

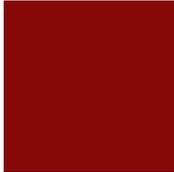


Ten Important Considerations to Achieve Compliance with the New Title IX Regulations

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Knutson, Flynn & Deans, P.A.

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Title IX Overview

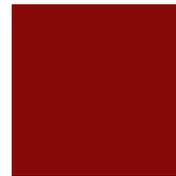


- Federal law prohibiting sex discrimination in education:
 - “No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance.”
- Prior to recent regulations, case law fleshed out the standards for when a school district may be held liable for sexual harassment under Title IX

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New Regulations Regarding Sexual Harassment Complaints Effective August 14, 2020



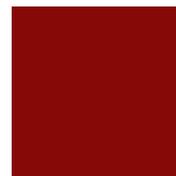
- Focuses strictly on sexual harassment
- Provides a definition of sexual harassment
- Establishes procedures for handling sexual harassment allegations:
 - Complaint intake by Title IX Coordinator
 - Investigation of Complaint
 - Decision-making process
 - Appeal process
- Requires creation of grievance process and procedures

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Ten Key Considerations



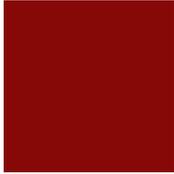
1. New definition of sexual harassment
2. Employee knowledge of sexual harassment triggers school's Title IX obligations
3. Schools must provide supportive measures even without formal complaint
4. Schools must notify respondent of complaint, including complainant's identity
5. Schools may not discipline student respondents before completion of investigation
6. Regulations create four distinct roles in complaint-handling process
7. Schools cannot compel participation in investigation
8. Schools cannot forbid parties from discussing investigation
9. Complainant and respondent are entitled to exchange written questions
10. New regulations are not retroactive

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First Consideration: New Sexual Harassment Definition



The new regulations include a definition of what constitutes sexual harassment prohibited by Title IX, including three categories of conduct:

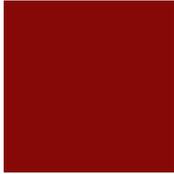
- **1. Quid pro quo harassment**
 - Occurs when an employee of a school district conditions provision of aid, benefit, or service on individual's participation in unwelcome sexual conduct
 - Note: applies only to an employee's conduct (not a volunteer or another student)
- **2. Hostile environment:**
 - Occurs when an employee or student engages in unwelcome conduct determined by reasonable person is so severe, pervasive, AND objectively offensive that it effectively denies equal access to educational program or activity
- **3. Certain Crimes defined in the Violence Against Women Act:**
 - Sexual assault, dating violence, domestic violence, or stalking

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First Consideration: New Sexual Harassment Definition



- To be covered by Title IX, sexual harassment must also occur both:
 - In an education program or activity
 - Includes any location, events, or circumstance over which the school district exhibits substantial control over both the alleged harasser and the 'context' in which the harassment occurred
 - In the United States
 - Note that if outside the U.S., other laws may still require the school district to address the conduct

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Second Consideration: Triggering Title IX Obligations



A school district with **actual knowledge** of sexual harassment in an education program or activity against a person in the United States must respond promptly and in a manner that is not deliberately indifferent

- This includes actual notice or knowledge by:
 - The School District's Title IX Coordinator;
 - Any official of the school district who has authority to institute corrective measures on behalf of the recipient; or
 - **Any employee of an elementary or secondary school**
- Accordingly, any employee with knowledge of conduct that could constitute sexual harassment should report it to the Title IX Coordinator

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Third Consideration: Obligations Regardless of Whether a Formal Complaint Is Filed



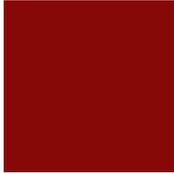
- A report of sexual harassment may result in a formal complaint signed by either the complainant or the Title IX Coordinator
- But even an informal report that never becomes a formal complaint places certain obligations upon the school district:
 - Treat complainant and respondent equitably
 - Contact complainant to discuss availability of supportive measures
 - Explain to complainant how to file a formal complaint
 - Offer supportive measures to both complainant and respondent

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Third Consideration: Obligations Regardless of Whether a Formal Complaint Is Filed



- Supportive measures:
 - Non-punitive, individualized services offered as appropriate and without charge to complainant and respondent
 - Should be designed to restore or preserve equal access to education program or activity without unreasonably burdening the other party
 - A supportive measure that completely removes a respondent from an activity would likely be considered punitive
- Could include:
 - Counseling
 - Course modifications
 - Schedule changes
 - Increased monitoring or supervision

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Fourth Consideration: Notifying Parties of Formal Complaint



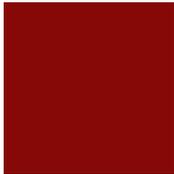
- The parties to the complaint must be given written notice of the complaint
- The notice must include:
 - A description of the grievance process, including any informal resolution process
 - A description of the allegations, in sufficient detail to allow respondent to respond
 - Includes the names of known parties
 - A statement that respondent is presumed not responsible and that responsibility is determined upon conclusion of grievance process
 - Notice of parties' right to have an advisor (who may be an attorney) and to inspect evidence
 - Advisor may be a school district employee
 - Any code of conduct provision that prohibits knowingly making false statements/evidence during grievance process

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Fifth Consideration: Limitations on Student Discipline



- Student respondents cannot be disciplined for sexual harassment until the full Title IX grievance process has concluded
 - Schools cannot use student conduct code to discipline a student for conduct that constitutes sexual harassment unless sexual harassment complaint is dismissed
- However, a student respondent can be removed through an immediate emergency removal in some circumstances
- An emergency removal must be:
 - Necessary to protect the student or another person from immediate threat to physical health and safety
 - Based on an individualized safety and risk analysis
 - Not inconsistent with any rights student may have under the IDEA or section 504
- A removed student respondent must be given notice and an opportunity to challenge immediately after removal
- Employee respondents, however, may be subject to administrative leave during the pendency of the investigation

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Sixth Consideration: Four Separate Roles Involved in Complaint Handling



The new regulations divide the responsibilities involved in addressing sexual harassment complaints between four different roles:

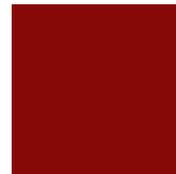
- Title IX Coordinator
 - Implements and supervises supportive measures
 - Serves as point-person for complaint process
 - Can also be the investigator
- Investigator
 - Investigates complaint by gathering evidence and conducting interviews
 - Provides evidence to parties
 - Produces written investigative report summarizing relevant evidence
- Decision-maker
 - Conducts hearing or non-hearing decision-making process
 - Supervises and reviews any exchange of written questions by parties
 - Issues written determination of responsibility and decision regarding remedies
- Appellate decision-maker
 - Decides any appeal

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Seventh Consideration: Limitation on Compelled Participation In Investigation



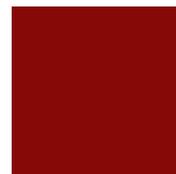
- The new Title IX regulations contain strong protections against retaliation against any individual “for the purpose of interfering with Title IX rights”
- Expressly includes retaliation because a person has participated in or refused to participate in any manner in a sexual harassment proceeding
 - This means that neither a witness nor a party can be required by the School District to participate in an investigation
 - Note, however, that if there is un rebutted evidence against a respondent and they refuse to participate, the School District may conclude that sexual harassment occurred

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Eighth Consideration: Prohibition on Gag Orders



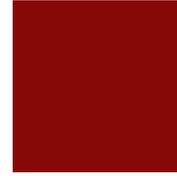
- During the investigation, a school district may not restrict the ability of either party to discuss the allegations or gather relevant evidence
 - This may be contrary to the way other types of investigations are handled
- Instead of directly prohibiting parties from discussing the allegations, a school district might choose to advise them that the parties should keep in mind the prohibitions against retaliation if and when they discuss the allegations
- This prohibition does not apply to non-party witnesses

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Ninth Consideration: Written Questions



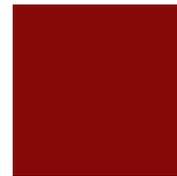
- At the decision-making phase, a school district can opt to hold a hearing, but is not required to do so
- If no hearing is held, the parties are entitled to exchange relevant written questions for the other party and witnesses to answer prior to the determination
- The decision-maker must assess whether each question is relevant
- Limited follow-up questions are also allowed
- This information will be considered by the decision-maker in addition to the evidence gathered by the investigator

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Tenth Consideration: Non-Retroactive



- The new Title IX regulations are not retroactive, per the U.S. Department of Education
- They apply only to sexual harassment occurring on or after August 14, 2020
- Accordingly, a school district's response to sexual harassment that occurred prior to August 14, 2020, need not comply with these regulations
 - Keep previous policies and procedures on hand, as a complaint where the underlying conduct predates the new regulation will be analyzed under the previous Title IX statute and regulations

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Questions?

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