



New Title IX Regulations

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JUNE 17, 2020

Title IX Overview

Title IX of the Education Act Amendments of 1972 provides:

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

20 U.S.C. 1681(a)

How did we get here?

April 4, 2011 – DOE issues Dear Colleague Letter (DCL) directing institutions to revise grievance procedures and disciplinary processes to address campus sexual violence and ensure equal access to educational opportunity.

September 2017 - DOE rescinds April 2011 DCL and related 2014 FAQ.

November 2018 - DOE issues Notice of Proposed Rule Making (NPRM) that shift focus to protection of Respondent's due process rights.

Over 125,000 comments submitted on NPRM by February 2019.

March 2020 - COVID 19 paralyzes nation.

May 22, 2020 – DOE formally issues final Rule.

Effective Date

August 14, 2020

Washington State has joined multi-state lawsuit seeking to enjoin implementation. Assuming court grants relief, injunction not likely to issue until late July at the earliest.

New Rule Overview

Imposes procedural requirements intended to protect complainants and respondents from discriminatory practices.

Narrowly defines sexual harassment for purposes of Title IX and imposes new jurisdiction requirements.

Formal written complaint necessary to trigger investigation.

Requires live hearings for employees and students.

Imposes new evidentiary requirements.

Requires training for all persons administering Title IX grievance and disciplinary procedures

Policy Changes for Colleges

Policy-making necessary in three areas:

- Revised Title IX Grievance (investigation) Procedures,
- Revised Title IX Student Conduct Code Provisions and Procedures, and
- Adoption of New Title IX Employee Discipline Procedures.

Title IX Student Conduct provisions subject to formal rulemaking under Washington's Administrative Procedure Act.

To meet August 14, 2020 deadline – institutions will need to employ emergency rulemaking process for student conduct code revisions.

Narrows Institutional Obligation to Act

To comply with Title IX, College's response must be **prompt** and **not deliberately indifferent**

- Deliberate indifference means "clearly unreasonable in light of known circumstances."

College can only be held responsible if it has **actual knowledge** of Title IX sexual harassment.

- "Actual knowledge" means "notice of sexual harassment or allegations of sexual harassment" to the Title IX Coordinator or "any official . . . who has the authority to institute corrective action." That institution knew or reasonably should have known about allegations through other sources is not sufficient to impute liability.
- Complainant's "reasonable belief" that employee has authority to address the matter not sufficient to trigger Title IX obligations.

NOTE: Institutions may impose their own mandatory reporting requirements that are broader than Title IX. In fact, failure to do so may result in liability under Title VII or WLAD.

New Grievance & Disciplinary Procedures

"Grievance Procedure" = opening and conducting investigation. Process is overseen by Title IX Coordinator, who may also serve as the investigator. Final product is an investigation report.

"Disciplinary Procedure" = imposition of discipline against a student or an employee.

- Student discipline is usually "overseen" by the Student Conduct Officer. Determinations of responsibility for violations are decided by the Student Conduct Committee.
- Employee discipline is usually imposed by the Appointing Authority subject to employment contracts and CBAs. New disciplinary body will need to be created to comply with Title IX Rule.

Many colleges adopted unified grievance procedure applying prior Title IX guidance for **all protected class discrimination claims**.

Unified grievance procedure **probably no longer practical** – recommending adoption of separate Title IX grievance procedure.

Title IX Jurisdiction

New grievances triggered by written complaint submitted by Complainant or signed by the Title IX coordinator.

Title IX does not apply to alleged misconduct occurring outside the United States.

Title IX does not apply to alleged misconduct occurring outside college educational programs and activities.

Sexual Harassment is Narrowly Defined

Quid pro quo harassment. A college **employee** conditioning the provision of an aid, benefit, or service of the College on an individual's participation in unwelcome sexual conduct.

Hostile environment. Unwelcome conduct that a reasonable person would find to be so severe, pervasive, **and** objectively offensive that it effectively denies a person equal access to the College's educational programs or activities, or College employment.

Sexual Harassment (cont.)

Sexual assault.

- **Nonconsensual sexual intercourse.** Any actual or attempted sexual intercourse (anal, oral, or vaginal), however slight, with any object or body part, by a person upon another person, that is without consent and/or by force. Sexual intercourse includes anal or vaginal penetration by a penis, tongue, finger, or object, or oral copulation by mouth to genital contact or genital to mouth contact.
- **Nonconsensual sexual contact.** Any actual or attempted sexual touching, however slight, with any body part or object, by a person upon another person that is without consent and/or by force. Sexual touching includes any bodily contact with the breasts, groin, mouth, or other bodily orifice of another individual, or any other bodily contact in a sexual manner.
- **Incest.** Sexual intercourse or sexual contact with a person known to be related to them, either legitimately or illegitimately, as an ancestor, descendant, brother, or sister of either wholly or half related. Descendant includes stepchildren, and adopted children under the age of eighteen (18).
- **Statutory Rape.** Consensual intercourse between a person who is eighteen (18) years of age or older, and a person who is under the age of sixteen (16).

Sexual Harassment (cont.)

- **Domestic violence.** Physical violence, bodily injury, assault, the infliction of fear of imminent physical harm, sexual assault, or stalking committed by a person with whom the victim shares a child in common, by a person who is cohabitating with or has cohabitated with the victim as a spouse, by a person similarly situated to a spouse of the victim under the domestic or family violence laws of State of Washington, or by any other person against an adult or youth victim who is protected from that person's acts under the domestic or family violence laws of the State of Washington, RCW 26.50.010.
- **Dating violence.** Physical violence, bodily injury, assault, the infliction of fear of imminent physical harm, sexual assault, or stalking committed by a person (i) who is or has been in a social relationship of a romantic or intimate nature with the victim; and (ii) where the existence of such a relationship shall be determined based on a consideration of the following factors:
 - (a) The length of the relationship;
 - (b) The type of relationship; and
 - (c) The frequency of interaction between the persons involved in the relationship
- **Stalking.** Engaging in a course of conduct directed at a specific person that would cause a reasonable person to (i) fear for their safety or the safety of others; or (ii) suffer substantial emotional distress.

Discretionary Dismissal of TIX Allegations

Title IX allegations **may be dismissed** at College's discretion when:

- Complainant provides written request to withdraw the Formal Complaint in whole or in part;
- Respondent is no longer student or employee of the College; or
- Specific circumstances prevent the College from gathering evidence sufficient to complete investigation of the Title IX allegations in whole or in part.

Mandatory Dismissal of TIX Allegations

Title IX allegations **must be dismissed** when the alleged misconduct:

- Took place outside the United States.
- Did not take place during an institution's educational program or activity.
- Does not meet the elements of sexual harassment as defined in the regulations.

Education Program or Activity

“Education Program or Activity” means:

Locations, events, or circumstances over which the College exercised substantial control over both the respondent and the context in which the alleged sexual harassment occurred. This definition includes any building owned or controlled by a student organization that is officially recognized by the College.

Examples Where Dismissal Required

Dismissal required if investigation determines alleged misconduct:

- Took place in off-campus housing.
- Occurred overseas during study abroad.
- Does not meet the definition of “sexual harassment,” e.g.:
 - Hostile environment was objectively offensive and pervasive, but not severe.
 - Hostile environment was objectively offensive and severe, but not pervasive.
 - Quid pro quo harassment was perpetrated by a student, rather than an employee.

What Happens if a Title IX Claim is Dismissed?

College must provide both parties written notice with explanation of dismissal.

Investigation and discipline may proceed if the allegations other conduct policies.

If so, College can dismiss Title IX and pursue other conduct violations using standard investigation and disciplinary procedures.

Important: College should identify and notify parties of other conduct violations in Notice of Investigation to minimize delay and confusion if Title IX charges are dismissed.

More Protective Federal & State Laws

Other federal and state laws prohibiting gender discrimination are more expansive than DOE's narrow reading of Title IX jurisdiction and sexual harassment.

Colleges face liability if they fail to adequately address employee and student misconduct that violates these other laws.

Imposing discipline for violation of other laws may not require Title IX procedural safeguards.

Other Gender Discrimination Laws

Title VII of the Civil Rights Act of 1964 – prohibits employers from discriminating on the basis of gender. Imposes hostile workplace liability if unwanted behavior is so “severe **or** pervasive” to a reasonable person as to alter terms or conditions of employment.

Gender Equality in Education, Chapter RCW 28B.110.010:

“[D]iscrimination on the basis of gender against any student in the institutions of higher education of Washington state is prohibited.”

Enforced under Washington’s Law Against Discrimination.

Washington’s Law Against Discrimination (WLAD)

WLAD also prohibits sexual harassment in the workplace – unwanted conduct must be severe **or** pervasive enough to be objectively offensive.

- RCW 49.60.180, *Glasgow v. Georgia Pac. Corp.*
 - Employer directly liable if harassment committed by manager, owner, or supervisor.
 - Liability for co-worker harassment imputed to employer if employer knew or reasonably should have known and failed to take reasonably prompt, adequate corrective action.
- RCW 49.60.180, *Larose v. King County* - public defender stalked by a criminal defendant/client – employer responsible for harassment if it knew or should have known about harassment and failed to take reasonably prompt, adequate corrective action.
- RCW 49.60.215, *Floeting v. Group Health Coop.* – employee harasses client – employer directly responsible for harassment of customer/client by employee regardless of knowledge or opportunity to take corrective action – single discriminatory act sufficient for violation.

Formal Complaint Required

“Formal complaint” - written submission from complainant or signed written statement from Title IX coordinator. Must be filed before College can pursue either formal or informal resolution processes.

At time of filing, **Complainant must be participating in or attempting to participate in a College education program or activity.**

“Formal resolution” - full investigation subject to grievance procedure.

“Informal resolution” - mediation, structured dialogue, voluntary alternative dispute resolution – parties may withdraw from process at any time – results in written, binding agreement between both parties and the College. May not be used to resolve allegations in which an employee sexually harasses a student.

Non-Title IX Offenses

Hostile Workplace Title IX – severe, persistent **and** objectively offensive.

Hostile Workplace Title VII – severe **or** pervasive enough to be objectively offensive.

Hypothetical: Student Respondent shows sexually explicit images and lewdly propositions Student Complainant after class. No evidence that respondent has engaged in this behavior before or since.

Title IX investigation dismissed. Why?

Does the College have alternative basis for pursuing discipline?

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New Investigation Procedures

Presumption that Respondent is not responsible for violation until investigation and disciplinary proceedings are completed.

College bears the burden of gathering and presenting evidence establishing responsibility, not the parties.

Complainant and Respondent to be treated “equitably.”

- Complainant receives “equitable” treatment through application of specified Title IX grievance and disciplinary proceedings.
- Respondent receives “equitable” treatment through imposition of procedural safeguards imposed on grievance and disciplinary proceedings.

Results of investigation (and disciplinary process) shall be based on relevant evidence, including both inculpatory and exculpatory evidence.

New Investigation Procedures

No gag orders on either party. Parties free to interview potential witnesses and collect evidence without restraint.

Investigation/discipline process must be completed within a reasonable timeframe, but may be subject to temporary delays and extensions for good cause shown with notice to parties. Examples of good cause include a party, party's advisor, or witness not being available, concurrent law enforcement activity, or the need to acquire language assistance or implement reasonable accommodations for a disability.

Parties allowed to have advisor of their choosing attend investigation interviews and meetings, but College may restrict advisor role during the investigation, *e.g.*, prohibit advisor from actively advocating for party during interview – restrictions must apply equally.



Investigation Notice Requirements

Both parties must receive investigation notice that:

- Describes the grievance procedure, including informal resolution procedures;
- Identifies the parties;
- Provides the date and location of the alleged incident;
- Describes the alleged misconduct with sufficient particularity for Respondent to prepare a response before initial interview;
- Identifies what type of sexual harassment under Title IX is being alleged;
- Describes the scope of possible disciplinary sanctions that may be imposed should the respondent be found responsible;
- Affirms that Respondent is presumed not responsible;
- Explains that parties may inspect and review evidence gathered by investigator;
- Informs parties they may have an advisor of their choice, who may be an attorney.
- Explains that persons making false statements during the grievance process are subject to discipline.



Notice of Interviews and Meetings

College must provide parties with advance written notice of interviews, meetings, or other proceedings related to the Title IX allegations to provide sufficient time for party to prepare to participate.

Notices must include date, time, location, participants, and purpose of meeting, interview, or proceeding.

Restrictions on Privileged Information

Privileged information = communications between parties that is confidential and not admissible in court absent an express waiver by the party holding the privilege.

Examples include:

- Attorney Client Communications / Attorney Work Product
- Spousal/Marital Privilege
- Priest/Chaplin Communications
- Medical Provider Communications
- Mental Health Care Provider Communications
- Sexual Assault and Domestic Violence Advocate Communications

Rule prohibits Title IX Administrators (Title IX Coordinator, Investigators, Student Conduct Officers, Student Conduct Committees, etc.) from requiring, allowing, relying upon, or otherwise using questions or evidence that seeks disclosure of privileged communications, **unless the privilege has been effectively waived by the holder.**

Final Investigation Report

Before final report issues, investigator must share draft report and all evidence with both parties **and their respective advisors**.

Parties receive **10 days to submit written comments on draft report and evidence** to investigator. Investigator must consider parties' submissions when drafting final report.

After final report issues, parties receive **additional 10 days to review final report and evidence** and submit written comments. No disciplinary hearing can be scheduled before this period has elapsed.

Title IX Disciplinary Procedures

Procedures only applies to "sexual harassment" as defined by Title IX regs and only if alleged incident occurred in United States during an education program or activity.

A live hearing before a neutral decision maker to determine responsibility is required.

Complainant must be authorized to appear as a party with a right to appeal.

All questioning on behalf of parties must be conducted by advisor of party's choice. If party does not choose an advisor, the College may select one of its own choosing to represent party.

College bears the burden of proving responsibility by a preponderance of the evidence.

Evidentiary Restrictions

Decision maker prohibited from considering testimony or statements for purposes of determining responsibility, unless there is opportunity to cross-examine the person making the statement during live hearing.

Decision maker may not draw inference regarding responsibility solely on a party's or witness's absence from the hearing or refusal to answer questions.

Decision maker responsible for ensuring that all questions are relevant. Decision maker must explain on the record why question excluded based on lack of relevance.

Evidentiary Restrictions (cont.)

Questions or evidence regarding Complainant's sexual predisposition or prior sexual behavior are not relevant and must be excluded, unless the question or evidence:

- Is offered to prove someone other than Respondent committed the alleged misconduct, or
- Concerns specific incidents of prior sexual behavior between Complainant and Respondent, which are offered on the issue of consent.

Inquiries regarding privileged communications prohibited, unless person holding privilege has waived the privilege.

Initial Order

In addition to findings of fact and conclusions, must:

- Identify the allegations possibility constituting sexual harassment.
- Describe the grievance and disciplinary procedures, starting with filing of the formal complaint through the determination of responsibility, including notices to parties, interviews with witnesses and parties, site visits,
- Include a statement of, and rationale for, the Committee's determination of responsibility for each allegation, including a determination of responsibility, any disciplinary sanction or conditions imposed against the Respondent, and **whether College will provide to complainant remedies designed to restore or preserve Complainant's equal access to the College's education programs or activities.**
- The Initial Order must be served on all parties simultaneously.

Appeals

Complainant and Respondent have right to appeal

- Finding of Responsibility, and
- Dismissal of Title IX claim (unclear whether this applies to dismissals during investigations).

Rules allow, **but do not require**, Colleges to limit grounds for appeal to:

- Procedural irregularity that affected the outcome of the proceedings;
- New evidence that was not reasonably available at the time of the determination of responsibility or dismissal, that would have affected the outcome of the proceedings; or
- Title IX administrators (Title IX Coordinator, investigator, decision makers, had a conflict of interest against complainants or respondents generally, or individual respondent or complainant in particular, that affected the outcome of the proceeding.

Other Issues

All Title IX administrators must be trained on grievance and hearing processes, applicable evidentiary standards, and avoiding conflicts of interest and bias.

Retaliation against parties or witnesses for participating in Title IX proceedings is prohibited and punishable under anti-retaliation provisions of employee and student codes – retaliation is not a Title IX violation

Colleges required to appoint at least one Title IX Coordinator, and post and disseminate notices regarding filing complaints, grievance procedure, and disciplinary processes.