**FAQs**

**Title IX and K-12 Schools[[1]](#footnote-1) in California**

**Q: Do K-12 schools have to designate a Title IX Coordinator?**

A: Yes. Under the final regulations, all elementary and secondary schools must designate and authorize at least one employee to coordinate its efforts to comply with its Title IX responsibilities. Schools must widely disseminate the Title IX Coordinator’s contact information by notifying “applicants for admission and employment, students, parents or legal guardians . . . employees, and all unions or professional organizations holding collective bargaining or professional agreements . . .” with the school of the name, title, office address, email and telephone number of the Title IX Coordinator. [[2]](#footnote-2)

Moreover, schools must prominently display the contact information on its website and in each handbook or catalog that it makes available to those individuals listed above.

**Q: Must K-12 school employees acting as Title IX Coordinators, investigators or adjudicators follow the same rules as those in postsecondary institutions?**

A: Yes. For example, the investigator, decision maker, and appellate decision maker must be separate individuals; however, the Title IX Coordinator may also serve as an investigator or informal resolution facilitator.[[3]](#footnote-3) Schools should exercise caution in determining whether a Title IX Coordinator should serve in dual roles given issues that may arise with conflicts of interest and, from a practical standpoint, the ability to manage the duties of a Title IX Coordinator which include initiating and tracking supportive measures.

**Q: How does the required training that K-12 school officials working in Title IX must receive differ from the training required for officials at postsecondary schools in California?**

A: The final regulations require that all of these individuals receive specific training to fulfill their roles. Title IX Coordinators, investigators, decision-makers and any person who facilitates an informal resolution process must receive training on: 1) the definition of sexual harassment in §106.30, (2) the scope of the school’s education program or activity, (3) how to conduct an investigation and grievance process including hearings, appeals, and informal resolution processes, when applicable, and (4) how to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias.[[4]](#footnote-4) The regulations specifically require that adjudicators have training on determining relevance and about the rape shield law.

Under California law, officials in these roles at postsecondary institutions must receive, in addition, training on conducting trauma-informed investigations and adjudications.[[5]](#footnote-5) No similar training requirement on trauma-informed practices exists for K-12 schools in California.

Yet a requirement that schools become trauma-informed can help transform the educational environment:

Schools can turn around the lives of many… “[i]f traumatized students don’t have to go to a school that further traumatizes them, and instead provides support. Four years after the principal, all teachers and staff at [Lincoln High School in Walla Walla, WA, integrated a trauma-informed approach](https://acestoohigh.com/2012/04/23/lincoln-high-school-in-walla-walla-wa-tries-new-approach-to-school-discipline-expulsions-drop-85/), student suspensions dropped 90% and expulsions were eliminated. The students’ test scores, grades and graduation rates increased, as did the number applying to two- and four-year colleges. The students, whose average [adverse childhood experiences (ACE) score](https://acestoohigh.com/got-your-ace-score/) is 5.5, call the school their family, because, for most, it’s safer and a more loving place than their own family.

…Many other schools have integrated trauma-informed, resilience-building approaches with results similar to those at Lincoln High School. They include [Cherokee Point Elementary in San Diego](https://acestoohigh.com/2013/07/22/at-cherokee-point-elementary-kids-dont-conform-to-school-school-conforms-to-kids/), six elementary [schools in Spokane](https://acestoohigh.com/2013/08/20/spokaneschools/), WA, four elementary [schools in San Francisco](https://acestoohigh.com/2014/01/28/hearts-el-dorado-elementary/), a [high school in Blaine, MN](https://acestoohigh.com/2015/04/09/minnesota-high-school-screens-for-aces-to-develop-trauma-informed-education/), and [West Seattle Elementary](http://www.seattletimes.com/news/you-are-more-than-your-mistakes-teachers-get-at-roots-of-bad-behavior/) in Seattle.

The key in all of these schools is, instead of asking a kid “What’s wrong with you?” teachers ask “What happened to you?” and provide support and guidance to the student and, if necessary and possible, the student’s family.[[6]](#footnote-6)

**Q: Does the affirmative consent standard used for higher education apply to K-12 schools?**

A: Yes. K-12 schools must teach students about sexual harassment and violence, including the affirmative consent standard (Ed. Code, § 67386), if they require a health class as a graduation requirement. (Ed. Code, § 51225.36.)

**Q: Do parents of minors have the rights given to students?**

A: Yes, to the extent they already had such rights. Any existing legal rights held by parents and guardians to act on behalf of a complainant, respondent or other individual are not diminished or affected by the new Title IX regulations, including the right to file a formal complaint. These existing legal rights are granted by “state law, court orders, child custody arrangements, or other sources granting legal rights to parents or guardians” or may be required under FERPA.[[7]](#footnote-7)

When parents or guardians have such rights, the parent or guardian must be permitted to exercise the rights granted to the party under these final regulations, whether such rights involve requesting supportive measures or participating in a grievance process. Similarly, the parent or guardian must be permitted to accompany the student to meetings, interviews, and hearings during a grievance process to exercise rights on behalf of the student, while the student’s advisor of choice may be a different person from the parent or guardian. The final Title IX Regulations provide a parent the right to inspect and review such evidence as well. These parental rights extend not only to sexual harassment proceedings under the new regulations, but to “any issue of sex discrimination under Title IX.”[[8]](#footnote-8)

**Q: Can a parent or guardian initiate a Title IX grievance proceeding?**

A: Yes. The Title IX regulations state that nothing about the final regulations may be read in derogation of the legal rights of parents or guardians to act on behalf of any individual in the exercise of rights under Title IX, including filing a formal complaint. [[9]](#footnote-9)

**Q: Who must receive notice of an incident of sexual harassment (including sexual violence) for a K-12 school to have actual knowledge?**

A: An elementary or secondary school has actual knowledge when notice is provided to any employee of the school.

The Title IX Regulations do not limit who may report an incident of sexual harassment that will provide actual knowledge so a K-12 school must respond if a report is made to any employee. Any person (i.e., the victim of alleged sexual harassment, bystander, a witness, a friend, or any other person) may report sexual harassment/sexual violence and trigger a recipient’s obligation to respond to the sexual harassment.[[10]](#footnote-10) If the report is made to any employee of an elementary or secondary school or to the Title IX Coordinator or an official with authority of a postsecondary institution, the recipient must respond with supportive measures.[[11]](#footnote-11)

**Q: Is a K-12 school required to do an investigation after receiving a report of sexual harassment from a third party?**

A: No. In contrast to the unlimited group of individuals who may report an act of sexual harassment/violence, a formal complaint requiring the grievance procedures may only be filed by the individual who is the alleged victim or the Title IX Coordinator. “These final regulations preserve the benefits of allowing third party reporting while still giving the complainant as much control as reasonably possible over whether the school investigates, because under the final regulations a third party can report – and trigger the Title IX Coordinator’s obligation to reach out to the complainant and offer supportive measures – but the third party cannot trigger an investigation.”[[12]](#footnote-12)

**Q: How must a K-12 school respond to a report of sexual harassment?**

A: A K-12 school with actual knowledge of sexual harassment/violence in an education program or activity of the school must respond promptly in a manner that is not deliberately indifferent. A recipient is deliberately indifferent only if its response to sexual harassment is clearly unreasonable in light of the known circumstances.

**Q: What does a K-12 school have to do to avoid being found “deliberately indifferent?”**

A: If the report is made to any employee of an elementary or secondary school, the school must respond at a minimum by contacting the survivor and offering supportive measures.[[13]](#footnote-13) To ensure that the school’s response is not deliberately indifferent, the Title IX Coordinator must also promptly explain the process for filing a formal complaint.[[14]](#footnote-14)

Unlike a report of sexual harassment, only a formal complaint triggers a school’s obligation to investigate and proceed with the formal grievance process outlined in § 106.45. A formal complaint is a document signed by the complainant, meaning the person alleged to be the victim of conduct that could constitute sexual harassment, or the Title IX Coordinator. The final regulations specifically allow parents and guardians with the legal authority to act on behalf of their students (e.g., because of the student’s age) to act on behalf of student parties in the Title IX grievance process, including by signing a formal complaint.[[15]](#footnote-15)

**Q: Does the Rape Shield law apply in a Title IX grievance proceeding in a K-12 school?**

A: Yes. The “rape shield” protection[[16]](#footnote-16) applies regardless of whether a hearing is held. It is identical to the protection provided in the case of hearings held in postsecondary institutions, and the regulations use the same reasoning in its commentary.[[17]](#footnote-17)

The Title IX regulations exclude most questions about past sexual history from a postsecondary institution’s hearing under the required grievance process. The regulations state, “Questions and evidence about the complainant’s sexual predisposition or prior sexual behavior are not relevant, unless the questions and evidence about the complainant’s prior sexual behavior are offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or if the questions and evidence concern specific incidents of the complainant’s prior sexual behavior with respect to the respondent and are offered to prove consent.”[[18]](#footnote-18)

For an elementary and secondary school, which may or may not hold a hearing in its grievance process, the rape shield exemptions relating to a complainant’s sexual predisposition or prior sexual history still apply, subject to the same exceptions including questions and evidence relating to the complainant’s prior sexual behavior with respect to the respondent to prove consent.[[19]](#footnote-19) While, if permitted, a respondent may ask questions and present evidence under the rape shield exception, it is not the respondent’s (or complainant’s) burden to prove or establish consent, the burden is always on the institution; questions and evidence may also be posed or presented by the school during its investigation and adjudication.[[20]](#footnote-20)

**Q: What must be reported to trigger a K-12 school’s response obligations?**

A: Notice via “an oral report of sexual harassment by a complainant or anyone else, a written report, through personal observation, through a newspaper article, through an anonymous report, or through various other means” to any employee of an elementary and secondary school is sufficient to give the school actual knowledge of sexual harassment.[[21]](#footnote-21)

The Title IX regulations do not mandate how a report is made or the information that must be included in a report. “With respect to both elementary and secondary schools as well as postsecondary institutions, the Title IX Regulations do not limit the manner in which the school may receive notice of sexual harassment. Although there is no imputation of knowledge based solely on vicarious liability or constructive notice, which are deemed insufficient to constitute actual knowledge, actual notice can be by any means.”

**Q: What about posts on social media? Is the K-12 school deemed to have actual notice of these?**

A: Yes, but only if the post is brought to the attention of an employee of the K-12 school. Anonymous reports in social media such as Twitter or Instagram posts, or anonymous social media sites (e.g., the now-defunct Yik Yak app), would constitute actual knowledge requiring a response if such information is received by or provided to the Title IX Coordinator or an official with authority of a postsecondary institution or any employee of an elementary or secondary school.[[22]](#footnote-22)

**Q: Do K-12 schools have to conduct a live hearing to adjudicate a Title IX complaint?**

A: No. Elementary and secondary schools may, but do not need to, provide for a live hearing when responding to formal complaints of sexual harassment.[[23]](#footnote-23)

**Q: What part of the Title IX grievance process does apply to a K-12 school?**

A: Regardless of whether a hearing is held, and before any determination regarding responsibility is reached, the decision-maker(s) must afford each party “the opportunity to submit written, relevant questions that a party wants asked of any party or witness, provide each party with the answers, and allow for additional, limited follow-up questions from each party.” Questions about the complainant’s sexual predisposition or prior sexual behavior are prohibited except under the circumstances outlined in the Rape Shield exclusion. Finally, the decision-maker(s) “must explain to the party proposing the questions any decision to exclude a question as not relevant.”[[24]](#footnote-24)

**Q: What evidence is deemed not relevant to a Title IX proceeding?**

A: Title IX regulations deem certain evidence and information to be not relevant or otherwise precludes the recipient from using it: (i) a party’s treatment records, without the party’s prior written consent; (ii) information protected by a legally recognized privilege (iii) questions or evidence about a complainant’s sexual predisposition, and questions or evidence about a complainant’s prior sexual behavior unless it meets one of two limited exceptions and, for postsecondary institutions, the decision-maker cannot rely on the statements of a party or witness who does not submit to cross-examination.[[25]](#footnote-25)

**Q: When a minor is involved in a K-12 Title IX proceeding, can his or her statement to the school’s investigator take the place of submitting written questions and/or expecting written answers in response?**

A: This is unclear. The final regulations state that, in lieu of requiring a live hearing, the submission of written questions “translate[s] those due process principles into meaningful rights for parties and increase[s] the likelihood of reliable outcomes.” But the regulations then immediately assert that schools are not precluded “from providing training to an investigator concerning effective interview techniques applicable to children or to individuals with disabilities,” which leaves open the question of whether the written questions can be presented orally to the parties by an investigator, rather than simply presenting the written list in writing and expecting written answers in response.[[26]](#footnote-26)

After written questions have been asked and answered, “limited follow-up questions” may be asked and answered. Schools have “discretion to set reasonable limits in that regard,”[[27]](#footnote-27) but the regulations do not tell us what such limits might be. However, the commentary to the regulations notes that the written question phase of the process may overlap with the ten-day period to respond to the investigative report, thus putting a practical time limit on the process.

**Q: Can parents control what questions are submitted?**

A: This is also unclear. Comments to the proposed Regulations raised concerns that if written comments were exchanged, parents might prepare the questions or answers on behalf of their child. The final regulations acknowledged this concern in the commentary but declined to specify whether parents must consult their child under these circumstances, instead choosing to rely on other unspecified laws regarding parental rights.

The commentary to the regulations suggests that any concerns about the process devolving to a fight between parents should be addressed by “rules of decorum” that are within the discretion of the recipient to adopt, such as requiring “questions to be posed in a respectful manner (e.g., without using profanity or irrelevant ad hominem attacks)” and limiting questions to those that are relevant. If a decision-maker excludes a question, they must explain to the party why the question was not relevant.[[28]](#footnote-28)

**Q: Who decides if a submitted question is relevant and must be answered by the other party?**

A: The school’s appointed decision maker, not the investigator, must decide whether a question will be excluded on the basis that it is irrelevant.

**Q: May a K-12 school choose to address conduct occurring off of school grounds and outside a school program or activity?**

A: Yes. A K-12 school may extend its jurisdiction to adjudicate sexual misconduct “outside the recipient’s education program or activity,” including in a study abroad program. [[29]](#footnote-29) Misconduct falling outside the scope of Title IX has to be addressed through a process outside of the Title IX regulations, because the final regulations would otherwise mandate dismissal of the formal complaint.[[30]](#footnote-30)

**Q: Does a K-12 school use the same grievance process for a complaint of sexual harassment that it uses for** **other forms of discrimination prohibited by Title IX (e.g., pay, admission, athletics programs)?**

A: Before the issuance of the 2020 Title IX regulations, the law required a “prompt and equitable” resolution procedure that would apply to all forms of discrimination prohibited under Title IX, including sexual harassment/violence, but also discrimination in pay, admissions, athletics, and other circumstances.[[31]](#footnote-31) The final regulations make clear that this existing procedure for “any action that would be prohibited” under Title IX continues, but must be joined by a second process that specifically applies to formal complaints brought for “sexual harassment.”[[32]](#footnote-32) Title IX retaliation claims appear to fall under the former “prompt and equitable” process for general discrimination claims, rather than the new process (under 34 C.F.R. § 106.45) for sexual harassment/violence claims.

**Q: When might a K-12 school decide to utilize live hearings to resolve a sexual harassment/violence complaint?**

A: The Title IX Coordinator may determine it is appropriate to hold a live hearing where the students are above a certain age, where the students are in high school, or where both parties request or consent to a hearing. Because rules must apply equally to both parties, a recipient’s policy could not allow for a hearing only if a respondent requests it or only if a complainant agrees to it, as this would not be an equal application of a rule to both parties[[33]](#footnote-33)

**Q: If a K-12 school chooses to hold a hearing, does it need to follow the procedures required by the Title IX regulations for hearings involving sexual assault, such as cross-examination?**

A: A review of the introductory text to the regulations[[34]](#footnote-34) suggests that K-12 schools can establish rules governing their own hearings that do not have to follow the regulations governing hearings in postsecondary institutions. The regulations seem to leave elementary and secondary schools with flexibility to draft procedures that fit the needs of the K-12 school’s educational environment.

**Q: Are there any restrictions on the procedures that may be adopted to resolve sexual harassment complaints at a K-12 school?**

A: The final regulations require that any rules adopted by a K-12 school for use in a Title IX grievance process, other than those required under § 106.45, must apply equally to both parties.[[35]](#footnote-35) Within that restriction, elementary and secondary schools retain discretion to decide how to conduct hearings if the school selects that option.

**Q: May K-12 schools adopt alternative resolution processes (such as restorative justice facilitation) instead of using the formal grievance process?**

A: Yes. Like postsecondary schools, K-12 schools have the option of offering informal resolution processes to the parties after a formal complaint is signed.[[36]](#footnote-36)

1. Title IX applies only to recipients of federal financial assistance; the text of Title IX, 20 U.S.C. 1681, clearly states that the Title IX non-discrimination mandate applies to education programs or activities that receive federal financial assistance, and expressly exempts educational institutions controlled by religious organizations from compliance with Title IX to the extent that compliance with Title IX is inconsistent with the religious tenets of the religious organization even if the educational institution does receive federal financial assistance. The schools addressed by these FAQs are recipients of federal financial assistance. [↑](#footnote-ref-1)
2. 34 C.F.R. § 106.8 (a). [↑](#footnote-ref-2)
3. 85 Fed. Reg. 30,026, 30,370 (May 19, 2020). [↑](#footnote-ref-3)
4. 34 C.F.R. 106.45(b)(1)(iii). [↑](#footnote-ref-4)
5. Cal. Ed. Code, § 67386. [↑](#footnote-ref-5)
6. Online at < https://acestoohigh.com/2015/05/18/landmark-lawsuit-filed-to-make-trauma-informed-practices-mandatory-for-all-public-schools/>. [↑](#footnote-ref-6)
7. 85 Fed. Reg. 30,026, 30,453 (May 19, 2020). [↑](#footnote-ref-7)
8. 85 Fed. Reg. 30,453-30,454. [↑](#footnote-ref-8)
9. 34 C.F.R. § 106.6(g). [↑](#footnote-ref-9)
10. 85 Fed. Reg. 30,121. [↑](#footnote-ref-10)
11. Supportive measures are described in 34 C.F.R. § 106.44(a). [↑](#footnote-ref-11)
12. See 34 C.F.R. § 106.45; 85 Fed. Reg. 30,194. [↑](#footnote-ref-12)
13. § 106.44(a). [↑](#footnote-ref-13)
14. § 106.44(a). [↑](#footnote-ref-14)
15. § 106.6(g). [↑](#footnote-ref-15)
16. § 106.45(b)(6)(ii). [↑](#footnote-ref-16)
17. See 85 Fed. Reg. at 30366. [↑](#footnote-ref-17)
18. § 106.45(b)(6)(i)-(ii). [↑](#footnote-ref-18)
19. § 106.45(b)(6)(ii). [↑](#footnote-ref-19)
20. 85 Fed. Reg. 30,125. [↑](#footnote-ref-20)
21. 85 Fed. Reg. 30115. [↑](#footnote-ref-21)
22. The Preamble of the final Title IX Regulations states, “Section 106.44(a) requires a recipient to respond promptly where the recipient has actual knowledge of sexual harassment; a recipient may have actual knowledge of sexual harassment even where no person has reported or filed a formal complaint about the sexual harassment.” [↑](#footnote-ref-22)
23. Section 106.45(b)(6)(ii), found on page 85 Fed. Reg. 30,577 begins with text signaling that, unlike the previous paragraph in (b)(6)(i) above, which applies to “postsecondary institutions,” this provision applies to “elementary and secondary schools, and other recipients that are not postsecondary institutions.” 85 Fed. Reg. 30,026, 30,577 (May 19, 2020). [↑](#footnote-ref-23)
24. 85 Fed. Reg. 30227; 30364-30365. [↑](#footnote-ref-24)
25. See § 106.45(b)(5)(i); § 106.45(b)(1)(x); § 106.45(b)(6)(i)-(ii); § 106.45(b)(6)(i). See Questions and Answers Regarding the Department’s Final Title IX Rule (Sept. 4, 2020), online at <https://www2.ed.gov/about/offices/list/ocr/docs/qa-titleix-20200904.pdf?utm_content=&utm_medium=email&utm_name=&utm_source=govdelivery&utm_term=>>. [↑](#footnote-ref-25)
26. 85 Fed. Reg. 30364. [↑](#footnote-ref-26)
27. 85 Fed. Reg. 30364-65. [↑](#footnote-ref-27)
28. 85 Fed. Reg. 30,365. [↑](#footnote-ref-28)
29. 85 Fed. Reg. 30,456-30,457. [↑](#footnote-ref-29)
30. See § 106.45(b)(3)(i).

 85 Fed. Reg. 30,4563 (grounds for mandatory dismissal); 85 Fed. Reg. 30,091. [↑](#footnote-ref-30)
31. See 34 C.F.R. § 106.8(c). [↑](#footnote-ref-31)
32. This second process is governed by 34 C.F.R. § 106.45. Sexual harassment is defined in 34 C.F.R. § 106.30. [↑](#footnote-ref-32)
33. . See 85 Fed. Reg. 30,365 at fn. 1395. This intention seems to be confirmed on pages 85 Fed. Reg. 30,365 of the final regulations, which states: “If an elementary and secondary school recipient chooses to hold a hearing (live or otherwise), this provision leaves the recipient significant discretion as to how to conduct such a hearing, because § 106.45(b)(6)(i) applies only to postsecondary institutions.” [↑](#footnote-ref-33)
34. 34 C.F.R. §106.45(b)(6)(i) and (ii). [↑](#footnote-ref-34)
35. 34 C.F.R. § 106.45(b). [↑](#footnote-ref-35)
36. 34 C.F.R. § 106.45(b)(9): “…[A]t any time prior to reaching a determination regarding responsibility the recipient may facilitate an informal resolution process, such as mediation, that does not involve a full investigation and adjudication, provided that the recipient –

(i) Provides to the parties a written notice disclosing: the allegations, the requirements of the informal resolution process including the circumstances under which it precludes the parties from resuming a formal complaint arising from the same allegations, provided, however, that at any time prior to agreeing to a resolution, any party has the right to withdraw from the informal resolution process and resume the grievance process with respect to the formal complaint, and any consequences resulting from participating in the informal resolution process, including the records that will be maintained or could be shared;

(ii) Obtains the parties’ voluntary, written consent to the informal resolution process; and

(iii) Does not offer or facilitate an informal resolution process to resolve allegations that an employee sexually harassed a student. [↑](#footnote-ref-36)