




Title IX: Sexual Harassment

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This presentation is meant to give you some basic information, and the materials are not intended to be relied upon as legal advice. If you have any questions, please contact your attorney or Pemberton 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.”

20 U.S.C. §1681



Purpose

- Protect every student's right to educational opportunities free from sex discrimination
- Previously never formally addressed sexual harassment or assault
- Requirements:
 - What constitutes sexual harassment
 - What triggers a school's legal obligation to respond
 - How a school must respond



Sexual Harassment

Sexual Harassment

- Old definition used for Title IX:
 - “unwelcome conduct of a sexual nature” that included “unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal, or physical conduct of a sexual nature.” OCR Guidance for Title IX



Sexual Harassment

- New Title IX defines Sexual Harassment as:
 - Conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct;
 - Unwelcome conduct on the basis of sex that is so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity; or
 - Sexual assault, as defined in 34 C.F.R. 668.46(a)

34 C.F.R. §106.30

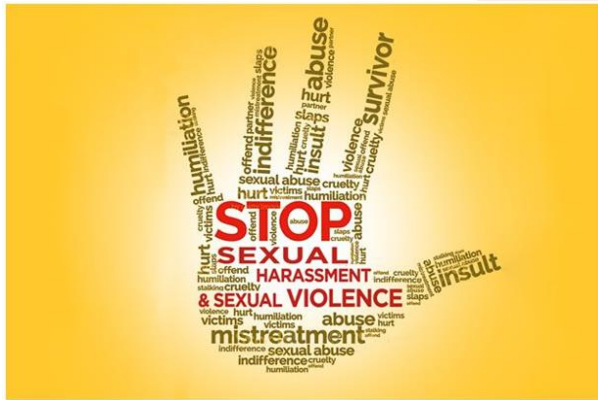


Sexual Harassment

- If the formal complaint does not meet this new definition, a complaint **must be** dismissed with respect to whether it constitutes sexual harassment under Title IX.

34 C.F.R. 106.45(b)(2)(B)(3).





“... On the Basis of Sex...”

Title IX does not just apply to females

Title IX applies equally to everyone



Key Players

- Complainant – victim, person alleging they are subject of sexual harassment
- Respondent – subject of the allegations
- Witnesses – others who may have observed conduct or have other information



Title IX Coordinator

- Notify applicants for admission and employment, parents, students, and all unions of the name of employee designated as the Title IX Coordinator
- Notify all of existence of grievance procedure/policy
- Prominently display contact info in Title IX policy including on website and/or in handbook

34 C.F.R. §106.8



Title IX Positions



Coordinator



Investigator



Decision
Maker



Appeal
Decision
Maker



When a School Must Respond

1. When the school has actual knowledge of sexual harassment

New rule expands “actual knowledge” to **include notice to any elementary or secondary school employee and that any person** (alleged victim or third party) may report to the Title IX Coordinator. 34 C.F.R. §106.30

2. That occurred within the school’s education program or activity

“education program or activity” = school exercised substantial control

3. Against a person in the U.S.

U.S. Department of Education



When a School Must Respond Continued

- Prompt response that is not deliberately indifferent
- Mandatory response obligations:
 - Offer supportive measures for victim
 - “**Supportive measures:**” individualized services reasonably available that are non-punitive, non-disciplinary, and not unreasonably burdensome while designed to ensure equal educational access
 - Coordinator contact complainant confidentially (regardless of formal or informal complaint)
 - Follow grievance process
 - Investigate any sexual harassment allegations



Actual Knowledge

- Actual knowledge may arise from more than a direct complaint.
- An employee or other person may have actual knowledge that requires reporting to the Title IX Coordinator based on rumors, direct observation, social media, or receipt of information regarding off-campus conduct that may have on-campus implications.



Who Should Make a Report?

- Any student who believes they have been the victim of sexual harassment.
- Any person (including a parent of a student) with actual knowledge of conduct in violation of Title IX.
- Any employee (excluding confidential resources) who has experienced, has actual knowledge of, has observed others experiencing what they believe to be sexual misconduct, or has witnessed sexual harassment.



Next Steps

- Complaint
 - Standard of Proof
 - Notice Requirements
 - Compliance with FERPA
- Investigative Process
- Determination of Responsibility
- Appeal
- Informal Resolution
- Prohibited Retaliation



Formal Complaint

- Begins the process.
- A formal complaint must be signed by the Complainant or by the Title IX Coordinator.
- Coordinator must immediately evaluate whether the complaint is in the proper form to move forward, or whether it must be dismissed.



Process After Formal Complaint

- District Follow-Through
- Supportive Measures
 - Cannot be punishment
 - Cannot be discipline
 - The goal is to protect the safety and access to education for everyone concerned
 - The right to have an advisor or advocate involved in the process
- Respondents



Timeline on Amendments

- June 23, 2022 – the Department of Education released proposed changes to Title IX
- July 12, 2022 – published to Federal Register with a 60-day comment period
 - Over 240,000 comments and Department must respond to all of them
- April 6, 2023 – the Department of Education released proposed rule on athletic eligibility based on gender
- October 2023 – final version expected and will likely differ from the proposal



2022 Proposed Amendments

- Discrimination based on sex - includes sex stereotypes, sexual orientation, gender identity, and pregnancy.
- Terminology change – replaces the term “**sexual harassment**” with **sex-based harassment**
- Evidentiary standard – preponderance of the evidence (is it more likely than not?)



2022 Proposed Amendments

- Schools are required to conduct reliable and impartial investigation of all complaints of sexual harassment.
 - Used to *only* investigate “formal” complaints
- Complaints of discrimination or harassment **do not** need to be submitted to the Title IX Coordinator or Team Member to be valid
 - Sex-based harassment claims can be made by the Complainant, a parent, guardian, or other authorized legal representative of the Complainant
 - Sex discrimination claims can be made by anyone
- Schools must act *promptly* and *effectively* in response to information and complaints about sex discrimination.



2022 Proposed Amendments

Pregnancy and Related Conditions

- Cannot adopt policies, practices, or procedures that treat students **OR** employees differently based past, current, or potential for pregnancy-related conditions.
- Pregnancy or related conditions include:
 - Pregnancy, childbirth, termination of pregnancy, or lactation
 - Medical conditions related to pregnancy, childbirth, termination of pregnancy, or lactation
 - Recovery from pregnancy, childbirth, termination of pregnancy, lactation, or their related medical conditions
- Schools must provide reasonable accommodations for pregnant students, reasonable break time for pregnant employees, and lactation space.



2022 Proposed Amendments

- Employees must notify the Title IX Coordinator and respond to allegations of sex-based harassment in their education programs / activities
- Preventing someone from participating in school programs/activities consistent with their gender identity would cause harm in violation of Title IX, except in some limited areas set out by statute or regulations. (different from sports teams)
- Requires schools to offer supportive measures, as appropriate, to restore or preserve access to school programs or activities (currently only requires when there is sexual harassment)



School Athletics

- Proposed Regulation's text:
 - The proposed regulation would be in the Title IX regulations at section 106.41(b)(2):
 - "If a recipient adopts or applies sex-related criteria that would limit or deny a student's eligibility to participate on a male or female team consistent with their gender identity, such criteria must, for each sport, level of competition, and grade or education level: (i) be substantially related to the achievement of an important educational objective, and (ii) minimize harms to students whose opportunity to participate on a male or female team consistent with their gender identity would be limited or denied."



School Athletics

- The proposed rule would establish that policies violate Title IX when they **categorically ban** transgender students from participating on sports teams consistent with their gender identity
- Recognizes that in some instances, particularly in competitive high school and college athletic environments, some schools may adopt policies that limit transgender participation
- The proposed rule would give schools a framework for developing eligibility criteria that protects students from being denied equal athletic opportunity, while giving schools the flexibility to develop their own participation policies.



School Athletics

- Allows schools the flexibility to develop team eligibility criteria that:
 - Serves important educational objectives such as ensuring fairness in competition or preventing sports-related injury
 - Accounts for the sport, level of competition, and grade or education level to which they apply



School Athletics

- Elementary school students would generally be able to participate on school sports teams consistent with their gender identity
 - Would be difficult for a school to justify excluding students immediately following elementary school from participating consistent with their gender identity
 - The Dept. of Education says that it recognizes that students have different levels of athletic skills and schools offer sports teams for younger students often focusing on building teamwork fitness, and basic skills for students just learning a sport. Whereas a high school or collegiate team may primarily be focused on competitive success.



Questions?



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