



Texas Association of School Boards

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Serving Texas Schools Since 1949

Title IX Sexual Harassment

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1. What Is Title IX?

Title IX of the Education Amendments of 1972 states:

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.¹

Although Title IX is not a lengthy statute, its scope is very broad. Notably, the law protects any person—not just students or employees. In addition, Title IX is not just for public schools. Any entity providing an education program or activity, whether public or private, must comply with the law’s requirements as a condition of receiving federal funds.

2. How does Title IX apply to sexual harassment?

Until recently, neither Title IX nor its implementing regulations specifically addressed sexual harassment. A pair of U.S. Supreme Court cases from the 1990s established when a school district could be held liable in court for sexual harassment under Title IX.

In the first case, *Gebser v. Lago Vista Independent School District*, a female high school student had a sexual relationship with a male teacher. The relationship was not reported to the school until after it had ended, at which point the teacher was arrested and terminated. The student sued the district, arguing that the district should have known about its employee’s misconduct and done something to stop it. The Court decided that a district may be liable for monetary damages under Title IX when an employee with authority to take corrective action has actual notice of sexual harassment within a district program or activity but responds with deliberate indifference.²

¹ 20 U.S.C. § 1681.

² *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274 (1998); see also *Franklin v. Gwinnett Cnty. Pub. Sch.*, 503 U.S. 60 (1992) (recognizing potential under Title IX for a school district to be liable for monetary damages based on a teacher’s sexual harassment of a student).

Not long after *Gebser*, the Court heard the case of a female fifth grader from Georgia who alleged that she was sexually harassed by a male classmate. In *Davis v. Monroe County Board of Education*, the Court affirmed the actual notice and deliberate indifference elements from *Gebser*, adding that, when a student is sexually harassed by another student, the district can only be liable when the harassment is “severe, pervasive, and objectively offensive.”³ In other words, mere teasing or name-calling, even if based on a student’s sex, would not rise to the level of sexual harassment under Title IX.⁴

To this day, *Gebser* and *Davis* describe when a school district or college may be held liable for violating Title IX in court and, therefore, may be subject to monetary damages, injunctions, or other legal remedies.

3. What is the Office for Civil Rights?

The U.S. Department of Education’s Office for Civil Rights (OCR) enforces federal laws that prohibit discrimination in education, including Title IX.⁵ Federal civil rights statutes and their implementing regulations provide OCR with administrative authority to address alleged violations, including the authority to withhold federal funding if OCR finds a violation that the district is unwilling to resolve. A person who believes he or she has been discriminated against may file a complaint with OCR, initiating an investigation. Alternatively, OCR may initiate its own investigation or compliance review. In addition, OCR issues written policy guidance to assist districts and other recipients of federal funds in compliance with the laws that it enforces.

Historically, OCR’s policy guidance established a higher standard for administrative enforcement than the *Gebser/Davis* standard for liability in private litigation.⁶ For example, in October 2010, OCR issued a “Dear Colleague Letter” (DCL) explaining that when a student is bullied because of a protected characteristic, including race, color, national origin, religion, disability, or sex, the conduct constitutes harassment.⁷ In the DCL, OCR advised that a district is “responsible for addressing harassment incidents about which it *knows or reasonably should have known*.”⁸ If the district concludes that harassment occurred, the DCL advised that a district “must take prompt and effective steps reasonably calculated to

³ *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 633 (1999).

⁴ See *Davis*, 526 U.S. at 652 (stating it is not enough to show that a student has been teased or called offensive names); see also *Sanchez v. Carrollton-Farmers Branch Indep. Sch. Dist.*, 647 F.3d 156, 165-67 (5th Cir. 2011) (holding derogatory gossip and name-calling were insufficient for Title IX claim, even if based on sex).

⁵ U.S. Dep’t of Educ., Office for Civil Rights, [About OCR](#).

⁶ See, e.g., U.S. Dep’t of Educ., Office for Civil Rights, [Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties](#) (Jan. 19, 2001) at 2 (emphasizing the distinction between administrative enforcement and liability for monetary damages in private litigation).

⁷ U.S. Dep’t of Educ., Office for Civil Rights, [Dear Colleague Letter](#) (Oct. 26, 2010).

⁸ U.S. Dep’t of Educ., Office for Civil Rights, [Dear Colleague Letter](#) (Oct. 26, 2010), at 2 (emphasis added).

end the harassment, eliminate any hostile environment and its effects, and prevent the harassment from recurring.”⁹

Under President Barack Obama, OCR issued multiple letters regarding Title IX, inspiring a vigorous debate about how to address sexual violence and harassment of victims while protecting the due process and First Amendment rights of the accused. Critics also accused the Obama administration of ‘ruling by letter’ rather than formal rulemaking under the Administrative Procedure Act. After the election of Donald Trump in 2016, Betsy DeVos, the new Secretary of Education, promised a new approach.

4. What are the new Title IX regulations?

On November 16, 2018, OCR proposed new rules to amend Title IX regulations.¹⁰ The proposed rules were designed to address sexual harassment and to address due process concerns raised by advocates for accused students in higher education. Nonetheless, in most respects the proposal treated K-12 schools and colleges identically. OCR received almost 125,000 comments from the public regarding the proposed rules.¹¹

On May 6, 2020, OCR released its long-awaited final [regulations](#).¹² The new rules, which go into effect on August 14, 2020, define *sexual harassment* as conduct on the basis of sex that satisfies one or more of the following:

1. An employee conditioning an aid, benefit, or service of the district on an individual’s participation in unwelcome sexual conduct (i.e., *quid pro quo* sexual harassment);
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 district’s education program or activity; or
3. *Sexual assault, dating violence, domestic violence, or stalking*, as these terms are defined in the federal Violence Against Women Act (VAWA).¹³

⁹ U.S. Dep’t of Educ., Office for Civil Rights, [Dear Colleague Letter](#) (Oct. 26, 2010), at 2-3.

¹⁰ US Dep’t of Educ., [Secretary DeVos: Proposed Title IX Rule Provides Clarity for Schools, Support for Survivors, and Due Process Rights for All](#) (Nov. 16, 2018).

¹¹ Both TASB and the National School Boards Association pointed out in their comments that K-12 schools are governed by a different set of laws and educational needs. Sarah Orman, Senior Attorney, TASB Legal Services, [Letter to Kenneth Marcus, Asst. Sec’y of Educ., Office for Civil Rights, U.S. Dept. of Educ.](#) (Jan. 30, 2019); Thomas J. Gentzel, Executive Director & CEO, Nat’l Sch. Bds. Assoc., [NSBA Comments on Department of Education Proposed Rule](#) (Jan. 30, 2019)

¹² U.S. Dep’t of Educ., Office for Civil Rights, [Title IX Regulations Addressing Sexual Harassment \(Unofficial Copy\)](#), (May 6, 2020).

¹³ 34 C.F.R. § 106.30(a).

The rules require a district to respond promptly, in a manner that is not deliberately indifferent, to actual knowledge of sexual harassment in an education program or activity of the district.¹⁴ In many respects, the rules adopt the *Gebser/Davis* standards. However, unlike the *Gebser* case, which required a district official with a certain level of authority to have actual knowledge of the harassment, the new Title IX rules provide that notice of potential sexual harassment by *any employee of a K-12 school district* is enough to trigger the district's duty to respond.¹⁵

5. Are we required to change our policies based on the new Title IX rules?

Yes. In Update 115, TASB Policy Service issued changes to model policies to assist districts in compliance with the new rules. Both the student nondiscrimination policies at FFH and the employee nondiscrimination policies at DIA were affected, as the new Title IX procedures for responding to sexual harassment apply to allegations by employees as well as students.

Changes to the policies include the following:

- The policies' definition of prohibited conduct was revised to include conduct that meets the Title IX definition of sexual harassment, but the policies retain the broader definitions of prohibited conduct in districts' current policies to ensure that all prohibited conduct is addressed.
- A new provision requires *any* employee who receives a report of prohibited conduct based on sex to notify the Title IX coordinator.
- New provisions direct the superintendent to develop a Title IX formal complaint process that must comply with the elements in the new regulations, as included in FFH(LEGAL). (The TASB sample complaint process is discussed below.)
- In response to the new rules' mandate that districts adopt and publish grievance procedures that provide for the prompt and equitable resolution of student and employee complaints, including a grievance process for resolving formal complaints that complies with 34 C.F.R. section 106.45(b), the policies state that the district's formal complaint process will be posted on the district's website.
- To determine responsibility in a Title IX formal complaint of sexual harassment, the policies designate that the district will use a *preponderance of the evidence* standard. The rules require districts to use the same standard of evidence for investigation of all formal Title IX sexual harassment complaints, including complaints by students and employees.¹⁶

¹⁴ 34 C.F.R. § 106.44(a).

¹⁵ 34 C.F.R. § 106.30(a).

¹⁶ See 34 C.F.R. § 106.45(b) (requiring a grievance process to state whether the standard of evidence to be used to determine responsibility is the preponderance of the evidence standard or the clear and convincing evidence standard).

- Provisions on retaliation and records retention have been updated to reflect the new rules' requirements.

6. What other TASB resources are available?

We're glad you asked! TASB Legal Service has created [sample administrative procedures](#) for the Title IX formal complaint process, available on TASB Legal Services' eSource. These procedures, which should be tailored to match the district's policies and practices, may serve as a district's grievance process for addressing formal complaints of sexual harassment against a student.¹⁷ The Title IX regulations do not require adopting a separate grievance process for complaints alleging sexual harassment against an employee.

Whether a district uses the TASB sample procedures, or another form, Title IX requires every district receiving federal funds to adopt a grievance process for addressing formal complaints of sexual harassment that complies with certain specific elements spelled out in the Title IX regulations.¹⁸ The TASB sample documents use the term "formal complaint process" to distinguish from the existing grievance processes in policies DGBA, FNG, and GF. Any local practices, rules, or provisions adopted as part of a district's Title IX formal complaint process must apply equally to both parties in a complaint.¹⁹

In addition to the sample procedures, we have provided a [Sample Title IX Formal Complaint](#).

The new rules also changed the notice and policy requirements under existing Title IX regulations.²⁰ TASB model employee and student handbooks have been updated to ensure compliance. In addition, we have provided a [sample website posting](#) to comply with the expanded notice and publication requirements, available on TASB Legal Services' eSource.

7. What is the impact of the new Title IX rules on Texas school districts?

The new Title IX rules impose significant challenges for K-12 school districts. Most Texas school districts do not employ a full-time Title IX coordinator. Keeping up with the new rules' extensive training, recordkeeping, and documentation requirements will require additional staff time. Harmonizing the Title IX formal complaint procedures with districts' existing policies and student codes of conduct will also be difficult. In addition, the rules raise some legal questions to which there are no satisfying answers. For example, although the Trump administration has rescinded much of OCR's past Title IX guidance, the 2010 bullying DCL is still in effect, implying that OCR will continue to rely on its previous

¹⁷ See 34 C.F.R. § 106.08(c) (requiring adoption of a grievance process that complies with Section 106.45 for formal complaints as defined in § 106.30).

¹⁸ 34 C.F.R. § 106.45(b).

¹⁹ 34 C.F.R. § 106.45(b).

²⁰ 34 C.F.R. § 106.8.

standards for complaints alleging harassment based on protected characteristics other than sex. Given this complexity, school district officials should follow their school attorneys' advice closely when allegations of harassment arise.

8. What should we do now?

The effective date of the new Title IX rules is August 14, 2020. In order to prepare for compliance, districts should focus on training employees and updating policies. Every employee in the district should be trained to recognize potential sexual harassment. Title IX coordinators and other employees who may be involved in the formal complaint process (investigators and decision-makers) must also be trained on the definition of sexual harassment and other specific topics.²¹

While the new Title IX regulations adopt the *Gebser/Davis* requirement that schools respond to sexual harassment with “non-deliberate indifference,” this has always been a floor not a ceiling. School districts can do more to protect students from harassment. In fact, state bullying laws and local policies may require a response to conduct that does not rise to the level of sexual harassment under Title IX.

Contact TASB Legal Services at 800.580.5345 or legal@tasb.org or your local school district attorney for more information about Title IX.

This document is continually updated, and references to online resources are hyperlinked, at tasb.org/services/legal-services/tasb-school-law-esource/students/documents/title-ix-sexual-harassment.pdf. For more information on this and other school law topics, visit TASB School Law eSource at schoollawesource.tasb.org.

This document is provided for educational purposes only and contains information to facilitate a general understanding of the law. It is not an exhaustive treatment of the law on this subject nor is it intended to substitute for the advice of an attorney. Consult with your own attorneys to apply these legal principles to specific fact situations.

²¹ 34 C.F.R. § 106.45(b).