

## CLIENT ALERT

### Title IX Sexual Harassment Final Rule Goes in to Effect in August

School districts focused on how and when schools might reopen in the fall must be prepared to comply with the Final Rule recently released by the U.S. Department of Education, Office for Civil Rights (OCR), amending Title IX regulations. For the first time since Title IX's enactment in 1972, the regulations will now define "sexual harassment" and establish detailed procedures for how school districts must respond to allegations of sexual harassment. The amendments to the Title IX regulations go into effect on August 14, 2020.



Media attention about the Final Rule has concentrated on its application at the college level. While several elements of the Final Rule apply only at the college level, the majority of the new procedures apply fully at the K-12 school levels. Additionally, media attention about the Final Rule has concentrated on its application when a student is the victim of the alleged sexual harassment. Yet, the Comments to the Final Rule clarify that its newly created grievance process, described below, applies to all formal complaints irrespective of whether a student or an employee is the alleged victim or alleged harasser. This Client Alert summarizes what school districts need to know now about the application of the Title IX amendments beginning in the 2020-2021 school year.

#### First Things First

By August 14, 2020, each school district must have designated and authorized an employee whose title is "Title IX Coordinator" to coordinate the law's implementation. The law doesn't require that this be a stand-alone position; however, school districts should consider adding "Title IX Coordinator" to the existing job title of the employee assigned this duty. The Title IX Coordinator must be trained to ensure that all necessary policies, notices, and training take place throughout the school district.

Each school will be required to update its sexual harassment policies and notify students, employees, applicants for admission and employment, parents or legal guardians, and all unions of those policies as well as of the name or title, office address, e-mail address, and telephone number of the Title IX Coordinator. This information must also be prominently displayed on the District's website and in each student handbook.

#### Sexual Harassment Definition

The regulation defines sexual harassment broadly to include any of three types of misconduct on the basis of sex: 1) any instance of *quid pro quo* harassment by a school's employee; 2) any unwelcome conduct that a reasonable person would find so severe, pervasive, and objectively offensive that it denies a person equal educational access; or 3) any instance of sexual assault as defined in the Clery Act, dating violence, domestic violence, or stalking as defined in the Violence Against Women Act.

The second definition of sexual harassment reflects the very high standard for a hostile educational environment articulated in the U.S. Supreme Court decision of *Davis v. Monroe County Bd. Of Ed.*, 526 U.S. 629 (1999). There will likely be few situations in which the unwelcome conduct was so severe, pervasive, and objectively offensive that it completely denies an individual equal educational access. Yet, harassment that does not meet this heightened standard may still constitute sexual harassment and will be subject to corrective action under other Illinois and federal anti-harassment statutes. For this reason, school districts will need to analyze claims of sexual harassment under Title IX --- and comply with the Final Rule described below for those claims that meet the Title IX definition --- as well as analyze claims that don't meet the Title IX definition under the district's current policies prohibiting sexual harassment. The Illinois Association of School Boards is revising its sample PRESS policies to provide a template for school districts to utilize.

### **How Are Schools Affected?**

The prohibition against sexual harassment covers each educational "program or activity," including locations, events, or circumstances over which the school district ("recipient") has substantial control over both the alleged harasser and the context (including use of electronic technologies) in which the harassment occurred.

The regulation's key provision requires a K-12 school to respond whenever **any** employee has **actual knowledge** of sex discrimination, including allegations of sexual harassment. Thus, *all* employees must understand their obligation to notify the Title IX Coordinator of all allegations of sexual harassment so that it can be properly addressed, while avoiding liability for failure to do so. This is a significant responsibility comparable to the "mandated reporter" responsibility of all employees under the Abused and Neglected Child Reporting Act.

### **Protections for Complainants and Respondents**

The Final Rule defines a "complainant" as the alleged victim of sexual harassment, and a "respondent" as the alleged perpetrator of such conduct. School districts are obligated to respond *promptly* to actual knowledge of sexual harassment in a manner that is not "deliberately indifferent" -- i.e., in a manner that is not clearly unreasonable in light of the circumstances. School districts must also respond in a way that supports alleged victims and treats both parties fairly. Specifically, the school district must offer "supportive measures" to a complainant and follow a prescribed grievance process before imposing any disciplinary consequences against the respondent.

### **Supportive Measures**

A "supportive measure" is a non-disciplinary, non-punitive, individualized service, offered without cost to the complainant or respondent. Examples include class reassignments, counseling, and increased monitoring or supervision. While such measures should restore or preserve equal access to the educational program, they should do so without "unreasonably" burdening the other party. The Final Rule does, however, allow for the immediate removal of a student or employee on an emergency basis if the school determines that such removal is necessary to protect the complainant from an immediate threat to their physical health or safety. Removals must be done in accordance with the Individuals with Disabilities Education Act, Section 504 of the Rehabilitation Act of 1973, or the Americans with Disabilities Act, if applicable.

### **Formal Complaint Process**

A complainant may file a formal complaint with the Title IX Coordinator, or the Title IX Coordinator may sign a complaint without the complainant's participation. Yet, regardless of whether a formal complaint is filed, the Title IX Coordinator must promptly contact the complainant to confidentially discuss the availability of supportive measures, consider the complainant's wishes with respect to supportive measures, consider the complainant's wishes with respect to supportive measures, and explain to the complainant the process for filing a formal complaint.

Once a formal complaint has been filed, the school district must follow a grievance procedure while abiding by the following principles:

- The complainant's wishes regarding an investigation should be respected unless the Title IX Coordinator signs a formal complaint to initiate an investigation in light of the known circumstances.
- Individuals' rights protected under the U.S. Constitution, including the First Amendment, Fifth Amendment, and Fourteenth Amendment, must not be restricted.
- Schools must dismiss any allegations that do not meet the definition of sexual harassment under Title IX's regulation, that did not occur in the school's education program or activity, or that did not occur in the United States. Schools may, however, still address such allegations in any manner the school deems appropriate under the school's own code of conduct.
- Both parties must be treated equitably; each receiving written notice of the allegations, each given an equal opportunity to select an advisor of the party's choice, and each given an opportunity to submit and review evidence throughout the investigation.
- The Title IX Coordinator and investigator(s), the decision-maker (Superintendent or designee), and the decision-maker of any appeal (school board) must each: (1) be independent of one another, (2) receive training, and (3) serve without any conflict of interest in a particular matter.
- The respondent is presumed to be not responsible during the grievance process to ensure the school bears the burden of proof and the standard of evidence is applied correctly.
- All evidence, inculpatory and exculpatory, must be evaluated objectively.
- The grievance procedures must state up front: (1) the possible disciplinary outcomes and remedies; (2) whether the school will use a "preponderance of evidence" or "clear and convincing evidence" standard to determine responsibility; (3) the range of supportive measures available to each party; and (4) the appeal process. Additionally, the grievance procedures must not require, allow, or use evidence or questions that constitute or seek legally privileged information without a waiver of the privilege.
- Retaliation for participating or refusing to participate in an investigation is prohibited; charging an individual with making a materially false statement in bad faith during an investigation is permissible and not deemed to be retaliation.

### **How Is the Process Different than at the College Level?**

Unlike at the college level, where a live hearing is mandatory, the Final Rule does not mandate a live hearing in K-12 schools. However, each party has an opportunity after the investigative report has been completed to submit written, relevant questions to be answered by another party or witness. At the conclusion of the investigation, the decision-maker must send both parties a written determination regarding responsibility, factually detailing how and why the decision-maker reached their conclusions.

### **Informal Resolution Options**

The Final Rule allows a school to choose to offer and facilitate informal resolution options, such as mediation or restorative justice, as long as both parties give voluntary, informed, written consent to attempt informal resolution. A school may not offer or facilitate an informal resolution process to resolve allegations if the alleged harasser of a student is an employee.

### **Recordkeeping**

Schools are required to maintain three sets of records related to their compliance with the Final Rule. First, for seven years, schools must maintain records of each sexual harassment investigation, including any determination regarding responsibility, any audio/visual recording or hearing transcript, any disciplinary sanctions imposed, any remedies provided to the complainant; any appeal and any informal resolution. Second, also for seven years, schools must maintain records of all actions taken, including any supportive measures, in response to all reports of sexual harassment, even when there was no formal complaint. This reporting must document the basis for a conclusion that the school was not deliberately indifferent and must document that the school has taken measures designed to restore or preserve equal access to the school's education program or activity. If no supportive measures were provided to a complainant, the school must document why its response was not clearly unreasonable in light of the circumstances. Third, all training materials, described below, must be publicly available on the school district's website. At the same time, school districts must be mindful of the copyright laws related to training materials prepared by outside entities.

## Training

To effectively comply with all of the new requirements, school districts must ensure that their Title IX Coordinator, as well as all investigators, decision-makers and any persons who facilitate an informal resolution process, receive necessary training. The training must include the new definition of sexual harassment under the Final Rule; the scope of the school's education or activity; how to conduct an investigation; and the grievance process. A school is required to ensure that decision-makers receive training on issues of relevance, avoiding prejudice of the facts at issue, conflicts of interest, and bias.

## Final Thoughts

The Title IX Final Rule is intended to ensure that all students and employees are given equal opportunity to access the school system. Educating all staff about their obligation to "say something if they see something" as well as training designated personnel about their specific obligations under Title IX are key to your entity's ability to fully comply with the law's requirements. Members of Ottosen DiNolfo are available to provide this necessary general training to all staff members as well as specific training for Title IX Coordinators, investigators, and decision-makers.

If you have any questions about Title IX and how to prepare for the implementation of its amendments, or if you would like to schedule training for your staff, please contact Maureen A. Lemon or another Ottosen DiNolfo attorney with whom you have worked.

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