

Preparing for Implementation of the New Title IX Final Rule: Compliance and Risk Management Considerations

Presented by
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Overview

- Final Rule published 5-19-2020 (85 Fed Reg 30026)
- Effective **August 14, 2020**
- Amends 34 CFR Part 106
- 2011 Q&A and 2001 OCR guidance remain good to the extent consistent with Final Rule
- Enforcement: OCR (resolution agreements and Title IV participation) and private (courts)

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Basic Title IX Obligations Unchanged

1. Designation of Title IX Coordinator responsible for implementation and investigation
2. Publication and Dissemination of Notice of Nondiscrimination Based on Sex
3. Publication and Dissemination of a “Prompt and Equitable Grievance Procedure” applicable to students and employees

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Publication and Dissemination

- Title IX Coordinator information and nondiscrimination policy must be [posted on website and in each handbook or catalog](#) provided to prospective/current students and employees
- Copy of [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 distributed to all prospective/current students and employees
- All materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process must be posted to the website
- A school must not use or distribute a publication stating that the school treats applicants, students, or employees differently on the basis of sex except as such treatment is permitted by title IX – examine materials used in Title IX policy and process for potential “bias” statements

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School's Response

- School must respond when:
 - The school has actual knowledge of sexual harassment
 - That occurred within the school's education program or activity
 - Against a person in the United States (no study abroad programs)
 - School violates Title IX when its response to sexual harassment is clearly unreasonable in light of the known circumstances (deliberate indifference)
 - Supportive Measures: Title IX Coordinator must promptly contact the complainant confidentially 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, and explain to the complainant the process for filing a formal complaint.
 - Schools must investigate every formal complaint (which may be filed by a complainant or by a school's Title IX Coordinator). If the alleged conduct does not fall under Title IX, then a school may address the allegations under the school's own code of conduct and provide supportive measures.

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Actual Knowledge

- A school's Title IX response obligation is based on “actual knowledge” of sexual harassment
 - Notice of sexual harassment or allegations of same to the Title IX Coordinator or [any official of the school who has authority to institute corrective measures on behalf of the school](#) (“designated official”) (or to any employee of an elementary and secondary school).
 - No more “should have known” standard (constructive notice).
 - This standard is not met when the only designated official is the respondent.

Action Item: Define your designated officials who will have authority to institute corrective measures. Clarify their roles, Title IX Coordinator reporting obligations and relationship with Clery reporting and Campus Security Authorities. Consider the legal and community risk/benefits of narrowing your current “responsible employees” to designated officials. Consider the benefits/risks of preserving confidentiality for a narrower group of designated officials. The Department notes that “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 one who has authority to institute corrective measures on behalf of the recipient.”

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Title IX Coordinator Role

- At least one employee
- **Notify** applicants for admission and employment, students, parents or legal guardians of elementary and secondary school students, employees, and all unions or professional organizations holding collective bargaining or professional agreements with the school, of the name or title, office address, electronic mail address, and telephone number of the employee or employees designated as the Title IX Coordinator.
- Any person may report sex discrimination, including sexual harassment (whether or not the person reporting is the person alleged to be the victim of conduct that could constitute sex discrimination or sexual harassment).
- **New:** Title IX Coordinator is responsible for coordinating the effective implementation of supportive measures. Coordinator 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, and explain to the complainant the process for filing a formal complaint.

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Sexual Harassment – New Definition

Means conduct on the basis of sex that satisfies one or more of the following:

- (1) 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;
- (2) 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 recipient's **education program or activity**; or
- (3) "Sexual assault" as defined in 20 U.S.C. 1092(f)(6)(A)(v), "dating violence" as defined in 34 U.S.C. 12291(a)(10), "domestic violence" as defined in 34 U.S.C. 12291(a)(8), or "stalking" as defined in 34 U.S.C. 12291(a)(30).

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Action Items

- Update your Title IX policies and procedures to incorporate the new Title IX sexual harassment definition. There will be more situations where conduct presented does not meet the new definition of sexual harassment – limiting school response obligation under Title IX.
- However, schools have the flexibility to address that conduct through its other disciplinary procedures and codes of conduct.
- Assess your current disciplinary procedures to determine how conduct that does not rise to the level of a Title IX sexual harassment will be handled. Have a conversation about your campus culture, current practices, and goals.
- You can use the Title IX grievance procedure or another procedure.
- Assess state law requirements: ED acknowledges that State laws may exceed the requirements in these final regulations as long as State laws do not conflict with the Title IX final rule definitions (106.30), response obligations (106.44) and grievance procedures (106.45).

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Education Program or Activity

- *Response standard: a School with actual knowledge of sexual harassment in an **education program or activity** of the recipient against a person in the United States, must respond promptly in a manner that is not deliberately indifferent*
- “Education program or activity” includes locations, events, or circumstances over which the recipient exercised substantial control over both the respondent and the context in which the sexual harassment occurs, and also includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution.
- **Action Item:** For an understanding of the geographic footprint of your Title IX obligations, define your “education program and activity” footprint

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Person in the United States

- A school's response obligations, including Title IX grievance process requirements, only “apply only to sex discrimination occurring against a person in the United States”
- **Action Item:** Consider whether to maintain the same Title IX grievance procedure requirements for persons outside the United States and whether to maintain the same non-Title IX grievance procedures for persons outside the United States. Expect most schools to maintain for all students and employees regardless of location.

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Deliberate Indifference

- A school must respond promptly in a manner that is not deliberately indifferent.
- A school is deliberately indifferent only if its response to sexual harassment is **clearly unreasonable in light of the known circumstances (reasonableness standard)**
- **Counseling Points:**
 - The Department states in regulation that a school that restricts First Amendment and Due Process rights can be deemed to have failed the “deliberate indifference” test. This matters for implementation of grievance process requirements and protection of free speech and due process rights of the responded and complainant.
 - Where no formal complaint is filed triggering the Title IX grievance procedure, but the school has actual knowledge of sexual harassment, the school must still respond without deliberate indifference. Our read of the rule is that providing supportive measures in conformance with the rule will be strong evidence that the school acted reasonably.

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Complainant

- Complainant means “an individual who is alleged to be the victim of conduct that could constitute sexual harassment”.
- If a parent or legal guardian has a legal right to act on behalf of a “complainant,” “respondent,” “party,” or other individual, that person may do so, including but not limited to filing a formal complaint.” Without such legal rights, only the alleged victim may file a formal Title IX complaint.
- **Action Item:** Assess your policies and procedures as to who may initiate a grievance process – Title IX and other procedures you will maintain for other conduct
- Note that ANY PERSON may report sex discrimination, including sexual harassment (whether or not the person reporting is the person alleged to be the victim of conduct that could constitute sex discrimination or sexual harassment) to the Title IX Coordinator. Only a complainant may file a formal complaint that initiates a Title IX grievance procedure however.
- **Action Item:** Reporting sex discrimination does not need to be discouraged even though only complainants may file formal complaints for Title IX purposes. A school’s other grievance procedures can address those issues.

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Supportive Measures

- Non- disciplinary, non-punitive; individualized services offered as appropriate; as reasonably available
- 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 education program or activity without unreasonably burdening the other party and to protect the safety of all parties, the school's educational environment, or deter sexual harassment.
- May 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.

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Supportive Measures (continued)

- School must maintain as confidential any supportive measures provided to the complainant or respondent, to the extent that maintaining such confidentiality would not impair the ability of the school to provide the supportive measures.
- Title IX Coordinator is responsible for coordinating the effective implementation of supportive measures. Must be given before sanctions in any grievance procedure are imposed.
- **Action Item:** Review current “interim measure” policies and conform to “supportive measures” definition. Understand this is now a legal requirement, and ED has given great weight to supportive measures being essential to Title IX compliance. There are increased mutuality requirements and expanded requirements regarding when to provide such measures.

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Title VII

“Nothing in this part may be read in derogation of any individual’s rights under title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e et seq. or any regulations promulgated thereunder.”

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Training

- Any individual designated as a Title IX Coordinator, investigator, decision-maker, or any person designated by the school to facilitate an informal resolution process, must not have a **conflict of interest or bias** for or against complainants or respondents generally or an individual complainant or respondent. Training must include how to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias.
- A school must ensure that Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process, receive training on the **definition of sexual harassment in §106.30, the scope of the school's education program or activity, how to conduct an investigation and grievance process including hearings, appeals and informal resolution.**

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Training

- A school must ensure that decision-makers receive training on any technology to be used at a live hearing and on issues of relevance of questions and evidence, including when questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant.
- A school must ensure that investigators receive training on issues of relevance to create an investigative report that fairly summarizes relevant evidence. Any materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process, must not rely on sex stereotypes and must promote impartial investigations and adjudications of formal complaints of sexual harassment.

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Fair Grievance Process



BUT FIRST...

A moment of Zen.



Fair Grievance Process

- Grievance process follows the filing of a “formal complaint”
- Supportive measures must be offered (to both parties) regardless of whether a formal complaint is filed
- Emergency removal of respondent is permitted, but post-removal due process protections must be provided
- Mandatory administrative leave allowed for employee respondents

Fair Grievance Process: Required Elements

- Grievance process must comply with certain requirements
- Any additional institutional procedures must apply to both parties equally
- Department may not find a violation solely on the basis that it would have reached a different conclusion

Fair Grievance Process: Conflicts and Bias

- All persons involved in grievance process
 - Must be free from conflicts of interest or bias against the respondent individually or respondents in general
 - Must receive training on:
 - Definition of sexual harassment
 - How to conduct an investigation and the grievance process
 - How to serve impartially
 - How to make relevancy determinations
 - All training materials must avoid sex stereotypes and promote impartial investigation and adjudication

Fair Grievance Process: Overview

- Basic elements:
 - Formal Complaint
 - Investigation
 - Live Hearing
 - Appeal
 - Implementation of Remedies
 - Informal Resolution

Fair Grievance Process: Ten Basic Elements

1. Treat both parties equally
2. Require objective evaluation of all evidence
3. All persons involved in process must be free of bias and conflicts of interest and must be trained
4. Presumption of “innocence” for respondents
5. Prompt timeframe for conclusion of grievance process

Fair Grievance Process: Ten Basic Elements

6. List possible remedies and disciplinary sanctions
7. State the standard of proof (preponderance or clear & convincing) and apply the same standard to all complaints
8. Provide for bases of appeal
9. Describe the available supportive measures
10. Preclude questions that violate a legally recognized privilege

Fair Grievance Process: Notice of Allegations

- After receiving a formal complaint
- Institution must provide notice to the parties of:
 - The Grievance Process
 - The allegations, including specific information
 - Parties must be given right to an advisor- need not be a lawyer
 - If additional allegations are investigated, new notice must be given

Fair Grievance Process: Dismissals

- Institution must dismiss any complaint that:
 - Does not constitute sexual harassment;
 - Did not occur in the program or activity; or,
 - Did not occur against a person in the United States.
- Institution may dismiss a complaint if:
 - Complainant withdraws the complaint
 - Respondent is no longer enrolled or employed
 - Circumstances prevent institution from investigating
- Dismissal does not prevent action under code of conduct

Fair Grievance Process: Consolidation

- Complaints against multiple respondents or by multiple complainants may be consolidated
- Contemplates situations where the complaints arise out of the same facts or circumstances

Fair Grievance Process: Investigation

- In conducting an investigation the institution must:
 - Ensure the burden of proof remains with the institution
 - Provide equal opportunity to the parties to present evidence
 - Not restrict the ability of the parties to discuss allegations
 - Provide parties the opportunity to have an advisor present
 - Provide notice to parties of all hearings, interviews, and meetings where they are expected to participate
 - Provide equal and meaningful access to evidence
 - Create an investigative report that fairly summarizes the evidence 10 days prior to any hearing

Fair Grievance Process: Hearings

- Postsecondary institutions must provide a live hearing
- Requirements for a live hearing include:
 - Opportunity for parties' advisors to examine and cross-examine witnesses, including challenging the credibility of witnesses
 - Examinations must be direct, oral, and in real time
 - Parties may be required to stay in separate rooms with a live video+audio connection
 - Only relevant questions may be asked; prior sexual conduct is not relevant

Fair Grievance Process: Hearings

- More live hearing requirements:
 - Institution must provide an advisor at no charge if a party does not have one
 - Decision-maker may not rely on a statement by a party or witness if they do not submit to cross-examination
 - Decision-maker may not draw an inference based solely on a refusal to testify
 - Institution must create a record of the hearing- video, audio, or transcript

Fair Grievance Process: Hearings

- Elementary and secondary schools have different hearing requirements:
 - No live hearing required
 - Each party must have opportunity to submit written questions of witnesses
 - Answers from witnesses must be provided to parties
 - Prior sexual conduct of complainant is not relevant

Fair Grievance Process: Determination

- Decision-maker must be someone other than the Title IX Coordinator
- Decision-maker may be more than one person
- Decision-maker must issue a written determination of responsibility using

Fair Grievance Process: Determination

- Written determination of responsibility must:
 - Use published standard of evidence
 - Identify the allegations constituting sexual harassment
 - Describe procedure from formal complaint through hearings
 - Make findings of fact and conclusions
 - Provide a rationale for the outcome on each allegation and imposition of any sanctions
 - State the procedures and allowable bases for any appeal
 - Be provided simultaneously to both parties

Fair Grievance Process: Determination

- Title IX Coordinator is responsible for implementation of any remedies
- Institution must provide for appeals based on certain criteria

Fair Grievance Process: Informal Resolution

- Informal resolution allowed, but cannot be required
- May only be offered if a formal complaint is filed
- Institution must:
 - Provide written notice to the parties of the allegations, requirements of the resolution process, and any limitations
 - Obtain written consent from both parties
- Informal resolution not permitted if complainant is a student and respondent is an employee



RETALIATION PROHIBITED

Retaliation Prohibited

- Prohibits intimidation, threats, coercion, or discrimination for making a complaint or participating in process
- Actions do not have to be on the basis of sex or involve sexual harassment to constitute retaliation
- Retaliation complaints may use the same grievance process as sexual harassment complaints
- Institution must keep identities of complainant, respondent, and witnesses confidential except as permitted by FERPA

Retaliation Prohibited

- The following do not constitute retaliation:
 - First Amendment free speech
 - Charging a person with a code of conduct violation for making a false statement



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