

# Title IX Final Rule and Interim Grievance Procedure

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# Title IX Overview

- Title IX of the Education Amendments of 1972.
- Prohibits discrimination based on sex in education programs and activities that receive federal financial assistance.
- “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.”

# Title IX Overview

- ▶ Types of discrimination covered under Title IX:
  - ▶ Sexual Harassment.
  - ▶ Failure to provide equal athletic opportunity.
  - ▶ Sex-based discrimination in courses and programs.
  - ▶ Discrimination based on pregnancy.
- ▶ Also prohibits retaliation for filing a complaint or advocating for a right protected by Title IX.

# 2011 Dear Colleague Letter

- ▶ Last major Title IX guidance from OCR.
- ▶ Not formal rulemaking.
- ▶ Clarified that colleges' obligations include:
  - ▶ Immediate and appropriate action to investigate possible sexual violence.
  - ▶ Obligation to stop, prevent, and remedy sexual violence.
  - ▶ Obligation to provide a grievance procedure for students to file complaints.
  - ▶ Obligation to use preponderance of evidence standard when investigating complaints.
  - ▶ No hearing requirement. Civil rights investigation model common.

# Title IX Final Rule

- ▶ Released on May 6, 2020.
- ▶ First time in over 40 years for Title IX notice-and-comment rulemaking.
- ▶ Required colleges to come into compliance by August 14, 2020.

# Final Rule Applicability

- ▶ “Sexual Harassment”:
  - ▶ Quid pro quo harassment by a school’s employee.
  - ▶ Hostile environment harassment (severe, pervasive, and objectively hostile).
  - ▶ Sexual assault.
  - ▶ Dating violence.
  - ▶ Domestic violence.
  - ▶ Stalking.

# Final Rule Applicability

- ▶ Applicable to education programs or activities receiving Federal funding.
- ▶ Includes locations, events, circumstances under school's substantial control.
- ▶ Applies to all educational programs or activities, whether on-campus or off.

# Final Rule

## Accessible Reporting

- ▶ Expanded notifications to students and employees.
- ▶ Title IX Coordinator contact information must be prominently displayed.
- ▶ Must allow reporting in person, by mail, by telephone, by email, or by any other means that facilitate verbal or written reports.
- ▶ Must allow 24/7 reporting.

# Final Rule

## Response Obligations

- ▶ Notice to Title IX Coordinator.
- ▶ Notice to official with authority to institute corrective measures.
- ▶ Institutions can choose mandatory reporting for all or can exempt certain employees.

# Final Rule

## Response Obligations

- ▶ Colleges must respond promptly to sexual harassment by doing the following:
  - ▶ Offering supportive measures to the complainant.
  - ▶ Contacting complainant promptly.
  - ▶ Establishing a grievance process.
  - ▶ Investigating all formal complaints.
  - ▶ Respecting complainant's wishes regarding whether to investigate, unless "Title IX Coordinator determines investigating is not clearly unreasonable in light of known circumstances."
  - ▶ Dismissing complaints that do not fall within the scope of Title IX.

# Final Rule

## Response Obligations

- ▶ Supportive Measures – individualized services that are non-punitive, non-disciplinary, and not unreasonably burdensome to the other party. Provided prior to determination.
- ▶ Remedies – designed to maintain complainant’s equal access to education. May include the same service as “supportive measures” but can be disciplinary and punitive and can burden the respondent. Only provided after determination.
- ▶ Sanctions – disciplinary, punitive measures imposed on respondent if found responsible.

# Final Rule

## Grievance Process

- ▶ Grievance process must:
  - ▶ Provide remedies for complainant any time respondent is found responsible.
  - ▶ Not impose sanctions without completing grievance process.
  - ▶ Require objective evaluation of all relevant evidence.
  - ▶ Require Title IX Coordinators, investigators, and decision-makers to be free of conflicts and bias.
  - ▶ Require training on various topics. Training materials must be posted online.
  - ▶ Impose reasonably prompt time frames.
  - ▶ Describe possible supportive measures, remedies, and sanctions.

# Final Rule

## Grievance Process

- ▶ Grievance process must:
  - ▶ Use either the preponderance of evidence standard or the clear and convincing standard.
  - ▶ Protect legal privileges.
  - ▶ Apply rules and practices equally to both parties.
  - ▶ Describe appeal procedures.

# Final Rule Investigations

- ▶ When conducting an investigation:
  - ▶ Burden of gathering evidence and the burden of proof are on the school/investigators.
  - ▶ Must provide equal opportunity to present witnesses and evidence.
  - ▶ May not impose “gag orders.”
  - ▶ Parties entitled to an advisor of their choosing.
  - ▶ Investigators must send written notice of investigative interviews, meetings, and hearings.
  - ▶ Investigators must send evidence to the parties and advisors at least 10 business days before the investigative report.
  - ▶ Investigators must send the parties and advisors the investigative report with at least 10 business days to respond.
  - ▶ Investigators may allow complainant to withdraw complaint.

# Final Rule Hearings

- ▶ Requires a live hearing with cross-examination.
  - ▶ Cross-examination through advisors only.
  - ▶ College must provide an advisor for the hearing if the parties do not have one.
  - ▶ May be conducted with parties in separate rooms.
  - ▶ Ruling on cross-examination questions prior to response.
  - ▶ Cannot rely on statements of witnesses who are not available at the hearing.
  - ▶ Hearings may be conducted virtually.
  - ▶ Hearings must be recorded or transcribed.

# Final Rule

## Written Determination

- ▶ Decision-maker must issue a written determination that includes:
  - ▶ Findings of fact.
  - ▶ Conclusion about whether alleged conduct occurred.
  - ▶ Rationale as to each allegation.
  - ▶ Disciplinary sanctions imposed on respondent.
  - ▶ Remedies provided to the complainant.

# Final Rule Appeals



College must provide appeal rights to both parties.

- ▶ Procedural irregularities.
- ▶ Newly discovered evidence.
- ▶ Conflict of interest/bias.

# Final Rule

## Informal Resolutions



- ▶ Colleges may provide informal resolution options.
  - ▶ Mediation.
  - ▶ Restorative justice.
  - ▶ Negotiated resolutions.
- ▶ May not mandate informal resolution.
- ▶ Either party can withdraw from informal resolution process at any time.
- ▶ Not available in cases of employee sexual harassment of student.

# Interim Sexual Harassment and Grievance Procedure

- ▶ Adopted on August 14, 2020.
- ▶ “Interim” designation – further refinement coming.
- ▶ Applicable only to complaints of harassment and discrimination based on sex.
- ▶ Applies to both students and employees.
- ▶ Makes all faculty, adjunct faculty, management, and support professional employees mandatory reporters, except for:
  - ▶ Student workers.
  - ▶ Temporary workers.
  - ▶ Professional counselors while engaging in professional counseling.

# Interim Sexual Harassment and Grievance Procedure

- ▶ Allows 24/7 reporting to Title IX Coordinators.
- ▶ Recognizes right to file claims with ERD, OCR, EEOC, etc.
- ▶ Applies to both in-person and online conduct.
- ▶ Prohibits Retaliation.

# Interim Sexual Harassment and Grievance Procedure

- ▶ Step 1: Complaint.
  - ▶ Any person may make a complaint to Title IX Coordinators.
  - ▶ Title IX Coordinator will contact the person to discuss:
    - ▶ Supportive measures.
    - ▶ The process for filing a formal complaint.
    - ▶ Whether the person wishes to file a formal complaint.
      - ▶ Title IX Coordinator will respect the person's wishes unless investigating is necessary under the circumstances.
- ▶ Step 2: Notification of Rights.
  - ▶ Title IX Coordinator will notify the person of their rights under state and federal law.

# Interim Sexual Harassment and Grievance Procedure

- ▶ Step 3: Determination of Validity.
  - ▶ Title IX Coordinator reviews complaint for “validity.”
  - ▶ Validity only concerns whether allegations fall within scope of Procedure.
  - ▶ If valid, complaint proceeds to next steps.
  - ▶ If not valid, the complaint will be closed for purposes of the procedure, but may be referred elsewhere.

# Interim Sexual Harassment and Grievance Procedure

- ▶ Step 4a: Informal Resolution.
  - ▶ Optional.
  - ▶ Only available when both parties agree to it.
  - ▶ May involve methods such as mediation, restorative justice, negotiated resolutions.
  - ▶ Parties may withdraw prior to resolution.
  - ▶ Unavailable when allegations are employee on student sexual harassment.

# Interim Sexual Harassment and Grievance Procedure

- ▶ Step 4b: Investigation.
  - ▶ Required for any valid formal complaint that is not withdrawn or informally resolved.
  - ▶ Investigators will conduct a prompt, fair, and impartial investigation.
  - ▶ Tools include interviews, fact/information gathering, reviewing documentary evidence.
  - ▶ No gag orders during investigation.
  - ▶ Each party entitled to an advisor of their choice.
  - ▶ Investigators must send evidence to parties at least 10 business days before report.
  - ▶ Investigators prepare written investigative report and provide to parties with at least 10 business days to respond.

# Interim Sexual Harassment and Grievance Procedure

- ▶ Step 5: Hearing.
  - ▶ Live hearing required.
  - ▶ Hearing will be before an independent hearing officer (IHO).
  - ▶ Hearing will always be conducted virtually.
  - ▶ Each party entitled to an advisor. MPTC to provide for free.
  - ▶ Cross examination allowed through advisors. IHO to review questions.

# Interim Sexual Harassment and Grievance Procedure

- ▶ Step 6: Written Determination.
  - ▶ Determination based on “preponderance of evidence” standard.
  - ▶ Determination issued within 10 business days of hearing.
  - ▶ Determination to include findings of fact, conclusions about conduct, rationale, and disciplinary sanctions.
    - ▶ Discipline will be determined in consultation with Title IX Coordinators.
  - ▶ Determination to identify remedies for complainant.

# Interim Sexual Harassment and Grievance Procedure

- ▶ Step 6: Appeals.
  - ▶ Available to both parties.
  - ▶ Must be filed within five business days of written determination.
  - ▶ Only on the following grounds:
    - ▶ Procedural irregularity that affected outcome.
    - ▶ Newly-discovered evidence that could affect outcome.
    - ▶ Conflict of interest or bias affected outcome.
    - ▶ Appeal of sanction imposed.
  - ▶ Reviewed by VP – Student Services or VP Finance and Administration
  - ▶ Decisions on appeals issued within ten business days.

# Interim Sexual Harassment and Grievance Procedure

- ▶ Possible sanctions (student) – warnings, probation, suspension, expulsion, withholding diploma, revocation of degree, organizational sanctions.
- ▶ Possible sanctions (employee) – warnings, evaluations, performance improvement plans, required counseling, required training or education, loss of raise, loss of responsibility, demotion, suspension, termination.
- ▶ Supportive measures – referrals to counseling, medical, or healthcare services; referrals to EAP, altering work arrangements, safety planning, safety escorts, transportation accommodations, contact limitations, academic support, class schedule modifications, increased security monitoring.

THANK YOU!