



TITLE IX OVERVIEW

August 10, 2022

HIGHER
EDUCATION

THIS SESSION'S TOPICS:

- Overview of Title IX and Legal Standards
- Sexual Harassment Offenses
- Retaliation
- People in the Process
- Supportive Measures
- Grievance Process
- Obligations of Those in Title IX Roles

TITLE IX AND LEGAL STANDARDS

20 U.S.C. § 1681 & 34 C.F.R. § 106.31

“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.”

REGULATIONS

Current – August 2020

Proposed (not yet in effect) – Comment period ends Sept. 12, 2022

LEGAL STANDARD

Once an institution has **actual knowledge** of sexual harassment in one of its education programs or activities, it must **respond promptly** in a manner that is **not deliberately indifferent**.

EDUCATION PROGRAM OR ACTIVITY

“**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.”

Whether events occur in an “education program or activity” is a fact specific inquiry. Education programs and activities may include locations, events, and circumstances that are “off campus” or take place online.

ACTUAL KNOWLEDGE

An institution has **actual knowledge** when the Title IX Coordinator or a **responsible employee** receives notice of sexual harassment.

A **responsible employee** is one who has the authority to institute corrective measures on behalf of the institution.

ACTUAL KNOWLEDGE

Anyone can report sexual harassment to the Title IX Coordinator or a responsible employee.

Reports can be made orally or in writing and may be formal (e.g., via a required reporting system) or informal (e.g., via an email, voicemail, or conversation).

ACTUAL KNOWLEDGE

“A formal complaint is *not* required in order for a recipient to have actual knowledge of sexual harassment, or allegations of sexual harassment, that activates the recipient’s legal obligation to respond promptly, including by offering supportive measures to a complainant.”

PROMPTLY

The regulations do not define “promptly” but indicate that a Title IX case should be resolved in a “reasonably prompt” manner.

DELIBERATE INDIFFERENCE

When deciding whether a school has been deliberately indifferent, courts do not ask whether the school's efforts were ineffective, but instead whether their efforts (or lack thereof) amounted to "an official decision... not to remedy the violation."

SEX

The Department of Education guidance interprets “sex” to include gender identity and sexual orientation.

SEXUAL HARASSMENT OFFENSES

SEXUAL HARASSMENT OFFENSES

All definitions come from the USHE Model Title IX Policy.

Sexual harassment means conduct on the basis of sex that satisfies one or more of the following:

(1) An employee of your institution conditioning the provision of an aid, benefit, or service of your institution on an individual's participation in unwelcome sexual conduct (referred to as **quid pro quo**);

SEXUAL HARASSMENT OFFENSES

(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 your institution's education program or activity (referred to as **hostile environment**); 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).

SEXUAL HARASSMENT OFFENSES

Dating violence means **violence** committed by a person (A) who is or has been in a **social relationship of a romantic or intimate nature** with the victim; and (B) where the existence of such a relationship shall be determined based on the following factors:

- Length of the relationship;
- Type of relationship; and
- Frequency of interaction between the persons involved in the relationship.

SEXUAL HARASSMENT OFFENSES

Domestic violence includes felony or misdemeanor crimes 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 (ages 11-24) victim who is protected from that person's acts under the domestic or family violence laws of the jurisdiction.

SEXUAL HARASSMENT OFFENSES

Stalking is a course of conduct directed at a specific person that would cause a reasonable person to fear for their safety or the safety of others or to suffer substantial emotional distress.

SEXUAL HARASSMENT OFFENSES

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; also, unlawful sexual intercourse, including **rape, sodomy, sexual assault with an object, fondling, incest, and statutory rape.**

SEXUAL HARASSMENT OFFENSES

Rape is 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 age or because of his/her temporary or permanent mental or physical incapacity.

Sodomy is 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 age or because of his/her temporary or permanent mental or physical incapacity.

SEXUAL HARASSMENT OFFENSES

Sexual assault with an object means 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 age or because of his/her temporary or permanent mental or physical incapacity.

Fondling is 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 age or because of his/her temporary or permanent mental or physical incapacity.

SEXUAL HARASSMENT OFFENSES

Incest is nonforcible sexual intercourse between persons who are related to each other within the degrees wherein marriage is prohibited by Utah law. *See Utah Code § 76-7-102.*

Statutory rape is nonforcible sexual intercourse with a person who is under Utah's statutory age of consent. *See Utah Code § 76-5-401 et seq.*

CONSENT

Consent to engage in a sexual encounter must be given by all participating parties; must be **clear, knowing, and voluntary**; and may be given only by someone who is 18 years of age or older and is not mentally and/or physically incapacitated. **Consent is active, not passive.** Consent requires an affirmatively communicated willingness through words and/or actions to participate in sexual activity. Silence, in and of itself, may not be interpreted as consent.

INCAPACITATION

An individual who is **incapacitated** cannot give consent to engage in a sexual encounter. Incapacitation is defined as **the physical and/or mental inability to make informed, rational judgments**. Factors that could be indications of incapacitation include but are not limited to mental or physical disability; lack of sleep; alcohol; illegal, date-rape, or prescription drug use; unconsciousness; blackout; or involuntary physical restraint. Being intoxicated by drugs or alcohol does not diminish one's responsibility to obtain consent. The factors to be considered when determining whether consent was given include whether the accused knew, or whether a reasonable person should have known, that the complainant was incapacitated.

RETALIATION

RETALIATION ALSO PROHIBITED

In addition to prohibiting sex-based discrimination, Title IX also prohibits retaliation.

"Neither the institution nor any member of the institution community may intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by Title IX or this policy, or because the individual has made a report or complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing under the institution's Title IX policy."

RETALIATION ALSO PROHIBITED

Retaliation is an action, performed directly or through others, that is aimed to dissuade a reasonable person from engaging in a protected activity or is done in retribution for engaging in a protected activity. Action in response to a protected activity is not retaliatory unless:

- It has a **materially adverse effect** on the working, academic, or other institution-related environment of an individual; and
- It **would not have occurred** in the absence of **(but for) the protected activity**.

Examples of **protected activities** include reporting (internally or externally) a complaint of sexual harassment in good faith, assisting others in making such a report, or honestly participating as an investigator, witness, decision maker, or otherwise assisting, in an investigation or proceeding related to suspected sexual harassment.

PEOPLE IN THE PROCESS

PEOPLE IN THE PROCESS

A **complainant** is the person who allegedly experienced the sexual harassment.

A **respondent** is the person who allegedly engaged in the sexual harassment.

A **witness** is a person who saw, or has information about, the alleged sexual harassment.

An **expert witness** is a person who has special knowledge or proficiency in a field relevant to a sexual harassment case.

PEOPLE IN THE PROCESS

A **support person** is a person chosen by a party to attend meetings, interviews, and hearings to provide emotional support to the party.

A **process advisor** is a person chosen by a party, or appointed by the institution, to advise the party about the grievance process and to conduct cross-examination on the party's behalf.

PEOPLE IN THE PROCESS

The **Title IX Coordinator** is the person designated by the institution to oversee the institution's response to complaints of sexual harassment. They can investigate and facilitate informal resolutions and hearings, but they cannot be the decision-maker.

An **investigator** is a fact finder.

A **facilitator** is a person who facilitates informal resolutions.

PEOPLE IN THE PROCESS

The **decision-maker** is a person or panel, not including the Title IX Coordinator, that holds a hearing and issues a determination as to whether the Respondent committed sexual harassment.

The **appeals officer** is the person who reviews and makes a decision on any appeals of the decision-maker's determination.

SUPPORTIVE MEASURES

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Supportive measures are individualized services provided to a party by the institution (through the Title IX Coordinator) that are non-punitive, non-disciplinary, and not unreasonably burdensome to the other party provided by the institution to restore or preserve equal access to education, protect student and employee safety, or deter sexual harassment.

SUPPORTIVE MEASURES

Examples include (but are not limited to):

- No contact orders
- Excused absences, extensions on assignments/exams, incompletes, or withdrawals
- Leaves of absence
- Adjustments to classes, work schedules, or on-campus housing arrangements

GRIEVANCE PROCESS

FORMAL COMPLAINT

A **formal complaint** is a document filed by either a complainant or the Title IX Coordinator alleging sexual harassment against a respondent and requesting that the university address the sexual harassment.

A formal complaint is required to initiate the grievance process.

RESOLUTION PATHS

Following a formal complaint, the case may proceed under either:

- Informal resolution; or
- Formal investigation/adjudication.

INFORMAL RESOLUTION

- A process through which parties try to reach a mutual agreement resolving the formal complaint without an investigation/adjudication.
- Either party may request an informal resolution at any time prior to a determination.
- An informal resolution agreement can include a wide range of resolution options.
- Any party can withdraw participation in the informal resolution process at any time. If parties do not reach an agreement, the case reverts to formal investigation.

INFORMAL RESOLUTION

IS permitted when:

- There is an active formal complaint;
- Both parties voluntarily consent in writing to proceed with IR; and
- Title IX Coordinator agrees informal resolution is appropriate.

34 C.F.R. § 106.45(b)(9)(iii).

INFORMAL RESOLUTION

IS NOT permitted when:

- Respondent is an employee and Complainant is a student;
- Formal complaint is institution driven (not explicit, but creates a power imbalance)

FORMAL INVESTIGATION/ADJUDICATION

- Involves an investigation in which parties and witnesses submit to interviews and provide evidence.
- Respondent is **presumed not responsible** until a determination regarding responsibility is made at the conclusion of the grievance process.

FORMAL INVESTIGATION/ADJUDICATION

- The standard of proof is **preponderance of the evidence**, which means that it is more likely than not that the conduct alleged occurred.
- The burden of proof and of gathering evidence falls on the institution, not on either the complainant or the respondent.

FORMAL INVESTIGATION

- A live hearing is held in which the parties are subject to cross-examination by the opposing party's process advisor.
- Parties must be able to see and hear each other, but do not have to be in the same room (can be conducted over Zoom).

FORMAL INVESTIGATION

- The decision-maker issues a determination as to whether respondent violated the sexual harassment policy by a preponderance of the evidence.
- If the decision-maker finds respondent responsible, the sanction is issued with the determination.
- Either party may appeal.

OBLIGATIONS OF THOSE IN TITLE IX ROLES

CONFIDENTIALITY

The institution and its employees involved in a Title IX case must keep confidential the name of any individual who has made a report of sexual harassment and parties, reporters, and witnesses except:

- As permitted by FERPA;
- As required by law; or
- To carry out the Title IX regulations

CONFLICTS OF INTEREST AND BIAS

The Title IX Coordinator, investigator, decision-maker, appellate officer, and individuals who facilitate informal resolutions cannot have a conflict of interest or bias for or against:

- Complainants or respondents **generally**; or
- **A specific** complainant or respondent.

CONFLICTS OF INTEREST AND BIAS

Conflict of interest means a conflict between competing duties; a conflict between the private interest and professional responsibilities of a person in a position of trust. (*Merriam-Webster Dictionary*)

Bias means inclined to favor or disfavor one party more than the other. (*Merriam-Webster Dictionary*)

CONFLICTS OF INTEREST AND BIAS

- Do not prejudge the parties or the evidence.
- Do not make inferences based on the gender of the party or their status.
- Objectively evaluate the evidence.
- Be impartial and neutral.

CONFLICTS OF INTEREST AND BIAS

- Ask yourself:
 - Do I know any of the parties or witnesses personally?
 - Do I have a bias against a party?
 - Do I have the ability to act impartially in this case?
- If you believe you have a conflict of interest or bias at any point, report it to the Title IX Coordinator.



QUESTIONS
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