

Back to the Future: The Title IX 2020/ 2025 Rules



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History of Title IX Regulations

- **2025 Rules: Effective on August 14, 2020, superseded in 2024, and then effective again on January 31, 2025.**
- DOE issued a DCL on January 31, 2025 that confirmed what everyone believed—that the 2024 Rules were void.
 - All Title IX complaints should be investigated under the 2020 Rules.
- 2024 Rules were short-lived.
 - Lots of lawsuits challenging the rules, with a nationwide injunction entered on January 9, 2025. New administration did not appeal and issued the January DCL.

History of Title IX Regulations

- **Primary changes made by 2024 Rules:**
 - Required specific Title IX grievance processes for more than “sexual harassment.” Broadened scope to apply to “sex-based harassment.”
 - Rejected the narrow definition of sexual harassment used by courts; more situations could be governed by Title IX.
 - Specifically identified sexual orientation and gender identity as discrimination “based on sex,” and concluded that not allowing someone to participate based on gender identity violated Title IX.
 - Allowed more flexibility in addressing situations to account for school size, student age, etc. and in using informal resolutions.



Title IX Prohibits Sex Discrimination

- The Rules focus on sexual harassment, although Title IX prohibits sex discrimination generally.
- The Rules define “sexual harassment”:
 - Employee quid pro quo – only employee-on-student
 - Hostile environment
 - Violence Against Women Act offenses:
 - Sexual assault
 - Dating violence
 - Domestic violence
 - Stalking

Gebser v. Lago Vista Independent School District, 524 U.S. 274 (1998)

School may be liable under Title IX for employee-on-student sexual harassment if:

- School official with authority to institute corrective measures
- has actual notice of allegations that an employee is engaging in sexual misconduct involving the student
- and the school acts in a deliberately indifferent manner.



Two Key Cases

Davis v. Monroe County Board of Education, 526 U.S. 629 (1999)

School may be liable under Title IX for student-on-student sexual harassment if:

- Unwelcome conduct as determined by a reasonable person
- is so severe, pervasive and objectively offensive that it effectively denies a person's equal access to the school's resources and opportunities.



Two Key Cases

Definitions of Key Terms and Concepts





“Quid Pro Quo”

- A school employee
- conditions an aid, service or benefit of the school
- on an individual’s participation in unwelcome sexual conduct.

Severity and harm are *presumed* with quid pro quo sexual harassment. By its very nature, it will result in a denial of access to the education program.



“Hostile Environment”

2020 DEFINITION (AND CURRENT)

- Unwelcome conduct
- Determined by a reasonable person
- That is so severe, pervasive **AND** objectively offensive that it **EFFECTIVELY DENIES** a student equal access to a school program or activity.

The *Davis* standard!

2024 DEFINITION (AND PREVIOUS)

- Unwelcome conduct
- That is both subjectively and objectively offensive
- and is so severe **OR** pervasive that it **LIMITS OR DENIES** a student’s ability to participate in or benefit from educational opportunities or activities.



“Actual Knowledge”

2020 DEFINITION (AND CURRENT)

A school with ACTUAL KNOWLEDGE of sexual harassment in a program or activities must respond promptly and in a manner that is not deliberately indifferent.

2024 DEFINITION (AND PREVIOUS)

A school with information of conduct that MAY constitute sex discrimination must respond promptly and effectively.



“Actual Knowledge”

Actual knowledge is notice of sexual harassment allegations that has been provided to:

- A school’s Title IX Coordinator; or
- *Any employee* of the school for K-12 schools.

All school employees should be trained to immediately report allegations of sexual harassment to the Title IX Coordinator.



“Deliberate Indifference”

2020 DEFINITION (AND CURRENT)

The school must respond reasonably to sex discrimination in light of known circumstances. If it fails to do so, it has been “deliberately indifferent.”

2024 DEFINITION (AND PREVIOUS)

A school must take prompt and effective action to end the sex discrimination, prevent its recurrence, and remedy its effects.



“Deliberate Indifference”

A return to the Gebser standard:
“The response must amount to deliberate indifference to discrimination. . . . The premise, in other words, is an official decision by [the school] not to remedy the violation.”

Some form of investigation and remediation, including supportive measures, is typically sufficient, if it is reasonable in scope. A school’s investigation and response need not be perfect. But the school needs to take some reasonable action.

Summary of Current Regulatory and Legal Standards

- A school that has *actual knowledge* of possible *sex discrimination*, including *sexual harassment*
- in a school *program or activity*
- must respond *promptly*
- and in a manner that is not *deliberately indifferent*.



Grievance Process Requirements for Responses to *Sexual Harassment* Allegations

- The 2020 Rules do not provide procedures for investigating and resolving complaints *other than* complaints of sexual harassment.
 - The grievance procedures for sexual harassment complaints are very rigid and complex.

Formal Complaint or Actual Knowledge



Initial Response by Title IX Coordinator



If Formal Complaint, then Investigation



Decision Maker Makes "Final" Decision



Potential Appeal

Grievance Process
Requirements for
Responses to *Sexual
Harassment*
Allegations



Your Title IX Team

Title IX Coordinator

Investigator (may be a different person
than Title IX Coordinator or not)

Decision Maker

Appeal Officer

Informal Resolution Facilitator

Initial Responses to Allegations



Formal Complaint v. Actual Knowledge

Schools must respond to sexual harassment reports (actual knowledge) OR formal complaints. Any kind of notice triggers responsibility to act.

- A “formal complaint” is a document that is filed by a complainant OR filed and signed by the Title IX Coordinator that alleges sexual harassment and that requests that the school investigate the allegations.

- A “complainant” is the alleged victim (even if they do not file a formal complaint).
- A “respondent” is the alleged perpetrator.
- Former students or employees cannot file a formal complaint.

Initial Responses to Notice

The Title IX 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 the process for filing a formal complaint and provide related information.

Initial Responses to Notice

Schools must:

- Treat complainants and respondents equitably, including considering offering supportive measures to both complainants and respondents.
- Follow a grievance process before disciplining or sanctioning a respondent.



“Supportive Measures”

- **Non-punitive, individualized services offered as appropriate and without charge to a complainant before or after filing a formal complaint or if no formal complaint is filed.**
- **Must be designed to restore or preserve educational access without unreasonably burdening the other party.**
- **The school should not disclose one party’s supportive measures to the other party.**



“Supportive Measures”

Examples of supportive measures:

- Counseling or other support services
- Course modifications (extensions on deadlines, etc.)
- Schedule changes
- Increased monitoring or supervision

A supportive measure that completely removes a respondent from an educational activity would likely be considered punitive and thus improper.

Unless. . . .

Emergency Removal

A respondent may be removed on an emergency basis when necessary to protect the student or another individual from *immediate threat to physical health or safety*.

- The decision must be based on an individualized safety and risk analysis.
- May not be solely for emotional or mental health reasons.
- After the removal, the school must give student notice and an opportunity to challenge the removal.
- Consider the interplay of other laws related to removal, including IDEA (a change in placement?) and Section 504.

But schools may also place *employee* on administrative leave, with or without pay, during pendency of an investigation in compliance with state law or contract.



Grievance Process Requirements for Responses to *Sexual Harassment* Allegations

- Response to actual knowledge can go in two directions.
 - No formal complaint = supportive measures + reasonable code of conduct or other investigation
 - Formal complaint = supportive measures + Title IX grievance procedures

Process When a Formal Complaint Is Filed



Formal Complaint Requirements

- Formal complaints may be submitted by either the complainant/the complainant's parent or by the Title IX Coordinator.
 - The complainant must be participating in or attempting to participate in the school's educational program when the formal complaint is filed.
 - The Title IX Coordinator can submit a formal complaint even if the complainant does not want to.
- A formal complaint must be written, contain allegations of sexual harassment, request that the school investigate the allegations, and be signed.

Dismissal

Formal Complaints *must* be dismissed if:

- The complaint does not state an allegation of sexual harassment, even if all facts are found to be true;
- The sexual harassment, even if it did occur, did not occur in a school program or activity; or
- The sexual harassment did not occur in the United States.

Formal Complaints *may* be dismissed if:

- The complainant notifies the Title IX Coordinator that s/he wants to withdraw the Complaint;
- The respondent's employment or enrollment with the school ends; or
- Circumstances prevents the gathering of evidence sufficient to render a determination (passage of time since conduct, complainant refuses to cooperate, etc.).

****If a complaint is dismissed, you can still address the allegations using your regular code of conduct or other investigation processes.**

Informal Resolutions

Informal resolutions are prohibited unless a formal complaint has been filed.

Informal resolutions are prohibited when the complainant is a student and the respondent is an employee.

Informal resolutions are allowed if:

- both parties are provided written notice of their rights; and
- both parties have provided voluntary, written consent to participate in the informal resolution.

Formal Complaint Investigation

- Formal requirements for investigating, dismissing and determining responsibility related to formal complaints.
 - Must treat parties equitably.
 - Must evaluate all evidence objectively.
 - Must presume that the respondent is not responsible.
 - Must provide reasonably prompt time frames for completion.
 - Must describe the possible outcomes.
 - Must state whether using the preponderance of the evidence or clear and convincing standard of evidence to determine responsibility.
 - Must ensure no conflict of interests by involved parties.
 - Must describe the appeal process.
 - Must describe the supportive measures that are available.
 - Must not require, allow or use evidence that is privileged.

Schools must provide written notice to the parties in sufficient time to allow the respondent to prepare a response before any initial interview.

Written Notice

The written notice must include:

- notice of the grievance process, including any informal resolution process;
- notice of the allegations, in sufficient detail to allow the respondent to prepare a response (names of known parties, conduct alleged, date and location of conduct, if known);
- a statement that the respondent is presumed to be not responsible for the conduct alleged;
- a statement that responsibility will be determined at the conclusion of the grievance process;
- notice of the parties' rights to have an attorney or non-attorney advisor and to inspect and review evidence; and
- notice of any provision in the code of conduct or school policies that prohibits knowingly making false statements or providing false evidence during the grievance process.



Who Investigates?

The school's Title IX Coordinator can investigate OR it can use someone else to investigate.

Schools *must* use a different person to investigate if the Title IX Coordinator has a conflict.

- They signed the formal complaint.
- They have a bias against one or both of the parties.

Investigation

In connection with investigation of a formal complaint, schools must:

- Ensure that the burden of proof is on the school, including for gathering any evidence.
- Provide an equal opportunity for the parties to present witnesses and evidence.
- Not restrict either party's ability to **discuss the allegations** or gather and present evidence.
- Provide the parties with the same opportunities for attorney/non-attorney advisors to be present during interviews or proceedings.
- Provide written notice of the date, time, participants, purpose and location of each interview or other meeting to allow the party to prepare or **participate**.

Investigation

Timing:

Schools need to act “promptly,” but there is no set deadline in the regulations.

Schools must make certain that they comply with the timeline in their Title IX Policy.

Schools can delay for “good cause” (law enforcement, witness unavailability, etc.) but let both parties know in writing.

Investigative Report Process

The investigator must provide the parties and their advisors with an equal opportunity to review all evidence – including evidence that is not going to be included in the report – at least 10 days before the report is finalized.

The parties may prepare written responses to the evidence, and the investigator must consider the responses before finalizing the report.

Then, the investigator must finalize a written report that fairly summarizes the relevant evidence.

The investigator must provide the final report to the parties at least 10 days before a determination of responsibility.

Providing Evidence to Parties

Have to provide written report and evidence and allow respondent to print copies. Different than many previous procedures.

Can you redact student or other witness names or information? No.

How can you preclude the parties from sharing the evidence with others? They can discuss allegations, but not evidence collected. Have them sign an NDA before you provide them with the evidence. Consider including language that discusses potential harm to young student witnesses if there is a breach.

Making Decisions About Formal Complaints



Who Decides?



- The final report now goes to the Decision Maker.
- The Decision Maker cannot be the same person as the Title IX Coordinator or investigator.

1. The Title IX Coordinator
2. The Decision Maker
3. Someone to decide any appeals

This means, schools need at least three different people to handle sexual harassment complaints. And maybe 4: An investigator (or two) if the Title IX Coordinator has a conflict!

Before a Final Decision

Before making a decision, the Decision Maker must give both parties an opportunity to submit written questions that they want the other party or a witness to answer.

The answers must be given to both parties.

The Decision Maker must allow limited follow up questions from the parties.

The Decision Maker is a question “gatekeeper” of sorts: can exclude a question but then must explain why the question is not *relevant*.

“Final” Decision

The Decision Maker must review the investigative report and the answers to any written questions and then issue a written decision.

The written decision must include:

- The allegations;
- The procedural steps taken;
- The Decision Maker’s findings of fact and the evidence on which they are based;
- A statement of and the rationale for the result of *each* allegation, including determination of responsibility, any disciplinary sanctions imposed and whether remedies to restore or preserve equal access to the educational program will be provided; and
- A description of appeal rights.

“Final” Decision

If the Decision Maker decides that the respondent engaged in sexual harassment, they must consider not only proper discipline, but appropriate measures for the complainant.

These can be similar to supportive measures, but now they can be punitive toward the respondent.

Appeals of Final Decisions



Appeals

Appeal rights must be offered to both the complainant and respondent for dismissals and final determinations.

The bases for an appeal are the following:

- procedural irregularity;
- new evidence that was not reasonably available earlier;
- conflict of interest on the part of the Title IX Coordinator, the investigator, or the Decision Maker.

Schools can offer other bases for appeal to the complainant and respondent on equal terms.

Appeals

Must give written notice that an appeal has been filed to both parties.

Both parties have an equal opportunity to submit a written statement in support of or challenging the Decision Maker's decision.

- The person deciding the appeal must issue a written decision indicating the result of the appeal and the rationale for the result. The decision must be provided to both parties simultaneously.

- Remember: The person who hears the appeal cannot be the same person as the Decision Maker, the investigator or the Title IX Coordinator.



Grievance Process Requirements for Responses to *Sexual Harassment* Allegations

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More Things Schools Have to Do





All schools must appoint a Title IX Coordinator

- Must be called the Title IX Coordinator
- Must be designated and “authorized” to coordinate the school’s Title IX compliance efforts.
- Must post Title IX Coordinator’s contact information on the school’s website, including office address, email address and phone number.

Training and Recordkeeping

Training:

All staff must be trained on how to identify and report sexual harassment.

All Title IX coordinators, investigators, Decision Makers, and persons that may facilitate an informal resolution must receive training on:

- the definition of sexual harassment;
- the scope of the recipient's education program or activity;
- how to conduct an investigation and grievance process; and
- how to serve impartially.

Investigators must also receive training on how to prepare an investigative report.

Recordkeeping:

Records related to an allegation of sexual harassment must be kept for a minimum of 7 years.

Records required to be created and maintained include:

- training materials;
- investigation records;
- disciplinary sanctions;
- supportive measure or other actions;
- remedies;
- appeals.

Records must also explain why the school's response was not deliberately indifferent.

Website Posting

Schools must post three things on their websites:

1. The name of the Title IX Coordinator and the Coordinator's contact information (including email address). This information must be "prominently displayed."
2. The school's non-discrimination policy.
3. Any training materials used to train the individuals who will be involved in the school's Title IX processes.

Notice Flowchart

1. Title IX Coordinator receives a report or a formal complaint.

2. Title IX Coordinator reviews the report and contacts complainant (if known).
- Discuss supportive measures and complainant's wishes.
 - Discuss process for filing a formal complaint (and perhaps standard for "sexual harassment").
 - Review any other applicable policies, including potential for student code of conduct investigation if no formal complaint is filed.

Notice Flowchart

3. School implements any supportive measures.

4. If a Formal Complaint is filed, the Title IX Coordinator reviews the complaint to determine if mandatory or discretionary dismissal is appropriate.

- If complaint is dismissed, determine whether different investigation is necessary or appropriate.

5. If no Formal Complaint is filed by complainant, Title IX Coordinator determines whether to submit Formal Complaint.

Complaint Flowchart

If formal complaint is not dismissed. . .

6. The Investigator determines if parties want to engage in the informal resolution process.



Complaint Flowchart

If parties do not want to engage in informal resolution or it fails. . .

7. The Investigator begins the investigation and provides the parties with a Notice of Investigation.

8. The Investigator collects all evidence, interviews parties and others, and prepares the draft investigation report.

- Draft report must be provided to parties simultaneously.
- Each party has 10 days to provide a written response.
- The Investigator issues a final investigation report after considering input of parties.

Complaint Flowchart

9. The Decision Maker prepares a final written decision.

- Decision must be provided to parties simultaneously.
- Decision must include appeal rights.

10. School implements remedies, if any, unless one party appeals.

- Both parties are notified that an appeal has been filed.

11. The person or persons deciding an appeal considers written submissions and prepares a decision.

- Appeal decision is final.



Questions?

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