

The New Title IX Regulations: What You Need to Know



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The Top 9



**TITLE IX
BACKGROUND**



**NEW TITLE IX
TERMINOLOGY**



TRAINING



**BUILDING YOUR
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**AVOIDING
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REPORT WRITING

NO. I: TITLE IX BACKGROUND



TITLE IX BACKGROUND



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.

20 U.S.C. § 1681(a).

BACKGROUND ON TITLE IX REGULATIONS



U.S. Department of Education, Office for Civil Rights (OCR) issues a Dear Colleague Letter and Q&A; rescinds Obama-era guidance.

Sep. 2017

OCR released the highly anticipated final rule.

6 May 2020

?

2021

Nov. 2018

Notice of Proposed Rulemaking seeking comments on changes to the Title IX regulations.

14 Aug. 2020

August 14, 2020
• Final rule becomes effective.

TITLE IX BACKGROUND



- **Q: Whom does Title IX protect?**
- **A: Any person participating in an educational program in the United States that receives federal financial assistance.**
 - Students.
 - Staff.
 - Applicants for admission.
 - Visitors and community members.

TITLE IX BACKGROUND



- **Q: What does Title IX protect against?**
- **A: Exclusion from participation in, or denial of benefits of, any educational program or activity on the basis of sex.**
 - Admissions and Employment.
 - Classes and curricular activities.
 - Extracurricular activities (including athletics).
 - Discipline.
 - Social media.
 - Pregnant and Parenting Students
 - Retaliation
 - Treatment of Transgender Students
 - Sex-based harassment and discrimination

NO. 2: NEW TITLE IX TERMINOLOGY



NEW TITLE IX LINGO (TERMS)



Recipients. School districts are now referred to as “recipients.”

Complainant. A person alleged to be the victim of conduct that could constitute sexual harassment.

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

Supportive Measures. These are your “interim measures.”

Determination of Responsibility. This is your report/decision.

NEW TITLE IX LINGO (DEFINITIONS)



Actual Knowledge

- Notice of sexual harassment or allegations of sexual harassment **to any employee.**

Obligation to Respond

- A school with **actual knowledge** of sexual harassment in a program or activity against a person in the U.S. must respond promptly and in a manner that is **not deliberately indifferent.**

DEFINITION OF SEXUAL HARASSMENT




- Sexual harassment can be any one of the following three things:
 1. A district employee conditioning the provision of an aid, benefit, or service on the individual's participation in unwelcome sexual conduct;
 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 recipient's education program or activity; or
 3. "Sexual assault" as defined the Clery Act, or "dating violence," "domestic violence," or "stalking" as defined in the Violence Against Women Act (VAWA).

Confidentiality

Recipients cannot restrict either party's ability to discuss the allegations or gather and present evidence.



Recipients must keep confidential the identity of a person who complains or reports sexual harassment, including parties and witnesses, except as permitted by law or to carry out the purpose of these regulations.



Will these responsibilities be frustrated in practice?

NO. 3: TRAINING REQUIREMENTS



TRAINING REQUIREMENTS



- Title IX Coordinators, Investigators, Decision-makers, and any person who facilitates an informal resolution process must receive training on:
 - the definition of sexual harassment in the regulations,
 - the scope of the recipient'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.

TRAINING REQUIREMENTS



- Districts must ensure that investigators receive training on issues of relevance to create an investigative report that fairly summarizes relevant evidence, as set forth in the regulations.
- Districts must ensure that decision-makers receive training on any technology to be used at a live hearing and 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, as set forth in the regulations.

TRAINING REQUIREMENTS



- Any materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process, must not rely on sex stereotypes and must promote impartial investigations and adjudications of formal complaints of sexual harassment.
- All materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution must be made available on the school's website, if it has one.
- Training materials must be kept for 7 years.

NO. 4: BUILDING YOUR TITLE IX TEAM



THE TITLE IX COORDINATOR'S ROLE



■ Title IX Coordinator(s)

- Must promptly contact Complainant, discuss available supportive measures (with or without a formal complaint), and explain process for filing a formal complaint.
- Responsible for effective implementation of any remedies.
- New documentation requirements:
 - Measures taken to restore or preserve equal access to the program or activity;
 - The basis for the conclusion that the District's response was not deliberately indifferent.



Investigator

Person designated to investigate, gather evidence and compile an investigation report.



Decisionmaker

Person who issues a written determination regarding responsibility.

Cannot be the same person as the Title IX Coordinator or the Investigator.



Appeals Designee

Must offer both respondent and complainant an opportunity to appeal.

Cannot be the same person as the Title IX Coordinator, Investigator, or the Decisionmaker.

NO. 5: AVOIDING CONFLICT AND BIAS



DUTY TO AVOID BIAS AND CONFLICTS OF INTEREST



- Your focus is the integrity of the process. Never an outcome.
- Recognize and understand what your biases are so that you can put them aside.
- Cultural competency – understand your microaggressions or unconscious biases.
- Check ego at the door.

DEFINING BIAS



- The decision maker must not be **biased**.
 - Black's Law Dictionary: Bias is a mental inclination or tendency; prejudice; predilection.
 - May not be biased for or against complainants or respondents generally.
 - May not be biased for or against the individual complainants or respondents involved in the formal complaint.

DEFINING CONFLICT



- The decision maker must not be **conflicted**.
 - Black's Law Dictionary: "Conflict of interest" means a real or seeming incompatibility between one's private interests and one's public duties.
 - May not have a conflict of interest in favor of or against complainants or respondents generally.
 - May not have a conflict of interest in favor of or against the individual complainants or respondents involved in the formal complaint.

NO. 6: POLICY DEVELOPMENT



POLICY DEVELOPMENT

- The new regulations require revisions to your Board Policies addressing Title IX.
- OSBA/NEOLA provide templates.
- Review templates carefully to ensure alignment with your district's operations and preferences:
 - Title IX Team
 - Live hearings are optional.



REQUIRED NOTICES

- Each district is required to provide notice of the following to certain groups:
 - Nondiscrimination Policy Statement.
 - Notice of the Title IX Coordinator's name or title, office address, electronic mail address, and telephone number.
 - Notice of the District's grievance procedures and grievance process, including how to file a complaint of sex discrimination, how to report file a formal complaint of sexual harassment, and how the District will respond.



NONDISCRIMINATION NOTICE

- The District does not discriminate on the basis of sex in the education program or activity that it operates, and that it is required by Title IX and its regulations not to discriminate in such a manner.
- The requirement not to discriminate in the education program or activity extends to admission and employment and inquiries about the application of Title IX and its regulations may be referred to the Title IX Coordinator or the Assistant Secretary for Civil Rights of the U.S. Department of Education.



NONDISCRIMINATION NOTICE

- Each district must provide notices to the following:
 - Applicants for admission and employment
 - Students
 - Parents/guardians of elementary and secondary school students
 - Employees
 - All unions or professional organizations with collective bargaining agreements or professional agreements with a school or institution



PUBLICATION REQUIREMENTS

- Districts must “prominently” display the name or title, office address, electronic mail address and telephone number of the employee(s) designated as the Title IX Coordinator(s) and its nondiscrimination notice on its website and in handbooks.
- Districts 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 the requirements for formal complaints.



NO. 7: JURISDICTION REQUIREMENTS



JURISDICTION

- To file a formal complaint, a complainant must be participating in or attempting to participate in the education program or activity of the recipient.
- “Education program or activity” includes locations, events, or circumstances over which the recipient 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.



JURISDICTION

- Anyone may report sex discrimination (by mail, telephone, email, or any other means that results in the Title IX Coordinator receiving the report), regardless of whether the person is the alleged victim of the reported conduct.
- A Title IX Coordinator can sign a complaint to trigger an investigation over the complainant's objections.



JURISDICTION

- What about off campus conduct?
 - Jurisdiction may still lie if there is control over the Respondent and the context, even if it occurs off campus.
- For off-campus misconduct outside the jurisdiction of the district, there may be in-program effects.
- Even if no jurisdiction under Title IX, a non-disciplinary remedial response would be best practice.
- May also want to look to other policies and code of conduct.



MANDATORY DISMISSAL OF FORMAL COMPLAINT

- Must dismiss a formal complaint if:
 - The conduct alleged in the formal complaint would not constitute sexual harassment as defined in the law/policy, even if proved;
 - If the conduct alleged did not occur in the recipient's education program or activity;
 - If the conduct alleged did not occur against a person in the United States.
- Such dismissal does not preclude other action under the District's code of conduct or other policies.



DISCRETIONARY DISMISSAL OF FORMAL COMPLAINT

- The District may dismiss a formal complaint or any allegations in the complaint if:
 - Complainant notifies the Title IX Coordinator in writing that the Complainant would like to withdraw the formal complaint or any allegations;
 - The Respondent is no longer enrolled or employed by the District;
 - Specific circumstances prevent the District from gathering evidence sufficient to reach a determination as to the formal complaint or allegations.
- Upon dismissal, must promptly send written notice of the dismissal and the reasons to the parties.



NO. 8: CONDUCTING THE INVESTIGATION



FIVE SIGNIFICANT CHANGES TO INVESTIGATIONS



- Mandatory separation between the investigation function and decision-making.
- Respondent is not just “innocent until proven guilty,” but must be presumed not responsible for the conduct throughout the entire investigation process.
- Parties are entitled to view all of the evidence in the case, even if it is not relevant.
- Parties are entitled to review the investigator’s draft report and make comments or criticisms before the report is finalized.
- Confidentiality of party and witness names is over.

- ✓ Notice of the grievance process, including any informal resolution process;
- ✓ Notice of the allegations, including sufficient detail (i.e., names of known parties, the conduct alleged to be sexual harassment, and the date and location of the conduct, if known) to allow the respondent to prepare a response before an initial interview;
- ✓ A statement that the respondent is presumed not responsible for the conduct and that responsibility will be determined at the conclusion of the grievance process;
- ✓ Notice of the parties' right to have an advisor (who may be, but is not required to be, an attorney) and to inspect and review evidence; and
- ✓ Notice of any provision in the code of conduct that prohibits knowingly making false statements or providing false information in the grievance process.

Written Notice Start of Investigation of Formal Complaint

INFORMAL RESOLUTION



- Districts may not offer an informal resolution process unless a formal complaint is filed.
- Districts 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 of sexual harassment.
- Districts may not require the parties to participate in an informal resolution process.
- However, at any time prior to reaching a determination regarding responsibility the district may facilitate an informal resolution process, such as mediation, that does not involve a full investigation and adjudication, provided that the recipient provides written notice disclosing certain items (next slide).
- Prior to informal resolution, the district must obtain the parties' voluntary, written consent to the informal resolution process.
- Districts cannot offer or facilitate an informal resolution process to resolve allegations that an employee sexually harassed a student.

MANAGING AN ADVISOR'S INVOLVEMENT



- Both parties have an equal opportunity to have others present during any grievance proceeding, including the opportunity to be accompanied by an advisor who may be, but is not required to be, an attorney.
- Employees will typically have a union representative and/or an attorney represent them.
- Students may bring a parent or advisor.
- Make sure to have a pre-interview discussion with representatives/advisors about the limitations of what they can do/say in the interview.
- You may establish restrictions regarding the extent to which the advisor may participate in the proceedings, as long as the restrictions apply equally to both parties.

GATHERING EVIDENCE – COMPLYING WITH THE REGULATIONS



- Burden of proof rests on the Recipient at all times.
- Provide an equal opportunity for the parties to present witnesses, including fact and expert witnesses, and other inculpatory and exculpatory evidence.
- Cannot restrict the parties from discussing the allegations under investigation or from gathering and presenting relevant evidence.
- Must provide to any party whose participation is invited or expected, written notice of the date, time, location, participants, and purpose of all hearings, investigative interviews, or other meetings, with sufficient time for the party to prepare to participate.

SPECIAL WITNESS CONSIDERATIONS: CONDUCTING A TRAUMA-INFORMED INTERVIEW



Trauma-informed investigating and interviewing include the following key components:

- 1) understanding the impact of trauma on a neurological, physical, and emotional level;
- 2) promoting safety and support;
- 3) knowing positive ways to respond that avoid re-traumatization; and
- 4) providing choice with a goal of empowerment.

SPECIAL WITNESS CONSIDERATIONS: CONDUCTING A TRAUMA-INFORMED INVESTIGATION



- Making the interview more comfortable and build rapport— having a box of tissues in the room; letting them choose their drink; maybe a white noise machine if it is in a busy space; letting them choose their seat/side of the table. Never “rank” the trauma (e.g., “you’re lucky you don’t remember” or ranking based on whether you were drugged or not drugged, or whether it was someone you know or a stranger, etc.)
- Avoid Asking “why” questions. “Why did you...” It sounds too judgmental.
 - Why assumes that there was another option that they didn’t choose.
 - Instead, can ask “how did it happen that...?”

NO. 9: REPORT WRITING AND DECISION-MAKING



- ✓ **Fairly summarize relevant evidence.**
- ✓ **Evaluates all relevant evidence objectively, including both inculpatory and exculpatory evidence.**
- ✓ **Make credibility determinations that are not based on a person's status as a Complainant, Respondent, or Witness.**
- ✓ **"Show your work" for all of the above in order to have a complete report.**

Investigator's Written Report

TURNING EVIDENCE INTO A REPORT – ASSESSING CREDIBILITY



- Credibility is the process of weighing the accuracy and veracity of evidence.
- Evaluate the source, content, and plausibility of testimony in light of other evidence.
- Assessment of credibility does not include making conclusions about whether a witness or evidence is credible, or judging the comparative credibility of evidence or witnesses. It stops just short of that, pointing to discrepancies without deciding them.

TURNING EVIDENCE INTO A REPORT: AVOIDING BIAS



- Distinguish undisputed evidence from contested evidence.
- Let the evidence lead to a conclusion – do not interpret the evidence with a goal to reach a particular conclusion.
- Avoid having a “hunch” from the beginning or judging based upon appearance or the “type” of girl/boy.
- Avoid “first impression bias.”
- There will be gaps in evidence – if you cannot fill those gaps, do not use your assumptions or speculation.

OBLIGATION TO PROVIDE EVIDENCE



- Must provide both parties an equal opportunity to inspect and review any evidence obtained as a part of the investigation that is **directly related to the allegations raised in a formal complaint**, including the evidence upon which the recipient does not intend to rely in reaching a determination.
- Must do this at this time so that each party can “meaningfully respond to the evidence prior to the conclusion of the investigation.”
- You must provide the evidence in an electronic format or hard copy and give the parties at least 10 days to submit a written response. If a written response is provided, consider it in completing your final report.
- Provide your final report to the Decisionmaker and the parties.

HOW WILL THE DISTRICT MAKE A DETERMINATION REGARDING RESPONSIBILITY?



- What procedure will the district use? Two options:
 - Adopt a hearing procedure.
 - Reach a decision through a written decision making process.

HEARINGS



- Required for postsecondary institutions.
- K-12 school districts may choose to include hearings in their grievance processes, but are not required to.
- If the grievance process includes a live hearing, the following is required:
 - The parties' advisors are permitted to ask live questions of the other party(ies) and witnesses.
 - Questioning must be conducted directly, orally, and in real time.
 - Upon request, the district must facilitate questioning with the parties located in separate rooms and connected by technology.
 - The decision maker must determine whether each question is relevant before allowing the other party or witness to answer it.
 - If a party does not have an advisor present, the district must provide one for free.
 - In determining responsibility, the decision maker may only rely on statements by parties or witnesses who agree to be questioned.
 - The District must create a recording or transcript of the hearing.

WRITTEN DECISION MAKING PROCESS



- If the district opts not to include hearings in the grievance process:
 - No interaction between the parties or live questioning is required.
 - The district need not appoint a hearing officer.
 - However, districts must still:
 - Appoint a Decision Maker.
 - Afford each party an opportunity to submit written, relevant questions to the other party or witnesses.
 - Provide each party with the answers to their questions.
 - Allow for additional, limited follow-up questions from each party.

DECISION MAKING PROCESS – ALLOWING QUESTIONING



- The decision maker may only allow relevant questions.
- What is a relevant question?
 - “Relevance” is not generally defined in the regulations.
 - Under the Federal Rules of Evidence, evidence is relevant if:
 - It has any tendency to make a fact more or less probable than it would be without the evidence;
and
 - The fact is of consequence in determining the action.

DECISION MAKING PROCESS – ALLOWING QUESTIONING



- What is a relevant question?
 - Questions and evidence about the Complainant's sexual predisposition or prior sexual behavior are not relevant.
 - Unless:
 - Offered to prove that someone other than the Respondent committed the conduct alleged by the Complaint; or
 - Concern specific incidents of the Complainant's prior sexual behavior with respect to the Respondent and are offered to prove consent.

INVESTIGATIVE REPORT VS. DETERMINATION OF RESPONSIBILITY

Investigative Report

- The investigator should be a **fact finder**.
 - Gather the facts.
 - Provide sufficient details to provide context and information on the importance of specific evidence.
 - Explain what questions were asked, what evidence was reviewed, and why the investigator made the choices to ask those questions and review that evidence.
 - Explain what evidence the investigator believes is most important and why. Explain what evidence the investigator believes is unimportant and why.
 - Explain why the investigator thinks certain evidence or statements are more or less credible.

Determination of Responsibility

- The decision maker should be a **decision maker**.
 - Make credibility determinations, including whether parties and witnesses were telling the truth.
 - Make determinations about what happened and when.
 - Make determinations about the relative importance of facts and evidence.
 - ***Make a determination regarding whether the Respondent sexually harassed the Complainant that is supported by the facts, as presented by the investigative report and reviewed by the decision maker.***
 - ***Make determinations regarding appropriate sanctions and remedies.***

- Applies the applicable standard;
- Allegations potentially constituting sexual harassment;
- Description of procedural steps taken from the receipt of the formal complaint through the determination, including any notifications to the parties, interviews with parties and witnesses, site visits, methods used to gather other evidence, and hearings held;
- **Findings of fact supporting the determination;**
- **Conclusions regarding the application of the district's code of conduct to the facts;**
- **A statement of, and rationale for, the result as to each allegation, including a determination regarding responsibility, disciplinary sanctions for the Respondent, and remedies designed to restore or preserve equal access to the district's education program or activity to be provided to the Complainant.**
- Procedures and permissible bases for the Complainant and the Respondent to appeal.

Requirements for the Written Determination of Responsibility

Report Writing: The Appeal After

Grounds for Appeal

Both parties have the right to appeal a determination of responsibility or a dismissal for the following reasons:

- (1) A procedural irregularity affected the outcome;
- (2) New evidence that was not reasonably available at the time of the determination and could affect the outcome;
- (3) Conflict of interest on the part of the Title IX Coordinator, Investigator, or Decisionmaker that affected the outcome; or
- (4) Other reasons as permitted by the recipient.

Appeal Process

Once an appeal is made, the recipient must give both sides written notice and an opportunity to submit a written statement in support of or challenging the determination.

Appeals must result in a written decision that is provided to both parties simultaneously.

Note: Carefully consider the appropriate appeal person(s) to serve as appeal decisionmakers, given the unique training requirements and prohibitions on conflicts of interest.

- When an appeal is received, notify the other party(ies) in writing of the appeal, and implement appeal procedures equally for both parties.
- Give both parties a reasonable, equal opportunity to submit a written statement in support of, or challenging, the determination of responsibility.
 - The grievance procedure should specify the deadline for submitting this statement. (Like the notice of appeal, this timeline can be fairly quick.)
 - The grievance procedure should specify any other requirements for this statement.

Written Notification of Appeal

DECIDING THE APPEAL



- The Appeal is not a Re-Do, but a Review.
 - Confine the review of the Determination of Responsibility to the specific issue raised in the Appeal and the statements the parties submitted in the Appeal.
 - The Appeals Decision Maker should not substitute his/her judgment for that of the Decision Maker, especially regarding factual determinations.
 - If no additional investigation is needed, the Appeals Decision Maker should identify the error and correct it, explaining how that changes the Determination of Responsibility, sanctions, and/or remedies.
 - If additional investigation is needed, the Appeals Decision Maker should “remand” the Complaint to the Decision Maker, with instructions on how to correct the error and appropriately revise the Determination of Responsibility.

THE WRITTEN APPEAL DECISION



- What are possible results of the appeal?
 - The Determination of Responsibility is “affirmed.”
 - The Determination of Responsibility is completely or partially “reversed” and the Appeals Decision Maker comes to a different final conclusion.
 - The complaint is “remanded” to the Investigator for limited further investigation in accordance with specific instructions from the Appeal Decision.

PROCEDURES FOR APPEALS – NOTIFYING PARTIES OF THE RESULT



- Issue a written appeal decision describing the result of the appeal and the rationale for the result.
- Simultaneously provide the written appeal decision to both parties.

THANK YOU FOR YOUR TIME AND ATTENTION!

