



Title IX Framework – What You Need to Know

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TWELVE OFFICES **COAST TO COAST**



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NEW MAJOR MARKETS
LAST FIVE YEARS

OUR CLIENT BASE



KEY INDUSTRIES SERVED

- Admiralty and Maritime
 - Automotive and Aerospace
 - Agriculture
 - Autonomy and Robotics Systems
 - Banking and Financial Services
 - Defense and Aviation
 - Energy, Utilities, and Natural Resources
- Fintech
 - Governmental Entities
 - Health Care
 - Higher Education
 - Industrial, Manufacturing, and Distribution
 - Insurance
- Internet of Things (IoT)
 - Life Sciences
 - Manufacturing
 - Medical Devices
 - Non-Profit
 - Outdoor Products
 - Personalized Medicine and Genomics
- Real Estate
 - Senior Living and Long-Term Care
 - Sports and Entertainment

HIGHER EDUCATION PRACTICE

- The Higher Education Practice Group is deeply experienced in all manner of regulatory issues that are important to institutions, investors, third-party servicers and accrediting agencies.

Title IV	Accreditation	State Licensure
Cybersecurity	False Claims Act	Title IX
Transactions	Government Relations	Government Investigations

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TITLE IX BACKGROUND

- Title IX of the Education Amendments of 1972 (“Title IX”) prohibits discrimination based on sex in education programs and activities that receive Federal financial assistance.
- U.S. Department of Education (“Department” or “ED”) implementation regulations are found in **34 C.F.R. Part 106**
- Title IX is enforced by the U.S. Department of Education’s, Office for Civil Rights (“OCR”).
- Failure to comply with Title IX can result in termination from participation in Title IV programs authorized under the Higher Education Act.

THE LEGAL FOUNDATION FOR TITLE IX

- The entire Title IX statutory and regulatory regime is founded on 37 words included by Congress in the Education Amendments of 1972.
- “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.” (20 U.S.C. § 1681(a).

THE LEGAL FOUNDATION FOR TITLE IX

- The U.S. Department of Health Education and Welfare issued implementing regulations in 1975.
- Prior to 2020, nothing in these or subsequent regulations addressed the issue of sexual harassment and sexual assault as a form of sex discrimination, which emerged instead as a legal concept in various court cases. (34 C.F.R. Part 106)

THE LEGAL FOUNDATION FOR TITLE IX

- In lieu of formal regulations, the Department issued a series of guidance documents, including:
 - *Dear Colleague Letter on Sexual Violence* (Apr. 4, 2011)
(<https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf>) – Withdrawn Sept. 2017
 - *Questions and Answers on Title IX and Sexual Violence* (Apr. 29, 2014)
(<https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>) – Withdrawn Sept. 2017

THE LEGAL FOUNDATION FOR TITLE IX

- Simultaneous with the withdrawal of the Obama Administration guidance, Secretary DeVos issued a new Dear Colleague Letter (<https://www2.ed.gov/about/offices/list/ocr/letters/colleague-title-ix-201709.pdf>) and new Questions and Answers guidance (<https://www2.ed.gov/about/offices/list/ocr/docs/qa-title-ix-201709.pdf>) (Sept. 22, 2017)
- The Department issued new proposed regulations on November 29, 2018, which eventually received more than 124,000 comments.

THE LEGAL FOUNDATION FOR TITLE IX

- The final rule was released on May 6, 2020, and published in the Federal Register on May 19, 2020. (<https://www.govinfo.gov/content/pkg/FR-2020-05-19/pdf/2020-10512.pdf>).
- The Department simultaneously released an overview of the final regulations (<https://www2.ed.gov/about/offices/list/ocr/docs/titleix-overview.pdf>) and a summary of major provisions of the new rule (<https://www2.ed.gov/about/offices/list/ocr/docs/titleix-comparison.pdf>).

DEFINITIONS

- “Complainant” “means an individual who is alleged to be the victim of conduct that could constitute sexual harassment.”
- “Respondent” “means an individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment.”
- “Recipient” “is an postsecondary institution participating in federal financial aid programs authorized under the Higher Education Act (e.g. Title IV).”

DEFINITIONS

- Sexual harassment:
 - Includes any of three types of misconduct on the basis of sex:
 - Any unwelcome conduct that a reasonable person would find so severe, pervasive, and objectively offensive that it denies a person equal educational access;
 - Any instance of a quid pro quo harassment by an institution's employee; and
 - Any instance of sexual assault, dating violence, domestic violence, or stalking (as defined in the Clery Act).

DEFINITIONS

- 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. (34 C.F.R. § 106.44)
 - In determining whether an institution exercised substantial control, courts will look at “whether the recipient funded, promoted, or sponsored the event or circumstance where the alleged harassment occurred.” (Final Rule at 30,197)

DEFINITIONS

- Education Program or Activity (cont'd)
 - Clinical clerkship
 - “With regard to clinical clerkships or with preceptors located at a separate facility, the institution “must consider whether the recipient exercised substantial control over both the respondent and the hospital or medical clinic where the clinical clerkship is held.”



DEFINITIONS

- Education Program or Activity (cont'd)
 - Applicability to **online platforms**:
 - “The operations of a school may certainly include computer and internet networks, digital platforms, and computer hardware or software owned or operated by, or used in the operations of, the school.”
 - “The factual circumstances of **online harassment** must be analyzed to determine if it occurred in an education program or activity.”
 - “The definition of education program or activity” in the 2020 [Final Rule] does not create a distinction between sexual harassment occurring in person versus online.”

DEFINITIONS

- “An institution has **actual knowledge** of sexual harassment when a school has notice that a person may have been victimized by sexual harassment.”
- A “**formal complaint**” is an official document alleging sexual harassment.”
 - Must be signed by the complainant or by the Title IX Coordinator
 - At the time of filing the complaint, the complainant must be participating or attempting to participate in an education program or activity.

WHEN TITLE IX **DOES NOT APPLY**

- Religious organizations:
 - Title IX regulations do not apply to an educational institution controlled by a religious organization “to the extent application of this part would not be consistent with the religious tenets of such organization.” (34 C.F.R. § 106.12(a).)

WHEN TITLE IX **DOES NOT APPLY**

- Religious organizations:
 - Opportunities for such an educational institution to assert its exemption (34 C.F.R. § 106.12(b)):
 - Such an educational institution can seek assurance of this exemption by providing a written statement to the Assistant Secretary outlining the parts of the Title IX regulations that conflict with its religious tenets.
 - An educational institution controlled by a religious organization is not required to seek assurance from the Assistant Secretary to assert an exemption.

REPORTING **SEXUAL HARASSMENT**

- Any person may report sex discrimination, including sexual harassment:
 - In person, by mail, by telephone, or by e-mail, using the contact information listed for the Title IX Coordinator, or by any other means that results in the Title IX Coordinator receiving the person's verbal or written report.

REPORTING **SEXUAL HARASSMENT**

- Any person may report sex discrimination, including sexual harassment (cont'd.):
 - Such a report may be made at any time, including during non-business hours, by using the telephone number or e-mail address, or by mail to the office address, listed for the Title IX Coordinator.
- In cases where an alleged victim does not file a formal complaint, a Title IX Coordinator may initiate grievance procedures where discipline is appropriate.

34 C.F.R. § 106.8(a)

RESPONSE OBLIGATIONS

- An institution must respond promptly to Title IX sexual harassment in a manner that is not deliberately indifferent when:
 - The institution has actual knowledge of sexual harassment;
 - That occurred within the institution's education program or activity; and
 - Against a person in the United States.

34 C.F.R. § 106.44(a)

RESPONSE OBLIGATIONS

- An institution is deliberately indifferent only if its response to sexual harassment is clearly unreasonable in light of the known circumstances.
- The Title IX Coordinator must promptly contact the complainant confidentially to discuss:
 - The availability of supportive measures;
 - The right to file a complaint; and
 - How to file a complaint.

SUPPORTIVE MEASURES

- Supportive measures are free, individualized services designed to restore or preserve equal access to education, protect safety, or deter sexual harassment.
- Supportive measures support a student, and they are not disciplinary or punitive with respect to another student.



SUPPORTIVE MEASURES

- There does not need to be a formal complaint for the person alleged to be the victim to receive supportive measures.
- Examples of supportive measures include counseling, extension of deadlines, modifications of class schedules, leaves of absence, and mutual restrictions on contact between individuals.

34 C.F.R. § 106.30

EMERGENCY REMOVAL

- Nothing in Part 106 “precludes a recipient from removing a respondent from the recipient’s education program or activity on an **emergency basis**, provided that:
 - The recipient 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

EMERGENCY REMOVAL

- Provide the respondent with notice and an opportunity to challenge the decision immediately following the removal.” (34 C.F.R. § 106.44(c).)
- Nothing in Part 106, Subpart D, “precludes a recipient from placing a **non-student employee respondent** on administrative leave during the pendency of a grievance process that complies with § 106.45.”

NOTIFICATION

- Must send written notice of any investigative interviews, meetings, or hearings.
- Must send the parties, and their advisors, evidence directly related to the allegations, in electronic format or hard copy, with at least 10 days for the parties to inspect, review, and respond to the evidence.
- Must send the parties, and their advisors, an investigative report that fairly summarizes relevant evidence, in electronic format or hard copy, with at least 10 days for the parties to respond.

GENERAL PROCEDURES

- Objective evaluation:
 - An institution's grievance procedures must ensure an objective evaluation of all evidence, including both inculpatory and exculpatory evidence.
 - Credibility determinations cannot be made on the basis of a person's status as a complainant, respondent, or witness.

GENERAL PROCEDURES

- Timeline
 - The grievance process must include reasonably prompt timeframes for resolving formal complaints of sexual harassment.
 - Temporary delays can only be granted for good cause.

DISMISSALS

- An institution must dismiss allegations of conduct that do not meet the definition of sexual harassment (under Title IX) or did not occur in an institution's education program or activity against a person in the U.S.

DISMISSALS

- An institution may dismiss the formal complaint or any allegations, if at any time during the proceedings:
 - The complainant notifies the Title IX Coordinator in writing that the complainant would like to withdraw the formal complaint or any specific allegations in the formal complaint;
 - The respondent is no longer enrolled or employed by the institution; or
 - The specific circumstances prevent the institution from gathering evidence sufficient to reach a determination.

34 C.F.R. § 106.45(b)(3)(i)

INFORMAL RESOLUTION

- At any time prior to reaching a determination, an institution may offer and facilitate an informal resolution, such as mediation or restorative justice.
- An institution, however, may not:
 - Require a student or employee to **waive the right** to an investigation and adjudication of a formal complaint;
 - Require the parties to **participate** in any informal resolution process; or
 - **Offer an informal resolution process unless a formal complaint has been filed.**

34 C.F.R. § 106.45(b)(9)

HEARINGS

- If the complaint cannot be resolved informally, the institution must hold a **live hearing**.
- At the request of either party, the recipient must provide for the entire live hearing (including cross-examination) to occur with the parties located in separate rooms with technology enabling the parties to see and hear each other.



HEARINGS

- The parties may be accompanied by an advisor of choice.
- If a party does not have an advisor present at the live hearing, the institution must provide, without fee or charge to that party, an advisor of the institution's choice who may be, but is not required to be, an attorney, to conduct cross-examination on behalf of the party.

34 C.F.R. § 106.45(b)(6)(i)

HEARINGS

- Cross-examination:
 - The parties' advisors are permitted to cross-examine other parties and witnesses.
 - The respondent and the complainant may not personally cross-examine each other or a witness.
 - Cross-examination questions must be relevant, and the decisionmaker(s) must decide if a question is relevant before a party or witness must answer the question.

HEARINGS

- Cross-examination (cont'd.):
 - If a party or witness does not submit to cross-examination at the live hearing, the decision-maker(s) must not rely on any statement of that party or witness in reaching a determination regarding responsibility. *(NOTE: This provision was recently struck down by a federal judge in Massachusetts.)*
 - No party may be forced, threatened, or discriminated against for choosing not to be part of the grievance process.

DETERMINATION REGARDING RESPONSIBILITY

- The decision-maker must issue a written determination that includes:
 - Responsibility, with findings of fact, conclusions about whether the alleged conduct occurred, and rationale for the result as to each allegation;
 - Any disciplinary sanctions imposed on the respondent; and
 - Whether remedies will be provided to the complainant.

DETERMINATION REGARDING RESPONSIBILITY

- The standard of evidence to determine responsibility is the preponderance of the evidence standard or the clear and convincing evidence standard.
- The written determination must be sent **simultaneously** to the parties along with information about how to file an appeal.

34 C.F.R. § 106.45(b)(7)

SANCTIONS AND REMEDIES

- The remedies for the complainant must be designed to preserve or restore equal access to the institution's education program or activity.
- Unlike supportive measures in place prior to a determination, a complainant's remedies can be punitive or disciplinary against the respondent.

SANCTIONS AND REMEDIES

Students	Employees
Written warning	Written warning
Removal from course	Required training
Probation	Suspension
Suspension or Expulsion	Termination

APPEALS

- “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 bases”:
 - Procedural irregularity that affected the outcome of the matter;
 - Newly discovered evidence that could affect the outcome of the matter; or
 - One or more of the school’s Title IX personnel had a conflict of interest or bias that affected the outcome of the matter.

34 C.F.R. § 106.45(b)(8)(i)

APPEALS

- A school may allow additional bases for appeal, so long as they apply equally to both parties.
- Regarding any appeal, the recipient must do the following:
 - “Notify the other party in writing when an appeal is filed and implement appeal procedures equally for both parties.”
 - “Ensure that the decision-maker(s) for the appeal is not the same person as the decision-maker(s) that reached the determination of responsibility or dismissal, the investigator(s), or the Title IX Coordinator.”

34 C.F.R. § 106.45(b)(8)(ii)

APPEALS

- Appeal procedures:
 - A notice of appeal must be in writing and must be filed with the Title IX Coordinator within ten business days after the delivery of the decision to be appealed.
 - The Title IX Coordinator will designate an Appeal Officer to hear and make a decision with regard to the appeal.
 - Each party will be given a minimum of ten business days to provide a written statement supporting or challenging the appealed action.

APPEALS

- Appeal procedures:
 - As soon as is reasonably practicable, and generally within fourteen (14) days after receipt of the parties' written statements, the Appeal Officer will issue a written decision regarding the appeal simultaneously to both parties. The decision will describe the result of the appeal and the rationale for the decision. The decision of the Appeal Officer is final.

TITLE IX COORDINATOR

- “Each recipient must designate and authorize at least one employee to coordinate its efforts to comply with its responsibilities under this part, which employee must be referred to as the ‘Title IX Coordinator.’” (Section 106.8(a))
- The Title IX Coordinator must be the recipient’s “employee.”
- The Title IX Coordinator must serve **without bias or conflicts of interest**, and receive the training specified in that provision. (34 C.F.R. § 106.45(b)(1)(iii))

TRAINING REQUIREMENTS

- Training of Title IX personnel (Title IX Coordinator, investigators, decision-makers, or facilitators of informal resolutions) must include training on:
 - The definition of sexual harassment
 - The scope of a school's education program or activity



TRAINING REQUIREMENTS

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- Training of Title IX personnel (Title IX Coordinator, investigators, decision-makers, or facilitators of informal resolutions) must include training on (cont'd):
 - How to conduct an investigation and grievance process including hearings, appeals, and informal resolution process
 - How to serve impartially, including by avoiding prejudgment of the facts at issues, conflicts of interest, and bias

34 C.F.R. § 106.45(b)(1)

TRAINING REQUIREMENTS

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- An institution must ensure that decision-makers receive training:
 - On any technology to be used at a live hearing; and
 - On issues of relevance, including how to apply the rape shield protections provided for complainants
 - The training materials cannot rely on sex stereotypes, must promote impartial investigations and adjudications, and must be posted on each institution's website.

CONFLICTS OF INTEREST

- 34 C.F.R. § 106.45(b)(1)(iii) requires that all Title IX personnel be free from conflicts of interest or bias against complainants and respondents generally or against an individual complainant or respondent.
- The Department leaves recipients discretion to decide how best to implement the prohibition on conflicts of interest and bias, including whether a recipient wishes to provide a process for parties to assert claims of conflict of interest of bias during the investigation.

PUBLICATION REQUIREMENTS

- Institutions must promptly display the Title IX Coordinator contact information and grievance policy on its website.
- The recipient must publish a grievance procedure that provides “for the prompt and equitable resolution of student and employee complaints” alleging a Title IX violation and a grievance process for handling formal complaints, as defined in Sections 106.30 and 106.45.
 - Written grievance procedures must include 10 other specific items.

REQUIRED RECORDS

- The recipient must maintain all of the following records for a period of seven years:
 - “Each sexual harassment investigation including any determination regarding responsibility and any audio or audiovisual recording or transcript required under [34 C.F.R. § 106.45(b)(6)(i)], any disciplinary sanctions imposed on the respondent, and any remedies provided to the complainant.”
 - “Any appeal and the result therefrom.”
 - “Any informal resolution and the result therefrom.”

34 C.F.R. § 106.45(b)(10)(i)

REQUIRED RECORDS

- A recipient must maintain and disclose its Title IX training materials:
 - Maintain all materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process for seven years.
 - Institutions must make these training materials publicly available on its website
- Institutions must create an audio or audiovisual recording, or transcript, of any live hearing.

RETALIATION

- Title IX regulations expressly provides that no school “or other person may intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by Title IX”
- Charging an individual with student code of conduct violations that do not involve sexual harassment, but that arise out of the same facts or circumstances as a report or formal complaint of sexual harassment, for the purpose of interfering with any right or privilege secured by Title IX, constitutes retaliation.

RETALIATION

- Charging an individual with a code of conduct violation for making a materially false statement in bad faith in the course of a Title IX grievance proceeding does not constitute retaliation.
- The exercise of rights protected under the First Amendment does not constitute retaliation.

34 C.F.R. § 106.71

WHAT IS **NEXT**?

- OCR is undertaking a comprehensive review of the Department's existing regulations, orders, guidance, policies, and any other similar agency actions, including the amendments to the Department's Title IX regulations that took effect on August 14, 2020.
<https://www2.ed.gov/about/offices/list/ocr/correspondence/stakeholders/20210406-titleix-eo-14021.pdf>

WHAT IS **NEXT**?

- OCR issued a 67-page question-and-answer document in July 2021.
<https://www2.ed.gov/about/offices/list/ocr/docs/202107-qa-titleix.pdf>
- At this time, the Title IX regulations as amended in 2020 remain in effect.
- Expect NPRM for new Title IX regulations in May 2022.

DECISIONS TO MAKE

- Who is/are the decision-maker(s)?
 - How are they chosen?
- What is the process for ensuring that the Title IX Coordinator, investigator(s) and decision-maker(s) do not have a conflict of interest or bias regarding a party?

DECISIONS TO MAKE

- How are the Title IX Coordinator, investigator(s) and decision-maker(s) trained?
 - How often are they trained?
 - How does the institution ensure that the training materials are free of sex stereotypes and promote impartial investigations and adjudications?
- Where are the training materials made public?

RESOURCES

- Title IX Final Rule
- Questions and Answers on the Title IX Regulations on Sexual Harassment
- Dear Colleague Letter regarding cross-examination

QUESTIONS





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