

RECENT CHANGES TO TITLE IX

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TITLE IX – WHAT IT PROTECTS

- Title IX prohibits discrimination on the basis of sex and sexual orientation, including peer-to-peer sexual harassment and sexual violence.
- Title IX requires the school to take immediate effective steps to comply with requirements.



UPDATED FINAL RULE

On May 19, 2020, the Secretary of Education amended the regulations implementing Title IX of the Education Amendments of 1972

They will take effect on August 14, 2020.



TITLE IX FINAL RULE

In September 2017, the Secretary of Education revoked an Obama-era civil rights directive and replaced it this year with the Final Rule.

There are many substantial and procedural changes, including new definitions, mandated training for all Title IX officials, a formal grievance process, and multi-investigator models.



TITLE IX FINAL RULE

- Sets the standard for administrative enforcement of Title IX
- Will not alter standards for lawsuits seeking money damages for violation of Title IX
- Will necessitate many changes in school districts' Title IX policy, procedures and practices
- Will not alter district policies governing other forms of protected-status harassment



TITLE IX – DEFINITIONS

New definition of “sexual harassment”

New definition of “location of incidents” districts must investigate



SEXUAL HARASSMENT

- Old definition:
 - *“Unwelcome conduct of a sexual nature”*

- New definition:
 - *“Severe, pervasive, and objectively offensive conduct”*
 - Includes *quid pro quo* harassment by a district employee
 - May not include a single incident of sexual harassment other than stalking, dating violence, and sexual assault



LOCATIONS OF INCIDENTS

- Old definition:
 - Did not contain the new, narrower parameters of locations of incidents which a district must investigate
- New definition:
 - Only includes incidents that occur in the United States during district-owned or district-sponsored activities such as educational trips organized by the district



MANDATORY TRAINING

- All employees at K-12 schools are required to report Title IX sexual harassment.
- Title IX officials at a district must receive training on Title IX and its regulations.



CHANGES TO WEBSITE

- Title IX Coordinator is the employee designated by a district to coordinate Title IX compliance—the name, contact information (including phone number, e-mail, fax (if applicable) and physical address of office) of this individual .
 - The district must provide this employee’s contact information not only to students and employees, but also to applicants for admission and employment, parents or legal guardians of the elementary and secondary school students, and all unions.
- Grievance procedures and grievance process, including how to report or file a complaint of sex discrimination, how to report or file a formal complaint of sexual harassment, and how the district will respond.
- Training materials.



MULTIPLE TITLE IX PERSONNEL

- Districts must utilize at least these three Title IX personnel in the grievance process:
 - Title IX Coordinator;
 - An Investigator; and
 - A Decision-Maker.

These roles must be filled by different individuals.

Designated Title IX personnel dealing with a complaint must be free of conflicts of interest regarding parties to the complaint.



ADDRESSING A COMPLAINT

- Districts are responsible only for addressing *known* violations or complaints. This means *actual* knowledge.
 - (1) Actual knowledge of sexual harassment (2) that occurred within the district's education program or activity (3) against a person in the United States.
- The previous guidance required that a district investigate if they *reasonably should have known* about a violation.



ADDRESSING A COMPLAINT

- The Title IX Coordinator must promptly contact the complainant confidentially to:
 - Discuss the availability of supportive measures;
 - Consider the complainant's wishes with respect to supportive measures;
 - Inform the complainant of the availability of supportive measures with or without the filing of a formal complaint; and
 - Explain to the complainant the process for filing a formal complaint.



SUPPORTIVE MEASURES

- “Supportive measures”
 - *Individualized services reasonably available that are non-punitive, non-disciplinary, and not unreasonably burdensome to the other party while designed to ensure equal educational access, protect safety, or deter sexual harassment.*
- Districts must provide supportive measures to both the victim and those accused of Title IX violations to preserve or restore access to educational programs or activities even if no formal complaint is filed.
- Non disciplinary in nature



GRIEVANCE PROCESS

- All districts which receive a formal complaint must proceed with a formal grievance process, but a live hearing with cross examination is only optional for K-12 institutions and is not required.
- “Formal complaint” can be filed by an alleged victim (or his or her parents) or the Title IX Coordinator



GRIEVANCE PROCESS

- An alleged victim can file a formal complaint only if:
 - The complainant is participating in education programs or activities;
or
 - Is attempting to participate in education program or activities
- May close a case if the respondent is permanently separated from a district.



DETERMINING A VIOLATION: STANDARD OF PROOF

OLD STANDARD:

Preponderance of the evidence – based on the reasonable evidence, it is more likely than not that the conduct occurred (51%)



DETERMINING A VIOLATION: STANDARD OF PROOF

NEW STANDARD—optional:

Clear and convincing: Evidence is highly and substantially more likely to be true than untrue. The fact finder must be convinced that the contention is highly probable.



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GRIEVANCE PROCESS

- When initiating the grievance process, the district must state the standard of evidence to determine responsibility.
- Preliminary investigation may be required to identify an alleged victim if it's not apparent from the report
- A formal investigation is triggered by a formal complaint.
 - Districts must provide anyone accused of sexual harassment with a written assurance of the presumption of innocence.
 - Equal opportunity to present evidence and witnesses (including experts)
 - Access to the evidence
 - Opportunity to view written report



INVESTIGATION REPORT

- Introductory paragraph – include the date the complaint was received and by whom; summarize the complaint and identify what policy or policies the complaint is being conducted under
- Policy/Rule paragraph – Identify the types of conduct prohibited by the applicable policies that apply and the applicable definitions
- Investigation summary – identify the types of documents and evidence reviewed and the interviews conducted (student witnesses can be identified as Student A, Student B...)



INTERIM REMOVALS

- Permissible for students only when individualized assessment finds:
 - Immediate threat
 - To the physical health or safety of any student or other individual arising from the allegations of sexual harassment
- Must be given the opportunity to challenge immediately after the removal.
- Employees can be placed on administrative leave



FORMAL HEARING

- Optional for K-12
- After the district has sent an investigative report to the parties and before reaching a determination regarding responsibility, the decision-makers 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 for each party.



FORMAL HEARING

- The Final Rule provides rape shield protections for complainants, deeming irrelevant questions and evidence about a complainant's prior sexual behavior unless offered to prove that someone other than the respondent committed the alleged misconduct or offered to prove consent.



FORMAL HEARING

- The decision-maker, who cannot be the Title IX Coordinator or the investigator, must issue a written determination regarding responsibility with findings of fact, conclusions about whether the alleged conduct occurred, rationale for the result as to each allegation, any disciplinary sanctions imposed on the respondent, and whether remedies will be provided to the complainant.



REPORT

- The District must provide remedies to restore or establish access to educational programming and activities when the investigative and evaluative process results in a finding of responsibility.
- The written determination must be sent simultaneously to the parties along with information about how to file an appeal.
- The appeal process must be available to either party.



REPORT

- A district receiving a sexual harassment report must provide the accused in writing of the allegations and the evidence gathered.
- If the accused is a minor, the district must also provide this writing to the parents of the accused.
- Districts must retain written records of sexual harassment complaints and the actions taken in response for seven (7) years.



LIABILITY

- Districts will be liable if they are “deliberately indifferent” to known sexual harassment or if they are found to have violated Title IX when its response to known sexual harassment is clearly unreasonable in light of the known circumstances.



ADDITIONAL REQUIREMENTS

■ Retaliation

- The Final Rule expressly prohibits retaliation, which includes charging an individual with code of conduct violations that do not involve sexual harassment but arise out of the same facts or circumstances as a report or formal complaint of sexual harassment.

■ Confidentiality

- A district must keep confidential the identity of the complainants, accused, and witnesses except as may be permitted by FERPA, as required by law, or as necessary to carry out a Title IX proceeding.



ADDITIONAL REQUIREMENTS

■ Informal Resolution

- Previously, informal resolutions such as mediation was prohibited under Title IX
- Districts may now offer it as an option to settle a Title IX complaint.
 - However, districts must not offer or facilitate an informal resolution process such as mediation to resolve allegations that an employee sexually harassed a student.
- Parties must provide voluntary, written consent after receiving detailed notice of allegations and explanation of informal resolution process



PENDING LITIGATION

- Pennsylvania, along with 17 other plaintiffs (16 states and D.C.) have filed a Complaint for Declaratory and Injunctive Relief against the Department of Education.





THANK YOU!

Additional comments or questions:

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