



Title IX Then and Now for K-12 – What has Changed?

This document compares Title IX then (the Patsy Mink Equal Opportunity in Education Act, 1972) and Title IX now (Final Rule, 2020) to identify changes to the policies and practices impacted by the 2020 regulations. These U.S. Department of Education regulations went into effect August 14, 2020. This document is intended for use by anyone (e.g., district and state Title IX compliance officers, policy makers, and Title IX Coordinators) seeking to understand the changes made to Title IX and assess and ensure compliance with current Title IX regulations.

“Title IX Then and Now” is part of the “Title IX 2020 Regulations” series. This series examines the overall impact of the Final Rule, Title IX 2020 regulations and its specific impact on various positions. See “Title IX Coordinator Roles and Responsibilities,” “Investigator Roles and Responsibilities,” and “Decision-Maker Roles and Responsibilities.”

Vocabulary:

Respondent - the person who allegedly perpetrates sexual harassment

Complainant - the person against whom sexual harassment is allegedly perpetrated

Then
(Title IX Pre-2020 Regulations)

Now
(Title IX with 2020 Regulations)

Sweeping Changes: Exemptions & New Definition

Previously, exemptions applied to the following:²

- private undergraduate colleges (admissions)
- public elementary and secondary schools (admissions)
- schools training individuals for military services or merchant marines
- social fraternities or sororities membership practices
- YMCA, YWCA, Girl Scouts, Boy Scouts, and Camp Fire Girls membership practices
- voluntary youth service organizations membership
- Boys and/or Girls conferences

There is an additional exemption, incorporated by § 106.12 (b):

- private schools operated by religious organizations (any application contrary to religious tenets)

Sexual harassment was defined as “when submission to unwelcome sexual conduct explicitly or implicitly affects an individual’s employment.”³ There are two types of unlawful sexual harassment:

1. “Quid pro quo,” when submitting to, or rejecting participation in sexual conduct affects employment decisions.
2. Hostile environment, when severe or pervasive sexual conduct “create[s] a work environment that a reasonable person would consider intimidating, hostile, or abusive.”⁴

The definition of sexual harassment has changed (§ 106.30 (a)). The new definition refers to conduct on the basis of sex that fulfills one or more of the following categories:

1. Unwelcome “quid pro quo” sexual harassment by a school employee.
2. Unwelcome conduct on the basis of sex that is so severe, pervasive, and objectively offensive that it denies a person equal access to their education.
3. An incident that meets the definition of “sexual assault,” “dating violence,” “domestic violence,” or “stalking” under the Clery Act.⁵

The second definition diverges from the Supreme Court’s workplace-harassment standard of severe, pervasive, or objectively offensive behavior.

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Responsibility of the School and Employees

While districts may have designated some employees as mandated reporters, only the Title IX Coordinator was federally mandated to report allegations of Title IX violations.

All elementary and secondary school employees are federally mandated reporters (§ 106.30 (a)). This change means that all district and school employees need training on how to recognize potential Title IX violations and how to report them to the Title IX Coordinator.

Schools had to behave “reasonably” when responding to Title IX claims.

Schools must “not behave unreasonably” when responding to Title IX claims (§ 106.44 (a)). The regulations in 2020 prescribe more behavior, therefore this language might assume that schools will know what “unreasonable behavior” is and will avoid such behavior.

All off-campus locations were included under the school’s jurisdiction.

School jurisdiction includes off-campus locations over which the school “exercises substantial control.” (§ 106.44 (a))

Schools had to use a preponderance of the evidence standard, (i.e., “more likely than not”), which aligns with the standard used by all courts in civil rights cases.

Schools get to choose whether they will abide by a preponderance of the evidence standard or clear and convincing evidence standard (§ 106.45 (b)(1)(vii)). Schools must apply the same standard to all Title IX sexual harassment cases, regardless of whether the parties involved are students or employees.

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Formal Complaints

There was no “formal complaint” process. The Title IX process began as soon as the Title IX Coordinator had knowledge of sexual harassment or assault. Sexual assault, now included under the 2020 definition of sexual harassment, referred to any type of non-consensual sexual contact or sexual behavior.

The sexual harassment investigation process cannot begin until there is a formal complaint. The formal complaint is a report of sexual harassment allegations, signed by the Title IX Coordinator (§ 106.30 (a)).

Complainants could file sexual harassment complaints even if they were not participating in the education program or activity in which they had been sexually harassed, and/or if the respondent was no longer in the education program or activity.

When the complainant files their formal complaint, they must be participating or trying to participate in the school’s education program or activity against which they are filing the complaint (§ 106.30 (a)).

Schools provided “interim measures” for complainants who had filed allegations of sexual harassment in order to provide equal access to their education and protect their safety. Many schools did not offer or implement interim measures to respondents at the beginning of, or through the grievance process.

The school must provide “supportive measures” to the complainant and respondent before or after a formal complaint is filed, or even if the complainant does not file a formal complaint. This measure intends to ensure that the complainant and respondent are safe and have equal access to their education. The supportive measures cannot be punitive or disciplinary against the complainant or the respondent.

Schools were required to continue to investigate Title IX complaints even when the complainant and respondent were no longer attending or employed by the school.

Schools have an expanded capacity to dismiss formal complaints. One of the ways they can dismiss a formal complaint is if the complainant or respondent is no longer enrolled or employed by the school (§ 106.45 (b)(3)(i-ii)).

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Grievance Procedures

The Department of Education recommended that schools finish investigations within 60 days.

The grievance process must take at least 20 days, encompassing two mandatory 10-day processes. Schools are advised to complete investigations within a “reasonable” amount of time (§ 106.45 (b)(5)(vi-vii)).

The complainant and respondent were not required to have advisors.

The complainant and respondent must be informed that they can have an advisor, who can be an attorney. Each advisor advocates for their party and has access to the same information as their party (e.g., investigative report, testimony, evidence, etc.).

School employees or the Title IX Coordinator facilitated the grievance process from beginning to end.

There are two new roles: Investigator and Decision-Maker. The Investigator investigates allegations and determines if the claim fulfills the definition of sexual harassment. All information gathered in the investigation process must be shared with both parties before a decision is issued. The Decision-maker oversees the hearing and delivers the verdict on the sexual harassment allegations. These two roles must be filled by different people. The Title IX Coordinator can be the Investigator, but not the Decision-maker.

No clear guidance for due process for the respondent was mandated.

Schools cannot presume guilt of the respondent. They must assume innocence (§ 106.45 (b)(1)(iv)).

Hearings were not mandatory at any level of education.

After an investigation is completed, hearings are mandatory at the university level and optional at the K-12 level. Hearings allow for live, oral cross-examination of the parties and witnesses by the adviser to a party. If a school decides not to have a hearing, the parties are allowed to submit questions that the Decision-maker will ask the witnesses and other parties (§ 106.45 (b)(6)).

Schools were prohibited from using mediation to resolve a Title IX complaint.

Schools can use an informal resolution process, such as mediation, that does not involve a full investigation and formal judgment. Mediation must occur prior to reaching the verdict (or “decision”) (§ 106.45 (b)(9)).

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Grievance Procedures

Schools were not required to provide an appeals process for the final decision of a Title IX case, but if they did, both parties were allowed to appeal.

Both parties can appeal after a formal complaint is dismissed or a policy violation is found. The appeal must be based on one or more of the following reasons:

- procedural irregularity that affected the outcome
- newly discovered evidence that could affect the outcome
- Title IX personnel had a conflict of interest or bias that affected the outcome

Schools can include other bases for appeal beyond those above.⁶

¹ Patsy Mink Equal Opportunity in Education Act, 20 U.S.C. § 1681 et seq. (1972).
<https://www.justice.gov/crt/title-ix-education-amendments-1972>

² U.S. Department of Education, Office for Civil Rights. (2020, January 15). Exemptions from Title IX. Retrieved from <https://www2.ed.gov/about/offices/list/ocr/docs/t9-rel-exempt/index.html>

³ Guidelines on Discrimination Because of Sex, 29 C.F.R § 1604.11(a)(1) (1972).

⁴ U.S. Equal Employment Opportunity Commission. (2020). Harassment. Retrieved from <https://www.eeoc.gov/harassment>

⁵ National Women's Law Center. (2020, May.) DeVos's new Title IX sexual harassment rule, explained. Retrieved from <https://nwlc.org/blog/the-new-title-ix-rule-is-dangerous-for-all-students-thats-why-were-suing-betsy-devos-again>

⁶ Farrell, Megan. (2020). 10 Important Changes for K-12 Districts in the Title IX Final Rule. Stop Sexual Assault in Schools. Retrieved from <https://stopsexualassaultinschools.org/title-ix-coordinators/>