

TITLE IX

Overview and Foundational Training

Kevin L. Carr | Spilman Thomas & Battle, PLLC
Megan W. Mullins | Spilman Thomas & Battle, PLLC

Training Expectations

Title IX Coordinators, investigators, decision-makers, and anyone who facilitates an informal resolution process **must receive training on:**

- The definition of sexual harassment in Section 106.30;
- The scope of the recipient's education program or activity;
- How to conduct an investigation and grievance process, including hearings, appeals, and informal resolution processes, as applicable; and,
- How to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias.

Decision-makers must 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.

Foundational Topics

- The New Rule & Sexual Harassment
- Title IX Scope and Jurisdiction
- Obligation to Respond
- Bias and Conflicts of Interest

THE NEW RULE

The Title IX Statute

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.

What is Sex-Based Discrimination?

Not defined in the Title IX rule.

“The Department follows the Supreme Court’s approach in interpreting conduct “on the basis of sex” to include conduct of a sexual nature or conduct referencing or aimed at a particular sex. 85 FR 30146-7

Includes sexual harassment (e.g., unwelcome sexual advances, requests for sexual favors), and sexual violence, which is a subset of sexual harassment (e.g., dating violence, domestic violence, sexual assault, or stalking)

The New Regulation

The Department of Education published the new regulation in the Federal Register on May 19, 2020 (34 CFR Part 106)

The regulation became effective on **August 14, 2020.**

The New Regulation

Amplifies the Title IX Statute considerably, requiring recipients to:

- Disseminate a policy which includes a non-discrimination statement.
- Designate a Title IX Coordinator.
- Adopt and publish grievance procedures that are prompt and equitable and allow for adequate, reliable, and impartial investigation of complaints.
- Take action to address and prevent sex-based discrimination.

Prohibited Discrimination

Students:

- Admissions and recruitment
- Education programs or activities
- Housing
- Facilities
- Counseling
- Financial and employment assistance
- Health insurance and benefits
- Marital or parental status
- Athletics

Employees:

- Employment
- Recruitment
- Compensation
- Job classification
- Fringe benefits
- Marital or parental status
- Advertising
- Pre-employment inquiries
- Employment criteria

The Foundation – Actual Knowledge

If you have **actual knowledge** of **sexual harassment** that occurred in your **education program or activity** against a person **in the United states**, you must respond promptly and in a manner that is **not deliberately indifferent.**

The Foundation – Formal Complaint

If you receive a **Formal Complaint** of **sexual harassment** signed by a **complainant** who is participating in or attempting to participate in your **education program or activity**, then you must follow a grievance process that complies with **§ 106.45**.

SCOPE AND JURISDICTION

Scope of “Sexual Harassment”

Sexual Harassment – conduct **on the basis of sex** that satisfies one or more of the following:

- Quid pro quo – 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 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,
- “sexual assault” as defined by 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).

Sexual Harassment

- **Does this definition prohibit all harassing or offensive remarks?**
- No. Unwelcome conduct must be severe, pervasive, and objectively offensive. But recipients can still address such remarks in a variety of ways.
- **Does quid pro quo harassment need to be severe, pervasive, and objectively offensive? How about Clery/VAWA offenses?**
- No. Only the “unwelcome conduct” prong of the sexual harassment definition must be severe, pervasive, and objectively offensive. A victim of quid pro quo sexual harassment or Clery/VAWA sex offenses, has been effectively denied equal access to education.

Sexual Harassment

“**Sexual assault**” means any sexual act directed against another person, without the consent of the victim, including instances where the victim is incapable of giving consent.

This includes:

- Rape
- Sodomy
- Sexual Assault with an Object
- Fondling
- Incest
- Statutory Rapt

Sexual Harassment

- **Rape:** The carnal knowledge of a person, without the consent of the victim, including instances where the victim is incapable of giving consent because of his/her/their age or because his/her/their temporary or permanent mental or physical incapacity.
- **Sodomy:** Oral or anal sexual intercourse with another person, without the consent of the victim, including instances where the victim is incapable of giving consent because of his/her/their age or because of his/her/their temporary or permanent mental or physical incapacity.

Sexual Harassment

- **Sexual Assault with an Object:** To use an object or instrument to unlawfully penetrate, however slightly, the genital or anal opening of the body of another person, without the consent of the victim, including instances where the victim is incapable of giving consent because of his/her/their temporary or permanent mental or physical incapacity.
- **Fondling:** The touching of the private body parts of another person for the purpose of sexual gratification, without the consent of the victim, including instances where the victim is incapable of giving consent because of his/her/their age or because of his/her/their temporary or permanent mental or physical incapacity.

Sexual Harassment

- **Incest:** Sexual intercourse between persons who are related to each other within the degrees wherein marriage is prohibited by law.
- **Statutory rape:** Sexual intercourse with a person who is under the statutory age of consent.

Sexual Harassment

- **Dating violence:** Any act of violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the victim and where the existence of such a relationship is determined based on a consideration of the length, type, and frequency of interactions between the persons involved in the relationship.

Sexual Harassment

- **Domestic violence:** A felony or misdemeanor crime of violence committed by a current or former spouse or intimate partner of the victim, 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 or intimate partner, by a person similarly situated to a spouse of the victim under the domestic or family violence laws of the jurisdiction receiving grant monies, 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 jurisdiction.

Sexual Harassment

- **Stalking:** Engaging in a course of conduct directed at a specific person that would cause a reasonable person to fear for his or her safety or the safety of others or suffer substantial emotional distress.

Jurisdiction

“Directed against a person in the United States”

- The complainant must be a person physically located in the United States.
- The Department acknowledges that individuals experiencing sexual harassment while outside of the country (*i.e.*, studying abroad) would **not** be covered.
- Sexual harassment perpetrated online against an individual physically located in the United States **could** be covered, even if the perpetrator were located outside of the country.

Jurisdiction

- Education program or activity includes:
 - Locations, events, **or** circumstances
 - On campus **or** off campus
 - Over which the institution exercised substantial control over **both the respondent and the context in which the sexual harassment occurs.**
- Also includes:
 - Any building owned or controlled by an officially recognized student organization (e.g., fraternity or sorority houses).

§ 106.44(a)

OBLIGATION TO RESPOND

Responding to Title IX Sexual Harassment

- **An institution must respond to sexual harassment, with or without a formal complaint, when:**
 - the alleged sexual harassment occurred in an education program or activity of the recipient;
 - the alleged sexual harassment was against a person physically located in the United States; and
 - the recipient has **actual knowledge** of the alleged sexual harassment.

Actual Knowledge

“Actual Knowledge” means having notice of sexual harassment or allegations of sexual **harassment to a recipient’s Title IX Coordinator or any official of the recipient who has the authority** to institute corrective measures on behalf of the recipient.

Actual Knowledge

Who can make a report?

- Any person (including bystanders or anonymous reports).

Who is an official with authority to institute corrective measures on behalf of the institution?

- This is a fact-specific determination. Recipients can identify such individuals in a list.

Which employees must report sexual harassment to the Title IX Coordinator?

- As to employees who are not the Title IX Coordinator or Officials with Authority, recipients have wide discretion to craft and implement their own employee reporting policy.

Officials with Authority

- Who is considered an official with authority to institute corrective measures on behalf of the recipient?
- “The mere ability or obligation to report sexual harassment does not make you an official with authority.”
- “Having been trained” to report sexual harassment does not make you an official with authority.

Response Obligations

- Recipients must respond “promptly” and “in a manner that is not **deliberately indifferent.**”
- A recipient is deliberately indifferent “only if its response to sexual harassment is clearly unreasonable in light of the known circumstances.

Response Obligations

Once the recipient has “actual knowledge,” the Title IX Coordinator **has an obligation** to:

- 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 to the complainant the process for filing a formal complaint.

Response Obligations

The final rule specifies that a school's response must treat complainants and respondents equitably by offering supportive measures to a complainant, and by following a compliant grievance process **before the imposition of any disciplinary sanctions against a respondent.**

Supportive Measures

Measures designed to restore or preserve equal access to the recipient's education program or activity without unreasonably burdening the other party, including measures designed to protect the safety of all parties, or the recipient's educational environment, or deter sexual harassment.

§ 106.30(a)

Supportive Measures

Supportive measures means 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.

§ 106.30(a)

Supportive Measures

Supportive measures **may** include:

- Counseling
- Extension of deadlines or other course-related adjustments
- Modification 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.

Supportive Measures

- The recipient 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 recipient to provide the supportive measures.
- The Title IX Coordinator is responsible for coordinating the effective implementation of supportive measures.

Removing Respondent from Campus

- If there is an **immediate threat to the physical health or safety** of any students or other individuals arising from the allegations of sexual harassment, a recipient **may employ an emergency removal process.**
- A recipient may place a **non-student** on **administrative leave** during the pendency of a grievance process.

§ 106.44(c);(d)

Removing the Respondent from Campus

A recipient would be permitted to remove a respondent from campus on an emergency basis, provided:

- that the institution undertakes an individualized safety and risk analysis;'
- determines 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; and
- provides the respondent with notice and an opportunity to challenge the decision **immediately** following the removal.

Response Obligations to Formal Complaint

- A recipient must follow the grievance process prescribed in the final regulations in response to a formal complaint.
- A **formal complaint** is a document **signed by the complainant or by the Title IX Coordinator on behalf of the complainant**, alleging sexual harassment against a respondent and requesting that the recipient investigate the allegation of sexual harassment.
- At the time of filing a formal complaint, a complainant must be participating in or attempting to participate in the education program or activity of the recipient with which the formal complaint is filed.

Dismissal of Formal Complaint

If the conduct alleged in the formal complaint:

- Would not constitute sexual harassment even if true;
- Did not occur within the recipient's program or activity; or,
- Did not occur against a person in the United States,

the recipient must stop its grievance process with respect to that conduct for the purposes of sexual harassment under Title IX.

Such a dismissal does not preclude action under another provision of the recipient's code of conduct

BIAS AND CONFLICTS OF INTEREST

Serving Without Bias or Conflicts of Interest

Any individual designated as a Title IX Coordinator, investigator, decision-maker, or 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.”

Grounds for Appeal

A recipient must offer both parties an appeal from a determination regarding responsibility, and from a recipient's dismissal of a formal complaint or any allegations therein, on the following grounds:

- (C) The Title IX Coordinator, investigator(s), or decision-maker(s) **had a conflict of interest or bias** for or against complainants or respondents generally or the individual complainant or respondent **that affected the outcome of the matter.**

Bias

- “Whether bias exists requires examination of the particular facts of a situation...and the Department encourages recipients to apply an **objective** (whether a reasonable person would believe bias exists), **common sense approach** to evaluating whether a particular person serving in a Title IX role is biased[.]”

Expectations

- Reliable
- Legitimate
- Impartial
- Accurate
- Truth-Seeking
- Rooted in Due Process

What *is* considered bias?

“Treating a party differently on the basis of the party’s sex or stereotypes about how men or women behave with respect to sexual violence constitutes impermissible bias.”

85 FR 30238-40

A “recipient that ignores, blames, or punishes a student due to stereotypes about the student violates the final regulations[.]”
85 FR 30496

“The Department’s conception of bias is broad and includes bias against an individual’s sex, race, ethnicity, sexual orientation, gender identity, disability or immigration status, financial ability, socioeconomic status, or other characteristic.”
85 FR 30084

Bias & Investigative Reports

- The main purpose of the investigative report, which is prepared by an investigator, is to summarize relevant evidence.
- The investigator may choose to keep the report strictly factual, or may recommend a determination.
- In reaching the outcome on responsibility, decision-makers must make independent credibility determinations.

What *is not* considered bias?

1. Outcomes of the grievance procedure

The Department cautions parties and recipients from concluding bias based solely on the outcome of the grievance procedure

“[T]he mere fact that a certain number of outcomes result in determinations of responsibility, or non-responsibility, does not necessarily indicate or imply bias on the part of the Title IX personnel.” 85 FR 30252.

What *is not* considered bias?

2. The Title IX Coordinator signs the Formal Complaint

A Title IX Coordinator signing a Formal Complaint does not render the Title IX Coordinator biased or pose a conflict of interest. 85 FR 30372.

What *is not* considered bias?

3. Professional experiences or affiliations

The prior professional experience of a person whom a recipient would like to have in a Title IX role need not disqualify the person from obtaining the requisite training to serve impartially in a Title IX role.

85 FR 30252.

What *is not* considered bias?

3. Professional experiences or affiliations

The prior professional experience of a person whom a recipient would like to have in a Title IX role need not disqualify the person from obtaining the requisite training to serve impartially in a Title IX role.

85 FR 30252.

Bias & Conflict of Interest

- Whether a Title IX personnel has a bias or conflict of interest is determined on a **case-by-case basis**, and any combination of the experiences or affiliations on the prior slide **may constitute bias and/or conflict of interest depending on the circumstances.**

Managing Roles

- **Title IX Coordinator:**
 - CAN serve as investigator
 - CAN serve as informal resolution facilitator
 - CANNOT serve as decision-maker or appellate decision-maker
- **Investigator:**
 - CAN serve as Title IX Coordinator
 - CAN serve as informal resolution facilitator
 - CANNOT decision-maker or appellate decision-maker

Managing Roles

- The **hearing decision-maker** **CANNOT** serve as:
 - Investigator
 - Title IX Coordinator
 - Appellate decision-maker
- The **appellate decision-maker** **CANNOT** serve as:
 - Investigator
 - Title IX Coordinator
 - Hearing decision-maker

How to Serve Impartially

- Do not prejudge facts at issue.
 - Cannot **pass judgment on allegations** of either party.
 - Cannot **jump to conclusions** without full investigation and gathering of facts and evidence.
 - Do not apply a “start by believing” approach, as doing so would violate the requirement to serve impartially.

How to Serve Impartially

- Do not rely on sex stereotypes.
 - Broad prohibition of sex stereotypes.
 - All decisions must be **based on individualized facts**, not on stereotypical notions of what “men” and “women” do or do not do.
 - Approach allegations of both parties with neutrality at the outset.

The Bottom Line

Treat both parties equally and provide an equal opportunity to present evidence, witnesses, and their versions of the story.