

# Overview of Title IX

- Title IX prohibits discrimination on the basis of sex in education programs and activities that receive Federal financial assistance

# History of Title IX Regulations and Guidance

- 1975 – Department of Health, Education, and Welfare first promulgated regulations under Title IX
- 1997 Guidance
- 2001 Guidance
- 2011 Dear Colleague Letter
- 2014 Q&A
- 2017 Q&A
- 2020 – Department of Education adopted regulations effective August 14, 2020

# August 2020 Regulations Overview

- Specifies how schools must respond to allegations of sexual harassment
- Requires schools to address sexual harassment as a form of sex discrimination
- Obligates schools to respond promptly and supportively to persons alleged to be victimized by sexual harassment
- Requires allegations to be resolved promptly and accurately under a predictable, fair grievance process
- Clarifies and modifies Title IX regulatory requirements regarding remedies the Department of Education may impose for violations
- Requires designation of a Title IX Coordinator
- Requires dissemination of a school's non-discrimination policy and contact information for Title IX Coordinator
- Requires adoption of grievance procedures and grievance process
- Prohibits retaliation for exercise of rights under Title IX

## §106.6(g) – Parents and Guardians

- Nothing in Title IX can be read in derogation of any legal right of a parent or guardian to act on behalf of a complainant, respondent, party, or other individual, including but not limited to filing a formal complaint
- **What it means:** When a party is a minor, the party's parent/guardian has the legal right to act on behalf of the party. This means that the parent/guardian must be allowed to file a formal complaint on behalf of the student, although the student would be the "complainant."
  - **Must be permitted to accompany the student to meetings, interviews, and hearings**

## § 106.8(a) – Title IX Coordinator

- Schools must designate and authorize at least 1 employee to coordinate its efforts to comply with its responsibilities, who must be referred to as the “Title IX Coordinator”
- Schools must notify applicants, students, parents/guardians, employees, and all unions/professional organizations holding collective bargaining or professional agreements with the school of the following information pertaining to the Title IX Coordinator(s):
  - Name or title
  - Office address
  - Email address
  - Telephone number

## §106.8(a) – Reporting to Title IX Coordinator

- Any person can report sex discrimination, including sexual harassment, in person, by mail, by telephone, or by email, using the contact information the school lists for the Title IX Coordinator(s)
- Any person can report sex discrimination, including sexual harassment, by any other means that results in the Title IX Coordinator(s) receiving the person's verbal or written report
- A report can be made at any time by using the telephone number, by using the email address, or by mailing to the office address listed for the Title IX Coordinator(s)

# § 106.8(b)(2) – Contact Information for Title IX Coordinator and Non- Discrimination Policy

- School must prominently display the contact information required to be listed for the Title IX Coordinator(s) and its non-discrimination policy on its website, if any, and in each handbook or catalog that it makes available to students, parents/legal guardians, employees, and all unions or professional organizations holding collective bargaining or professional agreements with the school

## §106.8(c) – Grievance Procedures

- School must adopt and publish grievance procedures that provide for prompt and equitable resolution of student and employee complaints that complies with § 106.45 for formal complaints
- The grievance procedures and grievance process, including how to report or file a complaint of sex discrimination, how to report or file a formal complaint of sexual harassment, and how the school will respond, must be provided to students, parents or legal guardians, employees, and all unions or professional organizations holding collective bargaining or professional agreements with the school



# §106.8(d) – Application of Grievance Procedures and Grievance Process Outside of United States

- School's grievance procedures applicable to sex discrimination and grievance process applicable to sexual harassment **do not apply to persons outside of the United States**
- School is more than welcome to adopt anti-harassment and assault policies applicable to programs or activities located abroad

## § 106.30(a) – Actual Knowledge

- Actual knowledge – notice of sexual harassment or allegations of sexual harassment to:
  - Title IX Coordinator(s)
  - Any official of the school who has authority to institute corrective measures on behalf of the school
  - Any employee of an elementary or secondary school
- The mere ability or obligation to report sexual harassment or to inform a student about how to report sexual harassment, or having been trained to do so, does not qualify an individual as an official with authority to institute corrective measures
  - Example: Volunteer parent

## § 103.30(a) - Complainant

- Complainant – an individual who is alleged to be the victim of conduct that could constitute sexual harassment
  - No matter who reports the sexual harassment, the complainant is always the alleged victim

## § 106.30(a) – Formal Complaint

- Formal complaint – a document filed by a complainant or signed by the Title IX Coordinator(s) alleging sexual harassment against a respondent and requesting that the school investigate the allegation
  - A complainant must be participating in or attempting to participate in the education program or activity of the school with which the formal complaint is filed
  - It can be filed with the Title IX Coordinator(s) in person, by mail, by email, or by any additional method designated by the school
  - Filing of a formal complaint triggers the need for a school to investigate allegations and comply with its grievance process

## §106.30(a) - Respondent

- Respondent – an individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment
  - Student
  - Faculty member
  - Another employee of the school
  - Other person with or without affiliation with the school

## §106.30(a) – Sexual Harassment

- Sexual harassment – conduct on the basis of sex that satisfies 1 or more of the following:
  - An employee of the school conditioning the provision of an aid, benefit or service of the school on an individual’s participation in unwelcome sexual conduct
  - 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 program or activity
  - Sexual assault, dating violence, domestic violence, or stalking

## § 106.30(a) – Supportive Measures

- Supportive measures - non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, and without fee or charge to the complainant or the respondent before or after the filing of a formal complaint or where no formal complaint has been filed
  - Designed to restore or preserve equal access to the school's education program or activity without unreasonably burdening the other party
  - Can 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, increased security and monitoring of certain areas of the campus, and other similar measures
  - Title IX Coordinator(s) responsible for coordinating the effective implementation of supportive measures

## §106.44(a) – Response to Sexual Harassment

- If a school has actual knowledge of sexual harassment in one of its education programs or activities within the United States, it must respond promptly in a manner that is not deliberately indifferent
  - Actual knowledge – notice of sexual harassment or allegation of sexual harassment to Title IX Coordinator, any official of the school who has authority to institute corrective measures on behalf of the school, or to any employee of an elementary or secondary school
  - Education program or activity – locations, events, or circumstances over which the school exercises substantial control over both the respondent and the context in which the sexual harassment occurs
- Deliberately indifferent – school’s response is clearly unreasonable in light of the known circumstances
- Response must treat complainants and respondents equitably by offering supportive measures to a complainant
- Response must follow a grievance process before imposing any disciplinary sanctions or other actions that are not supportive measures against a respondent



## §106.44(a) – Response to Sexual Harassment

- Title IX Coordinator(s) 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 the availability of supportive measures with or without the filing of a formal complaint
  - Explain the process for filing a formal complaint

## § 106.44(c) – Response to Sexual Harassment

- A school may remove a respondent from the school's education program or activity on an emergency basis
  - Must undertake an individualized safety and risk analysis
  - Must determine that an immediate threat to the physical health or safety of any student or other individual arising from the allegations of sexual harassment justifies removal
  - Must provide the respondent with notice and an opportunity to challenge the decision immediately following the removal

# §106.45 – Grievance Process and Formal Complaints

- Once a formal complaint is filed, the school must follow its adopted grievance process

# §106.45(b)(1) – Grievance Process Requirements

- (1) Treat complainants and respondents equitably by providing remedies to a complainant where a determination of responsibility for sexual harassment has been made against the respondent, and by following a grievance process that complies with the regulations before the imposition of any disciplinary sanctions or other actions that are not supportive measures against a respondent
  - Remedies must be designed to restore or preserve equal access to the school's program or activity
  - Remedies can include supportive measures, but they need not be non-disciplinary or non-punitive and need not avoid burdening the respondent
- (2) Require an objective evaluation criteria of all relevant evidence and provide that credibility determinations cannot be based on a person's status as a complainant, respondent, or witness

# §106.45(b)(1) – Grievance Process Requirements

- (3) Require that any individual designated by the school as a Title IX Coordinator, investigator, decision-maker, or any person designated by the school to facilitate an informal resolution process, does not have a conflict of interest or bias for or against complaints or respondents generally or an individual complainant or respondent
  - Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process must receive training on:
    - Definition of sexual harassment
    - Scope of the school's education program or activity
    - How to conduct an investigation and grievance process
    - How to serve impartially
    - Issues of relevance to create an investigative report that fairly summarizes relevant evidence
  - Any training materials cannot rely on sex stereotypes and must promote impartial investigations and adjudications of formal complaints of sexual harassment

## §106.45(b)(1) – Grievance Process Requirements

- (4) Include a presumption that the respondent is not responsible for the alleged conduct until a determination regarding responsibility is made at the conclusion of the grievance process
- (5) Include reasonably prompt time frames for conclusion of the grievance process
  - Reasonably prompt time frames for filing and resolving appeals
  - Reasonably prompt time frames for informal resolution processes if offered by the school
  - Process that allows for the temporary delay of the grievance process or the limited extension of time frames for good cause with written notice to the complainant and the respondent of the delay or extension and the reasons for the action
    - Good cause – absence of a party, a party’s advisor, or a witness; concurrent law enforcement activity; need for language assistance or accommodation of disabilities

# §106.45(b)(1) – Grievance Process Requirements

- (6) Describe the range of possible disciplinary sanctions and remedies or list the possible disciplinary sanctions and remedies that the school can implement following any determination of responsibility
- (7) State whether the standard of evidence to be used is preponderance of the evidence or clear and convincing evidence
  - Apply the same standard for formal complaints against students as for formal complaints against employees
  - Apply the same standard to all formal complaints of sexual harassment
- (8) Include the procedures and permissible bases for the complainant and the respondent to appeal
- (9) Describe the range of supportive measures available to complainants and respondents
- (10) Not require, allow, rely upon, or otherwise use questions or evidence that constitute, or seek disclosure of, information protected under a legally recognized privilege, unless the person holding such privilege has waived

## §106.45(b)(2) – Notice to Parties

- Once a formal complaint is received, the school must provide the following written notice to the parties who are known:
  - Notice of the school’s grievance process, including any informal resolution process
  - Notice of the allegations of sexual harassment, including sufficient details known at the time and with sufficient time to prepare a response before any initial interview
    - Sufficient details: identities of the parties involved, if known; the conduct allegedly constituting sexual harassment; and the date and location of the alleged incident, if known
  - Statement that the respondent is presumed not responsible for the alleged conduct and that a determination regarding responsibility is made at the conclusion of the grievance process
  - Parties may have an advisor of their choice
  - Any provision in the school’s code of conduct that prohibits knowingly making false statements or knowingly submitting false information during the grievance process



## §106.45(b)(2) – Notice to Parties

- If during investigation, the school decides to investigate allegations about either the complainant or respondent that are not included in the notice sent to the parties, the school must provide notice of the additional allegations to the parties whose identities are known

## §106.45(b)(3) – Dismissal of Formal Complaint

- The school *must* investigate the allegations in a formal complaint
- When a school *must* dismiss a formal complaint:
  - Conduct alleged would not constitute sexual harassment
  - Conduct alleged did not occur in the school’s education program or activity
  - Conduct alleged did not occur against a person in the United States
- When a school *may* dismiss a formal complaint:
  - Complainant notifies the Title IX Coordinator in writing that he/she would like to withdraw the formal complaint or allegations contained therein
  - Respondent is no longer enrolled or employed by the school
  - Specific circumstances prevent the school from gathering evidence sufficient to reach a determination as to the formal complaint or allegations therein
- Dismissal *does not* prohibit the school from taking action under another provision of its code of conduct

## §106.45(b)(3) – Dismissal of Formal Complaint

- Upon dismissal of a formal complaint (either required or permitted), the school must promptly send written notice of the dismissal and reason(s) therefore simultaneously to the parties

## §106.45(b)(4) – Consolidation of Formal Complaints

- A school can consolidate formal complaints against more than one respondent, or by more than one complainant against one or more respondents, or by one party against the other party, where the allegations of sexual harassment arise out of the same facts or circumstances

## §106.45(b)(5) – Investigation and Grievance Process Requirements

- The school must ensure that the burden of proof and burden of gathering evidence to reach a determination regarding responsibility rest on the school and not on the parties
  - The school cannot access, consider, disclose or otherwise use a party's records made or maintained by a physician, psychiatrist, psychologist, or other recognized professional/paraprofessional acting in their capacity that are made and maintained in connection with the provision of treatment to the party, unless the party gives voluntary, written consent to do so for a grievance process
- The school must provide an equal opportunity for the parties to present witnesses
- The school cannot restrict the ability of either party to discuss the allegations under investigation or to gather and present relevant evidence

## §106.45(b)(5) – Investigation and Grievance Process Requirements

- The school must provide the parties with the same opportunities to have others present during any grievance proceeding
  - Can establish restrictions regarding the extent to which the advisor may participate in the proceedings, as long as the restrictions apply equally to both parties
- The school must provide written notice to a party whose participation is expected with sufficient time for the party to prepare to participate
  - Date
  - Time
  - Location
  - Participants
  - Purpose of hearing, investigative interview, or other meeting

## §106.45(b)(5) – Investigation and Grievance Process Requirements

- The school must provide both parties an equal opportunity to inspect and review any evidence obtained as part of the investigation that is directly related to the allegations raised in the formal complaint
- Prior to completion of the investigative report, the school must send to each party and the party's advisor, if any, the evidence subject to inspection and review in an electronic format or a hard copy, and the parties must have at least 10 days to submit a written response, which will be considered by the investigator
- The school must make all such evidence subject to the parties' inspection and review available at any hearing to give each party equal opportunity to refer to such evidence during the hearing

## §106.45(b)(2) – Investigation and Grievance Process Requirements

- The school must create an investigative report that fairly summarizes relevant evidence
- At least 10 days prior to a hearing or other time of determination regarding responsibility, the school must send to each party and the party's advisor, if any, the investigative report in an electronic format or a hard copy



## §106.45(b)(6) – Hearings

- The school's grievance process may, but need not, provide for a hearing
- Regardless, the school must still send the investigative report to the parties
- Before reaching a determination regarding responsibility, the decision-maker(s) must give 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, and allow for additional, limited follow-up questions from each party
- Questions and evidence about the complainant's prior sexual behavior are not relevant, unless offered to prove that someone other than the respondent committed the conduct alleged, or if the questions/evidence concern specific incidents of prior sexual behavior with the respondent and are offered to prove consent

## §106.45(b)(7) – Determination of Responsibility

- The decision-maker(s) must issue a written determination regarding responsibility and must apply the standard of evidence the school has adopted in its grievance process
- The decision-maker(s) cannot be the same person(s) as the Title IX Coordinator or the investigator(s)
- The written determination must be provided to the parties simultaneously
- The determination regarding responsibility becomes final either on the date that the school provides the parties with the written determination of the result of the appeal, if filed, or if no appeal is filed, on the date on which an appeal would no longer be considered timely

## §106.45(b)(7) – Written Determination Requirements

- The written determination must include:
  - (1) Identification of the allegations potentially constituting sexual harassment
  - (2) A description of the procedural steps taken from the receipt of the formal complaint through the determination
    - Notifications to the parties
    - Interviews with parties and witnesses
    - Site visits
    - Methods used to gather evidence
    - Hearings held
  - (3) Findings of fact supporting the determination
  - (4) Conclusions regarding the application of the school's code of conduct to the facts
  - (5) A statement of, and rationale for, the result as to each allegation
    - Determination regarding responsibility
    - Any disciplinary sanctions the school imposes on the respondent
    - Whether remedies designed to restore or preserve equal access to the school's education program or activity will be provided to the complainant
  - (6) The school's procedures and permissible bases for the complainant and respondent to appeal

## §106.45(b)(7) – Implementation of Remedies

- The Title IX Coordinator is responsible for effective implementation of any remedies imposed

## §106.45(b)(8) – Appeal Process

- The school *must* offer both parties an appeal from either a determination regarding responsibility or from a dismissal of a formal complaint or any allegations therein on the following bases:
  - Procedural irregularity that affected outcome
  - New evidence that was not reasonably available at the time the determination of responsibility or dismissal was made that could affect the outcome
  - The Title IX Coordinator, investigator(s), or decision-maker(s) had a conflict of interest or bias for or against complainant or respondents generally or the individual complainant or respondent that affected the outcome
- The school *may* offer an appeal to both parties on other bases

## §106.45(b)(8) – Appeal Process Requirements

- Whether the appeal is mandatory or discretionary, the school must:
  - Notify the other party in writing that an appeal has been filed and must implement appeal procedures equally for both parties
  - Ensure that the decision-maker(s) for the appeal is not the same person as the decision-maker(s) that reached the determination regarding responsibility or dismissal, the investigator(s), or the Title IX Coordinator
  - Ensure that the decision-maker(s) for the appeal complies with conflict of interest/bias standards
  - Give both parties a reasonable, equal opportunity to submit a written statement in support of, or challenging, the outcome
  - Issue a written decision describing the result of the appeal and the rationale for the result
  - Provide the written decision simultaneously to both parties

## §106.45(b)(9) – Prohibition of Waiver and Informal Resolution Process

- The school cannot require as a condition of enrollment/continuing enrollment, employment/continuing employment, or enjoyment of any other right, waiver of the right to an investigation and adjudication of formal complaints of sexual harassment
- The school cannot require the parties to participate in an informal resolution process and cannot offer an informal resolution process unless a formal complaint has been filed
- However, prior to reaching a determination regarding responsibility, the school may facilitate an informal resolution process if the school:
  - Provides written notice to the parties disclosing the allegations, the requirements of the informal resolution process, and any consequences resulting from participating in the informal resolution process
  - Obtains the parties' voluntary, written consent to the informal resolution process
  - Does not offer or facilitate an informal resolution process to resolve allegations that an employee sexually harassed a student

## §106.45(b)(10) – Maintaining Records

- The school must maintain the following records for a period of 7 years:
  - Each sexual harassment investigation
    - Any determination regarding responsibility
    - Any disciplinary sanctions imposed on the respondent
    - Any remedies provided to the complainant designed to restore or preserve equal access to the school's education program or activity
  - Any appeal and the result therefrom
  - Any informal resolution and the result therefrom
  - All materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process
    - Materials must be publicly available on school's website
    - If the school does not have a website, they must be available upon request for inspection by members of the public



## §106.45(b)(10) – Maintaining Records of School’s Response

- For each response that the school is required to take once notified of an allegation of sexual harassment, the school must create, and maintain for 7 years, records of any actions taken in response to a report or formal complaint of sexual harassment
  - Should include any supportive measures offered
  - Must document the basis for its conclusion that its response was not deliberately indifferent
  - Must document that it has taken measures designed to restore or preserve equal access to the school’s education program or activity
  - If no supportive measures are provided to the complainant, the school must document why such a response was not clearly unreasonable in light of the known circumstances

## §106.71(a) – Retaliation Prohibited

- The school or any other person cannot intimidate, threaten, coerce, or discriminate against an individual for the purpose of interfering with any right or privilege under Title IX or because the individual made a report or complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing
  - Includes charges against an individual for code of conduct violations that do not involve sex discrimination or sexual harassment, but arise out of the same facts or circumstances as a report or complaint of sex discrimination, or report or formal complaint of sexual harassment, for the purpose of interfering with any right or privilege secured by Title IX or its implementing regulations
- The school must keep confidential the identity of any individual who has made a report or complaint of sex discrimination, any complainant, any individual who has been reported to be the perpetrator of sex discrimination, any respondent, and any witness
  - Unless permitted by FERPA, required by law, or to conduct an investigation, hearing, or judicial proceeding arising under Title IX

## §106.71(b)(2) – Code of Conduct Violation

- Charging an individual with a code of conduct violation for making a materially false statement in bad faith in the course of a grievance proceeding is not retaliation
- A determination regarding responsibility alone *is not sufficient* to conclude that any party made a materially false statement in bad faith

## Example of Retaliation

- If a school punishes a complainant or respondent for underage drinking, arising out of the same facts or circumstances as the report or formal complaint of sexual harassment, then such punishment constitutes retaliation if the punishment is for the purpose of interfering with any right or privilege secured by Title IX or its implementing regulations
- If a school always takes a zero tolerance approach to underage drinking in its code of conduct and always imposes the same punishment for underage drinking, irrespective of the circumstances, then imposing such a punishment would not be “for the purpose of interfering with any right or privilege secured by” Title IX or these final regulations and thus would not constitute retaliation under these final regulations.

# Response Overall

- (1) The school has actual knowledge of sexual harassment in its education program or activity against a person within the United States
  - Title IX Coordinator
  - Official who has authority to institute corrective measures on behalf of the school
  - Any employee of an elementary and secondary school
- (2) The school must respond promptly in a manner that is not deliberately indifferent
  - Must offer supportive measures to a complainant
  - Must follow a grievance process before imposing disciplinary sanctions or actions against a response
- (3) The Title IX Coordinator must promptly contact the complainant
  - Availability of supportive measures
  - Consider wishes for supportive measures
  - Inform complainant of availability of supportive measures with or without formal complaint
  - Explain process of filing formal complaint
- (4) If a formal complaint is filed, the school must follow its grievance process and must investigate the allegations contained therein