

Department of Education Issues Proposed Title IX Regulations

On November 16, 2018, the Department of Education (Department) released proposed federal regulations which seek to amend existing regulations related to Title IX of the Education Amendments Act of 1972 (Title IX). Title IX prohibits discrimination on the basis of sex. The proposed regulations were published in the Federal Register on November 29, 2018, and are not final. Outside parties can comment on the proposed regulations until January 28, 2019. After that time, it is anticipated that final regulations will follow that might vary from the proposed regulations.

According to the Department, the proposed regulations were necessary because the current regulations do not provide standards for how schools that receive federal funding must respond to incidents of sexual harassment. As a result, the proposed regulations are intended to address this concern and to align the regulations with the text and purpose of Title IX, Supreme Court precedent, and other case law. This article will highlight some of the more significant changes of the proposed regulations for school districts.

Prior to this time, the regulations related to Title IX did not contain any specific rules related to sexual harassment. Instead, sexual harassment under Title IX has been addressed through guidance documents issued by the Department's Office for Civil Rights (OCR), which enforces Title IX. In 2017, the Department withdrew sexual harassment guidance documents issued in 2014 and 2011 and issued new guidance. At that time, the Department announced its intent to draft new regulations on this subject. As a result, the proposed regulations are intended to replace the prior guidance.

When the Department issued the proposed regulations, it also provided commentary on the proposed regulations. This article also incorporates some of the commentary provided by the Department.

Definition of Sexual Harassment. One significant change within the proposed regulations is the addition of a definition of **sexual harassment**. Prior to this time, the regulations had not defined sexual harassment under Title IX; instead, it had always been defined by Department guidance or by the courts. The new regulations define sexual harassment actionable under Title IX to mean any of three types of behavior: (1) a school employee conditioning an educational benefit or service upon a person's participating in unwelcome sexual conduct (*i.e.*, quid pro quo harassment); (2) 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 school's education program or activity (*i.e.*, hostile environment); or (3) sexual assault as that crime is defined under the Clery Act. The second prong above is intended to be consistent with the standard from U.S. Supreme Court precedent (*Davis v. Monroe County*) and is intended to provide a narrower scope of what conduct will fall within the definition when compared with the definition of sexual harassment that is currently applied by the Department and courts.

Notice of Sexual Harassment. Another significant change relates to **notice** to a school district that triggers a school's obligation to respond to sexual harassment. The proposed regulations state that a school must have **actual knowledge** of sexual harassment (or allegations). Actual knowledge is defined under the proposed regulations and includes notice of sexual harassment (or allegations of sexual harassment) to a Title IX Coordinator, to any official of the recipient school who has the authority to institute corrective measures on behalf of the school, or, in the elementary and secondary context with regard to student-on-student harassment, to any teacher. This standard departs from the standard that has been applied by OCR to date: a school's obligation to respond is triggered when a responsible employee at the school knew or should have known of the sexual harassment.

Also, on the issue of notice, the proposed regulations state that the alleged harassment must involve conduct that occurred **within the school's own program or activity**. In this respect, the Department explains in its summary of the proposed regulations that situations are fact-specific, and schools should look to factors such as whether the harassment occurred at a location or under circumstances where the school owned the premises; exercised oversight, supervision, or discipline over the location or participants; or funded, sponsored, promoted or endorsed the event or circumstances where the harassment occurred.

Response to Sexual Harassment. The proposed regulations address the standard applicable to a school's **response** to sexual harassment. Specifically, they state that a school with actual knowledge of sexual harassment must respond in a manner that is **not deliberately indifferent**. A school is deliberately indifferent only if its response to sexual harassment is "clearly unreasonable in light of the known circumstances." Again, this regulation tracks the Supreme Court's decision from *Davis*.

With respect to a school's response to sexual harassment, the proposed regulations define a **formal complaint** and the requirements when such formal complaints are filed. A formal complaint is defined under the proposed regulations to include a document signed by a complainant (*i.e.*, the alleged victim) or by the Title IX Coordinator alleging sexual harassment against a respondent (*i.e.*, the alleged perpetrator) about conduct within its education program and requesting initiation of the school's grievance procedure. When a formal complaint is filed, a school must activate its grievance procedure and investigate the allegations unless the alleged conduct does not meet the definition of sexual harassment or did not occur within the school's own program or activity. A Title IX Coordinator must file a formal complaint when the school has actual knowledge regarding reports by multiple complainants of conduct by the same alleged perpetrator that could constitute sexual harassment. In addition, the Title IX Coordinator might also file a complaint on behalf of a complainant.

In instances where no formal complaint is filed, and a school does not need to investigate, the Department recognizes that schools may often still need to act to do something to address the allegations. In those instances, and in instances where there is a formal complaint, supportive measures may be appropriate. The proposed regulations include a definition of **supportive measures**. Supportive measures are non-disciplinary and non-punitive individualized services offered as appropriate as reasonably available, without fee or charge, to protect the safety of all parties and deter sexual harassment. Supportive measures may be available to both complainants and respondents in order to preserve their access to their education. A school may need to implement supportive measures to address any allegation of sexual harassment, regardless of whether a formal complaint is filed or not.

Investigation of Formal Complaints. The proposed regulations include specific guidance on what a school must have within its **grievance procedure** to address each formal complaint of sexual harassment. Some of the requirements include: (1) a presumption that the respondent is not responsible for the alleged conduct until a determination regarding responsibility is made at the conclusion of the grievance procedure; (2) reasonably prompt timeframes for conclusion of the grievance process; and (3) a description of the standard of evidence to be used to determine responsibility. A school is granted a safe harbor against a finding of "deliberate indifference" if it follows these grievance procedure requirements when responding to a formal complaint.

The proposed regulations establish specific steps that a school must take when **investigating a formal complaint**. In particular, a school must give written notice to both parties (*i.e.*, the alleged victim and the alleged perpetrator) containing sufficient details to permit a party to prepare for any initial interview and proceed with a factual investigation. Some of the other requirements include: (1) giving written notice of any interview, meeting, or hearing at which a party is invited or expected to participate; (2) providing the parties with the same opportunity to be accompanied at all phases of the grievance process by an advisor of the party's choice; and (3) providing equal access to review all the evidence that the school investigator has collected, including the investigation report.

After any investigation, the proposed regulations provide specifics on the **process for making a final determination**. In short, the proposed regulations state that, after an investigation, a written determination must be made by a decision-maker who is **not** the same person as the Title IX Coordinator or investigator. A written determination must be sent to both parties explaining for each allegation whether the respondent is responsible or not responsible, including the facts and evidence on which the conclusion is based. Either the "preponderance of the evidence" standard or the "clear and convincing evidence" standard may be applied for any determination. The lower preponderance standard can only be used, however, if the school uses this standard for conduct code violations that do not involve sexual harassment but carry the same maximum sanction. The same standard of evidence must also be used in cases against employees who are accused of sexual harassment under Title IX.

The proposed regulations also address what must be included in the final written determination. Among the items that must be included are any sanctions that the school imposes on the respondent and any remedies provided by the school to the complainant designed to restore or preserve access to the school's education program or activity. The written determination must be provided to the complainant and the respondent simultaneously.

Additional Provisions. Although the proposed regulations do not require an **appeal process**, if a school offers an appeal, the proposed regulations require that a school must allow both the complainant and the respondent to appeal. Also, the appeal decision-maker cannot be the same person who served as the Title IX Coordinator or investigator or decision-maker.

In addition, under the proposed regulations, a school may provide for an **informal resolution** of a sexual harassment complaint. However, in order to use any informal resolution process, it must be voluntary for all parties, and the parties must provide written consent after being fully informed of the process.

Also, the proposed regulations state that the Department will **not assess damages** against a school as a remedy for a violation under the Title IX regulations. Finally, schools must create and maintain **records** documenting every Title IX sexual harassment investigation, and the complainant and the respondent may request copies of these records.

Conclusion

The above discussion is specific to Title IX. Of course, other state statutes (including Wis. Stat. s. 118.13) and state regulations (including PI Chapter 9) set forth additional or different requirements for schools related to pupil harassment in Wisconsin. Further, other laws will need to be considered within this process, particularly the federal and state student records laws. The proposed regulations also include additional standards for higher education institutions, but those proposed changes are not addressed in this article.

Schools may wish to begin to review their policies and practices and consider whether any revisions should be made in anticipation of the promulgation of the final regulations. If the proposed regulations become final, changes will likely be needed. The proposed regulations also require training to relevant employees on the definition of sexual harassment and the investigation and grievance process. Our firm will provide updates on any final regulations and provide any Title IX training required under the final rules.

Come See Us At The Convention

In addition to Doug Witte of our firm serving as parliamentarian and legal counsel at the Convention's Delegate Assembly and related activities, multiple members of our School Law Practice Group will be on hand at the Wisconsin State Education Convention in Milwaukee on January 23 and January 24, 2019. Please come to see us at Booth 838 during exhibit hours. We look forward to seeing you there!

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