

DEPARTMENT OF EDUCATION RELEASES FINAL TITLE IX REGULATIONS

Hodgson Russ Education Alert
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On May 6, 2020, the U.S. Department of Education (“DOE”) issued final regulations implementing Title IX of the Educational Amendments Act of 1972 (“Title IX”), the federal law prohibiting sexual harassment and discrimination. These regulations have been widely awaited and debated since November 2018, when the DOE released the regulations in proposed form. The regulations apply to both Higher Education and K-12 schools (collectively “Schools”), with some distinctions based on the type of educational institution. They are in full effect as of **August 14, 2020**.

The new regulations are a dramatic change from prior guidance on Title IX. They impose a narrower definition of “sexual harassment,” and emphasize the need for due process during harassment investigations. The most controversial changes involve increased protections for the accused, and the requirement of live hearings with cross-examination of witnesses at higher education institutions.

Below is a summary of some of the most significant changes in the Title IX regulations.

The Definition of “Sexual Harassment”

The new regulations define sexual harassment as including sexual assault, dating violence, domestic violence, and stalking. It can include peer, faculty or staff harassment, or any combination thereof. In these circumstances, a School is required to investigate any claim of sexual harassment that falls under one or more of the following categories:

1. *quid pro quo* sexual misconduct by a school employee;
2. unwelcome conduct that a reasonable person would determine is so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the school’s education program or activity; or
3. sexual assault (as defined in the Clery Act), dating violence, domestic violence, or stalking as defined in the Violence Against Women Act (“VAWA”).

This definition represents a narrower one that had been previously used, which had broadly defined sexual harassment as “unwelcome conduct of a sexual nature.” Also, the definition of harassment explicitly covers dating violence, domestic violence, and stalking, as defined in the Violence Against Women Act (VAWA).

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School Response to Harassment Allegations

The new regulations establish procedures that Schools must follow when responding to an allegation of sexual harassment. Specifically, Schools with actual knowledge of sexual harassment are required to respond in a manner that is not *deliberately indifferent*. In other words, Schools should ensure that they are not consciously or recklessly disregarding claims of sexual harassment in light of the individual, known circumstances.

Schools should have in place grievance procedures that assure an equitable and fair review of sexual harassment complaints. This includes notice of a complaint to all parties, with an explanation of the grievance procedure. The regulations expressly state that the accused is presumed innocent throughout the grievance process, with the burden of proof resting on the School, not the parties. The burden of proof can be either based on a “preponderance of evidence” or the significantly higher standard of “clear and convincing evidence,” whichever standard the School establishes in its Title IX policies.

During the investigation, both parties have an equal opportunity to present witnesses and evidence, and have the option to have an advisor accompany them in any meeting or proceeding. The investigator must give the parties an opportunity to inspect and review any evidence gathered during the investigation.

For complaints involving higher education institutions, the School is required to conduct a live hearing (K-12 schools have the option but are not required to do so). At the hearing, the parties must be allowed to cross-examine the parties and witnesses. However, the cross-examination cannot include evidence of the accuser’s sexual behavior or predisposition, unless evidence is offered to prove that someone other than the accused committed the improper conduct.

At the conclusion of the investigation, a decision-maker *other than the investigator or Title IX Coordinator* must issue a written determination that identifies the allegations in the formal complaint, describes all procedural steps taken, includes findings of facts, and conclusions about the application of the School’s code of conduct. The decision-maker must then state the conclusion he or she has reached on each allegation and the rationale for each decision. The decision-maker must also explain the procedures and permissible bases for appeals.

Informal Resolution

Notwithstanding the above-described grievance procedures, the regulations allow Schools to offer parties the option of utilizing an informal resolution process, such as mediation, to resolve complaints. However, a School cannot *require* a party to utilize an informal resolution process, or require a party to waive his/her right to the formal resolution of a sexual harassment complaint.

Record-Keeping

The regulations also impose recordkeeping requirements in relations to Title IX matters. A School must keep for a period of seven (7) years the following documents:

- Records of each sexual harassment investigation, including any determination of responsibility; any audio or audiovisual recording or transcript; any disciplinary sanctions imposed on the respondent; and any remedies provided to the complainant.

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- Records of any appeal and the results of that appeal.
- Records of any informal resolution and the results of that informal resolution.
- All materials used to train Title IX coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process. (*Note: The recipient must make these training materials publicly available on its website or, if it does not have a website, make them available for inspection by the general public upon request.*)
- Records of any actions, including any supportive measures, taken in response to a report or formal complaint of sexual harassment.

Conclusion

The new Title IX regulations significantly change the procedures and obligations for Schools to investigate and respond to sexual harassment complaints. Schools, both higher education and K-12 institutions, are advised to review their current Title IX and Sexual Harassment policies and update them as necessary. Schools should also assure that its staff are properly trained on the Title IX procedures, and designate a Title IX Coordinator to assure compliance.

Please contact Ryan Everhart (716.848.1718) or any other member of our Education Practice for assistance and advice with any Title IX matter, including investigations of complaints as well as review of existing policies and procedures.

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