



U.S. Department of Education
Final Rules
on
Title IX and Sexual Harassment
July 8, 2020

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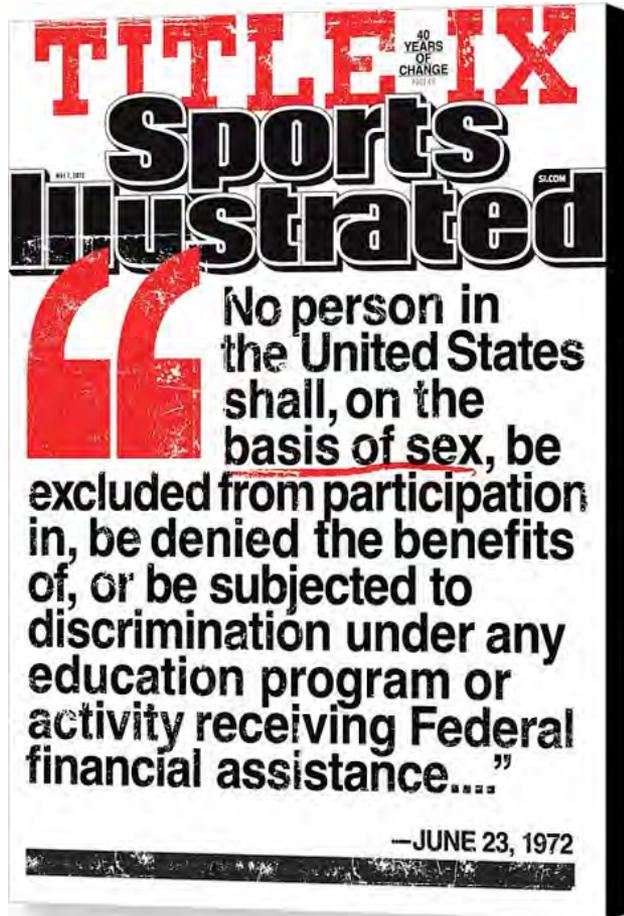


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Introduction

- The U.S. Department of Education has at long last adopted regulation regarding sexual harassment in the school setting – this has been nearly 50 years in the making.
- In response to criticism at the post secondary level, provides due process for persons accused of sexual harassment, changes the definition of sexual harassment, and requires schools to adopt a detailed grievance procedure to guide the process.
- Puts more responsibility on Title IX Coordination.
- Requires schools to appoint personnel to very discrete roles in the process.
- Our goal is to give you an overview of the 2000 plus pages of regulations and provide you with the tools to help you comply.

Statutory Background



- Title IX (enacted 1972) provides:
- “No person...shall, on the basis of sex, be excluded from, participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity or be denied the benefits of, or be subjected to discrimination under any education program receiving, Federal Assistance.”
- Originally understood to apply to equity in sports.
- Title IX does not explicitly refer to or include Sexual Harassment.

Court Interpretation

- Cannon v. University of Chicago, 441 U.S. 667 (1979) – seven years after enactment of Title IX in a case not involving sexual harassment, the Supreme Court recognized dual objectives of Title IX: (1) avoid the use of federal funds to support discrimination; and (2) provide individuals effective protection against those practices.
- Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986) – first recognized sexual harassment as form of sex discrimination under Title VII (employment context).
- Franklin v. Gwinnett County Public Schools, 503 U.S. 60 (1992) – recognized sexual harassment as a violation of Title IX, and held a school district can be liable in damages in cases involving a teachers sexual harassment of a student.

- Gebser v. Lago Vista Ind. School District, 524 U.S. 274 (1998) held: School district not liable under Title IX for teacher sexual harassment (including intercourse) of a student absent “actual knowledge” and “deliberate indifference” on the part of someone with Supervisory power, i.e. a school that responds with deliberate indifference is itself considered to be engaged in an act of discrimination. NOTE: Opinion authored by Justice Sandra Day O’Connor.
- Davis v. Monroe County Board of Education, 526 U.S. 629 (1999) held: School district liable in damages for student on student sexual harassment under Title IX. Adopted “actual knowledge” and the “deliberate indifference” standards as well as the “severe, pervasive and objectively offensive” standard. Conduct must deprive victims of access to the educational opportunities or benefits of the school. NOTE: Opinion authored by Justice Sandra Day O’Connor.
- Pursuing a private cause of action for money damages in court is one avenue to address sexual harassment. The other is administrative enforcement which could result in termination of financial assistance.

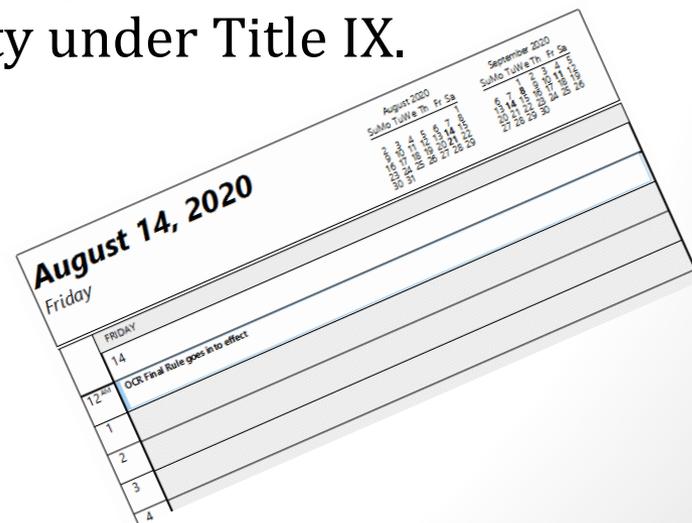
Administrative Liability

- Existing Title IX regulations didn't address sexual harassment.
- U.S. Department of Education's Office for Civil Rights (OCR)'s "Dear Colleague" letters – through a series of letters, OCR adopted standards for the assessment of administrative penalties (including denial of Federal Funds) in the event of sexual harassment in education programs.
- OCR adopted a lower burden of proof than the courts, e.g. "severe, pervasive or persistent."
- While OCR's "Dear Colleague" letters were not technically binding, generally presumed to be the standards applicable in K-12 settings.



NEW REGULATION

- On May 6, 2020, U.S. Department of Education released its long-awaited Final Rule, amending its Title IX regulations.
- The Final Rule goes into effect on August 14, 2020.
- Prior to the amendment, the regulations did not refer to “sexual harassment.” They squarely do now and set forth new standards for administrative liability that more closely align with the standards adopted by the Supreme Court in Gebser and Davis for civil liability under Title IX.



DEFINITION OF SEXUAL HARASSMENT

- The Final Rule defines sexual harassment as conduct on the basis of sex that satisfies one or more of the following:
 - An employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct (i.e., *quid pro quo* sexual harassment);
 - Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity; or

N.B.: In the past, OCR's definition was "severe, pervasive or persistent," a much lower standard. The new standard more closely follows the standard adopted by the Supreme Court in Davis, and brings the administrative and judicial definitions in line with one and other. The standard differs from that under Title VII (severe or pervasive) to reflect differences in norms between workplaces and schools.

- "Sexual assault" as defined in 20 U.S.C. 1092(f)(6)(A)(v), "dating violence" as defined in 34 U.S.C. 12291(a)(10), "domestic violence" as defined in 34 U.S.C. 12291(a)(8), or "stalking" as defined in 34 U.S.C. 12291(a)(30).

DEFINITION OF SEXUAL HARASSMENT

- In the K-12 content, an education program or activity is defined to include any location, event or circumstance over which the District exercises substantial control over the harasser and the context in which the harassment occurs e.g. bus, proms, athletic events, overnight trips.
- It can be carried out by use of email, the internet or other technologies, the same as if it were in person.

N.B.: It does not appear to apply to electronic communication over which the District has no control, e.g. private Facebook accounts.

ACTUAL KNOWLEDGE REQUIRED

- Actual knowledge of sexual harassment activates a school's obligation to respond promptly, including offering supportive measures, even if a formal complaint is not filed.
- Notice to or knowledge by (witness, or hear about any incident) any employee of allegations of sexual harassment meets the requirement of actual knowledge.
- Old requirements of constructive notice (should have known) no longer apply.
- All employees should be required to report incidents of sexual harassment to the Title IX Coordinator, in addition to any obligations they may have as a mandatory reporter of child abuse or neglect.

TITLE IX COORDINATOR

- While Title IX has always required a recipient to designate a Title IX Coordinator, the role and importance of the Title IX Coordinator is greatly enhanced under the new Regulation:
 - District must not only designate a Title IX Coordinator but “authorize” this person to coordinate compliance with the regulations and must “refer to” the employee as the Title IX Coordinator.
 - The Title IX Coordinator must promptly offer supportive measures (discussed later) to the Complainant and Respondent whether or not a formal complaint is filed.
 - Overall responsibility for District-wide compliance with Title IX and the regulations.
 - May initiate a complaint over a Complainant’s objection; the failure to do so may rise to the level of deliberate indifference where clearly unreasonable in light of known circumstances.

NOTIFICATION REQUIREMENTS

- The regulations require:
 - recipients to provide notice of its non-discrimination policy and grievance procedure, including how to file a report of sexual harassment to the following groups:
 - students
 - parents and legal guardians
 - applicants for employment
 - unions

NOTIFICATION REQUIREMENTS

- notice of the Title IX Coordinators name or title, office address, electronic mail address, and telephone number published prominently on the District's website.
- a notice of non-discrimination (Policy) to state that the recipient does not discriminate on the basis of sex in the education programs or activities that it operates, and that the prohibition applies to employment as well.
- that the notice of non-discrimination be published on the District's website and in any handbooks distributed to the above groups.



REPORTING ALLEGATIONS OF SEXUAL HARASSMENT

- A person other than the victim may report sexual harassment.
- A report can be made in person, by mail, telephone, or email to the Title IX Coordinator.
- A report can be made at any time, including after hours by telephone, mail or email.



PARTIES

- “Complainant” the person who is the alleged victim of sexual harassment.
- “Respondent” the alleged harasser.

FORMAL COMPLAINT PROCESS

- A Complainant may file a formal complaint (by mail, email or other means).
- The Title IX Coordinator may also file a formal complaint (and should to avoid a claim of deliberate indifference/even over the Complainant's objection); however, the Title IX Coordinator, is not a Complainant or party.
 - No one else may file a “formal” complaint, but anyone may file an informal complaint; only formal complaints must be investigated.
 - The Title IX Coordinator must decide whether to turn an informal complaint into a formal one.

RECIPIENT'S RESPONSE

- Must respond promptly to actual knowledge of sexual harassment in a manner that is not deliberately indifferent.
- Deliberate indifference is a response that is clearly unreasonable in light of “known circumstances,” and is considered intentional discrimination by the recipient. For a response not to be deliberately indifferent it must be prompt, include offering supportive measures, ensure the Title IX Coordinator contacts each Complainant to discuss supportive measures and explain process for filing a formal complaint.
- Recipient must treat the Complainant and Respondent equitably i.e., and must offer supportive measures to Complainant; follow grievance procedure before imposing discipline. Supportive measures are defined as non-disciplinary, non-punitive, individualized services offered as appropriate, such as course modifications, schedule changes, increased monitoring. They must be offered even where a formal complaint has not been filed.
- Intent is to restore the status quo without unreasonably burdening the other party.

RECIPIENT'S RESPONSE

- The Title IX Coordinator must promptly contact the Complainant (including an employee) to discuss the availability of supportive measures, and consider the Complainant's wishes in doing so, advise of the right to file a formal complaint and how to file a complaint.
- No punitive measures (e.g. discipline, other sanctions) to be taken until or unless the grievance process is completed and a determination of responsibility is made, i.e. due process.
- Does not prohibit immediate removal of a Respondent on an emergency basis to protect an individual from an immediate threat to physical health or safety, provided an individualized safety and risk analysis is performed (notice and an opportunity to challenge the decision must be provided).

N.B.: The right to remove does not supercede rights of students with disabilities under IDEA or Section 504.

FORMAL COMPLAINT/INVESTIGATION PROCESS

- Both parties must be treated equitably.
- Requires an unbiased process and no conflict of interest on the part of the recipient's personnel (Title IX Coordinator, investigator, decision maker).
- Presumption of innocence for the Respondent.
- Requires training of Title IX Coordinator, investigators and decision makers.
- Recipient must select either a “preponderance of the evidence” or “clear and convincing evidence” standard for all complaints (done via policy).

FORMAL COMPLAINT/INVESTIGATION PROCESS

- Upon receipt of a formal complaint, a recipient must provide written notice to the parties, which includes:
 - notice of the allegations in sufficient detail (names, conduct alleged, date, location)
 - statement of presumption of innocence (grows out of post-secondary concerns of due process)
 - notice of the right to use an advisor (need not be a lawyer)
 - notice of any provision in any Code of Conduct or similar policy about making false statements or providing false information
- Allow the Parties to prepare a response prior to initial interview.

FORMAL COMPLAINT/INVESTIGATION PROCESS

- The complaint may be dismissed if at any time the Complainant notifies the Title IX Coordinator she/he wishes to withdraw the complaint, or if the circumstances prohibit the recipient from gathering evidence and making a determination, e.g. the parties have left the school. If dismissed, notice shall be provided to both parties.
- The complaint must be dismissed if it fails to allege conduct constituting sexual harassment, even if proved or if the conduct did not occur in a District activity or program or against a person in the U.S.

FORMAL COMPLAINT/INVESTIGATION PROCESS

- The burden of proof rests on the recipient, not either party.
- Both parties shall be given the opportunity to present witnesses and evidence.
- “Gag orders” are prohibited.
- A party who is invited to an interview must be given written notice in advance of the date, time, participants, purpose and location.

FORMAL COMPLAINT/INVESTIGATION PROCESS

- At the conclusion of the investigation, the investigator shall prepare a written summary of the evidence.
- Each side shall be provided with an opportunity to review the evidence (witness statements, documentary evidence, etc.), including any exculpatory evidence. Such evidence will be provided with sufficient time prior to the completion of the investigation (at least 10 days) to prepare a written response prior to completion of the Investigation Report, including any questions the party wishes be presented to the other party or any witnesses.
- The parties are then provided an additional 10 days to respond to the Investigation Report before it is finalized.
- The regulations indicate information provided in the context of the investigation that is “directly related” to the complaint is not a FERPA violation, provided it is not disseminated further. In effect they are saying due process rights trump FERPA. The regulations explicitly do not prohibit the use of non-disclosure agreements to ensure compliance.

FORMAL COMPLAINT/INVESTIGATION PROCESS

- A written Investigation Report will be provided that fairly summarizes the relevant evidence, and will be provided to the parties and their advisors, if any; and they shall have at least an additional 10 days to review and respond to the Investigation Report.
- The Investigation Report may include recommended conclusion but that is the responsibility of the decision maker and should be included in their written decision.
- Evidence of prior sexual activity is not permitted, nor are privileged documents such as doctor patient privilege, without written consent.
- A grievance process must be adopted which incorporates the above and describes the possible range of outcomes and remedies and supportive measures.
- The decision maker shall take the Investigative Report and make a determination as to discipline and further accommodation.

FORMAL COMPLAINT/INVESTIGATION PROCESS

- The decision maker must make a written determination of responsibility that:
 - identifies the allegations
 - describes the procedural steps taken from receipt of the complaint through the investigation
 - include findings of fact
 - include conclusions
 - include a statement of and rationale for each allegation, including a determination of responsibility, sanctions, and any remedies to restore or preserve equal access to education program or activity
 - shall describe the procedure and basis for a possible appeal
 - the decision maker may not be the Title IX Coordinator or the investigator

APPEALS

- Either party may appeal the decision of responsibility or and from the dismissal of a formal complaint.
- Appeal may only be based upon and granted for the following reasons:
 - 1) a procedural irregularity that affected the outcome;
 - 2) new evidence that was not reasonably available at the time of the determination and could affect the outcome; and
 - 3) conflict of interest on the part of the Title IX Coordinator, the investigator, or decision maker.
- A school may, but need not, offer an appeal equally to both parties on an additional basis.

APPEALS

- Written notice of the appeal must be provided to both parties and they shall be provided with an opportunity to submit a written statement in support of/challenging the appeal.
- A written decision shall be issued with respect to the appeal.
- The decision maker on the appeal may not be the Title IX Coordinator, investigator or initial decision maker.

N.B.: Requires at least three (3) people from recipient be involved in the formal complaint process.

INFORMAL RESOLUTION

- Informal resolution may be offered by the Title IX Coordinator if a formal complaint is filed.
- A full investigation need not be conducted as long as written consent of both parties is obtained and the allegation does not involve an adult Respondent and a student Complainant.
- May include a broad range of strategies, including, mediation and restorative justice.
- The above must be spelled out in a “grievance procedure” that is disseminated to staff, students, parents and unions, and placed on the District’s website along with Title IX training materials.
- Must be facilitated by trained personnel.
- Any party has the right to withdraw from the informal resolution process at any time and may resume the formal grievance process.

RECORD KEEPING

- Recipient must keep all records related to reports of sexual harassment for seven (7) years, including, investigatory records, appeals and remedies including supportive measures.
- Identity of a person who files a complaint or reports sexual harassment must be protected to the extent permitted by law, and except as provided under the regulations, e.g. notice and evidence provided to the Respondent and representative.
- Recipient must keep for seven (7) years, any materials used to train Title IX Coordinators, investigators, decision makers, and any employee designated to facilitate an informal process.

RETALIATION IS PROHIBITED

- Prohibits discrimination by a recipient or any other person against any person because they have participated or refused to participate in a Title IX process, or exercised rights under Title IX.

SUMMARY

- Districts need to revise your sexual harassment policy and adopt a grievance procedure.
- Designate Title IX Coordinator; investigators, decision maker and person to hear appeals.
- Train Title IX personnel.
- We have model policies and grievance procedures we can share with clients to facilitate compliance with the new regulations.

QUESTIONS?

