

Title IX, Update from May 2020 guidance given by the Department of Education

What is Title IX

Established in 1972 Title IX, was designed to prevent discrimination in public schools based around the idea of equality between the genders. Most often noted when discussing title 9. Athletics or access to extracurricular activities is where the largest amount of complaints have come from. All students must have access to the same benefits that any school provides. The May 2020 updates have expanded the protection of everyone that is associated with a school district especially in the Area of Sexual Harassment. The **new Title IX regulation** holds schools accountable for failure to respond equitably and promptly to sexual misconduct incidents and ensures a more reliable adjudication process that is fair to all students. Title IX of the Education Amendments of 1972 prohibits discrimination based on sex in education programs and activities that receive federal financial assistance. All federal agencies that provide grants of assistance are required to enforce Title IX. The U.S. Department of Education gives grants of financial assistance to schools and colleges and to certain other entities, including vocational rehabilitation programs.

Examples of the types of discrimination that are covered under Title IX include sexual harassment; the failure to provide equal opportunity in athletics; discrimination in a school's science, technology, engineering, and math (STEM) courses and programs; and discrimination based on pregnancy. A fuller list of Title IX issues OCR addresses appears here. The Title IX regulation is enforced by OCR and is in the Code of Federal Regulations at 34 CFR Part 106.

Title IX prohibits retaliation for filing an OCR complaint or for advocating for a right protected by Title IX. Title IX also prohibits employment discrimination, but employment discrimination complaints filed with OCR are generally referred to the Equal Employment Opportunity Commission.

What does Title IX Say

Title IX states that: 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.

Who does Title IX apply to

Title IX applies to employees as well as students. Title IX controls an employee--on-- employee or student or student--on--faculty or student on student complaint of sex or gender discrimination, or Harassment.

What counts as a Title IX violation

Unwanted sexual behavior, advances, or requests for favors. Unwelcome verbal, visual, or physical sexual conduct. Offensive, severe, and/or frequent remarks about a person's sex. Harassment of a sexual nature which interferes with an individual's right to an education and participation in a program or activity.

New Definition of Sexual Harassment

Under the new regulations, prohibited "sexual harassment" means conduct on the basis of sex that satisfies one or more of the following:

- an employee conditioning the provision of an aid, benefit or service on an individual's participation in unwelcome sexual conduct (i.e., quid pro quo)
- unwelcome conduct determined by a reasonable person to be so severe, pervasive and objectively offensive that it effectively denies a person equal access to an education program or activity (i.e., hostile environment)
- sexual assault (as defined by Clery Act), or "dating violence," "domestic violence" and "stalking" (as defined by Violence Against Women Act)

How do I file a Title IX complaint.

1. Thought the School Website on our Title IX complaint page
2. Emailing Directly to jason.hicks@woodvilleeagles.org
3. Send mail to Woodville ISD 505 N. Charlton St, Woodville TX, 75979
4. Calling 409-331-3431 and ask for Jason Hicks

What happens after I file a complaint

The Title IX Coordinator will launch a fact finding campaign to determine validity of the complaint and contact appropriate authorities based on infraction type.

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This will be a critical change for many institutions, insofar as it requires behavior to be severe *and* pervasive, as well as objectively offensive to a reasonable person.

The Department further narrowed the scope of when an institution must respond to allegations of potential sexual misconduct. Previously, the Department mandated a broad definition for who on an institution's campus was a "responsible employee" who had an obligation to report suspected sexual misconduct. Under the new regulations, an institution must respond when it has "actual knowledge." That is, notice to the Title IX Coordinator or "an official of the recipient who has authority to institute corrective measures" of "sexual harassment." The Department also redefined a school's "education program or activity" to include "locations, events, or circumstances over which the recipient exercised substantial control" over the respondent and the context in which the sexual harassment occurred, as well as clarifying that it must occur in the United States. Previously, the Department had construed this element broadly so that it impacted education-related activities in foreign countries via study abroad.

In an apparent attempt to address the fact that the new regulations narrow the application of Title IX, the Department emphasized in the lengthy preamble that "nothing in these final regulations prevents a [school] from

addressing conduct that is outside the Department's jurisdiction" where the conduct: does not meet the Title IX definition of sexual harassment, occurred outside the school's education program or activity or occurred against a person outside the United States. If they wish, institutions can decide to continue to address such sexual misconduct through their policies, even if the Department does not require them to do so. Given this, institutions should decide now whether they wish to continue to prohibit and address such sexual misconduct outside the newly prescribed Title IX sexual harassment process, and if so, they should move forward to revise their Title IX and other policies and procedures to implement that decision.

New First Response/Supportive Measures Requirement

The new regulations also establish a first response protocol on the part of Title IX Coordinators that was not required previously. Specifically, if anyone (e.g., a reported survivor of sexual harassment, referred to as a "complainant" in the regulations, whether they wish to pursue a complaint or not, or a third-party reporter) reports sexual harassment through any method (including 24/7 web-based systems), the Title IX Coordinator or designee 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 availability of supportive measures with or without filing a complaint
- explain to the complainant the process for filing a formal complaint

While many of these steps are followed by many institutions already, the regulations now make them mandatory.

The Department also makes a sharp distinction between the obligation to offer supportive measures, which must occur in response to any report, and the pursuit of an investigation, which can occur only based upon a "written complaint" signed by the complainant or the Title IX Coordinator. On the latter point, the Department makes clear that while it prefers that schools defer to a complainant's wishes as to whether to pursue an investigation, Title IX Coordinators may sign a complaint to initiate an investigation if they determine that not pursuing an investigation would be deliberately

indifferent or that pursuing an investigation is necessary for community safety or similar reasons.

The supportive measures that must be offered are measures designed to: restore or preserve access to the school's education program or activity without unreasonably burdening the other party, protect the safety of all parties and the school's educational environment, and deter sexual harassment. Such 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, and increased security and monitoring of certain areas of the campus. They should be "non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, and without fee or charge" to the complainant and, as applicable, to a respondent as well.

New Procedural Requirements

The new procedural requirements imposed by the regulations are extensive and will be addressed in more detail in a future Holland & Knight alert, but for purposes of this early read, salient features include:

- a presumption of innocence throughout the process, with the burden of proof on the school
- a prohibition of the single-investigator model in which the investigator makes a decision regarding responsibility without a hearing, instead requiring a decision-maker separate from the Title IX Coordinator or investigator
- a requirement to use either the clear and convincing evidence or preponderance of the evidence standard
- written notice of allegations and an equal opportunity for parties and their advisors to review the evidence
- an investigation report with certain elements
- live hearings in the higher education context
- an opportunity to test the credibility of parties and witnesses through cross-examination conducted by advisors (but not parties personally) at such hearings (which can be conducted either remotely or in person)
- broad anti-retaliation protections

- an equal opportunity for parties to appeal on specified grounds

Again, more detail about the new procedural requirements will be provided in a subsequent alert. In the meantime, institutions that make the decision to address sexual conduct that is outside the Department's jurisdiction (as referenced above) should decide now whether they 1) plan to address both categories of sexual misconduct (i.e., sexual misconduct that is covered under the new Title IX regulations and that which is not) through one procedure that complies with the new Title IX regulations or 2) whether they instead wish to utilize the flexibility afforded in these regulations and address non-Title IX sexual misconduct through different procedures.

Informal Resolution Options

In a departure from long-standing Department guidance, the new regulations permit institutions to facilitate the resolution of sexual assault reports through informal processes, within certain parameters. Specifically, a school may facilitate informal resolution of formal complaints of all forms of sexual harassment (with one exception noted below) if it provides parties with written notice of the allegations, the requirements of the informal resolution process and any consequences from participating (including information about records that will be maintained or could be shared), and if it obtains the parties' voluntary, written consent to the use of the informal resolution process.

One notable limitation to this general provision is that schools cannot offer or facilitate an informal resolution process to resolve allegations that an employee sexually harassed a student, given power differentials inherent in such circumstances.

Employment Issues

Although the Department has maintained relatively generic and uncontroversial regulations prohibiting sex discrimination at colleges and universities for many years, the new regulations break new ground by requiring that all of the procedural requirements referenced above, including those requiring hearings with live cross-examination by advisors in covered sexual harassment cases, apply to reports that employees have harassed

other employees or have harassed students. This development, which will be discussed in more detail in a separate alert, will require substantial revisions of employee handbooks and agreements to ensure that institutions can follow this mandate while also not violating other employment laws, collective bargaining agreements or other contractual agreements.

New Training Requirements

The new regulations place a heavy emphasis on the importance of training. For example, one regulatory section states that schools "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], the scope of the [education program or activity, how to conduct an investigation and grievance process including hearings, appeals, and informal resolution processes ... and how to serve impartially" The regulations also require that "[a]ny 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 sexual harassment." Training for individuals serving in these roles must include information about:

- the definitions of prohibited conduct, including harassment
- how the processes — formal and informal — work
- how to conduct remote hearings
- how to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest and bias

Importantly, training materials must be maintained and posted on the institution's website for seven years after they were presented, which makes the care that must be taken in training paramount. In response to numerous public comments on the topic, the Department emphasized that trauma-informed investigation approaches and training on such approaches could be used appropriately, so long as such approaches and training were conducted in a fair, neutral manner. This topic will also be covered in a future alert.

Overview of the Title IV grievance process and response to violence.

Title IX Guidance requires every educational institution receiving federal funding to have a Title IX Coordinator.

The contact information (name/title, office address, telephone number, email address) of the Coordinator should be available both in your school's nondiscrimination notice, but also in an annual security report or higher education institutions. Both victims and third parties should contact the Coordinator to report incidents of sex discrimination, sexual harassment, or sexual violence.

The Title IX Coordinator ensures schools are compliant with Title IX, coordinates the investigation and disciplinary process, and looks for patterns or systematic problems with compliance to ensure schools fulfill all their federal obligations. The Coordinator may not have any other job responsibility that creates a conflict of interest with their responsibilities under Title IX. For example, the Title IX coordinator may not also sit on a disciplinary board or serve as legal counsel to the school.

Schools are required to adopt and publish a grievance procedure outlining the complaint, investigation, and disciplinary process for addressing sex discrimination, sexual harassment, and sexual violence occurring within educational programs.

This process should address discrimination perpetrated by students, employees, or third parties. Additionally, school security and/or law enforcement personnel must notify victims of their rights to use the school's grievance procedure in addition to being able to file a criminal complaint.

This grievance procedure requires the school's process be "prompt and equitable," meaning it must be a timely response to discrimination and provide both parties equivalent rights during the disciplinary process rather than having one-sided due process. For example, if the accused student is given a right to have an attorney present, so may the accusing student.

While sexual misconduct complaints *may* be resolved through informal mechanisms, such as mediation, students are **not required to use informal methods of grievance resolution and should not be pressured into such a process.**

In addition to being obligated to survivors, schools must address hostile educational environments created by sex discrimination, sexual harassment, and sexual violence school-wide. Addressing a hostile environment means remedying a current situation, addressing its effects, and preventing its recurrence in the future. Schools may meet this obligation through providing educational and awareness programming on sexual harassment or discrimination.

Employee Training: Both the Clery Act and Title IX Guidance require school employees that address sexual violence complaints to have appropriate training. The U.S. Department of Education (ED) also recommends that professors, campus police, administrators, counselors, health center staff, cleaning staff, coaches, resident advisers and others likely to receive reports be trained on how to identify and report sexual harassment and violence.

According to the Department of Education, schools need to:

- Ensure that responsible employees with the authority to address sexual violence know how to respond appropriately to reports of sexual violence; that other responsible employees know that they are obligated to report sexual violence to appropriate school officials; and that all other employees understand how to respond to reports of sexual violence.
- Make sure professional counselors, pastoral counselors, and non-professional counselors or advocates understand the extent to which they may keep a report confidential.
- Provide training to all employees likely to witness or receive reports of sexual violence, including teachers, professors, school law enforcement unit employees, school administrators, school counselors, general counsels, athletic coaches, health personnel, and resident advisors.

A school also should train responsible employees to inform students of:

- The reporting obligations of responsible employees;

- Students' option to request confidentiality and available confidential advocacy, counseling, or other support services; and
- Their right to file a Title IX complaint with the school and to report a crime to campus or local law enforcement.

Schools are required to be prompt when receiving a complaint of sex discrimination, sexual harassment, or sexual violence in order to remedy any hostile educational environment created by such behaviors.

The Department of Education has not provided details on the length of time they consider to be "prompt," but will evaluate a school's effort to conduct a fair, impartial investigation in a timely manner. If the length of your investigation has impeded on your access to an education and further created a hostile environment you may have grounds for an OCR complaint. A simultaneous police investigation does not remove a school's responsibility to resolve a complaint under Title IX. While a school may delay its response to accommodate a police investigation, schools that delay the Title IX complaint process unreasonably are in violation of Title IX."

Reporting Options: Title IX Guidance reminded schools that they have an obligation under the Clery Act to inform victims of their reporting options. Schools must notify victims of their right to report to police and facilitate that process if desired by the victim. Victims also have the right *not* to report to the police.

Regardless of a victim's choice to report to the police, a victim may use a school's grievance procedure to address sexual harassment or sexual violence or merely seek accommodations. When reasonable, schools must accommodate a victim on campus to remedy a hostile environment on a school's campus. This means schools may change academic or extracurricular schedules to prevent an ongoing hostile education environment or put in place safety measures, such as a no-contact directive or facilitate a student obtaining a restraining order. **The burden of accommodations or safety**

measures should not be solely placed on the victim, as this may be seen as a violation of Title IX."

Equitable Complaint Processes: Under Title IX, both the accuser and accused have equal rights, such as the right to:

- Have an adviser of choice present during the process (this includes an attorney if allowed at all by schools)
- Present evidence or have witnesses speak on their behalf
- Have timely access to information that will be used at the hearing
- Be present at pre-hearing meetings that provide an opportunity to present their testimony
- Receive the final hearing decision in writing at the same time as the other party *without being required to sign a non-disclosure agreement*
- Have the right to appeal a final decision. The Guidance states that a school may choose to allow appeals solely by the responding party *or* by both parties.

In addition, since Title IX is a federal civil right, the appropriate standard of evidence is a "preponderance of the evidence." This standard of evidence means that a hearing must determine whether a complaint of sex discrimination is "more likely than not" to have occurred or 51% likely to have occurred. This standard applies for all complaints of sex discrimination, including sexual harassment and violence, because Title IX outlines standards for *school disciplinary processes* — not *criminal complaints*, which require the highest standard of evidence, "beyond a reasonable doubt."

Retaliation:As a federal civil right, Title IX automatically protects any individual who reports sex discrimination, sexual harassment, or sexual violence against retaliation. This means employees and third party reports are protected along with reporting victims from any adverse consequence, harassment, intimidation, or discrimination that is causally related to reporting sex discrimination under Title IX. Schools must protect

against other employees or students retaliating against a reporting party when it “knows or should know” about retaliatory harassment or behavior.

If a school discourages or threatens you about discussing complaints of sex discrimination, sexual harassment, or sexual violence, this may be considered retaliation.