

December 17, 2018



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Proposed Title IX Sexual Harassment Regulations Would Have Significant Impact on Public Schools and Colleges and Universities

The U.S. Department of Education recently released its anticipated proposed regulations regarding sexual harassment for Title IX of the Education Amendments of 1972, (Title IX). If adopted, these regulations could have a significant impact on the manner in which educational agencies and institutions investigate and address claims of sexual harassment or discrimination. Although these regulations may not be binding on independent schools, these evolving standards will foreseeably impact best practices and establish more general expectations.

Title IX specifically applies to state and local educational agencies and institutions that receive federal financial assistance (recipient(s)) and specifically prohibits discrimination on the basis of sex, including sexual harassment, which has the effect of denying students access to educational programs or activities. Generally, independent schools do not receive federal financial assistance, and are thus not covered by Title IX. **However, if an independent school, or any part (or program) thereof, receives any federal funds for any purpose, all of the operations of the independent school will be deemed covered by Title IX.**

Key components of the proposed regulations include: a definition of sexual harassment; a duty for recipients only to investigate complaints of conduct that occurred within their program or activity; the adoption of an “actual knowledge” and “deliberate indifference” standard of liability; and detailed grievance procedures.

Currently there are no binding federal regulations related to sexual harassment under Title IX, only administrative guidance issued by the Department’s Office for Civil Rights (OCR), which enforces Title IX. The proposed regulations are open to public comment for 60 days. (Public comments may address any aspect of the proposed regulations as well as specific topics, including the applicability of the proposed rules to K-12 schools and sexual harassment claims by employees, and the appropriate standard of evidence to be used in determining responsibility.) As a result, the U.S. Department may further revise the proposed regulations before they become final.

MAJOR PROVISIONS OF THE PROPOSED REGULATIONS

1. Defining “Sexual Harassment”

Neither the Title IX statute itself nor current regulations define sexual harassment. The proposed regulations define sexual harassment as:

- (i) An employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual’s participation in unwelcome sexual conduct;

- (ii) Unwelcome conduct on the basis of sex that is so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient’s education program or activity; or
- (iii) Sexual assault [i.e., rape, fondling, incest or statutory rape as defined in federal regulations]

Importantly, the second prong of the proposed definition above incorporates the U.S. Supreme Court’s definition of sexual harassment from its 1999 case *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629 (1999). In recent years, OCR had used a broader definition of sexual harassment in its administrative enforcement.

2. Recipients will only have a duty to investigate conduct within a recipient’s program/activity.

OCR previously had interpreted Title IX to require a recipient to promptly investigate possible harassment that it knew or reasonably should have known about, regardless of (1) whether a complaint was filed or (2) whether such conduct occurred during a recipient’s program or activity. In cases where such misconduct occurred outside of a recipient’s program or activity, OCR additionally required a determination of whether such misconduct had the effect of creating a hostile environment in a recipient’s program or activity.

Under the proposed revisions, recipients would only be responsible for **processing complaints of conduct that occurred *within* a recipient’s program or activity.**

3. The standard for liability: “actual knowledge” and “deliberate indifference”

The proposed regulations provide that (with emphasis added):

A recipient with *actual knowledge* of sexual harassment in an education program or activity . . . against a person in the United States must respond in a manner that is not *deliberately indifferent*. A recipient is *deliberately indifferent* only if its response to sexual harassment is *clearly unreasonable* in light of the known circumstances.

The proposed regulations would define “actual knowledge” as notice to the Title IX Coordinator, any official who has authority to establish corrective measures, or to a teacher in the K-12 school context with respect to student-on-student harassment. The regulations clarify that such knowledge would not be imputed solely on a theory of liability based on subordinates’ knowledge or that the district should have known about the harassment based on the facts of the situation.

Significantly, regarding the deliberate indifference standard, the proposed regulations further clarify that when a recipient follows its procedures consistent with Title IX grievance requirements in response to a formal complaint, the district’s response will not be deemed deliberately indifferent.

In addition, specifically in the context of higher education, the proposed regulations also provide that a recipient would not be deemed deliberately indifferent if, in the absence of a formal complaint, it offers and implements “supportive measures” to address the effect on the complainant’s access to the recipient’s program or activity. In such cases,

the recipient would be required to notify the complainant of his or her right to file a formal complaint.

The proposed “actual knowledge” and “deliberate indifference” standards for a recipient’s response to sexual harassment is a stricter standard for liability than that in previous guidance from OCR. The previous guidance opined that a recipient had an obligation to take action regarding possible sexual harassment if it knew, or reasonably should have known, about the possible harassment, and that a recipient violated Title IX if it failed to take immediate action to eliminate the hostile environment, prevent its reoccurrence and address its effects.

4. Specific grievance procedures

The proposed regulations set forth a number of requirements for Title IX grievance procedures. These requirements require, among other things:

- Equitable treatment for complainants and respondents
- Due process protections for a respondent before any discipline is imposed
- Training for coordinators, investigators and decision-makers on the definition of sexual harassment and how to conduct an investigation and grievance process
- A presumption of innocence for the respondent until a determination regarding responsibility is made at the conclusion of the grievance process
- Reasonably prompt timeframes for the conclusion of the grievance process
- Options for both parties to appeal if a recipient chooses to offer an appeals procedure
- A description of the range of possible sanctions and remedies upon a finding of responsibility
- An opportunity for both parties to present witnesses and other inculpatory or exculpatory evidence
- An opportunity for each party to ask questions of witnesses
 - In the K-12 context, schools may choose whether to provide for a live hearing. Regardless of whether a live hearing is held, following the incorporation of the parties’ responses to the investigative report, the decision-maker must ask any relevant follow-up questions to a party or witness that a party wants asked. If no hearing is held, parties may submit written questions and follow-up questions to the witnesses’ answers.
 - In the context of higher education, a live hearing would be required, where both parties would have an opportunity for live cross-examination by an advisor of their choice, or if a party has no advisor, an advisor aligned with the party provided by the recipient. Such cross-examination could occur with the parties in separate rooms at the request of either party. The proposed regulation further advises that unwillingness by either party to submit to cross-examination would result in the decision-maker not relying on any statement of that party or witness in reaching a determination of responsibility.
- Restriction of questions about a complainant’s sexual behavior or predisposition unless offered to prove that someone other than the respondent committed the alleged conduct or unless offered to prove consent by the complainant
- An opportunity for both parties to inspect and review all evidence obtained as part of the investigation and an opportunity for parties to submit a written response to such evidence
- The creation of an investigative report, with prescribed components, that summarizes relevant evidence, which must be sent to each party for their review and response at



- least 10 days before a hearing or other determination of responsibility
- A decision-maker to determine whether the respondent is responsible for the alleged conduct and who is not the same person as the Title IX Coordinator or the investigator
- A decision whether to use the preponderance of the evidence standard (it is more likely than not that the harassment/discrimination occurred) or the higher clear and convincing evidence standard (highly and substantially more probable that the allegations are true rather than untrue), subject to some limitations
- A written determination of responsibility, which must include findings and conclusions and a statement of rationale for the result as to each allegation and any sanctions and remedies

In addition, the proposed regulations would authorize a recipient to facilitate a voluntary informal resolution process that does not involve a full investigation and adjudication (e.g., mediation) at any time prior to reaching a determination regarding responsibility, subject to certain requirements.

If adopted as proposed, these regulations will have significant implications for educational agencies and institutions. The proposed regulations would create a narrower standard of liability for recipients' responses to sexual harassment and would establish a stricter definition of sexual harassment compared to the broader definition previously favored by OCR. However, the proposed regulations dramatically expand the requirements for Title IX grievance procedures for formal Title IX complaints, which would require significant policy and procedure revisions, training and time to implement.

The proposed Title IX rule will be open for public comment **until January 28, 2019**. Comments may be submitted at <https://bit.ly/2BX6ry0>. The U.S. Department of Education's one-page summary of the proposed rule may be viewed at <https://bit.ly/2QBEZPy> or a section-by-section summary may be viewed at <https://bit.ly/2Gh7WeM>. The proposed rule in its entirety may be viewed at <https://bit.ly/2rDaidl>.

Questions or Assistance:

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