

New Title IX Regulations Issued by Department of Education

On May 6, 2020, the Department of Education (“Department”) issued long-awaited regulations addressing sexual harassment. These regulations, which go into effect on August 14, 2020, are the first Title IX regulations applicable to sexual harassment and are applicable to complaints by both school district students and employees. They were issued following an extended public comment period on proposed regulations first issued in November 2018. The extensive regulations will require districts to revise their policies and procedures with respect to sexual assault and harassment and ensure that administration and staff are trained on the new requirements.

Prior to the new regulations, school districts could only rely on Department guidance, which was not legally binding, and did not have the force and effect of law. According to the Department, the new regulations align with prior U.S. Supreme Court precedent and impose important legal obligations on school districts by requiring districts to respond promptly to all complaints of sexual assault and harassment. This article will highlight some of the most significant provisions in the new regulations.

Definition of Sexual Harassment

Sexual harassment under Title IX is defined for the first time. The definition includes three types of conduct. The first mirrors conduct described in past Department guidance: a school employee conditioning an educational aid, benefit, or service upon an individual’s participation in unwelcome sexual conduct (i.e., quid pro quo harassment). The second describes conduct that must meet a higher standard than that required in prior guidance: unwelcome conduct that is so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the district’s education program or activity (this description of “hostile environment” is narrower than prior guidance). The third describes conduct explicitly defined in federal legislation: sexual assault (as defined under the Clery Act), and dating violence, domestic violence, and stalking (as defined under the Violence Against Women Act).

Triggering District Obligations

While the new regulations require a district to respond promptly in a manner that does not exhibit deliberate indifference, the new regulations narrow the circumstances that trigger this obligation. First, these obligations are triggered only when the district has **actual knowledge** of sexual harassment – prior guidance included sexual harassment that a district knew or should have known about. Actual knowledge means **notice** of sexual harassment or allegations of sexual harassment to any employee of an elementary and secondary school including the Title IX coordinator. The new regulations emphasize that the actual knowledge requirement is not met when the imputation of knowledge is based solely on vicarious liability or constructive notice. While this area can be confusing, the preamble to the regulations provides a number of helpful examples that demonstrate

the distinction between actual notice and constructive notice and illustrate the Department’s intent to preclude any argument that a district should have known about harassment.

In addition, a district’s obligations are limited to harassment that occurs in an **education program or activity** in the United States. This includes locations, events, or circumstances over which the district exercised substantial control over both (1) the alleged perpetrator and (2) the context in which the alleged sexual harassment occurred.

Title IX Coordinator

Each district must **designate and authorize** at least one employee – a “Title IX coordinator” - to coordinate its efforts to comply with its responsibilities under the regulations.

Notice Requirements

The new regulations provide additional notice requirements. A district must provide applicants for admission and employment, students, parents, employees, and unions or professional organizations holding contracts with the district, notice of the following: the Title IX Coordinator’s name or title, office address, email address, and telephone number, and the district’s nondiscrimination policy (making clear it applies to both students and employees). This information must be displayed at least on the district website and in each handbook or catalog made available to the groups described above. Districts must adopt and publish a grievance procedure and provide copies of the grievance procedure and process to the individuals listed above which includes how to file a report and how the district will respond.

Reporting Requirements

The new regulations permit any person to **report** sex discrimination, including sexual harassment (whether or not the person reporting is the person alleged to be the victim). The report may be made at any time (including during non-business hours) but must be made in person, by mail, by telephone, or by email, using the contact information listed for the Title IX Coordinator. Alternatively, the person may report the incident by any other means that results in the Title IX Coordinator receiving the person’s verbal or written report.

Response to Sexual Harassment

The new regulations require a district with actual knowledge of sexual harassment to respond **promptly** in a manner that is **not deliberately indifferent**. A district is deliberately indifferent only if its response to sexual harassment is clearly unreasonable in light of the known circumstances. “Promptly” was added to the new regulations to emphasize that districts may not delay a response to notice of any sexual harassment.

Response without a Formal Complaint

After receiving notice or a report of any sexual harassment, the Title IX Coordinator must promptly take the following steps: (1) contact the complainant to discuss the availability of **supportive measures**, (2) consider the complainant’s wishes with respect to supportive measures, (3) inform the complainant of the availability of supportive measures with or without the filing of a formal complaint, and (4) explain to the complainant the process for filing a formal complaint. Further, the Title IX Coordinator is responsible for coordinating the effective implementation of supportive measures. An investigation of the allegations is not required absent a formal complaint.

Supportive measures are defined in the new regulations as non-disciplinary and non-punitive individualized services offered as appropriate as reasonably available, and without fee or charge to the **complainant** or the **respondent** before or after the filing of a formal complaint or where no formal complaint has been filed. Such measures are designed to restore or preserve equal access to the education program or activity without unreasonably burdening the other party, including measures to protect the safety of all parties and deter sexual

harassment. Supportive measures may include counseling, mutual restriction on contact between parties, modifications of class schedules, or other similar measures. The district must generally maintain confidentiality related to supportive measures.

Filing a Formal Complaint

A **formal complaint** is defined as a document that is either filed and signed (or otherwise indicates that the complainant is the person filing the formal complaint) by a complainant or signed by a Title IX Coordinator. The document must (1) allege sexual harassment against an individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment, and (2) request that the district investigate the allegation of sexual harassment.

To file a complaint, an alleged victim must, at the time of filing a formal complaint, be participating in or attempting to participate in the education program or activity of the district.

Dismissal of Formal Complaint

After receiving a formal complaint, a district **must dismiss** the complaint under Title IX if the conduct in the formal complaint (1) would not constitute sexual harassment, even if proven; (2) did not occur in the district's education program or activity; or (3) did not occur against a person in the United States. However, a district may continue to take action under the district's own code of conduct. The district **may dismiss** the complaint if the complainant seeks to withdraw the complaint, the alleged perpetrator is no longer a student or employee, or specific circumstances prevent a district from gathering evidence sufficient to reach a determination. Upon dismissal, a district must send written notice of the dismissal and reasons simultaneously to the complainant and alleged perpetrator (respondent).

Emergency Removal of Student or Employee Leave of Absence

The new regulations state that nothing in the regulations are intended to preclude a district from either removing a student from the district's education program or activity or from placing an employee on administrative leave during the pendency of the Title IX grievance process.

However, before removing a student, a district must (1) undertake an individualized safety and risk analysis, (2) determine that an immediate threat to the physical health or safety of any student or other individual arising from the allegations of sexual harassment justifies removal, and (3) provide the alleged perpetrator with notice and an opportunity to challenge the decision immediately following the removal. This provision does not modify any rights under the Individuals with Disabilities Education Act, the Americans with Disabilities Act, or Section 504 of the Rehabilitation Act.

Response with a Formal Complaint (Investigation)

The new regulations require not only a grievance procedure but also a **grievance process** that a district must follow when investigating a formal complaint. The investigator may be the Title IX Coordinator or another district designee.

The regulations lay out the requirements for a district **grievance process** and 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 process; (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. Districts will have to decide whether they use a "preponderance of the evidence" or "clear and convincing" standard to determine responsibility. Districts must use the same standard of evidence for all formal complaints, including complaints against employees.

Further, when **investigating a formal complaint**, the regulations require a district to give written notice to both parties containing sufficient details to permit a party to prepare a response before any initial interview. The regulations also require additional obligations such as: (1) provide written notice of any interview, meeting, or hearing at which a party is invited or expected to participate with sufficient time for the party to prepare to participate; (2) provide the parties with the same opportunity to have others present during any grievance proceeding, including an advisor of the party's choice; and (3) provide both parties an equal opportunity to inspect and review any evidence obtained as part of the investigation that is directly related to the allegation raised in a formal complaint.

The investigator must create an **investigative report** that fairly summarizes relevant evidence. Prior to completion of the investigation report, the investigator must send to the alleged victim and perpetrator (and any advisors) the evidence to inspect and review, and they must have at least 10 days to submit a written response, which the investigator must consider prior to completion of the investigative report. The investigative report must then be sent to each party (and the parties' advisors) at least 10 days prior to any time of determination regarding responsibility.

Decision-maker

After the investigator has sent the investigation report to the parties, the new regulations require a process for **determination of responsibility by a decision-maker**. The decision-maker cannot be the same person as the Title IX Coordinator or the investigator. At this step, the district grievance process may, but is not required to, provide for a hearing, which would include the opportunity for cross-examination. Each district will need to carefully consider whether to include a hearing in its grievance process.

With or without a hearing, the decision-maker 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 from each party. After this step, the decision-maker must prepare a written determination explaining for each allegation whether the alleged perpetrator is responsible or not responsible, including the facts and evidence on which the conclusion is based. The written determination must be sent to both parties.

Appeal Process

School districts must offer both parties an **appeal** from a determination regarding responsibility and from a district's dismissal of a formal complaint or any allegations therein (such appeal was optional under prior guidance). The new regulations identify different bases for appeal and also state that a district may offer an appeal on additional bases equally to both parties. The appeal procedure must follow certain steps, including issuing a written decision describing the result of an appeal and the rationale for the result. The decision must be provided simultaneously to both parties. The appeal decision-maker cannot be the same person who served as the Title IX Coordinator, investigator, or initial decision-maker.

Additional Provisions

The new regulations also include other important provisions which we only highlight in this article. First, a district may provide for an **informal resolution** of a formal complaint, in accordance with certain requirements including that the district obtains the parties' voluntary, written consent to the informal resolution. Further, an informal resolution may not be used to resolve allegations that an employee harassed a student. In addition, districts must create and maintain **records** for seven years documenting certain aspects of sexual harassment investigations, appeals, informal resolutions, training materials, and actions taken in response to reports of sexual harassment. Districts must also provide **training** to relevant employees on the investigation and

grievance process. Finally, the regulations include a section prohibiting **retaliation** against any individual who has made a report or complaint, testified, assisted, or participated in any investigation, proceeding, or hearing under the Title IX regulations.

Districts should begin to review their policies and practices to ensure compliance by August 14, 2020. Our firm is available to provide further guidance and assistance to school districts as changes are considered and made in the wake of the new Title IX regulations.

PRIMARY AUTHORS

Richard F. Verstegen

(608) 283-7233
RVERSTEGEN@BOARDMANCLARK.COM

M. Tess O'Brien-Heinzen

(608) 283-1798
TOBRIEN@BOARDMANCLARK.COM

Matthew W. Bell

(608) 286-7239
MBELL@BOARDMANCLARK.COM

Brian P. Goodman

(608) 283-1722
BGOODMAN@BOARDMANCLARK.COM

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|----------------------|----------------|---------------------------|----------------|--------------------------|----------------|
| ■ Michael J. Julka | (608) 286-7238 | ■ Steven C. Zach | (608) 283-1736 | ■ Matthew W. Bell | (608)286-7239 |
| ■ James K. Ruhly | (608) 283-1738 | ■ Richard F. Verstegen | (608) 283-7233 | ■ Christopher T. Schmidt | (608) 286-7157 |
| ■ William L. Fahey | (608) 286-7234 | ■ David P. Weller | (608)286-7235 | ■ Brian P. Goodman | (608) 283-1722 |
| ■ JoAnn M. Hart | (608) 286-7162 | ■ Jennifer S. Mirus | (608) 283-1799 | ■ Daniel T. Fahey | (608) 286-7216 |
| ■ Eileen A. Brownlee | (608) 822-3251 | ■ Rhonda R. Hazen | (608) 283-1724 | ■ Eric B. Hagen | (608) 286-7225 |
| ■ Doug E. Witte | (608) 283-7529 | ■ M. Tess O'Brien-Heinzen | (608) 283-1798 | | |

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