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2020 Title IX Regulations – FAQs

1. What are the 2020 Title IX Regulations?

In 2020, the U.S. Department of Education published regulations on how K-12 schools and institutions of higher education must respond to, investigate, and address allegations of sexual harassment and other sexual misconduct. The regulations also have training obligations for employees of educational institutions that receive federal funding, including New Mexico public school districts. The regulations do not apply to other complaints alleging discrimination based on pregnancy, different treatment based on sex, or other forms of sex discrimination.

2. I thought Title IX was about gender equity in athletics. How is this different?

Title IX says that “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.” This means that entities that receive federal funding cannot engage in sex discrimination in the areas like admissions, services, counseling, discipline, classroom assignment, grading, vocational education, physical education, athletics, and employment. Discrimination “on the basis of sex” includes sex-based discrimination, gender-based harassment, and sexual harassment.

3. What conduct do the new regulations consider to be sexual harassment?

The 2020 rules define sexual harassment and sexual assault as:

- a) An employee conditioning the provision of a district/school aid, benefit, or service on the student or employee’s participation in unwelcome sexual conduct (i.e., *quid pro quo* sexual harassment); or
- b) Unwelcome conduct, by an employee or student, determined by a reasonable person to be so severe, pervasive and objectively offensive that it effectively denies that individual equal access to the district/school education program or activity; or
- c) Sexual assault, dating violence, domestic violence, or stalking, as defined in applicable federal law.

That means the conduct at issue must be addressed using the Title IX regulatory processes if it meets one or more of the criteria above.

4. What about sexual harassment that takes place outside of school?

The 2020 Title IX regulations apply only to sexual harassment that occurs in buildings or other locations that are part of the district's/school's operations, including remote learning platforms, and to off-campus settings IF the district/school exercised "substantial control" over the alleged harasser ("Respondent") and the context in which the alleged sexual harassment occurred. Any other conduct that occurs outside those settings should be addressed under other laws or policies.

5. How do we decide whether the district/school exercised "substantial control" over the Respondent and the setting of the alleged harassment?

According to the U.S. Department of Education, "no single factor is determinative," so it will be a fact-specific determination. Generally though, the district/school should consider whether it owned, operated, "funded, promoted, or sponsored the event or circumstance where the alleged harassment occurred."

6. Does that mean the district/school cannot discipline sex-based misconduct that does not constitute sexual harassment under the Title IX regulations?

Schools can definitely discipline sexual misconduct that is not considered sexual harassment as defined by the Title IX rules. Unless a Title IX investigation is pending, the district/school does so using other applicable policies, regulations, handbooks, or laws. The U.S. Department of Education recently confirmed that "Title IX's sexual harassment regulation need not replace a school's more expansive code of conduct and does not prohibit a school from enforcing that code to address misconduct that does not constitute sexual harassment under the 2020 amendments."

7. What do the new terms Complainant and Respondent mean in the Title IX rules?

A "Complainant" is an individual who is alleged to be the victim of conduct that could constitute sexual harassment. The complainant is NOT necessarily the employee or individual who reports the alleged sexual harassment; that individual is considered the reporter. Under the Title IX rules, only the person who has been alleged to have experienced the sexual harassment or sexual violence is the complainant.

A "Respondent" is an individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment. Under the new regulations, the district/school, and all individuals involved in responding to allegations of sexual harassment, must not be biased or have any conflict of interest. Therefore, the Title IX rules require that the Respondent be

treated as not responsible for the alleged conduct until a determination regarding responsibility is made at the conclusion of any investigation of a formal complaint.

8. What does a school employee have to do if they receive a report of or observe sexual harassment or other sexual misconduct?

All employees are “mandatory reporters” of sexual harassment or other sexual misconduct. So, when any employee sees or receives a report or has knowledge of sexual harassment, sexual violence, or other sexual misconduct, a report must be promptly made to the Title IX Coordinator.

9. Is there a deadline for a student or employee to report alleged sexual harassment?

No, while employees must promptly report known sexual harassment or other sexual misconduct towards students or staff, and the district must respond whenever any school employee has notice of sexual harassment, the Department of Education has not imposed a statute of limitations or time limit for a Complainant to file a report or formal complaint of sexual harassment. However, if the alleged sexual harassment occurred before August 20, 2020, when the new Title IX rules went into effect, a district/school does not have to follow that regulatory process in responding to the complaint.

10. Does the district/school have to accept a formal complaint of sexual harassment from a Complainant student who is not currently enrolled in or attending the school?

For the district to accept a formal complaint of sexual harassment, a Complainant (the alleged victim) must be “participating in or attempting to participate in the education program or activity” of the district/school where the complaint is being made. If the Complainant makes a report or a formal complaint of sexual harassment, but later withdraws from school with the intention of returning, the investigation must be continued unless the Complainant withdraws the complaint.

The U.S. Department of Education has provided examples of what it means for a Complainant to be “attempting to participate” in a school’s education program. Those examples include:

- a) having withdrawn from school due to alleged sexual harassment and expressing a desire to re-enroll if the allegations are addressed
- b) is absent but still enrolled as a student
- c) has applied for admission.

Remember too that the Title IX Coordinator can file a formal complaint even if the Complainant is not associated with the school in any way where a failure to do so would be deliberating indifferent. An example of such a situation might be a former student alleging past sexual harassment or sexual misconduct by a respondent who is still employed as a

teacher. Title IX obligates a district/school to provide all students with an educational environment that is free from discrimination based on sex.

11. Can the district or school suspend a student or employee accused of sexual harassment?

When a report of sexual harassment has been made, the Title IX Coordinator must discuss and offer to the Complainant what are called “supportive measures.” Supportive measures are to be “designed to restore or preserve equal access to the [school’s] education program or activity.” Districts have to consider the Complainant’s wishes about supportive measures and cannot provide supportive measures that “unreasonably burden” the other party.

One supportive measure may be removal of the Respondent from school. While a non-student employee Respondent can simply be placed on administrative leave with pay, removal of a student can only be done on an “emergency basis.” This requires conducting what the rules call “an individualized safety and risk analysis.” If the student Respondent is determined to pose “an immediate threat to the physical health or safety of any student or other individual arising from the allegations of sexual harassment,” then the student can be removed from school as long as the student is given notice of the decision and “an opportunity to challenge the decision immediately following the removal.” This is a higher bar for removal than a normal student suspension. Also, the usual manifest determinations would need to first be made for a disabled student.

12. What if the Complainant (the alleged victim of sexual harassment) wants the sexual harassment complaint to be confidential?

Under the Title IX rules, except where it must be provided to the parties in order to conduct an investigation, is necessary to effectuate supportive measures, or where otherwise legally required, the district/school must keep confidential the name “of any person who has reported sexual harassment” and the name of someone “reported to be a perpetrator of sexual harassment.” A Complainant cannot make an anonymous formal complaint of sexual harassment.

13. Do we have to notify parents of the report of sexual harassment?

Of course the report of harassment could be made by any person, but regardless of who makes the reports, unless the student is 18 years or older, a parent or legal guardian should be notified of the report so that he or she can make decisions “on behalf of” a Complainant, Respondent, or other individual involved in a Title IX matter. Remember too the Title IX Coordinator’s obligations to meet with the Complainant, a parent or guardian, upon receipt of that report.

14. May the district contract with a third-party to act as investigator and/or decision-maker in a Title IX formal complaint?

Yes, a third party such as a REC official, an employee from another district, or a contractor can be engaged to serve as an investigator and/or decision-maker in responding to a formal complaint of sexual harassment or sexual misconduct. That third party must be properly trained in Title IX however.

Especially for smaller districts or where the district wants to assure there has been a neutral and prompt investigation, it may be advantageous to use a trained third-party investigator and/or decision-maker.

15. Can a Title IX investigation be conducted virtually?

Yes. The Title IX regulations do not obligate the district/school to conduct the investigation in person. This is helpful for more remote districts that may have to rely on non-district individuals to serve as investigators or decision-makers.

16. Is it possible to mediate reports of sexual harassment?

Yes, the Title IX rules allow “informal resolution” under certain conditions. First, there can be no informal resolution of allegations that an employee sexually harassed a student. Secondly, both parties must give their voluntary written consent to using an “informal resolution” process. Finally, either party has a right to withdraw from an informal resolution process” and proceed with the investigation process.