

Ten Things to Know About the New Title IX Regs

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1. Some Background is Helpful

- ❑ Title IX of the Education Amendments of 1972
 - ❑ Title IX is all of 37 words.
 - ❑ It prohibits discrimination based on sex in educational institutions that receive federal financial assistance.
- ❑ Harassment based on sex is a form of discrimination based on sex. This has been established in the law for a long time.
- ❑ Specific guidance on compliance has been limited, until now.
 - ❑ No officially adopted regulations addressing sexual harassment or school response
 - ❑ Primary guidance from court interpretations and “Dear Colleague” letters issued by the Department of Education (DOE).

But now....

- ❑ Regulations have been proposed for adoption, published in the Federal Register, commented upon (almost 125,000 comments!). Those comments have been reviewed by the DOE, and the final regs have now been promulgated.
- ❑ **Effective date: August 14, 2020**, unless stopped by court order.
- ❑ There is one suit already pending, filed by the ACLU.

2. Definitions and Terminology: 34 CFR 106.30(a).

- Six Kinds of Sexual Harassment
- Complainant
- Respondent
- Formal Complaint vs. "Report"
- Actual knowledge
- Substantial control
- Supportive Measures

Definition: Sexual Harassment

- ❑ Six Types of Sexual Harassment
 - ❑ Quid pro quo
 - ❑ Hostile environment
 - ❑ Sexual assault
 - ❑ Dating violence
 - ❑ Domestic violence
 - ❑ Stalking

Definitions: Sexual Harassment: Quid Pro Quo

- ❑ *Quid pro quo*: When an employee conditions favorable treatment on the acceptance of unwelcome sexual attention.
- ❑ This definition applies only to actions of employees.
 - ❑ Teacher offers good grades to student.....
 - ❑ Principal offers promotion to teacher....

Definitions: Sexual Harassment: Hostile Environment

- ❑ Conduct that it is so SEVERE, PERVASIVE **AND** OBJECTIVELY OFFENSIVE that it effectively DENIES a person EQUAL ACCESS to the program.
- ❑ What has changed from prior guidance?
 - ❑ OR → AND
 - ❑ LIMITS → DENIES
 - ❑ These changes are consistent with judicial interpretations but a departure from prior OCR guidance.
- ❑ This could be student-to-student conduct, employee-to-student conduct, or employee-to-employee conduct.
- ❑ Note: A lot of things happen in schools that are inappropriate and sexually oriented, but fall short of this definition. More on that later.

Definitions: Sexual Harassment: Four More

- ❑ Sexual assault: Forcible or non-forcible sexual offenses under the Uniform Crime Reporting System of the FBI.
- ❑ Dating violence: Violence done by a person who is, or has been, in a dating relationship with the other person.
- ❑ Domestic violence: Violence by a current or former intimate partner.
- ❑ Stalking: A course of conduct directed at a specific person that would cause a reasonable person to fear for personal safety of self or others; or to suffer emotional distress.

Terminology: Complainant

- ❑ This term always refers to the victim of sexual harassment, even if someone else is the one who made the complaint.
- ❑ Parent complains that Child is being harassed. Parent has made the complaint, but Child is the "complainant."
- ❑ Teacher reports that Student is being harassed. Teacher makes the Report, but Student is the "complainant."

Terminology: Respondent

- ❑ This term refers to the person accused of sexual harassment.
- ❑ Note: these terms (Complainant, Respondent) apply even when there is a Report, but no Formal Complaint.
- ❑ Example: Mom complains that Billy is being harassed by a coach based on his sex. The Title IX Coordinator (T9C) meets with mom and explains the Formal Complaint process. Mom does not want that. T9C also decides not to initiate Formal Complaint process.
- ❑ So there is no Formal Complaint, but there is a Report, and Billy is still the Complainant, and Coach is the Respondent.

Terminology: Supportive Measures

- ❑ Non-disciplinary, non-punitive measures to support the Complainant or Respondent after a Report of harassment is made. These measures must:
 - ❑ Be offered at no charge,
 - ❑ Be designed to maintain equal access to educational services, and
 - ❑ Not unreasonably burden either party.
- ❑ The Respondent might be “burdened” but not “unreasonably burdened.”
- ❑ More on this below.

3. The Role of the Title IX Coordinator: 34 CFR 106.8.

- ❑ Every district must have at least one, and that person must be designated as and identified as the Title IX Coordinator (T9C).
- ❑ T9C must have authority as well as responsibility—authority to “coordinate its efforts to comply with its responsibilities.”
- ❑ T9C meets promptly with Complainant upon receipt of a Report. More on that later.
- ❑ Contact information for the T9C should be prominent on the website and in catalogs and handbooks. These should also contain district policies and grievance procedures for sexual harassment complaints.

4. What does “actual knowledge” mean? 34 106.30(a).

- ❑ This term is important because the school’s duty to respond arises only when it has “actual knowledge” of sexual harassment, or of allegations of conduct that, if true, would be sexual harassment.
- ❑ Under the regs, the school has “actual knowledge” when any employee of the school--*other than the actual perpetrator of the harassment*—has actual knowledge.
- ❑ What has changed?
 - ❑ Previously, actual knowledge was imputed to the school only when it was known by someone who had the authority to address it.
 - ❑ Now, it is *any* employee.

Why the Change?

- ❑ The standard for “actual knowledge” at the post-secondary level remains as it was—someone with authority to take corrective action.
- ❑ DOE notes that with young children in K-12 schools, an adult is an adult.
 - ❑ K-12 students may not understand the distinctions between a para and a teacher, for example.
 - ❑ Regulation expanded to put the school on notice if *any* employee has actual knowledge.
- ❑ Let’s consider some scenarios....
- ❑ SEE NEXT SLIDE!!

Scenarios – Is there “actual knowledge”?

- My fellow teacher and drinking buddy confides in me that he’s been “fooling around” with a student. Makes sure she gets an A and a college recommendation.
- Custodian witnesses an act of sexual harassment in the bathroom.
- Student confides in a teacher’s aide about what happened on the school field trip.
- All three of these are examples of situations that, in the past, did not put the school on notice of “actual knowledge.” Now they do.

5. What does “substantial control” mean?

- ❑ The school is not responsible for responding to allegations of sexual harassment unless the school had “substantial control” over the harasser and the “context.”
- ❑ Consider how this will be applied to:
 - ❑ extracurricular activities;
 - ❑ field trips;
 - ❑ out of town, overnight trips;
 - ❑ cyberbullying off campus.
- ❑ Scenario: Student engages in cyberbullying off campus and on the weekend.
 - ❑ Does the school have “substantial control”?
 - ❑ What about state law which gives schools the authority to discipline students for certain off campus cyberbullying?

6. The Duty to Respond: 34 CFR 106.44.

- ❑ If the district has “actual knowledge” of “sexual harassment” as those terms are defined here, it “must respond promptly in a manner that is not deliberately indifferent.”
- ❑ The “response must treat complainants and respondents equitably by offering supportive measures....to a complainant, and by following a grievance process that complies with 106.45 before the imposition of any disciplinary sanctions or other actions that are not supportive measures....against a respondent.”

Implications of That.....

- ❑ The Respondent (student or employee) cannot be punished for “sexual harassment” unless the school first goes through the lengthy and complicated “grievance process.”
- ❑ What if the reported conduct doesn’t meet the definition of “sexual harassment”?
 - ❑ Most Reports of sexual harassment in K-12 schools will not meet the definition of “sexual harassment” under these regulations.
 - ❑ Under those circumstances, the district is required to respond promptly and equitably, and to offer “supportive measures” but is not required to provide a “grievance process.”

When is the “Grievance Process” Required?

- ❑ If a Formal Complaint is filed, the school must use the formal grievance process.
- ❑ If the school intends to impose disciplinary sanctions for “sexual harassment” as defined in these regulations, the formal grievance process must be completed before sanctions are imposed.
- ❑ What is the difference between a “formal complaint” and “formal grievance”?

7. How does the Formal Complaint process work?

- ❑ It's important to distinguish between a Report vs. a Formal Complaint.
- ❑ A Report does not have to take any specific form - a person (complainant or other) reports sexual harassment to an employee verbally or in writing.
- ❑ The district must respond to a Report promptly and equitably.
 - ❑ The T9C must promptly meet with the Complainant.
 - ❑ Among other things, the T9C must explain the Formal Complaint Process and consider the wishes of the Complainant about pursuing it or not.
 - ❑ The T9C must offer "supportive measures."
- ❑ After a Report is made, a Formal Complaint process may be initiated on that Report:
 - ❑ Only Complainant and the T9C can initiate.
 - ❑ T9C may initiate the process even when the Complainant chooses not to

Benchmarks of the Formal Complaint Process: 34 CFR 106.45.

1. Equal treatment of the parties.
2. Objective evaluation of evidence, including no credibility determinations based on the person's status as Complainant, Respondent or witness.
3. Bias-free training for T9C and others involved in the process. No conflicts of interest.
4. Presumption of innocence for the Respondent until the process is complete. The burden of proof and the duty to gather sufficient evidence is on the school—not on either party.
5. Reasonable time frames.

More Benchmarks

6. Description of possible outcomes, such as disciplinary sanctions and remedies.
7. Standard of proof: either “preponderance of the evidence” or “clear and convincing.” District chooses, but must always use the same standard.
8. Appeal available for either party.
9. Description of Supportive Measures.
10. Protection of privileged information.
11. Protection of Constitutional rights of free speech, due process.

What if There is no Formal Complaint?

- ❑ If neither the Complainant nor the T9C makes a Formal Complaint, you still have a Report. The district still has a duty to seek a “prompt and equitable resolution.”
- ❑ Supportive Measures must be offered.
- ❑ Let’s look at the definition in more detail: SEE NEXT SLIDE!!

Supportive Measures

- Non-disciplinary, non-punitive individualized services offered to Complainant or Respondent with no charge.
- Designed to “restore or preserve equal access to...the education program or activity without unreasonably burdening the other party.”
- Examples:
 - counseling,
 - extension of deadlines,
 - modification of schedule,
 - campus escort services,
 - mutual restrictions on contact,
 - leave of absence,
 - increased security/monitoring. 34 CFR 106.30.

8. How does all this mesh with our Code of Conduct?

- ❑ The regulations restrict the use of “emergency removal” of a person from the educational program unless:
 - ❑ 1) there is an individualized safety/risk analysis;
 - ❑ 2) there is an immediate threat to the physical health or safety of the person to be removed or others; *and*
 - ❑ 3) the person removed is given notice and an opportunity to challenge the decision immediately after the removal.
- ❑ “Emergency removal” could include out of school suspension.
- ❑ But remember: This restriction applies only when the removal is based on allegations that meet the definition of “sexual harassment.”

Consider this....

- ❑ Dad alleges that his daughter was called a slut, and tapped on the backside by a boy during school hours, at the school. *This is a Report.*
- ❑ T9C offers supportive measures and informs Dad of the Formal Complaint process.
- ❑ Dad files Formal Complaint.
- ❑ "The recipient must investigate the allegations in a formal complaint. If the conduct alleged in the formal complaint would not constitute sexual harassment as defined in 106.30 even if proved....then the recipient must dismiss the formal complaint for purposes of sexual harassment under Title IX or this part; such a dismissal does not preclude action under another provision of the recipient's code of conduct." 34 CFR 106.45(b)(3)(i).

Perspective....

- ❑ Most of what is reported as misconduct in school, even if sexual in nature, falls short of the Title IX definition of “sexual harassment.”
- ❑ Students may violate the Code of Conduct in ways that justify short term suspension, but not go so far as to be “severe, pervasive and objectively offensive.”
 - ❑ Short term removals based on such conduct should be documented as being based on your Code of Conduct.
- ❑ Behavior that meets the Title IX definition of “sexual harassment” would normally call for a more serious penalty—DAEP for example.

9. Training.

- ❑ Training will be needed at all levels.
 - ❑ All employees must understand when to report something, and to whom it should be reported.
 - ❑ Administrators need training on investigations.
 - ❑ Title IX Coordinators need extensive training on their obligations. Possible resource: www.atixa.org. Association of Title IX Administrators.
- ❑ We are offering three more On Demand Webinars on Title IX this month.
- ❑ When we get back to school, more extensive training is going to be needed.

Three More!

- ❑ June 11: So You Got a Complaint Under Title IX: Now What?
Craig Wood and Katie Payne
- ❑ June 15: Title IX and Special Education
Paula Maddox Roalson and Hank Bostwick
- ❑ June 16: Title IX Coordinator Training
Robb Decker and Melanie Charleston

Go to www.walshgallegos.com.

10. Record Keeping.

- ❑ SEVEN YEAR RETENTION PERIOD for records of:
 - ❑ 1) each sexual harassment investigation;
 - ❑ 2) any appeal; 3) any informal resolution; and
 - ❑ 4) training materials.
- ❑ District must retain training materials:
 - ❑ Retain any materials used with T9C, investigators, decision makers, and any other person who facilitates an informal resolution process.
 - ❑ These materials must be publicly available on the district's website.

Records of Investigations?

“For each response required under 106.44, a recipient must create, and maintain for a period of seven years, records of any actions, including any supportive measures, taken in response to a report or formal complaint of sexual harassment. In each instance, the recipient must document the basis for its conclusion that its response was not deliberately indifferent, and document that it has taken measures designed to restore or preserve equal access to the recipient’s education program or activity. If a recipient does not provide a complainant with supportive measure, then the recipient must document the reasons why such a response was not clearly unreasonable in light of the known circumstances.”

34 CFR 106.45(b)(10)(D)(ii).

Let's Remember!

- ❑ These regs do not change the standard of liability for schools under Title IX.
- ❑ Liability of the district occurs only if:
 - ❑ 1) sexual harassment happened;
 - ❑ 2) the district knew about it; and
 - ❑ 3) the district responded with "deliberate indifference."
- ❑ Remember that it's not "sexual harassment" under Title IX unless the district had "substantial control" over the harasser, and the context.
- ❑ Most of the lawsuits against districts cannot overcome the "deliberate indifference" hurdle. But this is not a phrase that educators should be using. Set your sights higher than that!

Set the Right Tone....

- ❑ We only have liability under the law when things are really bad.
- ❑ But the way we keep things from getting really bad is to address the minor incidents that occur along the way.
- ❑ Make sure that teachers, coaches, bus drivers, and other employees who have regular interaction with students are setting the right tone, being good role models, and being attentive.

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