

Part Two

The New Title IX Regulations on Sexual Harassment

The New Title IX Regulations on Sexual Harassment

- In May 2020, the Department of Education published new regulations on sexual harassment. 34 C.F.R. Part 106.
<https://www2.ed.gov/about/offices/list/ocr/newsroom.html>
- The actual regulations comprise a small portion of the publication (7 pages).
- The explanatory preamble is over 500 pages!
- The effective date of the regulations was August 14, 2020.

The 2020 Title IX Regulations – General Principles

When Must Schools Act and Who Must Report?

- The 2020 regulations return the focus of Title IX requirements for response by school districts to **actual knowledge** and **deliberate indifference**.
- Only if the school district has **actual knowledge** of **sexual harassment** (as sexual harassment is defined in the regulations) in its education programs and activities, against a person **in the United States**, does Title IX require a school district to respond promptly in a manner that is not **deliberately indifferent** -- meaning not clearly unreasonable in light of the known circumstances.
- **Actual knowledge** means notice of sexual harassment or allegations of sexual harassment to a **Title IX Coordinator** or any official who has the authority to institute corrective measures on behalf of the school district (e.g., Superintendent, building administrator).
- **ALL** employees in a K-12 school district are required to report suspected sexual harassment to the school district's **Title IX Coordinator**.

The 2020 Title IX Regulations – General Principles, *continued*

- There is now a difference between a **REPORT** of sexual harassment and a **FORMAL COMPLAINT**.
 - A “Report” triggers “*Supportive Measures*” to the alleged victim, but not an investigation.
 - Generally, only the victim (or parent/legal guardian for K-12 student) can file a formal complaint; this triggers an investigation.
 - The Title IX Coordinator can also trigger an investigation in certain circumstances (such as repeated accusations against the same student or employee).
 - If a Formal Complaint is filed, the decision-maker cannot be the same person as the investigator or Title IX Coordinator.
- Schools must treat complainants and respondents (those alleged to have committed sexual harassment) “equitably” in terms of the process.
- Schools must not presume responsibility on the part of a respondent until the process has run its course (and must state as much in the initial notice to parties of formal complaint).
- School districts may now choose to use the “preponderance” standard or the “clear and convincing” standard.

The 2020 Title IX Regulations – *The Title IX Coordinator*

- The 2020 regulations require that school districts appoint a ***Title IX Coordinator***, who has broad responsibilities for implementing the regulations and related policies/procedures for a school district.
- Deputy Title IX Coordinators are allowed (but one Coordinator should have overall responsibility).

The 2020 Title IX Regulations – *Enforcement*

- Title IX enforcement remains with the U.S. Department of Education's Office for Civil Rights (OCR), and through private lawsuits.
- OCR also announced in May that they were launching a new initiative to increase scrutiny on how K-12 schools handle sexual assaults through compliance reviews and data collection.
- Other forms of sex/gender discrimination covered under Title IX are unaffected and the existing Title IX regulations pertaining to them remain in effect (e.g. athletics).

The 2020 Regulations - *How Do School Districts Avoid Being Deliberately Indifferent?*

- By appointing a Title IX Coordinator.
- By adopting policies and procedures that comply with the Title IX regulations.
- By following the adopted policies and procedures, and retaining required records to demonstrate compliance.
- By retaining required records for seven years.

The 2020 Regulations - *Who is Covered Now: A Broader Scope*

- All students enrolled in the school district.
- All students seeking to enroll in the school district.
- Any individual participating in school programs, activities, and events.
- Employees, applicants for employment, and volunteers of the school district.



The addition of employees is a significant change.

The 2020 Regulations – *Where Does Title IX Apply: “Education Programs and Activities”*

- Under the new regulations, school districts only have a duty to respond to sexual harassment which occurs:
 - In education programs, activities or other events sponsored by the school district and taking place at school (e.g. classes, extra-curriculars, professional development activities).
 - Off school property, but only in the context of an education program or activity and when the school district has **substantial control** over the person who allegedly engaged in sexual harassment (e.g. field trips, away athletic events).
 - In the United States.

How is Title IX Sexual Harassment Defined

- The regulations prohibit “**sexual harassment.**”
- **Sexual harassment** means conduct on the basis of sex that falls into one of the following categories:
 1. “**Quid Pro Quo**” harassment by an **employee** (conditioning provision of a school district’s aid, benefit or service on an individual’s participation in unwelcome sexual conduct) against another employee or a student (e.g. a good evaluation for an employee; a better grade for a student).
 2. “**Hostile Environment**”: Unwelcome conduct based on sex that is so **severe, pervasive AND objectively offensive** that it effectively denies a person’s access to the school district’s education programs and activities.



The prior OCR Guidance definition was broader – Unwelcome conduct that was sufficiently severe, persistent, **OR** pervasive so as to limit a student’s ability to participate in or benefit from the school district’s education programs/activities.

How is Title IX Sexual Harassment Defined, continued

3. *Sexual Assault, Dating Violence, Domestic Violence, and Stalking:*

Sexual Assault: Defined as an offense classified as a Forcible or Non-Forcible Sex Offense under the uniform crime reporting system of the FBI. Those offenses are –

- **Non-Forcible Sex Offenses** -- Include incest and statutory rape. In New Hampshire, only children aged 16 and older can give consent to sexual contact with adults unless the two parties are legally married. A teenager under 13 cannot consent to any sexual contact. Children who are between 13 and 16 may consent to a sexual act when their partner is less than four years older than they are.
- **Forcible Sex Offenses** – Any sexual act directed against another person, without the **consent** of the victim, including instances where the victim is in a state of incapacitation. This sounds like a broad definition, but a sexual act is further defined **only** to include:
 - Forcible rape – Sexual intercourse with a person, forcibly and/or without that person’s consent, or in instances where the victim is in a state of incapacitation.
 - Forcible oral or anal sexual intercourse -- with another person, forcibly or without consent, or because of incapacitation.
 - Sexual assault with an object – Use of an object or instrument to unlawfully penetrate, however, slightly, the genital or anal opening of the body of another person, forcibly, or without consent or because of incapacitation.
 - Forcible fondling – The touching of the private body parts (genitals, buttocks or breasts) of another person for the purpose of sexual gratification, forcibly, or without consent, or because of incapacitation.

How is Title IX Sexual Harassment Defined, continued

4. ***Dating Violence:*** The Title IX regulations define dating violence as physical or sexual abuse, or threats of physical or sexual abuse, or emotional abuse committed by a person:
 - Who is or has been in a social relationship of a romantic or intimate nature with the victim; and
 - Where the existence of such a relationship is determined based on a consideration of the following factors: (a) length of relationship; (b) type of relationship; (c) the frequency of interaction between persons in the relationship.

5. ***Domestic Violence:*** This is essentially the same thing as Dating Violence, except among current or former spouses or cohabitants or people who share a child in common (in the K-12 context, this will only apply to employees).

How is Title IX Sexual Harassment Defined, continued

6. **Stalking:** The Title IX regulations define stalking as engaging in 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
 - Suffer **severe** emotional distress.

Additionally, the Regulations prohibit:

7. **Retaliation:** Prohibited, but addressed only through other student and employee disciplinary processes.

How is Title IX Sexual Harassment Defined, continued

- To summarize:
 - Quid Pro Quo harassment by an *employee*.
 - Unwelcome conduct based on sex that is severe, pervasive AND objectively offensive that it denies access to education programs/activities.
 - Sexual Assault
 - Situations where there is actual sexual contact involving penetration.
 - Touching (fondling) of genitals, breasts, or buttocks.
 - Dating violence and domestic violence.
 - Stalking.
 - Retaliation.

Sexual Harassment Under Other Laws

- School districts need to comply with both Title IX and the other applicable nondiscrimination/harassment laws (e.g., State law & Title VII).
- School districts will need to carefully review all harassment-related reports/complaints to ensure the appropriate procedure is followed.
- Don't forget:
 - JICK – Bullying.
 - Other conduct policies that may apply.