

# The Relationship Between Title IX and Chapter 37 of the Texas Education Code



Holly Boyd Wardell  
Tyler P. Ezell  
Oct. 21, 2020



[www.edlaw.com](http://www.edlaw.com)

1

---

---

---

---

---

---

---

---

“To the extent of a conflict between State or local law and title IX...the obligation to comply...is not obviated or alleviated by any State or local law.”

Preemptive effect. 34 C.F.R. § 106.6(h).

[www.edlaw.com](http://www.edlaw.com)

2

---

---

---

---

---

---

---

---

**Title IX trumps Chapter 37 of the Texas Education Code and locally adopted Student Codes of Conduct.**

[www.edlaw.com](http://www.edlaw.com)

3

---

---

---

---

---

---

---

---

**New Title IX Requirement – Sexual Harassment**

A recipient’s response must treat complainants and respondents equitably by offering supportive measures and by following a grievance process **before the imposition of any disciplinary sanctions** or other actions that are not supportive measures **against a respondent**.

General response to sexual harassment. 34 CFR §106.44(a)  
Basic requirements for grievance process. 34 CFR §106.45(b)(1)

www.edlaw.com

4

---

---

---

---

---

---

---

---



**Title IX: Definition Sexual Harassment**

1. Employee conditioning aid, benefit, or service on participation in unwelcome sexual conduct;
2. Unwelcome **conduct** that is severe, pervasive, and objectively offensive and denies a person of equal access to education/activity
3. **Sexual assault, dating violence, domestic violence, stalking**

34 CFR 106.30

www.edlaw.com

5

---

---

---

---

---

---

---

---



**Texas Education Code**

- § 25.0341 – Transfer of Students Involved in **Sexual Assault**
- § 37.001(a)(7)&(b) – Student Code of Conduct – **harassment**
- § 37.0051 – Placement of Students Committing **Sexual Assault** Against Another Student
- § 37.007 – Expulsion for Serious Offenses – **sexual assault**
- § 37.083 – Discipline Management Programs; **Sexual Harassment** Policies
- § 38.0831 – **Dating Violence** Policies
- § 37.115 – Threat Assessment and Safety and Supportive School Program and Team

www.edlaw.com

6

---

---

---

---

---

---

---

---

## Imposition of Disciplinary Sanctions

A recipient's treatment of a respondent may also constitute discrimination on the basis of sex under Title IX. The grievance process aims to provide both parties with equal rights and opportunities to participate in the process and to promote impartiality without favor to complainants or respondents, both because treating a complainant or respondent differently based on sex would violate Title IX and because a process lacking principles of due process risks bias that in the context of sexual harassment allegations is likely to involve bias based on stereotypes and generalizations on the basis of sex.

P. 284 - Commentary

www.ednet.com

7

---

---

---

---

---

---

---

---

---

---

## Imposition of Disciplinary Sanctions

Any respondent will receive the due process protections in the Title IX grievance process before the imposition of any disciplinary sanctions for sexual harassment under § 106.44(a).

- 
- Sexual harassment
  - Sexual assault
  - Dating violence
  - Stalking

P. 576 - Commentary

www.ednet.com

8

---

---

---

---

---

---

---

---

---

---

## Non-Title IX Conduct

**If the conduct alleged does not involve sexual harassment as defined in the new regulations, the Title IX grievance process does not apply.**

www.ednet.com

9

---

---

---

---

---

---

---

---

---

---

## Non-Title IX Conduct



**Dismissal:** If the conduct alleged in the formal complaint would not constitute sexual harassment even if proved, did not occur in the recipient's education program/activity or did not occur in the U.S., then the recipient must dismiss the formal complaint for sexual harassment purposes under Title IX. Such dismissal does not preclude action under another provision of the recipient's code of conduct.

34 CFR 106.45(b)(3)

[www.ed.gov](http://www.ed.gov)

10

---

---

---

---

---

---

---

---

## Non-Title IX Conduct



**The U.S. Department of Education cautions against using § 106.45 to circumvent the Title IX grievance process by processing sexual harassment complaints under non-Title IX provisions; however, allegations that do not meet the definition of "sexual harassment" may be addressed by the recipient under other provisions of its code of conduct.**

P. 264 - Commentary

[www.ed.gov](http://www.ed.gov)

11

---

---

---

---

---

---

---

---

## Title IX Conduct



**Conversely, if the allegations do meet the definition of "sexual harassment" the Title IX grievance procedures apply.**

[www.ed.gov](http://www.ed.gov)

12

---

---

---

---

---

---

---

---



September 4, 2020

**Questions and Answers  
Regarding the Department's Final Title IX Rule**

The Department of Education's Office for Civil Rights, through its new Outreach, Prevention, Education and Non-discrimination (OPEN) Center, issues the following technical assistance document to support institutions with meeting their obligations under the Title IX Rule, which was announced on May 6, 2020, and which became effective on August 14, 2020. Many of the questions were derived from questions posed to the OPEN center through e-mail.

www.ed.gov

13

**Question 3:** The Title IX Rule allows schools to continue to address misconduct that does not meet the definition of sexual harassment. Can Title IX personnel still review these complaints, and follow procedures similar to those allegations that do meet the definition of sexual harassment?

**Answer 3:** Yes. The Title IX Rule does not preclude a recipient from using the same Title IX personnel (including the Title IX Coordinator, who must be an employee of the recipient, and Title IX investigators and decision-makers, who may be a recipient's employees or the employees of a third-party, such as a consortium of schools) to review and investigate allegations of misconduct that fall outside the scope of Title IX. Similarly, the Rule does not preclude a recipient from using a grievance process that complies with § 106.45 with respect to allegations that fall outside the scope of Title IX. In the Preamble to the Rule at pages 481-82, for example, the Department states:

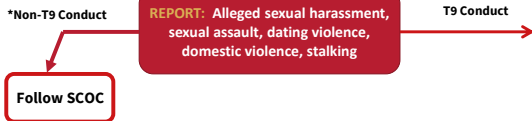
In response to commenters' concerns, the final regulations revise § 106.45(b)(3)(i) to clearly state that dismissal for Title IX purposes does not preclude action under another provision of the recipient's code of conduct. Thus, if a recipient is required under State law or the recipient's own policies to investigate sexual or other misconduct that does not meet the § 106.30 definition, the final regulations clarify that a recipient may do so. Similarly, if a recipient wishes to use a grievance process that complies with § 106.45 to resolve allegations of misconduct that do not constitute sexual harassment under § 106.30, nothing in the final regulations precludes a recipient from doing so. Alternatively, a recipient may respond to non-Title IX misconduct under disciplinary procedures that do not comply with § 106.45. The final regulations leave recipients flexibility in this regard, and preclude a particular grievance process only where allegations concern sexual harassment covered by Title IX.



www.ed.gov

14

**IMPOSING DISCIPLINARY SANCTIONS**

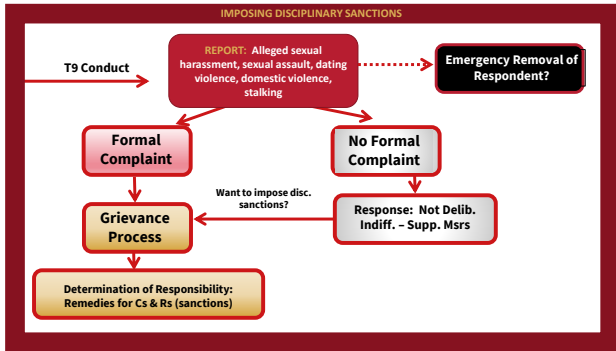


\*Not severe, pervasive, and objectively offensive enough to deny a person equal access to the educational program or activity (e.g., single instances of name calling or compliments like, "He called me 'Karen.'" "She called me a "itch." "Mr. Smith said I looked pretty today.").

\*Did not occur in the recipient's education program or activity

\*Did not occur against a person in the United States

15



16

---

---

---

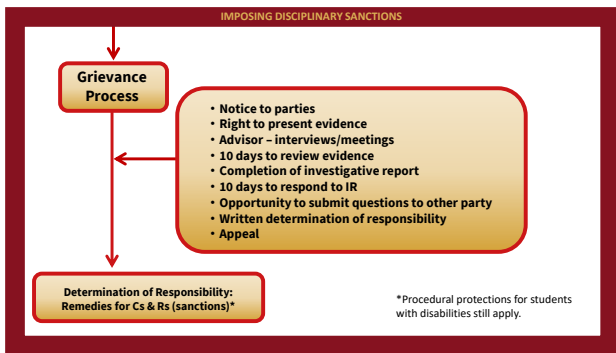
---

---

---

---

---



17

---

---

---

---

---

---

---

---

Cartman calls Kyle’s mom a bi-atch.

- Not sexual harassment
- Discipline per SCOC

[www.edlaw.com](http://www.edlaw.com)

18

---

---

---

---

---

---

---

---

Cartman calls Kyle a bi-atch, takes his AirPods, and tells other students that Kyle is gay.

Kyle files a formal complaint.  
Kyle does not file formal complaint.



[www.edlaw.com](http://www.edlaw.com)

19

---

---

---

---

---

---

---

---

District receives Art. 15.27 notice that a student was arrested for off-campus indecency with a child.

- Not sexual harassment (not in school program/activity)
- Discipline per SCOC, Chapter 37
- Watch for on-campus sexual harassment that may result from off-campus incident



[www.edlaw.com](http://www.edlaw.com)

20

---

---

---

---

---

---

---

---

District receives Art. 15.27 notice that a student was arrested for on-campus sexual assault.

- Sexual harassment
- If complainant, files formal complaint → grievance process
- If complainant does not file formal complaint, Title IX Coordinator can → grievance
- If want to impose disciplinary sanction → grievance process



[www.edlaw.com](http://www.edlaw.com)

21

---

---

---

---

---

---

---

---

Amara and Mateo previously dated. Mateo is jealous of Amara’s new relationship and stalks her at school, threatening to kill her.

- Sexual harassment
- If complainant, files formal complaint → grievance process
- If complainant does not file formal complaint, Title IX Coordinator can → grievance process
- If want to impose disciplinary sanction → grievance process
- Remember state dating violence policy requirements



www.edlaw.com

22

---

---

---

---

---

---

---

---

---

---

Ren routinely calls Aki names based on Aki’s perceived sexual orientation or gender stereotypes. A teacher reports Ren. Aki does not file a formal complaint.

- Sexual harassment
- If complainant, files formal complaint → grievance process
- If complainant does not file formal complaint, Title IX Coordinator can → grievance process
- If want to impose disciplinary sanction → grievance process
- Both students can be provided supportive measures without a formal complaint



www.edlaw.com

23

---

---

---

---

---

---

---

---

---

---

## Other Code of Conduct Provisions That Might Apply

- | MISTREATMENT OF OTHERS |  |
|------------------------|--|
| 9.                     | Threatening a District student, employee, or volunteer, including off school property if the conduct causes a substantial disruption to the educational environment.   |
| 10.                    | Throwing objects that can cause bodily injury or property damage.  |
| 11.                    | Directing profane, vulgar language, or obscene gestures toward other students, District employees or visitors.   |
| 12.                    | Fighting, participating in any manner in fight clubs or boxing.  |
| 13.                    | Fighting or scuffling that does not result in physical pain, illness, or any impairment of a physical condition.   |
| 14.                    | Engaging in hazing, roughhousing, and other playful behavior that, though not intended to harm, presents a reasonable risk of harm or threatens the safety of others.  |
| 15.                    | Participating in hazing.   |
| 16.                    | Committing extortion, coercion, or blackmail (obtaining money or another object of value from an unwilling person), or forcing an individual to act through the use of force or threat of force.   |
| 17.                    | Engaging in bullying or cyberbullying, including intimidation, teasing, name-calling, ethnic or racial slurs, or derogatory statements that school officials have reason to believe substantially disrupt the school program or create violence. |
| 18.                    | Release or threaten to release intimate visual material of a minor or a student who is eighteen years or older without the student's consent.  |
| 19.                    | Engaging in any conduct that constitutes sexual or gender-based harassment or sexual abuse whether the conduct is by word, gesture, or any other sexual conduct, including requests for sexual favors.   |
| 20.                    | Engaging in harassment of any kind, including, but not limited to, harassment motivated by race, color, religion, national origin, disability or age directed toward another student or District employee.                                       |
| 21.                    | Engaging in any inappropriate physical or sexual contact.  |

www.edlaw.com

24

---

---

---

---

---

---

---

---

---

---



## Other Code of Conduct Provisions That Might Apply

- 22. Engaging in inappropriate or indecent exposure of private parts.
- 23. Making threats, including verbal and written statements, hit lists, mail and e-mail, threats of a graphic nature (drawings, graffiti), and joking about threatening subjects that threaten the safety of another student, a school employee, or school property.
- 24. Committing simple assault (assault by contact).
- 25. Participating in consensual hugging, touching, or other displays of affection that are inappropriate.
- 26. Participating in consensual activities that result in physical alteration or injury to self or of another person's body (i.e. piercing, tattooing, etc.).
- 27. Failing to immediately report to a school employee knowledge of a device, object, substance, or event that could cause harm to self or others.
- 28. Engaging in conduct that constitutes dating violence, including the intentional use of physical, sexual, verbal, or emotional abuse to harm, threaten, intimidate, or control another person in a current or past dating relationship.

www.ednet.com

25

### BULLYING

**Bullying** is defined in Section 37.0832 of the Education Code as a single significant act or a pattern of acts by one or more students directed at another student that exploits an imbalance of power and involves engaging in written or verbal expression, expression through electronic means, or physical conduct that:

- 1. Has the effect or will have the effect of physically harming a student, damaging a student's property, or placing a student in reasonable fear of harm to the student's person or of damage to the student's property;
- 2. Is sufficiently severe, persistent, or pervasive enough that the action or threat creates an intimidating, threatening, or abusive educational environment for a student;
- 3. Materially and substantially disrupts the educational process or the orderly operation of a classroom or school; or
- 4. Infringes on the rights of the victim at school.

Bullying includes cyberbullying. **Cyberbullying** is defined by Section 37.0832 of the Education Code as bullying that is done through the use of any electronic communication device, including through the use of a cellular or other type of telephone, a computer, a camera, electronic mail, instant messaging, text messaging, social media application, an internet website, or any other internet-based communication tool.

The State Law on Bullying prevention applies to:

- 1. Bullying that occurs on or is delivered to school property or to the site of a school-sponsored or school-related activity on or off school property;
- 2. Bullying that occurs on a publicly or privately-owned school bus or vehicle being used for transportation of students to or from school or a school-sponsored or school-related activity; and
- 3. Cyberbullying that occurs off school property or outside of a school-sponsored or school-related activity if the cyberbullying interferes with a student's educational opportunities or substantially disrupts the orderly operation of a classroom, school, or school-sponsored or school-related activity.

www.ednet.com

26

### MISUSE OF TECHNOLOGY

- 34. Violating any of the prohibited behaviors/conduct listed in the LISD Technology Resource Acceptable Use Guidelines. See [Appendix B- Technology Resource Acceptable Use Guidelines for the complete list in the back of the handbook.](#)
- 35. Recording the voice or image of another without the prior consent of the individuals being recorded, or administrative approval, in any way that disrupts the educational environment or invades the privacy of others.
- 36. Copying, downloading, reproducing, distributing, retransmitting, redisplaying, or modifying items from the District's website.

www.ednet.com

27



**MISCELLANEOUS OFFENSES**

- 47. Engaging in cheating, plagiarism or, copying. This offense may result in possible grade reductions and other consequences as permitted by policy.
- 48. Bringing skateboards onto the bus. (Students with skateboards in their possession shall not be allowed to get on the bus.)
- 49. Aiding a student or students in committing prohibited behaviors.
- 50. Participating in gambling or betting money or other things of value.
- 51. Falsifying records, passes, or other school-related documents.
- 52. Certain criminal behavior resulting in the student receiving a ticket or citation, being arrested, or having an arrest warrant issued for himself/herself, regardless of where or when the alleged behavior occurred.
- 53. Using profane language verbally, written, or any electronic form.

www.ednet.com

28

---

---

---

---

---

---

---

---

---

---

**Potentially Overlapping Chapter 37 Provisions**



- § 37.001(a)(7)&(b) – Student Code of Conduct – **harassment**
- § 37.0051 – Placement of Students Committing **Sexual Assault** Against Another Student
- § 37.007 – Expulsion for Serious Offenses – **sexual assault**
- § 37.083 – Discipline Management Programs; **Sexual Harassment** Policies
- § 38.0831 – **Dating Violence** Policies
- § 37.115 – Threat Assessment and Safety and Supportive School Program and Team

www.ednet.com

29

---

---

---

---

---

---

---

---

---

---

**Chapter 37 Provisions**



- § 37.006 – Removal to DAEP:
  - On campus felony
  - Public lewdness
  - Indecent exposure
  - Harassment (Penal Code)
  - Off campus Title 5 felony offense (Tex. Penal Code)
  - Non-Title 5 felony + safety threat

www.ednet.com

30

---

---

---

---

---

---

---

---

---

---

*The information in this handout was prepared by Eichelbaum Wardell Hansen Powell & Muñoz, P.C. It is intended to be used for general information only and is not to be considered specific legal advice. If special legal advice is sought, consult an attorney.*



[www.edlaw.com](http://www.edlaw.com)

---

---

---

---

---

---

---

---