

EMERGING LEGAL ISSUES IN URBAN EDUCATION



The Department of Education's New Title IX Regulations: What this Means for Elementary and Secondary Schools

Tuesday, January 22, 2019



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Agenda

- I. Background:
 - A. What is Title IX and how does it regulate schools?
 - B. What was the previous OCR guidance?
 - C. What are the proposed regulations?
- II. The Proposed Regulation: New Requirements
 - A. ED's Proposed Standard
 - B. Definitions: Sexual Harassment, Deliberate Indifference, and Actual Knowledge
 - C. Investigation and Adjudication
 - D. Administrative Requirements
- III. Recommended Interim Policy Changes
- IV. Questions?



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Title IX: Background



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What is Title IX?

- Title IX prohibits discrimination based on sex in education programs or activities that accept federal financial assistance.

§ 1681. Sex

(a) Prohibition against discrimination; exceptions

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, except that:



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ED's Power to Issue Administrative Regulations Under Title IX

“Of course, the Department of Education could enforce the requirement administratively: Agencies generally have authority to promulgate and enforce requirements that effectuate the statute’s nondiscrimination mandate, 20 U.S.C. § 1682”

Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 292 (1998)



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Previous ED Guidance (still in effect)

REVISED SEXUAL HARASSMENT GUIDANCE:
HARASSMENT OF STUDENTS
BY SCHOOL EMPLOYEES, OTHER STUDENTS,
OR THIRD PARTIES

Sexual Harassment Guidance 1997

TITLE IX



January 2001

Title IX of the Education Amendments of 1972 (Title IX) and the Department of Education's (Department) implementing regulations prohibit discrimination on the basis of sex in federally assisted education programs and activities.² The Supreme Court, Congress, and Federal executive departments and agencies, including the Department, have recognized that sexual harassment of students can constitute discrimination prohibited by Title IX.³ This guidance focuses on a school's⁴ fundamental compliance responsibilities under Title IX and the Title IX regulations to address sexual harassment of students as a condition of continued receipt of Federal funding. It describes the regulatory basis for a school's compliance responsibilities under Title IX, outlines the circumstances under which sexual harassment may constitute discrimination prohibited by the statute and regulations, and provides information about actions that schools should take to prevent sexual harassment or to address it effectively if it does occur.⁵



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Previous ED Guidance



UNITED STATES DEPARTMENT OF EDUCATION

OFFICE FOR CIVIL RIGHTS

THE ASSISTANT SECRETARY

April 4, 2011

Dear Colleague:

Education has long been recognized as the great equalizer in America. The U.S. Department of Education and its Office for Civil Rights (OCR) believe that providing all students with an educational environment free from discrimination is extremely important. The sexual harassment of students, including sexual violence, interferes with students' right to receive an education free from discrimination and, in the case of sexual violence, is a crime.

Title IX of the Education Amendments of 1972 (Title IX), 20 U.S.C. §§ 1681 *et seq.*, and its implementing regulations, 34 C.F.R. Part 106, prohibit discrimination on the basis of sex in education programs or activities operated by recipients of Federal financial assistance. Sexual harassment of students, which includes acts of sexual violence, is a form of sex discrimination prohibited by Title IX. In order to assist recipients, which include school districts, colleges, and universities (hereinafter "schools" or "recipients") in meeting these obligations, this letter¹ explains that the requirements of Title IX pertaining to sexual harassment also cover sexual violence, and lays out the specific Title IX requirements applicable to sexual violence.² Sexual



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Previous ED Guidance

Archived Information



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THE ASSISTANT SECRETARY

Questions and Answers on Title IX and Sexual Violence¹

Title IX of the Education Amendments of 1972 ("Title IX")² is a federal civil rights law that prohibits discrimination on the basis of sex in federally funded education programs and activities. All public and private elementary and secondary schools, school districts, colleges, and universities receiving any federal financial assistance (hereinafter "schools", "recipients", or "recipient institutions") must comply with Title IX.³



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Previous ED Guidance



U.S. Department of Justice
Civil Rights Division



U.S. Department of Education
Office for Civil Rights

May 13, 2016

Dear Colleague:

Schools across the country strive to create and sustain inclusive, supportive, safe, and nondiscriminatory communities for all students. In recent years, we have received an increasing number of questions from parents, teachers, principals, and school superintendents about civil rights protections for transgender students. Title IX of the Education Amendments of 1972 (Title IX) and its implementing regulations prohibit sex discrimination in educational programs and activities operated by recipients of Federal financial assistance.¹ This prohibition encompasses discrimination based on a student's gender identity, including discrimination based on a student's transgender status. This letter summarizes a school's Title IX obligations regarding transgender students and explains how the U.S. Department of Education (ED) and the U.S. Department of Justice (DOJ) evaluate a school's compliance with these obligations.



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Withdrawal of Previous Guidance



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS
THE ASSISTANT SECRETARY

September 22, 2017

Dear Colleague:

The purpose of this letter is to inform you that the Department of Education is withdrawing the statements of policy and guidance reflected in the following documents:

- Dear Colleague Letter on Sexual Violence, issued by the Office for Civil Rights at the U.S. Department of Education, dated April 4, 2011.
- Questions and Answers on Title IX and Sexual Violence, issued by the Office for Civil Rights at the U.S. Department of Education, dated April 29, 2014.

These guidance documents interpreted Title IX to impose new mandates related to the procedures by which educational institutions investigate, adjudicate, and resolve allegations of student-on-student sexual misconduct. The 2011 Dear Colleague Letter required schools to adopt a minimal standard of proof—the preponderance-of-the-evidence standard—in administering student discipline, even though



U.S. Department of Justice
Civil Rights Division

February 22, 2017

Dear Colleague:

The purpose of this guidance is to inform you that the Department of Justice and the Department of Education are withdrawing the statements of policy and guidance reflected in:

- Letter to Emily Prince from James A. Ferg-Cadima, Acting Deputy Assistant Secretary for Policy, Office for Civil Rights at the Department of Education dated January 7, 2015; and
- Dear Colleague Letter on Transgender Students jointly issued by the Civil Rights Division of the Department of Justice and the Department of Education dated May 13, 2016.



U.S. Department of Education
Office for Civil Rights



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ED's Interim Guidance



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

September 2017

Q&A on Campus Sexual Misconduct

Under Title IX of the Education Amendments of 1972 and its implementing regulations, an institution that receives federal funds must ensure that no student suffers a deprivation of her or his access to educational opportunities on the basis of sex. The Department of Education intends to engage in rulemaking on the topic of schools' Title IX responsibilities concerning complaints of sexual misconduct, including peer-on-peer sexual harassment and sexual violence. The Department will solicit input from stakeholders and the public during that rulemaking process. In the interim, these questions and answers—along with the *Revised Sexual Harassment Guidance* previously issued by the Office for Civil Rights¹—provide information about how OCR will assess a school's compliance with Title IX.



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Proposed Regulation: Nov. 18, 2017

Secretary DeVos: Proposed Title IX Rule Provides Clarity for Schools, Support for Survivors, and Due Process Rights for All

Department of Education Welcomes Public Comment on Draft Rule

NOVEMBER 16, 2018



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What Happens Next?




- 60-day comment period
- Review of comments by ED
- Finalization of regulation
- Possible Litigation

Comments originally due January 28, 2019, **BUT** . . .



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During the funding lapse, Federalregister.gov is not being supported. If data feeds are not available from GPO, FederalRegister.gov will not be updated, so please use the official edition of the Federal Register Govinfo (<https://www.govinfo.gov/app/collection/fr/>). If there is a technical issue with the Public Inspection List, you can view the documents on public inspection at our office in Washington, DC or on archives.g

ED Civil Rights @EDcivilrights Following

1/4 The Federal eRulemaking Portal is currently unavailable due to technical issues, which began on the afternoon of January 16, 2019. While the Federal eRulemaking Portal is unavailable, comments on the Department's proposed rule under Title IX (Nondiscrimination on the Basis...

3:39 PM - 17 Jan 2019

ED Civil Rights @EDcivilrights · Jan 17

2/4 ...of Sex in Education Programs or Activities Receiving Federal Financial Assistance) may continue to be submitted via postal mail, commercial delivery, or hand delivery addressed to: Brittany Bull, U.S. Department of Education, 400 Maryland Ave. SW, Room 6E310,...

1 1


ED Civil Rights @EDcivilrights · Jan 17

3/4 ...Washington, DC 20202. The Department will extend the public comment period to ensure that the public will have had sixty days in total to submit comments on this proposed rule using the Federal eRulemaking Portal.

1 2


ED Civil Rights @EDcivilrights · Jan 17


4/4 The closing date for public comments on this proposed rule will be calculated once the Federal eRulemaking Portal is operational again, at which time comments may be submitted at [regulations.gov/document?D=ED_...](https://www.regulations.gov/document?D=ED_...)


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The Proposed Regulation: New Rules for Schools

- ED's Proposed Standard
- Definitions: "Sexual Harassment," "Deliberate Indifference," and "Actual Knowledge"
- Investigation and Adjudication
- Administrative Requirements




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ED's Proposed Standard

- Proposed § 106.44(a): A school with “**actual knowledge** of sexual harassment in an education program or activity . . . must respond in a manner that is not **deliberately indifferent**.”
- A school “is **deliberately indifferent** only if its response to sexual harassment is **clearly unreasonable** in light of the known circumstances.”



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Compare: 2011 Guidance

What are a school's responsibilities to address sexual harassment and sexual violence?

- A school has a responsibility to respond promptly and effectively. If a school knows or reasonably should know about sexual harassment or sexual violence that creates a hostile environment, the school must take immediate action to eliminate the sexual harassment or sexual violence, prevent its recurrence, and address its effects.



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Definition: Sexual Harassment

“**Sexual Harassment**” means a school:

- “conditioning the provision of an aid, benefit, or service of the recipient on an individual’s participation in unwelcome sexual conduct;”
- “unwelcome conduct on the basis of sex that is 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 in 34 CFR 668.46(a), implementing the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act (Clery Act).”



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Definition: “Actual Knowledge”

- “**Actual knowledge**” is defined as “notice of sexual harassment or allegations of sexual harassment to a recipient’s **Title IX Coordinator** or any official of the recipient who has **authority to institute corrective measures on behalf of the recipient.**”
- Replaces Obama-era “Responsible Employee” concept



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Actual Knowledge: Elementary & Secondary Schools

- “[A] teacher in the elementary and secondary context” is an official with the requisite authority “with regard to student-on-student harassment.”
- The Department reasoned that “school administrators and teachers are more likely to act in loco parentis, and exercise a considerable degree of control and supervision over their students” in elementary and secondary school settings.



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Actual Knowledge: Who is a Person with “Authority”?

- Student teacher?
- Cafeteria worker?
- Volunteer classroom parent?
- Coach?
- Counselor?



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Actual Knowledge

- Remember: Title IX Coordinator is always a person with authority.
- But: “the mere ability or obligation to report sexual harassment does not necessarily qualify an employee, even if that employee is an official, as one who has authority to institute corrective measures on behalf of the recipient.”



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Investigation & Adjudication



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Investigation

- The regulation would make clear that the “decision-maker(s) cannot be the same person as the “Title IX Coordinator or the investigator(s).”
- Prohibition on “Single Investigator” Model.



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Investigation: Presumption of Innocence



- Policy must include presumption of innocence
- Investigation notice must contain presumption of innocence
- Interim decisions must account for presumption of innocence



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Investigation: Mandatory Dismissals

- Must close a formal complaint that does not state a prima facie instance of sexual harassment or is outside Title IX jurisdiction
- May continue under student conduct code (presumably)

CASE CLOSED



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Investigation: Informal Resolution



- Permitted for any type of case, including sexual assault
- Still requires consent from both parties
- Can only occur after written notice of allegations to respondent



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Investigation: Parent Participation

Grants elementary and secondary schools “the discretion to look to state law and local educational practice in determining whether the rights of the party shall be exercised by the parent(s) or guardian(s) instead of or in addition to” the accused student.”



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Investigation: Interim Measures

- A school may “remov[e] a respondent from the recipient’s education program or activity on an emergency basis” so long as the school “undertakes an individualized safety and risk analysis, determines that an immediate threat to the health or safety of students or employees justifies removal, and provides the respondent with notice.”
- Must comply with IDEA, Section 504 and Title II of the ADA



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Adjudication

- **Live Hearings:** Encouraged, but optional for elementary and secondary schools.
- “Because most parties and many witnesses are minors in the elementary and secondary school context, sensitivities associated with age and developmental ability may outweigh the benefits of cross-examination at a live hearing.”



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Investigation: Access to Evidence

- Parties have right to review investigation file upon request
- Right attaches to all evidence related to allegations, even if school does not intend to rely on it
- Must be made available electronically before investigation report is final



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Adjudication: Alternative to Live Hearing

“If no hearing is held, the decision-maker must afford each party the opportunity to submit written questions, provide each party with the answers, and allow for additional, limited follow-up questions from each party.”



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Adjudication: Standard of Evidence

- Two options: Preponderance of Evidence and Clear and Convincing Evidence
- BUT cannot have different standards for students and faculty
- AND a school may only utilize the preponderance of evidence standard if the school “uses that standard for conduct code violations that do not involve sexual harassment but carry the same maximum disciplinary sanction”



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Administrative Requirements



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Records Retention



- Three year records retention requirement for case files
- Three year records retention requirement for training materials of involved employees
- Parties have right of access



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10 Notice Requirements

1. Title IX Contacts and Grievance Procedures
2. Non-Discrimination Statement
3. Formal Complaint
4. New Allegations
5. Emergency Removal of Respondent

NOTICE



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10 Notice Requirements

6. Informal Resolution
7. Extension of Investigation
8. Hearings, Investigative Interviews, or Other Meetings
9. Written Determination of Responsibility
10. Appeals

NOTICE



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Training Requirements

- Institutions must provide training on:
 - The definition of sexual harassment
 - How to conduct an investigation (including hearings, if applicable)
 - The school's grievance process



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Training Requirements

“[A]ny materials used to train coordinators, investigators, or decision-makers not rely on sex stereotypes and instead promote impartial investigations and adjudications of sexual harassment.”

Training



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Training Requirements

- ED estimates that the training “will take 16 hours each for the Title IX Coordinator, the investigator, and a decision-maker . . . for approximately \$14,458,650” in the first year (all schools receiving Title IX funds).
- ED “assume[s] that recipients will resume training of staff one their prior schedule after Year 1.”



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Training Requirements

- “The Department is interested in seeking comments from the public as to whether this requirement is adequate to ensure that recipients will provide necessary training to all appropriate individuals, including those at the elementary and secondary school level.”



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Specific Questions Addressed to K-12 Institutions

1. Whether there are parts of the proposed rule that will be unworkable at the elementary and secondary school level?
2. Whether there are additional parts of the proposed rule where the Department should direct recipients to take into account the age and developmental level of the parties involved and involve parents or guardians?



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Specific Questions Addressed to K-12 Institutions

3. Whether there are other unique aspects of addressing sexual harassment at the K-12 level that the Department should consider, such as systemic differences between institutions of higher education and elementary and secondary schools?



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Specific Questions Addressed to K-12 Institutions

4. Whether the regulations should differentiate the applicability of certain provisions on the basis of whether the complainant and respondent are 18 or over, in recognition of the fact that 18-year-olds are generally considered to be adults for many legal purposes?



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Interim Policy Changes



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Possible Interim Policy Changes

- Pre-interview written notice with sufficient details and with sufficient time
- Remove language about burden of interim measures falling on respondent
- Address inconsistent standard of proof as between sexual misconduct cases and other cases if exists
- Provide for pre-determination review of report and written comment
- Remove 60 day timeframe



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Other Changes?

- Regulations are not final and could change
- Earliest likely implementation summer/Fall 2019
- Litigation could invalidate portions of final regulations
- Use caution in embarking on full-scale re-writes at this time, but be prepared to update policies for next school year



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