

FOUNDATIONAL PRINCIPLES AND THE CURRENT REGULATIONS



EICHELBAUM WARDELL
HANSEN POWELL & MUÑOZ, P.C.

HOLLY BOYD WARDELL
October 18, 2022

Title IX: 1972

No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subject to discrimination under any education programs or activity receiving federal financial assistance.

Signed into law by President Richard Nixon on Friday, June 23, 1972.



Title IX: 1972

- 1973:** Battle of the Sexes - Billie Jean King defeated Bobby Riggs in an exhibition tennis match
- 1975:** First Title IX regulations adopted
- 1976:** NCAA challenged the legality of Title IX regarding athletics in a lawsuit was dismissed two years later
- 1977:** Three female students at Yale, two graduates, and a male faculty member became the first to sue over sexual harassment under Title IX (Alexander v. Yale). The cause of action failed on appeal.
- 1979:** Three-prong test for compliance in athletics established.
- 1979:** Students can sue for sex discrimination (Cannon v. Univ. of Chicago)
- 1980:** Oversight for compliance was given to the Office for Civil Rights (OCR) in the U.S. Department of Education
- 1982:** Employees could sue for sex discrimination
- 1992:** Students can sue for money damages for discrimination by employees (Franklin v. Gwinnett County Public Schools)
- 1999:** Students can sue for sexual harassment by students
- 1997:** OCR issued "*Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*" containing the first explicit reference to "gay or lesbian students" as being covered by federal prohibitions against sexual harassment



Title IX: 1972

- 1998:** Student can sue for teacher's sexual harassment only if the school had "actual notice" and acted with "deliberate indifference" (Gebser v. Lago Vista ISD)
- 1999:** Title IX covers student-to-student harassment; damages available only if school had actual notice and acted with deliberate indifference (Davis v. Monroe County)
- 2001:** OCR issued revised guidance on sexual harassment – Gebser and Davis did not apply to OCR enforcement actions
- 2005:** Coaches and teachers have a right of action under Title IX for retaliation (Jackson v. Birmingham Bd of Educ.)
- 2006:** OCR issued guidance allowing single-sex programs/schools
- 2014:** Obama Administration OCR issued DCL saying transgender students should be allowed to use the bathroom or locker room that matches their gender identity
- 2018:** Trump Administration OCR rescinded the 2014 Obama Guidance
- 2020:** [Second version of Title IX Regulations adopted](#) - amended to address sexual harassment investigations
- 2021:** Biden Administration – Exec. Order on Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation



OUTLINE FOR 2020 MODEL YOU STILL NEED TO KNOW

1. What is sexual harassment?
2. When is a school on notice of sexual harassment?
3. What must a school do to support alleged victims?
4. What personnel and policies do schools need?
5. What grievance process must a school generally follow before making findings and disciplining?
6. What are other features of the 2020 regulations?
7. How do the 2020 regulations “protect” free speech?
8. Who needs to be trained?



1. What is considered “sexual harassment”?

- **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 programs or activities.* (Hostile environment definition used by courts for student to student)
- **“Sexual assault,” “dating violence,” “domestic violence,” or “stalking”** as those terms are defined under the Federal laws called the Clery Act and the Violence Against Women Act. (These have their own definitions.)



2. When does a school have notice?

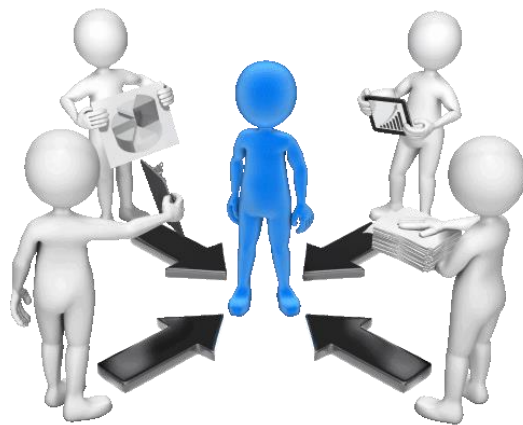
- Once a school has **actual knowledge** of sexual harassment or allegations of sexual harassment, the school has to respond and take action.
- A school has **actual knowledge** when the school has **notice** that a person may have been the victim of sexual harassment.
- By policy, all school staff have the duty to report.
- Any person, whether the alleged victim or a parent, friend, or bystander, has the right to report sexual harassment to put the school on notice.



REPORTS MAY BE MADE BY:

- Filling out form
- Verbal
- Mail
- Telephone
- Email

Reports may be made at any time, including non-school hours.



Actual Knowledge and School Personnel

- The Title IX Coordinator for the school district or school.
- Schools have to provide the contact information for the Title IX Coordinator. (see next slide)
- Other people within the school who have authority to institute corrective measures. This could vary from school to school, but always includes the Title IX Coordinator.
- **In elementary and secondary schools, knowledge by any school employee puts the school district on notice.** This includes food service, substitute teachers, bus drivers, custodians, clerks.
- This means schools should train ALL employees.



NOTICE

Title IX Coordinator's Contact Information must be given to:

- Students
- Employees
- Applicants for Admission
- Employee Applicants
- Parents/Legal Guardians

Contact Information: Name, title, office address, email address, and telephone number. Must be "**prominently displayed**" on website.



3. What kind of response must the school provide?

The school cannot be “**deliberately indifferent.**” Deliberate indifference = liability. That also means that it cannot be “**clearly unreasonable**” in light of the known circumstances. The clearly unreasonable standard may protect districts who “do not do enough, but were not clearly unreasonable”

The **Title IX Coordinator** must provide information to **Complainant**:

- The availability of **supportive measures**;
- The **right to file a complaint**, and
- How to file a complaint and the process.



4. What personnel and policies must schools have?



- **Title IX Coordinator**;
 - Specific information about how to contact the Title IX Coordinator must be provided by the school.
 - Currently also need Investigator, Decision Maker, Appellate Decision Maker
- **Non-Discrimination policy**;
- Written **grievance procedures**;
- Information about how to file a **formal complaint** regarding sexual harassment.





Formal Complaints

- A formal complaint is an official document alleging sexual harassment.
- It's **filed** and signed by the student (or parent/legal guardian) or in some cases the Title IX Coordinator.
- In cases where an alleged victim doesn't file a formal complaint, a Title IX Coordinator might initiate grievance procedures where discipline is appropriate.
- Discipline for Title IX-sexual harassment will be difficult without using procedure.



Written Grievance Procedures

- **For now**, grievance procedures dealing with sexual harassment must abide by the 2020 regulations.
- The 2020 regulations refer to alleged victims as **complainants** and alleged perpetrators as **respondents**, whether or not the grievance process has begun.
- The grievance procedures cannot discriminate on the basis of sex, and provisions **must apply equally** to complainants as respondents.
- Written grievance procedures need to include 10 other specific items.



Requirement 1: Treat Parties “Equitably”

- The school’s grievance process must treat complainants and respondents equitably by providing **remedies** to a complainant if a respondent is found responsible, and by following the prescribed **grievance process before** imposing **discipline** on a respondent.
- The **remedies** for a complainant must be **designed to restore or preserve equal access** to the school’s education program or activity.
- Unlike supportive measures in place with or without a grievance process pending, a complainant’s **remedies CAN be punitive** or disciplinary against the respondent.



Requirement 2: Objective Evaluation of Evidence

- The school’s grievance process must ensure an **objective evaluation** of all **relevant evidence** – including inculpatory and exculpatory evidence.
- **Credibility determinations** cannot be made on the basis of a person’s status as a complainant, respondent, or witness.

The term “grievance process” by OCR refers to the investigative process by a school.



Requirement 3: Training; No Conflicts of Interest

- The individuals involved in the process - the **Title IX Coordinator, investigators, decision-makers, or facilitators of informal, voluntary resolution efforts** – must not have any **bias** or **conflict of interest**.
- These individuals must also be **trained**. The materials used to train Title IX personnel cannot rely on sex stereotypes, must promote impartial investigations and adjudications, and must be **posted on each school's website**. (Must have copyright permission to publish.)



Requirement 4: Presumption of Innocence

- Under the school's grievance procedures, **the respondent must be initially presumed not responsible**, so that any finding of responsibility only comes at the conclusion of a grievance process.



Requirement 5: Reasonably Prompt Time Frames

- The grievance process must include **reasonably prompt time frames** for resolving formal complaints of sexual harassment.
- **Temporary delays** are permitted only for **good cause**. Good cause can include law enforcement activities, the absence of a party or witness, the absence of a party's advisor of choice, or the need to provide language assistance or accommodation of disabilities. District policy and handbooks should include these reasons along with any other reason deemed good cause.



Requirement 6: Description of Outcomes

The grievance process must describe or list the range of possible remedies and disciplinary sanctions that could occur following a determination of responsibility.

This means “the range” should be listed in handbook and any administrative regulations. See, e.g., [STUDENT WELFARE - FREEDOM FROM DISCRIMINATION, HARASSMENT, AND RETALIATION \(tasb.org\)](#).



Requirement 7: Standard of Evidence

- The grievance process must state which standard of evidence the school will use to reach a determination regarding responsibility.
- Schools can **choose** between the **preponderance of the evidence** standard and the **clear and convincing evidence** standard.
- Whichever standard the school chooses, it has to use that standard for all formal complaints of sexual harassment, whether the respondent is a student or employee.
- All sexual harassment proceedings must have the same standard of evidence.



Requirement 8: Right to Appeal

- The grievance procedures must contain the **right to appeal the result of the grievance process.**
- Appeal process should be explained in handbooks and administrative regulations



Requirement 9: Description of Range of Supportive Measures

The grievance process must describe the **range of supportive measures** available to complainants and respondents.

Examples need to go into handbooks and administrative regulations that are published.



Supportive Measures

Supportive measures may include:

- individualized services that are non-punitive, non-disciplinary, and do not unreasonably burden the other party yet are designed to restore or preserve a person's equal access to education;
- placing students immediately in separate classes pending the results of the school's investigation;
- notify the complainant of the options to avoid contact with the respondent and allow students to change academic situations as appropriate;
- counseling.



Requirement 10: Privileges

- No information protected by a legal privilege (such as the attorney-client privilege or the doctor-patient privilege) can be used during an investigation unless the person holding that privilege has waived it.
- Neither a party nor the school is allowed to seek, permit questions about, or allow the introduction of evidence that is protected by a recognized privilege.
- Individuals can always opt to waive their own privileges.



5. What is required in this Grievance Process?

- The process is triggered when a **report** is filed.
- An investigation is triggered when a **formal complaint** is filed
- A formal complaint can be filed by an individual or the Title IX Coordinator.

The “Grievance Process” contains multiple parts, including the “investigation,” which must be conducted before you come to any “conclusions,” and before any “appeal.”



Written Notice to the Parties

- When the school begins an investigation, it must provide the parties with written notice of certain information before anyone is questioned.



Details of Written Notice

1. The actual allegations and facts that would constitute sexual harassment.
2. The presumption of innocence.
3. A statement that the parties are entitled to advisor of their choice.
4. A statement that the parties can request to inspect and review certain evidence.
5. Information regarding the code of conduct and false statements.



Emergency Removals

- A school may remove a respondent from the school's education programs or activities on an emergency basis if the respondent poses an immediate threat to anyone's physical health or safety.
- If the respondent is a school employee, the final regulations do not prevent a school from placing that employee on administrative leave during the investigation.



Mandatory Dismissal

A school must dismiss a complaint:

- that does not describe conduct that meets the definition of sexual harassment;
- that alleges sexual harassment that did not occur in the school's education program or activity;
- that alleges sexual harassment that **did not occur in the United States** (e.g., schools trips out of U.S.).*

*Schools can still address these complaints under their code of conduct, even if the misconduct is not sexual harassment under Title IX.



Discretionary Dismissals

A school may dismiss a complaint:

- if the complainant notifies the Title IX Coordinator in writing that he/she wishes to withdraw the formal complaint or some of its allegations;
- if the respondent is no longer enrolled or employed by the school;* or
- if specific circumstances prevent the school from gathering evidence sufficient to reach a determination about the allegations.



*For employees, continue to SBEC/DNHR.

Dismissal Procedures

- Whenever a school dismisses a formal complaint, or any allegations in it, the school must promptly send written notice of the dismissal and the **reasons to the parties**.
- Both parties have the right to appeal a school's dismissal decisions (more later).



Gathering Evidence: Schools and Parties

- The school must give both parties equal rights and protections. These protections apply whether the complainant filed the formal complaint or whether the Title IX Coordinator began the investigation by signing the formal complaint.
- The school is not allowed to access a party's personal records if they are maintained by a physician, psychiatrist, psychologist, or other professional for the purpose of treatment to the party, without consent.



Gathering Evidence: Schools and Parties

- The school must provide an equal opportunity for the parties to present witnesses and evidence, including expert witnesses, as well as inculpatory or exculpatory evidence.
- The school cannot restrict the ability of either party to discuss allegations under investigation or to gather and present relevant evidence. (Note: This is for parties, not witnesses.)
- The school has to provide the same opportunities to the parties to have others present during the grievance proceedings, including access to an **advisor of choice** for **any meetings** or hearings. Both complainant and respondent are entitled to an “advisor” of their choice.



Gathering Evidence: Schools and Parties

- The school has to provide written notice of the date, time, location, participants, and purpose of all hearings, interviews, or other meetings, with sufficient time for the party to prepare.
- The school must also provide equal opportunities for the parties and their advisors to inspect and review the evidence obtained by the school as part of its investigation, if the information is directly related to the allegations raised in the formal complaint.
- The school must also give the parties a meaningful opportunity to respond to the evidence.



Investigative Reports

- After gathering evidence, the school must prepare an investigative report on the allegations of the formal complaint.
- A school must give the parties at least 10 days to respond to the evidence in writing. If a response is submitted, the school must consider that response before finalizing the investigative report. The investigative report can then be finalized and provided to the parties.
- That report must be circulated to the parties at least another 10 days before any determination of responsibility. This means before there can be a conclusion, at least 20 days will occur.



Hearings

- For elementary and secondary schools, the school has the **option**, but never the obligation, to hold a hearing.
- Even without a hearing, the elementary or secondary school must still give the parties equal opportunity to submit relevant, written questions to each other, before the decision-maker reaches a determination.
- Questions and evidence about a complainant's prior sexual history are not relevant, with two limited exceptions:
 - to prove someone other than the respondent committed the alleged misconduct or
 - to prove consent.



Participation and Cross-Examination

- Every person has the right to choose to participate or not participate in any part of a grievance process. No one may be forced, threatened, coerced, or discriminated against for choosing not to be part of the school's grievance process.
- The decision-maker is not supposed to make inferences about the determination regarding responsibility based on the fact that a party or witness did not fully participate in the process.



Decision-Making: Objective and Unbiased

- The school's decision-maker must objectively evaluate the relevant evidence and reach conclusions about whether the respondent is responsible for the alleged sexual harassment.
- A school's decision-maker needs to use independent judgment: **cannot be the same person who conducted the investigations or the Title IX Coordinator.**

Who are the decision-makers?

- Decision-makers must be free from conflicts of interest or bias for or against complainants or respondents and must receive special training about how to be impartial and how to decide what evidence is relevant.
- The decision-maker will weigh the relevant evidence and decide whether it meets the school's standard of evidence for sexual harassment allegations.



Decision-Making: Written Decisions

After the evidence has been weighed, DM must issue a **written decision**. It must include:

1. The **portion** of the school's **policies** that was **violated**.
2. A description of the that were taken by the school on the way to getting to that point. **procedural steps**
3. A **findings of fact** section
4. A section that draws **conclusions** after applying the facts to the portion of the school's policy that applies
5. A **statement and rationale** for the ultimate **determination of responsibility**.



Decision-Making: Written Decisions

6. **Any disciplinary sanctions** that the school will impose on the respondent and state whether the school will provide remedies to the complainant.
7. A statement and rationale for any remedies for the complainant, addressing **how those remedies will restore or preserve equal access.**
8. A statement of the recipient's procedures, a statement that the parties have a **right to appeal** the initial determination regarding responsibility, and the permissible bases for appeal.



Decision-Making: After the Decision

- The school must **send the written determination to the parties simultaneously, along with information about how to appeal the determination.**
- A school has discretion to set deadlines of when an appeal must be filed, bearing in mind the obligation to conclude the entire grievance process and bring resolution to the situation for both parties, within a reasonably prompt time frame.
- The **Title IX Coordinator is responsible for ensuring that the remedies contained in the written decision are carried out.**



Remedies

The District's remedies are designed to "restore or preserve equal access to the school's education program or activity." Possible "range of remedies" - verbal warning to assignment to disciplinary alternative placement/expulsion. Consider:

- training program for those involved in the complaint
- comprehensive education program for the school community
- counseling to the complainant and the respondent who engaged in prohibited conduct
- increasing staff monitoring of areas where prohibited conduct has occurred
- reaffirming the District's policy against discrimination and harassment.

Respondents who are employees may be subject to a range of discipline from a written warning up to and including termination of employment.



Appeals

- **Both parties have the right to appeal.**
- Appeals can be taken from two different steps in the process.
 - After a dismissal before the grievance process, whether mandatory or discretionary
 - At the end of the grievance process



Grounds for Appeal

1. A **procedural irregularity** affected the outcome of the matter.
2. **New evidence** has been discovered that was not reasonably available at the time of the determination of responsibility or dismissal.
3. A **conflict of interest** on the part of a Title IX Coordinator, an investigator who compiled the evidence, or a decision-maker, and the conflict of interest affected the outcome.
4. Schools can offer additional grounds for appeals, if they want to, so long as the grounds apply on an equal basis to the parties.



Appellate Process

- The recipient must notify the parties in writing and implement appeal procedures equally.
- Both parties must have equal opportunity to submit a written statement supporting or challenging the outcome
- The person who decides the appeal cannot be the same person **who reached the determination regarding responsibility, or the same person as the investigator or Title IX Coordinator.***
- After considering the parties' written statements, the decision-maker on appeal must issue a written decision and send it to the parties simultaneously.
- The school's determination about whether the respondent is responsible for the sexual harassment allegations **becomes final after appeal**. Final does not mean an employee is denied due process if the District wishes to terminate.



Informal Resolution

- Schools can offer informal resolution in appropriate cases:
 - Exception: Where the respondent is an employee of the school
- Informal resolution only if voluntary by each party.
- A school can never force, threaten, or require informal resolution.
- If informal resolution proceeds, the school must provide a facilitator who is unbiased and who has received special training.
- The school still needs to provide complainant and respondents with notice of the allegations, notice of their rights, information about whether an informal process is confidential, and about withdrawing from the process.



6. Other Issues: Record-Keeping

This duty extends for **7 years** and includes several categories of documents:

1. Records of investigation.
2. Records of any appeal/materials associated with an appeal.
3. Records of any informal resolution process
4. All materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution (and remain posted on District's website).
5. Records of the supportive measures that they took in response to a report or complaint of sexual harassment.



Other Issues: Retaliation

- No school or person is allowed to retaliate against anyone for exercising rights under Title IX.
- Any person **retaliated** against may file a complaint with the school, and the school must have procedures in place for the prompt and equitable resolution of such complaints.
- The school should keep the identities of parties and witnesses confidential, unless disclosure of someone's identity is required under other laws (e.g. FERPA) or is necessary in order to conduct the grievance process.

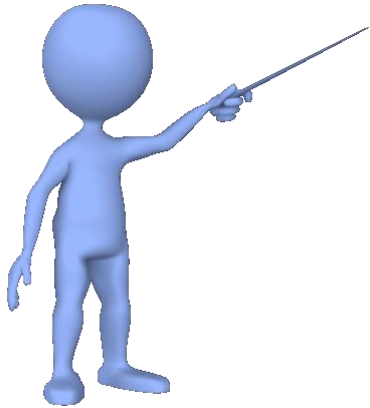


7. How does this process protect free speech?

- The 2020 regulations prohibit a school from telling complainants and respondents that they cannot talk about the allegations, investigation, or grievance process.
- When OCR investigates a school for possible Title IX violations, OCR will never view a school's attempt to suppress free speech as an appropriate response to sexual harassment.



8. Who needs to be trained?



- Title IX Coordinator
- Investigators
- Informal Resolution Facilitators
- Decision Makers
- Appellate Decision Makers



More on Training:

Training must include:

- Definition of sexual harassment
- The Scope of the school's education program/activity (what is included)
- How to conduct an investigation/grievance process
- Hearing (if you have them)
- Appeals
- Informal Resolution Process
- Avoiding prejudice of the facts at issue, conflicts of interest, bias
- Investigators must receive training on issues of relevance to create an investigative report that fairly summarizes relevant evidence



Record Keeping - Training

A recipient must maintain for a period of **seven** years records of:

- All materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process.
- Training materials must be made publicly available on a district's 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.



The information in this handout was prepared by Eichelbaum Wardell Hansen Powell & Muñoz, P.C. It is intended to be used for general information only and is not to be considered specific legal advice. If special legal advice is sought, consult an attorney.



www.edlaw.com | (800) 488-9045