



CLIENT ALERT

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Educators Still Required to Comply With New Title IX Regulations by August 14, 2020

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On August 14, 2020, the U.S. Department of Education's new Title IX regulations become effective. These regulations govern how education programs that receive federal funding must respond to sex discrimination, including sexual harassment. The regulations set forth specific minimum responsibilities and requirements that apply to kindergarten through 12th grade.

Not all of the requirements are new; however, certain provisions may seem new to K–12 districts/schools because this is the first time many requirements are explicitly stated in the regulations. As a result, K–12 districts/schools will need to review their current policies and make substantial changes regarding how they prevent, respond to, investigate, and address sexual harassment.

Several states have filed injunctive lawsuits in an attempt to postpone the effective date of these new regulations due to the COVID-19 pandemic and in light of all of the extra work administrators and teachers are currently undertaking to address health and safety response plans, as well as to develop, update, and implement virtual education programs. To date, the courts have not granted such relief. Therefore, as K-12 districts/schools struggle with reopening or continuing online learning during the pandemic, they must also comply with the new Title IX requirements, including but not limited to, designating certain Title IX staff positions, developing policies, responding to and investigating complaints, and implementing and posting training — all by August 14, 2020. We provide a brief overview of the key areas to be updated below.

DESIGNATION OBLIGATIONS

Before the changes, districts/schools were already required to have a "Title IX Coordinator" lead compliance efforts. Now the regulations require districts/schools to designate additional positions, including investigators (if different from the Title IX Coordinator) and two levels of decision-makers —one for an initial determination of a sexual harassment complaint and one for appeal. The regulations specify decision-makers cannot be the same person as the Title IX Coordinator or an investigator.

RESPONSE OBLIGATIONS

A K–12 district/school must investigate when any employee has

"actual knowledge" or notice of sexual harassment or allegations of sexual harassment. While many states already have mandatory reporting statutes for districts/schools, the new Title IX regulations essentially make reporting a federal requirement. Of note, the regulations define "sexual harassment" to include conditioning the provision of an aid, benefit, or service on an individual's participation in unwelcome sexual conduct; unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the education program or activity; and sexual assault, dating violence, domestic violence, or stalking.

Once a district or school's response obligations are triggered, the Title IX Coordinator must promptly contact the complainant to explain the process for filing a formal complaint. The new regulations also require districts to offer supportive measures — including counseling, contact restrictions, and modification of class schedules — to complainants of sexual harassment.

GRIEVANCE PROCESS REQUIREMENTS

Districts/Schools must follow a detailed and timely grievance process for sexual harassment complaints before imposing any discipline or non-supportive measures against the accused. However, districts/schools may place accused non-student employees on administrative leave while a grievance process is pending, or remove students on an emergency basis subject to certain parameters.

The new sexual harassment grievance process provides for substantial rights for the complainant and the accused, including but not limited to: explicit notice of the allegations; opportunities to respond; the ability to review evidence and the investigative report; the aid of an advisor throughout the proceedings, who may be, but is not required to be, an attorney; and the chance to submit questions to the other party or witnesses.

K-12 districts/schools can decide to hold hearings, though they are not required. Ultimately, a decision-maker must issue a written determination of responsibility on the sexual harassment complaint, and either party may appeal to a separate decision-maker on certain bases. If the decision-maker issues a determination of responsibility for sexual harassment, the district/school must provide remedies to a complainant.

INVESTIGATIVE REQUIREMENTS

During the investigation of a sexual harassment complaint, the Title IX Coordinator (or investigator if different) has enumerated responsibilities to provide the parties equal opportunity to present witnesses and other evidence, a notice of any interviews and time to prepare, and the ability to inspect and review evidence. The investigator must also maintain the proper burden of proof and create an investigative report that fairly summarizes the relevant evidence.

TRAINING REQUIREMENTS

Before the changes, Title IX already required districts to train certain personnel on the law. The new regulations, however, identify new training topics for certain designated personnel, including on the regulation's new definition of sexual harassment and how to serve impartially.

Moreover, districts/schools must now train decision-makers on how to conduct live hearings (if the K–12 district/school chooses to have live hearings) and how to review the evidence — including what questions and evidence are relevant — as well as train investigators on how to create an investigative report that fairly summarizes relevant evidence. Districts/Schools must also make all training materials publicly available by posting them on their website.

NOTIFICATION REQUIREMENTS

Districts/Schools must notify applicants for admission and employment, students, parents or legal guardians of students, employees, and all unions or professional organizations holding collective bargaining or professional agreements with the district/school, of Title IX Coordinator contact information, including email, and of the fact that it does not discriminate on the basis of sex in its education program or activity—posting this information on its website and in each student handbook or catalog. Such notification must state that the requirement not to discriminate in the education program or activity extends to admission (unless inapplicable) and employment, and that inquiries about the application of Title IX may be referred to the recipient's Title IX Coordinator, to the Assistant Secretary, or both.

Districts/Schools must also provide the aforementioned individuals with notice of the district/school's grievance procedures and grievance process, including how to report or file a complaint

of sex discrimination, how to report or file a formal complaint of sexual harassment, and how the district/school will respond.

RECORDKEEPING REQUIREMENTS

Each sexual harassment complaint also now includes the requirement to maintain specific records for a period of seven years, such as records pertaining to the investigation, any appeal, any resolution, and all materials used to train those involved.

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