

Title IX Legal Update 2020



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What's Covered:


Who is
OCR and
what do
they do

New terms
and
changes to
some old
terms

Identifying
new
processes
and
procedures

Identifying
the new
players and
their roles

Next steps
for
complying
with the
new Title
IX
regulations



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U.S. Dept. of Education, Office of Civil Rights

- Ensure equal access to education and promote educational excellence **through vigorous enforcement** of civil rights in our nation's schools
- OCR investigates complaints that allege discrimination
- OCR conducts "compliance reviews" to determine if policies, procedures and actions are consistent with civil rights laws



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U.S. Dept. of Education, Office of Civil Rights

- If a covered entity does not comply with regulation or law, OCR will seek corrective action through a voluntary agreement
- Issue Letter of Findings and may require corrective action
- Refer matters to the Department of Justice for investigation, enforcement action and/or to terminate federal funds

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Title IX: The Law

- Title IX prohibits discrimination on the basis of sex in education programs and activities that receive federal funds
- Congress passed Title IX in 1972

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Title IX: The Law

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

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Title IX: Sexual Harassment

- Until recently, neither the statute nor the regulations referred to sexual harassment
- Title IX applied to sexual harassment through the courts

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"Sexual Harassment" Under Title IX

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New Regulations Define Sexual Harassment

Conduct on the basis of sex that is one or more of the following:

- (1) Quid pro quo sexual harassment;
- (2) Hostile environment sexual harassment; or
- (3) Conduct that meets the criteria of certain federal laws regarding sexual violence.

34 C.F.R. § 106.30(a)

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Quid Pro Quo Sexual Harassment

- District employee conditions receipt of a benefit or service on an individual's participation in unwelcome sexual conduct
- Applies to employee conduct toward a student

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Hostile Environment Sexual Harassment

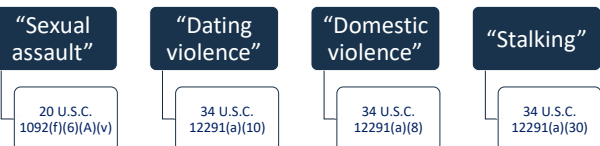
- Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the district's education program or activity
- Applies to student on student conduct

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Conduct that Meets the Criteria of Certain Federal Laws Regarding Sexual Violence



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Terminology for Sexual Harassment Complaints

Complainant:

- Any individual who is alleged to be the victim of sexual harassment

Respondent:

- Any individual who is reported to be the perpetrator of conduct that could constitute sexual harassment

Parent may act on behalf of a minor student who is a complainant or a respondent

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Designating a Title IX Coordinator

- Recipients must identify and authorize an individual to coordinate the school's Title IX compliance efforts
- Authorized to sign a complaint that initiates a formal complaint process (otherwise only the complainant can initiate a formal complaint)

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Designating a Title IX Coordinator

- Cannot have a bias against alleged victims or perpetrators of sexual harassment
- OCR guidance for designating Title IX coordinator
 - Conflict with duties of Title IX coordinator may occur for "dean of students, superintendent, principal, or athletics director"
 - If superintendent is only option, document consideration of potential conflict and steps taken to protect complainants

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Notice of Title IX Coordinator

- Must be known as the “Title IX Coordinator”
- Notice to parents, students, and employees required with contact information

34 CFR 106.8(e)

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Notice of Title IX Coordinator

Options for providing notice of Title IX Coordinator with contact information include:

- Update Exhibits to Board Policy
- Posters
- Student & Employee Handbooks
- Website
- Employment application materials

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Reporting Allegations of Sexual Harassment

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All District employees should be trained on recognizing and reporting sexual harassment

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Recognizing Sexual Harassment

Verbal

- Inappropriate statements
- Spreading sexual rumors
- Rating other students as to sexual activity or performance
- Making sexual propositions or pressuring students for sexual favors

Non-Verbal

- Displaying or distributing sexually explicit drawings, pictures, or written materials
- Performing sexual gestures or touching oneself sexually in front of others
- Telling sexual or dirty jokes

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Recognizing Sexual Harassment

Physical

- Pinches
- Touches
- Grabbing in a sexual way
- Touching of a sexual nature

Online

- Circulating or showing e-mails or web sites of a sexual nature

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Recognizing Sexual Harassment

Age and maturity level may impact district's response to allegations of harassment, but should not prevent reporting conduct

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Making a Report

Reports made to someone other than the Title IX Coordinator must be forwarded

Train/notify employees on how to report and document reports

District should develop procedure to receive reports from employees

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Responding to Sexual Harassment

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District's Obligation to Respond:

"A recipient (i.e. school district)

- 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.**"

34 CFR 106.44(a)

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What is "actual knowledge"?

Notice of sexual harassment or **allegations** of sexual harassment to:

- Title IX coordinator;
- Official with authority to institute corrective measures;
- **Any employee of an elementary and secondary school**

34 C.F.R. § 106.30(a)

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Notice requiring a response may result from:

- (1) Informal report (verbal or written) from employee, student, parent, or any other third party
 - Report can be made by anyone
 - Report can be made anytime (24/7) by phone or email – make sure Title IX coordinator information is current
- (2) Receipt of a **formal complaint** of sexual harassment:
 - A document filed by a complainant
 - Complaint signed by the Title IX Coordinator alleging sexual harassment and requesting an investigation of alleged sexual harassment

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What is an “education program or activity” ?

- Any location, event or circumstance where the District exhibits substantial control over both the harasser (respondent) and the context in which the alleged harassment occurred

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What is “deliberate indifference”?

The response is clearly unreasonable in light of known circumstances

Examples:

Ignoring a report or formal complaint

Undue delay in responding to a report or complaint

Responding in a manner known to be ineffective or inadequate

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Initial Response by Title IX Coordinator:

- Promptly contact the complainant to discuss the availability of supportive measures and consider the complainant’s wishes with respect to supportive measures;
- Inform the complainant supportive measures are available with or without the filing of a formal complaint;
- Explain the process for filing a formal complaint
34 C.F.R. 106.44(a)
- **Note:** the above actions are required **regardless** of whether a formal complaint is filed

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Initial Response by Title IX Coordinator:

Comments to the regulations
discuss opportunity for Title IX
Coordinator to delegate duties

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What are “supportive measures”?

- Non-disciplinary, **non-punitive**, individualized services, offered as appropriate and **without charge** to a **complainant** or a **respondent** before or after the filing of a formal complaint, or where no complaint has been filed

34 C.F.R. § 106.30(a)

- Must be designed to restore or preserve equal access to education programs or activities without unreasonably burdening the other party

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What are “supportive measures”?

- Examples:
 - Counseling
 - Course modifications
 - Schedule changes
 - Increased monitoring or supervision
 - Complete removal of a respondent from an activity would likely be considered punitive, except for an “emergency removal”

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Emergency removal

- Must be based on an individualized safety and risk analysis
- Necessary to protect a student or other individual from **immediate threat to physical health or safety**
- Notice & opportunity to challenge provided “immediately” following the removal

34 CFR 106.55(c)

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Emergency removal

- Emergency removal does NOT modify any rights under:
 - Individuals with Disabilities and Education Act (IDEA),
 - Section 504 of the Rehabilitation Act of 1973, or
 - American with Disabilities Act
- The Office of Civil Rights will provide technical assistance to recipients regarding compliance with all relevant laws
- School must coordinate their compliance efforts with special education staff

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District's Response to Formal Complaint

- Response MUST treat complainants and respondents equitably.
- Offer both parties supportive measures
- Follow grievance process that complies with Title IX regulations before the imposition of any disciplinary sanctions that are not supportive measures against a respondent

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Elements of Grievance Process for Formal Complaint

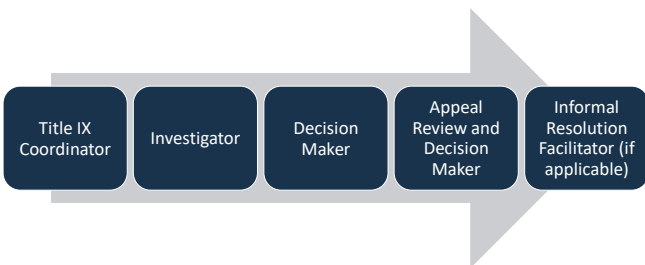
- Objective evaluation of all evidence
- No conflict of interest or bias for investigator or decision-maker
- Initial presumption respondent not responsible
- Reasonably prompt time frames
- Description or list of possible discipline/remedies
- Identify standard of evidence to be applied
- Appeal procedure
- Range of supportive measures available

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Elements of Grievance Process – Title IX Personnel



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Revisions to Board Policy FFH (LEGAL)

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STUDENT WELFARE FREEDOM FROM DISCRIMINATION, HARASSMENT, AND RETALIATION		FFH (LEGAL)
Process for Title IX Formal Complaint	For the purpose of addressing formal complaints of sexual harassment, a district's process must comply with the following requirements. Any provisions, rules, or practices other than those required by this provision that a district adopts as part of its process for handling formal complaints of sexual harassment must apply equally to both parties. 34 C.F.R. 106.45(b)	

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STUDENT WELFARE FREEDOM FROM DISCRIMINATION, HARASSMENT, AND RETALIATION		FFH (LEGAL)
A district's Title IX formal complaint process must:		
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 process that complies with the Title IX regulations 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 district's education program or activity. Such remedies may include the same individualized services described as supportive measures; however, remedies need not be nondisciplinary or nonpunitive and need not avoid burdening the respondent;	

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STUDENT WELFARE FREEDOM FROM DISCRIMINATION, HARASSMENT, AND RETALIATION		FFH (LEGAL)
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 district as a Title IX Coordinator, investigator, decision-maker, or any person designated by a district 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.	

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STUDENT WELFARE
FREEDOM FROM DISCRIMINATION, HARASSMENT, AND RETALIATION

FFH
(LEGAL)

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 Title IX formal complaint process;

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STUDENT WELFARE
FREEDOM FROM DISCRIMINATION, HARASSMENT, AND RETALIATION

FFH
(LEGAL)

5. Include reasonably prompt time frames for conclusion of the Title IX formal complaint process, including reasonably prompt time frames for filing and resolving appeals and informal resolution processes if the district offers informal resolution processes, and a process that allows for the temporary delay of the Title IX formal complaint 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;

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STUDENT WELFARE
FREEDOM FROM DISCRIMINATION, HARASSMENT, AND RETALIATION

FFH
(LEGAL)

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

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FREEDOM FROM DISCRIMINATION, HARASSMENT, AND RETALIATION

FFH
(LEGAL)

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;

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STUDENT WELFARE
FREEDOM FROM DISCRIMINATION, HARASSMENT, AND RETALIATION

FFH
(LEGAL)

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.

34 C.F.R. 106.45(b)(1)

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FFH (LOCAL) – Considerations for Formal Complaint Procedures

Assigning roles for formal complaint process

Standard of Evidence

Informal resolution process (optional)

Opportunity for live hearing (optional)

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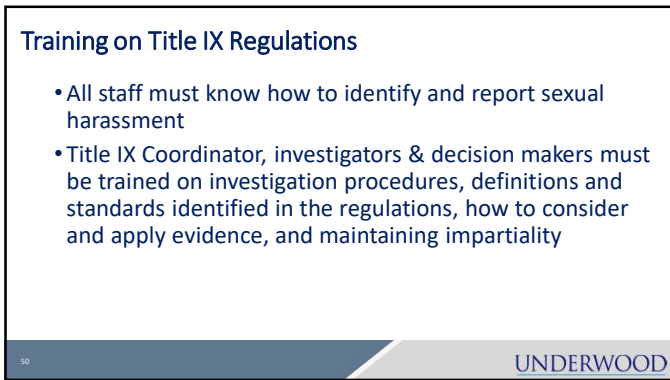
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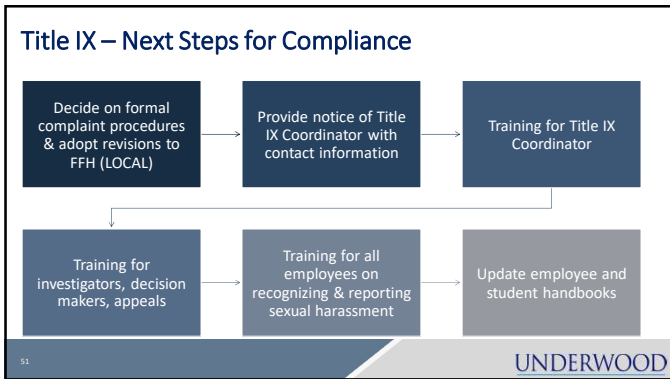
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Summary of Training Requirements

- Title IX Coordinators, Investigators and Decision Makers:
 - Definition of sexual harassment
 - Identifying the district's education program or activity (to establish jurisdiction)
 - How to conduct an investigation
 - Title IX formal complaint procedures including hearings, appeals, and informal resolution processes (if applicable)
 - How to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias

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Additional Training for Decision-Makers:

- Technology to be used at a live hearing, if district allows live hearings
- Considering issues of relevance for both questions and evidence presented (including when questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant)

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Additional Training for Investigators:

Consideration of relevance of evidence, including creating an investigative report that fairly summarizes relevant evidence

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Requirement for Training Materials

- Must be posted on District website
- 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

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