

Changes to Title IX

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New Rules

- Effective August 14, 2020
- Actual rules and no longer “Dear Colleague Letters”
 - Informal Best Practices vs. Formal Legal Requirements
- Implements as law many of the 2001 guidance

Sexual Harassment

- “Sexual harassment”: conduct that is so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the school corporation’s education, work programs, or activities.
- Include *quid pro quo* harassment, which was included in the prior rules, as well as four new categories of conduct now considered per se sexual harassment--sexual assault, dating violence, domestic violence, and stalking.

Obligation

- A recipient with actual knowledge of sexual harassment in an education program or activity of the recipient against a person in the United States, must respond promptly in a manner that is not deliberately indifferent.

Geographical Limitations

- Use of “in the United States” may limit Title IX obligations as well as liability regarding student trips
- Code of conduct, study abroad agreements or bullying statute may impact response

Actual Knowledge

- “Actual knowledge means notice of sexual harassment or allegations of sexual harassment to a recipient’s Title IX Coordinator or any official of the recipient who has authority to institute corrective measures on behalf of the recipient, **or to any employee of an elementary and secondary school.**”

Actual Knowledge

- “Actual knowledge”: means a mandated reporter has notice of “sexual harassment or allegations of sexual harassment.”
- Important distinction between K-12 and higher ed
 - In the K-12 context, all employees are now mandatory reporters.
 - Colleges and universities have more flexibility in this regard and can determine for themselves which employees have “authority to institute corrective measures” such that their knowledge of a sexual harassment complaint is “actual knowledge” for Title IX purposes.

Actual Knowledge

- “Accordingly, if an athletic coach is an employee of an elementary and secondary school, then that coach would have actual knowledge if the coach has notice of sexual harassment or allegations of sexual harassment”

Actual Knowledge

- Think of all employees in a school—
custodians, administrative assistances, etc.
- Be sure they know how to report these up the
chain
- Similar to DCS reporting protocols

Education Program or Activity

- “Education program or activity” includes locations, events, or circumstances over which the recipient exercised substantial control over both the respondent and the context in which the sexual harassment occurs”

Student Communications

- What about student social media/texting?
 - OCR previous 2010 Dear Colleague Letter addressing bullying and harassment. The Department's 2010 guidance made a passing reference that harassing conduct may include "use of cell phones or the internet," and the Department's position has not changed in this regard.
 - But the new regulations supply an important limiter

Student Communications

- “These final regulations apply to sexual harassment perpetrated through use of cell phones or the internet if sexual harassment occurred in the recipient’s education program or activity.”
- “For example, a student using a personal device to perpetrate online sexual harassment during class time may constitute a circumstance over which the recipient exercises substantial control.”

Student Communications

- Be aware of actions off campus that bleed into interactions in the educational program
 - EXAMPLE: Social media exchange then produces conversations in school building.
- Even if act is not a Title IX issue, it may be code of conduct/bullying issue.

Removal of Student

- Allows for removal of students based on individualized safety and risk analysis
 - Due process must be given before removal
 - Special ed still requires manifestation determination

Complaint Process

- Screening of complaint
- Equal opportunity to parties
- Not restrict ability of parties to discuss allegations
- Applies due process
- Reasonably prompt timeframes

Complaint Screening

“If the conduct alleged in the formal complaint would not constitute sexual harassment as defined in § 106.30 even if proved, did not occur in the recipient’s education program or activity, or did not occur against a person in the United States, then **the recipient must dismiss the formal complaint** with regard to that conduct for purposes of sexual harassment under title IX or this part; such a dismissal does not preclude action under another provision of the recipient’s code of conduct.”

Complaint Process

- Innocent until proven guilty
- Right to “advisors” during meetings and proceedings
- If live hearing, provide to the party whose participation is invited or expected written notice of the date, time, location, participants, and purpose of all hearings, investigative interviews, or other meetings with a party, with sufficient time for the party to prepare to participate

Complaint Process

- If no live hearing, parties must be able to send questions to parties/witnesses, receive answers, allow for follow-up questions
- Preliminary report prior to hearing summarizing evidence
- Written determination must be provided simultaneously to parties

Supportive Measures

- Must document no deliberate indifference and reason for no supportive measures
- “[N]on-disciplinary, 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”
- Supportive measures are confidential unless inability to provide supportive measure

Supportive Measures

“Supportive measures may include counseling, extensions of deadlines or other course-related adjustments, modifications of work or class schedules, campus escort services, mutual restrictions on contact between the parties, changes in work or housing locations, leaves of absence, increased security and monitoring of certain areas of the campus, and other similar measures.”

Complaint Process

- Decision-maker cannot be Title IX coordinator or investigator
- Process will be more similar to expulsion hearings

Appeals

- Appeals allowed:
 - Appellate decision-maker(s) must be different
 - Notice of appeal to all parties required
 - Both parties afforded opportunity to submit written statements on appeal
 - Written appellate decision to parties

Mediation

- Informal resolution:
 - Mediation
 - Notice of informal process
 - Voluntary, written consent

Training

- Title IX coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process, must receive training on the following:
 - Definition of sexual harassment
 - Scope of education program or activity
 - How to conduct an investigation
 - How to conduct grievance process
 - How to conduct hearings, appeals or mediations
 - How to serve impartially

Training

- Training for decision-makers if live hearings:
 - Technology training
 - Relevance of questions
 - Evidence
- Training for investigators:
 - Relevance
- Training must also address sex stereotypes, promote impartial investigations/adjudications

Final Thoughts

- Knowledge by any school employee—make sure they all are aware of how to report
- Complaints must be dismissed up front
- More formal process for handling complaints
- Report must address no deliberate indifference and how requested supportive measures are “clearly unreasonable”

Recordkeeping

- Records must be maintained for 7 years
 - Each investigation
 - Appeals
 - Informal resolutions
 - Training materials

Decisions for School Corporations

- Evidentiary standard (preponderance of the evidence vs. clear and convincing)
- Decision-maker (one vs. panel; internal vs. external)
- Who is serving as investigator, Title IX coordinator, *etc.*

Helpful Resources

<https://sites.ed.gov/titleix/policy/>

Questions and Answers