



D. STAFFORD
& ASSOCIATES



Overview of Title IX for Senior Leaders

*UVA Wise
Senior Leadership Session
July 14, 2022*

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TITLE IX



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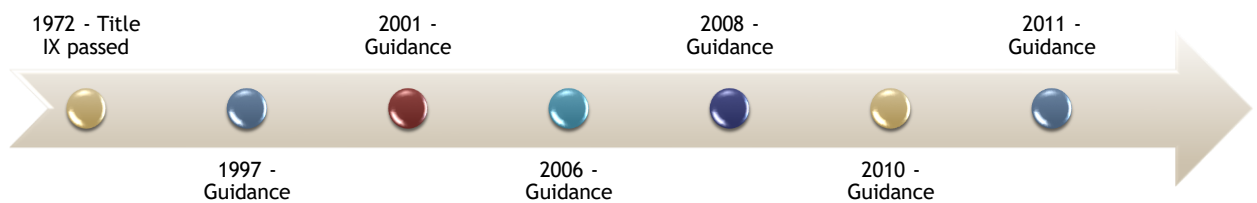
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Sexual Harassment Guidance Timeline



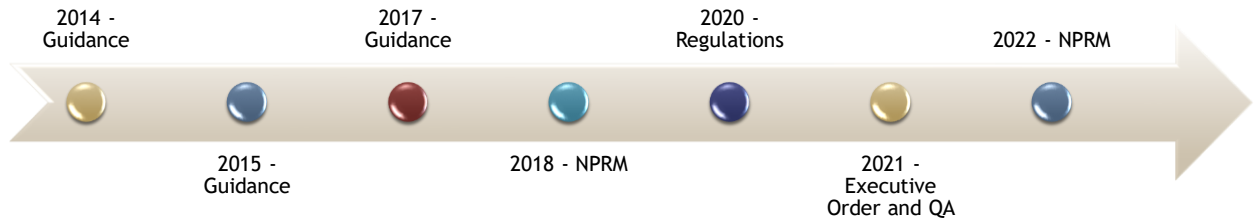


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Sexual Harassment Guidance Timeline



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Federal Law



Statutes

20 U.S.C.D.
§1681-1688



Regulatory Guidance

34 C.F.R. § 106



Sub-Regulatory Guidance

Dear Colleague Letters
OCR Website



Executive Orders

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Federal Statute - Prohibition



20 USCA § 1681 Sex (a) Prohibition against discrimination

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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34 C.F.R. Part 106 – Nondiscrimination on the Basis of Sex in Educational Program or Activities Receiving Financial Assistance (pre-2020)

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Subpart A: Introduction (106.1 - 106.9)

Subpart B: Coverage (106.11 - 106.17)

Subpart C: Admission and Recruitment (106.22 - 106.23)

Subpart D: Education Programs/Activities (Including athletics - 106.31-106.43)

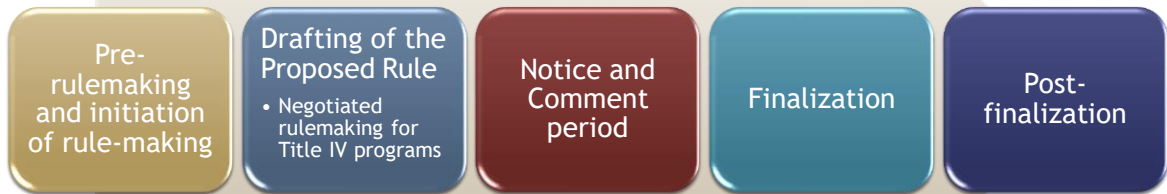
Subpart E: Employment (106.51-106.61)

Subpart F: Procedures (106.71)

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Regulatory Process



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Questions and Answers on the
Title IX Regulations on Sexual
Harassment (July 2021)

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BRIEFING ROOM

Executive Order on Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation

JANUARY 20, 2021 • PRESIDENTIAL ACTIONS

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CASE LAW



- GEBSER V. LAGO VISTA IND. SCHOOL DISTRICT, SCOTUS (1998)
- DAVIS V. MONROE COUNTY BOARD OF EDUCATION, SCOTUS (1999)
- JACKSON V. BIRMINGHAM BOARD OF EDUCATION, SCOTUS (2005)
- DOE V. BAUM, 6TH CIRCUIT (2018)
- HAIDAK V. UMASS-AMHERST, 1ST CIRCUIT (2019)
- DOE V. UNIVERSITY OF THE SCIENCES, 3RD CIRCUIT (2020)

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Definitions - Sexual Harassment



Sexual harassment means conduct on the basis of sex that satisfies one or more of the following:

1. *An employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct;*
2. *Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity;*
3. *"Sexual assault" as defined in 20 U.S.C. 1092(f)(6)(A)(v), "dating violence" as defined in 34 U.S.C. 12291(a)(10), "domestic violence" as defined in 34 U.S.C. 12291(a)(8), or "stalking" as defined in 34 U.S.C. 12291(a)(30).*

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Title IX Sexual Harassment Jurisdiction



Location
Educational program or activities and
in the United States



Parties

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Definitions: Key Terms



Actual Knowledge

Formal Complaint

Supportive Measures

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Consolidation of a Formal Complaint



Multiple
respondents

More than one
complainant
against one or
more respondent

One party
against other
party

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Dismissal of Formal Complaints



Must Dismiss

- Behavior does not constitute sexual harassment
- Did not occur in educational program or activity or not in the US



May Dismiss

- Complainant withdraws formal complaint
- Respondent no longer enrolled/employed
- Insufficient evidence

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Emergency Removal and Administrative Leave



Emergency removal



Administrative leave

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Notice Requirements



Grievance
process

Sufficient
details and
sufficient time
to prepare

Identities of the
parties, alleged
conduct

Date and
location of
incident

Presumed not
responsible

Advisor of
choice

False
statements

Additional
allegations

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Investigations and Evidence Gathering



- Burden of proof on the recipient
- Equal opportunity to present witnesses and facts
- No restrictions on discussing allegations
- Right to inspect evidence and respond
- Right to a final investigative report

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Live Hearing Requirements



“In-person”



Cross-examination



Relevancy determination



Record

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Appeals



MUST have

- Procedure
- New evidence
- Conflict or bias that impacted outcome

Additional grounds permitted

Decision-maker can have no other role

Reasonably prompt time frame

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Informal Resolution



Notice



Voluntary



Not allowed for
Employee/student

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Recordkeeping (Seven Years)



Case Materials



Training materials

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Participation Requirement



In accordance with the court's order, the Department will immediately cease enforcement of the part of § 106.45(b)(6)(i) regarding the prohibition against statements not subject to cross-examination. Postsecondary institutions are no longer subject to this portion of the provision.

Office For Civil Rights, August 24, 2021 Letter to Students, Educators, and other Stakeholders re: Victim Rights Law Center et al. v. Cardona Notice of Language Assistance

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Questions and Answers on the Title IX Regulations July 2021



The floor not
the ceiling

A reiteration of
the preamble

Most of the
“new stuff” is
in the policy
examples

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Biggest Takeaways



Respond through codes of conduct if outside Title IX

Effectively denies does not require denial of access

Attempting to participate includes alumni and applied for admission

Double-down on trauma informed approaches

Provides additional hearing rules and restrictions on the role of advisor

Additional considerations for students with disabilities (stop delaying and hearing process)

Protect the well-being of the parties (use lived names and pronouns, and support person AND advisor)

Limits on cross (the party needs to prepare questions)

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Questions and Answers on the Title IX Regulations June 2022



Released June 28, 2022

Provides Guidance in light of Cardona decision

Strikes/Edits Related Questions and Policy
Suggestions relating to postsecondary hearing

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2022 Q&A



CAN rely on statements

Took effect July 28, 2021

Can consider statements, even if those parties do not submit to cross-examination

Schools CANNOT maintain the prohibition on considering statements who does not submit to cross

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2022
NPRM

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Biggest Takeaways

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- RELAX
- Sex Discrimination
- Sexual Harassment Definition
- Grievance Processes
- Supportive Measures
- Reporting Requirements
- Title IX Coordinator Duties
- Pregnancy and Parenting

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Relax – Nothing is Required Right Now



60-day notice and
comment period



Implementation
2023



Start planning now

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SCOPE EXPANDED TO
INCLUDE ALL FORMS OF
SEX DISCRIMINATION

Title IX prohibits all
forms of sex
discrimination based
on basis of sex - sex
stereotypes, sex
characteristics,
pregnancy or
related conditions,
sexual orientation
and gender identity



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Educational Program or Activity



Buildings owned or
controlled by officially
recognized
organization

Outside the US

Conduct that occurred
off-campus but is
continuing to create a
hostile environment on
campus

Subjects a person to
more than de minimis
harm on the basis of
sex

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Parental, Family, or Marital Status; Pregnancy or Related Conditions

- Was NOT a focus in 2020
- Updates language throughout Title IX
 - Admission, employment
- Leaves of absence
- Comparable to temporary disability
- Time and space for lactation
- Expands duties of Title IX Coordinator
 - Implement, coordinate, and document modifications
 - Grievance procedures
- Echoes Salt Lake City Resolution Agreement

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Definitions - Sexual Harassment



Sex-based harassment prohibited by this part means sexual harassment on the bases described in § 106.10, and other conduct on the basis of sex that is:

1. *An employee, agent, or other person authorized by the recipient to provide an aid, benefit, or service under the recipient's education program or activity explicitly or impliedly conditioning the provision of such an aid, benefit, or service on a person's participation in unwelcome sexual conduct*
2. *Unwelcome sex-based conduct that is sufficiently severe or pervasive, that, based on the totality of the circumstances and evaluated subjectively and objectively, denies or limits a person's ability to participate in or benefit from the recipient's education program or activity (i.e., creates a hostile environment). Whether a hostile environment exists . . .*
3. *Specific Offenses. (i) Sexual assault meaning an offense classified as a forcible or nonforcible sex offense under the uniform crime reporting system of the Federal Bureau of Investigation; DVDVS - Incorporates 2022 VAVA*

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Sex Discrimination Grievance Process

- To be used for ALL report, EXCEPT sexual harassment complaints involving students at post-secondary institutions
- Decision-maker can be the same as the Title IX Coordinator or Investigator
- Expands when a complaint can be filed and who can file and does not have to be in writing
- Silent on advisor of choice
- Fewer policy requirements
- No mandated dismissal and complaints can be consolidated
- Lower investigation standard
- Need a “process” to make a determination regarding responsibility

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Sexual Harassment Grievance Process

- Only for post secondary institutions and only for students (either when a Complainant or respondent)
- Preponderance of evidence
- Written notice of allegations
- Dismissals still allowed
- Lower investigation standard
 - Evidence is relevant, impermissible, nor not relevant
 - Access and ability to respond (bye 10 days)
- Process for evaluating allegations and assessing credibility
 - Does not require live-hearing - What does your state/federal law require
- Written determination

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Appeals



Procedural irregularity that would change the determination of whether sex-based harassment occurred

New evidence that would change the outcome of the matter and that was not reasonably available at the time the determination of whether sex-based harassment occurred or dismissal was made

Title IX Coordinator, investigator or decision-maker had conflict of interest or bias that would change the outcome

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Informal Resolution

- Allowed for both sex discrimination and sex harassment
- Do not need a formal complaint
- Voluntary
- Not allowed for student/employee
- School determines when appropriate
 - Expands what might be done
- Need notice before process can begin
- Address discrimination as a whole, not just for Complainant
- Consequences about fraud

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Supportive Measures

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Supportive measures means non-disciplinary, non-punitive individualized measures offered as appropriate, as reasonably available, without unreasonably burdening a party, and without fee or charge to the complainant or respondent to: (i) restore or preserve that party's access to the recipient's education program or activity, including temporary measures that burden a respondent imposed for non-punitive and non-disciplinary reasons and that are designed to protect the safety of the complainant or the recipient's educational environment, or deter the respondent from engaging in sex-based harassment; or (ii) provide support during the recipient's grievance procedures under § 106.45, and if applicable § 106.46, or during the informal resolution process under § 106.44(k)

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Reporting Requirements (Post-Secondary)



Confidential employees

- Student or employee disclosures: Do NOT have to tell TIXC, but must provide TIXC information and explain confidentiality

Employees with ability to institute corrective measures

- Student or employee disclosures: MUST tell TIXC

Employees who are responsible for administrative leadership, teaching, or advising

- Student disclosures: Must tell TIXC
- Employee disclosures: Notify TIXC OR provide contact information

Everyone else

- Student OR employee disclosures: Tell TIXC OR provide contact information

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Title IX Coordinator and Response

- Upon notification of incident (formal written complaints are no longer needed)
 - Treat equitably
 - Notify C of grievance procedures (and R if complaint)
 - Supportive measures
 - Initiate grievance procedures
 - Determine to move forward without C
 - Take additional steps to end, eliminate, prevent, and remedy may not require grievance process
- TIX does not have to issue written notice in certain instances
- Expands responsibilities regarding pregnancy and parenting

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Questions?

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