 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.
- Supportive measures may include 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, leaves of absence, increased security and monitoring of certain areas of the campus, and other similar 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.



Formal Complaint

- “*Formal complaint*” 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.
- 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.

Written Notice to Parties

- Upon receipt of a formal complaint (or later as additional allegations become known), the School has to provide the following written notice to the parties who are known
 1. Notice of the School's grievance process that complies with this section, including any informal resolution process.
 2. Notice of the allegations of sexual harassment potentially constituting sexual harassment, including sufficient details known at the time and with sufficient time to prepare a response before any initial interview.
 3. Notice that the respondent is presumed not responsible for the alleged conduct and that a determination regarding responsibility is made at the conclusion of the grievance process.
 4. Notice to the parties that they may have an advisor of their choice, who may be, but is not required to be, an attorney, and may inspect and review evidence.
 5. Notice of any provision in the School's code of conduct that prohibits knowingly making false statements or knowingly submitting false information during the grievance process.



Investigation

- More to come later...

Investigative Report

- Prior to completion of their investigative report, send to each party and the party's advisor, if any, the evidence subject to inspection and review in an electronic format or a hard copy.
- The parties must have at least ten (10) business days to submit a written response, which the investigator will consider prior to completion of the investigative report.
- Create an investigative report that fairly summarizes relevant evidence.
- Send investigative report to each party at least 10 days prior to the determination regarding responsibility.
- Allow for review and written response.



Hearing and Question and Answer Period

- Institutions of higher education must hold a hearing prior to a determination of responsibility.
- **K-12 schools do not have to hold a hearing**, though they may choose to add a hearing to their grievance procedure.
- With or without a hearing, the decision-maker must still 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.

Hearing—K-12 has discretion on how to implement hearings, the following are higher ed hearing requirements that are optional for K-12

- At the live (or virtual) hearing, the decision-maker must permit each party's advisor to ask the other party and any witnesses all relevant questions and follow-up questions, including those challenging credibility.
- Such cross-examination at the live hearing must be conducted directly, orally, and in real time by the party's advisor of choice and never by a party personally.
- At the request of either party, the school must provide for the live hearing to occur with the parties located in separate rooms.
- **TRAIN ON TECHNOLOGY**



Hearing—K-12 has discretion on how to implement hearings, the following are higher ed hearing requirements that are optional for K-12

- Only relevant cross-examination and other questions may be asked of a party or witness.
- Before a complainant, respondent, or witness answers a cross-examination or other question, the decision-maker must first determine whether the question is relevant and explain any decision to exclude a question as not relevant.
- If a party does not have an advisor present at the live hearing, the school must provide without fee or charge to that party, an advisor of the school's choice, who may be, but is not required to be, an attorney, to conduct cross-examination on behalf of that party.



- If a party or witness does not submit to cross-examination at the live hearing, the decision-maker must not rely on any statement of that party or witness in reaching a determination regarding responsibility;
- The decision-maker cannot draw an inference about the determination regarding responsibility based solely on a party's or witness's absence from the live hearing or refusal to answer cross-examination or other questions.
- Schools must also create an audio or audiovisual recording, or transcript, of any live hearing and make it available to the parties for inspection and review.



Written Determination

- Provided simultaneously to the parties;
- Identification of the allegations potentially constituting sexual harassment;
- A description of the procedural steps taken from the receipt of the formal complaint through the determination;
- Findings of fact supporting the determination;
- Conclusions regarding the application of the School's code of conduct to the facts;
- A statement of, and rationale for, the result as to each allegation
 - A determination regarding responsibility,
 - any disciplinary sanctions the School imposes on the respondent,
 - whether remedies designed to restore or preserve equal access to the School's education program or activity will be provided by the School to the complainant;
- Procedures and permissible bases for appeal.



Appeal Bases

(A) Procedural irregularity that affected the outcome of the matter;

(B) 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;

(C) The Title IX Coordinator, investigator(s), or decision-maker(s) had a conflict of interest or bias for or against complainants or respondents generally or the individual complainant or respondent that affected the outcome of the matter; or

(D) Any other bases allowed equally to either party.



Appeal

- Different decision-maker
- Notice to the other party
- Opportunity for both parties to submit a written statement in support of, or challenging, outcome
- Written decision describing the result of the appeal and the rationale for the result and provided simultaneously to the parties
- Make sure no conflict of interest or bias
- Train

Overarching Requirements for Sexual Harassment Grievance Procedure

1. Have Presumption that Respondent is Not Responsible
2. Exclude Privileged Information
3. Follow Grievance Procedure Before Imposing Sanctions
4. No Bias or Conflict of Interest
5. Consider All Relevant Evidence Under Proper Standard (Preponderance or Clear and Convincing)
6. Include Range of Possible Sanctions/Remedies and Describe Supportive Measures
7. Follow Reasonably Prompt Timelines
8. Removal/Administrative Leave Permitted in Certain Instances
9. Remember Grounds for Dismissal
10. Informal Resolution Process After Formal Complaint Is Optional
11. Train Staff
12. Keep Records
13. No Retaliation
14. Maintain Confidentiality



Evidence

- Objective evaluation of all relevant evidence – including both inculpatory and exculpatory evidence
- Credibility determinations may not be based on a person's status as a complainant, respondent, or witness.
- The standard of evidence to be used to determine responsibility must be either the clear and convincing evidence standard or the preponderance of the evidence standard.

Good Cause Delay—With Written Notice

- Good cause may include considerations such as:
 - The absence of a party, a party's advisor, or a witness;
 - Concurrent law enforcement activity; or
 - The need for language assistance or accommodation of disabilities.

Emergency Removal

- BEFORE removal
 - Undertake an individualized safety and risk analysis, and
 - Determine 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.
- Provide the respondent with notice and an opportunity to challenge the decision immediately following the removal.
- Follow the IDEA and Section 504 before any removals.



Grounds for Dismissal

- The School MUST investigate the formal complaint
- If the conduct alleged in the formal complaint
 1. would not constitute sexual harassment even if proved,
 2. did not occur in the School's education program or activity, or
 3. did not occur against a person in the United States,

then the School must dismiss the formal complaint with regard to that conduct for purposes of sexual harassment under Title IX.

- However, such a dismissal does not preclude action under another provision of the School's code of conduct.



Permissive Grounds for Dismissal

The School may also dismiss the formal complaint or any allegations therein, if at any time during the investigation:

1. a complainant notifies the Title IX Coordinator in writing that the complainant would like to withdraw the formal complaint or any allegations therein;
2. the respondent is no longer enrolled or employed by the School; or
3. specific circumstances prevent the School from gathering evidence sufficient to reach a determination as to the formal complaint or allegations therein.



Informal Resolution

- Cannot require that the student or employee waive their right to the grievance process
- Cannot go forward with an informal process for sexual harassment allegations prior to there being a formal complaint
- Obtain voluntary written consent
- Not permitted for allegations that an employee sexually harassed a student
- Written notice to the parties is required, disclosing:
 1. the allegations,
 2. the requirements of the informal resolution process including the circumstances under which it precludes the parties from resuming a formal complaint arising from the same allegations,
 3. that at any time prior to agreeing to a resolution, any party has the right to withdraw from the informal resolution process and resume the grievance process with respect to the formal complaint, and
 4. any consequences resulting from participating in the informal resolution process, including the records that will be maintained or could be shared



Recordkeeping

- Keep for 7 years
- Investigation Records
- Appeal Records
- Informal Resolution Records
- Training Materials
- Response to all reports and formal complaints

No Retaliation Provision Added For All Sex Discrimination Complaints

- No recipient 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.
- 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 or this part, constitutes retaliation.
- Complaints alleging retaliation may be filed according to the grievance procedures for sex discrimination complaints not alleging sexual harassment



Maintain Confidentiality

- The recipient must keep confidential the identity of any individual who has made a report or complaint of sex discrimination, including any individual who has made a report or filed a formal complaint of sexual harassment, any complainant, any individual who has been reported to be the perpetrator of sex discrimination, any respondent, and any witness, except as may be permitted by [FERPA], or as required by law, or to carry out the purposes of [Title IX], including the conduct of any investigation, hearing, or judicial proceeding arising thereunder.



Grievance Procedures for Other Sex Discrimination

- A recipient must adopt and publish grievance procedures that provide for the prompt and equitable resolution of student and employee complaints alleging any action that would be prohibited by this part AND a grievance process that complies with § 106.45 for formal complaints as defined in § 106.30.
- A recipient must provide notice of the recipient's grievance procedures and grievance process, including how to report or file a complaint of sex discrimination, how to report or file a formal complaint of sexual harassment, and how the recipient will respond.



The Investigation

Conducting the Investigation

- Requirement 1: Trained Investigator
- Requirement 2: Equitable Treatment of Parties
- Requirement 3: Impartial Assessment (no prejudgment, no bias, no conflict of interest)
- Requirement 4: Objective Evaluation of the Evidence
- Requirement 5: Detailed Written Investigative Report
- Requirement 6: Detailed Written Decision-Maker Report

Title IX Team Members

Position	Scope of Responsibility	Requirements
Title IX Coordinator	Person designated to coordinate and conduct intake reports and complaints, initiate formal complaints, and implement supportive measures, as necessary.	N/A
Investigator	Person designated to investigate, gather evidence, and compile an investigation report.	May be the Title IX Coordinator.
Decision-Maker	Person who evaluates evidence, rules on relevancy during hearing (if any), issues a written determination regarding responsibility.	Must not be the same person as the Title IX Coordinator or the Investigator.
Appeal Designee	Person designated to handle appeal, if any.	Must not be the same person as the Title IX Coordinator, Investigator, or Decision-Maker.



Timeline and Notices

- “Reasonably prompt” (30 working days to gather the evidence).
- Temporary delays can be granted for good cause.
- Investigation should start immediately.
- If union involved expect union reps to be present from the start and review any applicable CBA provisions.
- Written notice of the details regarding investigative meetings, including the purpose.



The Duty to Investigate

- The thoroughness of the investigation is critical to the school's ability to determine whether or not misconduct or harassment occurred and which type of disciplinary action, if any, is required as a matter of law or organizational policy.
- Failure to carry out an adequate investigation may contribute to potential liability for the district.

Guidelines for Talking to Complainant

- Take the complaint seriously
- Listen objectively, without personal bias
- Focus on the facts and relevant details
- Document details

Ask Questions, such as:

- “Please describe the situation.”
- “Where/when did the behavior/incident occur?”
- “Who was involved?”
- “Were there any witnesses?”
- “Did you talk w/ anyone else about it?”
- “Has this happened to you before?”
- “To anyone else you know of?”
- “What would you like to see happen?”



Guidelines for Interviewing Witnesses

- Explain purpose of meeting
- Describe the circumstances generally (time & location only)
- Do not identify victim or harasser initially
- Focus on witness' observations, not opinions
- Talk w/ all witnesses in quick succession

Ask Questions to determine if the witness:

- was in the location where harassment alleged?
- observed any potentially harassing conduct?
- knows who was involved in the incident?
- can identify others who were present?
- was also target of unwelcome behavior?
- discussed the alleged incident with the complainant before the complaint was filed?

Document all the information provided by the witnesses.



Guidelines for Talking to Respondent

- Insure that the meeting place is private.
 - Explain the purpose of the meeting.
 - Be serious and to the point.
 - Explain meeting is confidential.
-
- Focus on the behavior, not intentions.
 - Do not identify witnesses, at least initially.
 - Be unbiased. Listen and be nonjudgmental.
 - Ask for separate response to each allegation.

Document the meeting.



Maintaining Confidentiality

- Section 106.71 requires schools to keep party and witness identities confidential except as permitted by law or FERPA, and as needed to conduct an investigation or hearing (30316)
- No one other than advisor is permitted to attend the hearing with a party, unless otherwise required by law (30339)



Burden of Proof 106.45(b)(5)(i)

- Schools cannot restrict either party's ability to discuss the allegations or gather and present evidence, HOWEVER . . .
- Burden of proof sufficient to reach a determination regarding responsibility, rest on the school.
- Burden of proof is on school to conduct investigation, interview witnesses, gather evidence.



Impartiality Regarding Burden of Proof

- The school and investigator must remain neutral and impartial during the investigative process.
 - Schools should not act as police to try to uncover evidence to prove guilt.
 - Schools should not act as defense attorney to try to get alleged perpetrators cleared.
- Objective is truth-seeking mission.

Emphasis on Impartiality

It is critically important that those individuals designated as Investigator, Decision-Maker, and Appeal Designee understand their duty to serve impartially during the process.

1. Individuals must treat parties equitably
2. Individuals must avoid prejudgment of the facts at issue.
3. Individuals must avoid conflicts of interest and recuse themselves when conflicts occur.
4. Individuals must avoid bias in the process in favor of either Complainants or Respondents.



Being Impartial

DO . . .

- treat parties equitably
- acknowledge unfair societal biases
- acknowledge unfair personal biases
- have awareness of your own biases
- ensure that the evidence is considered in its entirety, without outside influence or preconceived notions.

DON'T . . .

- act in favor of either party
- base credibility determinations on a person's status as complainant, respondent, witness, etc.
- base credibility determinations on a person's demographic or personal characteristics
- judge a party "due to inability to recount each specific detail of an incident in sequence, whether such inability is due to trauma, the effects of drugs or alcohol, or simple fallibility of human memory." (Preamble 30323)

Treating Parties Equitably 106.45(b)(1)(i)

Treat complainants and respondents equitably:

- Complainants = Provide remedies to a complainant where a determination of responsibility for sexual harassment has been made against the respondent.
- Respondents = Follow a grievance process that complies with Title IX before the imposition of any disciplinary sanctions or other actions that are not supportive measures against a respondent.



Presumption of Non-Responsibility 106.45(b)(1)(iv)

- Include in written notice to the parties a presumption that the respondent is not responsible for the alleged conduct until a determination regarding responsibility at the conclusion of the grievance process.

Avoiding Prejudgment of the Facts at Issue

To pass judgment prematurely or without sufficient reflection or investigation.

- Avoid rumors and speculation regarding alleged incident.
- Keep an open mind and listen to all the facts presented.
- Let the evidence and standard of proof guide your determination.
- Avoid filling in evidentiary gaps with statistics, personal beliefs, or information about trauma.
- Each case is unique and different.



106. 45(b)(1)(iii) Title IX Personnel Must be Conflict of Interest And Bias Free

(iii) Require that any individual designated by a recipient as a Title IX Coordinator, investigator, decision-maker, or any person designated by a recipient to facilitate an informal resolution process not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent. A recipient must ensure that Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process receive training on the definition of sexual harassment in § 106.30, the scope of the recipient's education program or activity ...



Bias and Conflict of Interest: Concerns Raised in Comments in Preamble

- Does decision-maker with financial and reputational interests aligned with the school create a conflict?
- Are all paid staff of school biased in favor of the school that employs them?
- Would the Title IX Coordinator directly supervising the decision-maker create a conflict?
- Would past tweets or public comments that appear to support complainants or respondents be sufficient to show bias?
- Does past advocacy for a survivor's or wrongfully accused's rights group create conflict or bias?
- Are perceived conflicts of interest and biases sufficient or do the conflicts/biases have to be actual?



Response to Comments

- Final regulations “leave recipients flexibility to use their own employees, or to outsource Title IX investigation and adjudication functions, and the Department encourages recipients to pursue alternatives to the inherent difficulties that arise when a recipient’s own employees are expected to perform functions free from conflicts of interest and bias.” (30251)
- No *per se* prohibited conflicts of interest under 106.45(b)(1)(iii) in using employees or administrative staff. (30352)—including supervisory hierarchies (but see portion about decision-makers and Title IX Coordinator as supervisor).
- No *per se* violations of 106.45(b)(1)(iii) for conflict of interest or bias for professional experiences or affiliations of decision-makers and other roles in the grievance process. (30353)



Response to Preamble Discussion

- Provides as an example that it is not a *per se* bias or conflict of interest to hire professionals with histories of working in the field of sexual violence. (30252)
- Cautions against using generalizations to identify bias and conflict of interest and, instead, recommends using a reasonable-person test to determine whether bias exists; e.g., not all self-professed feminists are biased against men, not all men are incapable of being sensitive to women, etc. (30252).
- Requires training on impartiality.
- Doesn't specify whether has to be perceived vs. actual bias or conflict.

Adequate And Unbiased Training

- Investigators and decision-makers must be free from bias or conflicts of interest.
- There is a heavy emphasis in the regulations on training the individuals involved in the investigation and the hearing process.
- A recipient must ensure that Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process receive training on how to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias.

Practical Takeaways

- Schools must have training to ensure no conflict/bias.
- Schools may have a process for parties to assert claims of conflict/bias during the grievance process.
- Conflict and bias of Title IX personnel is a basis for appeal.

Avoiding Conflicts of Interests

- Conflicts of interests are not specifically defined in the regulations.
- A situation in which the concerns or aims of two different parties are incompatible, such as when a person could derive a financial, professional, personal, or other benefit from his official actions or decisions.
- If there are any potential or actual conflicts of interests, the impacted Title IX Coordinator, Decision-Maker, Appeals Designee should recuse themselves or be removed.



Avoiding Bias

- Prejudice in favor of or against one thing, person, or group compared with another.
- No bias against a particular complainant or respondent.
- No bias against complainants or respondents generally.
- Must not rely on gender, racial, economic, other stereotypes.
- Examples of stereotypes in the comments to the regulations (30253):
 - Women have regret sex and lie about sexual assaults;
 - Men are sexually aggressive or likely to perpetrate sexual assault;
 - Certain marginalized groups more likely to be victimized. (30259-30260)

Examples of Bias

- Situation where investigator or decision-maker has prior involvement or knows complainant, respondent, or witness and has made a credibility determination regarding that person.
- Situation where information “gleaned” by the investigator is shared with the decision-maker outside the investigation report (in meetings to discuss pending cases, in passing while at work, etc.).
- Other biases exhibited during grievance process.

Race
Ethnicity
Gender

Sexual Orientation
Socio-economic Class
Age

Required Multiple-Investigator Model

- No more single-investigator (34 CFR 106.45(b)(7)(i)).
- The decision-maker at a hearing cannot be the same person(s) who served as the Title IX Coordinator or investigator.
- Title IX Coordinator may serve as investigator.
- Cost issue for smaller institutions.

Duty to Avoid Prejudgment, Bias, And Conflicts of Interest

- Your focus is the integrity of the process.
- Truth-seeking objective.
- Focus is not on reaching an outcome.
- Disclose all potential and actual conflicts.
- Recognize and understand what your biases are so that you can put them aside.
- Cultural competency – understand your unconscious bias.
- Check ego at the door.



Unconscious Bias Awareness



- There are many tools to recommend for Title IX Coordinators, Investigators, Decision-Makers to review.
- Harvard has a series of tests to raise awareness of our own unconscious or implicit bias.
- <https://implicit.harvard.edu/implicit/takeatest.html>
- Encourage your Title IX Team to privately take the test or use other tools to raise their own awareness as part of their training.



Project Implicit®

The Harvard Test includes numerous categories and asks a series of questions to help assess your implicit or unconscious biases.

- Raises awareness.
- Helps you check your own implicit bias to remain impartial.

Skin-tone IAT

Skin-tone ('Light Skin - Dark Skin' IAT). This IAT requires the ability to recognize light and dark-skinned faces. It often reveals an automatic preference for light-skin relative to dark-skin.

Disability IAT

Disability ('Disabled - Able' IAT). This IAT requires the ability to recognize symbols representing able and disabled individuals.

Transgender IAT

Transgender ('Transgender People - Cisgender People' IAT). This IAT requires the ability to distinguish photos of transgender celebrity faces from photos of cisgender celebrity faces.

Weapons IAT

Weapons ('Weapons - Harmless Objects' IAT). This IAT requires the ability to recognize White and Black faces, and images of weapons or harmless objects.

Native IAT

Native American ('Native - White American' IAT). This IAT requires the ability to recognize White and Native American faces in either classic or modern dress, and the names of places that are either American or Foreign in origin.

Weight IAT

Weight ('Fat - Thin' IAT). This IAT requires the ability to distinguish faces of people who are obese and people who are thin. It often reveals an automatic preference for thin people relative to fat people.

Gender-Science IAT

Gender - Science. This IAT often reveals a relative link between liberal arts and females and between science and males.

Religion IAT

Religion ('Religions' IAT). This IAT requires some familiarity with religious terms from various world religions.

Arab-Muslim IAT

Arab-Muslim ('Arab Muslim - Other People' IAT). This IAT requires the ability to distinguish names that are likely to belong to Arab-Muslims versus people of other nationalities or religions.

Race IAT

Race ('Black - White' IAT). This IAT requires the ability to distinguish faces of European and African origin. It indicates that most Americans have an automatic preference for white over black.

Asian IAT

Asian American ('Asian - European American' IAT). This IAT requires the ability to recognize White and Asian-American faces, and images of places that are either American or Foreign in origin.

Gender-Career IAT

Gender - Career. This IAT often reveals a relative link between family and females and between career and males.

Age IAT

Age ('Young - Old' IAT). This IAT requires the ability to distinguish old from young faces. This test often indicates that Americans have automatic preference for young over old.

The Investigator's Responsibility

- Evidence
- Relevancy
- Written Report

Evidence And Investigative Report

- Prior to completion of investigative report, school must send to the parties and their advisors all evidence (inculpatory and exculpatory) compiled that is directly related to the allegations and provide at least 10 days to review and respond in writing.
 - Inculpatory = evidence that tends to incriminate
 - Exculpatory = evidence that tends to clear someone of guilt
- The investigator shall prepare an investigative report that fairly summarizes relevant evidence and share the report (10 days prior to the hearing) with the parties and their advisors for review and response.

Related-to vs. Relevant Evidence

- **Related-to =**

- Investigator must collect all evidence that is related to the allegations whether or not relevant
 - Includes evidence otherwise excluded under rape shield protections
 - Excludes evidence subject to privilege, medical records

- **Relevant =**

- Relevant evidence is all evidence related to, except that which is protected under the rape shield provisions (and not otherwise privileged, medical records)
- Evidence pertinent to proving whether facts material to the allegation are more or less likely to be true



What is Relevant? (NOT based on Rules of Evidence)

- Any fact, testimony, other evidence related to a material issue involving the Complainant's allegation or the Respondent's defense that helps the decision makers come to a determination under the standard of evidence.
- Under preponderance of the evidence standard, ask does this fact, testimony, or evidence help me determine whether there was more likely than not a violation?
- Under clear and convincing standard, ask does this fact, testimony, or evidence help me determine if a fact is highly probable to be true?



Rape Shield Law – Complainants

- 34 CFR 45(b)(6)(i)
- Evidence and questions regarding complainants sexual predisposition or prior sexual behavior are not relevant.
- Unless
 - Offered to prove someone else committed alleged conduct
 - Offered to prove past sexual relationship with Respondent to establish consent

Rape Shield Law - Respondents

- Rape shield protection do not apply to Respondents.
- Evidence of sexual behavior of respondents may be included.
- “The Department reiterates that the rape shield language . . . Does not pertain to the sexual predisposition or sexual behavior of respondents, so evidence of a pattern of inappropriate behavior by an alleged harasser must be judged for relevance as any other evidence must be.”

Privileged Evidence Excluded 106.45(b)(1)(x)

- Precludes a recipient from using information or evidence protected by a legally recognized privilege unless the holder of the privilege has waived the privilege.
 - Medical records
 - Mental health treatment records
 - Attorney-client communications
 - Spousal privilege

Investigation Report

- Institution must create a written report that fairly summarizes relevant evidence.
- The parties must have an equal opportunity to inspect the investigative report and the evidence (inculpatory or exculpatory) at least 10 days prior to the hearing.
- The parties must be allowed to provide a written response to anything in the record.

Contents of Investigative Report

1. Summarize all relevant evidence.
 2. Evaluate all relevant evidence objectively, including both inculpatory and exculpatory evidence.
 3. Provide credibility determinations (must not be based on an individual's status as a Complainant, Respondent, or witness).
- Submit final report to the Decision-maker for a determination of responsibility.



Standard of Proof

- The regulations require that districts select the standard of evidence to determine responsibility within grievance process (preponderance of the evidence or clear and convincing).
 - Preponderance of the evidence = more likely than not to be true (30373, fn. 1409), i.e., 51% or more likely that conduct did or did not occur
 - Clear and convincing = highly probable to be true (30373, fn. 1409), i.e., higher bar, evidence is more than 51% but less than beyond a reasonable doubt
- Must apply same standard to all formal complaints of sexual harassment whether the respondent is a student or an employee (including tenured employee).



Decision-Maker Written Determination

Section 106.45(b)(7)

- The decision-maker (who cannot be the same person as the Title IX Coordinator or the investigator) must issue a written determination regarding responsibility, including:
 1. findings of fact;
 2. conclusions regarding whether the alleged conduct occurred;
 3. rationale for the result as to each allegation;
 4. any disciplinary sanctions imposed on the respondent; and
 5. whether remedies will be provided to the complainant.
- The written determination must be sent simultaneously to the parties along with information about how to file an appeal.



Lawyerly Disclaimer . . . (we can't help it)

- These training materials are informational in nature and should not be construed as legal advice and are not provided to address specific grievance situations.
- Consult with your legal counsel as necessary to address specific Title IX report and grievance situations and investigations.
- Use the chat function to ask general questions, or email your school law attorney, or Aimee Gibbs or Chelsea Canaday at:
- agibbs@dickinsonwright.com
- ccanaday@dickinsonwright.com



Summary of Major Provisions of the Department of Education’s Title IX Final Rule and Comparison to the NPRM

Issue	Provisions in Final Rule (Bold typeface indicates language added in the Final Rule, responsive to public comment)	Provisions in NPRM (Bold typeface indicates language not included in the Final Rule, responsive to public comment)
<p>1. <i>Notice to Schools, Colleges, Universities, and other Recipients of Federal Funds (“Schools”):</i></p> <p>Actual Knowledge</p>	<p>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 school, or to any employee of an elementary and secondary school.</p> <p>- “Notice” includes, but is not limited to, a report of sexual harassment to the Title IX Coordinator as described in the Final Rule.</p>	<p>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 school, or to a teacher in the elementary and secondary context with regard to student-on-student harassment.</p>
<p>2. <i>Definition of Sexual Harassment for Title IX Purposes</i></p>	<p>Sexual harassment means conduct on the basis of sex that satisfies one or more of the following:</p> <p>(i) A school employee conditioning education benefits on participation in unwelcome sexual conduct (i.e., <i>quid pro quo</i>); or</p> <p>(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</p> <p>(iii) Sexual assault (as defined in the Clery Act), dating violence, domestic violence, or stalking as defined in the Violence Against Women Act (VAWA).</p>	<p>Sexual harassment means:</p> <p>(i) A school employee conditioning education benefits on participation in unwelcome sexual conduct (i.e., <i>quid pro quo</i>); or</p> <p>(ii) Unwelcome conduct on the basis of sex, that is so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the school’s education program or activity; or</p> <p>(iii) Sexual assault (as defined in the Clery Act regulations).</p>

Summary of Major Provisions of the Department of Education’s Title IX Final Rule and Comparison to the NPRM

<p>3. <i>Sexual Harassment Occurring in a School’s “Education Program or Activity” and “in the United States”</i></p>	<p>Schools must respond when sexual harassment occurs in the school’s education program or activity, against a person in the United States. 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, and also includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution.</p>	<p>School must respond when sexual harassment occurs in the school’s education program or activity, against a person in the United States.</p>
<p>4. <i>Accessible Reporting to Title IX Coordinator; Adoption & Publication of Title IX Procedures</i></p>	<p>The Final Rule expands a school’s obligations to ensure its educational community knows how to report to the Title IX Coordinator by stating:</p> <ul style="list-style-type: none"> - Each school must designate and authorize at least one employee to coordinate its efforts to comply with its Title IX responsibilities, which employee must be referred to as the “Title IX Coordinator.” - The school must notify applicants for admission and employment, students, parents or legal guardians of elementary and secondary school students, employees, and all unions, of the name or title, office address, electronic mail address, and telephone number of the employee or employees designated as the Title IX Coordinator. - Any person may report sex discrimination, including sexual harassment (whether or not the person reporting is the person alleged to be the victim of conduct that could constitute sex discrimination or sexual harassment), in person, by mail, by telephone, or by electronic mail, using the contact information listed for the Title IX Coordinator, or by any other means that results in the Title IX Coordinator receiving the person’s verbal or written report. 	<p>The NPRM stated:</p> <ul style="list-style-type: none"> - Each school must designate at least one employee to coordinate its efforts to comply with its Title IX responsibilities. - The school must notify all its students and employees of the name or title, office address, electronic mail address, and telephone number of the employee or employees designated pursuant to this paragraph.

Summary of Major Provisions of the Department of Education’s Title IX Final Rule and Comparison to the NPRM

	<ul style="list-style-type: none"> - Such a report may be made at any time (including during non-business hours) by using the telephone number or electronic mail address, or by mail to the office address, listed for the Title IX Coordinator. - Schools must prominently display on their websites the required contact information for the Title IX Coordinator. 	
<p>5. <i>School’s Mandatory Response Obligations:</i></p> <p>Deliberate Indifference Standard</p>	<p>A school must respond promptly to Title IX sexual harassment in a manner that is not deliberately indifferent, which means in a way that is not clearly unreasonable in light of the known circumstances.</p> <p>A school’s mandatory response must include:</p> <ul style="list-style-type: none"> - Offering supportive measures to the complainant (i.e., the person alleged to be the victim). - The Title IX Coordinator promptly contacting 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. - Following a grievance process that complies with the Final Rule before the imposition of any disciplinary sanctions or other actions that are not supportive measures, against a respondent. - Must 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. 	<p>A school must respond to Title IX sexual harassment in a manner that is not deliberately indifferent, which means in a way that is not clearly unreasonable in light of the known circumstances.</p> <p>The NPRM offered postsecondary institutions a “safe harbor” against a finding of deliberate indifference where, in the absence of a formal complaint, a postsecondary institution implemented supportive measures for the complainant. This “safe harbor” has been removed in the Final Rule. The Final Rule requires all schools to offer supportive measures to every complainant, eliminating the need to incentivize supportive measures through a safe harbor.</p>

Summary of Major Provisions of the Department of Education’s Title IX Final Rule and Comparison to the NPRM

<p>6. <i>School’s Mandatory Response Obligations:</i></p> <p>Investigating a Formal Complaint</p>	<p>The Final Rule requires schools to investigate formal complaints of sexual harassment and does not offer schools any safe harbors against the Department finding that a school responded deliberately indifferently or otherwise in a manner that constitutes sex discrimination or violates Title IX or Title IX regulations. In response to a formal complaint, a recipient must follow a grievance process that complies with the Final Rule. With or without a formal complaint, a recipient must comply with all the mandatory response obligations described in Issue #5 above.</p>	<p>The NPRM required schools to investigate and adjudicate formal complaints of sexual harassment consistent with the grievance procedures described in § 106.45.</p> <ul style="list-style-type: none"> - The NPRM offered schools a “safe harbor” against a finding of deliberate indifference (or other finding that the school committed sex discrimination) if schools followed procedures consistent with § 106.45 in response to a formal complaint. This “safe harbor” has been removed in the Final Rule. - The NPRM required a school’s Title IX Coordinator to file a formal complaint any time the school had notice of multiple reports of sexual harassment against a particular respondent (and then offered a “safe harbor” for following procedures consistent with § 106.45). This mandate for the Title IX Coordinator to file a formal complaint, and corresponding “safe harbor,” have been removed in the Final Rule.
---	---	--

Summary of Major Provisions of the Department of Education’s Title IX Final Rule and Comparison to the NPRM

<p>7. <i>School’s Mandatory Response Obligations:</i></p> <p>Defining “Complainant,” “Respondent,” “Formal Complaint” and “Supportive Measures”</p>	<p>When responding to sexual harassment (e.g., by offering supportive measures to a complainant, refraining from disciplining a respondent without following a Title IX grievance process, or investigating formal complaints of sexual harassment), the Final Rule clarifies the definitions of complainant, respondent, and formal complaint so that schools, students, and employees clearly understand how a school must respond to sexual harassment incidents in a way that supports the alleged victim and treats both parties fairly.</p>	<p>The NPRM defined complainant, respondent, formal complaint, and supportive measures as follows:</p>
<p>“Complainant”</p>	<p>The Final Rule defines “complainant” as an individual who is alleged to be the victim of conduct that could constitute sexual harassment. - The 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 matters.</p>	<p>The NPRM defined “complainant” as an individual who has reported being the victim of conduct that could constitute sexual harassment, or on whose behalf the Title IX Coordinator has filed a formal complaint. For purposes of this definition, the person to whom the individual has reported must be the Title IX Coordinator or another person to whom notice of sexual harassment results in the school’s actual knowledge.</p>
<p>“Respondent”</p>	<p>The Final Rule defines “respondent” as an individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment.</p>	<p>The NPRM defined “respondent” as an individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment.</p>
<p>“Formal Complaint”</p>	<p>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.</p>	<p>The NPRM defined “formal complaint” as a document signed by a complainant or by the Title IX Coordinator alleging sexual harassment against a respondent about conduct within its education program or activity and requesting initiation of the school’s grievance procedures consistent with § 106.45.</p> <p>The Final Rule expands the definition of the kind of document that may constitute a formal complaint, and expands the ways in which a formal complaint may be</p>

Summary of Major Provisions of the Department of Education’s Title IX Final Rule and Comparison to the NPRM

<p>“Supportive Measures”</p>	<ul style="list-style-type: none"> - A formal complaint may be filed with the Title IX Coordinator in person, by mail, or by electronic mail, by using the contact information required to be listed for the Title IX Coordinator under the Final Rule, and by any additional method the school designates. - The phrase “document filed by a complainant” means a document or electronic submission (such as by electronic mail or through an online portal provided for this purpose by the school) that contains the complainant’s physical or digital signature, or otherwise indicates that the complainant is the person filing the formal complaint. - Where the Title IX Coordinator signs a formal complaint, the Title IX Coordinator is not a complainant or otherwise a party during a grievance process, and must comply with requirements for all Title IX personnel to be free from conflicts and bias. <p>The Final Rule retains the NPRM’s definition of “supportive measures” but clarifies that the purpose of supportive measures is equal access to education.</p> <ul style="list-style-type: none"> - The Final Rule clarifies that 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. - When a Title IX Coordinator signs a formal complaint, such action is not taken on behalf of a complainant, and the Title IX Coordinator does not become a party. 	<p>filed, so that the school and complainant clearly understand when a complainant desires the school to investigate sexual harassment allegations, and complainants (including parents and guardians, as applicable) have accessible options for filing a formal complaint.</p> <p>The NPRM defined “supportive measures” to mean:</p> <ul style="list-style-type: none"> - Non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, without fee or charge, to the complainant or 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 access to the recipient’s education program or activity, without unreasonably burdening the other party; protect the safety of all parties and the recipient’s educational environment; and deter sexual harassment. - Supportive measures may include 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.
------------------------------	--	--

Summary of Major Provisions of the Department of Education’s Title IX Final Rule and Comparison to the NPRM

<p>8. <i>Investigations</i></p>	<p>Similarly to the NPRM, the Final Rule states that the school must investigate the allegations in any formal complaint, send written notice to both parties of the allegations upon receipt of a formal complaint.</p> <p>The Final Rule adds the following privacy protection for parties during a Title IX sexual harassment investigation: - The Final Rule states that 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.</p>	<p>The NPRM required school to investigate the allegations in a formal complaint, send written notice of the allegations to both parties upon receipt of a formal complaint, and investigate under specified procedures. The Final Rule retains those required procedures and adds protection against using a party’s treatment records during a grievance process.</p>
<p>9. <i>Hearings:</i></p> <p>(a) Live Hearings & Cross-Examination (for Postsecondary recipients)</p>	<p>The Final Rule adds provisions to the “live hearing with cross-examination” requirement for postsecondary institutions, and clarifies that hearings are optional for K-12 schools (and any other recipient that is not a postsecondary institution).</p> <p>(a) For postsecondary institution recipients, the school’s grievance process must provide for a live hearing: - At the live hearing, the decision-maker(s) must permit each party’s advisor to ask the other party and any witnesses all relevant questions and follow-up questions, including those challenging credibility. - Such cross-examination at the live hearing must be conducted directly, orally, and in real time by the</p>	<p>Under the NPRM, adjudication of formal complaints differed for postsecondary institution recipients, and K-12 schools. The Final Rule retains this approach with clarifications.</p> <p>(a) For institutions of higher education the school’s grievance procedure must provide for a live hearing: - At the hearing the decision-maker must permit each party to ask the other party and any witnesses all relevant questions and follow-up questions, including those challenging credibility. - Such cross-examination must be conducted by the party’s advisor of choice; if a party does not have an advisor present at the hearing, the school must provide that party</p>

Summary of Major Provisions of the Department of Education’s Title IX Final Rule and Comparison to the NPRM

	<p>party’s advisor of choice and never by a party personally.</p> <ul style="list-style-type: none"> - At the request of either party, the recipient must provide for the live hearing to occur with the parties located in separate rooms with technology enabling the decision-maker(s) and parties to simultaneously see and hear the party answering questions. - Only relevant cross-examination and other questions may be asked of a party or witness. Before a complainant, respondent, or witness answers a cross-examination or other question, the decision-maker must first determine whether the question is relevant and explain any decision to exclude a question as not relevant. - If a party does not have an advisor present at the live hearing, the recipient must provide without fee or charge to that party, an advisor of the school’s choice, who may be, but is not required to be, an attorney, to conduct cross-examination on behalf of that party. - If a party or witness does not submit to cross-examination at the live hearing, the decision-maker(s) must not rely on any statement of that party or witness in reaching a determination regarding responsibility; provided, however, that the decision-maker(s) cannot draw an inference about the determination regarding responsibility based solely on a party’s or witness’s absence from the live hearing or refusal to answer cross-examination or other questions. - Live hearings pursuant to this paragraph may be conducted with all parties physically present in the same geographic location or, at the school’s discretion, any or all parties, witnesses, and other participants may appear at the live hearing virtually, with 	<p>an advisor aligned with that party to conduct cross-examination.</p> <ul style="list-style-type: none"> - At the request of either party the recipient must provide for cross-examination to occur with the parties located in separate rooms with technology enabling the decision-maker and parties to simultaneously see and hear the party answering questions. <p>The Final Rule removes the “aligned with that party” language. If a school must provide a party with an advisor, such a provided advisor need not be an attorney providing legal representation to the party. No training or qualification is necessary for a person to serve as a provided advisor. Parties retain the opportunity to select their own advisor of choice. If a party does not exercise that opportunity then the school must provide an advisor of the school’s own choosing, to that party, merely for the purpose of relaying the party’s cross-examination questions to the other party and witnesses so that a party never personally conducts cross-examination.</p> <ul style="list-style-type: none"> - If a party or witness does not submit to cross-examination at the hearing, the decision-maker must not rely on any statement of that party or witness in reaching a determination regarding responsibility.
--	--	---

Summary of Major Provisions of the Department of Education’s Title IX Final Rule and Comparison to the NPRM

<p>(b) Hearings are Optional, Written Questions Required (for K-12 schools)</p>	<p>technology enabling participants simultaneously to see and hear each other. - Schools must create an audio or audiovisual recording, or transcript, of any live hearing and make it available to the parties for inspection and review.</p> <p>(b) For recipients that are elementary and secondary schools, and other recipients that are not postsecondary institutions, the school’s grievance process may, but need not, provide for a hearing: - With or without a hearing, 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.</p> <p>- The decision-maker(s) must explain to the party proposing the questions any decision to exclude questions as not relevant.</p>	<p>(b) For recipients that are elementary and secondary schools the school’s grievance procedure may require a live hearing:</p> <p>- With or without a hearing, the decision-maker must, after the school has incorporated the parties’ responses to the investigative report, ask each party and any witnesses any relevant questions and follow-up questions, including those challenging credibility, that a party wants asked of any party or witness. If no hearing is held, the decision-maker must afford each party the opportunity to submit written questions, provide each party with the answers, and allow for additional, limited follow-up questions. - The decision-maker must explain to the party proposing the questions any decision to exclude questions as not relevant.</p>
<p>(c) Rape Shield Protections for Complainants</p>	<p>(c) The Final Rule keeps the rape shield protections for complainants (as to all recipients whether postsecondary, K-12 or others), clarified to state: Questions and evidence about the complainant’s sexual predisposition or prior sexual behavior are not relevant, unless such questions and evidence about the complainant’s prior sexual behavior are offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or if the questions and evidence concern specific incidents of the</p>	<p>(c) The NPRM provided rape shield protections for complainants in postsecondary institutions and K-12:</p> <p>All questioning must exclude evidence of the complainant’s sexual behavior or predisposition, unless such evidence about the complainant’s sexual behavior is offered to prove someone other than the respondent committed the conduct alleged by the complainant, or if the evidence concerns specific incidents of the complainant’s</p>

Summary of Major Provisions of the Department of Education’s Title IX Final Rule and Comparison to the NPRM

	complainant’s prior sexual behavior with respect to the respondent and are offered to prove consent.	sexual behavior with respect to the respondent and is offered to prove consent.
<i>10. Standard of Evidence</i>	<p>The Final Rule requires the school’s grievance process to state whether the standard of evidence to be used to determine responsibility is the preponderance of the evidence standard or the clear and convincing evidence standard, apply the same standard of evidence for formal complaints against students as for formal complaints against employees, including faculty.</p> <p>- The Final Rule removes the NPRM’s restriction on use of the preponderance of the evidence standard.</p>	<p>The NPRM proposed that to reach the determination regarding responsibility, the decision-maker must apply either the preponderance of the evidence standard or the clear and convincing evidence standard, although the recipient may employ the preponderance of the evidence standard only if the school uses that standard for conduct of code violations that do not involve sexual harassment but carry the same maximum sanction.</p>
<i>11. Appeals</i>	<p>The Final Rule states that a school must offer both parties an appeal from a determination regarding responsibility, and from a school’s dismissal of a formal complaint or any allegations therein, on the following bases: procedural irregularity that affected the outcome of the matter; 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; and/or the Title IX Coordinator, investigator, or decision-maker had a conflict of interest or bias that affected the outcome of the matter.</p> <p>- A school may offer an appeal equally to both parties on additional bases.</p>	<p>The NPRM provided that a school may choose to offer an appeal:</p> <p>- If a school offers an appeal, it must allow both parties to appeal.</p> <p>- Although a complainant may appeal on the ground that the remedies are not designed to restore or preserve the complainant’s access to the school’s education program or activity, a complainant is not entitled to a particular sanction against the respondent.</p> <p>- The Final Rule removes the NPRM’s restriction on complainants appealing the severity of sanctions.</p>
<i>12. Informal Resolution</i>	<p>The Final Rule retains a school’s discretion to choose to offer informal resolution options, if both parties give voluntary, informed, written consent. The Final Rule adds:</p> <p>- A school may not require as a condition of enrollment or continuing enrollment, or employment or continuing employment, or enjoyment of any other right, waiver of the right to an investigation and adjudication of formal complaints.</p>	<p>The NPRM allowed schools to choose to offer informal resolution options, only with the voluntary, informed, written consent of all parties.</p>

Summary of Major Provisions of the Department of Education’s Title IX Final Rule and Comparison to the NPRM

	<ul style="list-style-type: none"> - A school may not require the parties to participate in informal resolution and may not offer informal resolution unless a formal complaint is filed. - At any time prior to agreeing to a resolution, any party has the right to withdraw from informal resolution and resume the grievance process with respect to the formal complaint. - Schools must not offer or facilitate an informal resolution process to resolve allegations that an employee sexually harassed a student. 	
<p><i>13. Retaliation Prohibited</i></p>	<p>The Final Rule expressly prohibits retaliation against any individual for exercising Title IX rights:</p> <ul style="list-style-type: none"> - No school or 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 because the individual has made a report or complaint, testified, assisted, or participated or refused to participate in any manner in a Title IX investigation, proceeding, or hearing. - 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, constitutes retaliation. - The school must keep confidential the identity of complainants, respondents, and witnesses, except as may be permitted by FERPA, or as required by law, or as necessary to carry out a Title IX proceeding. - Complaints alleging retaliation may be filed according to the grievance procedures for sex discrimination that schools must adopt and publish. 	

**Summary of Major Provisions of the Department of Education's Title IX Final Rule
and Comparison to the NPRM**

	<ul style="list-style-type: none">- The exercise of rights protected under the First Amendment does not constitute retaliation.- Charging an individual with a code of conduct violation for making a materially false statement in bad faith in the course of a grievance proceeding under this part does not constitute retaliation; provided, however, that a determination regarding responsibility, alone, is not sufficient to conclude that any party made a bad faith materially false statement.	
--	--	--

Summary of Major Provisions of the Department of Education’s Title IX Final Rule

Issue	The Title IX Final Rule: Addressing Sexual Harassment in Schools
<p><i>1. Notice to the School, College, University (“Schools”): Actual Knowledge</i></p>	<p>The Final Rule requires a K-12 school to respond whenever <i>any</i> employee has notice of sexual harassment, including allegations of sexual harassment. Many State laws also require all K-12 employees to be mandatory reporters of child abuse. For postsecondary institutions, the Final Rule allows the institution to choose whether to have mandatory reporting for all employees, or to designate some employees to be confidential resources for college students to discuss sexual harassment without automatically triggering a report to the Title IX office.</p> <p>For all schools, notice to a Title IX Coordinator, or to an official with authority to institute corrective measures on the recipient’s behalf, charges a school with actual knowledge and triggers the school’s response obligations.</p>
<p><i>2. Definition of Sexual Harassment for Title IX Purposes</i></p>	<p>The Final Rule defines sexual harassment broadly to include any of three types of misconduct on the basis of sex, all of which jeopardize the equal access to education that Title IX is designed to protect: Any instance of <i>quid pro quo</i> harassment by a school’s employee; any unwelcome conduct that a reasonable person would find so severe, pervasive, and objectively offensive that it denies a person equal educational access; any instance of sexual assault (as defined in the Clery Act), dating violence, domestic violence, or stalking as defined in the Violence Against Women Act (VAWA).</p> <p>- The Final Rule prohibits sex-based misconduct in a manner consistent with the First Amendment. <i>Quid pro quo</i> harassment and Clery Act/VAWA offenses are <u>not</u> evaluated for severity, pervasiveness, offensiveness, or denial of equal educational access, because such misconduct is sufficiently serious to deprive a person of equal access.</p> <p>- The Final Rule uses the Supreme Court’s <i>Davis</i> definition (<i>severe and pervasive and objectively offensive</i> conduct, effectively denying a person equal educational access) as one of the three categories of sexual harassment, so that where unwelcome sex-based conduct consists of speech or expressive conduct, schools balance Title IX enforcement with respect for free speech and academic freedom.</p> <p>- The Final Rule uses the Supreme Court’s Title IX-specific definition rather than the Supreme Court’s Title VII workplace standard (<i>severe or pervasive</i> conduct creating a hostile work environment). First Amendment concerns differ in educational environments and workplace environments, and the Title IX definition provides First Amendment protections appropriate for educational institutions where students are learning, and employees are teaching. Students, teachers, faculty, and others should enjoy free speech and academic freedom protections, even when speech or expression is offensive.</p>

Summary of Major Provisions of the Department of Education’s Title IX Final Rule

<p><i>3. Sexual Harassment Occurring in a School’s “Education Program or Activity” and “in the United States”</i></p>	<p>The Title IX statute applies to persons in the United States with respect to education programs or activities that receive Federal financial assistance. Under the Final Rule, schools must respond when sexual harassment occurs in the school’s education program or activity, against a person in the United States.</p> <ul style="list-style-type: none"> - The Title IX statute and existing regulations contain broad definitions of a school’s “program or activity” and the Department will continue to look to these definitions for the scope of a school’s education program or activity. 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 occurred, and also includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution (such as a fraternity or sorority house). - Title IX applies to all of a school’s education programs or activities, whether such programs or activities occur on-campus or off-campus. A school may address sexual harassment affecting its students or employees that falls outside Title IX’s jurisdiction in any manner the school chooses, including providing supportive measures or pursuing discipline.
<p><i>4. Accessible Reporting to Title IX Coordinator</i></p>	<p>The Final Rule expands a school’s obligations to ensure its educational community knows how to report to the Title IX Coordinator.</p> <ul style="list-style-type: none"> - The employee designated by a recipient to coordinate its efforts to comply with Title IX responsibilities must be referred to as the “Title IX Coordinator.” - Instead of notifying only students and employees of the Title IX Coordinator’s contact information, the school must also notify applicants for admission and employment, parents or legal guardians of elementary and secondary school students, and all unions, of the name or title, office address, e-mail address, and telephone number of the Title IX Coordinator. - Schools must prominently display on their websites the required contact information for the Title IX Coordinator. - Any person may report sex discrimination, including sexual harassment (whether or not the person reporting is the person alleged to be the victim of conduct that could constitute sex discrimination or sexual harassment), in person, by mail, by telephone, or by e-mail, using the contact information listed for the Title IX Coordinator, or by any other means that results in the Title IX Coordinator receiving the person’s verbal or written report. - Such a report may be made at any time, including during non-business hours, by using the telephone number or e-mail address, or by mail to the office address, listed for the Title IX Coordinator.
<p><i>5. School’s Mandatory Response Obligations: The Deliberate Indifference Standard</i></p>	<p>Schools must respond promptly to Title IX sexual harassment in a manner that is not deliberately indifferent, which means a response that is not clearly unreasonable in light of the known circumstances. Schools have the following mandatory response obligations:</p> <ul style="list-style-type: none"> - Schools must offer supportive measures to the person alleged to be the victim (referred to as the “complainant”).

Summary of Major Provisions of the Department of Education’s Title IX Final Rule

	<ul style="list-style-type: none"> - The Title IX Coordinator must promptly contact the complainant confidentially 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. - Schools must follow a grievance process that complies with the Final Rule before the imposition of any disciplinary sanctions or other actions that are not supportive measures, against a respondent. - Schools must not restrict rights protected under the U.S. Constitution, including the First Amendment, Fifth Amendment, and Fourteenth Amendment, when complying with Title IX. - The Final Rule requires a school to investigate sexual harassment allegations in any formal complaint, which can be filed by a complainant, or signed by a Title IX Coordinator. - The Final Rule affirms that a complainant’s wishes with respect to whether the school investigates should be respected unless the Title IX Coordinator determines that signing a formal complaint to initiate an investigation over the wishes of the complainant is not clearly unreasonable in light of the known circumstances. - If the allegations in a formal complaint do not meet the definition of sexual harassment in the Final Rule, or did not occur in the school’s education program or activity against a person in the United States, the Final Rule clarifies that the school must dismiss such allegations <i>for purposes of Title IX</i> but may still address the allegations in any manner the school deems appropriate under the school’s own code of conduct.
<p>6. <i>School’s Mandatory Response Obligations:</i> <i>Defining</i> <i>“Complainant,”</i> <i>“Respondent,”</i> <i>“Formal Complaint,”</i> <i>“Supportive Measures”</i></p>	<p>When responding to sexual harassment (e.g., by offering supportive measures to a complainant and refraining from disciplining a respondent without following a Title IX grievance process, which includes investigating formal complaints of sexual harassment), the Final Rule provides clear definitions of complainant, respondent, formal complaint, and supportive measures so that recipients, students, and employees clearly understand how a school must respond to sexual harassment incidents in a way that supports the alleged victim and treats both parties fairly.</p> <p>The Final Rule defines “complainant” as an individual <i>who is alleged to be the victim</i> of conduct that could constitute sexual harassment.</p> <ul style="list-style-type: none"> - This clarifies that any third party as well as the complainant may report sexual harassment. - While parents and guardians do not become complainants (or respondents), the 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 matters. <p>The Final Rule defines “respondent” as an individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment.</p>

Summary of Major Provisions of the Department of Education’s Title IX Final Rule

	<p>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 and states:</p> <ul style="list-style-type: none"> - 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 formal complaint may be filed with the Title IX Coordinator in person, by mail, or by electronic mail, by using the contact information required to be listed for the Title IX Coordinator under the Final Rule, and by any additional method designated by the school. - The phrase “document filed by a complainant” means a document or electronic submission (such as by e-mail or through an online portal provided for this purpose by the school) that contains the complainant’s physical or digital signature, or otherwise indicates that the complainant is the person filing the formal complaint. - Where the Title IX Coordinator signs a formal complaint, the Title IX Coordinator is not a complainant or a party during a grievance process, and must comply with requirements for Title IX personnel to be free from conflicts and bias. <p>The Final Rule defines “supportive measures” as individualized services reasonably available that are non-punitive, non-disciplinary, and not unreasonably burdensome to the other party while designed to ensure equal educational access, protect safety, or deter sexual harassment.</p> <ul style="list-style-type: none"> - The Final Rule evaluates a school’s selection of supportive measures and remedies based on what is not clearly unreasonable in light of the known circumstances, and does not second guess a school’s disciplinary decisions, but requires the school to offer supportive measures, and provide remedies to a complainant whenever a respondent is found responsible.
<p>7. <i>Grievance Process, General Requirements</i></p>	<p>The Final Rule prescribes a consistent, transparent grievance process for resolving formal complaints of sexual harassment. Aside from hearings (see Issue #9 below), the grievance process prescribed by the Final Rule applies to all schools equally including K-12 schools and postsecondary institutions. The Final Rule states that a school’s grievance process must:</p> <ul style="list-style-type: none"> - Treat complainants equitably by providing remedies any time a respondent is found responsible, and treat respondents equitably by not imposing disciplinary sanctions without following the grievance process prescribed in the Final Rule. - Remedies, which are required to be provided to a complainant when a respondent is found responsible, must be designed to maintain the complainant’s equal access to education and may include the same individualized services described in the Final Rule as supportive measures; however, remedies need not be non-disciplinary or non-punitive and need not avoid burdening the respondent. - Require objective evaluation of all relevant evidence, inculpatory and exculpatory, and avoid credibility determinations based on a person’s status as a complainant, respondent, or witness.

Summary of Major Provisions of the Department of Education's Title IX Final Rule

- Require Title IX personnel (Title IX Coordinators, investigators, decision-makers, people who facilitate any informal resolution process) to be free from conflicts of interest or bias for or against complainants or respondents.
- Training of Title IX personnel must include training on the definition of sexual harassment in the Final Rule, 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, as applicable, and how to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias.
- A school must ensure that decision-makers receive training on any technology to be used at a live hearing.
- A school's decision-makers and investigators must receive training on issues of relevance, including how to apply the rape shield protections provided only for complainants.
- Include a presumption that the respondent is not responsible for the alleged conduct until a determination regarding responsibility is made at the conclusion of the grievance process.
- Recipients must post materials used to train Title IX personnel on their websites, if any, or make materials available for members of the public to inspect.
- Include reasonably prompt time frames for conclusion of the grievance process, including appeals and informal resolutions, with allowance for short-term, good cause delays or extensions of the time frames.
- Describe the range, or list, the possible remedies a school may provide a complainant and disciplinary sanctions a school might impose on a respondent, following determinations of responsibility.
- State whether the school has chosen to use the preponderance of the evidence standard, or the clear and convincing evidence standard, for all formal complaints of sexual harassment (including where employees and faculty are respondents).
- Describe the school's appeal procedures, and the range of supportive measures available to complainants and respondents.
- A school's grievance process must not use, rely on, or seek disclosure of information protected under a legally recognized privilege, unless the person holding such privilege has waived the privilege.
- Any provisions, rules, or practices other than those required by the Final Rule that a school adopts as part of its grievance process for handling formal complaints of sexual harassment, must apply equally to both parties.

Summary of Major Provisions of the Department of Education’s Title IX Final Rule

<p><i>8. Investigations</i></p>	<p>The Final Rule states that the school must investigate the allegations in any formal complaint and send written notice to both parties (complainants and respondents) of the allegations upon receipt of a formal complaint. During the grievance process and when investigating:</p> <ul style="list-style-type: none"> - The burden of gathering evidence and burden of proof must remain on schools, not on the parties. - Schools must provide equal opportunity for the parties to present fact and expert witnesses and other inculpatory and exculpatory evidence. - Schools must not restrict the ability of the parties to discuss the allegations or gather evidence (e.g., no “gag orders”). - Parties must have the same opportunity to select an advisor of the party’s choice who may be, but need not be, an attorney. - Schools must send written notice of any investigative interviews, meetings, or hearings. - Schools must send the parties, and their advisors, evidence directly related to the allegations, in electronic format or hard copy, with at least 10 days for the parties to inspect, review, and respond to the evidence. - Schools must send the parties, and their advisors, an investigative report that fairly summarizes relevant evidence, in electronic format or hard copy, with at least 10 days for the parties to respond. - Schools must dismiss allegations of conduct that do not meet the Final Rule’s definition of sexual harassment or did not occur in a school’s education program or activity against a person in the U.S. Such dismissal is only for Title IX purposes and does not preclude the school from addressing the conduct in any manner the school deems appropriate. - Schools may, in their discretion, dismiss a formal complaint or allegations therein if the complainant informs the Title IX Coordinator in writing that the complainant desires to withdraw the formal complaint or allegations therein, if the respondent is no longer enrolled or employed by the school, or if specific circumstances prevent the school from gathering sufficient evidence to reach a determination. - Schools must give the parties written notice of a dismissal (mandatory or discretionary) and the reasons for the dismissal. - Schools may, in their discretion, consolidate formal complaints where the allegations arise out of the same facts. - The Final Rule protects the privacy of a party’s medical, psychological, and similar treatment records by stating that schools cannot access or use such records unless the school obtains the party’s voluntary, written consent to do so.
<p><i>9. Hearings:</i></p>	<p>The Final Rule adds provisions to the “live hearing with cross-examination” requirement for postsecondary institutions and clarifies that hearings are optional for K-12 schools (and any other recipient that is not a postsecondary institution).</p>

Summary of Major Provisions of the Department of Education’s Title IX Final Rule

<p>(a) <i>Live Hearings & Cross-Examination (for Postsecondary Institutions)</i></p>	<p>(a) For postsecondary institutions, the school’s grievance process must provide for a live hearing:</p> <ul style="list-style-type: none"> - At the live hearing, the decision-maker(s) must permit each party’s advisor to ask the other party and any witnesses all relevant questions and follow-up questions, including those challenging credibility. - Such cross-examination at the live hearing must be conducted directly, orally, and in real time by the party’s advisor of choice and never by a party personally. - At the request of either party, the recipient must provide for the entire live hearing (including cross-examination) to occur with the parties located in separate rooms with technology enabling the parties to see and hear each other. - Only relevant cross-examination and other questions may be asked of a party or witness. Before a complainant, respondent, or witness answers a cross-examination or other question, the decision-maker must first determine whether the question is relevant and explain to the party’s advisor asking cross-examination questions any decision to exclude a question as not relevant. - If a party does not have an advisor present at the live hearing, the school must provide, without fee or charge to that party, an advisor of the school’s choice who may be, but is not required to be, an attorney to conduct cross-examination on behalf of that party. - If a party or witness does not submit to cross-examination at the live hearing, the decision-maker(s) must not rely on any statement of that party or witness in reaching a determination regarding responsibility; provided, however, that the decision-maker(s) cannot draw an inference about the determination regarding responsibility based solely on a party’s or witness’s absence from the live hearing or refusal to answer cross-examination or other questions. - Live hearings may be conducted with all parties physically present in the same geographic location or, at the school’s discretion, any or all parties, witnesses, and other participants may appear at the live hearing virtually. - Schools must create an audio or audiovisual recording, or transcript, of any live hearing.
<p>(b) <i>Hearings are Optional, Written Questions Required (for K-12 Schools)</i></p>	<p>(b) For recipients that are K-12 schools, and other recipients that are not postsecondary institutions, the recipient’s grievance process may, <i>but need not</i>, provide for a hearing:</p> <ul style="list-style-type: none"> - With or without a hearing, 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.
<p>(c) <i>Rape Shield Protections for Complainants</i></p>	<p>(c) The Final Rule provides rape shield protections for complainants (as to all recipients whether postsecondary institutions, K-12 schools, or others), deeming irrelevant questions and evidence about a complainant’s prior sexual behavior unless offered to prove that someone other than the respondent committed the alleged misconduct or offered to prove consent.</p>

Summary of Major Provisions of the Department of Education’s Title IX Final Rule

<p><i>10. Standard of Evidence & Written Determination</i></p>	<p>The Final Rule requires the school’s grievance process to state whether the standard of evidence to determine responsibility is the preponderance of the evidence standard or the clear and convincing evidence standard. The Final Rule makes each school’s grievance process consistent by requiring each school to apply the same standard of evidence for all formal complaints of sexual harassment whether the respondent is a student or an employee (including faculty member).</p> <ul style="list-style-type: none"> - The decision-maker (who cannot be the same person as the Title IX Coordinator or the investigator) must issue a written determination regarding responsibility with findings of fact, conclusions about whether the alleged conduct occurred, rationale for the result as to each allegation, any disciplinary sanctions imposed on the respondent, and whether remedies will be provided to the complainant. - The written determination must be sent simultaneously to the parties along with information about how to file an appeal.
<p><i>11. Appeals</i></p>	<p>The Final Rule states that a school must offer both parties an appeal from a determination regarding responsibility, and from a school’s dismissal of a formal complaint or any allegations therein, on the following bases: procedural irregularity that affected the outcome of the matter, newly discovered evidence that could affect the outcome of the matter, and/or Title IX personnel had a conflict of interest or bias, that affected the outcome of the matter.</p> <ul style="list-style-type: none"> - A school may offer an appeal equally to both parties on additional bases.
<p><i>12. Informal Resolution</i></p>	<p>The Final Rule allows a school, in its discretion, to choose to offer and facilitate informal resolution options, such as mediation or restorative justice, so long as both parties give voluntary, informed, written consent to attempt informal resolution. Any person who facilitates an informal resolution must be well trained. The Final Rule adds:</p> <ul style="list-style-type: none"> - A school may not require as a condition of enrollment or continuing enrollment, or employment or continuing employment, or enjoyment of any other right, waiver of the right to a formal investigation and adjudication of formal complaints of sexual harassment. Similarly, a school may not require the parties to participate in an informal resolution process and may not offer an informal resolution process unless a formal complaint is filed. - At any time prior to agreeing to a resolution, any party has the right to withdraw from the informal resolution process and resume the grievance process with respect to the formal complaint. - Schools must not offer or facilitate an informal resolution process to resolve allegations that an employee sexually harassed a student.

Summary of Major Provisions of the Department of Education's Title IX Final Rule

<p><i>13. Retaliation Prohibited</i></p>	<p>The Final Rule expressly prohibits retaliation.</p> <ul style="list-style-type: none">- Charging an individual with code of conduct violations that do not involve sexual harassment, but arise out of the same facts or circumstances as a report or formal complaint of sexual harassment, for the purpose of interfering with any right or privilege secured by Title IX constitutes retaliation.- The school must keep confidential the identity of complainants, respondents, and witnesses, except as may be permitted by FERPA, as required by law, or as necessary to carry out a Title IX proceeding.- Complaints alleging retaliation may be filed according to a school's prompt and equitable grievance procedures.- The exercise of rights protected under the First Amendment does not constitute retaliation.- Charging an individual with a code of conduct violation for making a materially false statement in bad faith in the course of a Title IX grievance proceeding does not constitute retaliation; however, a determination regarding responsibility, alone, is not sufficient to conclude that any party made a bad faith materially false statement.
--	---

U.S. Department of Education Title IX Final Rule Overview

GUIDING PRINCIPLES

- **Historic Recognition of Sexual Harassment as Sex Discrimination**

For the first time, the Department’s Title IX regulations recognize that sexual harassment, including sexual assault, is unlawful sex discrimination. The Department previously addressed sexual harassment only through guidance documents, which are not legally binding and do not have the force and effect of law. Now, the Department’s regulations impose important legal obligations on school districts, colleges, and universities (collectively “schools”), requiring a prompt response to reports of sexual harassment. The Final Rule improves the clarity and transparency of the requirements for how schools must respond to sexual harassment under Title IX so that every complainant receives appropriate support, respondents are treated as responsible only after receiving due process and fundamental fairness, and school officials serve impartially without bias for or against any party.

- **Supporting Complainants & Respecting Complainants’ Autonomy**

Under the Final Rule, schools must offer free supportive measures to every alleged victim of sexual harassment (called “complainants” in the Final Rule). Supportive measures are individualized services to restore or preserve equal access to education, protect student and employee safety, or deter sexual harassment. Supportive measures must be offered even if a complainant does not wish to initiate or participate in a grievance process. Every situation is unique, and individuals react to sexual harassment differently. Therefore, the Final Rule gives complainants control over the school-level response best meeting their needs. It respects complainants’ wishes and autonomy by giving them the clear choice to file a formal complaint, separate from the right to supportive measures. The Final Rule also provides a fair and impartial grievance process for complainants, and protects complainants from being coerced or threatened into participating in a grievance process.

- **Non-Discrimination, Free Speech, and Due Process**

The Final Rule reflects core American values of equal treatment on the basis of sex, free speech and academic freedom, due process of law, and fundamental fairness. Schools must operate free from sex discrimination, including sexual harassment. Complainants and respondents must have strong, clear procedural rights in a predictable, transparent grievance process designed to reach reliable outcomes. The Final Rule ensures that schools do not violate First Amendment rights when complying with Title IX.

A SCHOOL’S RESPONSE TO SEXUAL HARASSMENT

- Under the Final Rule, any of the following conduct on the basis of sex constitutes sexual harassment:
 - A school employee conditioning an educational benefit or service upon a person’s participation in unwelcome sexual conduct (often called “*quid pro quo*” harassment);
 - 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; or
 - Sexual assault, dating violence, domestic violence, or stalking (as those offenses are defined in the Clery Act, 20 U.S.C. § 1092(f), and the Violence Against Women Act, 34 U.S.C. § 12291(a)).

U.S. Department of Education Title IX Final Rule Overview

- Consistent with Supreme Court precedent and the text of Title IX, a 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. The Final Rule expands "actual knowledge" to include notice to any elementary or secondary school employee, and states that any person (*e.g.*, the alleged victim or any third party) may report to a Title IX Coordinator in person or by e-mail, phone, or mail. The Final Rule also specifies that a school's "education program or activity" includes situations over which the school exercised substantial control, and also buildings owned or controlled by student organizations officially recognized by a postsecondary institution, such as many fraternity and sorority houses.
- Consistent with Supreme Court precedent, a school violates Title IX when its response to sexual harassment is clearly unreasonable in light of the known circumstances, and the Final Rule adds mandatory response obligations such as offering supportive measures to every complainant, with or without a formal complaint.
- Schools must investigate every formal complaint (which may be filed by a complainant or by a school's Title IX Coordinator). If the alleged conduct does not fall under Title IX, then a school may address the allegations under the school's own code of conduct and provide supportive measures.

A FAIR GRIEVANCE PROCESS

The Final Rule requires schools to investigate and adjudicate formal complaints of sexual harassment using a grievance process that incorporates due process principles, treats all parties fairly, and reaches reliable responsibility determinations. A school's grievance process must:

- Give both parties written notice of the allegations, an equal opportunity to select an advisor of the party's choice (who may be, but does not need to be, an attorney), and an equal opportunity to submit and review evidence throughout the investigation;
- Use trained Title IX personnel to objectively evaluate all relevant evidence without prejudice of the facts at issue and free from conflicts of interest or bias for or against either party;
- Protect parties' privacy by requiring a party's written consent before using the party's medical, psychological, or similar treatment records during a grievance process;
- Obtain the parties' voluntary, written consent before using any kind of "informal resolution" process, such as mediation or restorative justice, and not use an informal process where an employee allegedly sexually harassed a student;
- Apply a presumption that the respondent is not responsible during the grievance process (often called a "presumption of innocence"), so that the school bears the burden of proof and the standard of evidence is applied correctly;
- Use either the preponderance of the evidence standard or the clear and convincing evidence standard (and use the same standard for formal complaints against students as for formal complaints against employees);
- Ensure the decision-maker is not the same person as the investigator or the Title IX Coordinator (*i.e.*, no "single investigator models");
- For postsecondary institutions, hold a live hearing and allow cross-examination by party advisors (never by the parties personally); K-12 schools do not need to hold a hearing, but parties may submit written questions for the other parties and witnesses to answer;
- Protect all complainants from inappropriately being asked about prior sexual history ("rape shield" protections);

U.S. Department of Education Title IX Final Rule Overview

- Send both parties a written determination regarding responsibility explaining how and why the decision-maker reached conclusions;
- Effectively implement remedies for a complainant if a respondent is found responsible for sexual harassment;
- Offer both parties an equal opportunity to appeal;
- Protect any individual, including complainants, respondents, and witnesses, from retaliation for reporting sexual harassment or participating (or refusing to participate) in any Title IX grievance process;
- Make all materials used to train Title IX personnel publicly available on the school's website or, if the school does not maintain a website, make these materials available upon request for inspection by members of the public; and
- Document and keep records of all sexual harassment reports and investigations.

SEX DISCRIMINATION REGULATIONS

Relating to sex discrimination generally, and not only to sexual harassment, the final regulations also:

- Affirm that the Department may require schools to take remedial action for discriminating on the basis of sex or otherwise violating the Department's Title IX regulations;
- Expressly state that in response to any claim of sex discrimination under Title IX, schools are never required to deprive an individual of rights guaranteed under the U.S. Constitution;
- Account for the interplay of Title IX, Title VII, and FERPA, as well as the legal rights of parents or guardians to act on behalf of individuals with respect to exercising Title IX rights;
- Update the requirement for schools to designate and identify a Title IX Coordinator, disseminate their non-discrimination policy and the Title IX Coordinator's contact information to ensure accessible channels for reporting sex discrimination (including sexual harassment), and notify students, employees, parents, and others of how the school will respond to reports and complaints of sex discrimination (including sexual harassment); and
- Clarify that an institution controlled by a religious organization is not required to submit a written statement to the Department to qualify for the Title IX religious exemption.

PRESIDENT DONALD J. TRUMP IS WORKING TO PROTECT STUDENTS FROM SEXUAL MISCONDUCT AND RESTORE FAIRNESS AND DUE PROCESS TO OUR CAMPUSES

"With today's action and every action to come, the Trump administration will fight for America's students." – President Donald J. Trump

TAKING HISTORIC ACTION: President Donald J. Trump is ensuring that all students are safe to learn and achieve without facing sexual harassment and sexual assault in our Nation's schools.

- Today, the Department of Education is issuing a final regulation to strengthen Title IX protections for survivors of sexual misconduct and fight sex misconduct in schools.
- For the first time in history, the new regulation will codify that sexual harassment, including sexual assault, dating violence, domestic violence, and stalking, is prohibited under Title IX.
- This new regulation will hold schools accountable for failures to respond equitably and promptly to incidents of sexual misconduct.
 - The action also empowers survivors to make decisions about how a school responds to incidents of sexual harassment.
- This rulemaking follows years of wide-ranging research, careful deliberation, and careful input from stakeholders – including survivors – and over 124,000 public comments.

ENSURING EVEN-HANDED JUSTICE: The President's new rules will also ensure that schools can no longer inflict longstanding harm against students before providing basic, fair procedures.

- Today's final regulation will also provide due process protections to students facing accusations of sexual misconduct.
 - Bureaucracy created in our Nation's institutions of higher education have often stacked the deck against the accused, failing to offer protections such as a presumption of innocence or adequate ability to rebut allegations.
- The regulation prescribes a transparent grievance process that treats the accused as innocent until proven guilty, requires the school to state a standard of evidence, and requires the school to provide a written decision and rationale.
- Recognizing that colleges often fail to provide due process, Federal courts reviewing campus adjudications have stepped in to issue more than 100 decisions favorable to the accused.
- Today's protections will legitimize the process and support survivors, including by ensuring that final findings of responsibility are credible.

MAKING OUR SCHOOLS SAFER: The Trump Administration is working every day to protect America's students and survivors of sexual misconduct.

- Under the President's leadership, the Department of Education has aggressively worked to hold schools accountable for sexual harassment in their education programs and activities.
 - Already, the Trump Administration has required sweeping reforms at educational institutions, including Michigan State University, Pennsylvania State University, the University of Southern California, and Chicago Public Schools.
- The Department of Education has led implementation of Every Student Succeeds Act rules that prohibit elementary and secondary school district administrators from shifting from one school to another employees who sexually abuse students.
- Over the last three years, the Department of Education's Office for Civil Rights has closed a total of 172 sexual violence cases with change, a 375 percent increase over the prior 8 years.



schools and educational institutions

Page 1 of 2

Schools & Educational Institutions

Schools and other educational institutions must contend with diverse legal issues ranging from general school matters like policies, procedures, student issues, and labor, employment and immigration concerns to real estate and finance matters. That's why it is critical that they have an experienced legal partner with a broad experience and expertise.

Dickinson Wright has a longstanding tradition of providing superior legal service to municipalities, school districts, schools, universities, and colleges throughout Arizona and the Great Lakes region. Our team serves as general counsel to both public and private educational entities, including public school districts, private schools, colleges, universities and other governmental and quasi-public bodies.

Offering Comprehensive Service

We offer a complete array of legal services to meet our clients' needs, including advising on labor and employment law, employee benefits, insurance, property and personal injury defense, real estate, zoning and development, arbitration and alternative dispute resolution, corporate law, and public finance issues, among others. We regularly advise on issues involving school districts, including resolving disputes and appearing before school districts on behalf of clients. Further, we litigate disputes involving schools and other educational institutions at all levels of court throughout the country.

Broad Experience

Our Schools & Educational Institutions practice group has represented clients on virtually every issue they face.

General School Matters

Policies and Compliance

- School Board policies including procedure, conflicts, budgets, employment, school calendar, curriculum and open enrollment assessment and testing, indemnification, fees and job descriptions
- School administrative policies, including adequate yearly progress, reporting discipline, evaluations, residency, bidding, documentation processes, school safety, ADA, and recordkeeping procedures
- Open Meetings Act
- No Child Left Behind Act/Elementary and Secondary Education Act (ESEA)
- Freedom of Information Act
- Family Educational Rights and Privacy Act

Dickinson Wright

From automotive to telecommunications to a wide range of sectors in-between, Dickinson Wright provides our clients with specialized knowledge in more than 40 practice areas. Our lawyers are experts in their areas of specialty: many belong to industry organizations, have industry-specific certifications and write and speak on related topics. Because our team is experienced and knowledgeable in so many different areas, we can easily draw upon the resources of different practice areas to meet the specific needs of each client.

DICKINSON WRIGHT PLLC

www.dickinsonwright.com

Student Matters

- Codes of student conduct
- Residency
- Student discipline/expulsion, including due process hearings and mediation
- Special education issues, including IDEA, IEPs, mainstreaming, and Section 504 matters
- Student records access, including FERPA, parental right of review, and amendment and destruction of records
- Abuse and neglect
- First Amendment issues
- Financial aid and assistance issues
- Immigration
- Dual enrollment

Labor and Employment Matters

Preventative Counseling

- Personnel policies and handbooks
- Employment contracts
- Workforce reorganizations
- Sexual and racial harassment and discrimination
- Employee discipline
- Affirmative action
- Supervisory training
- Wage and hour compliance
- Disability and family leave issues
- Drug and alcohol issues
- Compliance audits

Employment Claims

- Wrongful discharge and discrimination lawsuits
- Defamation and other workplace torts
- Injunction lawsuits
- Administrative claims
- Teacher tenure
- Appeals
- Alternative dispute resolution

Labor Relations

- Collective bargaining
- Contract administration and arbitration
- Michigan Employment Relations Commission (MERC) matters
- Representation elections

Employee Benefits

- Employee benefit and pension plans
- Flexible spending plans
- Section 125 cafeteria plans (allowing for pre-tax payment of health care premiums; health care and dependent care reimbursement accounts)

- Section 457 deferred compensation plans
- Section 403(b) annuity and pension plans
- HIPAA-related issues, including medical information privacy requirements
- ERISA-related matters

Immigration

- International movement of personnel
- Nonimmigrant (temporary, e.g., B, E, H, L and O) business/work visas
- Green cards
- Labor certifications
- Employment eligibility (form I-9 and employer sanctions)

Finance and Real Estate

School Finance

- State school aid and property tax matters
- Bond counsel regarding voter-approved building and site bond issues
- Bonds qualified through the Michigan School Bond Loan Fund
- Non-voted bonds
- Energy conservation bonds and notes
- Qualified zone academy bonds
- Tax-exempt installment purchase contracts
- State aid notes
- Bond, sinking fund, and millage ballot proposition
- Special elections
- Legal advice in drafting and interpreting public finance legislation affecting school districts
- Representation before administrative agencies

Real Estate

- Purchase, sale, and leasing of school property
- Zoning and land use
- Acquisition of property by adverse possession and condemnation
- Legal audit of property titles
- Reviewing, drafting, and negotiating architect and contractor construction agreements
- Bidding procedures
- Breach of contract claims and change orders
- Challenges to non-voter approved limited tax construction obligation bonds



CLIENT ALERT

August 5, 2020

1

Educators Still Required to Comply With New Title IX Regulations by August 14, 2020

By Aimee R. Gibbs, Adam J. Schira and Chelsea L. Canaday

On August 14, 2020, the U.S. Department of Education's new Title IX regulations become effective. These regulations govern how education programs that receive federal funding must respond to sex discrimination, including sexual harassment. The regulations set forth specific minimum responsibilities and requirements that apply to kindergarten through 12th grade.

Not all of the requirements are new; however, certain provisions may seem new to K–12 districts/schools because this is the first time many requirements are explicitly stated in the regulations. As a result, K–12 districts/schools will need to review their current policies and make substantial changes regarding how they prevent, respond to, investigate, and address sexual harassment.

Several states have filed injunctive lawsuits in an attempt to postpone the effective date of these new regulations due to the COVID-19 pandemic and in light of all of the extra work administrators and teachers are currently undertaking to address health and safety response plans, as well as to develop, update, and implement virtual education programs. To date, the courts have not granted such relief. Therefore, as K-12 districts/schools struggle with reopening or continuing online learning during the pandemic, they must also comply with the new Title IX requirements, including but not limited to, designating certain Title IX staff positions, developing policies, responding to and investigating complaints, and implementing and posting training — all by August 14, 2020. We provide a brief overview of the key areas to be updated below.

DESIGNATION OBLIGATIONS

Before the changes, districts/schools were already required to have a "Title IX Coordinator" lead compliance efforts. Now the regulations require districts/schools to designate additional positions, including investigators (if different from the Title IX Coordinator) and two levels of decision-makers —one for an initial determination of a sexual harassment complaint and one for appeal. The regulations specify decision-makers cannot be the same person as the Title IX Coordinator or an investigator.

RESPONSE OBLIGATIONS

A K–12 district/school must investigate when any employee has

"actual knowledge" or notice of sexual harassment or allegations of sexual harassment. While many states already have mandatory reporting statutes for districts/schools, the new Title IX regulations essentially make reporting a federal requirement. Of note, the regulations define "sexual harassment" to include conditioning the provision of an aid, benefit, or service on an individual's participation in unwelcome sexual conduct; 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 education program or activity; and sexual assault, dating violence, domestic violence, or stalking.

Once a district or school's response obligations are triggered, the Title IX Coordinator must promptly contact the complainant to explain the process for filing a formal complaint. The new regulations also require districts to offer supportive measures — including counseling, contact restrictions, and modification of class schedules — to complainants of sexual harassment.

GRIEVANCE PROCESS REQUIREMENTS

Districts/Schools must follow a detailed and timely grievance process for sexual harassment complaints before imposing any discipline or non-supportive measures against the accused. However, districts/schools may place accused non-student employees on administrative leave while a grievance process is pending, or remove students on an emergency basis subject to certain parameters.

The new sexual harassment grievance process provides for substantial rights for the complainant and the accused, including but not limited to: explicit notice of the allegations; opportunities to respond; the ability to review evidence and the investigative report; the aid of an advisor throughout the proceedings, who may be, but is not required to be, an attorney; and the chance to submit questions to the other party or witnesses.

K-12 districts/schools can decide to hold hearings, though they are not required. Ultimately, a decision-maker must issue a written determination of responsibility on the sexual harassment complaint, and either party may appeal to a separate decision-maker on certain bases. If the decision-maker issues a determination of responsibility for sexual harassment, the district/school must provide remedies to a complainant.

INVESTIGATIVE REQUIREMENTS

During the investigation of a sexual harassment complaint, the Title IX Coordinator (or investigator if different) has enumerated responsibilities to provide the parties equal opportunity to present witnesses and other evidence, a notice of any interviews and time to prepare, and the ability to inspect and review evidence. The investigator must also maintain the proper burden of proof and create an investigative report that fairly summarizes the relevant evidence.

TRAINING REQUIREMENTS

Before the changes, Title IX already required districts to train certain personnel on the law. The new regulations, however, identify new training topics for certain designated personnel, including on the regulation's new definition of sexual harassment and how to serve impartially.

Moreover, districts/schools must now train decision-makers on how to conduct live hearings (if the K-12 district/school chooses to have live hearings) and how to review the evidence — including what questions and evidence are relevant — as well as train investigators on how to create an investigative report that fairly summarizes relevant evidence. Districts/Schools must also make all training materials publicly available by posting them on their website.

NOTIFICATION REQUIREMENTS

Districts/Schools must notify applicants for admission and employment, students, parents or legal guardians of students, employees, and all unions or professional organizations holding collective bargaining or professional agreements with the district/school, of Title IX Coordinator contact information, including email, and of the fact that it does not discriminate on the basis of sex in its education program or activity—posting this information on its website and in each student handbook or catalog. Such notification must state that the requirement not to discriminate in the education program or activity extends to admission (unless inapplicable) and employment, and that inquiries about the application of Title IX may be referred to the recipient's Title IX Coordinator, to the Assistant Secretary, or both.

Districts/Schools must also provide the aforementioned individuals with notice of the district/school's grievance procedures and grievance process, including how to report or file a complaint

of sex discrimination, how to report or file a formal complaint of sexual harassment, and how the district/school will respond.

RECORDKEEPING REQUIREMENTS

Each sexual harassment complaint also now includes the requirement to maintain specific records for a period of seven years, such as records pertaining to the investigation, any appeal, any resolution, and all materials used to train those involved.

ABOUT THE AUTHORS



Aimee R. Gibbs is a Member in Dickinson Wright's Ann Arbor office. She can be reached at 734.623.1653 or agibbs@dickinsonwright.com.



Adam J. Schira is a Member in Dickinson Wright's Columbus office. He can be reached at 614.744.2932 or aschira@dickinsonwright.com.



Chelsea L. Canaday is Of Counsel in Dickinson Wright's Columbus office. She can be reached at 614.591.5496 or ccanaday@dickinsonwright.com.