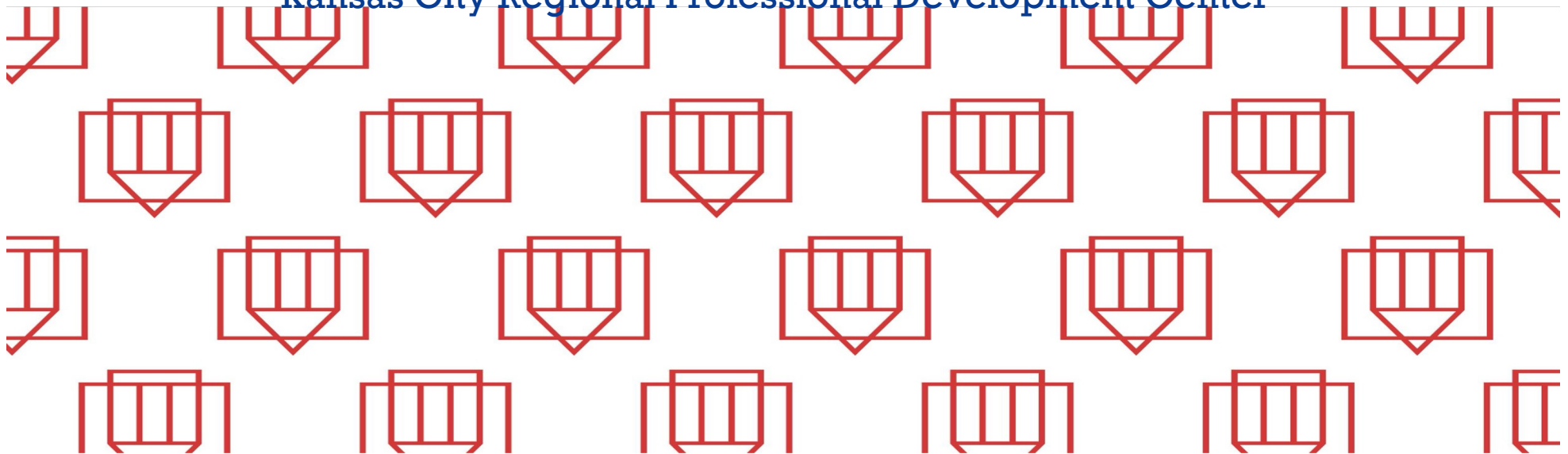


# **Title IX: How to Navigate the New Regulations**

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Kansas City Regional Professional Development Center



## Goals for Today

- Title IX – Overview of the Law
- Update to New Regulations
- Title IX Compliance
- Intersection between Title IX and Section 504/IDEA

\*Top Tip: Keep Legal Training Materials\*

# Title IX

- Title IX of the Education Amendments of 1972
  - Codified at 20 U.S.C. Sec. 1681
  - Regulations at 34 C.F.R. Part 106
  - Prohibits sex discrimination in any education program or activity that receives Federal financial aid from the Department of Education
  - Main congressional supporters:
    - Sen. Birch Bayh
    - Rep. Patsy Mink
    - Rep. Edith Green

# Title IX-Historical Background

- June 23, 1972 – Title IX signed into law
  - Specifically prohibits sex discrimination in any educational program or activity receiving any federal financial aid.
- May 20, 1974 – Failed Tower Amendment
  - Would have removed revenue-producing sports from determinations of Title IX compliance.
- May 27, 1975 – Gerald Ford Signs Final Version of Title IX
  - Includes an amendment that would have removed certain more popular sports from compliance pending congressional approval
  - That amendment fails to advance out of congress.

# Title IX-Historical Background

- April 4, 2011– New Policy Guidance Reaffirming Title IX’s protections cover sexual harassment
  - Until this point, much of OCR’s guidance had addressed equity in athletics
  - Clarified that procedures must be in place to address sexual harassment
  - Withdrawn by Department on September 22, 2017
- August 14, 2020 – Revised Title IX Rules Issued
  - Several changes to the procedure for investigating Title IX complaints
  - Bifurcated process – investigator and decision-maker
  - Specific training requirements
- April 19, 2024 – New Revised Title IX Rules Issued
  - Went into effect August 1, 2024
  - Federal Court Order enjoining enforcement in multiple states from implementing new rules

# Title IX

Statutory language of the law itself

## Regulations

Issued by the U.S. Department of Education to provide greater detail about how it will implement the requirements of Title IX

## OCR Guidance

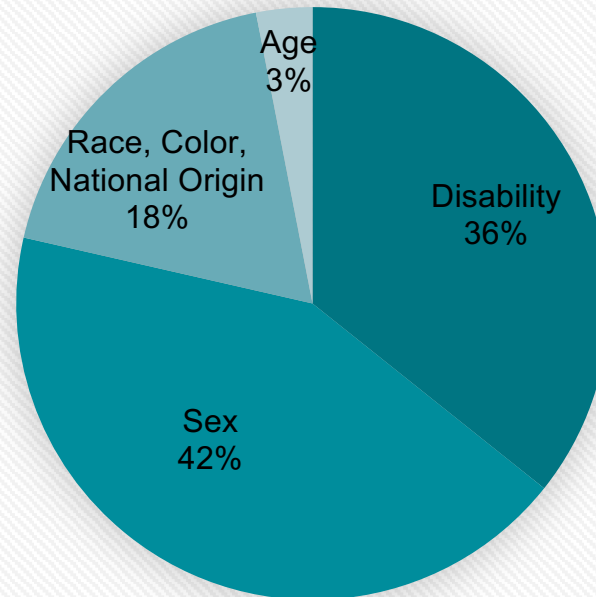
Issued by the U.S. Department of Education's enforcement arm, OCR, providing greater detail into how it will enforce Title IX and its regulations

## OCR Case Resolutions and Case Law

Real world case decisions from OCR and courts examining specific scenarios

# Office for Civil Rights Annual Report – 2023

## 2023 Complaints By Jurisdiction



# CRDC Data

Current Data Released November 2023

- 2020-2021 School Year

<https://www2.ed.gov/about/offices/list/ocr/data.html>



# Title IX-2024 Rules

- Expands the protections to include sex stereotypes, sexual orientation, gender identity and pregnancy or related conditions;
- Standard of hostile environment;
- More flexibility and discretion in grievance procedures
- Clarify that grievance procedures apply to all claims of sex discrimination, not just formal complaints of sexual harassment
- Schools must address sex-based hostile environment in its programs and activities even if some of the conduct occurred outside of the education program or activity; or outside the U.S.

# CURRENT STATE OF SUSPENDED ENFORCEMENT OF TITLE IX

## New Regulations Currently on Hold

- August 28, 2024, pursuant to Federal court orders, the Department of Education is prohibited from enforcing the 2024 regulations in several states, including Missouri and Kansas;
- Pending further orders, the 2020 regulations are in effect for schools impacted by the court order.

# Specific Schools Identified in MO and KS

## Missouri

- Cabool High School (Cabool, MO)
- Lighthouse Preparatory Academy (Jefferson City, MO)
- Odessa High School (Odessa, MO)
- School of the Ozarks (Point Lookout, MO)
- John Burroughs School (Saint Louis, MO)
- Chaminade College Prep School (St. Louis, MO)
- Christian Brothers College High School (St. Louis, MO)
- St. Joseph's Academy (St. Louis, MO)
- Troy Buchanan High School (Troy, MO)
- West Plains High School (West Plains, MO)

## Kansas

- Richard Warren Middle School (Leavenworth, KS)
- Heritage Christian Academy (Olathe, KS)
- Washburn Rural High School (Topeka, KS)
- Rossville Junior-Senior High School (Topeka, KS)
- Troy High School (Troy, KS)

## Office for Civil Rights

- Law enforcement agency of the U.S. Department of Education
- 12 regional offices throughout the country employing attorneys and investigators
- Investigate complaints, initiate compliance reviews, directed investigations, provide policy guidance
- Enforces:
  - Section 504 and Title II (disability)
  - Title IX of the Education Amendments (sex discrimination)
  - Title VI of the Civil Rights Act (race, color, national origin discrimination)
  - Age Discrimination Act (any age, not just over certain number)
  - Boy Scouts Equal Access Act (open forum access)

## Enforcement of Title IX

- U.S. Department of Education, Office for Civil Rights (OCR)
  - According to 2023 Annual Report, submitted to Congress, OCR received 8,151 Sex Discrimination complaints
    - 42% of its docket

# Title IX Regulations Essentials

## What has NOT changed

1. Notice of Nondiscrimination;
2. Identification of Title IX Coordinator;
3. Recordkeeping;
4. Training;
5. Investigations
6. Equitable treatment for complainant(s) and respondent(s);
7. Presumption that respondent is not responsible until a determination is made otherwise through appropriate investigative procedure;
8. Written notice of complaint and investigation;

# Basic Requirements of Title IX

- Identify a Title IX Coordinator
- Prohibit sexual harassment
  - Quid pro quo harassment – i.e., offering something to a student or other person in exchange for sexual conduct
  - Unwelcome conduct of a sexual nature that a reasonable person would find so severe, pervasive and objectively offensive that it effectively denies a person equal access to education program or activity
  - Sexual assault, dating violence, domestic abuse and stalking
- Different treatment and Retaliation
- When a school has actual knowledge of sexual harassment in its programs in the U.S., it must respond promptly in a manner that is not deliberately indifferent (i.e., clearly unreasonable in light of known circumstances).
- Title IX Coordinator must promptly contact complainant to discuss availability of supportive measures whether or not a formal complaint is filed and explain process of filing a formal complaint.



## Basic Requirements of Title IX

- An individual investigating a Title IX complaint must not have a conflict of interest or bias against/for complainants and respondents generally and the specific individuals.
- Institutions have flexibility to outsource investigations, or conduct internally
- Bifurcated investigation/decision-making structures to ensure added layers of fairness.

## Basic Requirements of Title IX

- “Sexual Assault” is defined by the FBI’s uniform crime code.
- Severe, pervasive and offensive standard is the most subjective of the three categories
  - A single bad act may not be “pervasive”
  - Or an act may be pervasive but a single person may not consider them to be “severe”

## Notice of Nondiscrimination

- Statement that the District does not discriminate on the basis of sex and prohibits discrimination on the basis of sex in its programs and activities;
- Identify the Title IX Coordinator, including contact information;
- Notification that complaints may be referred to the Title IX coordinator or OCR, or both;
- How to report Title IX concerns.
  
- OCR Publishes a Model Notice:

[www2.ed.gov/ocr/about/offices/list/ocr/poloverview.html](http://www2.ed.gov/ocr/about/offices/list/ocr/poloverview.html)

## **Title IX Coordinator – What to know for 2024 Rules**

- If a District has more than one Title IX Coordinator, it must designate one of its Title IX Coordinators to have ultimate oversight of Title IX compliance in the District.

## Grievance Procedures

- Adopt, publicize and implement grievance procedures that provide for the prompt and equitable resolution of complaints made pursuant to the District's Title IX provisions;
- Found in Districts' Board Policies;
- 34 C.F.R. § 106.45

## Investigative Practices

When the District has actual knowledge of sexual harassment under Title IX or related retaliation under Title IX, the Title IX Coordinator or an appropriately trained designee shall:

1. Promptly contact the complainant to discuss the availability of supportive measures;
2. Consider the complainant's wishes with respect to supportive measures;
3. Explain the process for filing a formal complaint; and
4. Inform the complainant of the availability of supportive measures regardless of whether a formal complaint is filed.

## Investigative Practices

- The respondent is presumed **not responsible** for the alleged conduct under Title IX and this Regulation until a determination regarding responsibility **is made at the conclusion** of the grievance process outlined an institution's policy.
- District will only impose disciplinary consequences against a respondent for violations of Title IX policy after the grievance process has been completed; however, the District may impose disciplinary consequences against a respondent for other violations of the District's policies that do not constitute sex discrimination or sexual harassment under Title IX prior to the conclusion of the grievance process.

# Emergency Removals

- If there is an immediate threat to the physical health or safety of any student arising from the allegation of sexual harassment under Title IX that justifies removal.
- Notice and opportunity to challenge



# Investigative Practices – Sample Language

Upon receipt of a formal complaint, the Title IX Coordinator shall promptly:

1. Provide written notice of the allegations, the grievance process, and any informal resolution process to the complainant and the respondent at least two days prior to an interview to give both parties the proper time to prepare a response before an interview;
  - The written notice shall include:
    - A copy of the Title IX Policy;
    - The identities of the parties involved in the incident, if known;
    - The conduct allegedly constituting sexual harassment;
    - The date and location of the alleged incident, if known;
    - A statement that the respondent is presumed not responsible for the alleged conduct under Title IX and District policy and that a determination regarding responsibility is made at the conclusion of the grievance process;
    - A statement that the parties may have an advisor (who may be, but who is not required to be, an attorney) present during any of their own subsequent meetings; and
    - The prohibition against making false statement or knowingly submitting false information.
  
2. Offer supportive measures in an equitable manner to the complainant and the respondent, when appropriate.

## Investigative Practices – Sample Language

The Title IX Coordinator MUST dismiss a formal complaint for any of the following reasons:

1. The conduct alleged in the formal complaint would not constitute sexual harassment under Title IX even if proved;
2. The conduct alleged in the formal complaint did not occur in the District's education program or activity; OR
3. The conduct alleged in the formal complaint did not occur against a person within the United States.

## Investigative Practices – Sample Language

The Title IX Coordinator MAY dismiss a formal complaint for any of the following reasons:

1. The complainant has notified the District in writing that the complainant would like to withdraw the formal complaint or any allegations therein;
2. The respondent is no longer enrolled in or employed by the District; OR
3. Specific circumstances prevent the District from gathering evidence sufficient to reach a determination as to the formal complaint or allegations therein.

## Investigative Practices – Sample Language

- If the Title IX Coordinator dismisses a formal complaint, **written notice** of the dismissal, including the reasons for dismissal, shall be provided to the complainant and the respondent;
- Appeal process available;
- Dismissal of a formal complaint does not preclude the District from investigating, taking action, or imposing discipline outside of its own policy related to the alleged conduct and in accordance with any other policy.

## Investigative Practices – Sample Language

- The Title IX Coordinator/designee, shall serve as the investigator and be responsible for investigating formal complaints in an equitable manner that involves an objective evaluation of all relevant evidence.
- A subordinate should not investigate where supervisor is complainant or respondent.
- The burden for obtaining evidence sufficient to reach a determination regarding responsibility rests on the District and not the complainant or respondent.

## Investigative Practices – Sample Language

1. Provide an equal opportunity for the complainant and the respondent to present witnesses and evidence;
2. Not restrict the ability of either the complainant or the respondent to discuss the allegations under investigation or to gather and present relevant evidence;
3. Refrain from requiring, allowing, relying upon, disclosing, or otherwise using questions or evidence that seek disclosure of a party's records made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in, or assisting in, their professional capacity, which are made or maintained in connection with treatment to the party, unless the District receives that party's, or party's parent's, voluntary, written consent;
4. Provide the complainant and the respondent with the same opportunities to have an advisor present during the investigation of a formal complaint;
5. Provide to the complainant and the respondent whose participation is requested written notice of the date, time, location, participants, and purpose of all investigative interviews, or other meetings, with sufficient time for the individual to prepare to participate;
6. Provide the complainant and the respondent an equal opportunity to inspect and review any evidence directly related to the allegations in the formal complaint; and
7. Result in the creation of an investigative report that fairly summarizes relevant evidence.

## Investigative Practices – Sample Language

- Both parties given access to evidence for review and response before creation of final report;
- Final report submitted to decision-maker with copies to complainant and respondent;
- Parties may submit written, relevant questions to parties through decision-maker.

## Decision-Maker Process – Sample Language

- The decision-maker will review the questions and determine their relevance.
- Questions about the complainant's sexual predisposition or prior sexual behavior are not relevant, unless such questions about the complainant's prior sexual behavior are offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or if the questions concern specific incidents of the complainant's prior sexual behavior with respect to the respondent and are offered to prove consent.
- The decision-maker must explain to the party proposing the questions any decision to exclude a question as not relevant.



# Decision of Responsibility-Sample Language

Written Decision Includes:

1. The allegations potentially constituting sexual harassment under Title IX;
2. A description of the procedural steps taken from the receipt of the formal complaint through the determination, including any notifications to the parties, interviews with parties and witnesses, site visits, and methods used to gather other evidence;
3. Findings of fact supporting the determination;
4. Conclusions regarding the application of the District's Code of Student Conduct to the facts;
5. A statement of, and rationale for, the result as to each allegation, including a determination regarding responsibility, any disciplinary sanctions the District imposes on the respondent, and whether remedies designed to restore or preserve equal access to the District's education program or activity will be provided by the recipient to the complainant; and
6. The District's procedures and permissible bases for the parties to appeal.

The preponderance of the evidence/clear and convincing standard shall be used in making a determination of responsibility.

# After Decision of Responsibility

## Title IX Coordinator Role

### Sample Language

- If a determination of responsibility against a respondent is made, the District shall impose consequences as described in its policies.
- After a determination of responsibility is made, the Title IX Coordinator will work with the complainant to determine if further supportive measures are necessary.
- The Title IX Coordinator will also determine whether any other actions are necessary to prevent reoccurrence of the harassment and to restore equal access to the education program or activity.

# Appeal

## Sample Language

- Either the complainant or the respondent may appeal from a determination of responsibility or a dismissal of a formal complaint for:
  1. A procedural irregularity that affected the outcome of the investigation;
  2. New evidence that was not reasonably available at the time of the determination and that could affect the outcome of the investigation; or
  3. A conflict of interest or bias on the part of the Title IX Coordinator, investigator, or decision-maker against either party, either generally or specifically.
-

## Informal Resolution Sample Language

- After a formal complaint is filed and prior to reaching a determination regarding responsibility, a district can offer to facilitate an informal resolution;
- Offered only after formal complaint filed;
- The informal resolution process is voluntary and does not involve a full investigation and adjudication under the grievance process.
- If the complainant and respondent both elect to engage in the informal resolution process, their consent is needed.

# Investigative Practices

A Title IX Investigation should be consistent with protections of Section 504

- Witnesses may require accommodations to participate in the process;
- Conduct outreach prior to interviews to ensure they are accessible
- Data collection considerations

## Actual Knowledge; Deliberate Indifference (2020)

- District must respond promptly and in a manner that is not deliberately indifferent to sexual harassment of which it has Actual Knowledge;
- Deliberate Indifference = clearly unreasonable in light of the known circumstances

# Grievance Procedure Requirements (2020)

1. Treat complainants and respondents equitably before imposing disciplinary action;

- Focus on restoring or preserving equal access to the educational program or activity;
- Offer supportive measures to both parties throughout the grievance process.

2. Require objective evaluation of all relevant evidence

- Include inculpatory and exculpatory evidence
- Credibility determinations may not be made on person's status as complainant; respondent or witness

## Grievance Procedure Requirements (2020) (cont'd)

3. All Title IX Coordinators, investigators, decision-makers may not have a conflict of interest or bias for or against complainants or respondents personally or in general
  - Must receive training on definition of sexual harassment;
  - Scope of the District's education program or activity;
  - How to conduct an investigation;
  - Informal resolution options;
  - Avoiding bias
  - Technology in hearing;
  - Issues of relevance to create an investigative report that fairly summarizes relevant evidence



## Grievance Procedure Requirements (2020) (cont'd)

4. Presumption that respondent is not responsible until determination is made at the end of grievance process;
5. Reasonably prompt timeframes for the conclusion of the process;
6. Provide range of possible disciplinary sanctions and remedies;
7. Identify the standard of evidence used to determine responsibility (PPE vs. CCE)
8. Include appeal procedures
9. Describe range of possible supportive measures
10. Do not require, allow, rely on or seek disclosure of evidence protected by a legally recognized privilege unless properly waived.

# Grievance Procedure Requirements (2020) (cont'd)

## Notice

### 1. Provide notice of allegations in writing

- Provide details known at the time
  - Identities of parties; conduct; date; location if known
  - Statement about presumption of non-responsibility
  - Right to an advisor who may be a lawyer
  - Reference to discipline provisions regarding false statements

### 2. Dismissal

- Mandatory vs. permissive

## Response – 2020 vs. 2024

2020:

- District must respond to Formal Complaints;
- Must offer supportive measures to both complainant and recipient.

2024

- Contains specific reporting requirements for elementary and secondary school employees who are not confidential employees;
- Notify Title IX Coordinator when employee has information about conduct that reasonably may constitute sex discrimination under Title IX.

# New Provisions in 2024 Rules

- Scope (not present in 2020 rules)
  - 34 C.F.R. § 106.10
  - Discrimination on the basis of sex includes discrimination based on:
    - Sex stereotypes;
    - Sex characteristics;
    - Pregnancy or related conditions;
    - Sexual orientation; and
    - Gender identity

# Hostile Environment Standard

## 2020 Rule:

- “Conduct that is so severe, pervasive and objectively offensive that it **effectively denies** a person equal access to the recipient’s education program or activity.”

## 2024 Rule:

- “Unwelcome, sex-based conduct that, based on the totality of the circumstances, is subjectively and objectively offensive and is so severe or pervasive that it **limits or denies a person’s ability to participate in or benefit from** the recipient’s education program or activity.”

## Intersection Between Title IX and Section 504

- Students with disabilities are especially vulnerable to sexual discrimination and harassment
- Reporting can be difficult
- Special discipline considerations

## Supportive Measures

Nondisciplinary, nonpunitive individualized services offered as appropriate, as reasonably available, and without fee or charge to the complainant or respondent before or after the filing of a formal complaint or where no formal complaint has been filed.

- Intended to restore or preserve equal access to the District's education program or activity without reasonably burdening the other party, including measures designed to protect the safety of all parties.
- See, 34 C.F.R. 106.30(a)

## Supportive Measures for Students with Disabilities

May include “assistance in requesting long-term academic accommodations if the individual qualifies as an individual with a disability

- See OCR Guidance Document, *Questions and Answers on the Title IX Regulations on Sexual Harassment*, July 2021

Note, Title IX Coordinator is responsible for implementing supportive Measures

- See, 34 C.F.R. 106.30(a)



# Supportive Measures = Change of Placement?

The provision of supportive measures may, in some cases, constitute a change of placement under IDEA.

- Examples:
  - Changes to a student's class schedule
  - Addition of provision of counseling services
  - “If the proposed change substantially or materially affects the composition of the educational program and services provided to the child, then a change of placement occurs”
    - Letter to Flores, 211 IDELR 233

## Emergency Removals Under Title IX

Under Title IX, a district may remove a student who is alleged to have engaged in sexual harassment from school on an emergency basis, provided the district:

- a. Undertakes an individualized safety and risk analysis;
- b. Determines that an immediate threat to the physical health or safety of any student or individual arising from the allegations justifies removal;  
and
- c. Provides the student with notice and an opportunity to challenge the decision immediately following the removal.

See, 34 C.F.R. 106.44(c)

Title IX's provisions relating to emergency removals do not affect the right of a student to disciplinary protections under the IDEA or Section 504.

# Resource Guide

OCR's Website: [www.ed.gov/ocr](http://www.ed.gov/ocr)

-Go to "Topics A to Z" and scroll down to Title IX or Sex Discrimination for guidance issued by OCR on the matter;