

Ten Things to Know About the New Title IX Regulations

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Some Background on Title IX

- ❑ Title IX of the Education Amendments of 1972
 - ❑ “No person in the United States, on the basis of sex, shall 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.”
- ❑ It has been long legally established that harassment “on the basis of sex” is a form of sex discrimination.
- ❑ But, no formal Department of Education (DOE) regulations addressing sexual harassment under Title IX, and schools’ proper response, until now.
 - ❑ Primary guidance has been from court interpretations and informal “Dear Colleague” letters issued by the DOE.
 - ❑ Those DOE letters did not have the force of law; these new regulations do.



2

A Bit About the New Regulations

- ❑ Proposed rules issued 1½ years ago, but not finalized until May of 2020.
- ❑ **Effective date is August 14, 2020**, unless stopped by court order.
 - ❑ There are at least two lawsuits pending challenging the regulations.
 - ❑ American Council on Education, 18 state attorneys general (including ours), and others asked DOE to delay the regulations until the COVID-19 pandemic had passed.
- ❑ Some key changes:
 - ❑ Narrower definition of sexual harassment.
 - ❑ Big changes to how allegations of sexual harassment are handled – from reporting to investigating to decision-making to discipline.
 - ❑ Much stronger protections for accused students and employees.
 - ❑ Different standards for district liability.



3

Top Ten, In Brief

1. New Terms and Definitions
2. Expanded Role of Title IX Coordinator
3. Change in What Constitutes Notice of Sexual Harassment
4. Limits on District Authority
5. Changes to Duty to Respond
6. Reporting Process and Obligations are New
7. New and More Complex Investigation Process, Plus Appeals
8. Interplay with Rules of Conduct is Complex
9. Training is Important
10. New Record-Keeping Obligations



4

1. New Title IX Definitions and Terminology: 34 CFR 106.30(a).

- Sexual Harassment
- Complainant
- Respondent
- Formal Complaint vs. "Report"
- Supportive Measures
- Actual Knowledge
- Substantial Control
- Grievance Process



5

Sexual Harassment Redefined

- Conduct is recognized as sexual harassment under the rules IF it occurs in a district program or activity, in the United States, where district has "substantial control" over the alleged harasser and the context, AND
- It is one of the following:
 - Quid pro quo
 - Hostile environment
 - As defined in the Violence Against Women Act:
 - Sexual assault
 - Dating violence
 - Domestic violence
 - Stalking



6

Sexual Harassment Types: Quid Pro Quo

- ❑ *Quid pro quo*: When an employee conditions a district benefit or service on an individual's "participation in unwelcome sexual conduct."
- ❑ Severity, pervasiveness, or offensiveness of the conduct does not matter.
- ❑ This type of harassment applies only to actions of employees.
 - ❑ Teacher offers good grades to student in exchange for...
 - ❑ Principal offers promotion to teacher if she...



7

Sexual Harassment Types: Hostile Environment

- ❑ Unwelcome conduct "on the basis of sex" that 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 OR INTERFERES WITH → DENIES
 - ❑ ABILITY TO PARTICIPATE → EQUAL ACCESS
 - ❑ These changes are a departure from prior OCR guidance.
- ❑ This could be student-to-student conduct, employee-to-student conduct, or employee-to-employee conduct.
- ❑ A lot of things happen in schools that are inappropriate and sexually oriented will fall short of this definition.



8

Plus, Four Types of Sexual Harassment as Defined in the Violence Against Women Act

- ❑ 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.



9

New Term: Complainant

- ❑ "An individual who is alleged to be the victim of conduct that could constitute sexual harassment."
- ❑ This term always refers to the alleged victim of sexual harassment, even if someone else made the initial report or complaint.
- ❑ EXAMPLES:
 - ❑ Parent complains that Student is being harassed. Parent has made the Report, but Student is the "Complainant."
 - ❑ Teacher reports that Student is being sexually harassed. Teacher makes the Report, but Student is the "Complainant."



10

New Term: Respondent

- ❑ “An individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment.”
- ❑ This term refers to the person accused of sexual harassment.
- ❑ Under the new regulations, this person is presumed to be “not responsible” for the alleged sexual harassment.



11

New Use of a Term: Report

- ❑ This term refers to a verbal or written report, made by any person, to the Title IX Coordinator (T9C), of conduct that could constitute sex discrimination or sexual harassment.
 - ❑ Anyone can make a Report to T9C, in person, by mail, phone, email, etc.
 - ❑ No deadline to report, but districts will want to impose deadlines for staff to report possible sexual harassment of students.
- ❑ Triggers districts’ obligation for an “initial response”:
 - ❑ T9C must “promptly contact Complainant and discuss the report, supportive measures, and process to file a Formal Complaint.
 - ❑ T9C must also treat the complainant and respondent equitably.
 - ❑ Cannot discipline the Respondent without a finding of responsibility for the sexual harassment after completion of a new Formal Grievance process.



12

New Term: Supportive Measures

- ❑ Non-disciplinary, non-punitive individualized services offered to both the Complainant or Respondent after a Report of sexual 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.
- ❑ A party might be “burdened” but cannot be “unreasonably burdened.”
- ❑ There are processes for limited emergency removals when certain conditions are met.



13

New Term: Formal Complaint

- ❑ A written document filed by a complainant with the T9C alleging sexual harassment against a respondent and requesting that the school investigate the allegation of sexual harassment (can be provided in person, or by mail, email, etc.)
 - ❑ The T9C can also initiate a Formal Complaint, without the Complainant's permission, if it would be necessary to ensure the District is not deliberately indifferent to sexual harassment.
 - ❑ No third party can file a Formal Complaint.
- ❑ Triggers new and specific Grievance Process for investigating, determining responsibility, and taking action including dismissal.
- ❑ If the conduct alleged does not constitute sexual harassment under Title IX, a Formal Complaint must be dismissed.
 - ❑ Other disciplinary action may be taken however.



14

New Use of a Term: Grievance Process

- ❑ If a Formal Complaint is filed, and is not dismissed, the District must “handle” that Formal Complaint through a Grievance Process.
- ❑ This is NOT your usual grievance process, as set out in policies or CBAs, though those could be used to address other complaints of sex discrimination.
- ❑ The Grievance Process must meet certain statutory benchmarks, which will be described below.



15

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

- ❑ Every district must have at least one, and that person must be designated and referred to as the Title IX Coordinator (T9C).
- ❑ T9C must have authority to “coordinate [District’s] efforts to comply with its [Title IX] responsibilities.”
- ❑ T9C must meet promptly with Complainant upon receipt of a Report.
- ❑ T9C can investigate complaints but cannot be the decision-maker.
- ❑ All *potential reporters* of sexual misconduct must be notified of T9C’s contact info: name, title, office and email addresses, and phone number.
- ❑ Contact information for the T9C must be prominent on the district website, in handbooks, and similar materials. These locations should also contain district policies and procedures for sexual harassment reports/complaints.



16

3. Actual Knowledge of Sexual Harassment 34 106.30(a).

- ❑ This term is important because the school's legal duty to respond arises when it has "actual knowledge" of sexual harassment, or of allegations of conduct that, if true, would be sexual harassment.
- ❑ Under the regulations, the school has "actual knowledge" when *any employee of the school—other than the perpetrator of the harassment*—has notice of sexual harassment.
- ❑ 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.
- ❑ Actual knowledge triggers district duty to respond.



17

Why this Change?

- ❑ For the U.S. Department of Education, in K-12 schools, an adult is an adult.
 - ❑ K-12 students may not understand the distinctions between an EA and a teacher, for example.
 - ❑ So now, the law puts the school on notice if *any* employee has notice.
- ❑ Let's consider some scenarios....



18

Scenarios – Is there “actual knowledge”?

- ❑ A teacher, and drinking buddy of another teacher, confides during their happy hour that he’s been “fooling around” with a student, and making sure she gets an A and a good college recommendation.
- ❑ Custodian witnesses an act of sexual harassment in the bathroom.
- ❑ Student confides in a teacher’s aide about sexual misconduct that 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. Now, these constitute “actual knowledge” for purposes of a district’s Title IX obligations, and potential liability.



19

4. Sexual Harassment and “Substantial Control”

- ❑ Under the new rules, the school is not responsible for responding to allegations of sexual harassment unless the school had “substantial control” over the Respondent and the “context” in which the alleged sexual harassment occurred. This includes all education programs and activities, on campus or off.
- ❑ Consider how this will be applied to:
 - ❑ extracurricular activities;
 - ❑ field trips;
 - ❑ out of town, overnight trips;
 - ❑ Other harassment or cyberbullying off campus.



20

“Substantial Control” Scenario

- ❑ Scenario: Student engages in cyberbullying of another, from the local Sonic, over the weekend.
- ❑ Scenario: Student reports that a teacher came to her workplace last night and made sexual remarks to and about her.
 - ❑ Does the school have “substantial control”?
 - ❑ What about state law which gives schools the authority to discipline students for certain off-campus cyberbullying?
- ❑ NOTE: Sexual harassment or sex discrimination outside Title IX’s jurisdiction can be handled under the student code of conduct, including possible discipline, and can be reported to law enforcement.



21

5. Duty to Respond: 34 CFR 106.44.

- ❑ If a 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.”
 - ❑ Deliberately indifferent = “clearly unreasonably in light of the known circumstances.”
 - ❑ The “response must treat complainants and respondents equitably... offer[] supportive measures....to a complainant, and by follow[] a grievance process that complies with [the regulations] before the imposition of any disciplinary sanctions or other actions that are not supportive measures....against a respondent.”



22

“Actual Knowledge” Triggers Duty to Respond

- ❑ So all employees must understand their obligation to report that they have witnessed or been told of potential sexual harassment, AND
- ❑ They must know how and where to report that information.
- ❑ When the T9C receives notification of potential sexual harassment – a Report – the T9C must promptly contact the Complainant to discuss:
 - ❑ The Report
 - ❑ Available Supportive Measures, taking Complainant’s wishes into account
 - ❑ Process to File a Formal Complaint which will be investigated
- ❑ T9C must also determine whether allegations, if true, would meet the definition of sexual harassment.



23

Duty to Respond and the Respondent

- ❑ The Respondent (student or employee) cannot be punished for “sexual harassment” unless the school first goes through the new lengthy and complicated Title IX “Grievance Process.”
- ❑ What if the Report of sexual misconduct doesn’t meet the definition of “sexual harassment”?
 - ❑ Probably most reports of sexual harassment in K-12 schools will not meet the definition under the new regulations, even if the conduct was of a sexual nature and wrongful.
 - ❑ Under those circumstances, the district will still want to respond promptly and equitably, and to offer “supportive measures” to both parties but is not required to provide the “grievance process.”
 - ❑ Supportive measures must be aimed at restoring or preserving equal access to the educational program or activity, without “reasonably burdening” either party.



24

When is this “Grievance Process” Required?

- ❑ If a Formal Complaint is filed by a Complainant, the school must use the new regulatory formal grievance process.
- ❑ To impose disciplinary sanctions for “sexual harassment” as defined in these regulations, the formal grievance process must be completed before any sanctions can be imposed.
- ❑ So what is the difference between a “formal complaint” and “formal grievance”?



25

6. Report versus Formal Complaint

- ❑ It’s important to distinguish between a Report and 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; that employee must notify T9C.
- ❑ 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
 - ❑ The T9C must offer “supportive measures.”
- ❑ After a Report is made, a Formal Complaint process *may* be initiated on that Report:
 - ❑ Only if Complainant or the T9C initiate it.
 - ❑ T9C may initiate the process even when the Complainant chooses not to do so.



26

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 to both parties.
- ❑ Let’s look at what counts as supportive measures in more detail.



27

Supportive Measures

- ❑ These are 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 schedules,
 - ❑ campus escort services,
 - ❑ mutual restrictions on contact,
 - ❑ leave of absence,
 - ❑ increased security/monitoring. 34 CFR 106.30.



28

Emergency Removal

- ❑ The new regulations do permit an emergency removal of a Respondent from a district program or activity prior to completing the Grievance Process if:
 - ❑ An individualized safety and risk analysis is conducted, AND
 - ❑ District determines that there is an immediate threat to the physical health or safety of any student or other person arising from the allegations of sexual harassment, AND
 - ❑ The Respondent is provided written notice of removal and an immediate opportunity to challenge the removal.
- ❑ Any removal of a special education student must comply with federal IDEA laws.



29

7. The Formal Complaint Process: 34 CFR 106.45.

- ❑ If a Complainant files a Formal Complaint and the alleged conduct does not constitute sexual harassment under Title IX, it must be dismissed.
- ❑ If the complaint is dismissed:
 - ❑ Written notice of dismissal, and options for appeal, must be sent to both the Respondent and Complainant.
 - ❑ The dismissal notice must give the rationale for dismissal and explain why dismissal is not deliberately indifferent.
 - ❑ The notice must be maintained for 7 years.
 - ❑ After a dismissal, the Complainant can still file a Formal Complaint.
- ❑ But this does not preclude other disciplinary action.
- ❑ If the Formal Complaint is not dismissed, a Grievance Process is used to address the Complaint.



30

Notice of allegations

- ❑ Upon receipt of a Formal Complaint, written notice must be given to known parties.
- ❑ Notice must include:
 - ❑ Description of grievance process, and any informal resolution process.
 - ❑ Sufficiently detailed notice of the allegations, including alleged conduct, names of the parties, date and location of the alleged conduct.
 - ❑ A statement that the Respondent is presumed not responsible for the conduct until a determination has been made at the end of the grievance process.
 - ❑ Notification that parties can have an advisor of their choice (attorney or not) and will have an opportunity to inspect the evidence.
 - ❑ Statement that knowingly providing false information during the grievance process is prohibited.



31

Grievance Process - Requirements

Under the new regulations, the Grievance Process must meet certain requirements, or no discipline can be imposed:

- ❑ The Complainant and Respondent must be treated equitably – opportunity to present witnesses and evidence, ability to discuss the allegations and gather evidence, opportunity to inspect evidence related to allegations (unless privileged), and an opportunity to participate in any hearing (a hearing is NOT required).
- ❑ A presumption of Respondent's innocence until a final determination has been made.
- ❑ The burden of proof and the duty to gather sufficient evidence is on the school—not on either party.
- ❑ There must be an objective evaluation of all relevant evidence, with no credibility determinations based on the person's status as Complainant, Respondent or witness.
- ❑ Impartiality is mandatory - no actual or perceived conflicts of interest or bias by the T9C, the investigator, the decision-maker, or any others involved in the process.



32

More Grievance Process Requirements

- ❑ All T9Cs, investigators, decision-makers, and any person who facilitates an informal resolution process, must receive training on the definition of sexual harassment, the scope of the district's education program or activity, how to conduct an investigation and grievance process, including hearings, appeals, and informal resolution processes, and how to serve impartially.
- ❑ "Reasonably prompt" time frames for the grievance process unless there is "good cause" for and written notice of the delay.
- ❑ Written description of possible outcomes (discipline and remedies) and supportive measures must be provided to both the Complainant and Respondent.
- ❑ May not request or use privileged information.
- ❑ Protect Constitutional rights of free speech, due process.
- ❑ State whether the standard of proof of sexual harassment will be "preponderance of the evidence" or "clear and convincing." District chooses, but must always use the same standard.
- ❑ Evidence of a party's prior sexual behavior or "predisposition" cannot be considered unless to prove consent or that another person committed the offense.
- ❑ A fair investigative report.



33

What About Informal Resolution?

- ❑ The regulations provide districts the option of voluntary Informal Resolution of Formal Complaints of student-student sexual harassment in lieu of completing an investigation.
 - ❑ This is *not* permitted in instances of employee-student harassment.
- ❑ Districts can offer this option to the parties, but must:
 - Provide the Complainant and Respondent with written notice of the sexual harassment allegations, the requirements of an informal resolution process, and any consequences from participating in the informal resolution process.
- ❑ Both parties' must voluntarily give written consent to the informal resolution process.



34

How Does Informal Resolution Work?

- ❑ There is flexibility on this option, but something like mediation would likely be the most common process for informal resolution.
- ❑ The Formal Grievance process can be abated during resolution efforts, but neither party can be required to waive their right to an investigation if the resolution process is unsuccessful and neither party can be required to participate in informal resolution.
- ❑ Either party can withdraw from the resolution process and resume the Formal Grievance process/investigation.



35

Once Investigative Report is Complete

- ❑ It must be sent to the Respondent and Complainant.
- ❑ Both can submit any questions written relevant questions for any party or witness for the Decision-Maker to use.
- ❑ Both must be provided written answers to those questions, and have opportunity for limited follow-up questions. Irrelevant questions can be excluded.
- ❑ Then, a Decision-Maker, who cannot be the T9C or investigator, reviews the evidence and issues a written determination to the parties, simultaneously.
- ❑ Written determination must include:
 - ❑ Description of allegations potentially constituting sexual harassment
 - ❑ Description of procedures taken from receipt of formal complaint to determination
 - ❑ Findings of fact that support the determination
 - ❑ Conclusions
 - ❑ Any disciplinary sanctions
 - ❑ Permissible bases for appeal



36

When Can a Determination be Appealed?

- ❑ Three grounds for appeal:
 - ❑ A procedural irregularity that affected the outcome.
 - ❑ New evidence that was not “reasonably” available at the time the determination regarding responsibility or dismissal was made, AND that could affect the outcome.
 - ❑ Title IX Coordinator, investigator(s), or decision-maker(s) had a conflict of interest or bias for or against complainants or respondents generally or individually that affected the outcome.
- ❑ The decision-maker in an appeal cannot be the T9C or the person who decided the outcome or dismissal.



37

8. How does all this mesh with Student Standards of Conduct?

- ❑ The regulations permit the use of “emergency removal” which could include out of school suspension.
- ❑ But remember: This applies only when the removal is based on allegations that meet the definition of “sexual harassment” and the conditions for emergency removal exist.
- ❑ Conduct that might not constitute sexual harassment under Title IX, could still constitute misconduct – e.g. bullying, assault, etc. – and can be disciplined once a Title IX report has been dismissed or a determination has been made.



38

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 [the regulations] even if proved....then the [District] 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 [District's] code of conduct." 34 CFR 106.45(b)(3)(i).



39

Perspective....

- ❑ Most of what is reported as misconduct in school, even if sexual in nature, will likely fall 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 provisions of your Code of Conduct.
- ❑ Remember that some behavior that meets the Title IX definition of "sexual harassment" may call for a more serious penalty such as expulsion or referral to law enforcement.
- ❑ Also, don't forget that discipline for sexual harassment cannot be imposed until the investigation has concluded and a decision maker has issued a written determination.



40

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.
 - ❑ Our firm will also be making available a guide with step-by-step checklists and documents.
- ❑ When school resumes, more extensive training is going to be needed.



41

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 to train 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.



42

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).



43

Remember!

- ❑ Liability of the district under Title IX occurs only if:
 - 1) sexual harassment happened;
 - 2) the district knew about it; and
 - 3) the district responded with "deliberate indifference," a high standard.
- ❑ It's not "sexual harassment" under Title IX unless the district had "substantial control" over the harasser, and the context.



44

Set the Right Tone....

- ❑ There can be liability under the law when things are handled really badly.
- ❑ But the way things don't get 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 to sex-based misconduct.
- ❑ Don't forget that policies need to be updated too!



45

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