

U.S. Department of Education's new Title IX regulations outline new requirements for school districts to address sexual harassment

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On May 19, 2020 the U.S. Department of Education (ED) published new [Title IX regulations](#) following an initial May 6 [press release](#) with [related resource documents](#). School districts are expected to be in compliance with the new requirements by August 14, 2020.

Since school districts receive federal funds, Title IX requires them to ensure that no student is deprived of access to educational opportunities on the basis of sex. The new regulations focus on sexual harassment as a form of sex discrimination and outline school districts' responsibilities regarding when and how to respond to such allegations. The new regulations come just months after ED [announced](#) an Office for Civil Rights-led initiative to combat sexual assault in school districts by, among other things, conducting Title IX compliance reviews and increasing data collection efforts.

Stakeholders have voiced several concerns with the new regulations, even after ED made certain changes in response to comments on its November 2018 notice of proposed rulemaking (aspects of which we summarized in a [prior client advisory](#)). For example:

- Some assert that it will be onerous to effectively implement the new regulations by August, considering necessary revisions to Title IX policies and procedures, professional development materials, and student and parent messaging, among other things.
- Others contend that the new regulations' complex requirements and decreased flexibilities may limit school districts' abilities to address certain types of conduct, such as incidents occurring off school district property or online, which may result in a potential increase in private lawsuits.
- Already, the American Civil Liberties Union has filed a [lawsuit](#) to block certain portions of the new regulations from taking effect, such as the definition of "sexual harassment" and the requirement to dismiss complaints when the alleged conduct does not occur in an "education program or activity" as defined in the new regulations.

This advisory compares selected aspects of the new regulations to ED's [January 2001 Guidance](#) and [September 2017 Q&A on Campus Sexual Misconduct](#) (collectively, "prior ED guidance"). ED previously [withdrew](#) Obama administration policy guidance issued in April 2011 and April 2014.

Overview of the new regulations

Generally, the new regulations require a school district to respond "promptly" and not in a "deliberately indifferent" manner (i.e., not "clearly unreasonable in light of the known circumstances") when it has "actual knowledge" of "sexual harassment" in its "education program or activity" against a person in the United States.

What are examples of similarities between the new regulations and prior ED guidance?

- **A school district is required to have at least one Title IX Coordinator.** As in prior ED guidance, the new regulations require a school district to designate and authorize a Title IX Coordinator to help carry out its Title IX compliance efforts. ED indicated that a school district may choose to have multiple Title IX Coordinators or deputy/assistant positions, as well as permit the Title IX Coordinator to delegate certain tasks or responsibilities to other personnel.
- **Grievance procedures must provide for a prompt and equitable resolution.** Generally, the new regulations build upon prior ED guidance that indicates a school district must:
 - Provide written notice of the allegations and grievance process.
 - Investigate the complaint, including by providing an equal opportunity for individuals to present witnesses and evidence, and review the investigation report.
 - Make an impartial determination as to whether the alleged misconduct occurred (i.e., a "responsibility determination").

A notable distinction, however, is that the new regulations explicitly require a school district to offer individuals the option to appeal a determination under prescribed circumstances, including conflict of interest or bias allegations against the Title IX Coordinator, investigator, or decision-maker.

The new regulations provide details regarding grievance process requirements, such as required content for written notices and responsibility determinations.

- **A school district may apply a "preponderance of the evidence" or "clear and convincing" standard.** As in prior ED guidance, a school district may select the standard of evidence it will apply. The new regulations state that the same standard must be applied to students and employees alike (i.e., student-student and student-employee complaints).
- **An informal resolution process is available under certain circumstances.** Prior ED guidance permitted a school district to facilitate informal resolution of a complaint if the involved individuals voluntarily agreed to it after receiving full disclosure of the allegations and options for formal resolution. Similarly, under the new regulations a school district may offer the option of an informal resolution process after a formal complaint is filed. A notable distinction, however, is that the new regulations explicitly prohibit a school district from offering or using an informal resolution process when the alleged perpetrator is an employee.

What are examples of differences between the new regulations and prior ED guidance?

- **The alleged misconduct must be "so severe, persistent, and pervasive," not "so severe, persistent, or pervasive."** The new regulations define "sexual harassment" to include, among other things, "unwelcome conduct that a reasonable person would find so severe, pervasive, and objectively offensive that it denies a person equal educational access." Such conduct now must meet all three categories – so severe and persistent and pervasive – in order to qualify as sexual harassment for Title IX purposes, instead of only one as indicated in prior ED guidance. ED stated that a school district should continue to use a common sense approach when evaluating whether alleged conduct constitutes sexual harassment, including by considering the ages, positions of authority, disability statuses, and other factors related to the involved individuals.
- **A school district is required to act when it has "actual knowledge," not "knows or reasonably should know."** The new regulations require a school district to respond appropriately when it has "actual knowledge" of alleged sexual harassment. For a school district, the "actual knowledge" threshold is met when notice or allegations of sexual harassment are reported to any school employee, or when an employee personally observes conduct that could constitute sexual harassment. This requirement differs from prior ED guidance, which required action when a school district knew or reasonably should have known of an incident of sexual misconduct.
- **A school district must offer "supportive measures," not "interim measures."** Once a school district has actual knowledge of sexual harassment allegations, the new regulations require it to promptly contact the individual alleged to be the victim of such conduct to discuss the availability of and consider their wishes regarding supportive measures. Examples of supportive measures include counseling, extensions of deadlines or other course-related adjustments, no-contact orders, leaves of absence, or other accommodations. Prior ED guidance permitted these same types of accommodations, but typically described them as being offered prior to or during an investigation; the new regulations explicitly state that they must be offered regardless of whether a formal complaint requesting an investigation is filed.

What are examples of other notable aspects of the new regulations?

- **A school district may address "bad behavior" through its own code of conduct.** Alleged misconduct that does not meet the regulatory definition of "sexual harassment" may not be resolved under the new Title IX regulations, but a school district may proceed in accordance with its own code of conduct.
- **A school district must assess the scope of its education program or activity.** The new regulations do not apply if the alleged misconduct occurred outside the scope of a school district's education program or activity. The new regulations define "education program or activity" to include locations, events, or circumstances over which the school district exercised substantial control over the alleged perpetrator and the context in which the sexual harassment occurred. ED indicated that depending on the circumstances, certain incidents that occur off school district property or online may still be considered part of the school district's education program or activity – for example, online harassment using a school district's digital platform or electronic devices.
- **A school district must use a decision-maker who is not the same person as the Title IX Coordinator or investigator.** The "single investigator" model – where, for

example, the investigator would also issue the responsibility determination – is no longer allowed.

- **A school district must use written questions and answers as part of its investigation process.** Hearings are discretionary, but written questions and answers are required (with or without a hearing). Before reaching a responsibility determination, a school district's decision-maker must:
 - Allow the involved individuals to submit written, relevant questions to ask the other side (including witnesses).
 - Provide each side with the answers to their questions.
 - Allow for additional, limited follow-up questions.

The decision-maker also must explain any decision to exclude questions as irrelevant. ED indicated that a school district "retain[s] discretion to decide how to conduct hearings if [it] selects that option" as long as the hearing rules apply equally to involved individuals.

- **A school district must meet detailed professional development and recordkeeping requirements.** A school district must:
 - Provide professional development on topics outlined in the new regulations to individuals designated as a Title IX Coordinator, investigator, decision-maker, or facilitator of an informal resolution process. Topics include, for example, how to conduct an investigation and grievance process and how to serve impartially. Professional development materials must be posted on a school district's website.
 - Maintain certain records for a seven-year period, such as investigation, appeal, and informal resolution records, and records of any actions – including any supportive measures – taken in response to a report or formal complaint of sexual harassment.

Examples of next steps

In order to comply with the new regulations, school districts will need to make changes to aspects of their operations. For example, school districts must, as appropriate:

- Review and revise Title IX policies and procedures.
- Review and revise codes of conduct and handbooks.
- Conduct professional development for staff, both at the centralized school district level and at individual schools.
- Educate and train students and parents/guardians.
- Provide via the school district website information such as Title IX Coordinator contact information, grievance procedures, and professional development materials.

We are available to assist school districts in understanding and implementing these and other aspects of the new Title IX regulations.

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