

Title IX: What You Need to Know Now*



***Although it may change in the next few years.**

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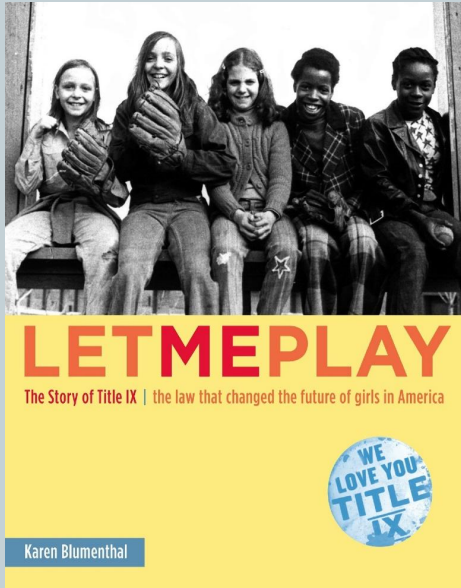
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Newish Rules



- On May 19, 2020, the Secretary of Education amended the regulations implementing Title IX of the Education Amendments of 1972.
- The new regulations took effect on August 14, 2020.
- The updates contain many substantial and procedural changes, including new definitions, mandated training for all Title IX officials, a formal grievance process, and multi- investigator models.
- The rules are geared toward post-secondary, but apply to you too. . . .

Scope of Title IX



Title IX prohibits schools from subjecting any person to separate or different rules of behavior, sanctions, or other treatment, such as discriminatory discipline, *based on sex*.

Covers athletics, sexual harassment, single-sex education, pregnancy


Scope of Title IX



- Focus on sexual harassment today.
- It is a violation of Title IX when a school has *actual knowledge* of an allegation of sexual harassment experienced by an *individual in the educational program/activity* and the school acts with *deliberate indifference* to that notice.

**Not all sexual harassment is Title IX
sexual harassment.**

Scope of Title IX



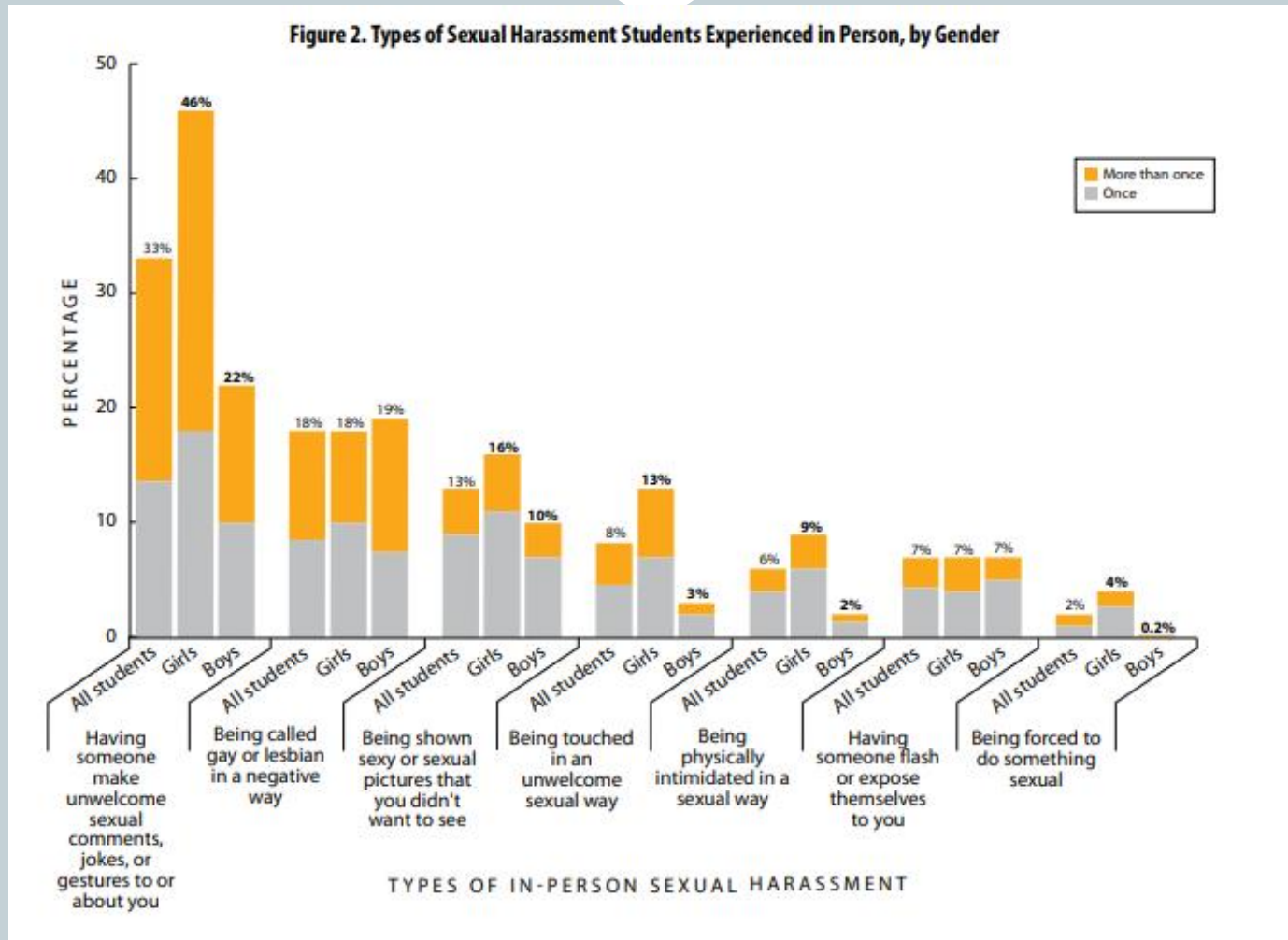
- **Conduct on the basis of sex that meets one or more of the following:**
 - **Quid pro quo:** A school employee conditions the provision of an aid, benefit, or service of the school on an individual's participation in unwelcome sexual conduct.
 - **Hostile Environment:** Unwelcome conduct that a reasonable person in the complainant's position would find to be so **severe, pervasive, and objectively offensive** that it **“effectively denies a person equal access”** to the school's education program or activities.
 - **Criminal acts:** Sexual assault, dating violence, domestic violence, or stalking. All of those terms are defined in federal law.

Scope of Title IX



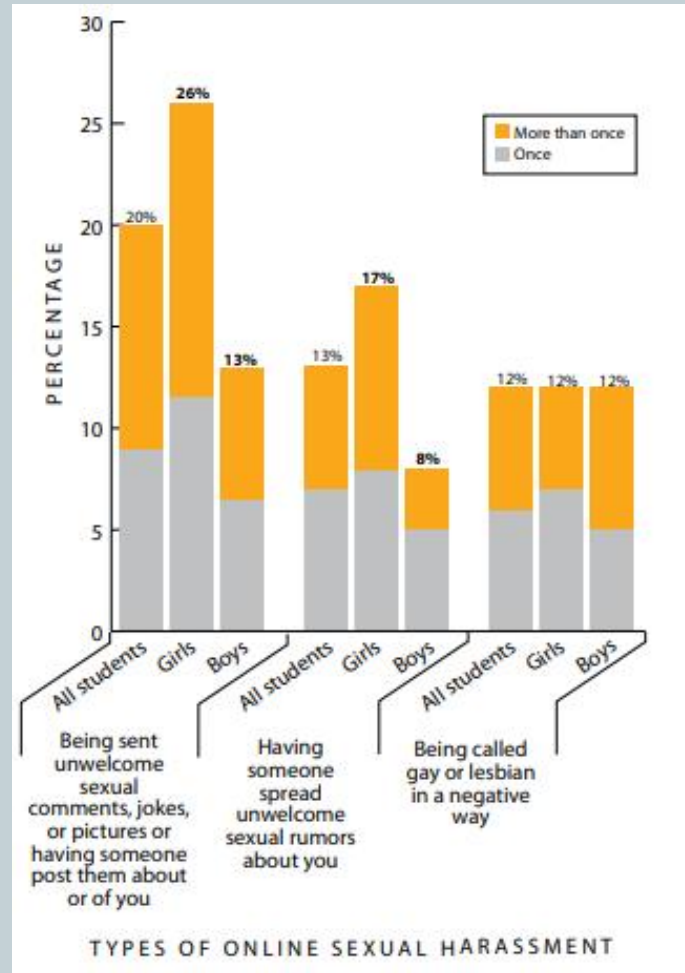
- **Examples of hostile environment sexual harassment:**
 - **“Rating” students on sex appeal or sexual performance.**
 - **Spreading sexual rumors.**
 - **Telling off-color jokes.**
 - **Unwelcome touching or brushing up against someone.**
 - **Leering or gestures, like licking lips while staring at breasts.**
 - **Continuing to express sexual interest after being informed that the interest is unwelcome.**
 - **Sending unwelcome and sexually explicit messages.**

Scope of Title IX




American Association of University Women Survey of students in grades 7-12, 2010-11

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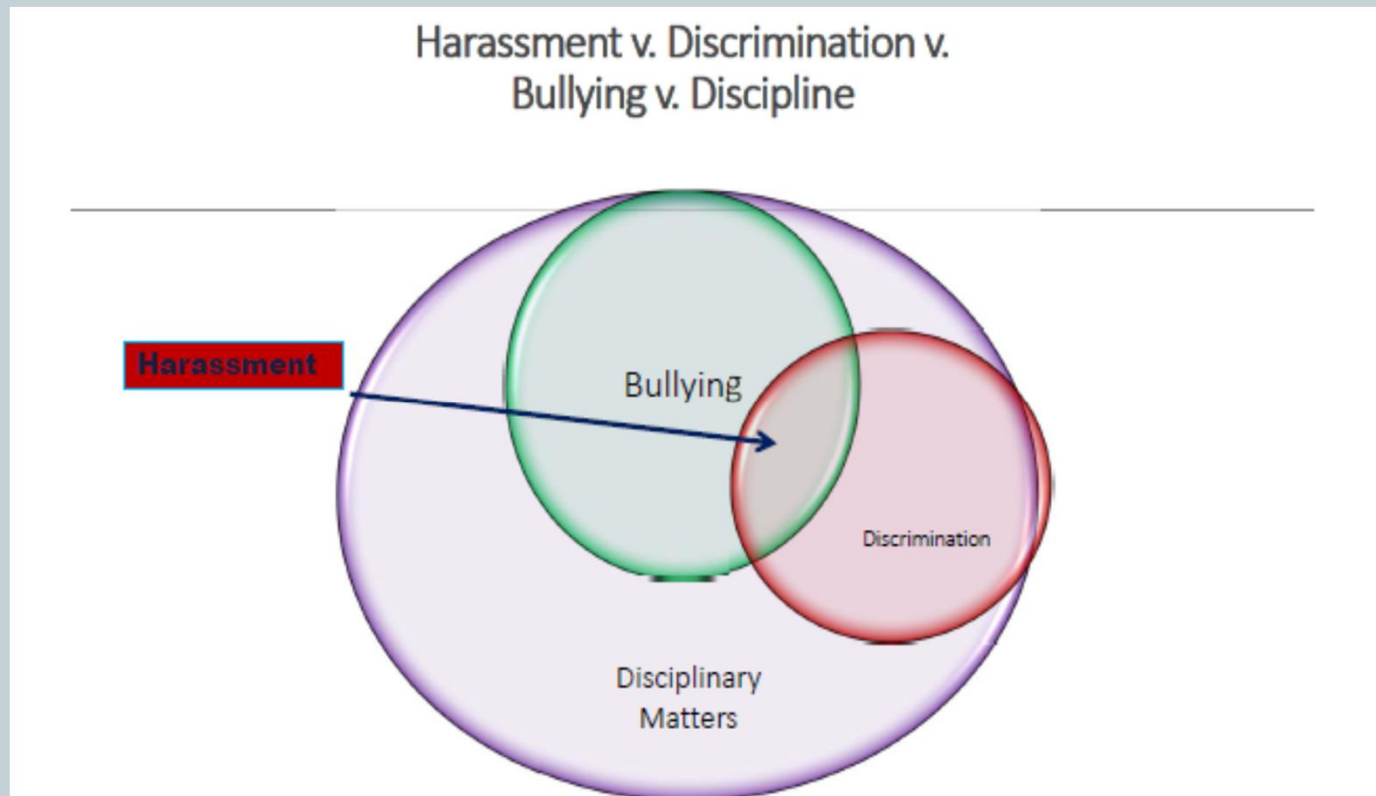
- **Examples of quid pro quo sexual harassment:**
 - **Offering or granting favors or educational or employment benefits, such as grades or promotions, favorable performance evaluations, favorable assignments, favorable duties or shifts, recommendations, reclassifications, in exchange for sexual favors.**
 - **A teacher gives a student a low grade because the student failed to agree to go on a date with him.**
 - **Generally includes a power imbalance.**

Scope of Title IX



- These are NOT requirements to meet the Title IX sexual harassment standard:
 - Happened more than once.*
 - ÷ * No need to show multiple instances if quid pro quo but must be “pervasive” if hostile environment.
 - Parties were not dating at the time.
 - Must occur on school property.
 - Person engaging in harassment must have had a bad intent.
 - Person reporting must have witnessed behavior personally.
- Guidance is clear that schools should consider the age and maturity of the students involved.

Other Investigations Possible



If a complaint does not allege “Title IX” prohibited conduct, the school can still consider whether the conduct violates other school conduct policies.

Actual Knowledge



- “A school with actual knowledge of sexual harassment in a program or activities must respond promptly and in a manner that is not deliberately indifferent.”
- Actual knowledge is notice of possible sexual harassment that has been provided to:
 - A school’s Title IX Coordinator; or
 - *Any employee of the school for K-12 schools.*

Actual Knowledge



You must immediately report any conduct that might be sexual harassment to the Title IX Coordinator.

- Know NOW who you need to report to.
- You can report in person, via email, via telephone.
- Do not try to figure out on your own if it meets the Title IX “sexual harassment” definition.
 - Do exercise common sense related to age of students involved.

Deliberate Indifference



- The school must respond “reasonably in light of known circumstances.”
- Some form of investigation and remediation is typically sufficient, if it is reasonable in scope. A school’s investigation and response need not be perfect. But the school needs to take some reasonable action.

New Grievance Process



Formal Complaint or Actual Knowledge



Initial Response by Title IX Coordinator



If Formal Complaint, then Investigation



Decision Maker Makes “Final Decision”



Potential Appeal

Lots of Players. . . .



- **Title IX Team now includes:**
 - **Title IX Coordinator**
 - **Investigator (may be a different person than Title IX Coordinator or not)**
 - **Decision Maker**
 - **Appeal Officer**
 - **Informal Resolution Facilitator**
 - **Advisors**

Title IX Parties



- **Complainant – individual who makes complaint of Title IX Incident even if they do not file a Formal Complaint (formerly alleged victim)**
- **Respondent – individual who is accused of committing Title IX Incident (formerly alleged perpetrator)**

Initial Responses to Notice



Schools must:

- i Treat complainants and respondents equitably, including offering supportive measures to both complainants and respondents.**
- i Follow a grievance process before disciplining or sanctioning a respondent for a violation of Title IX. Again, may still be able to discipline for something that is not Title IX sexual harassment.**
- i Inform the complainant of the process for filing a formal complaint.**

Supportive Measures



- **Title IX Coordinator must promptly contact the complainant and the respondent to engage in an interactive process about supportive measures.**
 - **Available even if no formal complaint is filed.**
 - **Supportive measures are non-disciplinary, non-punitive, individualized services, offered as appropriate and without charge to a complainant or a respondent.**
 - **Intended to restore equal access to educational program or activity without unduly burdening the other party.**
 - **Examples: Counseling, schedule changes, deadline extensions**
 - **BUT consider the complainant's wishes about these.**

Emergency Removal



- A respondent may be removed on an emergency basis when necessary to protect the student or another individual from *immediate* threat to *physical health or safety*.
 - The decision must be based on an individualized safety and risk analysis.
 - May not be solely for emotional or mental health reasons.
 - After the removal, the school must give student notice and an opportunity to challenge the removal.
 - Consider the interplay of other laws related to removal, including IDEA (a change in placement?) and Section 504.
- May place an employee on administrative leave.

Formal Complaints



- A “formal complaint” is a document that is filed by a complainant OR filed and signed by the Title IX Coordinator that alleges sexual harassment and that requests that the school investigate the allegations.
- A formal complaint requires a grievance process/investigation.
- Many requirements for investigating, dismissing and determining responsibility regarding allegations in a formal complaint.

Formal Complaints



- **Written notice must be given to both parties.**
 - Requires notifying respondent of identity of complainant and allegations, among other things.
- **Schools need to respond promptly, but there is no set timeframe in the rules.**
 - Most school districts have a 60-day start to finish deadline.
 - Your policy has deadlines for different parts of the process (some of these are required by the rules) and indicates that you will “attempt to resolve” all formal complaints within 120 days.
 - Deadlines can be extended for “good cause,” but have to inform parties.

Dismissing a Formal Complaint



— Formal Complaints *must* be dismissed if:

- The complaint does not state an allegation of sexual harassment, even if all facts are found to be true;
- The sexual harassment, even if it did occur, did not occur in a school program or activity; or
- The sexual harassment did not occur in the United States.

— Formal Complaints *may* be dismissed if:

- If the complainant notifies the Title IX Coordinator that s/he wants to withdraw the Complaint;
- If the respondent's employment or enrollment with the school ends;
- If circumstances prevent the gathering of evidence sufficient to make a determination (passage of time since conduct, complainant refuses to cooperate, etc.).

Investigation



- The school’s Title IX Coordinator can investigate OR it can use someone else to investigate.
- Schools *must* use a different person to investigate if the Title IX Coordinator has a conflict.
 - They signed the formal complaint or they are biased.
- The investigator will interview people and locate evidence.
 - The investigator must provide each party with written notice of interviews and at least 24 hours’ notice of the interviews, including any interviews of the complainant and respondent.
 - Parties and/or their advisors can be present during interviews.

Investigation



- **Both the complainant and the respondent can submit evidence to the investigator.**
 - **Under your policy, they have 21 days to submit evidence.**
 - **The investigator cannot restrict either party's ability to discuss the allegations or gather and present evidence.**
 - **No requirement that the complainant or the respondent answer questions or participate in any interviews.**

Interview Tips



- **Take notes but remember they will be disclosed to both parties.**
 - **No opinions, no conclusions, just facts, including non-verbal information (fidgeting, not making eye contact, etc.)**
- **Bring copies of any evidence you will ask about.**
- **Ask interviewee to notify you if they intend to bring an advisor with them. But remind everyone that you are conducting the interview and only the interviewee can answer questions.**
- **You can interview someone more than once.**

Sharing of Evidence



- **The investigation is totally transparent. Before a report is prepared, all evidence must be shared with the complainant and respondent, and they can respond in writing within 10 days.**
 - i Both relevant and irrelevant evidence is turned over to the parties, including any exculpatory evidence.**
 - i If evidence is determined irrelevant, the investigator must provide a valid reason for that determination and indicate it in the investigative report.**
 - i The investigator must consider the parties' responses before preparing a final investigative report.**

Investigative Report



- After considering all evidence and the parties’ responses to the evidence, the investigator must prepare a written investigative report that fairly summarizes the *relevant evidence*.
 - This is a factual summary. The investigator is not making a final decision about who is responsible.
 - Should include any discussion of the parties’ written responses to the evidence.
- No specific time limit for preparing the report in your policy – must “promptly prepare and issue” report.

Determination of Responsibility



- The investigator sends the report to the parties and to the Decision Maker, who determines whether Title IX was violated.
- Decision Maker must be someone other than Title IX Coordinator or investigator.
- Your policy indicates that the school will not hold a live hearing before deciding responsibility.
 - Colleges and universities must have a live hearing, but K-12 schools get to decide whether to have a live hearing.

Determination of Responsibility



- **Before the Decision Maker determines responsibility:**
 - Both parties must be given the opportunity to submit relevant written questions that they want asked of any party or witness.
 - The answers to those questions must be given to both parties.
 - The Decision Maker must allow limited follow-up questions from the parties.
 - The Decision Maker is a question “gatekeeper” of sorts: can exclude a question but then must explain why the question is not relevant.

The Decision



- **The Decision Maker must issue a written decision within 45 days of receiving the investigative report.**
- **Decision must contain:**
 - **The allegations;**
 - **The procedural steps taken;**
 - **The Decision Maker’s findings of fact;**
 - **The application of the code of conduct to the facts;**
 - **A statement of and the rationale for the result of each allegation, including determination of responsibility, any disciplinary sanctions imposed and whether remedies to restore or preserve equal access to the educational program will be provided; and**
 - **A description of appeal rights.**

The Decision



- **If the Decision Maker decides that the respondent engaged in sexual harassment, they must consider not only proper discipline, but appropriate measures for the complainant.**
 - **These can be similar to supportive measures, but now they can be punitive toward the respondent.**

Appeals



- Appeal rights must be offered to both the complainant and respondent for dismissals and final determinations.
- Not a do-over. The bases for an appeal are:
 - procedural irregularity;
 - new evidence that was not reasonably available earlier;
 - conflict of interest on the part of the Title IX Coordinator, the investigator, or the Decision Maker.
- Appeals are decided by someone else!

Retaliation Prohibited



- **The school cannot take any adverse action against anyone for reporting or participating in a report of sexual harassment.**
- **The school cannot take any adverse actions against anyone for participating or refusing to participate in a Title IX investigation.**

Questions?

