



June 2020

## TITLE IX - NEW GUIDELINES

On May 6, 2020, the U.S. Department of Education issued final regulations regarding the process that school and college campuses must follow in responding to sexual harassment claims. The new grievance procedure guidelines focus on due process for all parties involved in a complaint involving sexual harassment. These regulations will be effective August 14, 2020. This client update is to give you a summary of the relevant changes. Schools Legal Service is in the process of developing a full training on the new Title IX regulations and the training is currently scheduled for August 21, 2020.

Districts will be responsible for developing and implementing a grievance procedure as outlined in 34 Code of Federal Regulations sections 106.3–106.82. Some portions were amended, while a few new sections were added. Included in the required written procedure will be a decision as to the standard of proof that will be required: preponderance of the evidence or the clear and convincing evidence standard. Whichever standard your district chooses, it must be the same for student and employee complaints. The difference between these two options will be discussed at the upcoming training.

Another area of significance to each district will be the positions that must be appointed and the training required for each of those positions. The positions are Title IX Coordinator, Investigator, Decision Maker, and a person who facilitates informal resolution sessions under the guidelines set forth below. These positions cannot be held by the same person. For example, the Decision Maker cannot be the Title IX Coordinator. Another example is that the Decision Maker on an appeal cannot be the same as the Decision Maker in the original determination.

### *Highlights of New Title IX Requirements*

**Recognized Protections:** The new regulation recognizes constitutional protections, Title VII rights, a parent or guardian's right to act on behalf of a child, and specifies that state law does not alleviate obligations to comply with Title IX.<sup>1</sup>

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<sup>1</sup> 34 C.F.R. § 106.6

**Notification of Rights and Grievance Procedure:** The new regulation requires that notification of Title IX rights and the grievance procedure be provided to all students, employees, applicants for admission, applicants for employment, parents of elementary and secondary school students, and unions or professional organizations. These individuals must also be given the name and contact information of the Title IX Coordinator. Publication of this information must be on the district’s website or in a handbook or catalog that is available to everyone.<sup>2</sup>

**Definitions:** A new regulation was added on May 19, 2020, and provides definitions.<sup>3</sup> The two significant changes in the commonly used definitions were to what constitutes actual knowledge of harassment and the meaning of sexual harassment. As to actual knowledge, not only does notice to the Title IX Coordinator or any official recipient who has authority to institute an investigation constitute actual knowledge but, as to elementary or secondary schools, “any employee” is now included. Meaning that if any employee of an elementary or secondary school has knowledge of sexual harassment, that constitutes actual knowledge. The new regulation added dating violence, domestic violence, and stalking to the definition of sexual harassment when the conduct is on the basis of sex.

**Response:** Another new regulation requires that the recipient with actual knowledge of sexual harassment respond “promptly in a manner that is not deliberately indifferent.”<sup>4</sup> This section mandates that the Title IX Coordinator treat complainants and respondents equally by offering supportive measures and following the grievance process that the district has created in accordance with 34 Code of Federal Regulations section 106.45.

**Grievance Process Elements:** The new regulation outlines the grievance process for formal complaints of sexual harassment.<sup>5</sup> Again, the basic requirements focus on due process. The following is a summary and details will follow in our upcoming training.

- **Fair, Equitable Process:** The regulation requires a fair, equitable, and prompt process. For example, it requires an objective evaluation of all relevant evidence, including inculpatory and exculpatory evidence, and requires a presumption that the respondent is not responsible. What this means is that all incriminating and exonerating evidence should be considered and that the accused is presumed innocent of the allegations. This subdivision details specifically what type of training each person involved in the process must have.<sup>6</sup>
- **Written Notice:** The regulation details what must be included in the written notice to all parties.<sup>7</sup>

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<sup>2</sup> 34 C.F.R. § 106.8

<sup>3</sup> 34 C.F.R. § 106.30

<sup>4</sup> 34 C.F.R. § 106.44

<sup>5</sup> 34 C.F.R. § 106.45

<sup>6</sup> 34 C.F.R. § 106.45(b)(1)(i)-(x)

<sup>7</sup> 34 C.F.R. § 106.45(b)(2)(i)-(ii)

- **Dismissal:** The regulation establishes circumstances where a complaint must be dismissed or may be dismissed. This section allows, but does not require, the Title IX Coordinator to dismiss the complaint at the request of the complainant.<sup>8</sup>
- **Consolidation:** The regulation allows consolidation of complaints arising from the same set of facts or circumstances.<sup>9</sup>
- **Investigation:** The regulation outlines the requirements for the investigation of the complaint. This subdivision states that the burden of gathering the evidence is on the recipient, not the parties. Each party is allowed to have an advisor who may or may not be an attorney. Written notice of the entire process must be provided. Each party has a right to review the report prior to it becoming final and must be given 10 days to submit a response.<sup>10</sup>
- **Hearing:** As to postsecondary schools, the grievance process must provide for a live hearing. As to elementary and secondary schools, the district's grievance procedure may, but is not required to, provide for a hearing. The hearing procedure allows for questions to be asked by each party and the Decision Maker determines what questions will be allowed. If there is not a hearing, the Decision Maker must allow each party to submit written questions. Significantly, the guidelines provide protection of the complainant in line with what is known as the Rape Shield Law, which prohibits a complainant's sexual history from being presented at the hearing, except in certain limited circumstances.<sup>11</sup>
- **Decision Maker:** The regulation states that the Decision Maker cannot be the same person as the Title IX Coordinator. The Decision Maker must issue a written determination regarding responsibility based on the standard of evidence chosen by the district. There are several requirements for what must be included in the written determination regarding responsibility.<sup>12</sup>
- **Appeal Process:** The regulation provides that the Decision Maker on an appeal cannot be the same person as the Decision Maker on the original determination of responsibility; a Decision Maker cannot review his or her own work. Each party has a right to appeal the determination of responsibility or dismissal by the Decision Maker.<sup>13</sup>

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<sup>8</sup> 34 C.F.R. § 106.45(b)(3)(i)-(iii)

<sup>9</sup> 34 C.F.R. § 106.45(b)(4)

<sup>10</sup> 34 C.F.R. § 106.45(b)(5)(i)-(vii)

<sup>11</sup> 34 C.F.R. § 106.45(b)(6)(i)-(ii)

<sup>12</sup> 34 C.F.R. § 106.45(b)(7)(i)-(iv)

<sup>13</sup> 34 C.F.R. § 106.45(b)(8)(i)-(iii)

- **Informal Resolution Process:** The regulation outlines an informal resolution process that can be agreed upon by the parties under certain circumstances. Participation in resolution cannot be a condition of continued employment or enrollment. This process cannot be used regarding allegations that an employee sexually harassed a student.<sup>14</sup>
- **Records Retention:** The regulation now requires that all records in a sexual harassment investigation be retained for seven years. The specific records to be maintained are described in the statute.<sup>15</sup>

**Retaliation:** The new regulation clearly states that retaliation for exercising one's rights pursuant to Title IX is prohibited and can, itself, constitute a violation of Title IX.<sup>16</sup>

**Time Frames and Special Education Issues:** As you review the complete statute, you will see that the grievance process will take a minimum of 20 days due to the time allowed for each party to review the reports and submit questions. If respondent is a special education student and is suspended or moved out of a classroom during the pendency of the grievance process, the district will exceed the 10 days allowed for changes in placement without an IEP meeting. 34 Code of Federal Regulations section 106.44 does allow for emergency removal, however, it specifically states that nothing in that provision modifies any rights under IDEA, 504, or ADA.

As stated above, this is a cursory review of the new Title IX requirements. These issues and others will be addressed at the upcoming training on implementation of the Title IX final regulations.

Should you have any questions about the foregoing information, please contact our office.

- Melissa D. Allen

*Education Law Updates are intended to alert Schools Legal Service clients to developments in legislation, opinions of courts and administrative bodies and related matters. They are not intended as legal advice in any specific situation. Consult legal counsel as to how the issue presented may affect your particular circumstances.*

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<sup>14</sup> 34 C.F.R. § 106.45(b)(9)(i)-(iii)

<sup>15</sup> 34 C.F.R. § 106.45(b)(10)(i)-(ii)

<sup>16</sup> 34 C.F.R. § 106.71