

# Policy Considerations for Elementary and Secondary Schools Following the Arrival of the Final Rule Implementing New Title IX Regulations

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On May 6, 2020, the Department of Education (the "DOE") published the long-awaited Final Rule implementing new Title IX regulations. According to the DOE, the purpose of the Final Rule is to hold schools accountable for failures to respond equitably and promptly to sexual misconduct incidents and ensure a more reliable adjudication process that is fair to all students. The regulations are applicable to complaints filed by both school district students and employees. All schools receiving federal funding must comply with the Final Rule by no later than August 14, 2020, meaning school districts must revise their Title IX policies and provide appropriate training to staff by such date.

At the time of drafting, Attorneys General from 18 states, including Wisconsin, and the District of Columbia have sued the DOE in an effort to block the Final Rule from becoming effective. In addition, the ACLU has a pending lawsuit against the DOE filed May 14, 2020, challenging the regulations. Schools should stay abreast of pending litigation as the Final Rule may be held in abeyance or blocked altogether; however, because pending lawsuits may not be resolved prior to August 14, 2020, schools would be well-served to proceed with reviewing and revising applicable Title IX policies and training staff on such revised policies as if the August 14, 2020 deadline will remain in place. There are simply too many wide-sweeping changes required by the Final Rule for schools to take a wait-and-see approach without significant risk of non-compliance.

School districts should promptly review their current Title IX policies and revise them consistent with the following key Title IX regulation requirements under the Final Rule, which the DOE has stated aligns with Supreme Court precedent:

## **Include Key Definitions Identified in the Final Rule**

- **Sexual Harassment** – Your policy must include the following updated definition of sexual harassment:

Sexual harassment means conduct on the basis of sex that satisfies one or more of the following:

1. A school employee conditioning education benefits on participation in unwelcome sexual conduct (i.e., quid pro quo harassment); or
  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 (hostile environment); 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).
- **Complainant** – Your policy must define a “complainant” as an individual who is alleged to be the victim of conduct that could constitute sexual harassment, and your policy must authorize parents and legal guardians of a student to act on behalf of the student, including their ability to file a complaint on behalf of the student.
  - **Respondent** – Your policy must define “respondent” as an individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment.
  - **Formal Complaint** – Your policy must define a “formal complaint” as a document filed by a complainant or signed by the Title IX Coordinator alleging sexual harassment against a respondent and requesting that the school investigate the allegation of sexual harassment. Your policy must then further define the term “document filed by a complainant” to mean a document or electronic submission that contains the complainant’s physical or digital signature, or otherwise indicates that the complainant is the person filing the formal complaint.
  - **Supportive Measures** – Your policy must define “supportive measures” to mean individualized services reasonably available that are non-punitive, non-disciplinary, and not unreasonably burdensome to the other party while designed to ensure equal educational access, protect safety, or deter sexual harassment. These services are available without fee or charge to both the complainant and respondent, and confidentiality will be maintained to the extent practicable.
  - **Education Program or Activities** – Your policy must define “education program or activities” as locations, events, or circumstances over which the school exercised substantial control over both the respondent and the context in which the sexual harassment occurs.

### **Procedures for Filing a Complaint**

Your policy:

- Must indicate that, at the time of filing, a complainant must be participating in or attempting to participate in the education program or activity of the school with which the formal complaint is filed.
- Must state that a complainant must be permitted to file a formal complaint with the Title IX Coordinator in person, by mail, or by electronic mail, by using the contact information listed for the Title IX Coordinator within a school’s policy, and by any other additional filing methods permitted by a school.
- Should note that, when a Title IX Coordinator signs a formal complaint, the Title IX Coordinator is not a complainant or otherwise a party during the grievance procedure, and the Title IX Coordinator must comply with Title IX’s requirements throughout and proceedings to be free from conflicts and bias.

### **Title IX Coordinator Requirements**

Your policy:

- Must designate and authorize at least one employee to coordinate the school's efforts to comply with Title IX responsibilities, and that employee or those employees must be referred to as the "Title IX Coordinator(s)."
  - Consider designating and authorizing two Title IX Coordinators—one male and one female—as being able to report to a person of a particular sex may make a complainant more comfortable to file a complaint.
- Must indicate that applicants for employment, students, parents or legal guardians of students, employees, and all unions must be notified of the name and title, office address, email address, and telephone number of the employee or employees designated as the Title IX Coordinator.
- Should identify how the aforementioned notification is to occur, such as postings on job applications, Student Handbooks, Employee Handbooks, etc.
- Must state that any person can report sex discrimination, including sexual harassment (whether or not the person reporting is the alleged target of the conduct that could constitute sex discrimination or sexual harassment), in person, by mail, by telephone, or by email, using the contact information listed for the Title IX Coordinator, or by any other means that results in the Title IX Coordinator receiving the person's verbal or written report.
- Should state that the Title IX Coordinator's contact information will be prominently displayed on the school's website.

### **Mandatory Response Obligations**

Your policy must identify the following mandatory action items upon the school receiving a formal complaint or having actual knowledge of Title IX sexual harassment:

- Supportive measures must be offered to the complainant or, if no formal complaint has been filed, the person alleged to be the target of the harassment.
- The Title IX Coordinator must promptly contact the complainant confidentially to discuss the availability of supportive measures, consider the complainant's wishes with respect to supportive measures, inform the complainant of the availability of supportive measures with or without the filing of a formal complaint, and explain to the complainant the process for filing a formal complaint.
- If a complaint is filed, the school must provide for a legally compliant grievance process before imposing any disciplinary sanctions or other actions that are not supportive measures, against a respondent.
- A school cannot restrict rights protected under the U.S. Constitution, including the First Amendment, Fifth Amendment, and Fourteenth Amendment, when complying with Title IX.
- A school must investigate sexual harassment allegations in any formal complaint, which can be filed by a complainant, or signed by a Title IX Coordinator.
- A complainant's wishes with respect to whether the school investigates should be respected unless the Title IX Coordinator determines that signing a formal complaint to initiate an investigation over the wishes of the complainant is not clearly unreasonable in light of the known circumstances.
- If the allegations in a formal complaint do not meet the definition of sexual harassment under Title IX, or did not occur in the school's education program or activity against a person in the United States, the school must dismiss such allegations for purposes of Title IX but may still address the allegations in any manner the school deems appropriate under the school's own code of conduct.
- A school district may dismiss a complaint if the complainant seeks to withdraw the complaint, the alleged perpetrator is no longer employed by the school district or a pupil in the school district, or if special circumstances prevent a school district from gathering sufficient evidence to make a determination.

### **Grievance Procedures**

Your grievance procedure must:

- Give all parties written notice of the allegations, an opportunity to select an advisor, and an opportunity to submit and review evidence throughout the investigation.
- Provide parties at least 10 days to inspect, review, and respond to all evidence directly related to the allegations prior to the completion of the investigative report.
- Require objective evaluation of all relevant evidence, inculpatory and exculpatory, and avoid credibility determinations based on a person's status as a complainant, respondent, or witness.
- Require the utilization of trained Title IX personnel to objectively investigate all reports of sexual harassment. Prohibit investigators with conflicts or bias from being utilized.
- Require the creation of an investigative report that summarizes the relevant evidence.
- Provide parties at least 10 days to review and provide a written response to the investigative report.
- Provide for either a live-hearing or the opportunity for each party to submit written questions to be answered by the opposite party (a live-hearing is optional for elementary and secondary schools).
- Apply a presumption of innocence on the respondent during the grievance process and utilize either a preponderance of the evidence or a clear and convincing evidence standard in making findings. Either standard may be selected by a school, but once selected, the school must use the same standard for all formal complaints of sexual harassment.
- Keep the burden of proof and the burden of gathering evidence on the institution, not the parties.
- Ensure the investigator is a different person than the final decision maker in a formal complaint.
- Prohibit any inappropriate questioning about prior sexual history, unless offered to prove that someone other than the respondent committed the alleged misconduct or offered to prove consent.
- Protect the privacy of a party's medical, psychological, or similar treatment records absent voluntary, written consent from that party.
- Provide for a written determination, which must be sent simultaneously to both parties, with an analysis as to the findings of fact, conclusions about whether the alleged conduct occurred, rationale for the result as to each allegation, any disciplinary sanctions imposed on the respondent, and whether remedies will be provided to the complainant. The determination must also identify applicable appeal rights.
- Describe the range, or list the possible remedies a school may provide a complainant and disciplinary sanctions a school might impose on a respondent, following determinations of responsibility.
- Offer an opportunity to appeal a final determination.
  - An appeal can be filed by either the complainant or the respondent on the following bases: procedural irregularity, newly discovered evidence, and/or bias of the Title IX personnel that affected or could affect the outcome of the matter. A school may also add other rights to appeal, so long as the other bases are available to all parties.
  - Provide a process for appeal.
- Provide protection from retaliation for any individual that participates in a Title IX grievance process.
- Require the posting of all Title IX training materials on the school's website.

### **Informal Resolution**

- In addition to a grievance procedure, schools can choose to offer the option of informal resolution upon a formal complaint being filed, such as mediation or restorative justice; however, your policy must require the parties' voluntary, informed, written consent to initiate the informal resolution process and must prohibit the use of the informal resolution process with respect to an employee's alleged sexual harassment of a student. Parties must be permitted to withdraw from an informal resolution process at any time.

## **Training**

- Your policy must require that Title IX personnel be trained on the definition of sexual harassment, the scope of the school's education program or activity, how to conduct an investigation and the grievance process, including appeals, and informal resolution processes, as applicable, and how to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias.

Schools are permitted to implement additional requirements within their Title IX policies to the extent they are consistent with the Final Rule and applicable federal statutes. In doing so, schools should take a practical approach and consider requirements that are not just fair and equitable for all parties involved, but also administratively and economically feasible. When reviewing and revising Title IX policies to address the Final Rule's new Title IX requirements, schools should strongly consider working with legal counsel to minimize the likelihood of key provisions or requirements being overlooked.

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