TITLE IX PART I -
TITLE IX COORDINATOR ESSENTIALS
K-12

September 15, 2020

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## Title IX Part I - Title IX Coordinator Essentials

### K-12

**September 15, 2020**

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Title IX Part I –
Title IX Coordinator Essentials
September 15, 2020

Presented by:
Monica D. Batanero, Sr. Associate General Counsel
School & College Legal Services of California

Agenda

• Title IX Workshop Series
• What is Title IX?
• Investigation of Formal Complaint
• Decision Making
• Role of the Title IX Coordinator
• Wide Application of Title IX
• Enforcement
• Next Steps

Fall 2020
Title IX Workshop Series at SCOE

• Part 2 – Conducting Title IX Investigations, October 14, 2020
• Part 3 – Nuts and Bolts of the Roles of the Title IX Coordinator and Decision Maker, November 10, 2020
• Part 4 – CCD Only – Additional Title IX Challenges for Community Colleges, December 8, 2020
I. What Is Title IX?

What Is 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 educational program or activity receiving Federal financial assistance.”


What Is Title IX?

• Title IX of the Education Amendments of 1972

• Established to combat discrimination against women in the educational system

• Two objectives:
  • Prevent use of federal resources to support discriminatory practices in education
  • Provide individuals with protection against those practices

• Title IX protects any “person” against sex discrimination – both males and females
What Is Title IX?

- Title IX applies to “recipients of Federal financial assistance.”
- Every recipient must ensure that a student is not denied or limited in the ability to participate in or benefit from a school program or activity on the basis of sex.

Title IX Legal Framework

- Federal law
- Implementing regulations
- New TIX regulations (effective 8/14/20)
- Regulatory Guidance
  - RESCINDED - 2001 Revised Sexual Harassment Guidance
  - RESCINDED - 2017 Interim Guide: Q&A on Campus Sexual Misconduct

Defined Terms

- **Complainant** means an individual who is alleged to be the victim of conduct that could constitute sexual harassment.
- **Respondent** means an individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment.
- **Recipient** means elementary and secondary schools, as well as postsecondary institutions, that receive Federal financial assistance.
Sex-Based Discrimination

• Title IX prohibits sex-based discrimination
• Sex-based discrimination includes:
  • Sexual harassment
  • Sexual violence
  • Discrimination based on gender stereotypes
  • Gender-based discrimination
• Does NOT prohibit discrimination on the basis of sexual orientation (but California law does)

Title IX Sexual Harassment

1. Unwelcome conduct on the basis of sex that a reasonable person would determine is so “severe, pervasive and objectively offensive” that it effectively denies a person equal access to the recipient’s education program or activity;
2. Quid pro quo harassment; or
3. Sexual assault, dating violence, domestic violence, or stalking as defined in the Clery Act/Violence Against Women Act (“VAWA”).

Affirmative Consent

(Sexual Assault)

• The new regulations specifically note that schools are not required to adopt any particular definition of consent with regard to sexual assault.
• Effective 1/1/20, colleges that receive state funding must adopt a sexual assault policy that includes an affirmative consent standard in the determination of whether consent was given by both parties to sexual activity.
• “Affirmative consent” must be defined as “affirmative, conscious, and voluntary agreement to engage in sexual activity.”
Where Does Title IX Apply?

• Title IX protects students in connection with all academic, educational, extracurricular, athletic, and other programs of the district.

• Programs can take place in a district facility, on a school bus, at a program sponsored by the district at another location, or on a school-sponsored field trip.

Where Does Title IX Not Apply?

• Sexual harassment that occurs off campus and does not occur in an education program or activity of the recipient will not be covered under Title IX.

• When might jurisdiction not exist?
  • When conduct occurs off campus via social media
  • When conduct occurs outside of the United States

Educational Program or Activities

• Includes locations, events, or circumstances over which the recipient exercised substantial control over both the respondent and the context in which the harassment occurs.

• Includes any building owned or controlled by a student organization that is officially recognized by the CCD.
General Response to Sexual Harassment

- Once a recipient has actual knowledge of sexual harassment in an education program or activity of the recipient, it must respond promptly in a manner that is not deliberately indifferent.
  - A response is deliberately indifferent only if it’s response to sexual harassment is clearly unreasonable in light of the known circumstances.
- The 2001 Guidance (now rescinded) stated that recipients must take action in response to sexual harassment that is reasonably calculated to stop harassment and prevent recurrence of harassment.
  - DOE has clarified that it will not unrealistically hold recipient’s responsible where the recipient took action that was not clearly unreasonable in light of the known circumstances, and a perpetrator of harassment reoffends.

Actual Knowledge

“Actual knowledge means notice of sexual harassment or allegations of sexual harassment…Imputation of knowledge based solely on vicarious liability or constructive notice is insufficient to constitute actual knowledge. This standard is not met when the only official of the recipient with actual knowledge is the respondent.”

Receiving Actual Knowledge

- K-12:
  - Any elementary and secondary school employee.
- CCD:
  - The institution’s Title IX Coordinator, or any official who has authority to institute corrective measures on behalf of the recipient.
Responding to Notice

• Title IX Coordinator is responsible to promptly contact the Complainant and discuss:
  • Availability of Supportive Measures,
  • Option to File Formal Complaint, and
  • Formal Complaint Process.
• Title IX Coordinator must determine whether Title IX jurisdiction exists.

Supportive Measures

“Supportive measures means non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, and without fee or charge to the complainant or the respondent before or after the filing of a formal complaint or where no formal complaint has been filed. Such measures are designed to restore or preserve equal access to the recipient’s education program or activity without unreasonably burdening the other party, including measures designed to protect the safety of all parties or the recipient’s educational environment, or deter sexual harassment.”

Supportive Measures

• Counseling
• Extensions of deadlines or other course-related adjustments
• Modifications of work or class schedules
• Campus escort services
• Mutual restrictions on contact between the parties
• Changes in work or housing locations
• Leaves of absence
• Increased security and monitoring of certain areas of the campus
• Other similar measures
Pop Quiz!

II. Investigation of Formal Complaint

Title IX Grievance Procedures

- A formal complaint initiates the grievance process.
- Grievance procedures MUST include:
  1. Treat complainants and respondents equitably.
  2. Impose disciplinary sanctions only after following a grievance process that complies with the new regulations.
  3. An objective evaluation of all relevant evidence.
  4. No conflict of interest or bias by the Title IX Coordinator, investigator or decision-maker.
  5. Training for Title IX Coordinator, investigator or decision-maker on definition of sexual harassment, scope of the recipient’s education program or activity, how to conduct an investigation and grievance process (including hearings, appeals), and how to serve impartially.
Title IX Grievance Procedures, Cont’d.

• Grievance procedures MUST include:
  6. Presumption of respondent’s innocence until conclusion of grievance process.
  7. Reasonably prompt time frames, to include limited extension of time frames for good cause.
  8. Description of range of possible disciplinary sanctions and remedies.
  10. Appeal rights.
  11. Range of supportive services available.
  12. Not use or require evidence that is legally privileged, unless privilege is waived.

Formal Complaint

• A Formal Complaint is a document filed by a complainant or signed by the Title IX Coordinator alleging sexual harassment against a respondent and requesting that the recipient investigate the allegation of sexual harassment.
• A formal complaint may be filed with the Title IX Coordinator in person, by mail, or by electronic mail.
• 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 recipient with which the formal complaint is filed.

Mandatory Dismissal of Formal Complaint

• “If the conduct alleged in the formal complaint would not constitute sexual harassment as defined in § 106.30 even if proved, did not occur in the recipient’s education program or activity, or did not occur against a person in the United States, then the recipient must dismiss the formal complaint with regard to that conduct for purposes of sexual harassment under title IX or this part.”
Permissive Dismissal of Formal Complaint

- “The recipient may dismiss the formal complaint or any allegations therein, if at any time during the investigation or hearing: a complainant notifies the Title IX Coordinator in writing that the complainant would like to withdraw the formal complaint or any allegations therein; the respondent is no longer enrolled or employed by the recipient; or specific circumstances prevent the recipient from gathering evidence sufficient to reach a determination as to the formal complaint or allegations therein.”

Written Notice of Allegations

- Title IX coordinator is responsible for providing the following information in a written notice to the parties:
  - Notice of recipient’s grievance process, including any informal resolution process; and
  - Notice of the allegations, including sufficient details known at the time and with sufficient time to prepare a response before an initial interview. This includes the identities of parties involved, if known, and the date and location of the alleged incident, if known.

Informal Resolution

- “A recipient may not require the parties to participate in an informal resolution process under this section and may not offer an informal resolution process unless a formal complaint is filed.
- However, at any time prior to reaching a determination regarding responsibility the recipient may facilitate an informal resolution process, such as mediation, that does not involve a full investigation and adjudication.”
Emergency Removal

“Nothing in this part precludes a recipient from removing a respondent from the recipient’s education program or activity on an emergency basis, provided that the recipient [1] undertakes an individualized safety and risk analysis, [2] determines that an immediate threat to the physical health or safety of any student or other individual arising from the allegations of sexual harassment justifies removal, and [3] provides the respondent with notice and an opportunity to challenge the decision immediately following the removal.”

Investigation Process Requirements

• Burden of gathering evidence is on the recipient – not the complainant, respondent, or witnesses.
• Complainant and Respondent are provided equal opportunity to present evidence, including witnesses.
• No “gag-orders;” either party must be allowed to discuss the allegations and gather evidence.

Investigation Process, Cont’d.

• Allow both parties to have advisor present throughout process.
• Provide notice of all proceedings to parties expected to attend.
• Both parties may review the evidence and have opportunity to meaningfully respond before final report.
• Prepare and issue a final investigation report.
Standard of Evidence

- There are two permissible standards of evidence for Title IX investigations:
  - Preponderance of the Evidence (>50%)
  - Clear and Convincing (>75%)
- Recipients must apply the same standard to Title IX investigations involving students as those investigations involving employees.

Investigation Report

- Report should:
  - Fairly summarize relevant evidence, and
  - Be provided to complainant and respondent (and their advisors) for comment at least 10 days before a hearing or final determination.

Pop Quiz!
Title IX Investigation Procedures: Law Enforcement

- In cases involving potential criminal conduct, district personnel must determine whether law enforcement should be notified.
- District personnel should never discourage an alleged victim from reporting to law enforcement.
- Law enforcement involvement and/or separate investigation(s) does not relieve the district of its independent Title IX obligation to investigate the conduct.
- Conduct may constitute a violation of Title IX even if law enforcement does not have sufficient evidence of a criminal violation - different standards of evidence.

III. Decision Making

Cross-Examination Requirement

“With or without a hearing, after the recipient 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.”
Hearings

- CCDs (and other postsecondary institutions) are required to provide a live hearing prior to making a determination.
- K-12 schools may choose to adopt a hearing process, but are not required.
- At the hearing, the decision-maker(s) cannot be the investigator of the complaint or the Title IX Coordinator.

Hearing Process

- The decision-maker(s) must allow each party’s advisor to ask the other party and witnesses all relevant questions and follow-up, including questions that go to credibility.
- Cross examination at the hearing must be conducted:
  - Directly
  - Orally
  - In real time
- Only relevant questions may be asked of a party or witness. Prior to answering a question, the decision-maker must rule on relevancy.

Hearing Process, Cont’d.

- If a party does not have an advisor, the recipient must provide one, without charge. However, recipient chooses advisor.
- Questions about sexual history or predisposition are never relevant, unless they are offered to prove that someone else committed the conduct or to prove consent. ("Rape shield.")
- If a party does not submit to cross-examination, the decision-maker(s) may not rely on their statements in making a determination.
Hearing Process Tips

- Recipient must provide:
  - Decision-maker(s) trained in Title IX.
  - Representative to present the recipient’s case.
  - As necessary, an advisor for either party, which may but is not required to be an attorney.
  - Court-reporter or other method of recording the proceeding.
  - Parties do not have to be in the same room during the hearing, so long as participants may simultaneously see and hear one another.

Reaching a Determination

Following a hearing, if one is held, or after the parties have had an opportunity to review the investigative report and submit questions, “[t]he decision-maker(s), who cannot be the same person(s) as the Title IX Coordinator or the investigator(s), must issue a written determination regarding responsibility.”

Written Determination

- Must provide to parties simultaneously.
- The determination must contain:
  - 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, 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;
Written Determination, Cont’d.

• Conclusions regarding the application of the recipient’s code of conduct to the facts;
• A statement of, and rationale for, the result as to each allegation, including a determination regarding responsibility, any disciplinary sanctions the recipient imposes on the respondent, and whether remedies designed to restore or preserve equal access to the recipient’s education program or activity will be provided by the recipient to the complainant; and
• The recipient’s procedures and permissible bases for the complainant and respondent to appeal.

Appeals

• A recipient must offer both parties an appeal from a determination regarding responsibility...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
  • 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.

Appeals Process

As to all appeals, the recipient must:
1. Notify the other party in writing when an appeal is filed and implement appeal procedures equally for both parties;
2. Ensure that the decision-maker(s) for the appeal is not the same person as the decision-maker(s) that reached the determination regarding responsibility or dismissal, the investigator(s), or the Title IX Coordinator;
Appeals Process, Cont’d.

3. Ensure that the decision-maker(s) for the appeal is unbiased and meets the training requirements under Title IX;
4. Give both parties a reasonable, equal opportunity to submit a written statement in support of, or challenging, the outcome;
5. Issue a written decision describing the result of the appeal and the rationale for the result; and
6. Provide the written decision simultaneously to both parties.

Remedies and Sanctions

• If the district determines Title IX has been violated, the district must implement appropriate final remedies.

• Remedies for a complainant might include:
  • Money damages
  • Moving complainant or respondent to a new class or residence hall
  • Restoration of leave time
  • Providing counseling, medical, or academic services

• Remedies for the broader student/employee population might include:
  • Counseling and training
  • Campus climate check/survey

Retention of Records

• Seven (7) year maintenance requirement for:
  • Each sexual harassment investigation including any determination regarding responsibility and any audio or audiovisual recording or transcript required under Title IX, any disciplinary sanctions imposed on the respondent, and any remedies provided to the complainant designed to restore or preserve equal access to the recipient’s education program or activity;
  • Any appeal and the result therefrom; and
  • Any informal resolution and the result therefrom.
Pop Quiz!

IV. Role of the Title IX Coordinator

Title IX Coordinator

“Each recipient must designate and authorize at least one employee to coordinate its efforts to comply with its responsibilities under this part, which employee must be referred to as the “Title IX Coordinator.” The recipient must notify [1] applicants for admission and employment, [2] students, [3] parents or legal guardians of elementary and secondary school students, [4] employees, and [5] all unions or professional organizations holding collective bargaining or professional agreements with the recipient, of the name or title, office address, electronic mail address, and telephone number of the employee or employees designated as the Title IX Coordinator pursuant to this paragraph.”
Title IX Coordinator

• The Title IX Coordinator has many responsibilities, including broadly:
  • Promoting gender equity in education
  • Overseeing the response to Title IX reports and complaints
  • Determining if jurisdiction exists under Title IX
  • Training students, staff, and faculty
  • Involvement in drafting and revising Title IX policies and regulations
  • Ensuring proper posting of notices
  • Identifying and addressing patterns of gender inequity revealed by reports and complaints

Title IX Coordinator

• The Title IX Coordinator may also:
  • Conduct investigations
  • Work with local law enforcement and service providers
  • The Title IX Coordinator may not be the decision-maker

Title IX Training

• “A recipient must ensure that Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process, receive training on [1] the definition of sexual harassment in § 106.30, [2] the scope of the recipient’s education program or activity, [3] how to conduct an investigation and grievance process including hearings, appeals, and informal resolution processes, as applicable, and [4] how to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias.”
Title IX Training, Cont’d.
“A recipient 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 paragraph (b)(6) of this section. A recipient also must ensure that investigators receive training on issues of relevance to create an investigative report that fairly summarizes relevant evidence.”

Publication of Training Materials
• “A recipient must make [all materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process] publicly available on its website, or if the recipient does not maintain a website the recipient must make these materials available upon request for inspection by members of the public.”

Title IX Coordinator: Coordination with Law Enforcement
• The Title IX Coordinator/designee should provide assistance to district law enforcement unit employees regarding how to respond appropriately to reports of sexual violence.
• The Title IX Coordinator should be given access to district law enforcement investigation notes and findings as necessary for the Title IX investigation, so long as doing so does not compromise the criminal investigation.
• These procedures can be outlined in practice guidelines for the district’s Title IX office and its law enforcement unit.
V. Wide Application of Title IX

Athletics

• Recipients must provide equal athletic opportunities for members of both sexes.
• Recipients must also effectively accommodate students’ athletic interests and abilities.
• Recipients can demonstrate compliance in 3 ways:
  1. Provide participation opportunities for male and female students substantially proportionate to their respective enrollments; or
  2. For the sex currently or historically underrepresented in sports, show a history and continuing practice of expanding programs that is responsive to the interests of that sex; or
  3. If the recipient cannot show a history and continuing practice of program expansion, demonstrate that the district is meeting the interests and abilities of that sex with current programming.
Athletics

Part Two of the Three-Part Test
Showing a History and Continuing Practice of Expanding Programs that is Responsive to the Interests of that Sex

• These factors may indicate a history of expansion:
  • The institution’s record of adding intercollegiate teams or upgrading teams to intercollegiate status for the underrepresented sex;
  • The institution’s record of increasing the numbers of participants in intercollegiate sports of the underrepresented sex;
  • The institution’s affirmative responses to students’ requests for addition or elevation of sport.

• These factors may indicate a continuing practice of expansion:
  • The institution’s current implementation of a nondiscriminatory policy of procedure for requesting the addition or elevation of supports and the effective communication of the policy to students; and
  • The institution’s current implementation of a plan to expand programming in response to developing interests and abilities.

Athletics

Part Three of the Three-Part Test
Fully and Effectively Accommodating the Interests and the Abilities of the Underrepresented Sex

• For part three, OCR considers all three questions:
  1. Is there unmet interest in a particular sport?
  2. Is there sufficient ability to sustain a team in the sport?
  3. Is there a reasonable expectation of competition for the team?

• If the answers to all three questions is “yes,” OCR will find that an institution is not fully and effectively accommodating the interests and abilities of the underrepresented sex and therefore is not in compliance with Part Three.

Athletics

• Title IX Coordinator should regularly evaluate the equity between the institution’s athletics opportunities.
• Whether equal athletic opportunities are provided to both sexes is based upon a “laundry list” of factors.
Athletics

• “Laundry list” of factors:
  • Equipment and supplies
  • Scheduling of games and practice time
  • Travel and per diem allowances
  • Opportunity for coaching and academic tutoring
  • Assignment and compensation of coaches and tutors
  • Provision of locker rooms and practice and competitive facilities
  • Publicity
  • Recruitment
  • Support services

Athletics

• Starting with the 2015-16 school year, all public schools and charter schools that offer competitive athletics must make certain data publicly available:
  • Total enrollment, by gender
  • Number of pupils enrolled at the school who participate in competitive athletics, by gender
  • Number of boys’ and girls’ teams, classified by sport and competition level

• If the school has a website, the data must be available on the website

Single-Sex Education*

• Except as specifically allowed by law, districts may not carry out programs or activities separately on the basis of sex.
  • Single-sex classes may be offered under certain circumstances:
    • Contact sports in physical education classes;
    • Classes or portions of classes that deal primarily with human sexuality;
    • Non-vocational classes and extracurricular activities that meet specific criteria.
  • Consider the difference between designated single-sex classes versus classes with predominantly male or female students.

*This slide does not address athletics (see prior slides).
Discipline

• Title IX prohibits institutions from applying different rules of behavior, sanctions, or other treatment, including discipline, based on sex.
• Title IX Coordinators should regularly review discipline data to ensure that similarly situated students are not being disciplined differently based on sex for the same offense.
• Students should not be disciplined based on their gender identity or for failing to conform to stereotypical notions of masculinity or femininity in their appearance or behavior.

Financial Assistance

• Recipients may not provide different amounts or types of financial assistance, limit eligibility for financial assistance, or apply different criteria on the basis of sex in administering financial assistance.
• Recipients may not assist any entity offering sex-restricted financial aid.
• Three broad exceptions. (see next slide)
Recruitment, Admissions & Counseling

• Title IX prohibits higher education, vocational education, and professional education institutions from recruiting, admitting, and counseling or guiding students on the basis of sex.

• Title IX Coordinator should regularly review enrollment data to ensure disproportionate enrollment by one sex (e.g., in the STEM fields) is not the result of counseling practices or counseling materials.

Sex-Based Harassment

• Sexual harassment is a prohibited form of sex discrimination.

• Three types:
  - Hostile educational environment harassment
  - Quid pro quo harassment
  - Sexual assault, dating violence, domestic violence, or stalking

• Title IX prohibits sexual harassment by students, employees, and third parties (such as visiting speakers and athletes).

• Title IX prohibits same-sex sexual harassment too.

Gender-Based Discrimination

• Title IX prohibits gender-based discrimination, including:
  - verbal, nonverbal, or physical aggression, harassment, intimidation, or hostility, based on sex or sex stereotyping, even if not sexual in nature.
  - Includes not using a transgender student’s preferred name or pronouns when the school uses these tools for gender-conforming students.

• Federal guidance related to transgender students has shifted dramatically in recent years.

• In this and all areas of Title IX, districts must also consider California law.
Pop Quiz!

Sexual Orientation Harassment

- Title IX does not prohibit discrimination on the basis of sexual orientation (but CA law does).
- Harassment directed at LGBTQ students that is sufficiently serious to limit/deny their ability to participate in/benefit from the school’s services, activities, or programs is covered by Title IX.
- Title IX also prohibits discrimination based on sex or sex stereotyping, even if not sexual in nature.

Pregnant and Parenting Students

- A district may not require a pregnant student to participate in a separate school program.
- A district must provide the same special services to pregnant students that it does to students with other temporary medical conditions.
- A district must excuse a student’s absences due to pregnancy or related conditions, including recovery from childbirth or termination of pregnancy, as long as the student’s physician deems absences medically necessary.
- Harassment based on pregnancy or related conditions constitutes sex-based harassment and is prohibited under Title IX.
Pregnant and Parenting Students: Lactating Students

• Districts must provide reasonable accommodation to lactating students to express breast milk, breastfeed an infant child, or address other related needs.
  
  • Breastfeeding students may not be penalized academically as a result of needing to express breastmilk during the school day, and must be provided the opportunity to make up any missed work.

Abortion

• Title IX prohibits discrimination against, excluding, or denying benefits to a person (applicant, student, or employee) because they have obtained, sought, or will seek an abortion.

• Title IX does not require or prohibit any person, or public or private entity, from providing or paying for any benefit or service, including the use of facilities, related to an abortion (unless necessary to save the life of the woman).

Employment

• Title IX protects employees from sex discrimination in their employment.

• Title IX prohibits discrimination in:
  
  • Recruitment, advertising, and the application process
  • Hiring, upgrading, promoting, demoting, transferring, laying off, termination, returning from layoff, and rehiring
  • Pay, compensation, and fringe benefits
  • Job assignments, classifications, and structure
  • Leaves of absence
  • Selection and financial support for training
  • Employer-sponsored activities
Retaliation

- Title IX protects complainants and other participants in the investigation/complaint process from retaliation.
- “Among the most important immediate responsibilities of an [institution] is to ensure that students who allege harassment...are not subject to retaliation.”
- If retaliation occurs, districts should take strong responsive action.

You Decide: Title IX Violation?

1. Your institution’s grievance procedures allow for the termination of the Title IX process if either party initiates a civil, criminal, or agency (e.g., EEOC, DFEH) proceeding.
2. You conduct an investigation and determine that the evidence does not warrant a hearing. The complainant does not appeal the decision.
3. A student is raped on campus by another student. You provide her services and transfer her schools (at her request) but do not address the impact of the assault on other students at the school.
4. Your school has an abundance of sexual drawings/graffiti on walls, in bathrooms, on lockers, and in hallways.

VI. Enforcement of Title IX
Enforcement of Title IX

- Title IX is enforced by the U.S. Department of Education, Office for Civil Rights (OCR).
- A possible penalty for violating Title IX is the loss of all federal funding.
  - In 1979, the U.S. Supreme Court upheld a private right of action under Title IX.

Enforcement of Title IX

- “If the Assistant Secretary finds that a recipient has discriminated against persons on the basis of sex in an education program or activity under this part, or otherwise violated this part, such recipient must take such remedial action as the Assistant Secretary deems necessary to remedy the violation, consistent with 20 U.S.C. 1682.”

Enforcement of Title IX

- If OCR finds a recipient has violated Title IX, OCR will seek appropriate remedies.
- OCR may propose a Resolution Agreement with the district that requires various corrective measures.
- If a district refuses to negotiate a Resolution Agreement, OCR may initiate administrative enforcement proceedings to suspend, terminate, or refuse to grant Federal financial assistance.
- OCR may refer the case to the Department of Justice.
VI. Next Steps

What's Next?

Next Steps

1. Revise sexual harassment policy and regulation/procedure to incorporate new requirements
2. Ensure sexual harassment policy and regulation/procedure are posted on website and included in student and employee handbooks
3. Identify a Title IX Coordinator and clearly define their role
4. Identify other personnel to implement new grievance process
5. Provide training for Title IX Coordinator, potential investigators, decision makers, facilitators of informal resolution process

Next Steps, Cont’d.

6. Post training materials on website
7. Educate staff and students on new grievance process
8. Understand what the Department defines as actual knowledge of a Title IX incident that triggers duty to report to the district Title IX Coordinator
9. Ensure a prompt and equitable grievance process
10. Ensure effective documentation procedures are in place for how district receives and maintains information
### Additional Resources – K-12

- U.S. Department of Education, Office for Civil Rights: Title IX and Sex Discrimination, [https://www2.ed.gov/about/offices/list/ocr/docs/tix_dis.html](https://www2.ed.gov/about/offices/list/ocr/docs/tix_dis.html)
- U.S. Department of Education, Office for Civil Rights: Policy Guidance on Sex Discrimination, [https://www2.ed.gov/about/offices/list/ocr/frontpage/faq/tr/policyguidance/sex.html](https://www2.ed.gov/about/offices/list/ocr/frontpage/faq/tr/policyguidance/sex.html)
- National Center on Safe Supportive Learning Environments, [https://safesupportivelearning.ed.gov/safe-place-to-learn-k12](https://safesupportivelearning.ed.gov/safe-place-to-learn-k12)

### Additional Resources – Community Colleges

- U.S. Department of Education, Office for Civil Rights: Title IX and Sex Discrimination, [https://www2.ed.gov/about/offices/list/ocr/docs/tix_dis.html](https://www2.ed.gov/about/offices/list/ocr/docs/tix_dis.html)
- The Center for Changing Our Campus Culture, [www.changingourcampus.org](http://www.changingourcampus.org)
- California Office of the Attorney General, Campus Sexual Assault guidance and resources, [www.oag.ca.gov/campus-sexual-assault](http://www.oag.ca.gov/campus-sexual-assault)
- California Community Colleges Chancellor’s Office, [www.cccco.edu](http://www.cccco.edu)

### Questions?

Information in this presentation, including but not limited to PowerPoint handouts and presenters' comments, is summary only and not legal advice. We advise you consult with legal counsel to determine how this information may apply to your specific facts and circumstances.

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ATTACHMENTS
May 20, 2020

To: Superintendents, Member School Districts (K-12)

From: Monica D. Batanero, Sr. Assoc. General Counsel
       Kaitlyn A. Schwendeman, Schools Legal Counsel

Subject: New Title IX Regulations Effective August 14, 2020
         Memo No. 32-2020

The Department of Education on May 6, 2020, issued much-awaited final regulations on how K-12 school districts and college campuses must respond to allegations of sexual harassment. Secretary of Education Betsy DeVos said the final regulations under Title IX — which prohibits sex discrimination in federally funded educational institutions — were issued after considering various stakeholder comments and as many as 124,000 public comments made since the proposed guidelines were issued in November 2018.

The overall intent of the new Title IX regulations is to provide students accused of sexual misconduct with stronger due process protections. As a result, there are many additional requirements that include very specific grievance and investigation procedures that must be adopted by educational institutions.

The new regulations are scheduled to take effect August 14, 2020, and will require modification of current sexual harassment policies, including investigation procedures.

This office is offering a webinar, entitled “New Title IX Regulations for 2020-2021,” on June 3, 2020, from 1:00 p.m. to 4:00 p.m. where we will cover in more detail the new requirements under Title IX. You may register here: DETAILS/REGISTER.¹

¹ https://sclscal.org/workshop/new-title-ix-regulations-for-2020-2021-k-12-ccd/
Some of the more notable changes are detailed below:

**NEW TERMINOLOGY**

The regulations define the following terms to ensure consistency and clarity:

- **Complainant** means an individual who is alleged to be the victim of conduct that could constitute sexual harassment.
- **Respondent** means an individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment.
- **Recipient** means elementary and secondary schools, as well as postsecondary institutions, that receive Federal financial assistance.

**DEFINITION OF SEXUAL HARASSMENT**

The new regulations provide that there are only three categories of conduct that could constitute sexual harassment under Title IX:

1. unwelcome conduct on the basis of sex that a reasonable person would determine is so “severe, pervasive and objectively offensive” that it effectively denies a person equal access to the recipient’s education program or activity;
2. quid pro quo harassment; or
3. sexual assault, dating violence, domestic violence, or stalking as defined in the Clery Act/Violence Against Women Act (“VAWA”).

**What this means:** The final regulations continue the 1997 Guidance and 2001 Guidance approach of including as sexual harassment unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal, or physical conduct of a sexual nature by an employee, by another student, or by a third party. However, when determining whether conduct meets the definition of sexual harassment, particularly under category 1 (hostile environment), the conduct must be severe, pervasive and objectively offensive. Previously, the legal standard was that the conduct has to be either severe or pervasive. This will result in a huge shift in how we analyze whether sexual conduct creates a hostile environment for a complainant and will make it more difficult for a complainant to argue that he/she has been subjected to a hostile environment due to sexual harassment. Notably, under the new regulations a single instance of harassment on the basis of sex can no longer be considered sexual harassment pursuant to the hostile environment analysis.

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2 34 CFR § 106.30
3 Quid pro quo sexual harassment is defined as “an employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual’s participation in unwelcome sexual conduct.”
5 34 U.S.C. § 12291(a)(10)
6 34 U.S.C. § 12291(a)(8)
7 34 U.S.C. § 12291(a)(30)
It is important to note that conduct that falls under the other two categories – quid pro quo and Clery Act/VAWA offenses - do not have to meet the elements of “severe, pervasiveness, and objective offensiveness” such that a single instance of sufficiently severe harassment on the basis of sex may have the systemic effect of denying the victim equal access to an education program or activity.

Lastly, recipients may continue to address harassing conduct that does not meet the Title IX definition of sexual harassment under other provisions of the recipient’s own code of conduct.

**DESIGNATION OF A TITLE IX COORDINATOR**

The Department of Education (“DOE”) has clarified that each recipient must designate and authorize at least one employee to coordinate its efforts with its responsibilities under Title IX. The employee must be referred to as the “Title IX Coordinator” and the recipient must notify applicants for admission and employment, students, parents or legal guardians of elementary and secondary school students, employees, and all unions or professional organizations holding collective bargaining or professional agreements with the recipient, of the name and title, office address, electronic mail address, and telephone number of the employee designated as the Title IX Coordinator.

**What this means:** The DOE has expanded the groups of individuals/organizations that must be notified of the Title IX Coordinator’s information. The recipient must prominently display on its website, if any, of the Title IX Coordinator’s contact information and the recipient’s sexual harassment prevention policy and in each handbook catalog that it makes available to the individuals who now must be notified of the Title IX Coordinator’s information. In addition, the contact information of the Title IX Coordinator must now include either the name or title of the individual and the email address (which was not required previously).

Most importantly, the regulations clarify the independent compliance and investigatory responsibilities of the Title IX Coordinator. Title IX Coordinators must be given independent authority to monitor and implement a recipient’s compliance under Title IX. The Title IX Coordinator must be free from conflicts of interest and bias, and must be trained on, among other things, how to serve impartially.

**GENERAL RESPONSE TO SEXUAL HARASSMENT**

A recipient with actual knowledge of sexual harassment in an education program or activity of the recipient must respond promptly in a manner that is not deliberately indifferent. A recipient is deliberately indifferent only if its response to sexual harassment is clearly unreasonable in light of the known circumstances.

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8 34 CFR § 106.8
9 34 CFR § 106.45(b)(1)(iii)
10 34 CFR § 106.44
Actual knowledge means notice of sexual harassment or allegations of sexual harassment to a recipient’s Title IX Coordinator or any official of the recipient who has authority to institute corrective measures on behalf of the recipient, or to any employee of an elementary and secondary school.

Notice results whenever any elementary and secondary school employee, any Title IX Coordinator, or any official with authority: witnesses sexual harassment; hears about sexual harassment or sexual harassment allegations from a complainant (i.e., a person alleged to be the victim) or a third party (e.g., the complainant’s parent, friend, or peer); receives a written or verbal complaint about sexual harassment or sexual harassment allegations; or by any other means.

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, e.g., off-campus housing, fraternity/sorority houses, etc.

These final regulations emphasize that any person may trigger a recipient’s response obligations by reporting sexual harassment to the Title IX Coordinator using contact information that the recipient must post on the recipient’s website. The person who reports does not need to be the complainant (i.e., the person alleged to be the victim); a report may be made by “any person” who believes that sexual harassment may have occurred and requires a recipient’s response.

A recipient’s response must treat complainants and respondents equitably by offering supportive measures to a complainant, and by following a grievance process now required under the new Title IX regulations before the imposition of any disciplinary sanctions or other actions that are not supportive measures, against a respondent. The Title IX Coordinator must promptly contact the complainant to discuss the availability of supportive measures, consider the complainant’s wishes with respect to supportive measures, inform the complainant of the availability of supportive measures with or without the filing of a formal complaint, and explain to the complainant the process for filing a formal complaint.

Supportive measures means non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, and 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 equal access to the recipient’s education program or activity without unreasonably burdening the other party, including measures designed to protect the safety of all parties or the recipient’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 or housing locations,

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11 34 CFR § 106.44(a)
12 34 CFR § 106.30
leaves of absence, increased security and monitoring of certain areas of the campus, and other similar measures. The recipient 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 recipient to provide the supportive measures.

The Title IX Coordinator is responsible for coordinating the effective implementation of supportive measures.13

With or without a formal complaint, a recipient must comply with the requirement to offer supportive services.14

**What this means:** Previously, a recipient’s duty to investigate and remediate sexual misconduct was triggered when a “responsible employee” knew or should have known about the sexual harassment/sex discrimination. Not only do the new regulations no longer use the term “responsible employee,” the regulations also eliminated the concept of constructive notice (aka “should have known”).

For post-secondary educational institutions, notice of sexual harassment/sex discrimination only occurs when that institution’s Title IX Coordinator or any official who has authority to institute corrective measures on behalf of the recipient receives notice of sexual harassment or allegations of sexual harassment. Notice includes, but is not limited to, a report of sexual harassment to the Title IX Coordinator and the filing of a formal complaint.

For K-12 educational institutions, when any employee receives notice from a student or employee of sexual harassment or allegations of sexual harassment, the recipient is deemed to have actual knowledge, thereby triggering the recipient’s duty to promptly respond. So, all K-12 employees are considered officials with authority to institute corrective measures and schools may not exempt any classification of employee, such as counselors or classified employees.

The new regulations also eliminated the previously-used term “interim measures” and instead use the term “supportive services.”

**JURISDICTIONAL ISSUES**15

Sexual harassment that occurs off campus and does not occur in an education program or activity of the recipient (as defined above) will not be covered under Title IX. Therefore, sexual harassment that occurs off campus via social media that targets a student, for example, may not fall under the provision of Title IX. However, this type of misconduct may still be in violation of the recipient’s code of conduct and so the recipient’s response would be pursuant to that policy.

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13 34 CFR § 106.30
14 34 CFR § 106.45
15 34 CFR § 106.44(a)
In addition, Title IX no longer applies for acts committed outside the United States even if the misconduct occurred in a recipient’s education program or activity, e.g., study abroad program. However, other policies may apply, e.g., a code of conduct policy, that would require a response from the recipient.

**What this means:** Recipients must be careful to first identify if they have jurisdiction over sexual misconduct in order to determine if Title IX applies. However, even if a recipient does not have jurisdiction under Title IX, it may have jurisdiction under another policy or provision. For example, for K-12 school districts, bullying via social media that occurs off campus may be within a recipient’s jurisdiction and subject the offending student to discipline. However, that same conduct may not require a recipient to investigate under Title IX.

**FORMAL COMPLAINT**

A 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 recipient 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 recipient 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.

**What this means:** The definition of “formal complaint” precludes a third party from filing a formal complaint, which is defined as a document that must be filed by a complainant or signed by the Title IX Coordinator. However, as mentioned earlier, any person who believes that sexual harassment may have occurred may report sexual harassment which would then trigger a recipient’s responsibility to determine if supportive services are necessary under the circumstances. Furthermore, a complainant may not submit a formal complaint anonymously, as it requires their physical or digital signature. While a Title IX Coordinator may sign a formal complaint based upon an anonymous report, the identity of the complainant will be disclosed if known.

**NOTICE OF ALLEGATIONS**

Upon receipt of a formal complaint, a recipient must provide the following information through written notice to the parties who are known:

1. Notice of the recipient’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. Sufficient details include the identities of the

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16 34 CFR § 106.8(d)
17 34 CFR § 106.30
18 34 CFR § 106.45(b)(2)
parties involved in the incident, if known, the conduct allegedly constituting sexual harassment, and the date and location of the alleged incident, if known.

The written notice must include a statement 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. The written notice must inform 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 obtained during the investigation.

The written notice must inform the parties of any provision in the recipient’s code of conduct that prohibits knowingly making false statements or knowingly submitting false information during the grievance process.

If, in the course of an investigation, the recipient decides to investigate allegations about the complainant or respondent that are not included in the notice, the recipient must provide notice of the additional allegations to the parties whose identities are known.

What this means: The intent of the new Title IX regulations is to provide an equitable process that affords due process to the parties involved, particularly the respondent. Providing respondents with specific details about the allegations provides them a better opportunity to defend themselves, which is central to due process.

RESPONSE TO A FORMAL COMPLAINT

In response to a formal complaint, a recipient must adopt and follow a grievance process that complies with the following elements:

1. Treat complainants and respondents equitably by providing remedies to a complainant where a determination of responsibility for sexual harassment has been made against the respondent, and by following a grievance process that complies with this section before the imposition of any disciplinary sanctions or other actions that are not supportive measures as defined in § 106.30, against a respondent. Remedies must be designed to restore or preserve equal access to the recipient’s education program or activity. Such remedies may include the same individualized services described in § 106.30 as “supportive measures”; however, remedies need not be non-disciplinary or non-punitive and need not avoid burdening the respondent;

2. Require an objective evaluation of all relevant evidence – including both inculpatory and exculpatory evidence – and provide that credibility determinations may not be based on a person’s status as a complainant, respondent, or witness;

3. 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.

19 34 CFR § 106.45(b)(1)
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, 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 recipient 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. A recipient also must ensure that investigators receive training on issues of relevance to create an investigative report that fairly summarizes relevant evidence. 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;

4. 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;

5. Include reasonably prompt time frames for conclusion of the grievance process, including reasonably prompt time frames for filing and resolving appeals and informal resolution processes if the recipient offers informal resolution processes, and a process that allows for the temporary delay of the grievance process or the limited extension of time frames for good cause with written notice to the complainant and the respondent of the delay or extension and the reasons for the action. 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;

6. Describe the range of possible disciplinary sanctions and remedies or list the possible disciplinary sanctions and remedies that the recipient may implement following any determination of responsibility;

7. 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, and apply the same standard of evidence to all formal complaints of sexual harassment;

8. Include the procedures and permissible bases for the complainant and respondent to appeal;

9. Describe the range of supportive measures available to complainants and respondents; and
10. Not require, allow, rely upon, or otherwise use questions or evidence that constitute, or seek disclosure of, information protected under a legally recognized privilege, unless the person holding such privilege has waived the privilege.

**What this means:** The two most notable changes are the never before required training requirements for Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process and the requirement that recipients apply the same standard of evidence for formal complaints against students as for formal complaints against employees, including faculty. For example, if a collective bargaining agreement requires a clear and convincing standard for formal complaints against employees, then that same standard would have to be applied for formal complaints against students. The two standards of evidence that a recipient must choose from are preponderance of the evidence (more likely than not or >50%) or clear and convincing evidence (substantially more likely than not or ~75%).

Regarding the new training requirements for Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process, there is no minimum hourly training requirement, but instead the training must include the following components: the definition of sexual harassment, 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. Decision-makers specifically must 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. A recipient also must ensure that investigators receive training on issues of relevance to create an investigative report that fairly summarizes relevant evidence.

**DISMISSAL OF A FORMAL COMPLAINT**

The recipient must investigate the allegations in a formal complaint. If the conduct alleged in the formal complaint would not constitute sexual harassment as defined in § 106.30 even if proved, did not occur in the recipient’s education program or activity, or did not occur against a person in the United States, then the recipient must dismiss the formal complaint with regard to that conduct for purposes of sexual harassment under Title IX or this part; such a dismissal does not preclude action under another provision of the recipient’s code of conduct.

The recipient may dismiss the formal complaint or any allegations therein, if at any time during the investigation or hearing: a complainant notifies the Title IX Coordinator in writing that the complainant would like to withdraw the formal complaint or any allegations therein; the respondent is no longer enrolled or employed by the recipient; or specific circumstances prevent the recipient from gathering evidence sufficient to reach a determination as to the formal complaint or allegations therein. Upon dismissal of a formal complaint, the recipient must promptly send written notice of the dismissal and reason(s) therefore simultaneously to the parties.

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20 34 CFR § 106.45(b)(3)
What this means: The Title IX regulations now specify when a recipient must dismiss a complaint under Title IX. In addition, a complainant can request to dismiss a formal complaint, but the recipient is not required to dismiss the complaint.

**EMERGENCY REMOVAL**

Nothing in this part precludes a recipient from removing a respondent from the recipient’s education program or activity on an emergency basis, provided that the recipient undertakes an individualized safety and risk analysis, determines that an immediate threat to the physical health or safety of any student or other individual arising from the allegations of sexual harassment justifies removal, and provides the respondent with notice and an opportunity to challenge the decision immediately following the removal. This provision may not be construed to modify any rights under the Individuals with Disabilities Education Act, Section 504 of the Rehabilitation Act of 1973, or the Americans with Disabilities Act.

What this means: A recipient may only remove a respondent from his/her education program or activity after considering several criteria in order to determine if the respondent must be removed to ensure the physical health or safety of any student. In addition, a respondent is entitled to some form of due process immediately following his/her removal from his/her education program or activity. This “due process” may be a hearing or meeting with an administrator responsible for conducting the individualized safety and risk analysis for the sole purpose of providing the respondent the opportunity to challenge the decision.

**INVESTIGATION OF A FORMAL COMPLAINT**

When investigating a formal complaint and throughout the grievance process, a recipient must—

1. Ensure that the burden of proof and the burden of gathering evidence sufficient to reach a determination regarding responsibility rests on the recipient and not on the parties. Furthermore, the recipient 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 recipient obtains that party’s voluntary, written consent to do so for a grievance process under this section (if a party is not an “eligible student,” as defined in 34 CFR § 99.3, then the recipient must obtain the voluntary, written consent of a “parent,” as defined in 34 CFR § 99.3);

2. Provide an equal opportunity for the parties to present witnesses, including fact and expert witnesses, and other inculpatory and exculpatory evidence;

3. Not restrict the ability of either party to discuss the allegations under investigation or to gather and present relevant evidence;

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21 34 CFR § 106.44(c)
22 34 CFR § 106.45(b)(5)
4. Provide the parties with the same opportunities to have others present during any grievance proceeding, including the opportunity to be accompanied to any related meeting or proceeding by the advisor of their choice, who may be, but is not required to be, an attorney, and not limit the choice or presence of advisor for either the complainant or respondent in any meeting or grievance proceeding; however, the recipient 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;

5. Provide, to a 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;

6. Provide both parties an equal opportunity to inspect and review any evidence obtained as 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 regarding responsibility and inculpatory or exculpatory evidence whether obtained from a party or other source, so that each party can meaningfully respond to the evidence prior to conclusion of the investigation. Prior to completion of the investigative report, the recipient must 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, and the parties must have at least 10 days to submit a written response, which the investigator will consider prior to completion of the investigative report. The recipient must make all such evidence subject to the parties’ inspection and review available at any hearing to give each party equal opportunity to refer to such evidence during the hearing, including for purposes of cross-examination; and

7. Create an investigative report that fairly summarizes relevant evidence and, at least 10 days prior to a hearing (if a hearing is required or otherwise provided) or other time of determination regarding responsibility, send to each party and the party’s advisor, if any, the investigative report in an electronic format or a hard copy, for their review and written response.

**What this means:** The investigation procedure that recipients must now adopt must be followed in order to provide the parties, particularly the respondent, with due process. The regulations make clear that it is the recipient’s responsibility, not the parties’, to gather evidence sufficient to reach a determination regarding responsibility and the burden of proof rests with the recipient.

Each party is now entitled to review, prior to the completion of the investigation report, all evidence, inculpatory and exculpatory, that is directly related to the allegations raised in the formal complaint. Practically speaking, this will be accomplished by the investigator providing a copy of the draft investigation report prior to the completion of the report and allow each party at least 10 days to submit a written response, which the investigator will consider prior to completion of the investigative report.
**HEARINGS**

For postsecondary institutions, the recipient’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 party’s advisor of choice and never by a party personally, notwithstanding the discretion of the recipient to otherwise restrict the extent to which advisors may participate in the proceedings. 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 or the witness 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(s) 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 recipient’s choice, who may be, but is not required to be, an attorney, to conduct cross-examination on behalf of that party.

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 complainant’s prior sexual behavior with respect to the respondent and are offered to prove consent.

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 recipient’s discretion, any or all parties, witnesses, and other participants may appear at the live hearing virtually, with technology enabling participants simultaneously to see and hear each other.

Recipients must create an audio or audiovisual recording, or transcript, of any live hearing and make it available to the parties for inspection and review.

For recipients that are elementary and secondary schools, and other recipients that are not postsecondary institutions, the recipient’s grievance process may, but need not, provide for a

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23 34 CFR § 106.45(b)(6)(i)
hearing. With or without a hearing, after the recipient 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.

With or without a hearing, 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 complainant’s prior sexual behavior with respect to the respondent and are offered to prove consent. The decision-maker(s) must explain to the party proposing the questions any decision to exclude a question as not relevant.

**What this means:** Postsecondary institutions are now required to conduct a live hearing conducted by a neutral decision-maker (hearing officer or panel) who will review the evidence and make a decision as to culpability. The decision-maker cannot be the Title IX Coordinator or the investigator. The hearing can be conducted via video conference and it must always be recorded. The parties must be allowed to ask relevant questions and cross-examine witnesses.

If a party does not have an advisor present at a live hearing, the recipient must provide an advisor of the recipient’s choice to conduct cross-examination on behalf of that party. A party cannot conduct questioning on their own behalf. Therefore, if a party does not have an advisor, the recipient will need to provide one, which can be an employee of the recipient; however, the recipient chooses the advisor.

Recipients that are elementary and secondary schools are not required to conduct live hearings to determine culpability. However, the parties must be given the opportunity to submit written, relevant questions they wanted asked of any party or witness after receiving the investigation report. The recipient will then provide each party with the answers to their questions and then allow for additional, limited follow-up questions from each party.

**STANDARD OF EVIDENCE**

The final regulations were revised to clearly require a recipient’s grievance process to state up front which of the two permissible standards of evidence the recipient has selected and then to apply that selected standard to all formal complaints of sexual harassment, including those against employees.

**DETERMINATION REGARDING RESPONSIBILITY**

The decision-maker(s), who cannot be the same person(s) as the Title IX Coordinator or the investigator(s), must issue a written determination regarding responsibility. To reach this determination, the recipient must apply the standard of evidence that it applies to all formal

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24 34 CFR § 106.45(b)(1)(vii)
25 34 CFR § 106.45(b)(7)
complaints of sexual harassment – either preponderance of the evidence or clear and convincing evidence.

The written determination must include the following elements:

1. Identification of the allegations potentially constituting sexual harassment;

2. A description of the 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;

3. Findings of fact supporting the determination;

4. Conclusions regarding the application of the recipient’s code of conduct to the facts;

5. A statement of, and rationale for, the result as to each allegation, including a determination regarding responsibility, any disciplinary sanctions the recipient imposes on the respondent, and whether remedies designed to restore or preserve equal access to the recipient’s education program or activity will be provided by the recipient to the complainant; and

6. The recipient’s procedures and permissible bases for the complainant and respondent to appeal.

The recipient must provide the written determination to the parties simultaneously. The determination regarding responsibility becomes final either on the date that the recipient provides the parties with the written determination of the result of the appeal, if an appeal is filed, or if an appeal is not filed, the date on which an appeal would no longer be considered timely.

The Title IX Coordinator is responsible for effective implementation of any remedies.\(^{26}\)

**What this means:** A recipient must now ensure that an individual, other than the Title IX Coordinator or investigator, reviews all the evidence and makes a determination regarding a respondent’s responsibility under Title IX. In small elementary and secondary districts, this will require that the Title IX Coordinator be an employee other than the chief administrative officer.

**APPEALS**\(^{27}\)

A recipient must offer both parties an appeal from a determination regarding responsibility, and from a recipient’s dismissal of a formal complaint or any allegations therein, on the following bases:

1. Procedural irregularity that affected the outcome of the matter;

\(^{26}\) 34 CFR § 106.45(b)(7)(iv)

\(^{27}\) 34 CFR § 106.45(b)(8)
2. 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

3. 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.

A recipient may offer an appeal equally to both parties on additional bases. As to all appeals, the recipient must:

1. Notify the other party in writing when an appeal is filed and implement appeal procedures equally for both parties;

2. Ensure that the decision-maker(s) for the appeal is not the same person as the decision-maker(s) that reached the determination regarding responsibility or dismissal, the investigator(s), or the Title IX Coordinator;

3. Ensure that the decision-maker(s) for the appeal is unbiased and meets the training requirements under Title IX;

4. Give both parties a reasonable, equal opportunity to submit a written statement in support of, or challenging, the outcome;

5. Issue a written decision describing the result of the appeal and the rationale for the result; and

6. Provide the written decision simultaneously to both parties.

What this means: Both parties must now be offered the opportunity to appeal a determination regarding responsibility. Previously, recipients generally only provided the complainant with an opportunity to appeal a determination regarding responsibility. Also, the decision-maker for the appeal must meet the same training requirement as the Title IX Coordinator.

INFORMAL RESOLUTION

A recipient 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 consistent with this section. Similarly, a recipient may not require the parties to participate in an informal resolution process under this section and may not offer an informal resolution process unless a formal complaint is filed.

28 34 CFR § 106.45(b)(9)
However, at any time prior to reaching a determination regarding responsibility the recipient may facilitate an informal resolution process, such as mediation, that does not involve a full investigation and adjudication, provided that the recipient –

1. Provides to the parties a written notice disclosing: the allegations, 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, provided, however, 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 any consequences resulting from participating in the informal resolution process, including the records that will be maintained or could be shared;

2. Obtains the parties’ voluntary, written consent to the informal resolution process; and

3. Does not offer or facilitate an informal resolution process to resolve allegations that an employee sexually harassed a student.

**What this means:** Recipients are not required to develop and implement an informal resolution process. However, if a recipient chooses to develop an informal resolution process, it cannot be offered unless a formal complaint has been filed.

**RECORDKEEPING**

A recipient must maintain for a period of **seven (7) years** records of –

1. Each sexual harassment investigation including any determination regarding responsibility and any audio or audiovisual recording or transcript required under Title IX, any disciplinary sanctions imposed on the respondent, and any remedies provided to the complainant designed to restore or preserve equal access to the recipient’s education program or activity;

2. Any appeal and the result therefrom;

3. Any informal resolution and the result therefrom; and

4. All materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process. A recipient must make these training materials publicly available on its website, or if the recipient does not maintain a website, the recipient must make these materials available upon request for inspection by members of the public.

**What this means:** Recipients must now maintain records regarding every phase of a sexual harassment investigation under Title IX for at least seven years. Previously, there was no express requirement on maintaining records for a specific period of time.

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29 34 CFR § 106.45(b)(10)
TRAINING MATERIALS PUBLICATION REQUIREMENT

Each recipient must publish on its website the training materials used to train its Title IX Coordinator.

What this means: If the training materials are proprietary, and thus copyrighted, we recommend you list the materials by its title, but not make them available on your website. You can further state on your website that the materials may be available for inspection with the Title IX Coordinator.

REMEDIAL ACTION

The DOE has clarified that it may require a recipient to take remedial action for discriminating in violation of Title IX and for violating Title IX regulations.

What this means: A recipient that does not follow the requirements of Title IX, such as not designating an employee as a Title IX Coordinator, failing to offer supportive services, failing to send written notice after dismissing a complainant’s allegations, or not following its grievance procedures, may be found to have violated Title IX, even if the violation does not, itself, constitute sex discrimination.

RIGHTS OF PARENTS

The regulations expressly recognize the legal rights of parents/guardians to act on behalf of a complainant or respondent on any Title IX matter.

What this means: Parents/guardians cannot be prevented from representing their child or acting on their behalf on any Title IX matter. However, once a child attains the age of majority (18), he/she holds his/her educational rights, unless he/she is conserved, and can act on their own behalf. However, an adult child can assign his/her educational rights to his/her parent/guardian so that the parent/guardian can act on their child’s behalf.

Please contact our office with questions regarding this Legal Update or any other legal matter.
For the reasons discussed in the preamble, the Secretary amends part 106 of title 34 of the Code of Federal Regulations as follows:

PART 106—NONDISCRIMINATION ON THE BASIS OF SEX IN EDUCATION PROGRAMS OR ACTIVITIES RECEIVING FEDERAL FINANCIAL ASSISTANCE

1. The authority citation for part 106 continues to read as follows:

Authority: 20 U.S.C. 1681 et seq., unless otherwise noted.

2. Section 106.3 is amended by revising paragraph (a) to read as follows:

§106.3 Remedial and affirmative action and self-evaluation.

(a) Remedial action. If the Assistant Secretary finds that a recipient has discriminated against persons on the basis of sex in an education program or activity under this part, or otherwise violated this part, such recipient must take such remedial action as the Assistant Secretary deems necessary to remedy the violation, consistent with 20 U.S.C. 1682.

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3. Section 106.6 is amended by revising the section heading and adding paragraphs (d), (e), (f), (g), and (h) to read as follows:

§ 106.6 Effect of other requirements and preservation of rights.

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(d) Constitutional protections. Nothing in this part requires a recipient to:

(1) Restrict any rights that would otherwise be protected from government action by the First Amendment of the U.S. Constitution;

(2) Deprive a person of any rights that would otherwise be protected from government action under the Due Process Clauses of the Fifth and Fourteenth Amendments of the U.S. Constitution; or

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(3) Restrict any other rights guaranteed against government action by the U.S. Constitution.

(e) Effect of Section 444 of General Education Provisions Act (GEPA)/Family Educational Rights and Privacy Act (FERPA). The obligation to comply with this part is not obviated or alleviated by the FERPA statute, 20 U.S.C. 1232g, or FERPA regulations, 34 CFR part 99.

(f) Title VII of the Civil Rights Act of 1964. Nothing in this part may be read in derogation of any individual’s rights under title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e et seq. or any regulations promulgated thereunder.

(g) Exercise of rights by parents or guardians. Nothing in this part may be read in derogation of any legal right of a parent or guardian to act on behalf of a “complainant,” “respondent,” “party,” or other individual, subject to paragraph (e) of this section, including but not limited to filing a formal complaint.

(h) Preemptive effect. To the extent of a conflict between State or local law and title IX as implemented by §§ 106.30, 106.44, and 106.45, the obligation to comply with §§ 106.30, 106.44, and 106.45 is not obviated or alleviated by any State or local law.

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4. Section 106.8 is revised to read as follows:

§ 106.8 Designation of coordinator, dissemination of policy, and adoption of grievance procedures.

(a) Designation of coordinator. Each recipient must designate and authorize at least one employee to coordinate its efforts to comply with its responsibilities under this part, which employee must be referred to as the “Title IX Coordinator.” The recipient must notify applicants
for admission and employment, students, parents or legal guardians of elementary and secondary school students, employees, and all unions or professional organizations holding collective bargaining or professional agreements with the recipient, of the name or title, office address, electronic mail address, and telephone number of the employee or employees designated as the Title IX Coordinator pursuant to this paragraph. 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.

(b) Dissemination of policy—(1) Notification of policy. Each recipient must notify persons entitled to a notification under paragraph (a) of this section that the recipient 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 this part not to discriminate in such a manner. Such notification must state that the requirement not to discriminate in the education program or activity extends to admission (unless subpart C of this part does not apply) and employment, and that inquiries about the application of title IX and this part to such recipient may be referred to the recipient’s Title IX Coordinator, to the Assistant Secretary, or both.

(2) Publications. (i) Each recipient must prominently display the contact information required to be listed for the Title IX Coordinator under paragraph (a) of this section and the policy described in paragraph (b)(1) of this section on its website, if any, and in each handbook.
or catalog that it makes available to persons entitled to a notification under paragraph (a) of this section.

(ii) A recipient must not use or distribute a publication stating that the recipient treats applicants, students, or employees differently on the basis of sex except as such treatment is permitted by title IX or this part.

(c) Adoption of grievance procedures. 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 to persons entitled to a notification under paragraph (a) of this section 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.

(d) Application outside the United States. The requirements of paragraph (c) of this section apply only to sex discrimination occurring against a person in the United States.

5. Section 106.9 is revised to read as follows:

§ 106.9 Severability.

If any provision of this subpart or its application to any person, act, or practice is held invalid, the remainder of the subpart or the application of its provisions to any person, act, or practice shall not be affected thereby.
6. Section 106.12 is amended by revising paragraph (b) to read as follows:

§ 106.12 Educational institutions controlled by religious organizations.

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(b) Assurance of exemption. An educational institution that seeks assurance of the exemption set forth in paragraph (a) of this section may do so by submitting in writing to the Assistant Secretary a statement by the highest ranking official of the institution, identifying the provisions of this part that conflict with a specific tenet of the religious organization. An institution is not required to seek assurance from the Assistant Secretary in order to assert such an exemption. In the event the Department notifies an institution that it is under investigation for noncompliance with this part and the institution wishes to assert an exemption set forth in paragraph (a) of this section, the institution may at that time raise its exemption by submitting in writing to the Assistant Secretary a statement by the highest ranking official of the institution, identifying the provisions of this part which conflict with a specific tenet of the religious organization, whether or not the institution had previously sought assurance of an exemption from the Assistant Secretary.

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7. Add § 106.18 to subpart B to read as follows:

§ 106.18 Severability.

If any provision of this subpart or its application to any person, act, or practice is held invalid, the remainder of the subpart or the application of its provisions to any person, act, or practice shall not be affected thereby.
8. Add § 106.24 to subpart C to read as follows:

§ 106.24 Severability.

If any provision of this subpart or its application to any person, act, or practice is held invalid, the remainder of the subpart or the application of its provisions to any person, act, or practice shall not be affected thereby.

9. Add § 106.30 to subpart D to read as follows:

§ 106.30 Definitions.

(a) As used in this part:

*Actual knowledge* means notice of sexual harassment or allegations of sexual harassment to a recipient’s Title IX Coordinator or any official of the recipient who has authority to institute corrective measures on behalf of the recipient, or to any employee of an elementary and secondary school. Imputation of knowledge based solely on vicarious liability or constructive notice is insufficient to constitute actual knowledge. This standard is not met when the only official of the recipient with actual knowledge is the respondent. The mere ability or obligation to report sexual harassment or to inform a student about how to report sexual harassment, or having been trained to do so, does not qualify an individual as one who has authority to institute corrective measures on behalf of the recipient. “Notice” as used in this paragraph includes, but is not limited to, a report of sexual harassment to the Title IX Coordinator as described in § 106.8(a).

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

*Consent.* The Assistant Secretary will not require recipients to adopt a particular definition of consent with respect to sexual assault, as referenced in this section.
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 recipient 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 recipient 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 § 106.8(a), and by any additional method designated by the recipient. As used in this paragraph, 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 recipient) 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 under this part or under § 106.45, and must comply with the requirements of this part, including § 106.45(b)(1)(iii).

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

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

(1) An employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an 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

**Supportive measures** means non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, and without fee or charge to the complainant or the respondent before or after the filing of a formal complaint or where no formal complaint has been filed. Such measures are designed to restore or preserve equal access to the recipient’s education program or activity without unreasonably burdening the other party, including measures designed to protect the safety of all parties or the recipient’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 or housing locations, leaves of absence, increased security and monitoring of certain areas of the campus, and other similar measures. The recipient 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 recipient to provide the supportive measures. The Title IX Coordinator is responsible for coordinating the effective implementation of supportive measures.

(b) As used in §§ 106.44 and 106.45:

*Elementary and secondary school* means a local educational agency (LEA), as defined in the Elementary and Secondary Education Act of 1965, as amended by the Every Student Succeeds Act, a preschool, or a private elementary or secondary school.
Postsecondary institution means an institution of graduate higher education as defined in § 106.2(l), an institution of undergraduate higher education as defined in § 106.2(m), an institution of professional education as defined in § 106.2(n), or an institution of vocational education as defined in § 106.2(o).

10. Add § 106.44 to subpart D to read as follows:

§ 106.44 Recipient’s response to sexual harassment.

(a) General response to sexual harassment. A recipient with actual knowledge of sexual harassment in an education program or activity of the recipient against a person in the United States, must respond promptly in a manner that is not deliberately indifferent. A recipient is deliberately indifferent only if its response to sexual harassment is clearly unreasonable in light of the known circumstances. For the purposes of this section, §§ 106.30, and 106.45, “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. A recipient’s response must treat complainants and respondents equitably by offering supportive measures as defined in § 106.30 to a complainant, and by following a grievance process that complies with § 106.45 before the imposition of any disciplinary sanctions or other actions that are not supportive measures as defined in § 106.30, against a respondent. The Title IX Coordinator must promptly contact the complainant to discuss the availability of supportive measures as defined in § 106.30, 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. The Department may not deem a
recipient to have satisfied the recipient’s duty to not be deliberately indifferent under this part based on the recipient’s restriction of rights protected under the U.S. Constitution, including the First Amendment, Fifth Amendment, and Fourteenth Amendment.

(b) Response to a formal complaint. (1) In response to a formal complaint, a recipient must follow a grievance process that complies with § 106.45. With or without a formal complaint, a recipient must comply with § 106.44(a).

(2) The Assistant Secretary will not deem a recipient’s determination regarding responsibility to be evidence of deliberate indifference by the recipient, or otherwise evidence of discrimination under title IX by the recipient, solely because the Assistant Secretary would have reached a different determination based on an independent weighing of the evidence.

(c) Emergency removal. Nothing in this part precludes a recipient from removing a respondent from the recipient’s education program or activity on an emergency basis, provided that the recipient undertakes an individualized safety and risk analysis, determines that an immediate threat to the physical health or safety of any student or other individual arising from the allegations of sexual harassment justifies removal, and provides the respondent with notice and an opportunity to challenge the decision immediately following the removal. This provision may not be construed to modify any rights under the Individuals with Disabilities Education Act, Section 504 of the Rehabilitation Act of 1973, or the Americans with Disabilities Act.

(d) Administrative leave. Nothing in this subpart precludes a recipient from placing a non-student employee respondent on administrative leave during the pendency of a grievance process that complies with § 106.45. This provision may not be construed to modify any rights under Section 504 of the Rehabilitation Act of 1973 or the Americans with Disabilities Act.
11. Add § 106.45 to subpart D to read as follows:

§ 106.45 Grievance process for formal complaints of sexual harassment.

(a) Discrimination on the basis of sex. A recipient’s treatment of a complainant or a respondent in response to a formal complaint of sexual harassment may constitute discrimination on the basis of sex under title IX.

(b) Grievance process. For the purpose of addressing formal complaints of sexual harassment, a recipient’s grievance process must comply with the requirements of this section. Any provisions, rules, or practices other than those required by this section that a recipient adopts as part of its grievance process for handling formal complaints of sexual harassment as defined in § 106.30, must apply equally to both parties.

1. Basic requirements for grievance process. A recipient’s grievance process must—

(i) Treat complainants and respondents equitably by providing remedies to a complainant where a determination of responsibility for sexual harassment has been made against the respondent, and by following a grievance process that complies with this section before the imposition of any disciplinary sanctions or other actions that are not supportive measures as defined in § 106.30, against a respondent. Remedies must be designed to restore or preserve equal access to the recipient’s education program or activity. Such remedies may include the same individualized services described in § 106.30 as “supportive measures”; however, remedies need not be non-disciplinary or non-punitive and need not avoid burdening the respondent;

(ii) Require an objective evaluation of all relevant evidence – including both inculpatory and exculpatory evidence – and provide that credibility determinations may not be based on a person’s status as a complainant, respondent, or witness;
(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, 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 recipient 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 paragraph (b)(6) of this section. A recipient also must ensure that investigators receive training on issues of relevance to create an investigative report that fairly summarizes relevant evidence, as set forth in paragraph (b)(5)(vii) of this section. 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;

(iv) 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;

(v) Include reasonably prompt time frames for conclusion of the grievance process, including reasonably prompt time frames for filing and resolving appeals and informal resolution processes if the recipient offers informal resolution processes, and a process that allows for the
temporary delay of the grievance process or the limited extension of time frames for good cause
with written notice to the complainant and the respondent of the delay or extension and the
reasons for the action. 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;

(vi) Describe the range of possible disciplinary sanctions and remedies or list the possible
disciplinary sanctions and remedies that the recipient may implement following any
determination of responsibility;

(vii) 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, and apply the same standard of evidence to all formal
complaints of sexual harassment;

(viii) Include the procedures and permissible bases for the complainant and respondent to
appeal;

(ix) Describe the range of supportive measures available to complainants and
respondents; and

(x) Not require, allow, rely upon, or otherwise use questions or evidence that constitute,
or seek disclosure of, information protected under a legally recognized privilege, unless the
person holding such privilege has waived the privilege.

(2) Notice of allegations—(i) Upon receipt of a formal complaint, a recipient must
provide the following written notice to the parties who are known:
(A) Notice of the recipient’s grievance process that complies with this section, including any informal resolution process.

(B) Notice of the allegations of sexual harassment potentially constituting sexual harassment as defined in § 106.30, including sufficient details known at the time and with sufficient time to prepare a response before any initial interview. Sufficient details include the identities of the parties involved in the incident, if known, the conduct allegedly constituting sexual harassment under § 106.30, and the date and location of the alleged incident, if known. The written notice must include a statement 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. The written notice must inform the parties that they may have an advisor of their choice, who may be, but is not required to be, an attorney, under paragraph (b)(5)(iv) of this section, and may inspect and review evidence under paragraph (b)(5)(vi) of this section. The written notice must inform the parties of any provision in the recipient’s code of conduct that prohibits knowingly making false statements or knowingly submitting false information during the grievance process.

(ii) If, in the course of an investigation, the recipient decides to investigate allegations about the complainant or respondent that are not included in the notice provided pursuant to paragraph (b)(2)(i)(B) of this section, the recipient must provide notice of the additional allegations to the parties whose identities are known.

(3) Dismissal of a formal complaint—(i) The recipient must investigate the allegations in a formal complaint. If the conduct alleged in the formal complaint would not constitute sexual harassment as defined in § 106.30 even if proved, did not occur in the recipient’s education program or activity, or did not occur against a person in the United States, then the recipient
must dismiss the formal complaint with regard to that conduct for purposes of sexual harassment under title IX or this part; such a dismissal does not preclude action under another provision of the recipient’s code of conduct.

(ii) The recipient may dismiss the formal complaint or any allegations therein, if at any time during the investigation or hearing: a complainant notifies the Title IX Coordinator in writing that the complainant would like to withdraw the formal complaint or any allegations therein; the respondent is no longer enrolled or employed by the recipient; or specific circumstances prevent the recipient from gathering evidence sufficient to reach a determination as to the formal complaint or allegations therein.

(iii) Upon a dismissal required or permitted pursuant to paragraph (b)(3)(i) or (b)(3)(ii) of this section, the recipient must promptly send written notice of the dismissal and reason(s) therefor simultaneously to the parties.

(4) Consolidation of formal complaints. A recipient may consolidate formal complaints as to allegations of sexual harassment against more than one respondent, or by more than one complainant against one or more respondents, or by one party against the other party, where the allegations of sexual harassment arise out of the same facts or circumstances. Where a grievance process involves more than one complainant or more than one respondent, references in this section to the singular “party,” “complainant,” or “respondent” include the plural, as applicable.

(5) Investigation of a formal complaint. When investigating a formal complaint and throughout the grievance process, a recipient must—

(i) Ensure that the burden of proof and the burden of gathering evidence sufficient to reach a determination regarding responsibility rest on the recipient and not on the parties provided that the recipient 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 recipient obtains that party’s voluntary, written consent to do so for a grievance process under this section (if a party is not an “eligible student,” as defined in 34 CFR 99.3, then the recipient must obtain the voluntary, written consent of a “parent,” as defined in 34 CFR 99.3);

(ii) Provide an equal opportunity for the parties to present witnesses, including fact and expert witnesses, and other inculpatory and exculpatory evidence;

(iii) Not restrict the ability of either party to discuss the allegations under investigation or to gather and present relevant evidence;

(iv) Provide the parties with the same opportunities to have others present during any grievance proceeding, including the opportunity to be accompanied to any related meeting or proceeding by the advisor of their choice, who may be, but is not required to be, an attorney, and not limit the choice or presence of advisor for either the complainant or respondent in any meeting or grievance proceeding; however, the recipient 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;

(v) Provide, to a 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;

(vi) Provide both parties an equal opportunity to inspect and review any evidence obtained as part of the investigation that is directly related to the allegations raised in a formal

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complaint, including the evidence upon which the recipient does not intend to rely in reaching a
determination regarding responsibility and inculpatory or exculpatory evidence whether obtained
from a party or other source, so that each party can meaningfully respond to the evidence prior to
conclusion of the investigation. Prior to completion of the investigative report, the recipient must
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, and the parties must have at least 10 days to submit a
written response, which the investigator will consider prior to completion of the investigative
report. The recipient must make all such evidence subject to the parties’ inspection and review
available at any hearing to give each party equal opportunity to refer to such evidence during the
hearing, including for purposes of cross-examination; and

   (vii) Create an investigative report that fairly summarizes relevant evidence and, at least
10 days prior to a hearing (if a hearing is required under this section or otherwise provided) or
other time of determination regarding responsibility, send to each party and the party’s advisor, if
any, the investigative report in an electronic format or a hard copy, for their review and written
response.

   (6) Hearings. (i) For postsecondary institutions, the recipient’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 party’s advisor of choice and never by a party
personally, notwithstanding the discretion of the recipient under paragraph (b)(5)(iv) of this
section to otherwise restrict the extent to which advisors may participate in the proceedings. At
the request of either party, the recipient must provide for the live hearing to occur with the

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parties located in separate rooms with technology enabling the decision-maker(s) and parties to simultaneously see and hear the party or the witness 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(s) 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 recipient’s choice, who may be, but is not required to be, an attorney, to conduct cross-examination on behalf of that party. 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 complainant’s prior sexual behavior with respect to the respondent and are offered to prove consent. 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 recipient’s discretion, any or all parties, witnesses, and other participants may appear at the live hearing virtually, with technology enabling participants simultaneously to see and hear each other. Recipients must create an audio
or audiovisual recording, or transcript, of any live hearing and make it available to the parties for inspection and review.

(ii) For recipients that are elementary and secondary schools, and other recipients that are not postsecondary institutions, the recipient’s grievance process may, but need not, provide for a hearing. With or without a hearing, after the recipient has sent the investigative report to the parties pursuant to paragraph (b)(5)(vii) of this section 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. With or without a hearing, 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 complainant’s prior sexual behavior with respect to the respondent and are offered to prove consent. The decision-maker(s) must explain to the party proposing the questions any decision to exclude a question as not relevant.

(7) Determination regarding responsibility. (i) The decision-maker(s), who cannot be the same person(s) as the Title IX Coordinator or the investigator(s), must issue a written determination regarding responsibility. To reach this determination, the recipient must apply the standard of evidence described in paragraph (b)(1)(vii) of this section.

(ii) The written determination must include—

(A) Identification of the allegations potentially constituting sexual harassment as defined in § 106.30;
(B) A description of the 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;

(C) Findings of fact supporting the determination;

(D) Conclusions regarding the application of the recipient’s code of conduct to the facts;

(E) A statement of, and rationale for, the result as to each allegation, including a determination regarding responsibility, any disciplinary sanctions the recipient imposes on the respondent, and whether remedies designed to restore or preserve equal access to the recipient’s education program or activity will be provided by the recipient to the complainant; and

(F) The recipient’s procedures and permissible bases for the complainant and respondent to appeal.

(iii) The recipient must provide the written determination to the parties simultaneously. The determination regarding responsibility becomes final either on the date that the recipient provides the parties with the written determination of the result of the appeal, if an appeal is filed, or if an appeal is not filed, the date on which an appeal would no longer be considered timely.

(iv) The Title IX Coordinator is responsible for effective implementation of any remedies.

(8) Appeals. (i) A recipient must offer both parties an appeal from a determination regarding responsibility, and from a recipient’s dismissal of a formal complaint or any allegations therein, on the following 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; and

(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.

(ii) A recipient may offer an appeal equally to both parties on additional bases.

(iii) As to all appeals, the recipient must:

(A) Notify the other party in writing when an appeal is filed and implement appeal procedures equally for both parties;

(B) Ensure that the decision-maker(s) for the appeal is not the same person as the decision-maker(s) that reached the determination regarding responsibility or dismissal, the investigator(s), or the Title IX Coordinator;

(C) Ensure that the decision-maker(s) for the appeal complies with the standards set forth in paragraph (b)(1)(iii) of this section;

(D) Give both parties a reasonable, equal opportunity to submit a written statement in support of, or challenging, the outcome;

(E) Issue a written decision describing the result of the appeal and the rationale for the result; and

(F) Provide the written decision simultaneously to both parties.

(9) Informal resolution. A recipient 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 consistent with this section. Similarly, a recipient may not require the parties to
participate in an informal resolution process under this section and may not offer an informal resolution process unless a formal complaint is filed. However, at any time prior to reaching a determination regarding responsibility the recipient may facilitate an informal resolution process, such as mediation, that does not involve a full investigation and adjudication, provided that the recipient –

(i) Provides to the parties a written notice disclosing: the allegations, 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, provided, however, 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 any consequences resulting from participating in the informal resolution process, including the records that will be maintained or could be shared;

(ii) Obtains the parties’ voluntary, written consent to the informal resolution process; and

(iii) Does not offer or facilitate an informal resolution process to resolve allegations that an employee sexually harassed a student.

(10) Recordkeeping. (i) A recipient must maintain for a period of seven years records of –

(A) Each sexual harassment investigation including any determination regarding responsibility and any audio or audiovisual recording or transcript required under paragraph (b)(6)(i) of this section, any disciplinary sanctions imposed on the respondent, and any remedies provided to the complainant designed to restore or preserve equal access to the recipient’s education program or activity;

(B) Any appeal and the result therefrom;

(C) Any informal resolution and the result therefrom; and
(D) All materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process. A recipient must make these training materials publicly available on its website, or if the recipient does not maintain a website the recipient must make these materials available upon request for inspection by members of the public.

(ii) For each response required under § 106.44, a recipient must create, and maintain for a period of seven years, records of any actions, including any supportive measures, taken in response to a report or formal complaint of sexual harassment. In each instance, the recipient must document the basis for its conclusion that its response was not deliberately indifferent, and document that it has taken measures designed to restore or preserve equal access to the recipient’s education program or activity. If a recipient does not provide a complainant with supportive measures, then the recipient must document the reasons why such a response was not clearly unreasonable in light of the known circumstances. The documentation of certain bases or measures does not limit the recipient in the future from providing additional explanations or detailing additional measures taken.

12. Add § 106.46 to subpart D to read as follows:

§ 106.46 Severability.

If any provision of this subpart or its application to any person, act, or practice is held invalid, the remainder of the subpart or the application of its provisions to any person, act, or practice shall not be affected thereby.
13. Add § 106.62 to subpart E to read as follows:

§ 106.62 Severability.

   If any provision of this subpart or its application to any person, act, or practice is held invalid, the remainder of the subpart or the application of its provisions to any person, act, or practice shall not be affected thereby.

14. Subpart F is revised to read as follows:

Subpart F–Retaliation

Sec.

106.71 Retaliation

106.72 Severability

Subpart F–Retaliation

§ 106.71 Retaliation.

   (a) Retaliation prohibited. 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. 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 the FERPA statute, 20 U.S.C. 1232g, or FERPA regulations, 34 CFR part
99, or as required by law, or to carry out the purposes of 34 CFR part 106, including the conduct
of any investigation, hearing, or judicial proceeding arising thereunder. Complaints alleging
retaliation may be filed according to the grievance procedures for sex discrimination required to
be adopted under § 106.8(c).

(b) Specific circumstances. (1) The exercise of rights protected under the First
Amendment does not constitute retaliation prohibited under paragraph (a) of this section.

(2) 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 prohibited under paragraph (a) of this section, provided, however, that a determination
regarding responsibility, alone, is not sufficient to conclude that any party made a materially
false statement in bad faith.

§ 106.72 Severability.

If any provision of this subpart or its application to any person, act, or practice is held
invalid, the remainder of the subpart or the application of its provisions to any person, act, or
practice shall not be affected thereby.

15. Add subpart G to read as follows:

Subpart G – Procedures

Sec.

106.81 Procedures

106.82 Severability

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Subpart G – Procedures

§ 106.81 Procedures.

The procedural provisions applicable to title VI of the Civil Rights Act of 1964 are hereby adopted and incorporated herein by reference. These procedures may be found at 34 CFR 100.6-100.11 and 34 CFR part 101. The definitions in § 106.30 do not apply to 34 CFR 100.6-100.11 and 34 CFR part 101.

§ 106.82 Severability.

If any provision of this subpart or its application to any person, act, or practice is held invalid, the remainder of the subpart or the application of its provisions to any person, act, or practice shall not be affected thereby.

Subject Index to Title IX Preamble and Regulation [Removed]

16. Remove the Subject Index to Title IX Preamble and Regulation.

17. In addition to the amendments set forth above, in 34 CFR part 106, remove the parenthetical authority citation at the ends of §§ 106.1, 106.2, 106.3, 106.4, 106.5, 106.6, 106.7, , 106.11, 106.12, 106.13, 106.14, 106.15, 106.16, 106.17, 106.21, 106.22, 106.23, 106.31, 106.32, 106.33, 106.34, 106.35, 106.36, 106.37, 106.38, 106.39, 106.40, 106.41, 106.42, 106.43, 106.51, 106.52, 106.53, 106.54, 106.55, 106.56, 106.57, 106.58, 106.59, 106.60, and 106.61.
Questions and Answers Regarding the Department's Final Title IX Rule
Office for Civil Rights
N/A
September 4, 2020

Related Index Numbers
505. TITLE IX [OF THE EDUCATION AMENDMENTS OF 1972 - SEX DISCRIMINATION]

Ruling
In a Q&A document clarifying certain provisions of the 2020 Title IX regulations, OCR advised districts that sexual harassment is actionable when a reasonable person would find the unwelcome conduct to be so severe, pervasive, and objectively offensive that it denies equal access to an education. It also emphasized that districts must permit a complainant to file a formal Title IX complaint if she is participating or attempting to participate in the district's programs or activities.

Meaning
An alleged victim of sexual harassment isn't required to suffer a "concrete injury" to seek and receive the district's assistance under Title IX. As long as the alleged harassment is so severe, pervasive, and objectively offensive that it impacts the victim's equal access to her educational program, the district must take steps to resolve the harassment. For example, if a student skips class or has difficulty concentrating in class due to alleged sexual harassment, the district's Title IX coordinator should contact the student to ensure she receives supportive measures and has the opportunity to file a formal sexual harassment complaint.

Case Summary
Highlighting that individuals react to sexual harassment in a wide variety of ways, OCR stated that districts have a duty under Title IX to address such harassment if the alleged victim shows "signs of enduring unequal educational access." It emphasized that a district must properly respond to sexual harassment regardless of whether the alleged victim is presently a student or not. In a Q&A, OCR explained that the 2020 Title IX regulations adopted the definition of sexual harassment outlined in *Davis v. Monroe County Board of Education*, 3 GASLD 12 (U.S. 1999). According to that Supreme Court case, one form of sexual harassment is "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 [district's] education program or activity." However, OCR emphasized that neither the *Davis* decision nor the 2020 Title IX rule requires that a student drop out of school, fail a class, have a panic attack, or otherwise reach a "breaking point" to report sexual harassment and receive a district's support. Rather, OCR stated that a district must respond to sexual harassment when the student shows "signs of enduring unequal access," such as skipping class to avoid a harasser, a decline in GPA, and difficulty concentrating in class. Moreover, OCR stressed that districts must promptly respond to a report of sexual harassment, whether the alleged victim is presently a student or not, in a manner that is not deliberately indifferent or clearly unreasonable. It pointed out that an individual may file a formal Title IX complaint as long as she is participating or attempting to participate in the district's program or activities. For example, a complainant who has graduated may still be "attempting to participate" in the district's program if she intends to remain involved in the district's alumni activities. Additionally, a complainant who left school but expresses a desire to re-enroll is "attempting to participate" in the district's education program, OCR concluded.

Full Text
Questions and Answers Regarding the Department's Final Title IX Rule

The Department of Education's Office for Civil Rights, through its new Outreach, Prevention, Prevention, Prevention, Prevention, Prevention, Prevention, Prevention,
Education and Non-discrimination (OPEN) Center, issues the following technical assistance document to support institutions with meeting their obligations under the Title IX Rule, which was announced on May 6, 2020, and which became effective on August 14, 2020. Many of the questions were derived from questions posed to the OPEN center through e-mail.

OCR may periodically release additional Question and Answer documents addressing the Title IX Rule.

All references and citations are to the unofficial version of the Title IX Rule, which is available here. A link to the official version of the Rule published in the Federal Register is here.

Disclaimer: Other than statutory and regulatory requirements included in the document, the contents of this guidance do not have the force and effect of law and are not meant to bind the public in any way. This document is intended only to provide clarity to the public regarding existing requirements under the law or agency policies.

Effective Date of the Final Rule

Question 1: Can you please clarify whether the new Title IX rules that went into effect on August 14, 2020, will be applied retroactively?

Answer 1: The Title IX Rule will not be enforced retroactively. In the Preamble to the Rule at page 127, the Department states unambiguously that the Department will not enforce these final regulations retroactively. The Department also notes, in footnote 290 of the Rule, the general principle that:

Federal agencies authorized by statute to promulgate rules may only create rules with retroactive effect where the authorizing statute has expressly granted such authority. See 5 U.S.C. 551 (referring to a "rule" as agency action with "future effects" in the Administrative Procedure Act); Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208 (1988) ("Retroactivity is not favored in the law. Thus, congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result.").

Consistent with the Department's statements in the preamble to the Title IX Rule regarding non-retroactivity, the Rule does not apply to schools' responses to sexual harassment that allegedly occurred prior to August 14, 2020. The Department will only enforce the Rule as to sexual harassment that allegedly occurred on or after August 14, 2020.

With respect to sexual harassment that allegedly occurred prior to August 14, 2020, OCR will judge the school's Title IX compliance against the Title IX statute and the Title IX regulations in place at the time that the alleged sexual harassment occurred. In other words, the Rule governs how schools must respond to sexual harassment that allegedly occurs on or after August 14, 2020.

Title IX Coordinator and Other Personnel Issues

Question 2: Does the Title IX Rule specify whether each recipient must have a Title IX Coordinator, or is each school required to have a separate Title IX Coordinator, or both?

Answer 2: The Title IX Rule states in § 106.8(a): "Each recipient must designate and authorize at least one employee to coordinate its efforts to comply with its responsibilities under this part, which employee must be referred to as the "Title IX Coordinator."" (emphasis omitted).

Question 3: The Title IX Rule allows schools to continue to address misconduct that does not meet the definition of sexual harassment. Can Title IX personnel still review these complaints, and follow procedures similar to those allegations that do meet the definition of sexual harassment?

Answer 3: Yes. The Title IX Rule does not preclude a recipient from using the same Title IX personnel (including the Title IX Coordinator, who must be an employee of the recipient, and Title IX investigators and decision-makers, who may be a recipient's employees or the employees of a third-party, such as a consortium of schools) to review and investigate allegations of misconduct that fall outside the scope of Title IX. Similarly, the Rule
does not preclude a recipient from using a grievance process that complies with § 106.45 with respect to allegations that fall outside the scope of Title IX. In the Preamble to the Rule at pages 481-82, for example, the Department states:

In response to commenters' concerns, the final regulations revise § 106.45(b)(3)(i) to clearly state that dismissal for Title IX purposes does not preclude action under another provision of the recipient's code of conduct. Thus, if a recipient is required under State law or the recipient's own policies to investigate sexual or other misconduct that does not meet the § 106.30 definition, the final regulations clarify that a recipient may do so. Similarly, if a recipient wishes to use a grievance process that complies with § 106.45 to resolve allegations of misconduct that do not constitute sexual harassment under § 106.30, nothing in the final regulations precludes a recipient from doing so. Alternatively, a recipient may respond to non-Title IX misconduct under disciplinary procedures that do not comply with § 106.45. The final regulations leave recipients flexibility in this regard, and prescribe a particular grievance process only where allegations concern sexual harassment covered by Title IX.

**The Definition of Sexual Harassment**

Question 4: One form of sexual harassment is conduct on the basis of sex that constitutes "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." In this sentence, does "reasonable person" modify only "severe, pervasive, and objectively offensive" only, or the effective denial clause as well? To clarify, can an "effective denial" be something that a reasonable person would experience, even if there is not evidence to show that the Complainant was in fact effectively denied?

Answer 4: The "reasonable person" standard in the second prong of the definition of sexual harassment under § 106.30(a) applies to each of the elements drawn from the U.S. Supreme Court's decision in *Davis v. Monroe County Bd. of Ed.*, 526 U.S. 629 (1999). These elements include: severity, pervasiveness, objective offensiveness, and the effective denial of equal educational access. In the Preamble to the Rule, at page 515, the Department states: "The Davis standard ensures that all students, employees, and recipients understand that unwelcome conduct on the basis of sex is actionable under Title IX when a reasonable person in the complainant's position would find the conduct severe, pervasive, and objectively offensive such that it effectively denies equal access to the recipient's education program or activity."

With respect to the denial of the equal access element in particular, in the Preamble to the Title IX Rule, at page 525, states:

Neither the Supreme Court, nor the final regulations in § 106.30, requires showing that a complainant dropped out of school, failed a class, had a panic attack, or otherwise reached a "breaking point" in order to report and receive a recipient's supportive response to sexual harassment. The Department acknowledges that individuals react to sexual harassment in a wide variety of ways, and does not interpret the Davis standard to require certain manifestations of trauma or a "constructive expulsion." Evaluating whether a reasonable person in the complainant's position would deem the alleged harassment to deny a person "equal access" to education protects complainants against school officials inappropriately judging how a complainant has reacted to the sexual harassment. The § 106.30 definition neither requires nor permits school officials to impose notions of what a "perfect victim" does or says, nor may a recipient refuse to respond to sexual harassment because a complainant is "high-functioning" or not showing particular symptoms following a sexual harassment incident. Similarly, the Preamble to the Title IX Rule, at pages 526-27, states:

With respect to the denial of equal access element, neither the Davis Court nor the Department's
final regulations require complete exclusion from an education, but rather denial of "equal" access. Signs of enduring unequal educational access due to severe, pervasive, and objectively offensive sexual harassment may include, as commenters suggest, skipping class to avoid a harasser, a decline in a student's grade point average, or having difficulty concentrating in class; however, no concrete injury is required to conclude that serious harassment would deprive a reasonable person in the complainant's position of the ability to access the recipient's education program or activity on an equal basis with persons who are not suffering such harassment.

(emphasis omitted).

Filing of a Formal Complaint

Question 5: The Title IX Rule states: "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." If a complainant either withdraws from school because of sexual harassment and then files a complaint, or files a complaint but then withdraws as a result of the sexual harassment or stress of the grievance process, how would the regulations affect the complainant's ability to pursue a formal complaint?

Answer 5: Under the Title IX Rule, recipients must promptly respond to a report that an individual has been allegedly victimized by sexual harassment, whether the alleged victim is presently a student or not, in a manner that is not "deliberately indifferent," or clearly unreasonable in light of known circumstances. Students and others who are participating or attempting to participate in the school's program or activity also have the right to file a formal complaint.

In the Preamble to the Title IX Rule, at pages 411-12, the Department further explains:

A complainant who has graduated may still be 'attempting to participate' in the recipient's education program or activity; for example, where the complainant has graduated from one program but intends to apply to a different program, or where the graduated complainant intends to remain involved with a recipient's alumni programs and activities. Similarly, a complainant who is on a leave of absence may be 'participating or attempting to participate' in the recipient's education program or activity; for example, such a complainant may still be enrolled as a student even while on leave of absence, or may intend to re-apply after a leave of absence and thus is still 'attempting to participate' even while on a leave of absence. By way of further example, a complainant who has left school because of sexual harassment, but expresses a desire to re-enroll if the recipient appropriately responds to the sexual harassment, is 'attempting to participate' in the recipient's education program or activity.

(emphasis omitted). Additionally, the Rule permits Title IX Coordinators to sign a formal complaint, regardless of whether a complainant is "participating or attempting to participate" in the school's education program or activity. A Title IX Coordinator's decision to sign a formal complaint (or not) is evaluated under the deliberate indifference standard: whether the decision was clearly unreasonable in light of the known circumstances.

Conducting an Investigation Hearing

Question 6: May a recipient delegate many of the functions required by the Title IX Rule to an outside entity, such as a Regional Center or consortium of schools?

Answer 6: Yes. In particular, many of the elements of the investigation and hearing processes lend themselves to delegation. The recipient itself remains ultimately responsible for ensuring compliance with the legal obligations under the Title IX Rule.

At page 273 of the Preamble to the Title IX Rule, the Department expressly contemplates and encourages recipients to consider innovative approaches such as consortiums and regional centers:

The Department appreciates commenters’ recommendations for using regional center models.
and similar models involving voluntary, cooperative efforts among recipients to outsource the investigation and adjudication functions required under the final regulations. The Department believes these models represent the potential for innovation with respect to how recipients might best fulfill the obligation to impartially reach accurate factual determinations while treating both parties fairly. The Department encourages recipients to consider innovative solutions to the challenges presented by the legal obligation for recipients to fairly and impartially investigate and adjudicate these difficult cases, and the Department will provide technical assistance for recipients with questions about pursuing regional center models.

To be sure, there are limitations on the extent to which a recipient may delegate certain responsibilities to other entities. For instance, each recipient must itself employ a Title IX Coordinator. See § 106.8 ("Each recipient must designate and authorize at least one employee to coordinate its efforts to comply with its responsibilities under this part, which employee must be referred to as the "Title IX Coordinator."). Similarly, each recipient is responsible for ensuring that its grievance procedures satisfy the Title IX Rule. See § 106.44(c) ("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"). Still, despite these limitations, the Title IX Rule offers ample opportunity for recipients to find efficiencies in cooperation with other recipients, particularly with respect to investigation and adjudication.

Question 7: What are the rules of evidence at a hearing? Do courtroom rules like the Federal Rules of Evidence apply to a hearing under Title IX?

Answer 7: The Title IX Rule does not adopt the Federal Rules of Evidence for hearings conducted under Title IX. For instance, with respect to which evidence may be introduced, the Rule uses "relevance" as the sole admissibility criterion. See § 106.45(b)(1)(ii) (the recipient's grievance process must provide for objective evaluation of all relevant evidence, including evidence that is inculpatory and exculpatory).

The Title IX Rule also deems certain evidence and information to be not relevant or otherwise precludes the recipient from using it: (i) a party's treatment records, without the party's prior written consent [§ 106.45(b)(5)(i)]; (ii) information protected by a legally recognized privilege [§ 106.45(b)(1)(x)]; (iii) questions or evidence about a complainant's sexual predisposition, and questions or evidence about a complainant's prior sexual behavior unless it meets one of two limited exceptions [§ 106.45(b)(6)(i)-(ii)]; and, for postsecondary institutions, the decision-maker cannot rely on the statements of a party or witness who does not submit to cross-examination [§ 106.45(b)(6)(i)].

In the Preamble to the Title IX Rule, at pages 980-82, the Department explains:

These final regulations require objective evaluation of relevant evidence, and contain several provisions specifying types of evidence deemed irrelevant or excluded from consideration in a grievance process; a recipient may not adopt evidentiary rules of admissibility that contravene those evidentiary requirements prescribed under § 106.45. For example, a recipient may not adopt a rule excluding relevant evidence whose probative value is substantially outweighed by the danger of unfair prejudice; although such a rule is part of the Federal Rules of Evidence, the Federal Rules of Evidence constitute a complex, comprehensive set of evidentiary rules and exceptions designed to be applied by judges and lawyers, while Title IX grievance processes are not court trials and are expected to be overseen by layperson officials of a school, college, or university rather than by a judge or lawyer. Similarly, a recipient may not adopt rules excluding certain types of relevant evidence (e.g., lie detector test results, or rape kits) where the type of evidence is not either deemed "not relevant" (as is, for instance, evidence concerning a complainant's prior
sexual history) or otherwise barred from use under § 106.45 (as is, for instance, information protected by a legally recognized privilege). However, the § 106.45 grievance process does not prescribe rules governing how admissible, relevant evidence must be evaluated for weight or credibility by a recipient's decision-maker, and recipients thus have discretion to adopt and apply rules in that regard, so long as such rules do not conflict with § 106.45 and apply equally to both parties.

Question 8: Do recipients have latitude to define relevance on their own?

Answer 8: In the Preamble to the Title IX Rule, at page 811, footnote 1018, the Department states: "The final regulations do not define relevance, and the ordinary meaning of the word should be understood and applied." At page 812 of the Preamble, the Department states:

Relevance is the standard that these final regulations require, and any evidentiary rules that a recipient chooses must respect this standard of relevance. For example, a recipient may not adopt a rule excluding relevant evidence because such relevant evidence may be unduly prejudicial, concern prior bad acts, or constitute character evidence. A recipient may adopt rules of order or decorum to forbid badgering a witness, and may fairly deem repetition of the same question to be irrelevant.

However, there is a difference between the admission of relevant evidence, and the weight, credibility, or persuasiveness of particular evidence. At pages 981-82 of the Preamble, the Department further explains:

However, the § 106.45 grievance process does not prescribe rules governing how admissible, relevant evidence must be evaluated for weight or credibility by a recipient's decision-maker, and recipients thus have discretion to adopt and apply rules in that regard, so long as such rules do not conflict with § 106.45 and apply equally to both parties. In response to commenters' concerns that the final regulations do not specify rules about evaluation of evidence, and recognizing that recipients therefore have discretion to adopt rules not otherwise prohibited under § 106.45, the final regulations acknowledge this reality by adding language to the introductory sentence of § 106.45(b): "Any provisions, rules, or practices other than those required by § 106.45 that a recipient adopts as part of its grievance process for handling formal complaints of sexual harassment, as defined in § 106.30, must apply equally to both parties." A recipient may, for example, adopt a rule regarding the weight or credibility (but not the admissibility) that a decision-maker should assign to evidence of a party's prior bad acts, so long as such a rule applied equally to the prior bad acts of complainants and the prior bad acts of respondents. Because a recipient's investigators and decision-makers must be trained specifically with respect to "issues of relevance," any rules adopted by a recipient in this regard should be reflected in the recipient's training materials, which must be publicly available.

(emphasis omitted) (internal footnotes omitted).

Question 9: The Title IX Rule states that at the postsecondary level, if a party does not appear at a live hearing, or chooses to not answer cross examination questions, that party's statement must not be relied upon "in reaching a determination regarding responsibility." If a complainant opts not to answer cross-examination questions, how does that impact that complainant's statements in an investigative report? Does it mean all statements provided by that party before the hearing--including statements made to an investigator and summarized in the investigation report--are excluded?

Answer 9: The Title IX Rule, at § 106.45(b)(6)(i), requires postsecondary institutions to hold a live hearing with the opportunity for each party's advisor to conduct cross-examination of parties and witnesses.

At page 1179 of the Preamble to the Rule, the Department explains:

Because party and witness statements so often
raise credibility questions in the context of sexual harassment allegations, the decision-maker must consider only those statements that have benefited from the truth-seeking function of cross-examination. The recipient, and the parties, have equal opportunity (and, for the recipient, the obligation) to gather and present relevant evidence including fact and expert witnesses, and face the same limitations inherent in a lack of subpoena power to compel witness testimony. The Department believes that the final regulations, including § 106.45(b)(6)(i), strike the appropriate balance for a postsecondary institution context between ensuring that only relevant and reliable evidence is considered while not over-legalizing the grievance process.

(emphasis omitted). And at page 1181 of the Preamble to the Title IX Rule, the Department states:

The prohibition on reliance on "statements" applies not only to statements made during the hearing, but also to any statement of the party or witness who does not submit to cross-examination. "Statements" has its ordinary meaning, but would not include evidence (such as videos) that do not constitute a person's intent to make factual assertions, or to the extent that such evidence does not contain a person's statements. Thus, police reports, SANE reports, medical reports, and other documents and records may not be relied on to the extent that they contain the statements of a party or witness who has not submitted to cross-examination. While documentary evidence such as police reports or hospital records may have been gathered during investigation and, if directly related to the allegations inspected and reviewed by the parties, and to the extent they are relevant, summarized in the investigative report, the hearing is the parties' first opportunity to argue to the decision-maker about the credibility and implications of such evidence. Probing the credibility and reliability of statements asserted by witnesses contained in such evidence requires the parties to have the opportunity to cross-examine the witnesses making the statements.

(emphasis omitted) (footnotes omitted). For a further discussion of this topic and how it relates to unprotected speech that itself constitutes sexual harassment under the Title IX Rule, readers are invited to review OCR's blog post on this topic here.

Question 10: When a post-secondary institution holds a live hearing, is the questioning limited to certain subjects?

Answer 10: The Rule requires that schools provide the opportunity for cross-examination, and that party advisors must be permitted to ask all relevant questions (including follow-up questions), and only relevant questions.

Question 11: At the postsecondary level, are party advisors expected to cross-examine witnesses?

Answer 11: The Title IX Rule, at § 106.45(b)(6)(i), states that a postsecondary institution must hold a live hearing. At the hearing, each party's advisor of choice must be "permitted" to cross-examine witnesses. (Note that the same provision requires the recipient to provide a party with an advisor of the recipient's choice, if the party appears at the hearing without an advisor of the party's choice.)

Question 12: If a party's advisor fails to cross-examine another party on a key statement related to credibility, what is the effect of this on the statement made by the complainant? May the decision-maker consider the key statement?

Answer 12: The Title IX Rule, in § 106.45(b)(6)(i), states: "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."

In the Preamble to the Rule at page 1181, the Department states (emphasis omitted):

Probing the credibility and reliability of statements asserted by witnesses contained in such evidence requires the parties to have the opportunity to cross-examine the witnesses making the statements.
The Department appreciates the opportunity to clarify here that to "submit to cross-examination" means answering those cross-examination questions that are relevant; the decision-maker is required to make relevance determinations regarding cross-examination in real time during the hearing in part to ensure that parties and witnesses do not feel compelled to answer irrelevant questions for fear of their statements being excluded.

(emphasis omitted).

Thus, the decision-maker is obligated to "permit" each party's advisor to ask all relevant questions. However, this provision provides only an "opportunity" for each party (through an advisor) to conduct cross-examination; this provision does not purport to require that each party conduct cross-examination or will conduct cross-examination to the fullest extent possible. If a party chooses not to conduct cross-examination of another party or witness, that other party or witness cannot "submit" or "not submit" to cross-examination. Accordingly, the decision-maker is not precluded from relying on any statement of the party or witness who was not given the opportunity to submit to cross-examination. The same is true if a party's advisor asks some cross-examination questions but not every possible cross-examination question; as to cross-examination questions not asked of a party or witness, that party or witness cannot be said to have submitted or not submitted to cross-examination, so the decision-maker is not precluded from relying on that party's or witness's statements.

Conversely, if a party or witness answers one, or some, but not all, relevant cross-examination questions asked by a party's advisor at the live hearing, then that party or witness has not submitted to cross-examination and that party's or witness's statements cannot be relied on by the decision-maker. See Preamble at page 1183 ("the Department declines to allow a party or witness to "waive" a question because such a rule would circumvent the benefits and purposes of cross-examination as a truth-seeking tool for postsecondary institutions' Title IX adjudications").

Question 13: Does an advisor or party have an opportunity to provide input about how evidence should be weighted by the decision-maker?

Answer 13: Yes. The parties must have an equal opportunity to inspect, review, and respond to evidence directly related to the allegations (see § 106.45(b)(5)(vi)), and an equal opportunity to review and respond to the recipient's investigative report (see § 106.45(b)(5)(vii)), allows each party the opportunity to provide input and make arguments about the relevance of evidence and how a decision-maker should weigh the evidence. In the Preamble to the Rule at p. 1015, the Department states that the Rule:

... balances the recipient's obligation to impartially gather and objectively evaluate all relevant evidence, including inculpatory and exculpatory evidence, with the parties' equal right to participate in furthering each party's own interests by identifying evidence overlooked by the investigator and evidence the investigator erroneously deemed relevant or irrelevant and making arguments to the decision-maker regarding the relevance of evidence and the weight or credibility of relevant evidence.

Note that Sections 106.45(b)(5)(vi) and (vii) require the recipient to "send to each party and the party's advisor, if any" the evidence and the investigative report, so that a party's advisor can advise the party in exercising the party's right to review and respond to the evidence and to the investigative report.

Question 14: Are all witnesses expected to appear at a hearing, or do decision-makers have the flexibility to request witnesses as they deem necessary?

Answer 14: The Title IX Rule does not require that all witnesses appear at a hearing, although it does provide the parties an equal right to present witnesses. At page 1176 of the Preamble of the Title IX Rule, the Department acknowledges that recipients do not have subpoena powers to compel attendance of parties or witnesses at a hearing:
The Department understands that complainants (and respondents) often will not have control over whether witnesses appear and are cross-examined, because neither the recipient nor the parties have subpoena power to compel appearance of witnesses. Some absences of witnesses can be avoided by a recipient thoughtfully working with witnesses regarding scheduling of a hearing, and taking advantage of the discretion to permit witnesses to testify remotely.

Furthermore, § 106.71(a) protects parties and witnesses against retaliation for deciding to participate or not to participate in a Title IX grievance process. Thus, a witness cannot be compelled to appear at a hearing, and cannot be intimidated, threatened, coerced, or discriminated against if the witness chooses not to appear. However, the parties must have an equal opportunity to "present" witnesses, so the decision-maker cannot request the presence only of witnesses the decision-maker has deemed necessary. The decision-maker has discretion to permit witnesses to testify at the hearing remotely, using technology. See § 106.45(b)(6)(i).

Question 15: Some recipients divide hearings between a "responsibility" phase and a "sanctions" phase. Is that bifurcation possible under Title IX?

Answer 15: Yes. The Rule does not preclude a recipient from using one decision-maker to reach the determination regarding responsibility, and having another decision-maker determine appropriate remedies or a complainant or appropriate disciplinary sanctions for the respondent. However, the end result must be that the written determination regarding responsibility includes the remedies and disciplinary sanctions decided upon in the written determination issued under § 106.45(b)(7).

That provision, at § 106.45(b)(7), requires a recipient's decision-maker(s) to issue a written determination that must include, among other items, the result as to each allegation and rationale for the result, any disciplinary sanctions imposed by the recipient against the respondent, and whether remedies will be provided by the recipient to the complainant. The issuance of a written determination cannot be a piecemeal process that is broken down into chronologically occurring sub-parts.

Recipients should also remain aware of their obligation to conclude the grievance process within the reasonably prompt time frames designated in the recipient's grievance process, under § 106.45(b)(1)(v). Additionally, each decision-maker--whether an employee of the recipient or an employee of a third party such as a consortium of schools--owes an individual and ongoing duty not have a conflict of interest or bias for or against complainants or respondents generally, or with respect to an individual complainant or respondent, pursuant to § 106.45(b)(1)(iii).

If you have questions for the Office for Civil Rights (OCR), want additional information or technical assistance, or believe that a school is violating federal civil rights law, visit OCR's website at www.ed.gov/ocr, or the Department's Title IX page at www.ed.gov/titleix. You may contact OCR at (800) 421-3481 (TDD: 800-877-8339), ocr@ed.gov, or contact OCR's Outreach, Prevention, Education and Non-discrimination (OPEN) Center at OPEN@ed.gov, or e-mail the OPEN Center with additional questions about the Title IX Final Rule at T9questions@ed.gov. Additional information regarding the Title IX Final Rule is available here. You may also fill out a complaint form online at https://www2.ed.gov/about/offices/list/ocr/complaintintro.html.
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 prejudgment 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);
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- 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.
## Summary of Major Provisions of the Department of Education’s Title IX Final Rule

<table>
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<tr>
<th>Issue</th>
<th>The Title IX Final Rule: Addressing Sexual Harassment in Schools</th>
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<tbody>
<tr>
<td>1. Notice to the School, College, University (“Schools”): Actual Knowledge</td>
<td>The Final Rule requires a K-12 school to respond whenever <em>any</em> 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. 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.</td>
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<td>2. Definition of Sexual Harassment for Title IX Purposes</td>
<td>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 <em>quid pro quo</em> 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).</td>
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- The Final Rule prohibits sex-based misconduct in a manner consistent with the First Amendment. *Quid pro quo* harassment and Clery Act/VAWA offenses are not evaluated for severity, pervasiveness, offensiveness, or denial of equal educational access, because such misconduct is sufficiently serious to deprive a person of equal access.                                                                                                                                                                                                 |

- The Final Rule uses the Supreme Court’s *Davis* definition (severe *and* pervasive *and* objectively offensive 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.                                                                                                                                                                                                 |

- The Final Rule uses the Supreme Court’s Title IX-specific definition rather than the Supreme Court’s Title VII workplace standard (severe or pervasive 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.                                                                                                                                                                                                 |
### Summary of Major Provisions of the Department of Education’s Title IX Final Rule

| 3. Sexual Harassment Occurring in a School’s “Education Program or Activity” and “in the United States” | 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.

- 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. |

| 4. Accessible Reporting to Title IX Coordinator | The Final Rule expands a school’s obligations to ensure its educational community knows how to report to the Title IX Coordinator.

- 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. |

| 5. School’s Mandatory Response Obligations: The Deliberate Indifference Standard | 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:

- 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

- 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 for purposes of Title IX but may still address the allegations in any manner the school deems appropriate under the school’s own code of conduct.

6. School’s Mandatory Response Obligations:

**Defining “Complainant,” “Respondent,” “Formal Complaint,” “Supportive Measures”**

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.

The Final Rule defines “complainant” as an individual who is alleged to be the victim of conduct that could constitute sexual harassment.

- 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.

The Final Rule defines “respondent” as an individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment.
### Summary of Major Provisions of the Department of Education’s Title IX Final Rule

<table>
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<tr>
<th>Section</th>
<th>Provisions</th>
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<tr>
<td><strong>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:</strong></td>
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<td>- 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.</td>
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<td>- 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.</td>
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<td>- 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.</td>
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<tr>
<td>- 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.</td>
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<td><strong>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.</strong></td>
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<td>- 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.</td>
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<td><strong>Grievance Process, General Requirements</strong></td>
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<td>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:</td>
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<td>- 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.</td>
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<tr>
<td>- 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.</td>
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<tr>
<td>- 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.</td>
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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.
| 8. Investigations | 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:
- 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. |
| 9. Hearings: | 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). |
## Summary of Major Provisions of the Department of Education’s Title IX Final Rule

<table>
<thead>
<tr>
<th><strong>(a) Live Hearings &amp; Cross-Examination</strong> (for Postsecondary Institutions)</th>
<th><strong>(a) For postsecondary institutions, the school’s grievance process must provide for a live hearing:</strong></th>
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<tbody>
<tr>
<td></td>
<td>- 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.</td>
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<td>- 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.</td>
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<td>- 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.</td>
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<td>- 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.</td>
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<td>- 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.</td>
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<td>- 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.</td>
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<td>- 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.</td>
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<td>- Schools must create an audio or audiovisual recording, or transcript, of any live hearing.</td>
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<tr>
<th><strong>(b) Hearings are Optional, Written Questions Required</strong> (for K-12 Schools)</th>
<th><strong>(b) For recipients that are K-12 schools, and other recipients that are not postsecondary institutions, the recipient’s grievance process may, but need not, provide for a hearing:</strong></th>
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<td>- 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.</td>
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</table>

| **(c) Rape Shield Protections for Complainants** | **(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.** |
### 10. Standard of Evidence & Written Determination

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).

- 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.

### 11. Appeals

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.

- A school may offer an appeal equally to both parties on additional bases.

### 12. Informal Resolution

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:

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

<table>
<thead>
<tr>
<th>Issue</th>
<th>Provisions in Final Rule</th>
<th>Provisions in NPRM</th>
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<tbody>
<tr>
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<td>(Bold typeface indicates language added in the Final Rule, responsive to public comment)</td>
<td>(Bold typeface indicates language not included in the Final Rule, responsive to public comment)</td>
</tr>
<tr>
<td>1. Notice to Schools, Colleges, Universities, and other Recipients of Federal Funds (&quot;Schools&quot;): Actual Knowledge</td>
<td>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. “Notice” includes, but is not limited to, a report of sexual harassment to the Title IX Coordinator as described in the Final Rule.</td>
<td>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.</td>
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<tr>
<td>2. Definition of Sexual Harassment for Title IX Purposes</td>
<td>Sexual harassment means <strong>conduct on the basis of sex that satisfies one or more of the following:</strong> (i) A school employee conditioning education benefits on participation in unwelcome sexual conduct (i.e., quid pro quo); or (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 (iii) Sexual assault (as defined in the Clery Act), dating violence, domestic violence, or stalking as defined in the Violence Against Women Act (VAWA).</td>
<td>Sexual harassment means: (i) A school employee conditioning education benefits on participation in unwelcome sexual conduct (i.e., quid pro quo); or (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 (iii) Sexual assault (as defined in the Clery Act regulations).</td>
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Summary of Major Provisions of the Department of Education’s Title IX Final Rule and Comparison to the NPRM

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<tr>
<th>3. Sexual Harassment Occurring in a School’s “Education Program or Activity” and “in the United States”</th>
<th>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.</th>
<th>School must respond when sexual harassment occurs in the school’s education program or activity, against a person in the United States.</th>
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<tr>
<td>4. Accessible Reporting to Title IX Coordinator; Adoption &amp; Publication of Title IX Procedures</td>
<td>The Final Rule expands a school’s obligations to ensure its educational community knows how to report to the Title IX Coordinator by stating: - 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.</td>
<td>The NPRM stated: - 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.</td>
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### Summary of Major Provisions of the Department of Education’s Title IX Final Rule and Comparison to the NPRM

| 5. School’s Mandatory Response Obligations: Deliberate Indifference Standard | 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.  

A school’s mandatory response must include:  
- **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. | 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.  

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. |
| 6. School’s Mandatory Response Obligations: | 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. |
| Investigating a Formal Complaint | The NPRM required schools to investigate and adjudicate formal complaints of sexual harassment consistent with the grievance procedures described in § 106.45. |
| | - The NPRM required schools to investigate and adjudicate formal complaints of sexual harassment consistent with the grievance procedures described in § 106.45. |
| | - 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

<table>
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<tr>
<th>7. School’s Mandatory Response Obligations: Defining “Complainant,” “Respondent,” “Formal Complaint” and “Supportive Measures”</th>
<th>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. The NPRM defined complainant, respondent, formal complaint, and supportive measures as follows:</th>
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<tr>
<td>“Complainant”</td>
<td>The Final Rule defines “complainant” as an individual who is alleged to be the victim of conduct that could constitute sexual harassment. 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.</td>
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<td>“Respondent”</td>
<td>The Final Rule defines “respondent” as an individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment. The NPRM defined “respondent” as an individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment.</td>
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<tr>
<td>“Formal Complaint”</td>
<td>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. 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. 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</td>
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<tr>
<td>“Supportive Measures”</td>
<td>The Final Rule retains the NPRM’s definition of “supportive measures” but clarifies that the purpose of supportive measures is equal access to education. - 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.</td>
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<td>- 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.</td>
<td>- The NPRM defined “supportive measures” to mean: - 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.</td>
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<td>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.</td>
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### 8. Investigations

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.

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.

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.

### 9. Hearings:

#### (a) Live Hearings & Cross-Examination (for Postsecondary recipients)

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).

(a) For **postsecondary institution recipients**, the school’s grievance procedure 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 decision-maker(s)

Under the NPRM, adjudication of formal complaints differed for postsecondary institution recipients, and K-12 schools. The Final Rule retains this approach with clarifications.

(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
party’s advisor of choice and never by a party personally.

- 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

an advisor aligned with that party to conduct cross-examination.

- 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.

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.

- 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

| (b) Hearings are Optional, Written Questions Required (for K-12 schools) | 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.  
(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.  
- The decision-maker(s) must explain to the party proposing the questions any decision to exclude questions as not relevant.  
(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
| (c) Rape Shield Protections for Complainants | (b) For recipients that are elementary and secondary schools the school’s grievance procedure may require a live hearing:  
- 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.  
(c) The NPRM provided rape shield protections for complainants in postsecondary institutions and K-12:  
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
### Summary of Major Provisions of the Department of Education’s Title IX Final Rule and Comparison to the NPRM

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<tr>
<th>Provision</th>
<th>Final Rule</th>
<th>NPRM</th>
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<td><strong>complainant’s prior sexual behavior with respect to the respondent and are offered to prove consent.</strong></td>
<td>sexual behavior with respect to the respondent and is offered to prove consent.</td>
<td><strong>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.</strong>&lt;br&gt;- The Final Rule removes the NPRM’s restriction on use of the preponderance of the evidence standard.</td>
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<tr>
<td><strong>10. Standard of Evidence</strong></td>
<td><strong>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.</strong>&lt;br&gt;- A school may offer an appeal equally to both parties on additional bases.</td>
<td>The NPRM provided that a school may choose to offer an appeal:&lt;br&gt;- If a school offers an appeal, it must allow both parties to appeal.&lt;br&gt;- 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.&lt;br&gt;- The Final Rule removes the NPRM’s restriction on complainants appealing the severity of sanctions.</td>
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<tr>
<td><strong>11. Appeals</strong></td>
<td><strong>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:</strong>&lt;br&gt;- 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.</td>
<td>The NPRM allowed schools to choose to offer informal resolution options, only with the voluntary, informed, written consent of all parties.</td>
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<td><strong>12. Informal Resolution</strong></td>
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### Summary of Major Provisions of the Department of Education’s Title IX Final Rule and Comparison to the NPRM

<table>
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<tr>
<th>Provision</th>
<th>Details</th>
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<tr>
<td>- A school may not require the parties to participate in informal resolution and may not offer informal resolution unless a formal complaint is filed.</td>
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<td>- 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.</td>
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<td>- Schools must not offer or facilitate an informal resolution process to resolve allegations that an employee sexually harassed a student.</td>
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<td><strong>13. Retaliation Prohibited</strong></td>
<td>The Final Rule expressly prohibits retaliation against any individual for exercising Title IX rights:</td>
</tr>
<tr>
<td>- <strong>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.</strong></td>
<td></td>
</tr>
<tr>
<td>- 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.</td>
<td></td>
</tr>
<tr>
<td>- 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.</td>
<td></td>
</tr>
<tr>
<td>- Complaints alleging retaliation may be filed according to the grievance procedures for sex discrimination that schools must adopt and publish.</td>
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</table>
Summary of Major Provisions of the Department of Education’s Title IX Final Rule and Comparison to the NPRM

| - 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. |
K-12 Title IX Flowchart

- Actual Knowledge
- Title IX Coordinator
- Complainant

- No Formal Complaint
  - Investigate pursuant to Code of Conduct, as applicable
- Formal Complaint
  - Investigation
  - Dismissal
  - Informal Resolution
  - Decision

- Appeal

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Sample

Board Policy
Sexual Harassment

BP 5145.7
Students

The Governing Board is committed to maintaining a safe school environment that is free from harassment and discrimination. The Board prohibits, at school or at school-sponsored or school-related activities, sexual harassment targeted at any student by anyone. The Board also prohibits retaliatory behavior or action against any person who reports, files a complaint or testifies about, or otherwise supports a complainant in alleging sexual harassment.

The district strongly encourages any student who feels that he/she is being or has been sexually harassed on school grounds or at a school-sponsored or school-related activity by another student or an adult to immediately contact his/her teacher, the principal, or any other available school employee. Any employee who receives a report or observes an incident of sexual harassment shall notify the principal or the district Title IX Coordinator. Once notified, the principal or Title IX Coordinator shall take the steps to investigate and address the allegation, as specified in the accompanying administrative regulation.

(cf. 0410 - Nondiscrimination in District Programs and Activities)
(cf. 1312.1 - Complaints Concerning District Employees)
(cf. 5131 - Conduct)
(cf. 5131.2 - Bullying)
(cf. 5137 - Positive School Climate)
(cf. 5141.4 - Child Abuse Prevention and Reporting)
(cf. 5145.3 - Nondiscrimination/Harassment)
(cf. 6142.1 - Sexual Health and HIV/AIDS Prevention Instruction)

The Superintendent or designee shall take appropriate actions to reinforce the district's sexual harassment policy.

Instruction/Information

The Superintendent or designee shall ensure that all district students receive age-appropriate information on sexual harassment. Such instruction and information shall include:

1. What acts and behavior constitute sexual harassment, including the fact that sexual harassment could occur between people of the same sex and could involve sexual violence;

2. A clear message that students do not have to endure sexual harassment under any circumstance;
3. Encouragement to report observed incidents of sexual harassment even where the alleged complainant of the harassment has not complained;

4. A clear message that student safety is the district's primary concern, and that any separate rule violation involving an alleged victim or any other person reporting a sexual harassment incident will be addressed separately and will not affect the manner in which the sexual harassment complaint will be received, investigated, or resolved;

5. A clear message that every report of sexual harassment that involves a student shall trigger the district’s response obligations, which involves discussing with the complainant the availability of supportive measures and the process for filing a formal complaint;

6. Information about the district's grievance process for investigating complaints and the person(s) to whom a report of sexual harassment should be made;

7. Information about the rights of students and parents/guardians to file a civil or criminal complaint, as applicable, including the right to file a civil or criminal complaint while the district investigation of a sexual harassment complaint continues; and

8. A clear message that, when needed, the district will provide supportive measures, which are designed to restore or preserve equal access to the district’s education program or activity without unreasonably burdening the other party, including measures designed to protect the safety of all parties or the district’s educational environment, or deter sexual harassment.

Complaint Process and Disciplinary Actions

Sexual harassment complaints by and against students shall be investigated and resolved in accordance with law and district procedures specified in AR 5145.7 Sexual Harassment. Principals are responsible for notifying students and parents/guardians that complaints of sexual harassment can be filed under AR 5145.7 and where to obtain a copy of the procedures.

Upon investigation of a sexual harassment complaint, any student found to have engaged in sexual harassment or sexual violence in violation of this policy shall be subject to disciplinary action. For students in grades 4-12, disciplinary action may include suspension and/or expulsion, provided that, in imposing such discipline, the entire circumstances of the incident(s) shall be taken into account.

(cf. 5144 - Discipline)
(cf. 5144.1 - Suspension and Expulsion/Due Process)
(cf. 5144.2 - Suspension and Expulsion/Due Process (Students with Disabilities))

Upon investigation of a sexual harassment complaint, any employee found to have engaged in sexual harassment or sexual violence toward any student shall have his/her employment terminated in accordance with law and the applicable collective bargaining agreement.
Record-Keeping

The District shall maintain for a period of seven (7) years records of –

1. Each sexual harassment investigation including any determination regarding responsibility and any audio or audiovisual recording or transcript required under Title IX, any disciplinary sanctions imposed on the respondent, and any remedies provided to the complainant designed to restore or preserve equal access to the recipient’s education program or activity;

2. Any appeal and the result therefrom;

3. Any informal resolution and the result therefrom; and

4. All materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process. The District must make these training materials publicly available on its website, or if the District does not maintain a website, the District must make these materials available upon request for inspection by members of the public.

Legal Reference:
EDUCATION CODE
200-262.4 Prohibition of discrimination on the basis of sex
48900 Grounds for suspension or expulsion
48900.2 Additional grounds for suspension or expulsion; sexual harassment
48904 Liability of parent/guardian for willful student misconduct
48980 Notice at beginning of term
CIVIL CODE
51.9 Liability for sexual harassment; business, service and professional relationships
1714.1 Liability of parents/guardians for willful misconduct of minor
GOVERNMENT CODE
12950.1 Sexual harassment training
CODE OF REGULATIONS, TITLE 5
4600-4670 Uniform complaint procedures
4900-4965 Nondiscrimination in elementary and secondary education programs
UNITED STATES CODE, TITLE 20
1221 Application of laws
1232g  Family Educational Rights and Privacy Act
1681-1688  Title IX, discrimination
UNITED STATES CODE, TITLE 42
1983  Civil action for deprivation of rights
2000d-2000d-7  Title VI, Civil Rights Act of 1964
2000e-2000e-17  Title VII, Civil Rights Act of 1964 as amended
CODE OF FEDERAL REGULATIONS, TITLE 34
99.1-99.67  Family Educational Rights and Privacy
106.1-106.71  Nondiscrimination on the basis of sex in education programs
COURT DECISIONS
Flores v. Morgan Hill Unified School District, (2003, 9th Cir.) 324 F.3d 1130
Oona by Kate S. v. McCaffrey, (1998, 9th Cir.) 143 F.3d 473
Doe v. Petaluma City School District, (1995, 9th Cir.) 54 F.3d 1447

Management Resources:
CSBA PUBLICATIONS
Providing a Safe, Nondiscriminatory School Environment for Transgender and Gender-Nonconforming Students, Policy Brief, February 2014
Safe Schools:  Strategies for Governing Boards to Ensure Student Success, 2011
U.S. DEPARTMENT OF EDUCATION, OFFICE FOR CIVIL RIGHTS PUBLICATIONS
Q&A on Campus Sexual Misconduct, September 2017
Dear Colleague Letter:  Title IX Coordinators, April 2015
Sexual Harassment:  It's Not Academic, September 2008
Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, January 2001
WEB SITES
CSBA:  http://www.csba.org
California Department of Education:  http://www.cde.ca.gov
U.S. Department of Education, Office for Civil Rights:  http://www.ed.gov/about/offices/list/ocr

[DATE OF REVISION]
Sample
Administrative Regulation
Sexual Harassment

AR 5145.7
Students

The district designates the following individual(s) as the responsible employee(s) to coordinate its efforts to comply with Title IX of the Education Amendments of 1972 and California Education Code § 234.1, as well as to investigate and resolve sexual harassment complaints. The coordinator/compliance officer(s) may be contacted at:

_________________________________________________________
(title or position)

_________________________________________________________
(address)

_________________________________________________________
(telephone number)

_________________________________________________________
(email)

Title IX of the Education Amendments Act of 1972 defines sexual harassment as conduct on the basis of sex that satisfies one or more of the following:

(1) An employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an 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, dating violence, domestic violence or stalking.

The term “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. (20 U.S.C. 1092(f)(6)(A)(v))

The term “sex offense” means any sexual act directed against another person, without the consent of the victim, including instances where the victim is incapable of giving consent.
There are four types of sex offenses:

1. **Rape**: the penetration, no matter how slight, of the vagina or anus, with any body part or object, or oral penetration by a sex organ of another person, without the consent of the victim. This offense includes the rape of both males and females.

2. **Fondling**: the touching of the private body parts of another person for the purpose of sexual gratification, without the consent of the victim, including instances where the victim is incapable of giving consent because of his/her age or because of his/her temporary or permanent mental incapacity.

3. **Incest**: sexual intercourse between persons who are related to each other within the degrees wherein marriage is prohibited by law.

4. **Statutory Rape**: sexual intercourse with a person who is under your state’s statutory age of consent (18).

The term “dating violence” means violence committed by a person:

1. who is or has been in a social relationship of a romantic or intimate nature with the victim; and

2. where the existence of such a relationship shall be determined based on a consideration of the following factors:
   a. The length of the relationship.
   b. The type of relationship.
   c. The frequency of interaction between the persons involved in the relationship.  (34 U.S.C. 12291(a)(10))

The term “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.  (34 U.S.C. 12291(a)(8))

The term “stalking” means engaging in a course of conduct directed at a specific person that would cause a reasonable person to:

1. Fear for his or her safety or the safety of others; or
2. Suffer substantial emotional distress.  (34 U.S.C. 12291(a)(30))

Pursuant to California Education Code, prohibited sexual harassment includes, but is not limited to, unwelcome sexual advances, unwanted requests for sexual favors, or other unwelcome verbal, visual, or physical conduct of a sexual nature made against another person of the same or opposite sex in the educational setting, under any of the following conditions (Education Code § 212.5; 5 CCR 4916):
1. Submission to the conduct is explicitly or implicitly made a term or condition of a student's academic status or progress.

2. Submission to or rejection of the conduct by a student is used as the basis for academic decisions affecting the student.

3. The conduct has the purpose or effect of having a negative impact on the student's academic performance or of creating an intimidating, hostile, or offensive educational environment.

4. Submission to or rejection of the conduct by the student is used as the basis for any decision affecting the student regarding benefits and services, honors, programs, or activities available at or through any district program or activity.

(cf. 5131 - Conduct)
(cf. 5131.2 - Bullying)
(cf. 5137 - Positive School Climate)
(cf. 5145.3 - Nondiscrimination/Harassment)
(cf. 6142.1 - Sexual Health and HIV/AIDS Prevention Instruction)

Examples of types of conduct which are prohibited in the district and which may constitute sexual harassment include, but are not limited to:

1. Unwelcome leering, sexual flirtations, or propositions;

2. Unwelcome sexual slurs, epithets, threats, verbal abuse, derogatory comments, or sexually degrading descriptions;

3. Graphic verbal comments about an individual's body or overly personal conversation;

4. Sexual jokes, derogatory posters, notes, stories, cartoons, drawings, pictures, obscene gestures, or computer-generated images of a sexual nature;

5. Spreading sexual rumors;

6. Teasing or sexual remarks about students enrolled in a predominantly single-sex class;

7. Massaging, grabbing, fondling, stroking, or brushing the body;

8. Touching an individual's body or clothes in a sexual way;

9. Impeding or blocking movements or any physical interference with school activities when directed at an individual on the basis of sex;

10. Displaying sexually suggestive objects;
11. Sexual assault, sexual battery, or sexual coercion; and

12. Electronic communications containing comments, words, or images described above.

Prohibited sexual harassment may also include any act of retaliation against an individual who reports a violation of the district's sexual harassment policy or who participates in the investigation of a sexual harassment complaint.

A school district with actual knowledge of sexual harassment in an education program or activity of the recipient must respond promptly in a manner that is not deliberately indifferent. A recipient is deliberately indifferent only if its response to sexual harassment is clearly unreasonable in light of the known circumstances.

**Actual knowledge** means notice of sexual harassment or allegations of sexual harassment to any employee of an elementary and secondary school.

**Notice** results whenever any elementary and secondary school employee witnesses sexual harassment; hears about sexual harassment or sexual harassment allegations from a complainant (i.e., a person alleged to be the victim) or a third party (e.g., the complainant’s parent, friend, or peer); receives a written or verbal complaint about sexual harassment or sexual harassment allegations; or by any other means.

**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.

**Reporting Process**

Any student who believes that he/she has been subjected to sexual harassment by another student, an employee, or a third party or who has witnessed sexual harassment is strongly encouraged to report the incident to his/her teacher, the principal, or any other available school employee. Within one school day of receiving such a report, the school employee shall forward the report to the principal or the district's Title IX Coordinator. In addition, any school employee who observes an incident of sexual harassment involving a student shall, within one school day, report his/her observation to the principal or Title IX Coordinator. The employee shall take these actions, whether or not the alleged victim files a complaint. If the employee submits a report of sexual harassment to the principal, the principal shall forward the report to the Title IX Coordinator within two school days.

Any person may trigger a recipient’s response obligations by reporting sexual harassment to the Title IX Coordinator using contact information provided by the district, which must be available on the district’s website. The person who reports does not need to be the complainant; a report may be made by “any person” who believes that sexual harassment may have occurred and requires a recipient’s response.

**Supportive Measures**
When the Title IX Coordinator receives a verbal or informal report of sexual harassment, the Title IX Coordinator must promptly do the following:

1. Contact the complainant to 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 means non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, and without fee or charge to the complainant or the respondent before or after the filing of a formal complaint or where no formal complaint has been filed. Such measures are designed to restore or preserve equal access to the recipient’s education program or activity without unreasonably burdening the other party, including measures designed to protect the safety of all parties or the recipient’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 or housing locations, leaves of absence, increased security and monitoring of certain areas of the campus, and other similar measures. The district 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 district to provide the supportive measures. The Title IX Coordinator is responsible for coordinating the effective implementation of supportive measures.

Filing a Formal Complaint

Any student who believes that he/she has been subjected to sexual harassment/sex discrimination by another student, an employee, or a third party may file a written formal complaint with the Title IX Coordinator in person, by mail, or by electronic mail.

The complaint shall be initiated no later than six months from the date that the alleged unlawful sexual harassment/sex discrimination occurred, or six months from the date that the complainant first obtained knowledge of the facts of the alleged unlawful sex harassment/sex discrimination. The time for filing may be extended for up to 90 days by the Superintendent or designee for good cause upon written request by the complainant setting forth the reasons for the extension. (5 CCR 4630)

A 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 recipient 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 recipient with which the formal complaint is filed.
If a complaint of sexual harassment is initially submitted to the principal, he/she shall, within two (2) school days, forward the report to the compliance officer to initiate investigation of the complaint.

In any case of sexual harassment involving the compliance officer, the complaint may instead be submitted to the Superintendent or designee who shall determine who will investigate the complaint.

(cf. 5141.4 - Child Abuse Prevention and Reporting)

Consolidation of Formal Complaints

The district may consolidate formal complaints as to allegations of sexual harassment against more than one respondent, or by more than one complainant against one or more respondents, or by one party against the other party, where the allegations of sexual harassment arise out of the same facts or circumstances.

Dismissal of a Formal Complaint

The district must investigate the allegations in a formal complaint. If the conduct alleged in the formal complaint would not constitute sexual harassment as defined in this regulation even if proved, did not occur in the recipient’s education program or activity, or did not occur against a person in the United States, then the recipient must dismiss the formal complaint with regard to that conduct for purposes of sexual harassment under Title IX; such a dismissal does not preclude action under another provision of the district’s code of conduct.

The district may dismiss the formal complaint or any allegations therein, if at any time during the investigation or hearing: a complainant notifies the Title IX Coordinator in writing that the complainant would like to withdraw the formal complaint or any allegations therein; the respondent is no longer enrolled or employed by the recipient; or specific circumstances prevent the district from gathering evidence sufficient to reach a determination as to the formal complaint or allegations therein. Upon dismissal of a formal complaint, the district must promptly send written notice of the dismissal and reason(s) therefore simultaneously to the parties.

Notice of Allegations

Upon receipt of a formal complaint, a recipient must provide the following information through written notice to the parties who are known:

1. Notice of the district’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. Sufficient details include the identities of the
parties involved in the incident, if known, the conduct allegedly constituting sexual harassment, and the date and location of the alleged incident, if known.

The written notice must include a statement 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. The written notice must inform 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 obtained during the investigation.

The written notice must inform the parties of any provision in the recipient’s code of conduct that prohibits knowingly making false statements or knowingly submitting false information during the grievance process.

If, in the course of an investigation, the recipient decides to investigate allegations about the complainant or respondent that are not included in the notice, the recipient must provide notice of the additional allegations to the parties whose identities are known.

Informal Resolution Process

The district 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. Similarly, the district 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.

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:

1. Provides to the parties a written notice disclosing: the allegations, 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, provided, however, 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 any consequences resulting from participating in the informal resolution process, including the records that will be maintained or could be shared;
2. Obtains the parties’ voluntary, written consent to the informal resolution process; and
3. Does not offer or facilitate an informal resolution process to resolve allegations that an employee sexually harassed a student.

Emergency removal

The district may remove a respondent from the district’s education program or activity on an emergency basis, provided that the district undertakes an individualized safety and risk analysis, determines that an immediate threat to the physical health or safety of any student or other
individual arising from the allegations of sexual harassment justifies removal, and provides the respondent with notice and an opportunity to challenge the decision immediately following the removal. This provision may not be construed to modify any rights under the Individuals with Disabilities Education Act, Section 504 of the Rehabilitation Act of 1973, or the Americans with Disabilities Act.

Administrative leave

The district may place a non-student employee respondent on administrative leave during the pendency of the grievance process. This provision may not be construed to modify any rights under Section 504 of the Rehabilitation Act of 1973 or the Americans with Disabilities Act.

Grievance Process: Investigation of a Formal Complaint

Within 10 business days after the Title IX Coordinator receives the complaint, the Title IX Coordinator shall begin an investigation into the formal complaint. As necessary, additional staff or legal counsel may conduct or support the investigation.

Any individual designated by the district as a Title IX Coordinator, investigator, decision-maker, or any person designated by a recipient to facilitate an informal resolution process, must not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent.

Within five (5) business days of initiating the investigation, the Title IX Coordinator shall provide the complainant and respondent with the opportunity to present witnesses, including fact and expert witnesses, and other inculpatory and exculpatory evidence any evidence, or information leading to evidence. Such evidence or information may be presented at any time during the investigation.

In conducting the investigation, the Title IX Coordinator shall collect all available documents and review all available records, notes, or statements related to the complaint, including any additional evidence or information received from the parties during the course of the investigation. The Title IX Coordinator shall individually interview all available witnesses with information pertinent to the complaint, and may visit any reasonably accessible location where the relevant actions are alleged to have taken place. At appropriate intervals, the Title IX Coordinator shall inform both parties of the status of the investigation.

The district will conduct an objective evaluation of all relevant evidence – including both inculpatory and exculpatory evidence – and provide that credibility determinations may not be based on a person’s status as a complainant, respondent, or witness.

The district shall have the burden of proof and the burden of gathering evidence sufficient to reach a determination regarding responsibility. Furthermore, the district 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 district obtains that party’s voluntary, written consent to do so for a grievance process under this section (if a party is not an “eligible student,” as defined in 34 CFR § 99.3, then the recipient must obtain the voluntary, written consent of a “parent,” as defined in 34 CFR § 99.3).

The Title IX Coordinator shall interview the complainant, respondent, and other relevant witnesses privately, separately, and in a confidential manner. The district shall provide to a 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. The complainant and respondent shall be entitled to have an advisor of their choice, who may be, but is not required to be, an attorney to accompany them to any related meeting or interview. However, the district 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.

The district will presume that the respondent is not responsible for the alleged conduct until a determination regarding responsibility is made at the conclusion of the grievance process.

A complainant’s refusal to provide the district’s investigator with documents or other evidence related to the allegations in the complaint, failure or refusal to cooperate in the investigation, or engagement in any other obstruction of the investigation may result in the dismissal of the complaint because of a lack of evidence to support the allegation. Similarly, a respondent’s refusal to provide the district’s investigator with documents or other evidence related to the allegations in the complaint, failure or refusal to cooperate in the investigation, or engagement in any other obstruction of the investigation may result in a finding, based on evidence collected, that a violation has occurred and in the imposition of a remedy in favor of the complainant. (5 CCR 4631)

In accordance with law, the district shall provide the investigator with access to records and other information related to the allegation in the complaint and shall not in any way obstruct the investigation. Failure or refusal of the district to cooperate in the investigation may result in a finding based on evidence collected that a violation has occurred and in the imposition of a remedy in favor of the complainant. (5 CCR 4631)

The district shall provide both parties an equal opportunity to inspect and review any evidence obtained as 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 regarding responsibility and inculpatory or exculpatory evidence whether obtained from a party or other source, so that each party can meaningfully respond to the evidence prior to conclusion of the investigation.

Prior to completion of the investigative report, the district shall 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, and the parties shall have at least 10 days to submit a written response, which the investigator will consider prior to completion of the investigative report.
The district shall create an investigative report that fairly summarizes relevant evidence and, at least 10 days prior to a determination regarding responsibility, send to each party and the party’s advisor, if any, the investigative report in an electronic format or a hard copy, for their review and written response.

Grievance Process: Determination Regarding Responsibility

After the recipient 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.

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 complainant’s prior sexual behavior with respect to the respondent and are offered to prove consent. The decision-maker(s) must explain to the party proposing the questions any decision to exclude a question as not relevant.

The decision-maker(s), who cannot be the same person(s) as the Title IX Coordinator or the investigator(s), must issue a written determination regarding responsibility. To reach this determination, the district must apply the standard of evidence that it applies to all formal complaints of sexual harassment – [SPECIFY IF THE STANDARD OF EVIDENCE IS PREPONDERANCE OF THE EVIDENCE OR CLEAR AND CONVINCING EVIDENCE]. The written determination must include the following elements:

1. Identification of the allegations potentially constituting sexual harassment;

2. A description of the 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;

3. Findings of fact supporting the determination. In reaching a factual determination, the following factors may be taken into account:
   a. Statements made by any witnesses
   b. The relative credibility of the individuals involved
   c. How the complaining individual reacted to the incident
   d. Any documentary or other evidence relating to the alleged conduct
   e. Past instances of similar conduct by any alleged offenders
   f. Past false allegations made by the complainant

4. Conclusions regarding the application of the recipient’s code of conduct to the facts;
5. A statement of, and rationale for, the result as to each allegation, including a determination regarding responsibility, any disciplinary sanctions the recipient imposes on the respondent, and whether remedies designed to restore or preserve equal access to the recipient’s education program or activity will be provided by the recipient to the complainant; and

6. The recipient’s procedures and permissible bases for the complainant and respondent to appeal.

The recipient must provide the written determination to the parties simultaneously. The determination regarding responsibility becomes final either on the date that the recipient provides the parties with the written determination of the result of the appeal, if an appeal is filed, or if an appeal is not filed, the date on which an appeal would no longer be considered timely.

The determination of whether a hostile environment exists may involve consideration of the following:

1. The manner in which the misconduct affected one or more students’ education
2. The type, frequency, and duration of the misconduct
3. The relationship between the alleged victim(s) and offender(s)
4. The number of persons engaged in the conduct and at whom the conduct was directed
5. The size of the school, location of the incidents, and context in which they occurred
6. Other incidents at the school involving different individuals

Timeline for Determination Regarding Responsibility

Unless extended by written agreement with the complainant, the compliance officer shall prepare and send to the complainant a written Determination Regarding Responsibility, as described in the section above entitled “Determination Regarding Responsibility,” within 60 calendar days of the district's receipt of the complaint. (5 CCR 4631)

The respondent shall be informed of any extension of the timeline agreed to by the complainant.

Corrective Actions

The district will treat complainants and respondents equitably by providing remedies to a complainant where a determination of responsibility for sexual harassment has been made against the respondent, and by following a grievance process before the imposition of any disciplinary sanctions or other actions that are not supportive measures against a respondent.
Remedies must be designed to restore or preserve equal access to the recipient’s education program or activity. Such remedies may include the same individualized services as “supportive measures”; however, remedies need not be non-disciplinary or non-punitive and need not avoid burdening the respondent.

The Title IX Coordinator is responsible for effective implementation of any remedies.

After a Determination Regarding Responsibility has been made, the Title IX Coordinator shall adopt any appropriate corrective action permitted by law. Appropriate corrective actions that focus on the larger school or district environment may include, but are not limited to, actions to reinforce district policies; training for faculty, staff, and students; updates to school policies; or school climate surveys.

Appropriate remedies that may be offered to the Complainant but not communicated to the respondent may include, but are not limited to, the following:

1. Counseling
   (cf. 6164.2 - Guidance/Counseling Services)
2. Academic support
3. Health services
4. Assignment of an escort to allow the victim to move safely about campus
5. Information regarding available resources and how to report similar incidents or retaliation
6. Separation of the victim from any other individuals involved, provided the separation does not penalize the victim
7. Restorative justice
8. Follow-up inquiries to ensure that the conduct has stopped and there has been no retaliation

Appropriate corrective actions that focus on a respondent may include, but are not limited to, the following:

1. Transfer from a class or school as permitted by law
2. Parent/guardian conference
3. Education regarding the impact of the conduct on others
4. Positive behavior support
5. Referral to a student success team
   (cf. 6164.5 - Student Success Teams)
6. Denial of participation in extracurricular or cocurricular activities or other privileges as permitted by law
   (cf. 6145 - Extracurricular and Cocurricular Activities)
7. Disciplinary action, such as suspension or expulsion, as permitted by law
   (cf. 5144 - Discipline)  
   (cf. 5144.1 - Suspension and Expulsion/Due Process)
In consultation with district legal counsel, the district may notify the complainant of any sanction imposed upon the respondent that directly relates to the complainant.

When an employee is found to have committed retaliation or sexual harassment/sex discrimination, the district shall take appropriate disciplinary action, up to and including dismissal, in accordance with applicable law and collective bargaining agreement. (cf. 4118 - Dismissal/Suspension/Disciplinary Action) (cf. 4218 - Dismissal/Suspension/Disciplinary Action)

The district may also consider training and other interventions for the larger school community to ensure that students, staff, and parents/guardians understand the types of behavior that constitute unlawful sexual harassment/sex discrimination, that the district does not tolerate it, and how to report and respond to it.

Appeal

Any complainant or respondent who is dissatisfied with the district's written Determination Regarding Responsibility or with the district’s dismissal of a formal complaint or any allegations therein may file an appeal in writing with the Governing Board within 15 calendar days of receiving the district's decision on the following bases:

1. Procedural irregularity that affected the outcome of the matter;

2. 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

3. 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.

As to all appeals, the district must:

1. Notify the other party in writing when an appeal is filed and implement appeal procedures equally for both parties;

2. Ensure that the decision-maker(s) for the appeal is not the same person as the decision-maker(s) that reached the determination regarding responsibility or dismissal, the investigator(s), or the Title IX Coordinator;

3. Ensure that the decision-maker(s) for the appeal is unbiased and meets the training requirements under Title IX;

4. Give both parties a reasonable, equal opportunity to submit a written statement in support of, or challenging, the outcome;
5. Issue a written decision describing the result of the appeal and the rationale for the result; and

6. Provide the written decision simultaneously to both parties.

Appeals to the California Department of Education

Any complainant or respondent who is dissatisfied with the district's written Determination Regarding Responsibility may file an appeal in writing with CDE within 15 calendar days of receiving the district's decision. (5 CCR 4632)

The party shall specify the basis for the appeal of the decision and how the facts of the district's decision are incorrect and/or the law has been misapplied. The appeal shall be sent to CDE with a copy of the original locally filed complaint and a copy of the district's decision in that complaint. (5 CCR 4632)

Upon notification by CDE that the district's decision has been appealed, the Superintendent or designee shall forward the following documents to CDE (5 CCR 4633):

1. A copy of the original complaint;
2. A copy of the written decision;
3. A summary of the nature and extent of the investigation conducted by the district, if not covered by the decision;
4. A copy of the investigation file including, but not limited to, all notes, interviews, and documents submitted by the parties and gathered by the investigator;
5. A report of any action taken to resolve the complaint;
6. A copy of the district's UCP; and
7. Other relevant information requested by CDE.

Confidentiality

All complaints and allegations of sexual harassment shall be kept confidential except as necessary to carry out the investigation or take other subsequent necessary action. (5 CCR 4964)

However, a complainant may not file a formal complaint with the Title IX Coordinator anonymously. If a complainant chooses not to ultimately file a formal complaint under the grievance process, the Title IX Coordinator will take into account the wishes of a complainant and will only initiate a grievance process against the complainant’s wishes if doing so is not clearly unreasonable in light of the known circumstances.

However, each party may discuss the allegations under investigation with other individuals in order to gather and present relevant evidence.

However, when a complainant or victim of sexual harassment notifies the district of the harassment but requests confidentiality, the compliance officer shall inform him/her that the
request may limit the district's ability to investigate the harassment or take other necessary action. When honoring a request for confidentiality, the district will nevertheless take all reasonable steps to investigate and respond to the complaint consistent with the request.

When a complainant of sexual harassment notifies the district of the harassment but requests that the district not pursue an investigation, the district will determine whether or not it can honor such a request while still providing a safe and nondiscriminatory environment for all students.

(cf. 4119.23/4219.23/4319.23 - Unauthorized Release of Confidential/Privileged Information)
(cf. 5125 - Student Records)

Notifications

A copy of the district's sexual harassment policy and regulation shall:

1. Be included in the notifications that are sent to parents/guardians at the beginning of each school year (Education Code § 48980; 5 CCR 4917)

(cf. 5145.6 - Parental Notifications)

2. Be displayed in a prominent location in the main administrative building or other area where notices of district rules, regulations, procedures, and standards of conduct are posted (Education Code § 231.5)

A copy of the district's sexual harassment policy and regulation shall be posted on district and school web sites and, when available, on district-supported social media.

(cf. 1113 - District and School Web Sites)
(cf. 1114 - District-Sponsored Social Media)

3. Be provided as part of any orientation program conducted for new students at the beginning of each quarter, semester, or summer session (Education Code § 231.5)

4. Appear in any school or district publication that sets forth the school's or district's comprehensive rules, regulations, procedures, and standards of conduct (Education Code § 231.5)

5. Be included in the student handbook

6. Be provided to employees and employee organizations

[DATE OF REVISION]
Legal Update

October 20, 2016

To: Superintendents, Member School Districts (K-12)

From: Mia N. Robertshaw
Assistant General Counsel

Subject: Senate Bill 1375 / Title IX Notifications
Memo No. 37-2016

The Governor has signed California Senate Bill (“SB”) 1375, attached, which adds section 221.61 to the Education Code, imposing new requirements on all public schools, county offices of education, charter schools, and private schools which are subject to Title IX requirements (herein, “education entities”). New section 221.61 requires these education entities to post information relating to Title IX on their websites in a “prominent and conspicuous location” no later than July 1, 2017. Education entities that do not have websites are not required to establish websites for this section, but if they do not have websites then the required information must be posted on the district website or the county office of education website.

Posted information must include:

1. The name and contact information of the Title IX Coordinator, including the Title IX Coordinator’s telephone number and email address.

2. The rights of the pupil and responsibilities of the education entity under Title IX, including the list of rights in Education Code section 221.8 as well as links to relevant websites of the U.S. Department of Education Office for Civil Rights and the California Department of Education’s Office for Equal Opportunity.

3. A description of how to file a Title IX complaint, including:

“(A) An explanation of the statute of limitations within which a complaint must be filed after an alleged incident of discrimination has occurred, and how a complaint may be filed beyond the statute of limitations.
(B) An explanation of how the complaint will be investigated and how the complainant may further pursue the complaint, including, but not limited to, Internet Web links to this information on the United States Department of Education Office for Civil Rights’ Internet Web site.

(C) An Internet Web link to the United States Department of Education Office for Civil Rights complaints form, and the contact information for the office, which shall include the phone number and email address for the office.”

If a district’s schools have their own websites, this information must be posted on the school website in addition to the district website. The district website should specify that the Title IX information provided on the district website applies to every school site (if this is true). If a school site has its own Title IX Coordinator, the school Title IX Coordinator and the district lead Title IX Coordinator should both be listed on both the school and district websites.

Finally, SB 1375 provides that if the Commission on State Mandates determines that SB 1375 imposes state-mandated costs, these costs may be reimbursed to local agencies and school districts pursuant to Government Code section 17500 et seq.

All education entities should add the required information to their websites promptly and no later than July 1, 2017. Every education entity should ensure that it has a designated Title IX Coordinator who is trained and has proper authority to oversee the entity’s efforts to comply with Title IX. School & College Legal Services is offering a Title IX Coordinator 101 workshop on April 21, 2017 at the Sonoma County Office of Education. Please visit www.sclscal.org/workshops for more information and to register.

Please contact our office with questions regarding this Legal Update or any other legal matter.

The information in this Legal Update is provided as a summary of law and is not intended as legal advice. Application of the law may vary depending on the particular facts and circumstances at issue. We, therefore, recommend that you consult legal counsel to advise you on how the law applies to your specific situation.

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1 Education Code section 221.61.
Senate Bill No. 1375

CHAPTER 655

An act to add Section 221.61 to the Education Code, relating to educational equity.

[Approved by Governor September 26, 2016. Filed with Secretary of State September 26, 2016.]

LEGISLATIVE COUNSEL'S DIGEST

SB 1375, Jackson. Educational equity: sex equity in education: federal Title IX notifications.

Existing law, the Sex Equity in Education Act, states the policy of the state that elementary and secondary school classes and courses, including nonacademic and elective classes and courses, be conducted without regard to the sex of the pupil enrolled in these classes or courses. Existing federal law, known as Title IX, prohibits a person, on the basis of sex, from being excluded from participation in, being denied the benefits of, or being subject to discrimination under, any education program or activity receiving federal financial assistance.

This bill would require, on or before July 1, 2017, all public schools, private schools that receive federal funds and are subject to the requirements of Title IX, school districts, county offices of education, and charter schools to post in a prominent and conspicuous location on their Internet Web sites specified information relating to Title IX. The bill would require the Superintendent of Public Instruction to annually send a letter through electronic means to all public schools, private schools that receive federal funds and are subject to the requirements of Title IX, school districts, county offices of education, and charter schools informing them of the new requirement that would be created by this bill and of their responsibilities under Title IX. Because the bill would impose additional duties on public schools, school districts, county offices of education, and charter schools, the bill would impose a state-mandated local program.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that, if the Commission on State Mandates determines that the bill contains costs mandated by the state, reimbursement for those costs shall be made pursuant to these statutory provisions.

The people of the State of California do enact as follows:

SECTION 1. The Legislature finds and declares all of the following:

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The goal of Title IX of the Education Amendments of 1972 (20 U.S.C. Sec. 1681 et seq.) is to provide greater levels of gender equity in schools. The results have been higher enrollment in colleges and universities, increased numbers of graduate degrees in science and mathematics, increased participation in athletics, and fairer treatment in cases of sexual and gender harassment. These benefits not only lead to higher self-esteem and enhanced leadership skills, but also to higher rates of graduation and greater levels of career success. Title IX was approved in 1972, yet noncompliance with its requirements is still problematic.


On January 20, 2015, the Senate Judiciary Committee held an informational hearing entitled “Attaining Equal Opportunity for Girls in California’s Secondary Schools: How our Schools are Complying with Title IX.” During the hearing, the committee heard from the United States Department of Education Office for Civil Rights and the State Department of Education.

As demonstrated by testimony provided during the informational hearing, school districts are often unaware that Title IX requires them to do the following:

1. Appoint a Title IX coordinator at both the district and school levels who is responsible for coordinating the school and school district’s Title IX compliance. The coordinator should not have other responsibilities that create a conflict of interest with his or her role as coordinator.
2. Adopt and publish rules and procedures on how to receive, investigate, and respond to a complaint filed under Title IX.
3. Notify all pupils, parents and guardians of pupils, and school staff of their rights under Title IX.
4. A 2015 American Civil Liberties Union (ACLU) of California report found widespread unawareness among pupils and school administrators of the rights of pregnant and parenting pupils, including an extremely limited knowledge that pregnant pupils and those recovering from childbirth and related medical conditions are entitled to services available to other pupils with temporary medical conditions.
5. The ACLU report found that only 4 percent of school districts surveyed included “parenting” status within the list of categories in the nondiscrimination board policy, 25 percent of pupil survey respondents indicated that they had been restricted from participating in an extracurricular activity, such as physical education or a sport, due to their pregnancy status, and 13 percent of pupil survey respondents said that they were required by their school district to move to an alternative or continuation school as a result of their pregnancy despite the law requiring that enrollment in separate programs for parenting pupils be strictly voluntary.
6. Since Title IX was passed 44 years ago, it has been the subject of over 20 proposed amendments, reviews, Supreme Court cases, and other
political actions. It is a living, breathing law that benefits countless women and girls. The lack of knowledge of and training on Title IX harms pupils.

SEC. 2. Section 221.61 is added to the Education Code, immediately following Section 221.6, to read:

221.61. (a) On or before July 1, 2017, public schools, private schools that receive federal funds and are subject to the requirements of Title IX, school districts, county offices of education, and charter schools shall post in a prominent and conspicuous location on their Internet Web sites all of the following:

(1) The name and contact information of the Title IX coordinator for that public school, private school, school district, county office of education, or charter school, which shall include the Title IX coordinator’s phone number and email address.

(2) The rights of a pupil and the public and the responsibilities of the public school, private school, school district, county office of education, or charter school under Title IX, which shall include, but shall not be limited to, Internet Web links to information about those rights and responsibilities located on the Internet Web sites of the department’s Office for Equal Opportunity and the United States Department of Education Office of Civil Rights, and the list of rights specified in Section 221.8.

(3) A description of how to file a complaint under Title IX, which shall include all of the following:

(A) An explanation of the statute of limitations within which a complaint must be filed after an alleged incident of discrimination has occurred, and how a complaint may be filed beyond the statute of limitations.

(B) An explanation of how the complaint will be investigated and how the complainant may further pursue the complaint, including, but not limited to, Internet Web links to this information on the United States Department of Education Office for Civil Rights’ Internet Web site.

(C) An Internet Web link to the United States Department of Education Office for Civil Rights complaints form, and the contact information for the office, which shall include the phone number and email address for the office.

(b) On or before April 1, 2017, and annually thereafter, the Superintendent shall send a letter through electronic means to all public schools, private schools that receive federal funds and are subject to the requirements of Title IX, school districts, county offices of education, and charter schools informing them of the requirement specified in subdivision (a) and of their responsibilities under Title IX.

(c) A public school that does not maintain an Internet Web site may comply with subdivision (a) by posting the information specified in paragraphs (1) to (3), inclusive, of subdivision (a) on the Internet Web site of its school district or county office of education.

(d) Nothing in this section shall be construed to require a school or local educational agency to establish an Internet Web site if the school or local educational agency does not already maintain one.
SEC. 3. If the Commission on State Mandates determines that this act contains costs mandated by the state, reimbursement to local agencies and school districts for those costs shall be made pursuant to Part 7 (commencing with Section 17500) of Division 4 of Title 2 of the Government Code.
LEGAL UPDATE

November 23, 2016

To: Superintendents, Member School Districts (K-12)

From: Mia N. Robertshaw
Assistant General Counsel

Subject: Title IX Notifications Sample Posting
SUPPLEMENT to Memo No. 37-2016

As we explained in Legal Update Memo No. 37-2016, new Education Code section 221.61 requires public schools, county offices of education, charter schools, and private schools which are subject to Title IX (herein, “education entities”) to post information relating to Title IX on their websites. A number of clients requested a sample posting to use to comply with new Education Code section 221.61. We are supplementing Legal Update Memo No. 37-2016 to include the attached sample posting for your use or reference.

If you choose to use this sample posting, please review it carefully and fill in district-specific information as noted. Any words set forth in brackets [like this] are notes to the district which should not be included in the final posting except as noted. Highlighted material may be necessary depending on the practices and policies of each district. Please ensure that the information in your final posting is consistent with your applicable policies and procedures.

The information required by Education Code section 221.61 must be posted in a “prominent and conspicuous location” of the education entity’s website no later than July 1, 2017. The information must be posted on the district website. If any school has its own website, the information must be posted on the school website as well as the district website. If the district does not have a website, this information must be posted on the county office of education website.

Please contact our office with questions regarding this Legal Update or any other legal matter.

The information in this Legal Update is provided as a summary of law and is not intended as legal advice. Application of the law may vary depending on the particular facts and circumstances at issue. We, therefore, recommend that you consult legal counsel to advise you on how the law applies to your specific situation.

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Title IX – Sex-Based Discrimination is Prohibited

What is Title IX?

Title IX of the Education Amendments of 1972 ("Title IX") is a federal law that prohibits sex-based discrimination in all educational programs and activities, including athletic programs. No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any educational program or activity operated by the District. Title IX protects all participants in the District’s educational programs and activities, including students, parents, employees, and job applicants. The District does not discriminate on the basis of sex. Discrimination on the basis of sex can include sexual harassment and sexual violence.

In addition to Title IX, the California Education Code prohibits discrimination on the basis of sex in schools. (California Education Code §§ 220-221.1.) Other state and federal laws also prohibit discrimination and ensure equality in education. Please refer to Board Policies [insert relevant Board Policy numbers] and Administrative Regulations [insert relevant Administrative Regulation numbers] for more information on the District’s anti-discrimination policies.

Title IX information provided here applies to every school site and to all District programs and activities.

What are my rights under Title IX?

You have the following rights under Title IX, to the extent applicable at the District:

- You have the right to fair and equitable treatment and you shall not be discriminated against based on your sex.
- You have the right to be provided with an equitable opportunity to participate in all academic extracurricular activities, including athletics.
- You have the right to inquire of the athletic director of your school or appropriate District personnel as to the athletic opportunities offered by the school.
- You have the right to apply for athletic scholarships if the District offers any.
- You have the right to receive equitable treatment and benefits in the provision of all of the following related to athletics, if any are provided by the District:
  - Equipment and supplies;
  - Scheduling of games and practices;
  - Transportation and daily allowances;
  - Access to tutoring;
  - Coaching;
  - Locker rooms;
  - Practice and competitive facilities;
  - Medical and training facilities and services; and
  - Publicity.
• You have the right to have access to a sex/gender equity coordinator, referred to as the Title IX Coordinator, to answer questions regarding sex/gender equity laws.
• You have the right to contact the State Department of Education and the California Interscholastic Federation to access information on sex/gender equity laws.
• You have the right to file a confidential discrimination complaint with the United States Department of Education Office for Civil Rights or the California Department of Education if you believe you have been discriminated against or if you believe you have received unequal treatment on the basis of your sex.
• You have the right to pursue civil remedies if you have been discriminated against.
• You have the right to be protected against retaliation if you file a discrimination complaint. (California Education Code § 221.8.)

The District has a responsibility to respond promptly and effectively to sex-based discrimination, including sexual harassment and sexual violence. If the District knows or reasonably should know about sex discrimination, it must take action to eliminate the sex discrimination, prevent its recurrence, and address its effects. The District must resolve complaints of sex discrimination promptly and equitably. Information on filing a complaint alleging sex-based discrimination is below, including contact information for the District’s Title IX Coordinator.

For more information specific to anti-discrimination in District employment, please contact the Title IX Coordinator.

Learn more about your rights under Title IX:
• Review United States Department of Education Office for Civil Rights, Know Your Rights documents:
  o Title IX prohibits sexual harassment and sexual violence: https://www2.ed.gov/about/offices/list/ocr/docs/title-ix-rights-201104.pdf.
  o Title IX requires the District to address sexual violence: https://www2.ed.gov/about/offices/list/ocr/docs/know-rights-201404-title-ix.pdf.
  o Title IX prohibits discrimination against pregnant or parenting individuals: http://www2.ed.gov/about/offices/list/ocr/docs/dcl-know-rights-201306-title-ix.pdf.
• Visit the website of the California Department of Education Office of Equal Opportunity at http://www.cde.ca.gov/re/di/eo/ and the webpage on Gender Equity/Title IX at http://www.cde.ca.gov/re/di/eo/genequitytitleix.asp.

Review related District policies and regulations:
• [Provide links to or information about how to obtain District policies and regulations regarding Title IX, including sexual harassment.]
**Who is the Title IX Coordinator?**

The District has a Title IX Coordinator who oversees the District’s compliance with Title IX requirements and promotes sex equity in the District’s programs. Contact the District’s Title IX Coordinator:

[Name], Title IX Coordinator  
[Office/Building Location]  
[Street Address]  
[City], California [Zip Code]  
Telephone: [(__) ___-____]  
Email: [___________@________]

[Note: The Title IX Coordinator’s telephone number and email must be included.]

(Optional statement to include if the District has additional Title IX Coordinators for school sites or program, such as Deputy Title IX Coordinators:)

In addition, the District has designated Deputy Title IX Coordinators for [specify school site/program, etc.]. You may contact these Deputy Title IX Coordinators or the lead Title IX Coordinator listed above. Contact the Deputy Title IX Coordinators at:

[Name], Deputy Title IX Coordinator  
[Office/Building Location]  
[Street Address]  
[City], California [Zip Code]  
Telephone: [(__) ___-____]  
Email: [___________@________]

[Name], Deputy Title IX Coordinator  
[Office/Building Location]  
[Street Address]  
[City], California [Zip Code]  
Telephone: [(__) ___-____]  
Email: [___________@________]

**How do I file a complaint of sex discrimination?**

A student, parent, guardian, employee, individual, or organization may file a written complaint alleging discrimination, harassment, intimidation, and/or bullying on the basis of a protected characteristic under the District’s Uniform Complaint Procedure by sending a complaint to:

[Name], [Title]  
[Office/Building Location]  
[Street Address]  
[City], California [Zip Code]  
Telephone: [(__) ___-____]  
Email: [___________@________]
The Uniform Complaint Procedure is available at [provide a direct link or information on where to obtain the procedure] [optional: and in _______ [specify any other languages] at ______________]. If you need assistance putting your complaint in writing, please contact __________ at ____________ [specify which position or office a person should contact for help putting a complaint in writing]. You may file a complaint anonymously, but the District’s ability to investigate and respond may be limited by a lack of information.

You may also file a discrimination complaint with the U.S. Department of Education Office for Civil Rights. For more information, visit http://www2.ed.gov/about/offices/list/ocr/complaintintro.html. The electronic complaint form for the Office for Civil Rights is available online at https://ocrcas.ed.gov/. Contact the Office for Civil Rights at:

- San Francisco Office
- Office for Civil Rights
- U.S. Department of Education
- 50 United Nations Plaza
- San Francisco, CA 94102
- Telephone: (415) 486-5555
- Fax: (415) 486-5570; TDD: (800) 877-8339
- Email: ocr.sanfrancisco@ed.gov

For information about how to file other types of complaints and the procedures for those complaints, please contact the District Office at [(___) ___-____].

**When must a complaint be filed?**

A complaint alleging unlawful discrimination or retaliation must be filed no later than six months from the date the discrimination or retaliation occurred, or six months from when the complainant first learned of the unlawful discrimination. The Superintendent or designee may extend this timeline by up to ninety days for good cause, upon written request by the complainant setting forth the reasons for the extension.

**How will a complaint be investigated?**

Complaints filed under the District’s Uniform Complaint Procedure will be investigated and a decision made within sixty calendar days of the District’s receipt, unless the complainant agrees to an extension. The District’s compliance officer or designee may interview alleged victims, alleged offenders, and relevant witnesses. The compliance officer may review available records, statements, or notes related to the complaint, including evidence or information received from the parties during the investigation. The compliance officer may visit reasonably accessible locations where discrimination is alleged to have occurred. As appropriate, the District’s compliance officer periodically will inform the parties of the status of the investigation. The complainant will be notified when a decision is made.
Complaints that are not filed under the District’s Uniform Complaint Procedure will be investigated and decided pursuant to the applicable procedure.

**What happens when the investigation is complete?**

For complaints filed under the Uniform Complaint Procedure, the compliance officer will prepare and send a final written decision to the complainant and respondent, if any, within ___ [insert the appropriate number of days pursuant to your UCP – for example, 30 or 60] calendar days of the District’s receipt of the complaint (unless this deadline is extended by mutual agreement).

[This paragraph should be included only by districts that allow appeals to the Board: If the complainant or respondent is not satisfied with the decision, either the complainant or respondent may, within five business days, file the complaint in writing with the Board. The Board may consider the matter at a Board meeting or decide not to hear the complaint, in which case the compliance officer’s decision shall be final.]

The complainant or respondent may appeal the District’s decision within fifteen calendar days to the California Department of Education. The appeal must specify the reason for the appeal and whether the District’s facts are incorrect and/or the law is misapplied. The appeal must include a copy of the original complaint to the District and a copy of the District’s decision. For more information, visit the California Department of Education’s webpage on Uniform Complaint Procedures: http://www.cde.ca.gov/re/cp/uc/index.asp.

For complaints alleging unlawful discrimination based on state law, the complainant may pursue available civil law remedies, including seeking assistance from mediation centers or public/private interest attorneys, sixty calendar days after filing an appeal with the California Department of Education. (California Education Code § 262.3.) Note that this sixty day moratorium does not apply to complaints seeking injunctive relief in state courts or to discrimination complaints based on federal law. (California Education Code § 262.3.)

Complaints may also be filed with the United States Department of Education, Office for Civil Rights, within 180 days of the alleged discrimination. For contact information, see the section above on “How do I file a complaint of sex discrimination?“ For more information, visit http://www2.ed.gov/about/offices/list/ocr/complaintintro.html.

If the compliance officer finds that a complaint has merit, the District will take appropriate corrective action.
How do I get more information?

For more information regarding Title IX and sex equity in education or in District employment, please contact the District’s Title IX Coordinator.
Dear Colleague:

Title IX of the Education Amendments of 1972\(^1\) (Title IX) prohibits discrimination on the basis of sex in education programs and activities by recipients of Federal financial assistance, which include schools, colleges and universities. Since its passage, Title IX has dramatically increased academic, athletic and employment opportunities for women and girls. Title IX stands for the proposition that equality of opportunity in America is not rhetoric, but rather a guiding principle.

Although there has been indisputable progress since Title IX was enacted, notably in interscholastic and intercollegiate athletic programs, sex discrimination unfortunately continues to exist in many education programs and activities. I am committed to the vigorous enforcement of Title IX to resolve this discrimination and to provide clear policy guidance to assist a recipient institution (institution) in making the promise of Title IX a reality for all.

To that end, on behalf of the Office for Civil Rights (OCR) of the U.S. Department of Education (Department), it is my pleasure to provide you with this “Intercollegiate Athletics Policy Clarification: The Three-Part Test – Part Three.” With this letter, the Department is withdrawing the “Additional Clarification of Intercollegiate Athletics Policy: Three Part Test – Part Three” (2005 Additional Clarification) and all related documents accompanying it, including the “User’s Guide to Student Interest Surveys under Title IX” (User’s Guide) and related technical report, that were issued by the Department on March 17, 2005.

OCR enforces Title IX and its implementing regulation.\(^2\) The regulation contains specific provisions governing athletic programs\(^3\) and the awarding of athletic scholarships.\(^4\) Specifically, the Title IX regulation provides that if an institution operates or sponsors an athletic program, it must provide equal athletic opportunities for members of both sexes.\(^5\) In determining whether equal athletic opportunities are available, the regulation requires OCR to consider whether an institution is effectively accommodating the athletic interests and abilities of students of both sexes.\(^6\)

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\(^1\) 20 U.S.C. § 1681 et seq.
\(^2\) 34 C.F.R. Part 106.
\(^3\) 34 C.F.R. § 106.37(c).
\(^4\) 34 C.F.R. § 106.37(c).
\(^5\) 34 C.F.R. § 106.41(c).
\(^6\) 34 C.F.R. § 106.41(c)(1). The Title IX regulation at 34 C.F.R. § 106.41(c) provides that OCR also will consider other factors when determining whether equal athletic opportunity is available at an institution. This Dear Colleague
The “Intercollegiate Athletics Policy Interpretation” (1979 Policy Interpretation), published on December 11, 1979, provides additional guidance on the Title IX intercollegiate athletic regulatory requirements. The 1979 Policy Interpretation sets out a three-part test that OCR uses to assess whether an institution is effectively accommodating the athletic interests and abilities of its students to the extent necessary to provide equal athletic opportunity. On January 16, 1996, OCR issued the “Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test” (1996 Clarification) to provide additional clarification on all parts of the three-part test, including the specific factors that OCR uses to evaluate compliance under the third part of the three-part test (Part Three).

In 2005, OCR issued the Additional Clarification regarding application of the indicators in the 1996 Clarification that guided OCR’s analysis of Part Three. The accompanying User’s Guide included a prototype survey instrument (model survey) that institutions could use to measure student interest in participating in intercollegiate athletics and included specific guidance on its implementation. The Additional Clarification and User’s Guide changed OCR’s approach from an analysis of multiple indicators to a reliance on a single survey instrument to demonstrate that an institution is accommodating student interests and abilities in compliance with Part Three. After careful review, OCR has determined that the 2005 Additional Clarification and the User’s Guide are inconsistent with the nondiscriminatory methods of assessment set forth in the 1979 Policy Interpretation and the 1996 Clarification and do not provide the appropriate and necessary clarity regarding nondiscriminatory assessment methods, including surveys, under Part Three. Accordingly, the Department is withdrawing the 2005 Additional Clarification and User’s Guide, including the model survey. All other Department policies on Part Three remain in effect and provide the applicable standards for evaluating Part Three compliance.

Given the resource limitations faced by institutions throughout the nation and the effect on institutions’ athletics programs, I recognize the importance of assisting institutions in developing their own assessment methods that retain the flexibility to meet their unique circumstances, but are consistent with the nondiscrimination requirements of the Title IX regulation. Therefore, this Dear Colleague letter reaffirms, and provides additional clarification

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letter only addresses the regulatory requirement, at 34 C.F.R. § 106.41(c)(1), to effectively accommodate interests and abilities.

7 44 Fed. Reg. 71413 (1979). The 1979 Policy Interpretation was published by the former Department of Health, Education, and Welfare, and was adopted by the Department of Education when it was established in 1980.

8 Although the 1979 Policy Interpretation is designed for intercollegiate athletics, its general principles, and those of this letter, often will apply to interscholastic, club, and intramural athletic programs. 44 Fed. Reg. at 71413. Furthermore, the Title IX regulation requires institutions to provide equal athletic opportunities in intercollegiate, interscholastic, club, and intramural athletics. 34 C.F.R. § 106.41(c).

9 As discussed in the 1979 Policy Interpretation, OCR also considers the quality of competitive opportunities offered to members of both sexes in determining whether an institution effectively accommodates the athletic interests and abilities of its students. 44 Fed. Reg. at 71418.

10 OCR’s “Further Clarification of Intercollegiate Athletics Policy Guidance Regarding Title IX Compliance,” which was issued as a Dear Colleague letter on July 11, 2003, also reincorporated the 1996 Clarification’s broad range of specific factors and illustrative examples.
on, the multiple indicators discussed in the 1996 Clarification that guide OCR’s analysis of whether institutions are in compliance with Part Three, as well as the nondiscriminatory implementation of a survey as one assessment technique.

The Three-Part Test

As discussed above, OCR uses the three-part test to determine whether an institution is providing nondiscriminatory athletic participation opportunities in compliance with the Title IX regulation. The test provides the following three compliance options:

1. Whether intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments; or

2. Where the members of one sex have been and are underrepresented among intercollegiate athletes, whether the institution can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interests and abilities of the members of that sex; or

3. Where the members of one sex are underrepresented among intercollegiate athletes, and the institution cannot show a history and continuing practice of program expansion, as described above, whether it can be demonstrated that the interests and abilities of the members of that sex have been fully and effectively accommodated by the present program.\(^{11}\)

The three-part test is intended to allow institutions to maintain flexibility and control over their athletic programs consistent with Title IX’s nondiscrimination requirements. As stated in the 1996 Clarification, “[T]he three-part test furnishes an institution with three individual avenues to choose from when determining how it will provide individuals of each sex with nondiscriminatory opportunities to participate in intercollegiate athletics. If an institution has met any part of the three-part test, OCR will determine that the institution is meeting this requirement.”

Part Three of the Three-Part Test — Fully and Effectively Accommodating the Interests and Abilities of the Underrepresented Sex

This letter focuses on Part Three — whether an institution is fully and effectively accommodating the athletic interests and abilities of the underrepresented sex. As the 1996 Clarification indicates, while disproportionately high athletic participation rates by an institution’s students of the overrepresented sex (as compared to their enrollment rates) may indicate that an institution is not providing equal athletic opportunities to its students of the underrepresented sex, an institution can satisfy Part Three if it can show that the underrepresented sex is not being denied opportunities, i.e., that the interests and abilities of

\(^{11}\) 44 Fed. Reg. at 71418.
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the underrepresented sex are fully and effectively accommodated. This letter provides information that guides OCR in its evaluation of compliance with Part Three and the nondiscriminatory implementation of assessments of students' athletic interests and abilities under it.

Under Part Three, the focus is on full and effective accommodation of the interests and abilities of the institution's students who are members of the underrepresented sex — including students who are admitted to the institution though not yet enrolled. As stated in the 1996 Clarification, and as further discussed below, in determining compliance with Part Three, OCR considers all of the following three questions:

1. Is there unmet interest in a particular sport?
2. Is there sufficient ability to sustain a team in the sport?
3. Is there a reasonable expectation of competition for the team?

If the answer to all three questions is "Yes," OCR will find that an institution is not fully and effectively accommodating the interests and abilities of the underrepresented sex and therefore is not in compliance with Part Three.

A. **Unmet Interest and Ability — OCR Evaluation Criteria**

In determining whether an institution has unmet interest and ability to support an intercollegiate team in a particular sport, OCR evaluates a broad range of indicators, including:

- whether an institution uses nondiscriminatory methods of assessment when determining the athletic interests and abilities of its students;
- whether a viable team for the underrepresented sex recently was eliminated;
- multiple indicators of interest;
- multiple indicators of ability; and
- frequency of conducting assessments.

Each of these five criteria is described below. Following the discussion of these criteria, this section provides technical assistance recommendations for effective assessment procedures and the nondiscriminatory implementation of a survey as one component of assessing the interests and abilities of students of the underrepresented sex. This section concludes with a discussion of the multiple indicators OCR evaluates to determine whether there are a sufficient number of students with unmet interest and ability to sustain a new intercollegiate team.

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12 OCR examines an institution's recruitment practices under another part of the 1979 Policy Interpretation. See 44 Fed. Reg. at 71417. Accordingly, where an institution recruits potential student athletes for its men's teams, it must ensure that its women's teams are provided with substantially equal opportunities to recruit potential student athletes.
1. Nondiscriminatory Methods of Assessment

Under Part Three, OCR evaluates whether an institution uses processes and methods for assessing the athletic interests and abilities of its students of the underrepresented sex that are consistent with the nondiscrimination standards set forth in the 1979 Policy Interpretation. The 1979 Policy Interpretation states that institutions may determine the athletic interests and abilities of students by nondiscriminatory methods of their choosing provided:

   a. The processes take into account the nationally increasing levels of women’s interests and abilities;

   b. The methods of determining interest and ability do not disadvantage the members of an underrepresented sex;

   c. The methods of determining ability take into account team performance records; and

   d. The methods are responsive to the expressed interests of students capable of intercollegiate competition who are members of an underrepresented sex.\(^{13}\)

An institution should document its assessment of students’ interests and abilities.

2. Assessments Not Used To Eliminate Viable Teams

As discussed in the 1996 Clarification, if an institution recently has eliminated a viable team for the underrepresented sex from the intercollegiate athletics program, OCR will find that there is sufficient interest, ability, and available competition to sustain an intercollegiate team in that sport and thus there would be a presumption that the institution is not in compliance with Part Three. This presumption can be overcome if the institution can provide strong evidence that interest, ability, or competition no longer exists.

Accordingly, OCR does not consider the failure by students to express interest during a survey under Part Three as evidence sufficient to justify the elimination of a current and viable intercollegiate team for the underrepresented sex. In other words, students participating on a viable intercollegiate team have expressed interest by active participation, and OCR does not use survey results to nullify that expressed interest.

3. Multiple Indicators Evaluated to Assess Interest

OCR considers a broad range of indicators to assess whether there is unmet athletic interest among the underrepresented sex. These indicators guide OCR in determining whether the institution has measured the interests of students of the underrepresented sex using nondiscriminatory methods consistent with the 1979 Policy Interpretation. As discussed in the

\(^{13}\) 44 Fed. Reg. at 71417.
1996 Clarification, OCR evaluates the interests of the underrepresented sex by examining the following list of non-exhaustive indicators:

- requests by students and admitted students that a particular sport be added;
- requests for the elevation of an existing club sport to intercollegiate status;
- participation in club or intramural sports;
- interviews with students, admitted students, coaches, administrators and others regarding interests in particular sports;
- results of surveys or questionnaires of students and admitted students regarding interests in particular sports;\(^{14}\)
- participation in interscholastic sports by admitted students; and
- participation rates in sports in high schools, amateur athletic associations, and community sports leagues that operate in areas from which the institution draws its students.\(^{15}\)

In accordance with the 1996 Clarification, OCR also will consider the likely interest\(^{16}\) of the underrepresented sex by looking at participation in intercollegiate sports in the institution's normal competitive regions.

4. Multiple Indicators Evaluated to Assess Ability

As discussed in the 1996 Clarification, OCR considers a range of indicators to assess whether there is sufficient ability among interested students of the underrepresented sex to sustain a team in the sport. When making this determination, OCR examines indicators such as:

- the athletic experience and accomplishments — in interscholastic, club or intramural competition — of underrepresented students and admitted students interested in playing the sport;

\(^{14}\) OCR evaluates all of the indicators discussed here so OCR does not consider survey results alone as sufficient evidence of lack of interest under Part Three.

\(^{15}\) As discussed in the 1996 Clarification, this indicator may be helpful to OCR in ascertaining likely interest of an institution’s students and admitted students in particular sports, especially in the absence of more direct indicia. However, in conducting its investigations, OCR determines whether an institution is meeting the actual interests and abilities of its students and admitted students.

An institution's evaluation should take into account sports played in the high schools and communities from which it draws its students, both as an indication of possible interest at the institution, and to permit the institution to plan to meet the interests of admitted students of the underrepresented sex. For example, if OCR's investigation finds that a substantial number of high schools from the relevant region offer a particular sport that the institution does not offer for the underrepresented sex, OCR will ask the institution to provide a basis for any assertion that its students and admitted students are not interested in playing that sport. OCR also may interview students, admitted students, coaches, and others regarding interest in that sport.

\(^{16}\) See Footnote 15 above.
• opinions of coaches, administrators, and athletes at the institution regarding whether interested students and admitted students have the potential to sustain an intercollegiate team; and
• if the team has previously competed at the club or intramural level, whether the competitive experience of the team indicates that it has the potential to sustain an intercollegiate team.

Additionally, because OCR recognizes that students may have a broad range of athletic experiences and abilities, OCR also examines other indications of ability such as:

• participation in other sports, intercollegiate, interscholastic or otherwise, that may demonstrate skills or abilities that are fundamental to the particular sport being considered; and
• tryouts or other direct observations of participation in the particular sport in which there is interest.

As the 1996 Clarification indicated, neither a poor competitive record, nor the inability of interested students or admitted students to play at the same level of competition engaged in by the institution’s other athletes, is conclusive evidence of lack of ability. For the purposes of assessing ability, it is sufficient that interested students and admitted students have the potential to sustain an intercollegiate team.

5. Frequency of Assessments

As discussed in the 1996 Clarification, OCR evaluates whether an institution assesses interest and ability periodically so that the institution can identify in a timely and responsive manner any developing interests and abilities of the underrepresented sex. There are several factors OCR considers when determining the rate of frequency for conducting an assessment. These factors include, but are not limited to:

• the degree to which the previous assessment captured the interests and abilities of the institution’s students and admitted students of the underrepresented sex;
• changes in demographics or student population at the institution;¹⁷ and
• whether there have been complaints from the underrepresented sex with regard to a lack of athletic opportunities or requests for the addition of new teams.

Further, OCR will consider whether an institution conducts more frequent assessments if a previous assessment detected levels of student interest and ability in any sport that were close to the minimum number of players required to sustain a team.

¹⁷ For example, in a typical four-year institution, the student body population will change substantially each year, by approximately 25 percent annually.
6. Effective Procedures for Evaluating Requests to Add Teams and Assessing Participation

An institution has a continuing obligation to comply with Title IX’s nondiscrimination requirements; thus, OCR recommends that institutions have effective ongoing procedures for collecting, maintaining, and analyzing information on the interests and abilities of students of the underrepresented sex, including easily understood policies and procedures for receiving and responding to requests for additional teams, and wide dissemination of such policies and procedures to existing and newly admitted students, as well as to coaches and other employees.

OCR also recommends that institutions develop procedures for, and maintain documentation from, routine monitoring of participation of the underrepresented sex in club and intramural sports as part of their assessment of student interests and abilities. OCR further recommends that institutions develop procedures for, and maintain documentation from, evaluations of the participation of the underrepresented sex in high school athletic programs, amateur athletic associations, and community sports leagues that operate in areas from which the institution draws its students. This is the type of documentation that may be needed in order for an institution to demonstrate that it is assessing interests and abilities in compliance with Part Three.

The Title IX regulation requires institutions to designate at least one employee to coordinate their efforts to comply with and carry out their Title IX responsibilities. Therefore, institutions may wish to consider whether the monitoring and documentation of participation in club, intramural, and interscholastic sports and the processing of requests for the addition or elevation of athletic teams should be part of the responsibilities of their Title IX coordinators in conjunction with their athletic departments. Another option an institution may wish to consider is to create a Title IX committee to carry out these functions. If an institution chooses to form such a committee, it should include the Title IX coordinator as part of the committee and provide appropriate training on the Title IX requirements for committee members.

7. Survey May Assist in Capturing Information on Students’ Interests and Abilities

As discussed in the 1996 Clarification, institutions may use a variety of techniques to identify students’ interests and abilities. OCR recognizes that a properly designed and implemented survey is one tool that can assist an institution in capturing information on students’ interests and abilities. OCR evaluates a survey as one component of an institution’s overall assessment under Part Three and will not accept an institution’s reliance on a survey alone, regardless of the response rate, to determine whether it is fully and effectively accommodating the interests and abilities of its underrepresented students. If an institution conducts a survey as part of its assessment, OCR examines the content, implementation and response rates of the survey, as well as an institution’s other methods of measuring interest and ability.

\[18\] 34 C.F.R. § 106.8(a).
Under Part Three, OCR evaluates the overall weight it will accord the conclusions drawn by an institution from the results of a survey by examining the following factors, among others:

- content of the survey;
- target population surveyed;
- response rates and treatment of non-responses;
- confidentiality protections; and
- frequency of conducting the survey.

OCR also considers whether a survey is implemented in such a way as to maximize the possibility of obtaining accurate information and facilitating responses. A properly designed survey should effectively capture information on interest and ability\(^\text{19}\) across multiple sports, without complicating responses with superfluous or confusing questions.

OCR has not endorsed or sanctioned any particular survey; however, for technical assistance purposes, this letter contains information that an institution may wish to consider in developing its own survey.

a. **Content of the Survey**

i. **Purpose**

To ensure students understand the importance of responding to the survey, OCR evaluates whether a survey clearly states its purpose. For technical assistance purposes, an example of a purpose statement might be:

**Purpose:** This data collection is being conducted for evaluation, research, and planning purposes and may be used along with other information to determine whether [institution] is effectively accommodating the athletic interests and abilities of its students, including whether to add additional teams.

ii. **Collect information regarding all sports**

In addition, OCR evaluates whether the survey lists all sports for the underrepresented sex recognized by the three primary national intercollegiate athletic associations,\(^\text{20}\) and contains an open-ended inquiry for other sports to allow students to write in any sports that are not

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\(^\text{19}\) Experience in sports generally is one indicator of ability.

\(^\text{20}\) These associations are the National Collegiate Athletic Association, the National Association of Intercollegiate Athletics, and the National Junior College Athletic Association. A current list of these sports for both sexes is: baseball, basketball, bowling, cross country, fencing, field hockey, football, golf, gymnastics, ice hockey, lacrosse, rifle, rowing, skiing, soccer, softball, swimming and diving, tennis, indoor track and field, outdoor track and field, volleyball, water polo, and wrestling.
listed. OCR considers whether the survey allows students to identify their interest in future or current participation in all of the sports they identify and general athletic experience. OCR also considers whether the survey allows students to provide additional information or comments about their interest, experience, and ability. For technical assistance purposes, the types of questions an institution could ask regarding interest in future participation, current participation, and prior athletic experience might be:

<table>
<thead>
<tr>
<th>Sport</th>
<th>Interest in Future Participation: At what level do you wish to participate in this sport at [Institution]?</th>
<th>Current Participation: At what level are you participating in this sport?</th>
<th>Prior Experience: At what level did you participate in this sport or any other relevant sport in high school, college, or in another capacity?</th>
</tr>
</thead>
<tbody>
<tr>
<td>Basketball</td>
<td>☐ Intercollegiate ☐ Club ☐ Intramural ☐ Recreational</td>
<td>☐ Intercollegiate ☐ Club ☐ Intramural ☐ Recreational ☐ Other _________</td>
<td>☐ College ☐ Intercollegiate ☐ Club ☐ Intramural ☐ Recreational ☐ Other _________ High School ☐ Varsity ☐ Junior Varsity ☐ Club ☐ Intramural ☐ Recreational ☐ Other _________</td>
</tr>
<tr>
<td>Lacrosse</td>
<td>☐ Intercollegiate ☐ Club ☐ Intramural ☐ Recreational</td>
<td>☐ Intercollegiate ☐ Club ☐ Intramural ☐ Recreational ☐ Other _________</td>
<td>☐ College ☐ Intercollegiate ☐ Club ☐ Intramural ☐ Recreational ☐ Other _________ High School ☐ Varsity ☐ Junior Varsity ☐ Club ☐ Intramural ☐ Recreational ☐ Other _________</td>
</tr>
<tr>
<td>Other sport identified by student</td>
<td>☐ Intercollegiate ☐ Club ☐ Intramural ☐ Recreational</td>
<td>☐ Intercollegiate ☐ Club ☐ Intramural ☐ Recreational ☐ Other _________</td>
<td>☐ College ☐ Intercollegiate ☐ Club ☐ Intramural ☐ Recreational ☐ Other _________ High School ☐ Varsity ☐ Junior Varsity ☐ Club ☐ Intramural ☐ Recreational ☐ Other _________</td>
</tr>
</tbody>
</table>

iii. Contact Information

OCR also looks at whether an institution requests contact information, to allow the institution to follow-up with students who wish to be contacted regarding their interests and abilities.

b. Target Population Surveyed

OCR considers the target population surveyed at the institution. Under Part Three, OCR evaluates whether the survey is administered as a census to all full-time undergraduate

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21 An open-ended inquiry for other sports should be prominent or otherwise readily visible and contain a line or other mechanism for students to write in the sport for which they wish to express interest and ability.

22 If the survey is provided in paper form, an institution should provide a surplus of rows to ensure that a respondent can provide information for all the sports for which there is interest.
students of the underrepresented sex and admitted students of the underrepresented sex.\textsuperscript{23} Using a census of all students can avoid several issues associated with sample surveys including, but not limited to: selection of the sampling mechanism, selection of the sample size, calculation of sampling error, and using sample estimates. If an institution intends to administer a survey to a sample population to gauge an estimate of interests and abilities, the larger the sample, the more weight OCR will accord the estimate.

\textbf{c. Responses: Rates and Treatment of Non-Responses}

OCR evaluates whether the survey is administered in a manner designed to generate high response rates and how institutions treat responses and non-responses.

OCR looks at whether institutions provide the survey in a context that encourages high response rates, and whether institutions widely publicize the survey; give students, including those participating in club or intramural sports, advance notice of the survey; and provide students adequate time to respond. Generally, OCR accords more weight to a survey with a higher response rate than a survey with a lower response rate, and institutions may want to distribute the survey through multiple mechanisms to increase the response rate.

For example, for enrolled students, an institution may want to administer the survey as part of a mandatory activity, such as during course registration. If administered as part of a mandatory activity, students also should have the option of completing the survey at a later date in order to ensure that they have adequate time to respond. Students who indicate that they wish to complete the survey at a later time should be given the opportunity to provide their contact information to enable the institution to take steps to ensure that they complete the survey. An institution should follow-up with those students who indicate that they wish to respond in the future.

An institution also may choose to send an email to the entire target population that includes a link to the survey. If an institution's assessment process includes email, OCR considers whether the institution takes appropriate cautionary measures, such as ensuring that it has accurate email addresses and that the target population has access to email.\textsuperscript{24} OCR also expects institutions to take additional steps to follow-up with those who do not respond, including sending widely publicized reminder notices.

If institutions administer the survey through a web-based distribution system, students who indicate that they have no current interest\textsuperscript{25} in athletic participation should be asked to confirm their lack of interest before they exit the system. If response rates using the methods described

\textsuperscript{23} For example, institutions may distribute surveys to all admitted students of the underrepresented sex with acceptance letters.

\textsuperscript{24} OCR also evaluates whether the survey is administered in a manner designed to ensure the accurate identity of the respondent and to protect against multiple responses by the same individual.

\textsuperscript{25} Students may have, or may be unaware of whether they will have, a future interest in athletic participation.
above are low, an institution should consider administering the survey in another manner to obtain higher response rates.

OCR does not consider non-responses to surveys as evidence of lack of interest or ability in athletics. As discussed above, regardless of whether students respond to a survey, OCR also evaluates whether students’ interest and abilities are assessed using the multiple indicators described above.

d. Confidentiality Protections

OCR also looks at whether institutions notify students that all responses as well as any personally identifiable information they provide will be kept confidential, although the aggregate survey information will be shared with athletic directors, coaches, and other staff, as appropriate. When requesting any personal or personally identifiable data, protecting the respondents’ confidentiality helps to ensure that institutions obtain high-quality data and high response rates. If a student has expressed interest in being contacted when responding to the survey, an institution should continue to maintain the student’s confidentiality except to the extent needed to follow-up with the student.

e. Frequency of Conducting the Survey

As discussed above, OCR evaluates whether an institution periodically conducts an assessment of interest and abilities. In addition to the factors OCR considers when determining the rate of frequency for conducting an assessment, OCR also will consider factors such as the size of the previously assessed survey population and the rate of response to the immediately preceding survey(s) conducted by the institution, if any.

8. Multiple Indicators Evaluated to Assess Sufficient Number of Interested and Able Students to Sustain a Team

Under Part Three, institutions are not required to create an intercollegiate team or elevate a club team to intercollegiate status unless there are a sufficient number of interested and able students to sustain a team. When OCR evaluates whether there are a sufficient number of students, OCR considers such indicators as the:

- minimum number of participants needed for a particular sport;
- opinions of athletic directors and coaches concerning the abilities required to field an intercollegiate team; and
- size of a team in a particular sport at institutions in the governing athletic association or conference to which the institution belongs or in the institution’s competitive regions.

When evaluating the minimum number of athletes needed, OCR may consider factors such as the:
• rate of substitutions necessitated by factors such as length of competitions, intensity of
play, or injury;
• variety of skill sets required for competition; and
• minimum number of athletes needed to conduct effective practices for skill
development.

B. Reasonable Expectation of Competition — OCR Evaluation Criteria

Lastly, as indicated in the 1996 Clarification, OCR evaluates whether there is a reasonable
expectation of intercollegiate competition for the team in the institution’s normal competitive
regions. In evaluating available competition, OCR considers available competitive opportunities
in the geographic area in which the institution’s athletes primarily compete, including:

• competitive opportunities offered by other schools against which the institution
competes; and
• competitive opportunities offered by other schools in the institution’s geographic area,
including those offered by schools against which the institution does not now
compete.\(^{26}\)

If the information or documentation compiled by the institution during the assessment process
shows that there is sufficient interest and ability to support a new intercollegiate team and a
reasonable expectation of intercollegiate competition in the institution’s normal competitive
region for the team, the institution is under an obligation to create an intercollegiate team
within a reasonable period of time in order to comply with Part Three.

Conclusion

The three-part test gives institutions flexibility and affords them control over their athletics
programs. This flexibility, however, must be used consistent with Title IX’s nondiscrimination
requirements. OCR will continue to work with institutions to assist them in finding ways to
address their particular circumstances and comply with Title IX. For technical assistance, please
contact the OCR enforcement office that serves your area, found at

Sincerely,

RusslynnAli
Assistant Secretary for Civil Rights

\(^{26}\) Under the 1979 Policy Interpretation, an institution also may be required to actively encourage the development
of intercollegiate competition for a sport for members of the underrepresented sex when overall athletic
opportunities within its competitive region have been historically limited for members of that sex. 44 Fed. Reg. at
71418.
State of California

EDUCATION CODE

Section 221.9

221.9. (a) Commencing with the 2015–16 school year and every year thereafter, each public elementary and secondary school in the state, including each charter school, that offers competitive athletics shall publicly make available at the end of the school year all of the following information:

1. The total enrollment of the school, classified by gender.
2. The number of pupils enrolled at the school who participate in competitive athletics, classified by gender.
3. The number of boys’ and girls’ teams, classified by sport and by competition level.

(b) The data required pursuant to subdivision (a) shall reflect the total number of players on a team roster on the official first day of competition.

(c) The school shall make the information specified in subdivision (a) publicly available as follows:

1. If the school maintains an Internet Web site, by posting the information on the school’s Internet Web site.
2. If the school does not maintain an Internet Web site, by submitting the information to its school district or, for a charter school, to its charter operator. The school district or charter operator shall post the information on its Internet Web site, and the information shall be disaggregated by schoolsite.

(d) The materials used by a school to compile the information specified in subdivision (a) shall be retained by the school for at least three years after the information is posted on the Internet pursuant to subdivision (c).

(e) As used in this section, “competitive athletics” means sports where the activity has coaches, a governing organization, and practices, and competes during a defined season, and has competition as its primary goal.

(Added by Stats. 2014, Ch. 258, Sec. 2. (SB 1349) Effective January 1, 2015.)
On February 22, 2017, the U.S. Department of Education, Office for Civil Rights (“OCR”) and the U.S. Department of Justice, Civil Rights Division (“CRD”) jointly issued a Dear Colleague Letter withdrawing two guidance documents relative to Title IX protections for transgender students. Specifically, the letter withdrew and rescinded guidance contained in the Letter to Emily Prince dated January 7, 2015\(^1\) and the Dear Colleague Letter on Transgender Students dated May 13, 2016.\(^2\)

Both documents took the position that Title IX of the Education Amendments of 1972 (“Title IX”),\(^3\) which prohibits discrimination on the basis of sex in educational programs and activities, required transgender students to be able to access sex-segregated facilities, including restrooms and locker rooms, based on their gender identity.\(^4\) The February 22, 2017, Dear Colleague Letter is attached.\(^5\)

The letter provided that the withdrawal of this interpretation “does not leave students without protections from discrimination, bullying, or harassment,” and that “schools must ensure that all students, including LGBT students, are able to learn and thrive in a safe environment.”

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\(^2\) Available at https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf.

\(^3\) 20 U.S.C. § 1681 et seq.

\(^4\) See 34 C.F.R. § 106.33.

\(^5\) It is also available for download at https://www.justice.gov/opa/press-release/file/941551/download.
Notwithstanding this federal action, California law permits transgender students to participate in school programs and activities and use facilities according to their gender identity. Section 221.5(f) of the Education Code provides:

A pupil shall be permitted to participate in sex-segregated school programs and activities, including athletic teams and competitions, and use facilities consistent with his or her gender identity, irrespective of the gender listed on the pupil's records.

California law also prohibits discrimination in public schools on the basis of gender, gender identity, and gender expression.

Superintendent of Public Instruction Tom Torlakson stated his strong support for the rights of transgender students in a News Release issued by the California Department of Education on February 22, 2017. He also clarified that California laws protecting transgender students remain intact.

Meanwhile, the Gloucester County School Board v. G.G. case previously pending before the Supreme Court has been thrown into legal limbo. The G.G. case addresses whether a transgender high school student can use the boys’ restroom consistent with his gender identity. On March 6, 2017, the Supreme Court issued a one-sentence order vacating the Fourth Circuit Court of Appeal’s ruling in favor of the transgender teen and remanding the case back to the Fourth Circuit. The Court of Appeals must now decide whether Title IX’s prohibition on sex discrimination extends to gender identity in the absence of federal guidance on the issue.

Please contact our office with questions regarding this Legal Update or any other legal matter.

The information in this Legal Update is provided as a summary of law and is not intended as legal advice. Application of the law may vary depending on the particular facts and circumstances at issue. We, therefore, recommend that you consult legal counsel to advise you on how the law applies to your specific situation.

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6 Education Code § 200.
7 “Gender” means sex, and includes a person’s gender identity and gender expression. “Gender expression” means a person’s gender-related appearance and behavior, whether or not stereotypically associated with the person’s sex assigned at birth. Education Code § 210.7.
8 Available at http://www.cde.ca.gov/nr/ne/yr17/yr17rel17.asp.
February 22, 2017

Dear Colleague:

The purpose of this guidance is to inform you that the Department of Justice and the Department of Education are withdrawing the statements of policy and guidance reflected in:

- Letter to Emily Prince from James A. Ferg-Cadima, Acting Deputy Assistant Secretary for Policy, Office for Civil Rights at the Department of Education dated January 7, 2015; and

- Dear Colleague Letter on Transgender Students jointly issued by the Civil Rights Division of the Department of Justice and the Department of Education dated May 13, 2016.

These guidance documents take the position that the prohibitions on discrimination “on the basis of sex” in Title IX of the Education Amendments of 1972 (Title IX), 20 U.S.C. § 1681 et seq., and its implementing regulations, see, e.g., 34 C.F.R. § 106.33, require access to sex-segregated facilities based on gender identity. These guidance documents do not, however, contain extensive legal analysis or explain how the position is consistent with the express language of Title IX, nor did they undergo any formal public process.

This interpretation has given rise to significant litigation regarding school restrooms and locker rooms. The U.S. Court of Appeals for the Fourth Circuit concluded that the term “sex” in the regulations is ambiguous and deferred to what the court characterized as the “novel” interpretation advanced in the guidance. By contrast, a federal district court in Texas held that the term “sex” unambiguously refers to biological sex and that, in any event, the guidance was “legislative and substantive” and thus formal rulemaking should have occurred prior to the adoption of any such policy. In August of 2016, the Texas court preliminarily enjoined enforcement of the interpretation, and that nationwide injunction has not been overturned.

In addition, the Departments believe that, in this context, there must be due regard for the primary role of the States and local school districts in establishing educational policy.

In these circumstances, the Department of Education and the Department of Justice have decided to withdraw and rescind the above-referenced guidance documents in order to further and more completely consider the legal issues involved. The Departments thus will not rely on the views expressed within them.
Dear Colleague Letter

Please note that this withdrawal of these guidance documents does not leave students without protections from discrimination, bullying, or harassment. All schools must ensure that all students, including LGBT students, are able to learn and thrive in a safe environment. The Department of Education Office for Civil Rights will continue its duty under law to hear all claims of discrimination and will explore every appropriate opportunity to protect all students and to encourage civility in our classrooms. The Department of Education and the Department of Justice are committed to the application of Title IX and other federal laws to ensure such protection.

This guidance does not add requirements to applicable law. If you have questions or are interested in commenting on this letter, please contact the Department of Education at ocr@ed.gov or 800-421-3481 (TDD: 800-877-8339); or the Department of Justice at education@usdoj.gov or 877-292-3804 (TTY: 800-514-0383).

Sincerely,

/s/
Sandra Battle
Acting Assistant Secretary for Civil Rights
U.S. Department of Education

/s/
T.E. Wheeler, II
Acting Assistant Attorney General for Civil Rights
U.S. Department of Justice
OCR Instructions to the Field re Complaints Involving Transgender Students

Regional Directors:

I am writing to explain the effects of developments on the enforcement of Title IX by the Office for Civil Rights. The recent developments include the following:

- On February 22, 2017, the U.S. Departments of Education and Justice issued a letter withdrawing the statements of policy and guidance reflected in the May 13, 2016 Dear Colleague Letter (DCL) on OCR’s enforcement of Title IX with respect to transgender students based on gender identity, as well as a related January 2015 letter, “in order to further and more completely consider the legal issues involved.”

- On March 3, 2017, the U.S. District Court for the Northern District of Texas dismissed without prejudice the multi-state lawsuit challenging the May 2016 DCL and dissolved the preliminary injunction (as clarified in October 2016) that had restricted OCR’s enforcement of Title IX with respect to transgender individuals’ access to “intimate” facilities.

- On March 6, 2017, the U.S. Supreme Court vacated and remanded Gloucester County School Board v. G.G., a case involving Title IX as it relates to transgender students’ access to restrooms. The Court said it was remanding the case to the U.S. Court of Appeals for the Fourth Circuit for further consideration “in light of the guidance document issued by the [Departments] on February 22, 2017” (i.e., the letter withdrawing the May 2016 DCL discussed above).

Thus, OCR may not rely on the policy set forth in the May 2016 DCL or the January 7, 2015 letter to a private individual as the sole basis for resolving a complaint. However, as was stated in the February 22, 2017, letter, “withdrawal of these guidance documents does not leave students without protections from discrimination, bullying, or harassment.” Rather, OCR should rely on Title IX and its implementing regulations, as interpreted in decisions of federal courts and OCR guidance documents that remain in effect, in evaluating complaints of sex discrimination against individuals whether or not the individual is transgender.

OCR may assert subject matter jurisdiction over and open for investigation the following allegations if other jurisdictional requirements have been established (see CPM sections 104-106):

- failure to promptly and equitably resolve a transgender student’s complaint of sex discrimination (34 C.F.R. § 106.8(b));
- failure to assess whether sexual harassment (i.e., unwelcome conduct of a sexual nature) or gender-based harassment (i.e., based on sex stereotyping, such as acts of verbal, nonverbal, or physical aggression, intimidation, or hostility based on sex or sex-stereotyping, such as refusing to use a transgender student’s preferred name or pronouns when the school uses preferred names for gender-conforming students or when the refusal is motivated by animus toward
people who do not conform to sex stereotypes) of a transgender student created a hostile
environment;
• failure to take steps reasonably calculated to address sexual or gender-based harassment that
creates a hostile environment;
• retaliation against a transgender student after concerns about possible sex discrimination were
brought to the recipient’s attention (34 C.F.R. § 106.71 (incorporating by reference 34 C.F.R. §
100.7(e))); and
• different treatment based on sex stereotyping (e.g., based on a student’s failure to conform to
stereotyped notions of masculinity or femininity) (34 C.F.R. § 106.31(b)).

It is the goal and desire of this Department that OCR approach each of these cases with great care and
individualized attention before reaching a dismissal conclusion. Please evaluate each allegation
separately, searching for a permissible jurisdictional basis for OCR to retain and pursue the complaint. It
is permissible, for example, for one allegation in a complaint (such as harassment based on gender
stereotypes) to go forward while another allegation (such as denial of access to restrooms based on
gender identity) is dismissed.

As always, other requirements in evaluating complaints, as explained in OCR’s Case Processing Manual
(CPM) apply, including CPM Sections 101, 105 and 106. For example, in establishing whether an
allegation includes sufficient information to proceed to investigation, OCR will, consistent with CPM
Section 108, “assist the complainant in understanding the information that OCR requires in order to
proceed to the investigation of the complainant’s allegation(s). This will include explaining OCR’s
investigation process and the rights of the complainant under the statutes and regulations enforced by
OCR. OCR will also specifically identify the information necessary for OCR to proceed to investigation.”
I also encourage you to contact the Program Legal Group’s Title IX team if you have any questions about
whether OCR has jurisdiction over a case involving a transgender student or alleged discrimination
based on gender identity.

When a complaint or case is dismissed, an appropriate text for a letter of dismissal could be:

On February 22, 2017, OCR and the U.S. Department of Justice (DOJ) issued a letter withdrawing
their joint Dear Colleague Letter on Transgender Students, issued on May 13, 2016. OCR and
DOJ stated that they were withdrawing the 2016 guidance in order to further and more
completely consider the legal issues involved. OCR is therefore dismissing this
[complaint/allegation/monitoring] under Sections 104 and 108 of OCR’s Case Processing
Manual. We remind you however, that there are other statutes and legal provisions that bar
discrimination. Additionally, as Betsy DeVos, Secretary of the U.S. Department of Education has
stated, each school has a responsibility to protect every student in America and ensure that they
have the freedom to learn and thrive in a safe environment. Some States and school districts
have found adopted policies and practices that protect all students, including transgender
students. The Department’s Examples of Policies and Emerging Practices for Supporting
some of those policies and practices.
Thank you for your continued dedicated to OCR’s core mission. As Secretary DeVos stated on February 22, 2017, OCR remains committed to investigating all claims of discrimination, bullying and harassment against those who are most vulnerable in our schools. I trust you will apply these instructions in line with the attitude and approach we are proud to foster here in OCR: that OCR exists to robustly enforce the civil rights laws under our jurisdiction, and we will do so in a neutral, impartial manner and as efficiently as possible.

If you have any questions about these instructions, please contact your Enforcement Director, and always feel free to reach out to PLG for assistance in brainstorming how to process a particular complaint.

Sincerely,

/s/
Candice Jackson
Acting Assistant Secretary for Civil Rights
Office for Civil Rights
Department of Education
§ 221.5. Policy of State; prohibited discrimination, CA EDUC § 221.5

(a) It is the policy of the state that elementary and secondary school classes and courses, including nonacademic and elective classes and courses, be conducted, without regard to the sex of the pupil enrolled in these classes and courses.

(b) A school district shall not prohibit a pupil from enrolling in any class or course on the basis of the sex of the pupil, except a class subject to Chapter 5.6 (commencing with Section 51930) of Part 28 of Division 4 of Title 2.

(c) A school district shall not require a pupil of one sex to enroll in a particular class or course, unless the same class or course is also required of a pupil of the opposite sex.

(d) A school counselor, teacher, instructor, administrator, or aide shall not, on the basis of the sex of a pupil, offer vocational or school program guidance to a pupil of one sex that is different from that offered to a pupil of the opposite sex or, in counseling a pupil, differentiate career, vocational, or higher education opportunities on the basis of the sex of the pupil counseled. Any school personnel acting in a career counseling or course selection capacity to a pupil shall affirmatively explore with the pupil the possibility of careers, or courses leading to careers, that are nontraditional for that pupil's sex. The parents or legal guardian of the pupil shall be notified in a general manner at least once in the manner prescribed by Section 48980, in advance of career counseling and course selection commencing with course selection for grade 7 so that they may participate in the counseling sessions and decisions.

(e) Participation in a particular physical education activity or sport, if required of pupils of one sex, shall be available to pupils of each sex.

(f) A pupil shall be permitted to participate in sex-segregated school programs and activities, including athletic teams and competitions, and use facilities consistent with his or her gender identity, irrespective of the gender listed on the pupil's records.

Credits
222. (a) A school operated by a school district or a county office of education, the California School for the Deaf, the California School for the Blind, and a charter school shall provide reasonable accommodations to a lactating pupil on a school campus to express breast milk, breast-feed an infant child, or address other needs related to breast-feeding. Reasonable accommodations under this section include, but are not limited to, all of the following:
   (1) Access to a private and secure room, other than a restroom, to express breast milk or breast-feed an infant child.
   (2) Permission to bring onto a school campus a breast pump and any other equipment used to express breast milk.
   (3) Access to a power source for a breast pump or any other equipment used to express breast milk.
   (4) Access to a place to store expressed breast milk safely.
   (b) A lactating pupil on a school campus shall be provided a reasonable amount of time to accommodate her need to express breast milk or breast-feed an infant child.
   (c) A school specified in subdivision (a) shall provide the reasonable accommodations specified in subdivisions (a) and (b) only if there is at least one lactating pupil on the school campus.
   (d) A school subject to this section may use an existing facility to meet the requirements specified in subdivision (a).
   (e) A pupil shall not incur an academic penalty as a result of her use, during the school day, of the reasonable accommodations specified in this section, and shall be provided the opportunity to make up any work missed due to such use.
   (f) (1) A complaint of noncompliance with the requirements of this section may be filed with the local educational agency under the Uniform Complaint Procedures set forth in Chapter 5.1 (commencing with Section 4600) of Division 1 of Title 5 of the California Code of Regulations.
   (2) A local educational agency shall respond to a complaint filed pursuant to paragraph (1) in accordance with Chapter 5.1 (commencing with Section 4600) of Division 1 of Title 5 of the California Code of Regulations.
   (3) A complainant not satisfied with the decision of a local educational agency may appeal the decision to the department pursuant to Chapter 5.1 (commencing with Section 4600) of Division 1 of Title 5 of the California Code of Regulations and shall receive a written decision regarding the appeal within 60 days of the department’s receipt of the appeal.
(4) If a local educational agency finds merit in a complaint, or if the Superintendent finds merit in an appeal, the local educational agency shall provide a remedy to the affected pupil.

(Added by Stats. 2015, Ch. 690, Sec. 2. (AB 302) Effective January 1, 2016.)
OCR Instructions to the Field re Scope of Complaints

Regional Directors:

These Instructions set forth new internal guidance regarding the scope of the investigation of all OCR cases. This guidance is effective immediately and applies to all complaints currently in evaluation or investigation, as well as newly-filed complaints. These Instructions shall be applied consistently with OCR’s Case Processing Manual (CPM), and if any questions arise about how to apply these Instructions consistently with the CPM, please contact your designated Enforcement Director for clarification.

Effective immediately, there is no mandate that any one type of complaint is automatically treated differently than any other type of complaint with respect to the scope of the investigation, the type or amount of data needed to conduct the investigation, or the amount or type of review or oversight needed over the investigation by Headquarters. There is no longer a “sensitive case” or “call home” list; rather, Headquarters and the Regional Offices (Regional Director) will consult regularly to determine on a case-by-case basis whether complex or problematic investigations require Headquarters review or intervention and when trends emerge that require Headquarters oversight or direction. Cases are retroactive and can/will be returned to the respective Regional Office if the RD feels a case can be adjudicated at the regional level.

In particular, OCR will no longer follow the existing investigative rule of obtaining three (3) years of past complaint data/files in order to assess a recipient’s compliance, which rule had been stated in OCR’s Approach to Title IX PSE Sexual Violence Complaints (January 2014) (for internal discussion), OCR’s Approach to the Evaluation, Investigation and Resolution of Title VI Discipline Complaints (February 12, 2014) (Draft for internal discussion), and other related internal policy documents. For example, if a discipline complaint requires analysis of whether a facially-neutral suspension policy was applied differently against a particular student based on a prohibited classification such as race, the investigative team (supervised by their Team Leader and Regional Director) is empowered to determine what comparative data (CRDC or otherwise) are necessary to, e.g., determine if other similarly-situated students of a different race were, in fact, treated differently from the student on whose behalf the complaint was filed.

The scope of the investigation of all complaints, including ESE discipline and PSE sexual violence complaints, is determined by the statutes and regulations, OCR’s published guidance, and the legal theory(ies) applicable to the allegation(s) stated by the complainant. There is no longer a “one size fits all” approach to the investigation of any category of complaints. Based on the investigative requirements set forth in the statutes and regulations, published guidance, and the legal theory(ies) applicable to the allegation(s) stated by the complainant, it is the investigative team’s responsibility (under appropriate supervision by Team Leaders and other Regional Office supervisors) to determine on a case-by-case basis the type and scope of evidence that is necessary to support a legally sound investigation and determination, with the understanding that all OCR investigations are to be framed in their scope by the allegations of each particular complaint.

For the sake of clarity, these Instructions mean that OCR will only apply a “systemic” or “class-action” approach where the individual complaint allegations themselves raise systemic or class-wide issues or the investigative team determines a systemic approach is warranted through conversations with the complainant.
Please apply the instructions in this document with the understanding that OCR’s goal is to swiftly address compliance issues raised by individual complaint allegations, reach reasonable resolution agreements with defined, enforceable obligations placed upon recipients directly responsive to addressing the concerns raised in the individual complaint being resolved, and encourage voluntary settlements wherever possible.

I trust you will apply these instructions in line with the attitude and approach we are proud to foster here in OCR: that OCR exists to robustly enforce the civil rights laws under our jurisdiction, and we will do so in a neutral, impartial manner and as efficiently as possible. These instructions in particular are designed to empower our investigative staff to clear case backlogs and resolve complaints within a reasonable time-frame, thus providing effective resolution and justice to complainants and recipients.

Thank you for your continued dedicated to OCR’s core mission to ensure equal access to education and to promote educational excellence through vigorous enforcement of civil rights in our nation’s schools. If you have any questions about these instructions, please contact your Enforcement Director. You may also contact me if further clarification is needed.

Candice Jackson
OCR Acting Assistant Secretary for Civil Rights
Hypothetical Scenario

You are the vice principal of a high school. You are aware that a particular student, Britney, has a habit of wearing revealing tops that violate the school’s dress code. Britney has been sent to the principal’s office on numerous occasions as a result of being written up by her English teacher.

After one such write up, you receive an email from Britney’s mother that the English teacher often refers to Britney as “sweetie” or “honey.” The mother also explains that on one particular occasion, Britney said that the teacher called her out for her dress code violation, and then made her sit next to his desk while he “ leer ed” at her breasts.

Britney later reported to you (the vice principal) that she felt uncomfortable when the teacher commented on sexual themes in a novel the class was studying.

In another email, a few weeks later, the mother expressed concern about what she alleged to be inappropriate comments by the teacher about Britney’s neckline, made during class, which embarrassed the student.

What do you do?

Adapted from: Paso Robles Joint Unified School District, OCR Case No. 09-14-1376