



Title IX Regulations

MTBSA Legal Staff



Title IX -- Overview

Title IX (20 U.S.C. § § 1681 – 1688)

- “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”
- Signed into law in 1972 by President Nixon
- Applies to virtually all aspects of federally funded education programs or activities

The New Title IX Regulations

Intent:

- Provide clear, predictable, and effective rules to ensure schools have the tools they need to address incidents of sexual harassment in their programs and activities
- Schools understand the importance of responding to complaints appropriately
- Provide a fair, transparent process for investigating and adjudicating harassment matters.

Final rule carries force and effect of law as of August 14, 2020

Notice and Actual Knowledge

- Requires a K-12 public school to respond whenever ANY employee has notice of sexual harassment, including allegations of sexual harassment
- Montana – mandatory reporting of child abuse or neglect
- Notice to a Title Coordinator, or to a school official with authority to institute corrective measures on the district's behalf, charges a district with “actual notice” which then triggers the school's response obligations

Broadened Definition of Sexual Harassment

Includes any of the 3 types of misconduct on the basis of sex:

- *Quid Pro Quo* harassment by a school employee
 - not evaluated for severity, pervasiveness, offensiveness or denial of equal educational access
- Any unwelcome conduct that a reasonable person would find so *severe, pervasive, and objectively offensive* that it denies a person equal educational access
 - Where unwelcome sex-based conduct consists of speech or expressive conduct, schools must balance Title IX enforcement v. free speech/academic freedom
- Any instance of sexual assault, dating violence, domestic violence or stalking

Sexual Harassment Occurring in a School's Education Programs or Activities

- Schools must respond when sexual harassment occurs against any person in any education program or activities
- Definition of “program or activity” includes:
 - Any locations, events, or circumstances over which the school exercised substantial control over both the respondent and the context in which the sexual harassment occurred
 - On and off campus

Expanded Reporting to Title IX Coordinators

- Employee designated to coordinate the district's efforts to comply with Title IX must be referred to as the "Title IX Coordinator"
- Schools must notify applicants for enrollment and employment, parents/legal guardians, and unions of Title IX Coordinators name/title, office address, email address and phone number
- Must be prominently displayed on the District's website
- Any person may report sex discrimination/harassment (whether or not the person reporting is the personal alleged to be the victim of conduct that could constitute sex discrimination/harassment) by any means

Mandatory Response Obligations: The Deliberate Indifference Standard

- Schools must respond promptly to sexual harassment in a manner that is not deliberately indifferent (i.e., not clearly unreasonable in light of the known circumstances)
- Mandatory response obligations:
 - Must offer supportive measures to the victim
 - Title IX Coordinator must promptly contact the victim
 - Must follow grievance process before the imposition of discipline or other non-supporting measures against a respondent.
 - Must not restrict other rights (e.g., 1st Amendment, 5th Amendment, 14th Amendment, etc.)
 - Requires investigation with any formal complaint
 - Wishes of victim re: whether the school investigates shall be respected unless Title IX Coordinator determines investigation is warranted (not clearly unreasonable) in light of the known circumstances.
- Allegations not meeting definition of sexual harassment must be dismissed

Mandatory Response Obligations, cont.

- At time of filing formal complaint, complainant must be participating in or attempting to participate in the district's education program/activity
- Complainant must sign or otherwise indicate the complainant is the person filing the formal complaint
- If Title IX Coordinator signs a formal complaint, must remain free from conflicts and bias
- Supporting measures include individualized services reasonably available that are non-punitive, non-disciplinary, and not unreasonably burdensome to the other party designed to ensure equal educational access, protect safety or deter sexual harassment
- Schools supportive measures and remedies are evaluated, but a school's disciplinary decisions are not second guessed

Grievance Process Requirements

Schools are required to:

- Provide equitable treatment to the complainant and the respondent
- Required remedies must be designed to maintain the Complainants equal access to education but need not be non-disciplinary or non-punitive and need not avoid burdening the respondent
- Require objective evaluation of all relevant evidence and the avoidance of credibility determinations based upon the status as a complainant, respondent or witness
- Ensure Title IX personnel remain unbiased

Grievance Process Requirements, cont.

Schools are required to:

- Provide training to Title IX personnel on investigations application of rape shield protections, etc.
- Post materials used to train Title IX personnel on their websites and/or make available for public inspection
- Ensure reasonable prompt time frames for the grievance process
- Ensure decision-makers are trained on technologies to be used at live hearings (Discussed below)
- Ensure a presumption of non-responsibility on the part of the respondent until the conclusion of the grievance process

Grievance Process Requirements, cont.

Schools are required to:

- Following a determination of responsibility, prepare a range (list) of possible remedies to the complainant and possible disciplinary sanctions that may be imposed on the respondent
- State the established standard (preponderance of evidence or clear and convincing evidence) for all formal complaints
- Describe the District's appeal procedures and the range of supportive measures available to complainants and respondents
- Refrain from using, relying upon or seeking disclosure of privileged information

Investigations

Schools must:

- Investigate and send written notice to both parties of the allegations upon receipt of a formal complaint
- Provide equal opportunities for the parties to present facts, expert witnesses and evidence
- No gag orders
- Send written notice of any investigative interviews, meetings or hearings
- Send evidence directly related to the allegations with at least 10 days for the parties to inspect, review and respond to the evidence
- Send the parties an investigative report that summarizes relevant evidence with at least 10 days for the parties to respond

Investigations

Schools must:

- Dismiss allegations that do not meet the definition of sexual harassment or did not occur in a school's education program or activity
- Give the parties written notice of a dismissal and the reasons for the same

Investigations

Schools may:

- Dismiss a formal complaint if complainant informs the Title IX Coordinator in writing of their desire to withdraw the formal complaint
- Consolidate formal complaints where the allegations arise of the same facts

Hearings/Written Questions/Rape Shield Protections

- Hearings (including live hearings, cross-examination) are not required for K-12 schools, but are permitted
- 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
- 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 are deemed not relevant

Standard of Evidence & Written Determination

- Same standard of evidence must apply to both students and employees
- 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

Appeals

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 any additional basis

Informal Resolutions

Schools may:

- offer and facilitate informal resolution options, such as mediation or restorative justice
 - Both parties must give voluntary, informed, written consent to attempt informal resolution
- 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
- 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

Retaliation Prohibited

- 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
- Grievance procedures
 - The exercise of rights protected under the First Amendment does not constitute retaliation

MTSBA Model Policy Changes to Meet the new Title IX regulation requirements

Overview of the changes made to MTSBA Model Policies:

- Students:
 - 3210: EEO, Nondiscrimination and Sex Equity
 - 3225, 3225F and 3225P: Sexual Harassment of Students
 - 3226: Bullying/Harassment/Intimidation/hazing
 - 3310: Student Discipline
- Staff:
 - 5010: EEO, Non-discrimination and Sex Equity
 - 5012, 5012F and 5012P: Sexual Harassment of Employees
 - 5015: Bullying/Harassment/Intimidation

Sources of Authority

<https://www2.ed.gov/about/offices/list/ocr/docs/titleix-summary.pdf>

<https://www2.ed.gov/about/offices/list/ocr/docs/titleix-comparison.pdf>

<https://www2.ed.gov/about/offices/list/ocr/docs/titleix-fact-sheet.pdf>

<https://www.youtube.com/watch?v=TdfT5R8ibm4&feature=youtu.be>



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