

Title IX Regulations: Frequently Asked Questions

1. What is Title IX?

Title IX is a federal law that requires educational institutions that receive federal funding to prohibit sex discrimination in their education programs and activities. In 2011, the U.S. Department of Education issued a “Dear Colleague Letter” to schools to inform them of their responsibility to respond appropriately to complaints of sexual harassment and sexual violence by students and employees as well as provide appropriate supportive measures and resources. (Dear Colleague letters are letters issued by the U.S. Department of Education to provide guidance to K-12 schools and institutions of higher education on implementation of and compliance with related laws and regulations.) In May 2020, the U.S. Department of Education issued new regulations that define the types of sexual misconduct that are covered under Title IX as well as the processes and response mechanisms that schools and institutions must employ when they receive reports of sexual misconduct.

2. What do the new regulations require schools to do?

The new regulations: (1) require schools to investigate formal complaints of sexual harassment and sexual misconduct as defined in the regulations; and (2) outline certain steps that schools and institutions must take in responding to reports of sexual harassment and misconduct as defined in the regulations.

In addition, the new regulations require schools and institutions to provide free supportive measures such as counseling, legal help, academic supportive measures, referrals to medical care or financial assistance, help creating safety plans, and other types of advocacy and support to individuals that have alleged to have experienced sexual harassment and sexual misconduct, even if the individual does not wish to file a complaint. Schools and institutions are also required to provide respondents with the same supportive measures as those provided to individuals that have alleged to have experienced sexual harassment and sexual misconduct.

3. How do the regulations define “sexual harassment”?

For Title IX purposes only, sexual harassment is defined as conduct on the basis of sex that satisfies one or more of the following:

- (1) An employee of the institution conditioning the provision of an aid, benefit, or service of the institution 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 institution's education program or activity; or
- (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).

The Title IX definition of sexual harassment as outlined in (1) and (2) above is different than the standard previously used under the Dear Colleague letter guidance from the U.S. Department of Education and the standard used under Title VII.

In addition, under the new regulations, in order to be considered a formal Title IX complaint, the alleged conduct must 1) be on the basis of sex, 2) have occurred within the University's education program or activity, 3) have been directed against someone in the United States and 4) the complainant must be participating in or attempting to participate in the University's education program or activity at the time they file the complaint. The complainant must file a formal written Title IX complaint, or a formal complaint must be signed by the Title IX Coordinator. For purposes of Title IX misconduct only, an education program or activity includes locations, events, or circumstances over which the school or institution exercised substantial control over both the respondent and the context in which the sexual harassment occurs, and also includes any building owned or controlled by a student organization, such as a sorority or fraternity, that is officially recognized by the institution. It is important to note that under the new regulations schools and institutions are not prohibited from addressing sexual harassment and sexual misconduct that would not meet the criteria for Title IX. The University of Wisconsin System and its institutions will continue to address allegations of sexual harassment and sexual misconduct that do not meet the Title IX formal complaint criteria with similar procedures and protections as those that do.

4. Does this mean that schools will no longer be able to investigate allegations of sexual misconduct if they do not meet this new standard or they occur off-campus?

No. The Title IX regulations specifically state that we may continue to address violations that do not meet the Title IX definition or occur off campus using our own conduct codes and procedures. At the UW System, our plan is to continue to respond to sexual misconduct that falls outside of Title IX as we always have. The processes we will use to do so are outlined in our conduct codes and policies. Title IX Coordinators at each UW System institution will evaluate each complaint of sexual misconduct to determine whether the case should proceed under Title IX or non-Title IX procedures.

5. When a student or employee files a formal Title IX misconduct complaint, what actions are schools required to take?

Beyond the intake process and providing supportive measures, the steps that we are required to take are outlined in detail in UWS 4 (faculty), UWS 11 (staff), UWS 17 (students), and Interim RPD 14-2, Appendix C (employees other than faculty and staff).

In brief, when a student, faculty member, or employee files a formal Title IX sexual misconduct complaint we are required to provide sufficient notice to the parties, an investigation with the parties' ability to review all evidence, a live hearing with cross-examination conducted by an advisor of choice or provided by the institution, a hearing officer or panel, and appeal rights for both parties. The new regulations outlined the specific requirements of all these elements, which we adopted in the emergency rules code provisions linked above and will be included in the permanent rules. Non-Title IX sexual misconduct complaints will be handled with similar procedures and protections.

6. What is the standard of evidence in these Title IX proceedings?

The new regulations allow schools and institutions to use either the preponderance of the evidence or clear and convincing standard, so long as the same standard is used for employee and student cases. The UW System previously used and will continue to use the preponderance of the evidence standard for all Title IX misconduct cases.

7. What happens if we do not comply with Title IX?

Failure to comply with Title IX could result in legal sanctions or loss of federal funding. The UW System received approximately \$985 million in federal funding in FY 2019.

8. What is the process for implementing these new procedures?

Staff at UW System are currently working on updating procedures used to investigate sexual misconduct in a way that complies with these new regulations. These procedures are contained both in state law (or *code*) and in Board of Regent policy. State code provisions must go through a process known as *rulemaking* to be changed. We used a process called *emergency rulemaking* to make changes to code quickly in order to be in compliance by August 14, 2020. The emergency rule language will only be in effect for a limited time, however (150 days with an option of two 60-day extensions). Now that the emergency rules are in effect, we are going through a longer process (known as *permanent rulemaking*) to put permanent code language into place. This permanent language was available for internal review and comment in October and will be available for public review and comment in November 2020 with a target effective date sometime in spring 2021. Board of Regent Policy Document 14-2, Sexual Harassment and Sexual Violence was amended on an interim temporary basis to meet the August 14, 2020 deadline and will be amended permanently after the permanent code language is in place. Board of Regent Policy Document 14-2 follows the procedures outlined in code but adds more specific details regarding the processes and procedures we use to investigate complaints of sexual misconduct.

9. How might implementation of these new rules be affected by ongoing litigation in federal court?

Any action taken by a federal court impacting implementation of these regulations will be evaluated by our UW System legal team and brought before the board with a plan for how to best proceed. An injunction could result in delayed timeline or in the unenforceability of the regulations.

10. Why was sexual exploitation added to the types of sexual misconduct under the emergency rules and interim RPD 14-2?

The addition of sexual exploitation to the types of sexual misconduct covered under the emergency rules and interim RPD 14-2 was imperative to the UW System's commitment to addressing sexual harassment and sexual misconduct. Also, the inclusion of sexual exploitation, as defined in the UWS Admin Code Chapters and interim RPD 14-2, brings us into alignment with the majority of our peer institutions, including most Big Ten universities. Sexual exploitation is defined as "when an individual attempts, takes, or threatens to take nonconsensual sexual advantage of another person," conduct which, under our previous code and policies, sometimes fell outside of our definitions of sexual misconduct and therefore was required to be addressed through other policies. Complaints involving allegations of sexual exploitation will be addressed under non-Title IX sexual misconduct procedures depending on the specific facts at issue.

11. Who should I contact if I have questions?

Each campus has a designated Title IX Coordinator, whom you may contact. In addition, please feel free to contact Sarah E. Harebo, Title IX and Clery Administrator – University of Wisconsin System, at sharebo@uwsa.edu or the Office of Compliance and Integrity at compliance@uwsa.edu.