

Title IX



THE NEW REGULATIONS

ANNE M. SKRODZKI
KLEIN, THORPE & JENKINS, LTD.

What is Title IX?



- Title IX provides that no person in the United States shall, based on sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance
- The statute itself is brief and interpreted by regulations, guidance, and caselaw
- Previous guidance was withdrawn in 2017; after a lengthy process the Department of Education announced new rules on May 6, 2020

Title IX: The Old Requirements



- Have a non-discrimination policy
- Notify students and employees of the policy
- Have a grievance process that provides for the “prompt and equitable” resolution of sex discrimination complaints
- Designate at least one employee to serve as a Title IX Coordinator to handle complaints

Title IX's New Requirements



- School districts must still have a designated Title IX Coordinator and a non-discrimination policy
- Applicants for employment, parents/legal guardians, and unions must be notified of the contact information (name, office address, e-mail address, and phone number) of the Title IX Coordinators (not just the students and employees)
- Contact information must also be displayed on the School District website

Sexual Harassment Defined



- Sexual harassment is now defined as misconduct on the basis of sex effectively denying equal access to education on the following bases:
 - *Quid pro quo harassment*: a school employee conditioning an educational benefit or service upon a person's participation in unwelcome sexual conduct
 - *Hostile environment harassment*: unwelcome conduct determined by a reasonable person to be so severe, pervasive AND objectionably offensive that it effectively denies a person equal access to the recipient's education program or activity
 - ✦ Change in standard; previously it had to be severe, pervasive, OR objectively offensive
 - *Sexual Assault, dating/domestic violence, or stalking*: uses VAWA/Clery Act definitions

Knowledge of Harassment



- School District is required to respond when they have “actual knowledge” of a complaint of sexual harassment.
- Elementary/ Secondary school must respond if a report is made to any employee, including allegations. Every employee is therefore a “mandated” reporter. For all schools, notice to a Title IX Coordinator or to an official with authority to institute investigative measures on behalf of the school charges a school with actual knowledge.

Reports of Harassment



- A report means a report of sexual harassment or discrimination made by any person, any time, written or verbal (may be in person, via phone, mail or e-mail)
- Reports can be made by third parties (complainant's parent, friend, or peer)
- Need not be a “formal complaint”—any report triggers a duty to respond
- Any report received by a teacher or staff member should be promptly referred to the Title IX Coordinator

School Authority/ Jurisdiction to Respond



- A school is only required to respond if:
 - The allegations fit the definition of “harassment”
 - The harassment occurs “in the school’s education program or activity”
 - ✦ Includes “locations, events, or circumstances over which the school exercised substantial control over both the perpetrator and the context in which sexual harassment occurs”

School Authority/ Jurisdiction to Respond II



- **School can dismiss complaints if:**
 - Complainant withdraws formal complaint in writing
 - Alleged perpetrator is no longer enrolled as a student or employed by the school
 - Circumstances prevent the school from gathering evidence that would be sufficient to reach a determination

Response to Report of Sexual Harassment



- Must be prompt and not “deliberately indifferent” (not clearly unreasonable in light of the known circumstances)
- Based on the facts and circumstances of each case, but promptness, impartiality, avoiding conflicts of interest, compliance with policies and procedures, and the offer of “supportive measures” are important considerations
 - “Supportive measures” are defined as non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, and without fee or charge to the complainant or respondent.

Supportive Measures, continued



- Examples of supportive measures include:
 - Counseling
 - Extensions of deadlines or other course-related adjustments
 - Modifications of work or class schedules
 - Campus escort services
 - Mutual contact restrictions
 - Changes in work or housing locations
 - Leaves of absence
 - Increased security
 - Other individualized, similar measures
- Supportive measures should be coordinated by the Title IX Coordinator and kept confidential to the extent reasonably possible. Supportive measures should be equitably offered to both the complainant and respondent

Response to Report of Sexual Harassment II



- Upon receiving a report, a Title IX Coordinator should promptly respond by:
 - Contacting the victim, if identified
 - Explaining the process of filing a formal complaint
 - Offering supportive measures and explain they are available with or without a formal complaint
 - ✦ If supportive measures are not provided, school must document why they were not provided and why not providing measures was not deliberately indifferent
 - Contacting alleged perpetrator, offer supportive measures

Standards of Evidence/ Burden of Proof



- Schools are required to select one of two standards of evidence
 - Preponderance of the evidence standard
 - Clear and convincing evidence standard
- The selected standard must be applied evenly to proceedings for all students and employees
- Burden of proof rests with the school district to produce evidence meeting the applicable standard

Initiating a Formal Complaint



- Only a complainant can “file” a formal complaint, which must be written (as opposed to reports, which may be made by third parties) (Parents may file on behalf of their minor child)
- A Title IX Coordinator also has the authority to “sign” a formal, written complaint
 - Any decision of a Title IX Coordinator to proceed with a formal complaint and investigation if a complainant decides against proceeding can be reviewed by the Office of Civil Rights to determine if the District was “deliberately indifferent” to the student’s request.
 - Title IX Coordinator is also required to document the reasons for any response to a report, specifically the decision to go forward or not go forward with a formal complaint. There will need to be specific, clear circumstances justifying a decision to bring a formal complaint without the consent of the complainant.
- Either path initiates the formal grievance process required by the rules

Initiating a Formal Complaint II



- A school “should respect the complainant’s autonomy and wishes with respect to a formal complaint and grievance process to the extent possible.”
- The “credibility” of a complaint should NOT be considered in determining whether to go forward, as it undermines the use of the grievance process itself
- However, the Title IX Coordinator is required to file a formal complaint to investigate a possible pattern of harassment (to address serial predator or repeat offender situations) even where no complainant wishes to file a formal complaint
 - Pattern of alleged conduct and the involvement of violence, weapons or other factors in the allegations should be considered.

Alternatives to a Formal Complaint



- If both the complainant and respondent voluntarily agree (evidenced by written consent of both parties) they may participate in an informal resolution process
- This may include mediation, restorative justice, or other models of alternative dispute resolution
- Alternative resolution processes are not available where the alleged perpetrator is an employee and the alleged victim is a student

The Grievance Process



- The filing of a formal complaint institutes the grievance process, which must include the following elements:
 - A presumption of innocence for the respondent throughout the grievance process
 - Objective evaluation of all relevant evidence, including inculpatory and exculpatory evidence, with standards for the assessment of evidence (*Clear and convincing* OR *preponderance of the evidence*)
 - Timelines for the prompt completion of the investigation, decision-making, and appeals (if appeals are allowed). Deadlines should be extended only for good cause.

The Grievance Process, continued



- No discipline of an alleged perpetrator without due process protection
 - ✦ This does not require an in-person hearing, but a district must allow both parties the opportunity for written cross-examination and to respond in writing to relevant evidence and findings by allowing written Q and A between parties that request it
 - ✦ Districts must also provide rape shield protections for victims
- The burden of proof and the burden of gathering evidence must be on the school, not on the parties
- Title IX Coordinators, investigators and decision-makers must not have conflicts of interest or bias for or against complainants or perpetrators
- If the perpetrator is found guilty, the complaining student has to be offered remedies designed to restore or preserve equal access to education (similar to supportive measures in place during the investigation)

Responsibilities of the School District



- **The District must provide:**
 - Written notice of the allegations to the parties containing sufficient details to permit a party to prepare for any initial interview and proceed with a factual investigation
 - An equal opportunity for both parties to present witnesses and evidence
 - No restrictions on the ability of either party to discuss the allegations or gather relevant evidence (no “gag orders”)
 - Each party the same opportunity to use a representative of their choice at all times during the grievance process (can be an attorney)
 - Written notice of any interview, meeting or hearing at which a party is invited or expected to participate
 - Equal access to all evidence the school investigator collects, including the investigative report
 - Each party an equal opportunity to respond to the evidence before any determination is made
 - Each party an opportunity to submit written questions to challenge the other’s credibility before the decision-maker makes a determination

Making a Determination



- Upon completion of the investigation, a written determination is to be sent to both parties explaining for each allegation whether the respondent is guilty or not, including the facts and evidence on which the conclusion is based
- The determination must be made by a decision-maker who is not the same person as the Title IX Coordinator or investigator
- Districts may not use a “single-investigator” or “investigator-only” model for the investigation and decision

Appeal of the Decision



- If a school district chooses to offer any process of appeal, it must allow both parties to appeal.
- The decision-maker on appeal cannot be the same person who served as the Title IX Coordinator, investigator, or initial decision-maker
- Decision-maker must further be free from bias or conflicts of interest
- Appeals must be resolved within reasonable timeframes
- Each party must have the opportunity to submit written arguments for or against the outcome
- Complainants can challenge on appeal the adequacy of the remedies designed to ensure the complainant's equal access to education (although complainants cannot demand any particular disciplinary sanction against a respondent)

Remedies



- If the grievance procedures determine a finding of responsibility, the school district is required to provide remedies designed to restore or preserve access to the school's education program or activity
- While the remedies may include measures similar to the supportive measures in place during the investigation, the primary difference is that supportive measures cannot include discipline against an alleged perpetrator, while remedies can include disciplinary measures against a responsible perpetrator

Safe Harbor



- If the District follows a grievance procedure consistent with the regulation, then the school has a “safe harbor” regarding a possible finding of deliberate indifference with respect to the school’s response to the formal complaint

Training Requirements for All Employees



- Training is required for all employees on:
 - The definition of sexual harassment
 - The obligation to make a report to the Title IX Coordinator if receiving a report of sexual harassment (by any means, including personally witnessing or becoming aware through the complainant or third parties)

Training Requirements for Title IX Coordinators



- Title IX Coordinators, Investigators, Decision-Makers (initial and appellate) must also be trained in:
 - Response requirements
 - Investigation Procedures
 - Decision-making procedures and standards
 - Supportive-measured
 - Alternative resolution options and processes
 - Impartiality, conflicts of interest, issues of relevancy, other aspects of the grievance process
 - Decision-makers and investigators must also receive training on how to apply rape shield protections provided only for complainants
 - Must keep records of and post materials used to train Title IX personnel on their website, or make materials available for members of the public to inspect

Confidentiality/ Rape Shield Protections



- Complainants/ victims are not required to divulge medical, psychological, or similarly privileged records
- Complainants / victims should not be inappropriately asked about prior sexual history

Record Keeping Requirements



- Schools are required to record and maintain documentation of any Title IX sexual harassment investigation and all findings of guilt, including informal resolutions or appeals
- The documentation kept must include the facts on which the Title IX Coordinator based any conclusion that it was not deliberately indifferent to the allegation of sexual harassment
- Either party can request copies of the records related to their case
- Schools must also maintain records regarding their response to all reports of sexual harassment that the school becomes aware of (even those which do not result in a formal complaint) and the “supportive measures” offered to and/or provided to the complaining student

Distinctions between K-12 and Higher Ed



- The regulations do not have a separate set of rules for K-12 institutions and higher education; however, they do make distinctions between the requirements appropriate for each
 - Grievance procedures established for K-12 schools “may but need not” include live hearings and cross-examination. While that might be appropriate for students approaching adulthood, it would not be for younger ones. School officials are “encouraged to use their discretion and expertise within the confines of the final regulations.”
 - *All* teachers and staff members of K-12 are required to report allegations of misconduct

Implementation of the New Title IX Rules



- There are at least three active lawsuits and a motion by 18 attorneys general to block the new regulations
- The lawsuits challenge the legality and the merits of the regulations, and have become increasingly partisan
- Several lawsuits have asked for more time to implement, due to the significant administrative demands of the coronavirus
- Regulations have not been blocked
- Executive Order extends the holding in *Bostock* to Title IX

New Regulations Relating to Sex Discrimination



- The new regulations also contain several provisions relating to sex discrimination generally and not only to sexual harassment. These regulations:
 - Affirm that the Department may require schools to take remedial action for discriminating on the basis of sex or otherwise violating Title IX regulations
 - Expressly state that schools are never required to deprive an individual of Constitutional rights
 - Affirm the legal rights of parents or guardians to act on behalf of individuals with respect to exercising Title IX Rights
 - Update the requirement for schools to designate and identify a Title IX Coordinator, disseminate their non-discrimination policy and the Title IX Coordinator's contact information, and notify students, employees, parents and others of how the school will respond to reports and complaints of sex discrimination (including but not limited to sexual harassment)

Conclusion



- The new regulations are controversial; however, they went through a lengthy rulemaking process and in order to be changed, the Biden administration would likely have to go through the same process
- On March 8, President Biden signed an Executive Order asking the DOE to review the rules and issue new guidance as necessary
- There will certainly be extensive litigation regarding interpretation and implementation of the new regulations
- There may be new guidance interpreting the rules; we will monitor for all developments