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EST. 1876

## Title IX

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# Presentation Agenda

Abernathy, Roeder, Boyd & Hullett, P.C.

- New Definition of Sexual Harassment
- First Response Protocols
- Emergency Removals
- Investigations
- Procedural Requirements
- Hearings
- Evidentiary Standard
- Trainings
- Appeals
- Retention

# TITLE IX

Abernathy, Roeder, Boyd & Hullett, P.C.



## AUGUST 14, 2020

| Mon | Tue | Wed | Thu | Fri | Sat | Sun |
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## OLD DEFINITION

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Previously, the regulations described sexual harassment as  
**“unwelcome conduct of a sexual nature.”**

## NEW DEFINITION

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The new Title IX regulation provides for a narrower definition of sexual harassment that constitutes sex discrimination. The new definition has **(3) types of sex-based conduct** which would constitute sexual harassment:

- Sexual assault, dating violence, domestic violence, and stalking;
- “Unwelcome conduct that is **so severe, pervasive and objectively offensive** that it effectively denies a person equal educational access; and
- An employee conditioning the aid, benefit or service on participation of unwelcomed sexual conduct (Quid pro Quo)

# When Must a School Respond?

A school must respond when:

1. the school has **actual knowledge** of sexual harassment;  
and
2. that occurred within the **school's education program  
or activity**; and
3. against a person in the United States.

- “**Actual knowledge**” includes notice to any elementary or secondary school employee, and
- Any person (e.g., the alleged victim or any third party) may report to a Title IX Coordinator in person or by e-mail, phone, or mail.

# When Must a School Respond?

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- **“Education program or activity”** includes situations over which the school exercised substantial control
- Substantial control over activities includes field trips, academic conferences, or other school-sponsored travel. Substantial control also applies over school owned buildings.

The new regulations establish a first response protocol for the Title IX Coordinators. Specifically, if anyone reports sexual harassment, the Title IX Coordinator must:

- Promptly contact the complainant to confidentially discuss the availability of supportive measures.
  - Supportive measures are individualized services to restore or preserve equal access to education, protect student and employee safety, or deter sexual harassment

- Supportive measures can include counseling, extensions of deadlines or other course-related adjustments, changes in work locations, leaves of absence, escort services, modifications in class or work schedules, restrictions on contact between the parties and/or increased security in certain areas of the school.
- Supportive measures cannot be punitive or disciplinary.
- Supportive measures must be provided free of charge to the complainant.
- Explain that supportive measures are available with or without the filing of a formal complaint.
- Explain to the complainant the process for filing a formal complaint.

- Title IX regulations do not prohibit immediate removal of a respondent from the education program or activity on an emergency basis
  - This is only if the school conducts an individualized safety and risk analysis and determines that emergency removal is necessary in order to protect a student or other individual from an immediate threat to physical health or safety.
  - The school must provide the respondent with notice and an opportunity to challenge the decision immediately after the removal.

Schools must investigate allegations in any formal complaint and **send written notice** to both the complainant, respondent and their parents of the allegations upon receipt of a formal complaint.

## Written Notice

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- Notice has to include presumption of innocence at the onset of the grievance process.
- The written notice must inform both parties of the school's grievance process.
- The written notice must also include if there is an opportunity for an informal resolution process.
- It must also include key details of the allegations of sexual harassment including parties involved, date and location of alleged incident (if known) and the alleged conduct that constitutes sexual harassment.

## Written Notice

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- A statement that that parties are entitled to an advisor of their choice.
- Notice that the parties can inspect and review certain evidence.
- Information regarding any provisions from the code of conduct (if one exists) regarding making false statements during the grievance process
- If in the course of an investigation, the school decides to investigate allegations about the respondent or complainant that were not included in the original notice, notice of additional allegations must be provided in writing to the parties.

- The burden of gathering evidence during the investigation remains on schools.
- Schools must provide equal opportunity for the parties to present facts, witnesses, and any other evidence.
- Schools cannot restrict the ability of the parties to discuss the allegations or gather evidence.
- Both parties must be allowed an opportunity to select an advisor who may be, but does not need to be, an attorney.
- Schools must send written notices of any investigative interviews, meetings, or hearings.

- Schools are required to disclose to the parties and their advisors any evidence directly related to the allegations and an investigative report that summarizes relevant evidence with at least ten days for the parties to inspect, review, and respond.
- Schools cannot access any medical, psychological, or similar treatment records without written consent.

- A presumption of innocence throughout the process. The respondent is not responsible for the alleged conduct until a determination is made at the conclusion of the grievance process.
- Written notice of allegations and an equal opportunity for parties and their advisors to review the evidence
- Protect any individual, including complainants, respondents, and witnesses, from retaliation for reporting sexual harassment or participating (or refusing to participate) in any Title IX grievance process
- Provide remedies when a respondent is found responsible. The remedies must be designed to maintain the complainant's equal access to education.
- An equal opportunity for parties to appeal on specified grounds

A school **must** dismiss a claim:

- That does not meet the definition of sexual harassment as adopted by this statute;
- Where the alleged sexual harassment did not occur in the school's education program or activity;
- Where the alleged sexual harassment did not occur in the United States of America;

Schools can still investigate these claims under their Code of Conduct

A school may dismiss a claim if:

- If the complainant notifies the Title IX coordinator in writing that the complainant wishes to withdraw the formal complaint or some of its allegations;
- If the respondent is no longer employed by or enrolled at the school;
- If there is a specific circumstance which prevents the school from gathering sufficient information in order to make a decision about the allegations.

Elementary and secondary schools that receive federal funding **are not required to provide a hearing**, but may choose to do so. The school can complete an investigative report and send it to the parties before reaching a determination of responsibility. Each party **must be allowed** to submit written questions for witnesses and must be provided with the answers. The parties should be given additional time for limited follow-up questions.

Schools are not required to but are able to facilitate a resolution through an informal process. With the exception of one type of claim, schools can provide parties with written notice of the allegations, the requirements of the informal resolution process and any consequences from participating (i.e. records that will be maintained and could be shared), and obtain voluntary written consent to use the informal resolution process.

# No Informal Resolutions

Schools cannot offer or facilitate an informal resolution process to resolve allegations that an employee sexually harassed a student. This is because of the power differentials inherent in such circumstances.

- The new Title IX legislation provides rape shield protections to complainants. All questions and evidence about a complainant's prior sexual behavior will be deemed irrelevant.
- It will only be allowed to prove that someone other than the respondent committed the alleged misconduct or it can be offered to prove consent.

Schools can choose which standard of evidence they want to use – but must use the same standard for all proceedings with students and employees.

## Clear and Convincing Evidence

- Higher standard of proof
- Evidence being presented must be “highly” and substantially more probable to be true rather than untrue

## Preponderance of Evidence

- more likely than not” or anything above a “fifty-fifty” likelihood of guilt.
- Standard under the old rule

In an elementary or secondary school, whether there has been a hearing or not, the decision-maker needs to objectively evaluate the evidence and reach a conclusion regarding the sexual harassment claims.

- The decision maker **cannot** be the same person who conducted the investigation and cannot be the same as the Title IX Coordinator.
- Decision makers must be free from conflicts of interests or bias for or against either party.
- Decision makers must receive special training on how to be impartial and how to determine what evidence is relevant
- The decision maker must issue a written decision (even if there is no hearing)

The written decision must include the following:

- The portion of the school's policy that was violated
- Has to include a description of all the procedural steps that were taken by the school. This includes all the interviews that were conducted.
- Include a findings of facts section
- Section that draws a conclusion after the finding of facts
- Statement or rationale for the ultimate determination

- Any disciplinary actions the school will impose on the respondent and state if any remedies are provided to the complainant.
- Statement and rationale for any remedies provided to the complainant and explain how that remedy will restore or preserve equal access to education
- A statement of the procedures, the right to appeal and permissible basis for appeal.

- The new regulations place a heavy emphasis on training. Schools must ensure that Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process, receive training on the following:
  - The definitions of prohibited conduct, including harassment
  - How both the informal and formal processes work
  - How to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest and bias
  - How to apply the rape shield protections provided for complainants.

Schools must make all materials used to train Title IX personnel publicly available on the school's website or, if the school does not maintain a website, make these materials available upon request for inspection by members of the public.

Schools must offer both parties an appeal from a determination regarding:

- Responsibility, and
- From a school's dismissal of a formal complaint

Both parties can appeal for the following reasons:

- Procedural irregularity that affected the outcome of the matter,
- Newly discovered evidence that could affect the outcome of the matter, and/or
- Conflict of interest or bias by Title IX personnel that affected the outcome of the matter

Schools must keep the following records for a minimum of seven (7) years:

1. Records of a school's investigation,
2. Records of any appeals and materials from the appeal;
3. Records of any informal resolution process;
4. Title IX training materials;
  1. Title IX coordinators, investigators, decision makers, and any employee designated to facilitate an informal process,.
  2. Schools must also post the training material on their websites, or, if a recipient does not maintain a website, otherwise make the materials available to the public.
5. Records of any supportive measures taken
  1. If no supportive measures were taken, the school should document why supportive measures were not needed in that case.

# Questions?

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THANK YOU!

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