

**Education Alert**  
**April 25, 2024**

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

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On April 19, 2024, 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 based on sex in education programs or activities receiving federal financial assistance. The new regulations go into effect on August 1, 2024, 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 continue to list specific elements that must be included in any policy, such as range of disciplinary actions, standards of evidence, and procedures. The DOE has provided template policies here:

<https://www2.ed.gov/about/offices/list/ocr/docs/resource-nondiscrimination-policies.pdf> and Murphy, Hesse, Toomey & Lehane will be creating model policies and notice letters as well.

**What Falls Under Title IX**

One of the largest changes under the new regulations is what is covered under the Title IX grievance procedures. The prior regulations applied only to allegations of sexual harassment. The new regulations apply to any allegations of sex discrimination. Sex discrimination includes discrimination based on sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity. Pregnancy or related conditions covers discrimination based on pregnancy, childbirth, termination of pregnancy, lactation, related medical conditions, or recovery, including by providing reasonable modifications for students, reasonable break time for employees for lactation, and a clean, private lactation space for both students and employees.

Under the prior regulations, school districts did not have 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 sex-based hostile environment in its education program or activity in the United States, even when some conduct alleged to be contributing to the hostile environment occurred outside the recipient’s education program or activity or outside the United States.

In addition, previously, for conduct to constitute sexual harassment, it had to be severe, pervasive, and objectively offensive. Under the new regulations, sex-based harassment is conduct that is either sufficiently severe or pervasive and school districts must consider both

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subjective and objective factors. The DOE outlines the following factors to consider when determining sexual harassment:

- the degree to which the conduct affected the complainant's ability to access the recipient's education program or activity;
- the type, frequency, and duration of the conduct;
- the parties' ages, roles within the school district's education program or activity, previous interactions, and other factors about each party that may be relevant to evaluating the effects of the conduct;
- the location of the conduct and the context in which the conduct occurred; and
- other sex-based harassment in the district's education program or activity.

Furthermore, previously, a complainant had to participate in the district's program or activity. Now, a complainant can file a complaint about sex discrimination they experienced even if they have chosen to leave the district's education program or activity because of that discrimination or for other reasons.

Finally, school districts now must address complaints for which they have knowledge, rather than just actual knowledge. This change in language brings in constructive knowledge, such as allegations that the school district should have known about. Additionally, any non-confidential employee at an elementary school or secondary school is obligated to notify the Title IX Coordinator of allegations of sex discrimination.

The regulations state that districts may designate confidential employees who are not required to notify the Title IX Coordinator about conduct that reasonably may constitute sex discrimination. These individuals are designated as confidential for the purpose of providing services to persons related to sex discrimination. These confidential employees must provide information to anyone who informs them of conduct that reasonably may constitute sex discrimination about their status as confidential for purposes of Title IX, how to contact the Title IX Coordinator, how to make a complaint, and how the Title IX Coordinator can help.

**Training**

Schools must provide training on an annual basis to employees on when the employees must notify the Title IX Coordinator about conduct that reasonably may constitute sex discrimination, how students can seek confidential assistance or make a complaint of sex discrimination requiring the district to initiate its grievance procedures.

On an annual basis, all investigators, decisionmakers, and other persons who are responsible for implementing the district's grievance procedures or have the authority to modify

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or terminate supportive measures must be trained on:

- the district's requirements under Title IX;
- the district's grievance procedures;
- how to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias; and
- the meaning and application of the term "relevant" in relation to questions and evidence, and the types of evidence that are impermissible regardless of relevance.

The Title IX Coordinators must have training on their responsibilities and record keeping responsibilities.

**Title IX Coordinator**

Each school district must continue to designate at least one employee as a Title IX Coordinator and the person must be referred to as the "Title IX Coordinator." If a school district has more than one Title IX Coordinator, it must designate one of its Title IX Coordinators to retain ultimate oversight over those responsibilities and ensure the district's consistent compliance with Title IX.

**Response to Notice of Alleged Sex Discrimination**

The DOE continued the current requirement to provide "supportive measures" and did not change the definition of "supportive measures." Now, however, the regulations specify that if the school district has initiated grievance procedures or offered an informal resolution process to the respondent, it must offer and coordinate supportive measures as appropriate, for the respondent. Moreover, the regulations outline that if the complainant is unknown, the school district must notify the individual who reported the conduct, of the grievance procedures and the informal resolution process, if available and appropriate.

A school district may now as appropriate, modify or terminate supportive measures at the conclusion of the grievance procedures or at the conclusion of the informal resolution process, or the district may continue them beyond that point. If the district decides to modify or terminate the supportive measures, the district must allow the complainant or respondent to timely seek, from an appropriate and impartial employee, modification or reversal of the district's decision to provide, deny, modify, or terminate supportive measures applicable to them. The impartial employee must be someone other than the employee who made the challenged decision and must have authority to modify or reverse the decision, if the impartial employee determines that the decision to provide, deny, modify, or terminate the supportive measure was inconsistent with the definition of supportive measures.

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Under the prior regulations, school districts could only engage in informal resolution if there was a formal complaint. Now, school districts can engage in informal resolution if it has a complaint or has information about conduct that reasonably may constitute sex discrimination. Before the school district can engage in informal resolution, it must provide the parties the following written information:

- The allegations;
- The requirements of the informal resolution process;
- That, prior to agreeing to a resolution, any party has the right to withdraw from the informal resolution process and to initiate or resume the district's grievance procedures;
- That the parties' agreement to a resolution at the conclusion of the informal resolution process would preclude the parties from initiating or resuming grievance procedures arising from the same allegations;
- The potential terms that may be requested or offered in an informal resolution agreement, including notice that an informal resolution agreement is binding only on the parties; and
- What information the district will maintain and whether and how the district could disclose such information for use in grievance procedures if grievance procedures are initiated or resumed.

As before, school districts must only investigate formal complaints of sex-based discrimination. A formal complaint no longer has to be in writing. An oral complaint indicating the complainant wants an investigation is sufficient.

Under the current regulations, the Title IX Coordinator could override a decision of the complainant to not file a Title IX complaint if it was deliberately indifferent not to do so. Now, in the absence of a complaint, and in the absence or termination of an informal resolution process, the Title IX Coordinator may initiate a complaint only if the conduct presents an imminent and serious threat to someone's health or safety or prevents the recipient from ensuring equal access based on sex to its education program or activity. If the Title IX Coordinator initiates a complaint, the Title IX Coordinator must notify the complainant prior to doing so and appropriately address reasonable concerns about the complainant's safety or the safety of others.

The regulations continue to require written notice upon receipt of a formal complaint. The new regulations still require an investigation to occur upon receipt of a formal complaint, but two reports are no longer required. Instead, the new regulations allow for a single investigator and decision-maker.

Previously during the investigation, the district had to provide both parties the evidence and ten days to respond. The new regulations require the parties to have access to the evidence "or an accurate description of this evidence" and an opportunity to respond, but a timeframe of

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ten days is no longer required. If the school provides the description, the parties may request and then must receive access to the relevant and not otherwise impermissible evidence. Schools must create procedures to prevent and address the parties' unauthorized disclosure of information and evidence obtained solely through the grievance procedures.

The current regulations provide the parties an opportunity to have an advisor. The new regulations no longer have that requirement.

Finally, under the new regulations, if a complainant or respondent is a student with a disability, the Title IX Coordinator must consult with one or more members, as appropriate, of the student's Individualized Education Program (IEP) team to determine appropriate supportive measures and how to comply with the requirements of the Individuals with Disabilities Education Act, 20 U.S.C. 1400 et seq., and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794, throughout the implementation of grievance procedures.

**Findings**

Under the prior regulations, the parties are allowed to ask written questions of any party or witness. The new regulations only require the single investigator or decisionmaker to question parties and witnesses to adequately assess a party's or witness's credibility when credibility is in dispute and relevant.

Like the current regulations, decisionmakers must issue a written decision and if there are sex discrimination institute remedial measures. Moreover, as under the current regulations, before a school district can institute discipline and hold a hearing under Massachusetts General Law, Chapters 71, Section 37H, 37H1/2 and 37H3/4, based on an allegation of sex-based harassment, the school district must follow the formal complaint process outlined.

**Appeal**

The school district under the prior regulations must offer an appeal in certain circumstances. It now must offer an appeal process that, at a minimum, is the same as the district offers in all other comparable proceedings, if any, including proceedings relating to other discrimination complaints.

**Retaliation**

The new regulations continue to prohibit retaliation, but now define retaliation. Retaliation is defined as intimidation, threats, coercion, or discrimination against any person by the district, a student, or an employee or other person authorized by the district to provide aid, benefit, or service under the district's education program or activity, for the purpose of

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interfering with any right or privilege secured by Title IX or the regulations, or because the person has reported possible sex discrimination, made a sex-discrimination complaint, or participated or refused to participate in any way in a recipient's Title IX process.

**Pregnancy**

When a student (or a student's parent or other legal representative) informs a district of the student's pregnancy or related conditions, the district must provide that person with the Title IX Coordinator's contact information and informs that person that the Title IX Coordinator can coordinate specific actions to prevent sex discrimination and ensure the student's equal access to the education program or activity. The district must provide the student with the option of individualized, reasonable modifications as needed to prevent discrimination and ensure equal access to the recipient's education program or activity, allow the student a voluntary leave of absence for, at minimum, the medically necessary time period and reinstatement upon return and ensure the student's access to a clean, private space for lactation. Reasonable modifications may include, but are not limited to, breaks during class to express breast milk, breastfeed, or attend to health needs associated with pregnancy or related conditions, including eating, drinking, or using the restroom; intermittent absences to attend medical appointments; access to online or homebound education; changes in schedule or course sequence; extensions of time for coursework and rescheduling of tests and examinations; allowing a student to sit or stand, or carry or keep water nearby; counseling; changes in physical space or supplies (for example, access to a larger desk or a footrest); elevator access; or other changes to policies, practices, or procedures.

A school district cannot not require supporting documentation from a student unless doing so is necessary and reasonable. For example, a school district cannot require documentation when it relates to lactation needs or the need is obvious.

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

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