

New Title IX Guidance & Charter School Investigations

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Session Disclaimer

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Title IX Final Rule: Addressing Sexual Harassment in Schools

- ▶ The Final Rule requires K-12 schools to respond whenever **any** employee has notice of sexual harassment, including allegations of sexual harassment.
- ▶ If a report of sexual harassment is made to the Title IX Coordinator, or to another school official with authority to institute corrective measures, the school is deemed to have **actual knowledge** of the incident and the school's response obligations are triggered.

Applicability of Final Rule

- ▶ Title IX applies to persons in the United States with respect to a school's education programs or activities.
 - ▶ Schools must respond when sexual harassment occurs in the school's education program or activity, against a person in the United States.
- ▶ What's an "education program or activity?"
 - ▶ Locations, events, or circumstances over which a school exercises substantial control over both the respondent and the context in which the sexual harassment occurred.
 - ▶ Title IX applies to all education programs or activities, whether they occur on-campus or off-campus.

What is Sexual Harassment Under Title IX?

Conduct based on sex that satisfies one or more of the following:

1. A school employee conditions the provision of an aid, benefit, or service of the school 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 school's education program or activity; or
3. Sexual assault, dating violence, domestic violence, or stalking as defined in various federal laws.

Additional Definitions

Complainant

- ▶ An individual who is alleged to be the victim of conduct that could constitute sexual harassment
 - ▶ Any third party may report sexual harassment, as well as the complainant
 - ▶ While parents and guardians do not become complainants (or respondents), the Final Rule recognizes the right of parents and guardians to act on behalf of parties (including by filing formal complaints) in Title IX matters

Additional Definitions

Respondent

- ▶ Individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment

Additional Definitions

Formal Complaint

- ▶ 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 allegations of sexual harassment
 - ▶ At the time of filing a formal complaint, a complainant must be participating in or attempting to participate in the school's education program or activity
 - ▶ A formal complaint may be filed with the Title IX Coordinator in person, by mail, or by e-mail, and by any other additional method designated by the school
 - ▶ Document or electronic transmission that contains the complainant's physical or digital signature, or otherwise indicates that the complainant is the person filing the formal complaint
 - ▶ If a Title IX Coordinator signs a formal complaint, he or she 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

Additional Definitions

Supportive Measures

- ▶ 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
 - ▶ 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
 - ▶ Leaves of absence
 - ▶ Increased security
 - ▶ Other similar measures

Additional Definitions

Days

- ▶ The Final Rule does not require a specific method for calculating “days”
 - ▶ Schools retain flexibility to adopt a method that works best for them, including calculating “days” using calendar days, business days, school days, or so forth

Designating a Title IX Coordinator

- ▶ School must designate one or more individuals as the Title IX Coordinator.
 - ▶ Responsible for coordinating the school's efforts to comply with Title IX.

Notice of Title IX Coordinator

- ▶ Contact information for Title IX Coordinator(s) must be provided to:
 - ▶ Applicants for admission and employment;
 - ▶ Employees;
 - ▶ Parents and legal guardians of elementary and secondary students; and
 - ▶ Unions or other collective bargaining entities who have a relationship with the school (not likely to apply to Texas schools).

Notice of Title IX Coordinator

- ▶ Information to provide:
 - ▶ Name or title
 - ▶ Office address
 - ▶ E-mail address
 - ▶ Telephone number
- ▶ This information must be disseminated in the employee and student handbooks, and on the school's website.

Reporting to Title IX Coordinator

- ▶ **Any person** may report sex discrimination, including sexual harassment, regardless of whether the person making the report is the alleged victim.
- ▶ Reports may be made:
 - ▶ In person
 - ▶ By mail
 - ▶ By telephone
 - ▶ By email
 - ▶ Or any other means that result in the Title IX Coordinator receiving the person's written or verbal report.
 - ▶ **At any time**, including non-business hours, but using the telephone number or e-mail address, or by mail to the office address, listed for the Title IX Coordinator.

Response Obligations

- ▶ Schools must respond promptly to Title IX sexual harassment in a manner that is not deliberately indifferent.
 - ▶ Response that is not clearly unreasonable in light of the known circumstances.

Mandatory Response Obligations

- ▶ Mandatory response obligations are:
 - ▶ Offer supportive measures to the person alleged to be the victim (the “complainant”)
 - ▶ Title IX Coordinator promptly contact the complainant confidentially to discuss availability of supportive measures, inform the complainant of the availability of supportive measures with or without the filing of a formal complaint, and explain the process for filing a formal complaint
 - ▶ Follow a grievance process before imposing any disciplinary sanctions or other actions that are not supportive measures against a respondent (the alleged harasser)

Mandatory Response Obligations

- ▶ Mandatory response obligations are:
 - ▶ Do not restrict rights protected under the U.S. Constitution (1st Amendment, 5th Amendment, 14th Amendment)
 - ▶ Investigate sexual harassment allegations in any formal complaint
 - ▶ Respect the complainant's wishes with respect to whether the school investigates, unless the Title IX Coordinator determines that assigning a formal complaint to initiate an investigation over the wishes of the complainant is not clearly unreasonable in light of the circumstances

Mandatory Response Obligations

- ▶ If the allegations in a formal complaint do not meet Title IX’s definition of “sexual harassment”, or did not occur in the school’s education program or activity against a person in the United States, the school must dismiss the allegations **for purposes of Title IX**, but may still address the allegations in a manner deemed appropriate under the code of conduct.

Grievance Process

- ▶ The Final Rule requires a consistent, transparent grievance process for resolving formal complaints of sexual harassment.
- ▶ Aside from hearings, the grievance process outlined in the Final Rule applies to all schools equally, including K-12 schools and postsecondary institutions.

Grievance Process Requirements

A school's grievance process MUST:

- ▶ Treat complainants equitably by providing remedies any time a respondent is found responsible
- ▶ Treat respondents equitably by not imposing disciplinary consequences prior to completion of the grievance process

Grievance Process Requirements, cont.

- ▶ Allow for the design of remedies (when a respondent is found responsible) that will maintain the victim's equal access to education
 - ▶ Remedies need not be non-disciplinary or non-punitive
- ▶ Objectively evaluate all relevant evidence, inculpatory and exculpatory, and avoid credibility determinations based on a person's status as a complainant, respondent, or witness

Grievance Process Requirements, cont.

- ▶ Title IX personnel (Title IX Coordinators, investigators, decision-makers, informal resolution facilitators) must be free from conflicts of interest or bias for or against complainants or respondents
- ▶ Train Title IX personnel on the definition of sexual harassment, the scope of the school's education program or activity, how to conduct an investigation and grievance process, and how to serve impartially, including how to avoid prejudgment of the facts, conflicts of interest, and bias

Grievance Process Requirements, cont.

- ▶ Ensure that decision-makers receive training on technology to be used at a live hearing (only if hearings are part of grievance process)
- ▶ Train decision-makers and investigators on issues of relevance, including how to apply the rape shield protections provided for complainants
- ▶ Presumption that a respondent is not responsible for the alleged conduct until a determination regarding responsibility is made at the conclusion of the grievance process

Grievance Process Requirements, cont.

- ▶ Post materials used to train Title IX personnel on the school website
- ▶ Identify reasonably prompt timelines for concluding the grievance process, including appeals and informal resolutions
 - ▶ Commentary to the Final Rule recognizes that former Title IX guidance referred to a 60-day time frame for sexual harassment complaints
 - ▶ Schools can determine that 60 days represents a reasonable time frame to conclude the grievance process
 - ▶ Or, there is discretion to determine a shorter or longer period of time
 - ▶ Goal to resolve a grievance process as quickly as possible to ensure fairness and accuracy
 - ▶ Final Rule also allows for short-term delays and extensions for good cause

Grievance Process Requirements, cont.

- ▶ Describe the range of (or list out) possible remedies that may be provided to a complainant and disciplinary sanctions if a respondent is determined to be responsible
- ▶ State whether the school has chosen the preponderance of the evidence standard or the clear and convincing evidence standard for all complaints of sexual harassment
 - ▶ Chosen standard must be used for all Title IX investigations of sexual harassment

Grievance Process Requirements, cont.

- ▶ Describe appeal procedures, and range of supportive measures available to complainants and respondents
- ▶ May not use, rely on, or seek disclosure of privileged information unless the privilege has been waived
 - ▶ Attorney-client, physician-patient, etc.
- ▶ Apply rules concerning handling of formal complaints equally to both parties

Title IX Investigations

- ▶ Schools must investigate the allegations in any formal complaint
- ▶ Formal notice must be sent to both parties (complainants and respondents) of the allegations upon receipt of a formal complaint

Title IX Investigations, cont.

- ▶ During the grievance process and as part of the investigation
 - ▶ Burden of gathering evidence and burden of proof must remain on schools, not the parties
 - ▶ Provide equal opportunity for the parties to present facts and expert witnesses, and other inculpatory and exculpatory evidence
 - ▶ Cannot restrict the ability of the parties to discuss the allegations or gather evidence (no 'gag orders')
 - ▶ Parties must have the same opportunity to select an advisor (may be, but need not be, an attorney)

Title IX Investigations, cont.

- ▶ During the grievance process and as part of the investigation
 - ▶ School must provide written notice of any investigative interviews, meetings, or hearings
 - ▶ 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
 - ▶ 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
 - ▶ May consolidate formal complaints where the allegations arise out of the same facts
 - ▶ Privacy of a party's medical, psychological, and similar treatment records must be respected, and can only be accessed or used when a party's voluntary, written consent is obtained

Investigative Reports

- ▶ Investigator is obligated to gather evidence directly related to the allegations, regardless of whether the school intends to rely on the evidence
 - ▶ For instance, evidence may be related to an allegation, but the investigator does not believe it to be credible
- ▶ Parties may inspect and review the evidence directly related to the allegations
- ▶ Investigator must take into consideration the parties' responses and then determine what evidence is relevant and summarize the relevant evidence in the investigative report

Investigative Reports, cont.

- ▶ If a party disagrees with an investigator's determination about relevance, the party can make that argument in a written response to the investigator's report
- ▶ Decision-maker is ultimately obligated to objectively evaluate all relevant evidence

Dismissing Allegations

Schools **must** dismiss allegations of conduct that:

- ▶ Do not meet the Final Rule’s definition of “sexual harassment”;
or
- ▶ Did not occur in the school’s education program or activity against a person in the United States

The dismissal is only for Title IX purposes, and the school may address the conduct in other ways deemed appropriate.

Dismissing Allegations, cont.

Schools **may** dismiss, at their discretion, a formal complaint or allegations if:

- ▶ A complainant informs the Title IX Coordinator in writing that the complainant desires to withdraw the formal complaint or allegations therein;
- ▶ The respondent is no longer enrolled with or employed by the school; or
- ▶ If specific circumstances prevent the school from gathering sufficient evidence to reach a determination

Dismissing Allegations, cont.

Schools ***must*** give parties written notice of dismissal, with the reasons for the dismissal.

Live Hearings?

- ▶ The Final Rule requires ***postsecondary institutions*** to provide a “live hearing with cross-examination” as part of the investigation process
- ▶ The Final Rule provides that live hearings are optional for K-12 schools, meaning such hearings are not required.

Live Hearing Requirements

- ▶ 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
- ▶ Cross-examination must be conducted directly, orally, and in real time by the party's advisor and never by a party personally
- ▶ At the request of either party, the school 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

Live Hearing Requirements, cont.

- ▶ 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 to the party's advisor asking cross-examination questions any decision to exclude a question as not relevant
- ▶ If a party does not have an advisor, the school must provide (without fee or charge) 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

Live Hearing Requirements, cont.

- ▶ 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
 - ▶ 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
- ▶ Hearings may be conducted with all parties physically present in the same geographic location or, at the school's discretion, parties, witnesses, and other participants may appear virtually
- ▶ Must create an audio or audiovisual recording, or transcript, of any live hearing

Written Questions

- ▶ 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
 - ▶ Allow for additional, limited follow-up questions from each party
- ▶ The Final Rule provides “rape shield” protections for potential victims, which deem as irrelevant questions and evidence about a potential victim’s sexual behavior (unless offered to prove that someone other than the respondent committed the alleged misconduct or to provide consent)

Standard of Evidence

- ▶ Schools must choose either the preponderance of the evidence standard or clear and convincing evidence standard when deciding responsibility.
 - ▶ Preponderance – more likely than not
 - ▶ Clear and Convincing – highly and substantially more probable to be true than not
- ▶ The same standard must apply for all formal complaints, whether the respondent is a student or an employee.

Written Determinations

- ▶ Decision-maker(s) (who cannot be the Title IX Coordinator or the investigator) must issue a written determination regarding responsibility
- ▶ A written determination must include:
 - ▶ Findings of fact
 - ▶ Conclusions about whether the alleged conduct occurred
 - ▶ Rationale for the result as to each allegation
 - ▶ Disciplinary sanctions imposed on the respondent
 - ▶ Whether remedies will be provided to the complainant
- ▶ A written determination must be sent simultaneously to both parties, along with information about how to file an appeal

Appeals

- ▶ Schools must offer both parties an appeal from a determination regarding responsibility, and for 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
 - ▶ The Title IX personnel had a conflict of interest or bias that affected the outcome of the matter.
- ▶ May offer additional bases for appeal that apply equally to both parties.

Informal Resolution Opportunity

- ▶ Schools have discretion to offer and facilitate an informal resolution process (mediation, restorative justice, etc.).
- ▶ Guidelines for informal resolution are:
 - ▶ Both parties must give voluntary, informed, written consent to attempt it
 - ▶ Any person who facilitates the informal resolution must be trained
 - ▶ School may not require the waiver of the right to formal investigation and adjudication of formal complaints as a condition of enrollment or continuing enrollment, or employment, or the enjoyment of any right

Informal Resolution Process

- ▶ Schools cannot require parties to participate in informal resolution
- ▶ Informal resolution cannot be offered unless a formal complaint is filed
- ▶ At any time prior to agreeing to a resolution, either party has the right to withdraw from the informal resolution process and resume the grievance process
- ▶ Schools ***must not*** offer or facilitate an informal resolution process to resolve allegations that an employee sexually harassed a student

Retaliation Prohibited

- ▶ The Final Rule prohibits retaliation
- ▶ Retaliation includes actions related to a report or investigation of sexual harassment for the purpose of interfering with any right or privilege secured by Title IX
- ▶ Complaints alleging retaliation may be filed according to a school's grievance procedures
- ▶ Charging an individual with code of conduct violations for making a materially false statement in bad faith during a Title IX Grievance proceeding, ***does not constitute retaliation***
 - ▶ A determination regarding responsibility is insufficient to conclude a person made a bad faith/materially false statement

Confidentiality

- ▶ The School **must** keep confidential the identity of complainants, respondents, and witnesses, except as permitted by FERPA, as required by law, or as necessary to carry out Title IX proceedings.

Questions?

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