

Education Alert
May 8, 2020

**U.S. DEPARTMENT OF EDUCATION ISSUES TITLE IX
REGULATIONS**

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On May 6, 2020, the United States Department of Education (“DOE”) issued final regulations for Title IX of the Education Amendments of 1972 (“Title IX”). Title IX prohibits discrimination on the basis of sex in education programs or activities receiving federal financial assistance. The new regulations go into effect on August 14, 2020, so school districts are encouraged to review their policies and procedures and provide staff training on these new regulations as soon as possible. The final regulations list specific elements that must be included in any policy, such as range of disciplinary actions, standards of evidence, and procedures.

What Falls Under Title IX

Previously, school districts had to respond to allegations of off-campus sexual harassment that could create a hostile environment in school. Under the new regulations, school districts must respond to allegations of sexual harassment that occur in the school’s program or activity, which includes a location, event or circumstance in which the school district exercises substantial control. Thus, school districts no longer have to investigate or address off-campus conduct over which the school does not exercise substantial control.

In addition, “hostile environment” harassment (e.g., sexual harassment that does not constitute sexual assault, domestic or dating violence, stalking, or a quid pro quo request for sexual activity) must be both severe and pervasive, as well as objectively offensive, in order to constitute a violation of Title IX. Under the new regulations, a school district must think about how a reasonable person would view the conduct when determining whether the conduct constitutes sexual harassment. In making this determination, school districts may consider the age and number of parties involved.

Furthermore, school districts must define consent in their policies when determining what sexual assault is. The DOE did not adopt a definition of consent.

Finally, school districts must address complaints for which they have actual knowledge. A school district has actual knowledge if an employee of the school district receives notice of an allegation of sexual harassment or if the employee personally observes sexual harassment. The notice to employees of the school district may be oral. Constructive knowledge, such as allegations that the school district should have known about, is no longer sufficient.

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Title IX Coordinator

Each school district must continue to designate at least one employee as a Title IX Coordinator and the regulations require the use of this specific title. Other titles such as “Civil Rights Compliance Officer” should not be used. The Title IX Coordinator, in addition to decision-makers and individuals who facilitate informal resolution, must have training on applicable definitions, the scope of the school districts’ programs or activities, their obligations, and how to conduct investigations and the grievance process. This investigatory training must include the relevance of questions and evidence and how to determine the relevance or irrelevance of a complainant’s prior sexual history. The training materials cannot rely on sex stereotypes and must be published on the school district’s website. The final regulations do not require this training to occur annually or specify any regular interval for the training.

The school district must notify applicants for employment, parents, employees and all unions of the name or title of the Title IX Coordinator, his or her address, email address and telephone number. The Title IX Coordinator’s information must be displayed prominently on the school district’s website.

Reports of Sexual Harassment

First, individuals must be able to report sexual harassment at any time, including during non-business hours, to the email address or phone number for the Title IX Coordinator.

Second, there is no time limit or statute of limitation to file a formal complaint. However, at the time of filing a formal complaint, an alleged victim must be participating or attempting to participate in a program or activity of the school district. Consequently, this would not cover complaints by former employees or students. Additionally, a school district has discretion to dismiss a formal complaint where the passage of time would result in the district’s inability to gather evidence sufficient to reach a determination regarding responsibility.

Response to Notice of Alleged Sexual Harassment

In the final regulations, the DOE stated that all steps of the process must be “prompt.” There is no definition of “prompt,” but the DOE states that school districts should specify in their policies what is prompt. We generally recommend a thirty to sixty day timeframe to complete a formal Title IX process.

The DOE continued the current requirement to provide interim measures to alleged victims, which the regulations call “supportive measures.” Supportive measures are intended to

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restore or preserve access to the education program, without unreasonably burdening the other parties and protecting the safety of others. This may include counseling, course-related adjustments, campus escorts, increased security, and stay away orders. If a school district determines that a particular supportive measure was not appropriate even though requested by the alleged victim or does not provide any supportive measures, the school district must document why its response was not deliberately indifferent. These supportive measures must be offered with or without the filing of a formal complaint. There is no limitation for how long a school district must provide these supportive measures, and consequently, they could continue indefinitely.

The Title IX Coordinator must contact the person who is the alleged victim to discuss the availability of supportive measures, consider the alleged victim's wishes for supportive measures, and notify the alleged victim on how to file a formal complaint.

Previously, school districts had to investigate complaints, even if there was no formal complaint. Under the final regulations, school districts must only investigate formal complaints of sexual harassment. A formal complaint is a document filed by a victim or the parent or guardian of the victim or signed by the Title IX Coordinator, alleging sexual harassment and requesting that the school district investigate the allegation of sexual harassment. It thus does not include a complaint filed by a third party on behalf of another individual. The final regulations allow the Title IX Coordinator to sign a formal complaint and start an investigation where an alleged victim does not wish to file a formal complaint, when safety or similar concerns lead the school district to conclude that a non-deliberately indifferent response to actual knowledge of Title IX sexual harassment may require the school district to investigate and potentially sanction a respondent. Consequently, to the extent a Title IX Coordinator is initiating a formal complaint over the alleged victim's wishes, the Title IX Coordinator must be able to justify the decision.

Upon receipt of a formal complaint, under the final regulations, a school district must send written notice to both parties of the allegations, including the identities of the parties, if known. In contrast to the current practice of many school districts, the alleged victim cannot remain anonymous or prevent his or her identity from being disclosed to the alleged aggressor in the written notice. Additionally, during the investigative process and any further hearings, alleged victims and alleged aggressors have a right to have advisors of their choice participate. As a result, students and parents can insist that parents and/ or attorneys participate in the process. Furthermore, during a formal investigation, a school district must provide written notice of investigative interviews, meetings, and hearings, with time to prepare.

The final regulations state that the investigator of the complaint must be different from the decision-maker. Thus, for example, if a principal is going to determine whether an individual

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engaged in sexual harassment, a different individual, like an assistant principal, must investigate the allegations. During the investigation, each party must be provided an equal opportunity to present both fact and expert witnesses. Furthermore, school districts may not limit students' and employees' ability to discuss (i.e., speak or write about) the allegations under investigation, for example with a parent, friend, or other source of emotional support, or with an advocacy organization.

Finally, while the final regulations allow school districts to continue using informal resolution, such as mediation or restorative justice, informal resolution may only be offered after a formal complaint is filed, and the parties must give written consent. Informal resolution may not be used if the allegations involve an employee's conduct towards a student or before a formal complaint is filed.

Findings

In the final regulations, the school district, not the parties, bear the burden of proof. When determining whether sexual harassment occurred, the final rule states that a school district has the ability to decide on a preponderance of the evidence or clear and convincing standard. The school district must use the same standard for employees and students. We recommend that school districts adopt a preponderance of the evidence standard.

Before a school district can determine responsibility, school districts must send an investigative report to the parties and the decision-maker must offer both the alleged victim and alleged aggressor the opportunity to submit written, relevant questions to ask of any party or witness, to respond to questions posed by another party, and to offer additional limited follow-up.

Consequently, before a school district can institute discipline and hold a hearing under Massachusetts General Laws, Chapter 71, Section 37H, 37H1/2 and 37H3/4, based on an allegation of sexual harassment, the school district must follow the formal complaint process outlined. This requirement is a significant limitation on a school district's authority to discipline and will slow down the disciplinary process. These requirements do not prevent a school district from removing a student from a program or activity on an emergency basis based on immediate threats to people's physical health or safety (when otherwise authorized under state law) or placing an employee on administrative leave during the pendency of an investigation.

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Appeal

The school district must offer both parties an appeal from a determination of responsibility and from a dismissal of a complaint based on procedural irregularities, new evidence that was not reasonably available during the determination, or if the Title IX Coordinator had a conflict of interest or bias.

Records

School districts 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 and must document the basis for its conclusion that its response was not deliberately indifferent.

This Client Alert was prepared by Felicia Vasudevan and was reviewed by Elizabeth Sherwood, Andrew Waugh, Kevin Bresnahan, Mary Ellen Sowyrda and Alisia St. Florian. If you have any questions about this issue, please contact Felicia Vasudevan or the attorney responsible for your account, or call (617) 479-5000.

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