



TITLE IX: SEX DISCRIMINATION

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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 of Title IX

- Protect every student's right to educational opportunities free from sex discrimination.
 - This includes sex-based harassment
- New 2024 Final Rule “protects all students and employees from all sex discrimination prohibited under Title IX including sex discrimination based on sex stereo-types, sexual orientation, gender identity and sex characteristics.” Effective August 1, 2024.



Title IX Scope

- Discrimination on the basis of sex includes:
 - Sex stereotypes
 - Sex characteristics
 - Pregnancy or related conditions
 - Sexual orientation
 - Gender identity

34 C.F.R. § 106.10.



Sex Separation

- Rule clarifies that districts must not separate or treat any person differently based on sex in a manner that subjects them to more than “de minimis harm.”
 - Except in the limited circumstances specified by Title IX.
 - Rule recognizes that preventing a person from participating in an education program or activity consistent with the person’s gender identity subjects that person to more than “de minimis” harm.



Application of Title IX

- Title IX applies to all sex discrimination that impacts programs and activities regardless of where it occurs.
- This includes conduct outside of the United States or outside of education program or activity.



Sex-based Harassment

Former Definition Sexual Harassment

- 2020 Regulations defined Sexual Harassment as:
 - An employee of the recipient 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



2024 Final Rule: Sex-based Harassment

- Includes sexual harassment and other harassment on the basis of sex that is:
 1. Quid pro quo harassment;
 2. Hostile environment harassment; and/or
 3. Specific offenses (sexual assault, dating violence, domestic violence, and stalking).

34 C.F.R. § 106.2.



Sex-based Harassment Cont.

- Hostile Environment Harassment fact-specific inquiry:
 - Conduct's impact on complainant's ability to access education program/activity;
 - Type, frequency, and duration of conduct;
 - Parties' ages, roles, previous interactions;
 - Location and context of the conduct; **or**
 - Other sex-based harassment in education program/activity.

34 C.F.R. § 106.2



Sex-based Harassment Cont.

- Specific offenses include:
 1. Sexual assault
 2. Dating violence
 3. Domestic violence
 4. Stalking



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)



When a School Must Respond

1. When the school has “knowledge” of conduct that reasonably may constitute sex discrimination.

New! Rule removes “actual knowledge” and “deliberate indifference” component.

New! Rule adds requirement that schools “respond promptly and effectively.”

34 C.F.R. § 106.44(a)(1)

2. That occurred under the school’s education program or activity in the U.S.

New! Duty even if alleged conduct took place outside the recipient’s education program or activity or outside the United States.

34 C.F.R. § 106.11.



Notification Requirements

- All employees are required to notify the Title IX Coordinator when the employee has information about conduct that may constitute sex discrimination under Title IX

34 CFR. 106.44(c)

- Confidential vs. non-confidential employees



Notification Requirements

- Pregnancy related conditions –
- When a student, or a person who has a legal right to act on behalf of the student, informs any employee of the student's pregnancy or related conditions the employee must:
 - Promptly provide that person with the Title IX Coordinator's contact information
 - Inform that person that the Title IX Coordinator can coordinate specific actions to prevent sex discrimination and ensure the student's equal access to the recipient's education program or activity.

34 C.F.R. 106.40(b)(2)



Title IX Coordinator

Title IX Coordinator

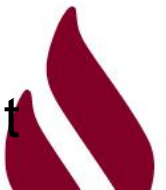
- Notify applicants for admission and employment, parents, students, and all unions of the name of employee designated as the Title IX Coordinator.
- Notify all of existence of grievance procedure/policy.
- Prominently display contact info in Title IX policy including on website and/or in handbook.

34 C.F.R. §106.8



Title IX Coordinator's Response

- No duty if “reasonably determine” conduct does not constitute sex discrimination.
- **Mandatory** response obligations to end any sex discrimination:
 - Treat parties equitably
 - Offer supportive measures
 - Notify complainant of grievance procedures and informal resolution process (when appropriate)
 - Notice to respondent after complaint
 - Complaint → grievance process or informal resolution
 - No complaint → determine whether to initiate a complaint



Title IX Coordinator's Response

- Must initiate a complaint if conduct:
 1. Presents an imminent and serious threat to the health or safety of the complainant or other person;
or
 2. Prevents recipient from ensuring equal access on the basis of sex to its education program or activity.

34. C.F.R. § 106.44(f)(1)(v)(B)
- Notify complainant BEFORE initiating complaint and address safety concerns.



Title IX Coordinator's Response Cont.

Factors for considering when to initiate a complaint:

1. Complainant's request not to proceed with initiation of complaint;
2. Complainant's reasonable safety concerns;
3. Risk that additional acts of sex discrimination will occur;
4. Severity of alleged sex discrimination;
5. Age and relationship of the parties;
6. Scope of alleged sex discrimination;
7. Availability of evidence;
8. Whether recipient could end the alleged sex discrimination and prevent its recurrence without initiating grievance procedures.



Supportive Measures

- Supportive measures must be offered to each party and coordinated by the district
- Supportive measures may vary, but can include:
 - Counseling
 - Extensions of deadlines
 - Security and monitoring of certain areas
 - Leaves of absence
 - Changes in classes or extracurriculars
 - Training and education programs related to sex-based harassment



Emergency Removal

- A respondent may be removed from the education program or activity on an emergency basis.
- Individual safety and risk analysis must take place to determine an imminent and/or serious threat to the health or safety of any students, employees, or other persons.
- Respondent must get notice of opportunity to challenge the removal.



Informal Resolution

- May be offered in some circumstances
- Both parties must voluntarily agree
- School cannot require waiver of right to investigation and determination of a complaint
- Any time prior to resolution, party has right to withdraw and resume grievance process
- Not available for allegations that employee engaged in sex-based harassment of a student, or when process would conflict with law

34 C.F.R. 106.44(k)



Informal Resolution Notice

- Before initiation of an informal resolution process, notice must be provided to the parties explaining:
 - The allegations;
 - The requirements of the informal resolution process;
 - That parties have the right to withdraw from the process;
 - That the parties' agreement at the end would preclude moving forward with the grievance process;
 - The potential terms that may be requested or offered in an informal resolution agreement, including notice that the agreement is binding only on the parties;
 - What information will be maintained and how the information could be disclosed through the grievance procedures.



Terms of Resolution

- Potential terms that may be included in informal resolution agreement:
 - Restrictions on contact; and
 - Restrictions on respondent's participation in one or more of the district's programs or activities or attendance of specific events.
 - Includes restrictions the district could have imposed had the district determined at the conclusion of the process that sex discrimination occurred.



A Fair Grievance Process

A Fair Grievance Process

- Grievance process must be in writing.
- “Complaint” is oral or written request.
 - Complainant = an individual alleged to have been subjected to conduct or any person participating or attempting to participate in education program or activity at time of alleged sex discrimination.

34 C.F.R. §106.2.

- If no bias or conflict, decisionmaker may also be Title IX Coordinator or investigator.
- Establish prompt timeframes for major stages (evaluation, investigation, determination, appeal).



Basic Requirements

- Treat complainants and respondents equitably
- Require that any person designated as Title IX Coordinator, investigator, or decisionmaker not have a conflict of interest or bias
- Include a presumption that respondent is not responsible for alleged sex discrimination until a determination is made
- Establish reasonably prompt timeframes for the major stages of the process, including allowing extensions of timeframes.



Basic Requirements Cont.

- Take reasonable steps to protect the privacy of the parties and witnesses during the pendency of the grievance process
- Require an objective evaluation of all evidence that is relevant and not otherwise impermissible
- Provide credibility determinations
 - Must not be based on person's status as complainant, respondent, or witness
- Exclude impermissible evidence and questions seeking impermissible evidence
 - Defined in a later slide
- Articulate consistent principles for application of procedures



Complainant Defined

- Covers Two Situations:
 1. Student or employee alleged to have been subjected to conduct that could constitute sex discrimination.
 2. Someone else that is alleged to have been subjected to conduct that could constitute sex discrimination.
 - Only if they were participating or attempting to participate in program/activity at the time of the alleged sex discrimination.

34 C.F.R. 106.2



Complainant Defined Cont.

Who Can Report?	Report of Sex Discrimination	Report of Sex-based Harassment
Complainant	X	X
Parent, guardian, authorized legal representative	X	X
Title IX Coordinator	X	X
Any student or employee	X	
Any person who participated or attempted to participate in program/activity at time of alleged discrimination	X	



A Fair Grievance Process: Standard of Proof

- Default is “**preponderance of the evidence**” → “**more likely than not.**”
 - Exception: may use “**clear and convincing evidence**” standard if applied in all other comparable proceedings.
- Use one standard consistently for all Title IX Complaints.

34 C.F.R. 106.45(h)



A Fair Grievance Process: Notice Requirements

- Notice of allegations to “parties” after initiate grievance procedures.
 - Party= complainant or respondent
- Notice must include:
 - Any grievance processes
 - “Sufficient information available at the time” allowing parties to respond to allegations
 - Statement prohibiting retaliation
 - Right to equal opportunity to access relevant and not impermissible evidence (or accurate description of evidence)

34 C.F.R. 106.45(c)



A Fair Grievance Process: Notice Requirements

- Title IX is an exception to FERPA.
- Title IX complainant anonymous except where necessary for respondent to have due process rights for a fair grievance process.



Title IX Personnel: Duty to Serve Impartially

- Examine the particular facts of the situation and apply an objective common-sense approach to evaluating whether a particular person serving in a Title IX role is biased.
 - Assess actual or perceived conflicts of interest
 - Acknowledge possible biases
 - Assess ability to maintain neutrality, be fair and equitable, and remain objective
 - Avoid prejudgment of the issues



Investigation

Investigative Process

- Burden on district– not parties– to gather sufficient evidence.
- Equal opportunity for parties to present fact witnesses and other relevant evidence.
- Provide equal opportunity to access evidence or accurate description of evidence (with opportunity to request access to evidence).
- No gag orders.



Investigative Process

- Parties must be given **reasonable** opportunity to respond to the evidence or to the accurate description of the evidence.
- Decisionmaker determines whether sex discrimination occurred and provides written notice of determination and option to appeal to parties.



Determination of Responsibility

Determinations Of Responsibility

- Decisionmaker (DM) conducts credibility assessments if needed.

34 C.F.R. 106.45(g)

- Before determination, parties must have had equal opportunity to access relevant evidence (or description of evidence) and respond to the evidence.

34 C.F.R.106.45(b)(5)(vii)



Evidence

- Only relevant evidence may be considered.
- New rule excludes consideration of certain impermissible evidence:
 1. Privileged under federal or state law
 2. Records made or maintained by physician or other professional or paraprofessional for provision of treatment
 3. Complainant's sexual interests or prior sexual conduct, unless:
 - 1) Used to prove someone else committed conduct; or
 - 2) Used to prove consent and is evidence of complainant's sexual conduct with respondent

34 C.F.R. 106.45(b)(7)



Evidence

Rape Shield: Questions about complainant's sexual predisposition or sexual behavior are **generally irrelevant** except for specific purposes related to demonstrating that someone other than the respondent engaged in the alleged behavior or if specifically related to an issue of consent



Determinations Of Responsibility

- *New!* DM can be same person as Title IX Coordinator or Investigator.

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

- Written notice of determination provided to parties.
- No discipline until determination at the conclusion of grievance procedure that respondent engaged in prohibited sex discrimination.

34 C.F.R. 106.45(h)(3)



Determinations Of Responsibility

- If determination is that sex discrimination occurred, Title IX Coordinator must:
 - Implement any remedies to the complainant or other person(s)
 - Coordinate imposition of any disciplinary sanctions on respondent
 - Notify complainant of any disciplinary sanctions
 - Take appropriate and prompt steps to ensure sex discrimination does not continue or recur

34 C.F.R 106.45(h)(3)



Determinations Of Responsibility

- Written determination must include:
 - Determination of whether sex discrimination occurred
 - Rationale for determination
 - Procedures and permissible bases to appeal

34 C.F.R. 106.45(h)(2)



Dismissal

- Schools may dismiss a complaint if:
 - Unable to identify respondent
 - Respondent is not participating in education program or activity
 - Complainant voluntarily withdraws complaint
 - After clarifying with complainant, determine conduct does not constitute sex discrimination under Title IX
- Schools must give notice of dismissal and reason for dismissal (including right to appeal).



Appeals

Appeals- Dismissals

- Bases to appeal:

1. Procedural irregularity that would change outcome
2. New evidence
3. Conflict of interest with Title IX Coordinator, Investigator, or Decisionmaker

34 C.F.R. 106.45(d)(3)

- Procedural Requirements:

- Notify parties of appeal
- Implement equal appeal procedures for the parties
- DM for appeal did not take part in investigation or dismissal of complaint
- DM for appeal is trained
- Reasonable and equal opportunities for parties to make a statement in support of or challenging outcome
- Notify parties of the result of the appeal and rationale for result



Appeals- Determinations

- At a minimum, offer same appeal process for other comparable proceedings.

34 C.F.R. 106.45(i)

- Same bases apply, postsecondary institution may offer an appeal to the parties on additional bases, so long as they are applied equally.



Retaliation

Prohibited Retaliation

- The school district must prohibit retaliation including peer retaliation.
- New rule defines “retaliation” and “peer retaliation.”
- District must respond to information and complaints involving conduct that reasonably may constitute retaliation using the same procedures it uses for other forms of sex discrimination.



Recordkeeping

Recordkeeping Requirements

- Title IX Coordinator/District must maintain for a period of at least **seven years**:
 - For each complaint of sex discrimination, records documenting the informal resolution process or the grievance procedures.
 - For each notification, the Title IX Coordinator receives information about conduct that reasonably may constitute sex discrimination under Title IX, including notifications, records documenting the actions the recipient took to meet its obligations.
 - All materials used to provide training. A recipient must make these training materials available upon request for inspection by members of the public.



Training

New Training Requirements

- The new regulations require that all school employees receive training on:
 - (1) a school's obligation to address sex discrimination;
 - (2) conduct that constitutes Title IX sex discrimination, including sex-based harassment; and
 - (3) notice and reporting requirements.
- All other Title IX personnel will need role-specific training.



Questions?



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